

## UK asbestos liability: anarchy in the UK?

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# The UK asbestos problem

The only liability problem in the UK that comes close to emulating US-scale litigation is asbestos. The UK's problem is at an earlier stage of development than the US's. It is shaping up to be large – almost certainly the second largest in the world – but it is not simply a replication of the US problem. For a variety of reasons, what we face in the UK is different. In some respects our problem is not as serious as the US's; but in others, it is worse.

Claims for asbestos-related injury have been made in the UK since the 1960s. Our exposure profile means that claims will continue to be made for decades to come. In terms of time, the UK is probably half-way through its asbestos liability problem. However, a reasonable estimate is that somewhere between 75% and 90% of asbestos liability costs lie in the future. Measured in this way, what seems like yesterday's problem is in fact tomorrow's.

## Types of asbestos

Over six million tonnes of asbestos was imported into the UK during the 20th century. The principal types of asbestos used commercially in the UK were chrysotile, crocidolite and amosite.

It is thought that proportionately more of the two most dangerous types of asbestos, crocidolite (blue) and amosite (brown), was used in the UK than the US. Blue asbestos was typically used in rope lagging and in pre-formed thermal or sprayed insulation. It is known to be the most lethal type of asbestos. An authoritative paper by the Health & Safety Executive<sup>1</sup> (HSE)

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1 The government agency responsible for safety in the workplace.

estimates that those who were exposed to blue asbestos are at about 500 times greater risk of developing mesothelioma and 10-50 times greater risk of developing lung cancer than those exposed to white asbestos (chrysotile). Brown asbestos was used in buildings for anti-condensation and acoustic purposes and for fire protection. It was also widely used in the UK in the manufacture of insulation boards. The HSE estimates that compared to exposure to white asbestos, exposure to brown asbestos produces about a 100 times greater risk of developing mesothelioma and a 10-50 times greater risk of developing lung cancer.

## Exposure

### *Types of industries*

The Trades Union Congress<sup>2</sup> has called asbestos the UK's biggest workplace killer. An editorial in the British Medical Journal noted that one in every hundred men born in the UK in the 1940s will die of malignant mesothelioma; and that the lifetime risk of mesothelioma for a man first exposed as a teenager, who spent his working life in a high risk occupation, can be as high as one in five.

The HSE has identified the following industries as being associated with occupations with the highest risks of developing mesothelioma: shipbuilding, railway carriage and locomotive building and the installation and maintenance of lagging and other insulation materials in buildings. Dockyards and factories that worked with raw asbestos are also identified. The HSE estimates that over 25% of those with mesothelioma worked in the building or maintenance industry. The industries and occupations which used or were exposed to asbestos changed over time and this is reflected in the occupational status of those who have developed asbestos-related diseases.

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2 The official representative body of British trade unions.

Although this note focuses upon the implications of asbestos use in the UK, there may be circumstances in which a UK company can be held liable in the UK to individuals exposed to asbestos outside the UK.

### *Period of exposure*

The main period of asbestos consumption in the US spanned 1940 to 1985 whereas in the UK and the rest of Europe the height was between 1950 and 1995 (about ten years later than the US), and consumption remained relatively high in Europe until the end of the 1990s. The peak of exposure to asbestos in the UK is thought to have occurred in the mid-1960s. The use of blue and brown asbestos was not banned in the UK until 1985; the use of white asbestos (being perceived to be the less dangerous form) was not banned until 1999. Exposure did not, however, end in 1999. Millions of buildings in the UK, both commercial and residential, still contain asbestos in their fabric leading to the risk of exposure when that asbestos is disturbed during refurbishment or demolition work. It is for this reason that those involved in construction or the building trades will continue to be at risk of exposure for the foreseeable future.

## Categories of claimant

### *Employees*

Most of the claims seen to date have been brought by individuals against their employers in respect of exposure to asbestos in the course of their employment. In broad terms, UK asbestos liability has hitherto been largely an employee problem rather than a product liability problem.

As an employee problem, employers' liability insurance is the cover most likely to be relevant. Given that such insurance has been compulsory since 1972, and given the way in which it responds, it is of potentially great significance.

One of the uncertainties in the UK is how many non-employee claims (the various categories of which are described below) will be made. To date, such claims represent only a small proportion, but there are signs that they may be made at an increasing rate.

### *Bystanders*

Bystander claims typically involve individuals who did not work directly with asbestos, but who worked in close proximity to individuals who did: for example an individual employed as a welder in a ship's boiler-room may have worked alongside a 'lagger' removing and replacing asbestos pipe-lagging. That operation would almost certainly have exposed not only the lagger but also the welder working next to him (the bystander) to asbestos.

### *Household*

A number of claims have been brought by individuals who suffered 'secondary' exposure to asbestos when a member of their household, often a husband or father, carried asbestos from their workplace into the home on their work clothes (see, for example, the facts of *Maguire v Harland & Wolff*<sup>3</sup> discussed below).

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3 [2005] PIQR P.21.

## *Neighbourhood*

Claims have been brought by individuals exposed to asbestos as a result of living close to premises where asbestos was used. An asbestos producer was successfully sued in respect of the mesothelioma developed by the claimants as a result of exposure to asbestos while they lived, as children, near its factory in Leeds<sup>4</sup>.

