

Asbestos at Work

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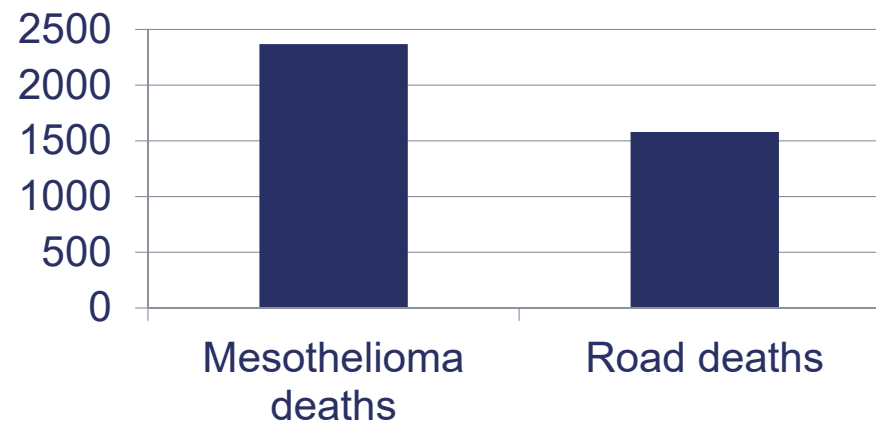
Hazards Conference, 1 August 2021

Context

Estimated 1,580 road deaths in the year ending June 2020 -

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956524/road-casualties-year-ending-june-2020.pdf

Estimated 2,369 mesothelioma deaths in 2019 - <https://www.hse.gov.uk/sTATIsTICs/causdis/asbestos-related-disease.pdf>



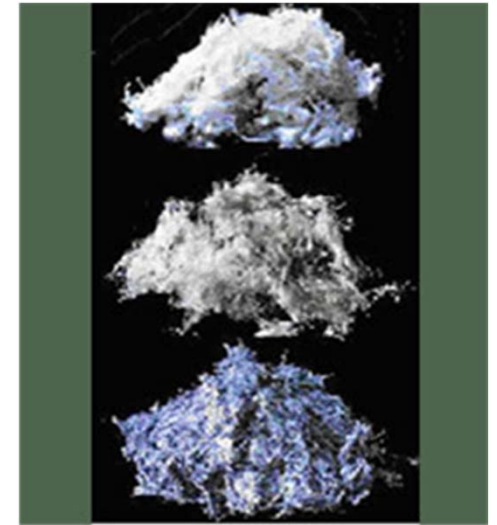
Three main types

Brown (amosite)

Blue (crocidolite)

White (chrysotile)

