

General Damages for Asbestosis

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An award of damages in an asbestosis claim is reasonably substantial, often in the region of six figures. It is almost always made on a provisional basis, a consequence of which is that, unless the return clauses are activated, special damages are usually lower than general damages. Therefore, the award for general damages is likely to be the main component of the relatively large total award of damages in such claims.

The two brackets in the *Judicial College Guidelines* dealing with the level of award for general damages in asbestosis claims were amended when the 16th edition of those guidelines was published on 11 April 2022, following implicit judicial criticism of the wording of those brackets in the 15th edition. However, the higher of those two brackets remains very wide, with the upper and lower ends of the bracket being over £70,000 apart.

It follows from the above that, in order to properly advise on quantum in an asbestosis claim, a practitioner will need to have a good understanding of precisely where, within the above brackets, a Court is likely to place the award for general damages. This post aims to assist that understanding with reference to the relevant guidelines and the most recent authorities on quantum of general damages in asbestosis claims.

The Judicial College Guidelines (16th Edition)

The starting point for quantifying general damages in a claim for asbestosis are the two brackets of the *Judicial College Guidelines* (16th edition) found at 'Chapter 6 - Injuries to Internal Organs, Section (C) - Asbestos-related Disease' which read as follows:

(c) Asbestosis and pleural thickening—where the current level of respiratory disability attributable to asbestos will typically be in excess of 10% causing progressive symptoms of breathlessness by reducing lung function. Awards at the lower end of the bracket will be applicable where the condition is relatively static or may be exceptional cases of 10% disability in a significantly younger individual. Higher awards will be applicable where the condition has progressed or is likely to progress to cause more severe breathlessness. Awards at the top end of the bracket will be applicable where mobility and quality of life has or is likely to become significantly impaired and/or life expectancy significantly reduced. This is a wide bracket and the extent of respiratory disability will be highly significant with disabilities of up to 30% being at the lower end, 30-50% in the middle, and in excess of 50% at the higher end.

£35,500 to £105,850

(d) Asbestosis and pleural thickening—where the current level of respiratory disability/lung function impairment attributable to asbestos is up to 10%. Cases of 10% respiratory disability will normally fall within a range from £32,500 to £35,500.

£15,100 to £35,500

Brackets (c) and (d) above represent an award of general damages on a provisional basis, with the triggers for the right to return for further damages typically being the development of cancer, mesothelioma, or a significant increase in respiratory disability. An award should be increased to take account of those risks if made on a full and final basis.

It will be seen from the above wording in those brackets that:

- The principal criterion in quantifying general damages for asbestosis is the level of respiratory disability attributable to asbestos, both current and future.
- The above brackets apply to awards made on a provisional basis. If the award is made on a full and final basis without return clauses, it should be increased to take account of the risks of developing mesothelioma, asbestos-related lung cancer and/or a significant increase in respiratory disability attributable to asbestosis. Although, the wording gives no indication of how or by what amount the award should be increased if made on the latter basis.
- The upper of the two brackets suggests that it can be sub-divided into three parts (higher, middle and lower), depending on the level of respiratory disability. Although, it does not give guideline figures or sub-brackets for these three parts or any indication of how such ranges should be calculated.

Therefore, when assessing the likely quantum of general damages in an asbestosis claim each of the matters set out in the above bullet points should be considered, along with the relevant guidance on them.

Level of Respiratory Disability

Claimants will often have an 'overall' respiratory disability which is attributable in part to asbestosis but also attributable in part to another cause or causes. Consequently, the level of the overall respiratory disability will be higher than the level of the respiratory disability attributable to asbestosis alone. For example, a Claimant may have an overall respiratory disability of 30%, of which 20% is attributable to asbestosis and 10% is attributable to non-asbestos related COPD.

It is important to remember that the above brackets provide for general damages to be assessed on the basis of the level of the respiratory disability attributable to asbestos alone, not on the basis of the level of the overall respiratory disability. Therefore, using the above example, general damages would be assessed on the basis of the 20% respiratory disability attributable to asbestosis, not on the basis of the 30% overall respiratory disability.

Expert evidence will be required to assist the Court to decide the level of respiratory disability attributable to asbestosis both currently and, in cases where there is likely to be progression of symptoms, in the future. Experts usually measure the level of respiratory disability by reference to the 'respiratory disability rating scale' developed following the British Coal respiratory disease litigation and the subsequent claims handling agreement.

However, there is no completely objective method of assessing respiratory disability. Therefore, experts will often disagree as to the precise percentage of current and/or (likely) future respiratory disability attributable to asbestosis such that the Court will have to make its own determination of the level, taking into account the expert evidence.

The rating scale is reproduced in *Kemp & Kemp: Quantum of Damages* at chapter 48 (Asbestos Disease Claims), paragraph 46. It is a useful tool for the practitioner as one can use it to check that the percentage of respiratory disability opined by the expert(s) accords with the percentage given in the rating scale for an individual with similar symptoms to those of the claimant. If it does not, that may form a basis for challenging the percentage given by that expert.

