

Uncertain climate for UK claims



With the constantly evolving legal landscape many uncertainties surround the future exposure in the UK to asbestos claims. **Robert Kingston** and **Deborah Johnstone** of PRO Insurance Solutions consider some of the pertinent case law and examine the key issues

Current estimates, from the UK Asbestos Working Party¹ (AWP) (see p.20), are that the UK insurance industry could be exposed to an undiscounted cost of £11 billion in asbestos-related claims. Whilst this is a considerable value it remains relatively small in comparison with expectations for US exposures. With the UK legal background still developing it is interesting to consider whether we can learn anything from the US — or are we totally different animals?

In the US, litigation started earlier and domestic use of asbestos ended earlier than the UK, resulting in more developed asbestos exposures. In the UK, deaths are estimated to increase by a factor of about 75 per cent at their peak compared to the present day, whereas in the US deaths are believed to be at their current peak.

A recent study² by AM Best estimates the US industry's ultimate

asbestos exposures are projected to reach \$75 billion, up \$10 billion from a previous estimate. 'The increase in asbestos estimates reflects ongoing, elevated levels of annual incurred losses, as well as a subtle shift of losses away from product liability claims to more costly non-products claims against more peripheral defendants,' according to the report. 'Also affecting asbestos losses is a growing proportion of settlements in more serious cases, principally related to mesothelioma, which is increasing the average values of such claims.'

However the number of mesothelioma claims is not rising in the US. The filing count has been relatively constant for a number of years, and it is estimated that the mesothelioma claims in the US have either peaked or are peaking.

So can we learn any lessons from our counterparts in the US?

In the UK, the peak of exposure to

asbestos is thought to have occurred in the mid 1960s. For mesothelioma, which has a long latency period, typically in excess of 40 years, the Health and Safety Executive (HSE) estimates that the number of deaths will not peak in the UK until 2016. The HSE also estimates that there may be at least as many deaths from lung cancers, with asbestos as a contributing factor, each year as there are from mesothelioma. By 2016 it is estimated that deaths from all diseases caused by asbestos exposure will increase to more than 6,000 per year.

In the UK, asbestos liability is largely an employee problem rather than a product liability problem. This is one of the major differences because most claim filings in the US are not against the employer but against the asbestos manufacturer.

Ostensibly, the US legal system and the method in which claimants there

¹ Actuarial Professionals UK Asbestos Working Party Report 26 January 2010

² AM Best — 2009 Special Report: U.S. Asbestos & Environmental Liabilities —2008 Market Review

pursue claims differ widely from that in the UK, so it is difficult to draw many direct comparisons. However, generally the US experience has demonstrated that the costs involved in asbestos-related litigation became too high and lawyers invariably benefited comparatively more than the claimants who had suffered from an asbestos-related disease. The UK should take heed of this and endeavour to keep costs to a minimum, particularly for the lower end cases.

The UK legal landscape

There are several practical issues that insurers with exposure to UK asbestos claims currently face. These include uncertainties in terms of current case law, lack of general policy information, claims arising out of new areas, and a difference in the profile of claimants that we are now seeing.

Staying aware of such issues is an essential requirement for PRO as a provider of claims management services to a large number of Employers Liability (EL) insurers who have asbestos exposures. Notably, PRO acts on behalf of the Financial Services Compensation Scheme and is the appointed TPA for Turner & Newall Ltd, a UK company which at one time was a world class contender in the flourishing asbestos trade, and is now owned by the US multinational Federal-Mogul.

The UK legal position is developing but remains confusing and unresolved, as can be demonstrated by the following summary of some of the key cases that have an impact upon the exposure of the UK insurance industry:

Fairchild & Barker — Fairchild³ allowed claimants to recover from one single employer where the conduct of that employer had made a

material contribution to the claimant developing mesothelioma. Barker⁴ effectively overturned this ruling, leaving claimants having to prove causation against every employer. A claimant would therefore have to successfully sue each of their employers that negligently exposed them to asbestos if they were to recover 100 per cent of their damages. In light of Barker, once insurers and reinsurers realised they had non-causation wordings they started rejecting claims, leaving some claimants with no-one to claim from.

The Compensation Act 2006 — in response to the outcry that followed the Barker ruling, the Government passed the Compensation Act and section 3 of this was enacted to reverse part of the decision in Barker. Section 3 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.