## *Environmental*

The HSE states that any building which was built or had major refurbishment work between the 1950s and 1980s is likely to contain some form of asbestos material. There is therefore the risk that both the individuals who installed the material and those now occupying or repairing the buildings could have been or could be exposed to asbestos.

## *Non-UK claimants*

In the late 1990s Cape plc was successfully sued in England by a group of more than 7,000 South African claimants in respect of the conduct of one of Cape's subsidiaries in South Africa<sup>5</sup>. Cape plc, a company incorporated in England, mined crocidolite in South Africa and owned shares in two companies that operated an amosite mine and mill in South Africa. Cape's South African operations were conducted directly by Cape until 1948 and then through Cape's wholly-owned subsidiaries until 1979.

Due to the insolvency of Cape's South African subsidiaries, the claimants' only realistic target was the English parent company, Cape. The claimants alleged that Cape was in breach of its duty of care towards those working at or living near its factories.

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4 *Lubbe & others v Cape Plc* (2000) 1 WLR 1545.

5 *Margereson v J W Roberts Ltd* [1996] PIQR P358.

The House of Lords ruled in July 2000 that the claims could proceed in the English High Court. The main reasons for the House of Lords' decision were that public funds might not be available to fund court actions in South Africa; there was no guarantee that those attorneys in South Africa with expertise in this field had the means to conduct, or would run the risk of conducting, the proceedings on a contingency fee basis; and that the absence in South Africa of developed procedures for handling group actions increased the chance that decisions would be contested, which would result in delay and increased costs.

This judgment demonstrates that in certain circumstances the English courts may take account of the ability of foreign claimants to sue in their own country. A claimant may be able to establish that a UK parent company owes a duty of care to the employees of its foreign subsidiary, particularly where the foreign subsidiary is located in a country where access to justice is difficult.

## Number of claims

### *Historic and current claims*

A study by the Faculty & Institute of Actuaries estimates that the number of asbestos claims notified to insurers rose from 2,000 claims a year in 1990 to around 10,000 a year in 2003. Indications are that the rate of claims has continued to increase. HSE figures show that the annual number of mesothelioma deaths has risen from 153 in 1968 to 2037 in 2005. Estimating the number of lung cancer deaths resulting from asbestos exposure is difficult on the data available; however, the HSE estimates that there are at least as many deaths from asbestos-related lung cancers each year as there are from mesothelioma.

## *Future claims*

The HSE has estimated that deaths from all diseases caused by asbestos exposure will increase to more than 10,000 per year by 2015. Cancer specialists have warned that Britain has the highest rate of mesothelioma in the world and have estimated that 60,000 people will die from mesothelioma in Britain, with a similar number likely to die from other asbestos-related lung cancers.

Mesothelioma has a long latency period of between 15 and 60 years from the point of exposure to the disease manifesting itself. The HSE estimates that the number of deaths from mesothelioma will not peak in the UK until between 2011 and 2015. Others believe that point will not be reached until even later: for example, the Cape group of companies, one of the UK's main asbestos defendants, calculated that the peak value of claims against it will not be until somewhere between 2025 and 2030 and that it will face claims for at least the next 46 years<sup>6</sup>. The peak is estimated to be around 2,500 deaths per annum. To put this in context, the average number of mesothelioma deaths per year in the US is about the same but produced from a population that is five times larger than the UK's. It is predicted that as far into the future as 2050, the rate of mesothelioma cases in the UK will still be significant (perhaps 500 per year).

## *Estimated cost of claims*

The UK's claims and costs data are incomplete. A reasonable estimate is that about £2billion has been paid out so far for the UK's asbestos disease claims, with most of that borne by insurance. It is likely that about half of that cost has been in respect of mesothelioma claims.

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6 These estimates were prepared for Cape's scheme of arrangement.

The Faculty & Institute of Actuaries' study estimates future costs at between £3.76 billion and £9.86 billion, depending on the number of claims and the level of inflation. Other estimates put the total cost of the UK's asbestos liability problem as high as £20 billion. If that pessimistic estimate is accurate, the UK's asbestos liability problem will be proportionately as costly as the US's.

### *The asbestos claims environment*

The claims environment in the UK is very different from that in the US. Claims in the UK tend to be made by employees exposed to asbestos in the workplace rather than by individuals relying on theories of product liability. Most of the factors which encourage an entrepreneurial litigation model in the US system – such as the threat of civil juries making multi-million dollar awards and contingency fees for lawyers – are absent in the UK. There is broad public support for the principle that those who are injured through exposure to asbestos should be compensated fairly.

There is no large-scale manipulation to 'target' a particular defendant. By and large, there is no incentive for a claimant – or his lawyer – to sue any defendant other than the one that appears actually to be responsible; to date, that defendant has usually been the employer. It is probably for this reason, combined with the fact that most of the claims have been covered by insurance, that the UK has not had a raft of asbestos-driven bankruptcies.