Amphibole (Blue/brown)
more potent than Chrysotile



Asbestos

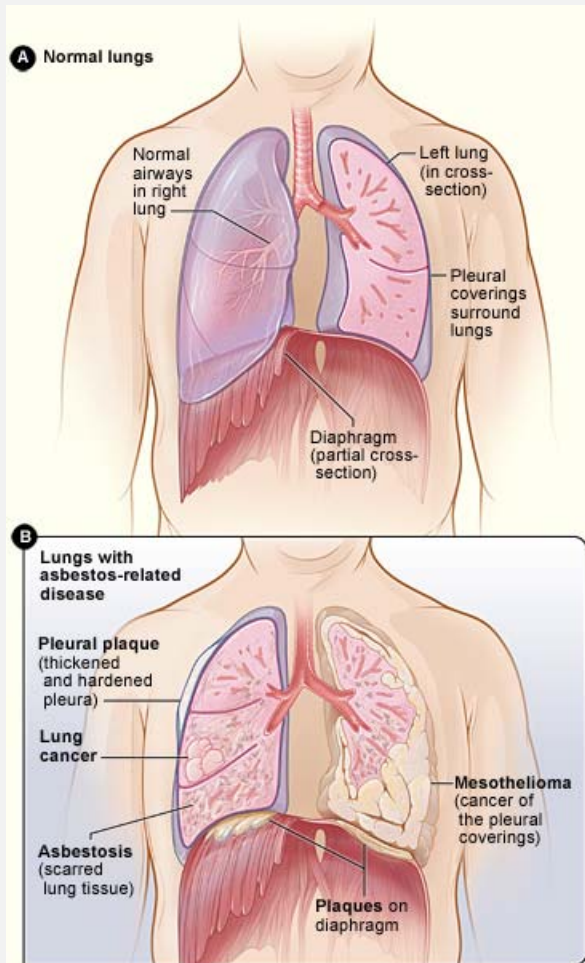


Uses of asbestos

Ban on using asbestos

- Imports of asbestos into the UK were at their highest from about 1955 -1980.
- 1972 – voluntary ban on blue asbestos
- 1985 – statutory ban on blue and brown asbestos
- 1999 – statutory ban on white asbestos





Asbestos related diseases

- Non Malignant: asbestosis (pulmonary fibrosis due to asbestos), diffuse pleural thickening, pleural plaques, pleural effusion, rounded atelectasis
- Malignant: lung cancer and malignant mesothelioma (pleura, peritoneum, testes)



Claims

- Brought by the person living with an occupational disease, or their family
- No automatic right to compensation, must prove a claim on balance of probabilities
- Breach or failure
 - fell below standards
 - breach of a regulation or statute
- Causation (direct link between the negligent exposure and the condition)

Developing knowledge of the dangers

- a) From the early 1930s there was knowledge that exposure to substantial quantities of asbestos dust was associated with a risk of developing asbestosis.
- b) From the mid-1950s there was knowledge of a risk of developing lung cancer (Dr Hughson will say in 1955 it was identified there was an increased risk of lung cancer in patients with asbestosis).
- c) From the mid-1960s there was knowledge that exposure to relatively small quantities of asbestos dust, in particular crocidolite, was associated with a risk of developing mesothelioma. It is generally agreed that this became common knowledge in 1965 following publication of an article by Newhouse and Thompson which received national press coverage.”

Bussey [2018] EWCA Civ 243 para 54

Brit. J. industr. Med., 1965, 22, 261.

MESOTHELIOMA OF PLEURA AND PERITONEUM FOLLOWING EXPOSURE TO ASBESTOS IN THE LONDON AREA

BY

MURIEL L. NEWHOUSE and HILDA THOMPSON

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(RECEIVED FOR PUBLICATION FEBRUARY 11, 1965)

A series of 83 patients from the London Hospital with a diagnosis of mesothelioma confirmed by necropsy or biopsy has been studied for possible exposure to asbestos. The series consisted of 41 men and 42 women; 27 of the patients had peritoneal and 56 pleural tumours. The earliest death recorded was in 1917, but only 10 of the series died before 1950 and 40 (48%) between 1960 and 1964.

Enterprise and Regulatory Reform Act 2013

For modern claims / claims in the future

Cannot directly plead a breach of a statutory duty

A breach is indicative of a failure

- 69 **Civil liability for breach of health and safety duties**
- (1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7).
 - (2) In subsection (1), omit paragraph (b) (including the "or" at the end of that paragraph).
 - (3) For subsection (2) substitute—
 - "(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
 - (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).
 - (2B) Regulations under this section may include provision for—
 - (a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);
 - (b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void."

The Control of Asbestos at Work Regulations - history

- Control of Asbestos at Work Regulations 1987
- Control of Asbestos at Work (Amended) Regulations 1992
- The Control of Asbestos at Work Regulations 2002
- The Control of Asbestos Regulations 2006
- The Control of Asbestos at Work Regulations 2012

The Control of Asbestos at Work Regulations – reg 11

- Duty to prevent exposure

Prevention or reduction of exposure to asbestos

11.—(1) Every employer must—

- (a) prevent the exposure to asbestos of any employee employed by that employer so far as is reasonably practicable;
- (b) where it is not reasonably practicable to prevent such exposure—
 - (i) take the measures necessary to reduce exposure to asbestos of any such employee to the lowest level reasonably practicable by measures other than the use of respiratory protective equipment, and
 - (ii) ensure that the number of any such employees exposed to asbestos at any one time is as low as is reasonably practicable.