The rating scale increases in increments of 10% such that the bottom of the scale reads as follows:

THE RESPIRATORY DISABILITY RATING SCALE		
All assessments should be based upon comparison with a healthy man of a similar age.		
Disability Score	Symptoms	Lung Function Impairment
0%	Not breathless on exercise	None
10%	Breathless on prolonged or heavy exertion	Mild

It will be noted that there is no increment in the rating scale between a 0% respiratory disability and a 10% respiratory disability. It is perhaps for this reason that, in the writer's experience, it is rare to see an expert opine that a claimant's

level of respiratory disability attributable to asbestosis is below 10%. In practice, this renders bracket 6(C)(d) of the *Judicial College Guidelines* (above), or all but the upper end of it, somewhat redundant.

In other words, in the vast majority of asbestosis claims, the level of respiratory disability attributable to asbestosis is likely to be either 10%, in which case the award for general damages should (unless the claimant is “*significantly younger*” than usual) be towards the top of bracket 6(C)(d) of the *Judicial College Guidelines*, or above 10%, in which case the award will fall into bracket 6(C)(c).

Applicable to Awards Made on a Provisional Basis

To the writer’s knowledge, there have only been two cases this decade in which the High Court has given a judgment assessing the appropriate level of general damages in an asbestosis claim.

The first is *Hamilton v NG Bailey Ltd* [2020] EWHC 2910 (QB). In that case, the court considered brackets 6(C)(c) and (d) of the 15th edition of the *Judicial College Guidelines*. Dan Squires KC, sitting as a Deputy High Court Judge, at [27] to [35] of his judgment, highlighted the potential unfairness of the brackets seeming to apply to both provisional and full and final awards for general damages for asbestosis. He suggested that it would be helpful for those drafting the *Judicial College Guidelines* to clarify this issue.

It seems that, when drafting the 16th edition of the *Judicial College Guidelines*, the editors did seek to clarify the above issue as the wording in brackets 6(C)(c) and (d) of the 16th edition has been amended to provide “*Brackets (c) and (d) above represent an award of general damages on a provisional basis with the triggers for the right to return for further damages typically being the development of cancer, mesothelioma, or a significant increase in respiratory disability*”, which appears to clarify that the brackets only apply to awards made on a provisional basis and not to both provisional and full and final awards. However, the amended paragraph goes on to say “*An award should be increased to take account of those risks if made on a full and final basis.*”

It is suggested that the correct reading of the amended wording in the 16th edition is that:

- Brackets 6(C)(c) and (d) of the *Judicial College Guidelines* provide the brackets for the appropriate level of general damages in an asbestosis claim where the award for damages is made on a provisional basis.
- If, however, the award for damages is made on a full and final settlement basis, the level of general damages, as set out in those brackets, should be increased to account for any risks (based on the expert medical evidence) of developing mesothelioma, asbestos-related lung cancer and/or increased asbestos-related respiratory disability.

Unfortunately, the amended paragraph in the 16th edition of the *Judicial College Guidelines* is silent on how – i.e. the mechanism by which – the level of general damages should be increased to take account of the above risks where an award is made on a full and final basis. However, the approach taken/mechanism used in *Rothwell v Chemical & Insulating Co* [2006] 4 All ER 1161 at [174] and [179] was cited with approval in *Hamilton* at [24].

Accordingly, it would appear that, in a (rare) asbestosis case in which the award for damages was made on a full and final basis, if there was a 1% risk of developing mesothelioma and the median award for general damages for mesothelioma was £90,000, the claimant would be awarded £900 in addition to the general damages awarded under bracket 6(C)(c) or (d) of the *Judicial College Guidelines* to reflect that risk.

Bracket 6(C)(c) Divided Into Higher, Middle and Lower End

The wording of bracket 6(C)(c) of the *Judicial College Guidelines* suggests that it can be sub-divided into three parts – higher, middle and lower – according to the level of respiratory disability. However, it does not give guideline figures or sub-brackets for these three parts or any indication of how such figures or ranges should be calculated.

The most recent High Court case in which the level of general damages in an asbestosis claim was considered is *Brown v G & K Manson Limited* [2022] EWHC 3004 (KB), in which the writer appeared on behalf of the Defendant’s insurer. HHJ Blair KC, sitting as a Judge of the High Court, at [28] considered the wording of bracket 6(C)(c) of the 16th edition of the *Judicial College Guidelines*. In doing so, he decided to take a mathematical approach to the lower, middle and higher “bands” (as he referred to them) of that bracket as follows:

Lower (respiratory disability up to 30%):

£35,500 - £58,950;

Middle (respiratory disability between 30% and 50%):

£58,951 - £82,400;

Higher (respiratory disability in excess of 50%):

£82,401 - £105,850.

It is likely, in the writer's view, that other courts would find the above approach and sub-brackets or 'bands' highly persuasive thus be likely to follow them.

Conclusion

In order to assess the likely level of general damages in an asbestos claim, the above are the relevant matters for the practitioner to consider.

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