### *The UK civil justice system*

Many of the features of the US tort system that created or exacerbated the US asbestos litigation problem are missing from the UK's system. While both systems' tort laws are based upon similar concepts, the UK's approach to tort litigation is different. Personal injury claims are heard by a judge alone; there are no juries.

In a tort case, the purpose of damages is to put the claimant in the position in which he would have been if the tort had not been committed. Punitive damages are not available in personal injury litigation. The broad aim of an award of damages is to compensate the victim; it is certainly not to punish the defendant. There is no possibility of a 'runaway verdict'. The financial rewards available to plaintiff lawyers in the US are not possible in the UK system. We do not (currently) permit contingency fees.

Claimant solicitors are allowed to enter into 'conditional fee arrangements', but these permit only an uplift of the fees, not a 'cut' of the damages. In most cases costs 'follow the event', with the loser paying a significant proportion of the winner's costs. This costs risk is enough to discourage most weak or unmeritorious claims. While some claimant lawyers in the UK are sophisticated – and becoming more so – there is currently no scope to operate a business model along US lines.

The UK has been a relatively benign environment for defendants. There are, however, a number of signs that the claims environment could worsen. There is considerable lobbying by claimant lawyers for contingency fees to be introduced. Claimant lawyers argue that this type of incentive would result in potential claimants having easier 'access to justice' to pursue their claims. There is no doubt that UK claimant lawyers are exploring ways in which to exploit the UK's asbestos problem. Even more worrying is that the US plaintiff bar has been looking at the UK, seeking to identify opportunities to develop a more entrepreneurial model. In simple terms, there is a view on the claimant side that the UK's problem should support what is already being called an asbestos litigation 'industry'. The claimant lawyers are at the stage of deciding how to develop that 'business'.

The claims environment also has a political dimension to consider. Claimant groups (notably personal injury lawyers and trade unions, supported by a number of politicians) have shown themselves to be capable of mounting effective lobbying campaigns to improve the claimants' position. It appears that the defendant/insurer side has not yet developed an effective method

of countering this. The current government has been generally sympathetic to the concerns of the victims of asbestos, notably when it swiftly introduced legislation to reverse one aspect of a House of Lords decision that would have prejudiced mesothelioma victims.

However, the government has so far refused to restore compensation for those who have developed pleural plaques (see below).

## Legal liability

Almost all asbestos personal injury claims allege negligence (a breach of a duty to take reasonable care) or the breach of a duty that arises by statute. These statutory duties are often very specific. Examples of statutory duties relied upon by claimants seeking damages for asbestos-related injury include:

- a duty to maintain adequate ventilation for each room or compartment where employees work, and for rendering harmless the asbestos dust (Shipbuilding and Shiprepairing Regulations 1960)
- a duty to ensure that floors, plant, apparatus and all internal surfaces are kept clean and free from asbestos waste, debris or dust (Asbestos Industry Regulations 1931).

Whether the duty of care has been breached is determined by considering whether a defendant's conduct falls below that which could reasonably be expected from someone in the defendant's circumstances. The defendant will be judged against the state of knowledge at the time of the breach<sup>7</sup>.

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<sup>7</sup> *Rowe v Ministry of Health* [1954] 2 All ER 118.

## Causation and damage

The court must be satisfied that, as a question of fact, the defendant's breach of duty caused the damage sustained by the claimant<sup>8</sup>. The conventional test for legal causation is the 'but for' test: whether, but for the breach of duty, the claimant would have suffered the damage which occurred. In other words, it is not enough to show that the defendant's conduct increased the likelihood of damage and may have caused it. It must be proved on a balance of probability that the defendant's conduct did cause the damage in the sense that it would not otherwise have happened. The damage must be reasonably foreseeable<sup>9</sup>. A defendant will still be liable if the claimant suffers a type of loss that is similar to one which was foreseeable<sup>10</sup>.

### Causation: mesothelioma

In *Fairchild v Glenhaven Funeral Services Ltd*<sup>11</sup> the House of Lords considered the requirement to prove causation in respect of someone who had developed mesothelioma. The claimants had each been exposed to asbestos by a number of employers. The defendants in *Fairchild* each admitted that they had breached their duties to the claimants, but the claimants' difficulty was that, because of the limits of medical knowledge, they could not prove on a balance of probabilities that but for their employment with any particular one of their several employers they would not have developed mesothelioma. The existence of more than one tortfeasor meant the claimants could not establish during which period of employment they had inhaled the fibre or fibres which caused the mesothelioma. If each claimant had had only one negligent employer, he would have been able to establish causation because there would have been only one likely source of the fibre or fibres. The House of Lords held

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8 *Barnet v Kensington & Chelsea Hospital* [1969] 1 QB 428.

9 *Wagon Mound (No. 1)* [1961] AC 388.

10 *Hughes v Lord Advocate* [1963] AC 837.

11 [2003] 1 AC 32.

that where the conduct of the defendant has made ‘a material contribution to or materially increased the risk of’ the claimant developing mesothelioma, that is sufficient to establish causation. The House of Lords acknowledged that this decision would mean in some cases that an employer would be held liable for damage which, in fact (although unknowable), it had not caused. Their Lordships were clear that where a choice was to be made between the risk of imposing liability on an employer who was in breach of duty but was not the cause of the claimant’s mesothelioma and preventing a claimant from obtaining redress for developing his fatal disease, justice and fairness clearly required the former to be chosen. The Fairchild principle represented a relaxation of the standard test for causation albeit limited to cases involving mesothelioma. It has been reflected in subsection 3(1) of the Compensation Act 2006.