Bolton — this was a Public Liability (PL) matter, where cover is generally provided in respect of bodily injury which 'occurs' during the period of the policy. In the case of Bolton⁵ the Court of Appeal held that at the point where the claimant had done nothing more than inhale asbestos fibres, he had suffered no injury; it was the onset of the malignancy that was deemed the point at which the injury occurred.

Four insurers (Builders Accident, Independent, Excess and Municipal Mutual) had EL policies which were worded in a very similar way to the PL policy in Bolton. Following that decision those insurers decided to apply Bolton to their EL policies and declined cover. This decision by the so-called 'Boltonites' led inevitably to the Trigger Litigation⁶.

Test Trigger cases — given the overall confusion that the above rulings have generated, Court guidance was sought and during 2008 six test cases, all relating to mesothelioma claims, were tried in the High Court. It was hoped that the meaning of 'occurred', 'contracted' and 'sustained' would be strictly (and legally) defined. In addition, it was hoped that some clarification would be given on pre-1972 policy wordings.

Judgment was handed down by Mr Justice Burton who found for the claimants, namely a cohort of individual claimants and policyholders who were looking for an indemnity in respect of mesothelioma claims.

The case turned on the first issue. Having heard both sides' interpretation of the 'sustained/suffered/contracted' EL wordings, the judge concluded that these were unclear and open to interpretation. Looking at the factual background and the commercial purpose of EL cover, he concluded that insurers had in the past, and without apparent difficulty, interpreted 'caused' and 'sustained/suffered/contracted' interchangeably in EL policies. The cases had always been dealt with on a causation basis and accordingly, the 'Boltonites' policies should also respond on the causation basis.

On the question of injury, the judge was persuaded on the weight of authority that mesothelioma is not a disease or actionable until many years after fibres are first inhaled. With that in mind, the judge followed settled authority and concluded that, for trigger purposes, there is no injury on inhalation.

Turning to the Employers' Liability Compulsory Insurance Act, the judge felt that a causation wording would best achieve the aims of this Act and that would ensure there

³ *Fairchild v Glenhaven Funeral Services Ltd* 2002

⁴ *Barker v Corus* 2006

⁵ *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Limited and Commercial Union* 2006

⁶ 'Trigger litigation' - *Durham v BAI(run off) Ltd & ors* 2008



were no gaps in cover. However, the Act did not prescribe a form of wording and the judge therefore decided that the Boltonite interpretation of their EL policies would not fall foul of the Act.

On the final issue, the judge was not satisfied that there was sufficient evidence of a widely understood and binding usage. Whilst all

with the rest of Europe and Scotland. Indeed, in October 2009, Trade Unions stepped up their campaign to win compensation for victims of asbestos-related pleural plaques, with a fresh appeal to the Government to overturn the Law Lords ruling. Additionally, a small group of insurers (Aviva, AXA, RSA and Zurich Financial Services) were unsuccessful,

during January 2010, in seeking a judicial review of the Act.

Margereson — this case involved ‘foreseeability’. Asbestos used by the defendant in making products escaped through the factory doors and the factory’s loading bays. The Court found that the defendant in Margereson⁸ knew of the risks posed by asbestos and it was therefore foreseeable that mismanagement of asbestos could result in people (both inside the factory and in the immediate vicinity) developing asbestos-related diseases. Accordingly the Court

of knowledge was such that in 1965 (the year the husband ceased to work for the defendant) there was nothing to alert employers to the risks posed by asbestos to the families of their employees. The case against the defendant therefore failed.

Sienkiewicz — a very recent case law of significance to include is the Court of Appeal case of Sienkiewicz v Grief¹⁰. In this case, and by way of distinction from the facts of Fairchild, the claimant was only exposed to asbestos during one period of employment and it could be shown that the exposure to asbestos fibres was modest. Those representing the defendant sought to distinguish the facts from the Fairchild case as a way of arguing that the material contribution test should not apply. The contention in this particular case was that causation ought only to be accepted if the risk of catching mesothelioma had been doubled, which is a familiar test for other disease cases.

The defendant admitted its use of asbestos but denied breach of duty of care. It also denied causation, arguing that any occupational exposure to asbestos had been minimal

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insurers had operated their policies on the causation basis, their reasons for doing so varied widely. On the estoppel issues, he felt that the policyholders had suffered no detriment by entering into contracts with the four insurers named above. The ruling has been appealed and currently the outcome is awaited.