The Control of Asbestos at Work Regulations – reg 4

- Duty to manage – work out where the asbestos is
 - Any non domestic property
 - Identify the location and condition of asbestos – usually via an asbestos survey
 - An asbestos management plan

(3) In order to manage the risk from asbestos in non-domestic premises, the dutyholder must ensure that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises.

(4) In making the assessment—

- (a) such steps as are reasonable in the circumstances must be taken; and
- (b) the condition of any asbestos which is, or has been assumed to be, present in the premises must be considered.

(5) Without prejudice to the generality of paragraph (4), the dutyholder must ensure that—

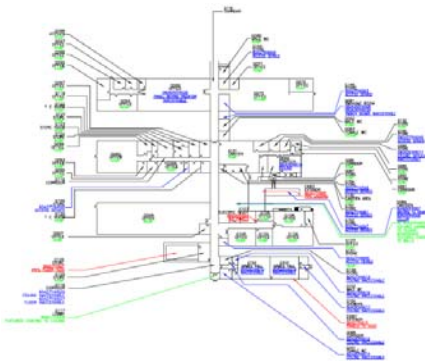
- (a) account is taken of building plans or other relevant information and of the age of the premises; and
- (b) an inspection is made of those parts of the premises which are reasonably accessible.

The Control of Asbestos at Work Regulations – survey examples

ASBESTOS SURVEY

PART I

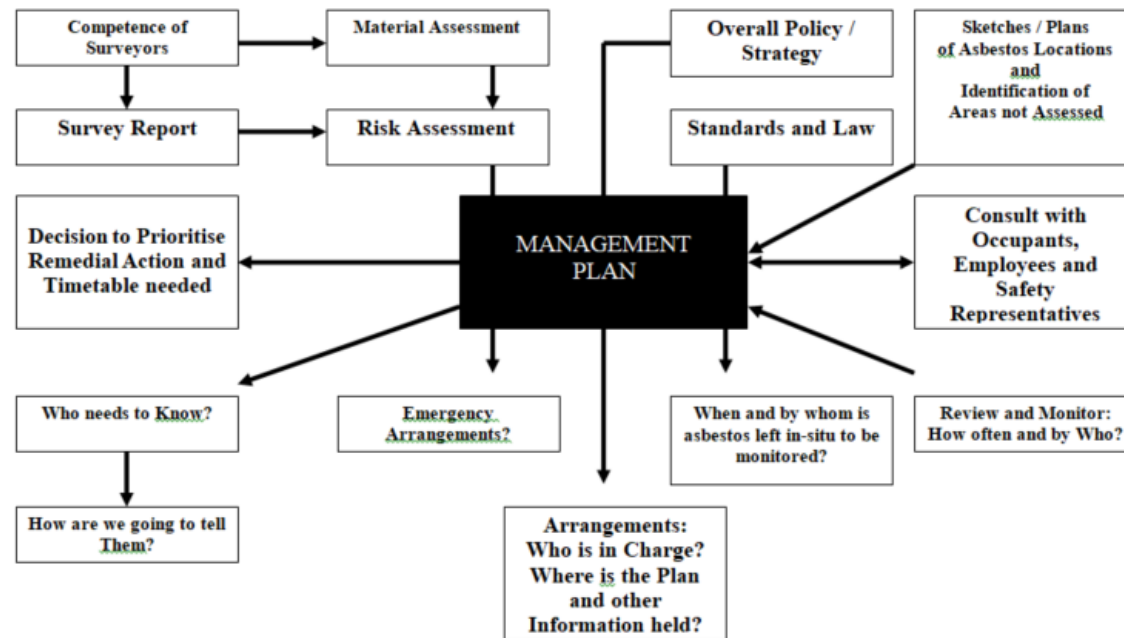
LOCATIONS WHERE ASBESTOS IS STILL PRESENT



SITE	BLOCK NO	LOCATION	REF SURVEY	REPORT	DESCRIPTION	COND	HAZARD	ACTION
H	002	ADMINISTRATION	PAGE 7	NOBS INV 51	UNDERCROFT	GOOD	AMO	PERMIT TO WORK NOTICES JUNE 1985
H	002	ADMINISTRATION	WTNNS	NOBS	FIRE DOOR FIRST FLOOR	GOOD	CHRY/AMO	

Floor	Room	Location and Description	Form	Priority
Basement	15 Unit B5 17 Boiler Room	To pipe elbows	Insulation - Pipe	A
		Debris against back wall of boiler room	Debris - High Friability	A
		Debris to left hand side of boiler room	Debris - High Friability	A
		Debris to right hand side of door	Debris - High Friability	A

The Control of Asbestos at Work Regulations – management plan



The Control of Asbestos at Work Regulations – reg 19

- Duty to monitor air quality

Air monitoring

19.—(1) Subject to paragraph (2), every employer must monitor the exposure to asbestos of any employees employed by that employer by measurement of asbestos fibres present in the air—

- (a) at regular intervals; and
- (b) when a change occurs which may affect that exposure.

(2) Paragraph (1) does not apply where—

- (a) the exposure of an employee is not liable to exceed the control limit; or
- (b) the employer is able to demonstrate by another method of evaluation that the requirements of regulation 11(1) and (5) have been complied with.

The Control of Asbestos at Work Regulations – reg 10

- Duty to train

Information, instruction and training

10.—(1) Every employer must ensure that any employee employed by that employer is given adequate information, instruction and training where that employee—