The Court of Appeal applied the *Fairchild* principle in *Brett (deceased) v Reading University*<sup>12</sup>. The claimant had died of mesothelioma. It was proved that the claimant had been exposed to asbestos during the course of his employment with Reading University, but the court found that for most of his working life the claimant had been in other employments which were equally capable of exposing him to asbestos. The court reiterated that it was for the claimant to prove the elements of his case; and that one necessary element in a personal injury action is that the injury was caused by a breach of duty on the defendant's part. The claimant was unable to establish that the defendant had failed to take the necessary steps to protect the claimant from inhaling asbestos. Even though the claimant had proved exposure to asbestos while in the defendant's employment, he had failed to establish a breach of duty by the defendant. Accordingly, the defendant was not liable. The decision makes clear that the Fairchild principle is limited to relaxing the need to prove causation, but it has no effect on the requirement to prove breach of duty.

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12 [2007] EWCA Civ 88.

The decision of the House of Lords in *Barker v Corus (UK) plc*<sup>13</sup> considered a situation where a victim of mesothelioma had been tortiously exposed to asbestos by two different employers and also during a period of self-employment as a plasterer.

The House of Lords confirmed that the *Fairchild* approach to causation is applicable in this situation even though the mesothelioma may in fact have been caused by the inhalation of an asbestos fibre (or fibres) during the non-tortious exposure while the claimant was self-employed.

### *Damage: pleural plaques*

Three court decisions in the early 1980s established that those who had developed pleural plaques were entitled to damages. Pleural plaques are localised areas of thickening which usually develop on the parietal pleura, part of a two-layered membrane surrounding the lung. These plaques are often described as being a form of ‘scarring’. The plaques themselves do not lead to other, symptomatic conditions caused by asbestos exposure; rather they indicate that the individual has been exposed to asbestos. It is that exposure, and not the development of pleural plaques, that might cause the individual to develop an asbestos-related condition such as mesothelioma. For 20 years, thousands of claims have been made; and defendants and insurers have paid out perhaps as much as £1billion in settlement. The House of Lords’ landmark decision in *Rothwell v Chemical & Insulating Co Ltd*<sup>14</sup> (previously known as the Grieves case) handed down in October 2007 has reversed the position.

In *Rothwell*, and the linked cases, the defendants accepted that they had negligently exposed the claimants to asbestos. The issue for the House of Lords was whether the claimants could satisfy the requirement for a claim in

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13 [2006] 3 All ER 785, previously known as *Barker v St Gobain Pipelines plc*.

14 [2007] UKHL 39.

tort that the claimant had sustained ‘damage’, in the sense understood by the law. The claimants’ primary argument was that pleural plaques constituted damage sufficient to complete a cause of action in tort. The claimants argued in the alternative that the plaques themselves, when combined with the risk that the claimant would develop an asbestos disease as a result of their exposure to a threshold amount of asbestos and the anxiety felt as a result of the knowledge of that risk, amounted to damage sufficient to complete a cause of action (the aggregation argument).

The House of Lords, having stated that without proof of damage a claim in tort could not be successful, decided that, although the plaques could amount to an injury, they could not be said to be damage in the context of the necessary elements of a tort claim. Consequently, pleural plaques could not found a claim in tort and the claimants' argument that pleural plaques themselves were compensatable failed. The House of Lords then turned to the aggregation argument. The court decided, on the basis of previous long-standing decisions, that neither anxiety nor the risk of future illness was individually sufficient damage to found a claim in tort. The House of Lords found that combining three elements (the pleural plaques, the anxiety and the risk of developing an asbestos-related disease), none of which in itself is damage, did not amount to damage or an actionable claim.

An often-repeated estimate is that 100,000 people in the UK have developed or will develop pleural plaques and that the cost of claims would have been around £1.5 billion. Those figures might be significant underestimates as no one has any real idea about the scale of the problem. The Scottish Executive has announced that it is considering legislation to prevent the House of Lords’ decision from having effect in Scotland and so it appears likely that, in Scotland at least, pleural plaques claims will continue to be pursued. The UK Government, having so far rejected calls for legislation to reverse the House of Lords’ decision, has accepted that it might be difficult to maintain a situation where compensation can be obtained in tort in Scotland but not in England and Wales.