Rothwell — in Rothwell⁷ it was ruled that pleural plaques could not be regarded as a compensable injury, because no pain and suffering had taken place, and don’t constitute a compensatable injury. It was ruled that pleural plaques do not have any side effects and they do not develop into any related disease.

The issue of pleural plaques remains uncertain because in Europe plaques remain actionable as they also do in Scotland. Claimants who have been diagnosed with pleural plaques, caused by negligent exposure to asbestos at work, will be allowed to claim compensation under the Damages (Asbestos-related conditions) (Scotland) Bill, passed by the Scottish Parliament as of March 2009.

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ruled that the defendant’s duty of care extended to individuals outside the factory.

Maguire — this case involved ‘secondary exposure’. In Maguire⁹ the wife of a man who worked for the defendant alleged that she was exposed to asbestos when she laundered his clothes every day. The Court of Appeal ruled that the state

and much less than the background environmental exposure. In order to succeed, the defendant argued the claimant had to show that it was probably the occupational exposure rather than the environmental exposure that had caused the disease.

At first instance the Judge held that the deceased had been exposed to low level asbestos during her

7 Rothwell v Chemical and Insulating Co Ltd 2007

8 Margereson v J W Roberts Ltd 1996

9 Maguire v Harland & Wolf 2005

10 Sienkiewicz v Greif (UK) Ltd 2009

employment with the defendant and exposed to asbestos in the general atmosphere, and she had not been exposed to asbestos during any other employment. However, the Judge dismissed the claim on the basis that the claimant could not show that the occupational risk had at least doubled the risk which the deceased had unavoidably faced as the result of living in Ellesmere Port. Following the approach adopted in Jones¹¹ he held that the occupational exposure increased the background risk due to the environment by only 18 per cent.

The claimant appealed and the appeal was allowed on the basis that in a mesothelioma case, it was not open to a defendant to put a claimant to proof of causation by reference to a twofold increase in risk. The correct test on causation is whether the tortfeasor had materially increased the risk. This decision demonstrates that, in the absence of occupational exposure elsewhere, the claimant needs only show a measurable degree of occupational exposure to succeed on causation.

Whether or not this outcome was intended by Parliament, we now know that the Fairfield exception is not restricted to claims involving exposures to asbestos by more than one negligent employer. Whilst Sienkiewicz does not establish strict liability for employers, the case does show that the Court of Appeal is prepared to help claimants who have difficulties proving causation using the conventional 'but for' test.

The Court's handling of mesothelioma claims

Over the past five years the RCJ has been trialling a system of handling mesothelioma claims with a view to achieving a standardisation

in approach which will speed up the claim process, which is particularly relevant given the life span of the claimants. With a live claimant the RCJ aims to have a decision on liability made within four months of service of proceedings and in the case of a deceased claimant in six to seven months, with full settlements following very shortly thereafter.

This system was to be rolled out, from April 2009 onwards, to all other Courts in the UK with the aim that mesothelioma cases should effectively be fast tracked across the UK. It appears that so far the fast tracking directive is being ignored in many provincial courts, inevitably leading to long delays in cases being heard. There is a viewpoint that if this continues then we are also likely to see claims for professional negligence

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arising on the basis of not ensuring the directive is being upheld or that applications have not been made to have cases heard in a London Court, where the directive is being upheld.

Criticism of the Government

There has been much bad press coverage recently in relation to lost or missing EL policies, and the fact that claimants are failing to get full compensation awarded to them as a result.

The Government has conceded that the voluntary scheme adopted by insurers, overseen by the Association of British Insurers (ABI), was 'not delivering' and that the figures were not acceptable.

In response, the Government is now considering establishing a 'more formal' tracing office and discussions are taking place with the ABI in relation to setting up a proper national database.

Claims trends and forecasts

Forecasting future asbestos claim filings is not always just scientific. Whilst medical models are useful in predicting future claim filings for malignant diseases, such models are not so helpful when trying to predict non malignant claims. Cynically we would proffer that many of these claims in the past have been generated by law firms, and not necessarily by a diagnosis from a physician.