(a) is or is liable to be exposed to asbestos, or if that employee supervises such employees, so that those employees are aware of

—

- (i) the properties of asbestos and its effects on health, including its interaction with smoking,
- (ii) the types of products or materials likely to contain asbestos,
- (iii) the operations which could result in asbestos exposure and the importance of preventive controls to minimise exposure,
- (iv) safe work practices, control measures, and protective equipment,
- (v) the purpose, choice, limitations, proper use and maintenance of respiratory protective equipment,
- (vi) emergency procedures,
- (vii) hygiene requirements,
- (viii) decontamination procedures,
- (ix) waste handling procedures,
- (x) medical examination requirements, and
- (xi) the control limit and the need for air monitoring,

in order to safeguard themselves and other employees; and

The Control of Asbestos at Work Regulations – control measures

- Reg 12 - duty to use and apply control measures

Use of control measures etc

12.—(1) Every employer who provides any control measure, other thing or facility pursuant to these Regulations must take all reasonable steps to ensure that it is properly used or applied as the case may be.

(2) Every employee must make full and proper use of any control measure, other thing or facility provided pursuant to these Regulations and—

- (a) where relevant take all reasonable steps to ensure that it is returned after use to any accommodation provided for it; and
- (b) report any defect discovered without delay to that employee's employer.

- Reg 13 - duty to maintain control measures

Maintenance of control measures etc

13.—(1) Every employer who provides any control measure to meet the requirements of these Regulations must ensure that—

- (a) in the case of plant and equipment, including engineering controls and personal protective equipment, it is maintained in an efficient state, in efficient working order, in good repair and in a clean condition; and
- (b) in the case of provision of systems of work and supervision and of any other measure, any such measures are reviewed at suitable intervals and revised if necessary.

The Control of Asbestos at Work Regulations – PPE

- Reg 14 - duty to provide PPE

Provision and cleaning of protective clothing

14.—(1) Every employer must provide adequate and suitable protective clothing for any employee employed by that employer who is exposed or is liable to be exposed to asbestos, unless no significant quantity of asbestos is liable to be deposited on the clothes of an employee while at work.