The *Rothwell* ruling precludes claims in tort, but three of their Lordships raised the possibility of an employee bringing a claim against his employer for breaching his contract of employment by exposing him to asbestos. In England, an employer has a duty to provide a safe working environment for its employees. Under English law, a claimant has a cause of action in contract as soon as the breach has occurred; there is no requirement that damage be suffered. One of the Law Lords, Lord Scott, suggested that it might be arguable that employees who have been exposed to asbestos but who have not yet suffered any injury at all could bring a claim in contract and recover damages to compensate them for being subjected to the risk of contracting a life-threatening asbestos-related disease. The claim envisaged appears to be focused upon the exposure rather than on injury. Given the very large number of individuals exposed to asbestos by their employers in the last fifty years, this is likely to be an extraordinarily large pool of potential claimants. Those bringing breach of employment contract claims would face difficulties in proving loss and in addressing limitation defences (although Lord Scott in *Rothwell* indicated that there may well be an answer to the limitation arguments). The first breach of contract claims have surfaced; in addition to relying upon an employer's duty to provide a safe working environment, the claims allege that the employer's breaches have undermined the employee's confidence and peace of mind in relation to his future health and strength.

It remains to be seen whether damages for those who have developed pleural plaques can be obtained through alleging a breach of the employment contract. If courts accept that the focus should be upon the loss suffered by claimants as a result of the exposure rather than the development of pleural plaques, it seems logical to argue that all who have been exposed by their employers, and not just those who have pleural plaques, should be able to claim. If that were the case, the number of potential claimants would be vast.

## Defences

### *Lack of knowledge*

When considering whether a defendant has been negligent, the court looks at what the defendant knew or should have known about the dangers of asbestos at the time of exposure. That assessment of the defendant's awareness is relevant to whether damage was 'reasonably foreseeable'.

In *Margereson v JW Roberts Ltd*<sup>15</sup> the court accepted evidence that the asbestos used by the defendant in making products escaped from its factory through doors, windows and the factory's loading bays. The court also heard that the defendant temporarily stored bales of asbestos in loading bays. Local children played on these bales, often jumping on them causing them to burst and even making 'snowballs' from the asbestos.

The court found that the defendant was well aware of the dangers of asbestos before either of the claimants were born, in 1925 and 1932 respectively, and therefore it was reasonably foreseeable that mismanagement of the asbestos used by the factory could result in people (inside the factory and in the immediate vicinity) developing asbestos-related diseases. The court found that the defendant knew of the risks posed by asbestos and that no distinction could, on these facts, be drawn between the asbestos situation in the factory itself and the immediate vicinity; accordingly, the duty of care extended to individuals outside the factory.

*Maguire v Harland & Wolff*<sup>16</sup> involved a claim by the wife of a man who worked for the defendant in the 1960s. Mr Maguire worked in ships' boiler-rooms and engine-rooms where he was in close proximity to the men whose job was to remove and re-apply asbestos pipe lagging.

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15 LTL 3/4/96; The Times, April 17, 1996.

16 [2005] PIQR P.21.

No changing facilities were provided and when Mr Maguire returned home each night, his work clothes were covered in asbestos dust. Mrs Maguire was exposed to that asbestos when she laundered her husband's work clothes each day; she subsequently developed mesothelioma. The court, at first instance, held that her husband's employer owed a duty of care to Mrs Maguire because it should have foreseen the risk of serious injury to her. The Court of Appeal reversed this decision and held that the state of knowledge was such that until 1965 (the year in which Mr Maguire ceased to work for the defendant), there was nothing to alert employers to the risks posed by asbestos to the families of their employees. Most commentators have expressed surprise at the harshness of the decision. The House of Lords refused leave to appeal.

In *John Pinder v Cape Plc*<sup>17</sup> the High Court held that the defendant company, Cape, was not liable in negligence to a claimant who had contracted mesothelioma as a result of playing in asbestos waste deposited by the company at a local tip during the 1950s. The court held that the claimant's exposure to asbestos was occasional and relatively low level and would not be such as to make a risk of injury foreseeable to Cape at the time; the real dangers of second-hand and intermittent contact became appreciated only a decade later and to impose a duty of care before that point would be applying hindsight to the standards which applied in the 1950s. There was no evidence that Cape knew or ought to have known that children were playing at the tip and the court did not consider that by the standards of the 1950s Cape should have taken particular steps after depositing the asbestos waste at the tip. On the evidence, the claimant could not establish that Cape owed him a duty of care.

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17 [2006] EWHC 3630.

## Severity of exposure

Until now, defendants have only rarely contested claims on grounds relating to the nature of the exposure. If, as seems inevitable, claim numbers and values rise, we are likely to see increased investigation of scientific issues, notably the relative health risks posed by the different types of asbestos and different levels of intensity of exposure. As part of this, defendants are more likely to focus upon the medical consequences of different exposures, especially exposures outside the scope of employment: for example, through DIY activities or the presence of asbestos fibres in the environment.

## Level of damages

When deciding the level of personal injury damages, English judges follow guidelines issued by the Judicial Studies Board and have regard to the levels of past awards. As a result, awards in England are fairly consistent and, as they are made by judges, there is no risk of disproportionately large awards of the type made by juries in the US.

Damages are classified as either ‘general’ or ‘special’. In asbestos personal injury cases special damages typically consist of expenses such as medical bills and loss of earnings incurred to the date of trial; they are generally capable of fairly precise calculation. General damages include compensation for pain and suffering and, if the injuries are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future<sup>18</sup>.

The range of damages for the five main types of asbestos-related conditions – pleural plaques, pleural thickening, asbestosis, asbestos-related lung cancer and mesothelioma – are set out below.