Nonetheless, can we expect an explosion of EL claims in the UK? There has been an astonishing

growth in the number of mesothelioma cases and all the predictions are that these will not peak until 2016. We are now acutely aware that there is a real problem in the UK and the speed of filings continues to increase as a result of earlier diagnosis and NHS advice on the claims procedure. Clinicians are being encouraged to inform sufferers of their potential for mounting a compensation claim once a diagnosis of mesothelioma has been made. Close collaboration between medical and legal professions is not a normal occurrence in the UK; however, given the speed of death after mesothelioma has been diagnosed the practice has been seen as a prudent move. This is manifest-

11 *Jones v Metal Box Ltd and Crown Court & Seal Ltd 2007*



ing in an increased number of live claimants pursuing mesothelioma claims, highlighting a need for insurers to have claims quantified and settled as early as possible.

With the existence of higher resolution CT scans, which are now picking up things that could not be detected before, we will undoubtedly see an increase in the number of asbestos-related diagnosis.

We are also likely to notice an increase in claims that were originally settled on a provisional damages basis which are now reaching the end of their terms of settlement where claimants are seeking a renewal or extension to the terms for a further specified period of time.

The profile of claimants with mesothelioma is also changing. Claimants are no longer typically boiler ladders; they are carpenters and other building site workers that are driving a new wave of UK claims. As a result, we are likely to see an increase in the quantum of claims as these 'new' claimants will have higher loss of earnings and dependency claims. Claims from the construction industry tend to be rather awkward and often fragmented with multiple insurers involved, which present difficulties.

Indeed an £85 million asbestos compensation fund has been set up for London's public sector, amid warnings that claims could double in the next decade. The London Pensions Fund Authority is putting aside the cash following estimates that the number of cases will rise to 25 a year, after a landmark legal case led to the authority paying out in a case involving a teacher.

The average cost of a mesothelioma claim is currently between £200,000-£225,000, but we may well see this increasing in years to come. There are quite likely to be an increasing number of £1 million plus claims especially where the victims are diagnosed at a comparatively young age or are in high-earning

occupations. Hopefully though the legal costs will be kept down by the system of fast tracking claims.

Until now defendants have only rarely contested claims on grounds relating to the nature of exposure. With the increase in both volume and value of claims, it seems inevitable that we are likely to see increased investigation of scientific issues, notably the relative health risks posed by different types of asbestos and the different levels of intensity of exposure. Defendants are more likely to focus upon the medical consequences of different exposures, especially those that took place outside of the scope of employment.

The source of UK asbestos claims could also change. Historically claims have arisen from EL business, however, there is real potential for an increase in the number of public and product liability claims that could also emerge and flood the market. Already we can see more new public liability claims being pursued in the construction industry against contractors rather than just employers. Currently an unknown quantity, it should be noted that should the UK continue to export asbestos products it must surely only be a matter of time before products liability claims of some magnitude will emerge.

Pressure on the industry

UK industrial disease is a big story, there is more awareness from claimants of their rights and we live in a more litigious environment. Due to an increased public profile of latent disease health issues through the press, regulators are coming under attack to ensure that the insurance industry acts appropriately when dealing with claims.

Issues to be considered include:

- Capacity to deal with an influx of mesothelioma cases. Particularly if, in addition, the pleural plaques decision is overturned. This in

itself will generate the re-opening of many claims as well as notification of new cases.

- Ability to trace past insurers and insurance documents.
- The effect of the trigger test cases.
- How a dramatic increase in the volume of claims will be handled expediently yet keeping the costs from spiralling out of control.

There is likely to be growing pressure for the ABI to enforce more claimant friendly handling of EL exposures by the insurance industry. The issue of not being able to identify coverage due to lack of archive documents could no longer be an appropriate response. This will generate considerable additional problems for insurers, particularly those who have EL exposure that was not written as a strategically key line of business and whose records are scanty.

This in turn is likely to generate an increased need for low cost claims handling capabilities, particularly as the majority of claim filings fall into this category. It is essential that whatever the claim value an effective control mechanism is maintained. Insurers should be careful not to focus purely upon rationalising their claims management activities and taking the approach of agreeing and settling every small claim irrespective of their merits in order to realise administrative cost savings.

Equally, a requirement exists for the allocation of specialist expertise to high cost cases which require the most detailed review. An often overlooked competence which is due to come more to the fore is archaeological investigation, whereby insurers will have a requirement to categorise which records relate to EL business to be able to effectively identify coverage and pay claims.

We can be assured that UK asbestos will be a growing issue for certain UK insurers and that there will be further key legal precedents set as litigation in this area develops. ●