(2) The employer must ensure that protective clothing provided in pursuance of paragraph (1) is either disposed of as asbestos waste or adequately cleaned at suitable intervals.

(3) The cleaning required by paragraph (2) must be carried out either on the premises where the exposure to asbestos has occurred, where those premises are suitably equipped for such cleaning, or in a suitably equipped laundry.

(4) The employer must ensure that protective clothing which has been used and is to be removed from the premises referred to in paragraph (3) (whether for cleaning, further use or disposal) is packed, before being removed, in a suitable receptacle which must be labelled in accordance with the provisions of Schedule 2, as if it were a product containing asbestos or, in the case of protective clothing intended for disposal as waste, in accordance with regulation 24(3).

(5) Where, as a result of the failure or improper use of the protective clothing provided in pursuance of paragraph (1), a significant quantity of asbestos is deposited on the personal clothing of an employee, then for the purposes of paragraphs (2), (3) and (4) that personal clothing must be treated as if it were protective clothing provided in pursuance of paragraph (1).

The Control of Asbestos at Work Regulations – work liable to expose

- Reg 6 duty to risk assess
- Reg 5 identify the type of asbestos
- Reg 16 prevent spread
- Reg 17 duty to keep clean

Assessment of work which exposes employees to asbestos

- 6.—(1) An employer must not carry out work which is liable to expose employees of that employer to asbestos unless that employer has—
- made a suitable and sufficient assessment of the risk created by that exposure to the health of those employees and of the steps that need to be taken to meet the requirements of these Regulations;
 - recorded the significant findings of that risk assessment as soon as is practicable after the risk assessment is made; and
 - implemented the steps referred to in sub-paragraph (a).

Identification of the presence of asbestos

5. An employer must not undertake work in demolition, maintenance or any other work which exposes or is liable to expose employees of that employer to asbestos in respect of any premises unless either—

- that employer has carried out a suitable and sufficient assessment as to whether asbestos, what type of asbestos, contained in what material and in what condition is present or is liable to be present in those premises; or
- if there is doubt as to whether asbestos is present in those premises, that employer—
 - assumes that asbestos is present, and that it is not chrysotile alone, and
 - observes the applicable provisions of these Regulations.

Duty to prevent or reduce the spread of asbestos

16. Every employer must prevent or, where this is not reasonably practicable, reduce to the lowest level reasonably practicable the spread of asbestos from any place where work under the employer's control is carried out.

Cleanliness of premises and plant

17. Every employer who undertakes work which exposes or is liable to expose any employees of that employer to asbestos must ensure that—

- the premises, or those parts of the premises where that work is carried out, and the plant used in connection with that work are kept in a clean state; and
- where such work has been completed, the premises, or those parts of the premises where the work was carried out, are thoroughly cleaned.

The Control of Asbestos at Work Regulations – control limit

- Reg 2 (1) defines the control limit

“the control limit” means a concentration of asbestos in the atmosphere when measured in accordance with the 1997 WHO recommended method, or by a method giving equivalent results to that method approved by the Executive, of 0.1 fibres per cubic centimetre of air averaged over a continuous period of 4 hours;

The Control of Asbestos at Work Regulations – accidents

- Reg 15 gives guidance if an accident happens

Arrangements to deal with accidents, incidents and emergencies

15.—(1) In the event of an accident, incident or emergency related to the unplanned release of asbestos at the workplace, the employer must ensure that—

- (a) immediate steps are taken to—
 - (i) mitigate the effects of the event,
 - (ii) restore the situation to normal, and
 - (iii) inform any person who may be affected; and
- (b) only those persons who are responsible for the carrying out of repairs and other necessary work are permitted in the affected area and that such persons are provided with—
 - (i) appropriate respiratory protective equipment and protective clothing, and
 - (ii) any necessary specialised safety equipment and plant,

which must be used until the situation is restored to normal.

