

Harry Steinberg QC and Aliyah Akram successfully argued in the Court of Appeal that a 2.3% contribution to a claimant's asbestosis constituted actionable damage.

Mr Carder was exposed to asbestos while he was working as an electrician for the University of Exeter. The University admitted liability but sought to defend the claim on the basis that it had not caused actionable damage. It was agreed that the University's contribution to Mr Carder's overall asbestos exposure was 2.3% and also agreed that this had made a 2.3% contribution to his asbestosis. The University argued however, that because its contribution to the Mr Carder's asbestosis did not make a measurable or observable difference to his lungs he had not suffered any damage. That argument was rejected at first instance and was the subject of the appeal.

The Master of the Rolls, in delivering a unanimous judgment, considered the now classic cases of *Rothwell* and *Holtby* and held that the only relevant question was whether the tort had caused Mr Carder to be materially worse off, i.e. had he suffered damage?

In answering that question the key evidence was that asbestosis is a fibrosis of the lung which is dose related so that ingested asbestos fibres operate cumulatively to cause and then progress the disease. The cumulative nature of asbestosis means that it is a divisible disease, so any tortfeasor's individual contribution can be apportioned.

The court dismissed the appeal and accepted the argument made on behalf of Mr Carder that "[t]he fact that the ingestion of a quantity of asbestos dust makes no measurable or observable difference to a person's lungs does not necessarily mean that it makes no difference to them as a matter of objective fact." It found that Mr Carder's disease had been made more severe if only to a small and admittedly not measurable extent.

The Master of the Rolls pointed out that there was an inherent contradiction in the University's case between accepting it had made a 2.3% contribution to a cumulative disease which causes an individual to be worse off and then seeking to argue that this contribution had made no difference.

Lastly there was a reminder to those backing the University's defence and appeal, who had complained about the costs of defending claims of this nature: Mr Carder recovered £1,552.50, that the most obvious way to save costs in factually complex litigation is to try settle them early.