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18 *British Transport Commission v Gourley* [1956] AC 185.

## *Pleural plaques*

Following the House of Lords' decision in *Rothwell* (see above), claimants with pleural plaques alone are not entitled to damages. If legislation is enacted in Scotland it will remain to be seen what the quantum of damages will be. The Court of Appeal in *Rothwell*, although it ruled that pleural plaques were not actionable, suggested that if the condition were actionable the prevailing range of general damages of between £12,500-£20,000 for a final award should perhaps be increased.

## *Pleural thickening*

This is a pleural fibrosis in the thoracic cavity. It is usually described as 'diffuse' because it is without well-circumscribed margins. If sufficiently extensive, the thickening restricts expansion of the lungs, resulting in reduced elasticity/capacity with varying degrees of breathlessness. Occasionally it causes persistent chest pain. Settlement may be on a provisional or final basis. The range of awards for general damages on a full and final basis is £22,000 to £45,000.

## *Asbestosis*

Asbestosis is typically associated with substantial dust exposure. It is a form of lung or pulmonary fibrosis, which normally develops 15 to 40 years after first exposure to asbestos. Inhaled asbestos fibres irritate the lung and cause the formation of scar tissue which damages the delicate structure of the lung. It is a disabling and progressive condition which leads to increasing breathlessness and, in extreme cases, death through heart failure.

General damages for pain and suffering range from about £28,000 to £61,000. Respiratory disability of between 10% and 20% will normally attract an award in the region of £40,000. Lung disability at the higher end of the scale is more likely to attract damages for nursing care and loss of income, pushing settlements into the mesothelioma/lung cancer range.

### *Asbestos-related lung cancer*

Heavy asbestos dust exposure can cause lung cancer. Such malignancy usually develops after 20 years from first exposure. There are other causes of lung cancer (notably smoking) and asbestos is not always identified as the cause or a contributing factor. Lung cancers resulting from asbestos exposure are clinically indistinguishable from those caused by smoking. As a result, there has almost certainly been considerable underreporting of asbestos-related lung cancer.

Calculating the relative risks of asbestos exposure and smoking in determining legal liability is complicated, particularly as these two causative agents are thought to interact. In the decision in *Badger v MOD*<sup>19</sup>, the court ruled that cigarette smoking and exposure to asbestos were both causative of the claimant's husband's lung cancer. The court found that, in the circumstances, a failure to give up smoking once the risks were known, and after being advised to give up for health reasons, constituted contributory negligence. The court calculated that smoking caused a greater increase in the risk of developing lung cancer than exposure to asbestos. However, after taking other factors into account (notably the relative 'blameworthiness' of the parties' conduct), the court reduced the damages award against the defendant (that had exposed Mr Badger to asbestos) by 20% (from £149,000 to £119,000). This case emphasises the potential relevance of the claimant's smoking history.

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19 [2006] 3 All ER 173.

In the *Barker* case, the House of Lords made it clear that the relaxed test for causation formulated in *Fairchild* does not apply in circumstances where there is more than one possible causative agent. Therefore the *Fairchild* principle will not, it seems, apply in the case of a lung cancer victim where it cannot be established whether asbestos exposure or cigarette-smoking caused the disease. This aspect of the *Barker* decision appears to cast significant doubt on the approach of the court in *Badger*. It appears to be no longer open to a court to find both asbestos exposure and cigarette-smoking to have caused a claimant's lung cancer. Instead, a court would have to decide, on the balance of probability, which agent caused the cancer. In the *Badger* case, the court calculated that smoking had increased the risk of developing cancer more than asbestos exposure.

The Faculty & Institute of Actuaries estimates that general damages for lung cancer are on average £10,000 less than for mesothelioma claims for claimants with the same financial and family dependency circumstances. This is largely accounted for by the reduction that has typically been made if the claimant was a smoker, to reflect his own contribution to his disease. It is unclear whether this type of reduction will survive the *Barker* decision. General damages range from about £45,000 to £58,500. Total awards are usually in the £100,000 to £200,000 range.

## *Mesothelioma*

Mesothelioma is a malignant tumour found most commonly in the pleura. This cancer typically results from a low exposure to asbestos and usually develops 30 to 50 years after exposure. It is almost always fatal within two years of diagnosis.

The cost of a mesothelioma claim varies with the claimant's age, earnings, marital status, dependants and duration of pain and suffering. A judge commented, in a case where the claimant had a lung removed and

underwent intensive chemotherapy and radiotherapy, that damages in such cases should reflect not only the duration of suffering but also its intensity. General damages for mesothelioma range from £47,850 to £74,300.

Taking all heads of damage into account, a mesothelioma victim will usually be awarded damages in the £150,000 to £250,000 range. Awards are heavily dependent upon the personal and financial circumstances of the claimant. The widow of a man who built up a successful business and who died of mesothelioma aged 47 following exposure by a previous employer was awarded more than £4 million. A relatively young man, aged 59, was awarded £950,000 which included £500,000 in loss of future earnings plus medical and care costs. There are quite likely to be an increasing number of £1million plus awards or settlements over the next few years, especially where victims are diagnosed at a comparatively young age or are in relatively high-earning occupations.