Enforcement from a litigation perspective

Comparison

Civil litigation

- Driven by individuals
 - willingness to claim
 - during illness
- Civil claim in Court
- Reactive & after the fact
- Damages to the injured person

HSE prosecution

- Resourcing issues
- Criminal process
- 2 stage issue re whether to prosecute
 - evidential
 - public interest

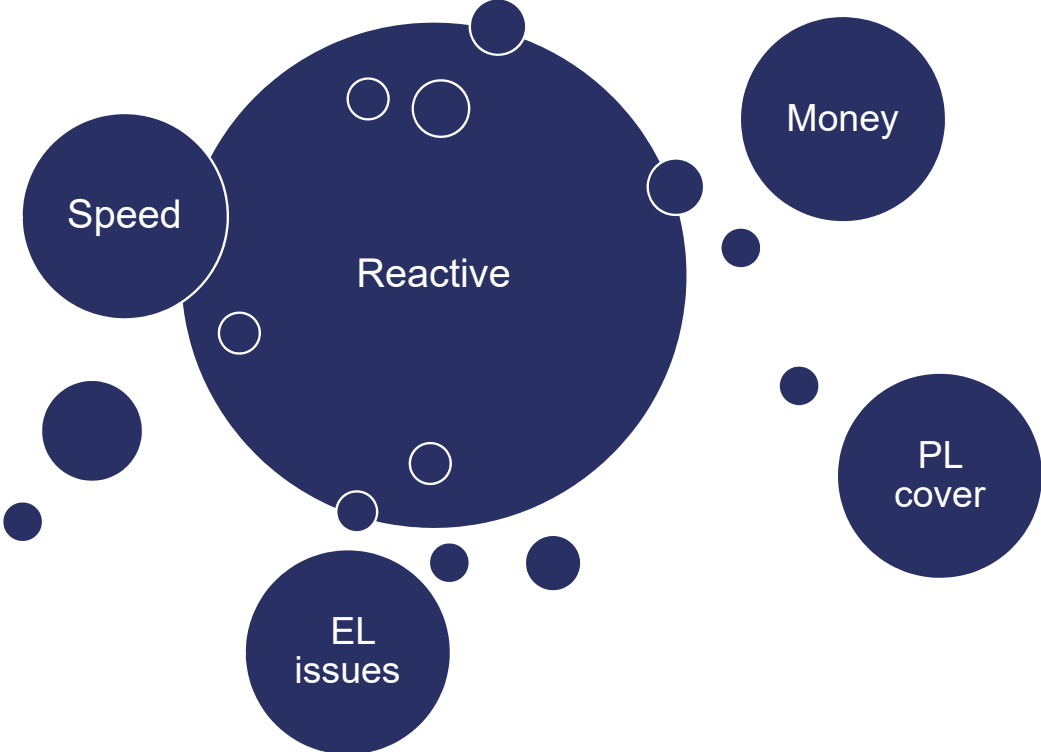
Practical considerations 1 - evidence

- Evidence of exposure
- Management plan, survey, risk assessment
- Correct procedure?
 - Warnings
 - Training
 - Health surveillance
 - Local exhaust ventilation
 - Other dust suppression
 - Face fit, train and ensure compliance
- Records of concerns, accidents

Practical considerations 2 – recovery

- Insolvent companies
- Employers liability insurance vs public liability insurance
- Benign cases don't have access to the Diffuse Mesothelioma Payment Scheme
- Apportionment issues in benign cases

Problems with the law



Useful links for further information

- <https://www.legislation.gov.uk/ukxi/2012/632/contents/made>
- <https://www.hse.gov.uk/pubns/priced/l143.pdf>
- <https://www.hse.gov.uk/asbestos/>
- <https://www.mesothelioma.uk.com/>

Questions?

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