### *Apportionment and contribution*

As a matter of principle, contribution claims are possible only where two or more parties are liable for causing the same injury or damage<sup>20</sup>. A contribution claim arises where a defendant is liable (or, but for a settlement, would have been found liable) for 100% of a claimant's damage, but another party (which may be a defendant to the same claim or simply another tortfeasor) is also legally responsible for the whole of that damage. A defendant may seek contributions to reflect the relative responsibility of other defendants/tortfeasors for causing that loss. By contrast, where a number of defendants are found to have caused *different* damage, a court will apportion liability among the defendants to reflect the damage each has caused.

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20 Section 1 of the Civil Liability (Contribution) Act 1978.

## *'Divisible' or 'indivisible' diseases*

Mesothelioma is regarded by the English courts as an 'all or nothing' and hence 'indivisible' disease. It is not necessarily the result of long exposure or of a build up of material; rather it is caused by a number of fibres – perhaps even a single fibre – entering the lung. The fibre or fibres responsible could have been inhaled at any point during the victim's exposure. While the severity of the disease is not related to the length of exposure, the risk of developing the malignancy does increase with longer exposure. Lung cancer is also regarded as an indivisible disease, but the fact that it can be caused by a completely different agent (smoking) complicates the analysis.

Asbestosis, pleural thickening and pleural plaques are cumulative conditions and therefore 'divisible' as they are caused and contributed to by a build-up of asbestos dust or fibres over time. The extent of the injury or disease develops in direct proportion to the number of fibres or level of dust breathed in and the length of exposure. These divisible conditions are sometimes described as being 'dose-related', since the higher the 'dose' of asbestos, the more severe they become.

## *Application of principles*

As a general principle, a defendant will be liable to a claimant only to the extent that it contributed to the claimant developing an asbestos-related condition<sup>21</sup>. This principle is applicable to divisible conditions since they are dose-related. Where a court finds several defendants liable for contributing to the development of the disease, it will apportion liability between those defendants, largely on a 'time-exposed' basis, but it may also take the severity of the exposure into account. This principle is applied even where

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21 *Holtby v Brigham & Cowan (Hull) Ltd* [2000] All ER 421.

the claimant has been exposed by a party not before the court, as all exposure is taken into account when apportioning liability.

Since liability is apportioned to reflect the damage caused by the conduct of each defendant, contribution between defendants responsible for different periods of exposure does not arise. In simple terms, each defendant has been found liable for the damage it alone has caused.

Mesothelioma is an indivisible disease and is therefore treated differently. Section 3 of the Compensation Act 2006 provides that a defendant who has negligently exposed a person to asbestos, and that person has developed mesothelioma, is jointly and severally liable in respect of the whole damage. The provision makes it clear that it makes no difference whether or not someone else could have caused the disease; whether the victim could have contracted the disease from environmental exposure; or whether the responsible defendant exposed the victim in a non-tortious (eg before knowledge of the dangers of asbestos) as well as tortious way.

The Act confirms that contribution claims can be made between such tortfeasors and that the court will decide levels of contribution by reference to the relative lengths of the periods of exposure unless the judge thinks another approach is more appropriate in the circumstances or the parties agree a different approach. This leaves it open for tortfeasors to argue that the severity of exposure should be taken into account. If the mesothelioma claimant is found to have negligently exposed himself to asbestos, then the damages may be reduced accordingly under the principle of contributory negligence. This could be relevant where that self-exposure was during a period of self-employment or through DIY activities; or perhaps where an employee has disregarded his employer's safety procedures.

The Government has acknowledged the effect that section 3 of the Compensation Act, which was enacted to reverse part of the House of Lords' decision in *Barker*, will have on defendants and their insurers.

The statutory confirmation of joint and several liability will mean that mesothelioma claimants will be seeking to recover 100% of the compensation from one defendant, typically medium to large employers (the most likely to be in existence and solvent) or from the Government (in relation to state-owned industries). It is then up to that defendant to seek a contribution from other responsible parties. Where those other responsible parties are insolvent and are without recoverable insurance, the right to contribution is of no use. In this type of situation, the burden will fall disproportionately upon solvent defendants.

Following the Compensation Act changes were made to the Financial Services Compensation Scheme (FSCS) to assist defendants. The FSCS provides a consumer safety net in relation to insurance and allows claims for compensation to be made where an authorised insurer has become insolvent. The changes give a defendant who has paid a mesothelioma claim a right to claim against the FSCS in circumstances where the mesothelioma victim could himself make a claim against the FSCS.

### *Contribution claims*

In relation to claims other than mesothelioma claims governed by the Compensation Act, contribution claims are possible only between two or more parties that are responsible for the same asbestos exposure and therefore for causing the same injury. This will arise typically in a bystander situation eg where an employer has been held responsible to an employee for injury caused by exposure to asbestos, but the exposure was through the use of asbestos by a contractor on site. In that situation, the employee can recover in full from his employer; and the employer may then seek contribution from the contractor.

# Insurance

## *Employers' liability insurance*

Since 1 January 1972 it has been compulsory for most UK employers to take out and maintain insurance, under one or more approved policies, with an authorised insurer against liability for bodily injury or disease sustained by employees arising out of and in the course of their employment<sup>22</sup>.

These policies cover liability to employees only; they do not, for example, provide cover for an employee's family.

Employers have been required to have cover (not subject to a deductible) of not less than £2 million (increased to £5 million from 1999) "*in respect of a claim relating to any one or more employees arising out of one occurrence*" and any costs and expenses incurred in relation to such claims. Insurance market practice has been to treat the injury or disease suffered by an employee as a separate occurrence so that the minimum level of indemnity provided by the policy is available in respect of each employee. Operated in this way, employers' liability policies have no aggregate limit.

The minimum cover per occurrence (in effect, the liability incurred to one employee) is significantly more than any likely award of damages or settlement in respect of an individual claimant. Taken together, these features render this class of insurance exceedingly important in relation to an employer's liability for asbestos-related claims.

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22 Employers' Liability (Compulsory Insurance) Act 1969. Most public organisations or publicly-funded bodies are exempt

## Public liability

Companies generally have public liability insurance, providing cover for legal liability to members of the public for death, bodily injury or damage to their property which occurs as a result of business activities. Since the 1990s, most public liability policies have excluded cover for asbestos-related incidents from the cover, but policies providing cover over the past few decades with no such exclusion may be relevant.

Public liability policies generally provide cover in respect of bodily injury which ‘occurs’ during the period of the policy. The Court of Appeal in *Bolton MBC v Municipal Mutual Insurance*<sup>23</sup> confirmed that at the point when the claimant had done nothing more than inhale asbestos fibres, he had suffered no injury. *Bolton MBC* involved a mesothelioma claim. The Court of Appeal did not need to decide whether the bodily injury occurred when the first malignant cells developed (approximately 10 years before diagnosis) or when the symptoms became manifest, as Municipal's public liability policy was on risk at both these points; however, both the court at first instance and the Court of Appeal appeared to tend towards the onset of malignancy as the point at which injury occurred.

The Court of Appeal decision is consistent with the way in which the London Market has operated public liability policies for many years. In giving its ruling, the appeal court expressly refused to adopt the ‘triple trigger theory’ (exposure, development of disease and diagnosis) (also known as the ‘multiple’ or ‘continuous’ trigger) adopted in the US.

The Court of Appeal said that theory had been adopted in the US “*avowedly for policy reasons*”, in effect to maximise the insurance proceeds available for the vast number of claims in the US. The court said that the same policy considerations are not present here. One aspect that the *Bolton MBC* ruling

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23 [2006] 1 WLR 1492.

highlights is that if the claim involves a public liability policy, it is conceivable, perhaps likely, that only one policy will be triggered and (subject to any limits) that one policy will be called upon to indemnify the whole of the claim. It seems that the courts will now have to establish when other types of asbestos-related disease occur for the purposes of determining which policy year is triggered. It is likely that there will have to be a different formula for each asbestos-related disease.

### *Product liability*

Manufacturing companies generally have product liability insurance, indemnifying them against liability for damages awarded in actions brought by the purchasers of defective products. Product liability claims in the UK relating to asbestos are relatively rare. They arise in circumstances where a claimant purchased a product containing asbestos and exposure to that product caused an asbestos-related disease.

### *The relevant policy trigger*

The Court of Appeal's decision in *Bolton MBC* (which concerned a public liability policy) has focused attention upon the trigger for all types of liability policies potentially covering asbestos-related disease claims, but particularly employers' liability insurance. Identifying the correct trigger will determine which policy period or periods should respond. In a typical case, it will be several decades between first exposure and a disease being diagnosed. In between, there will have been physiological changes and the manifestation of the disease. The events will span many policy periods and possibly involve a number of different insurers.

The UK insurance market has traditionally operated on the basis that employers' liability policies are triggered by exposure to asbestos. In other words, the policy (or, more likely, policies) to respond is the one in force during the period

when the claimant was exposed to asbestos. This consistent market approach fails to recognise that the wordings of employers' liability policies vary. Policies that indemnify in respect of liability for injury or disease which is 'caused' during the period of the policy might well be triggered by exposure, as it seems reasonable to assume that the injury or disease is caused by and/or during the exposure. Many policies, however, are expressed to indemnify in respect of liability for injury or disease which is 'sustained' or 'occurs' during the period of the policy. In *Bolton MBC*, the Court of Appeal found that the victim of mesothelioma had suffered no 'injury' during the period of exposure; 'injury' occurred at the earliest when the malignancy first developed.

This approach would seem to be equally apt in relation to policies which look to when injury or disease is 'sustained'. If that is right, then the traditional market approach appears unsustainable. The English High Court will be hearing a series of test cases commencing in June 2008 to determine the relevant trigger for various employers' liability policies where the wording refers to injury being sustained or occurring during the period of the policy. These 'trigger' test cases all relate to mesothelioma claims.

With such huge sums at stake, the outcome of the 'trigger' test cases will be eagerly awaited. Any outcome that does not support decades of market practice has the capacity to cause chaos for claimants, defendants and insurers alike.

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This publication is for general guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

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