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Asbestos: a clear and present danger—a UK perspective

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Summary The hazardous nature of asbestos has been recognised for over a hundred years yet, despite legislation to protect and compensate workers, the battle for adequate compensation continues.

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1. Introduction

Asbestos-related personal injury litigation has seen more dramatic events during the past three years than over any comparable period in its history. Indeed, 2001 was without doubt an “annus horribilis” for asbestos victims in the UK—some might say that it was for all of us given the dreadful events that happened on 11th September. The word “asbestos” has been mentioned in that context as well, as some commentators have suggested that if the World Trade Centre had been fireproofed with sprayed asbestos like the Chase Manhattan Bank headquarters nearby, the Twin Towers may never have collapsed. How many lives would have been lost putting it in in the first place, I wonder?

2. Background

The “evil effects” of asbestos were first described by H M Inspector of Factories in 1898. It was

not until 1924 that the first clear case of death due to an asbestos-related disease appeared in medical literature. That year, Dr. W.E. Cooke, an English physician, performed a post mortem examination on the body of a 33-year-old woman who had started working at the age of 13 in an asbestos textile factory. By 1917, after 13 years of exposure, she had been coughing and in bad health. The autopsy showed lung scarring and dense strands of abnormal fibrous tissue connecting the lungs and the pleural membranes surrounding them.

Cooke’s discovery, which was published in the *British Medical Journal*, was the point of departure for an intensive study of asbestosis, in Britain, over the next 7 years. Cooke published the results, in England, in 1927. He named the scarring of the lung from asbestos dust “asbestosis”.

Asbestos has been killing people since we began to use it over 100 years ago. The rising death toll was being noticed by at least the mid 1920s. Even so, it continued to be used with little or no regard for the health of workers, or anyone else either. In 1929, a case of asbestosis was reported in a person living next door to an asbestos factory, in Armley, Leeds. There is, therefore,

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nothing new in the concept of “neighbourhood victims”.

3. Health regulations

Beginning in 1935, doctors started to record that workers with asbestosis were also suffering from cancer. In Germany, asbestosis became a compensable disease in 1936. Germany also began providing compensation to victims of asbestos-induced lung cancer in 1939, the first country to do so. In many other countries, in particular the United States, this did not happen until much later.

Asbestos manufacturing companies (Turner and Newall and Johns-Manville being two notable examples) and their employers' liability insurers were well aware of the hazards of asbestos from very early on. Indeed by 1918, many US and Canadian insurance companies had started declining insurance to asbestos workers. One large insurer, Metropolitan Life, actually began a conscious policy of declining insurance to asbestos exposed workers, or increasing premiums to account for the increased cost due to their shortened life span.

The United Kingdom, in 1931, was the first country to establish health laws regulating exposure to asbestos. On 1 March 1932, the Asbestos Industry Regulations 1931 came into force. They were intended to regulate asbestos exposure levels for factory workers and to protect their health. Canada followed in 1935. Knowledge of health effects, however, did cause companies to take precautions—not to protect the health of their workers, but against legal action from them. At meetings in the 1930s many of the asbestos companies got together and took “concerted” action to create a strategy for defending future claims. The strategy included the establishment of “standards” (later called “threshold limit values”, or TLV's) for exposure to asbestos and silica products which, if complied with, could serve as a “defence” to claims. They were bogus.

4. Compensation claims

In England it was only following the passing of the Limitation Act 1963 that the possibility of successfully taking court action for compensation opened up. Previously, the time limit rules made it effectively impossible. On 6 October 1963, proceedings were commenced by seven English asbestos workers in the case that became known as Smith versus Central Asbestos Company. The claims were pursued

through the civil courts and came to trial together. The seven men were successful, but the company appealed. After a four day hearing in the Court of Appeal on 26 May 1971, the men again won. For the very first time in the UK, victims of negligent exposure to asbestos, at long last, recovered damages through the courts.

There are three main routes to claiming compensation in the UK. The first is state social security through a prescribed industrial disease system called “Industrial Injuries Disablement Benefit”. IIDB covers those suffering from asbestosis, mesothelioma, lung cancer (with pleural thickening, or asbestosis) and bilateral diffuse pleural thickening. The second route is through the state no fault compensation scheme: under the Pneumoconiosis etc (Workers' Compensation) Act 1979, payments can be obtained if no relevant employer is still in operation (and provided disablement benefit has also been paid to the applicant in respect of the prescribed disease). The condition is that the applicant has not already brought any action, or compromised any claim, for damages in respect of the injury complained of. Thirdly, a civil claim can be made for damages. These can be pursued for all of the diseases referred to previously, plus symptom-free pleural plaques.

5. Provisional damages

For people with benign pleural disease, UK claimants are entitled to claim “provisional damages”. This allows a modest sum to be accepted in settlement (i.e. immediate payment) with the opportunity to reopen the case if a more serious disease (for example mesothelioma) develops later. Provisional damages can also be awarded in asbestosis cases. Until the turn of the century, there was a false perception that asbestos-related claims were fairly routine—difficulties that arose mainly concerned the liquidation of a potential defendant. While this remains a major problem, a number of important recent court decisions demonstrate that these claims are complex and far from straightforward. Proof of actual exposure is needed. The claimant must prove negligence (i.e. “guilty exposure”) and foreseeability with specific evidence. No blame: no claim. You need to find the right company, or companies, to sue. You also need to find the relevant insurer, or insurers, to have a realistic chance of recovering a payment in most cases. Unfortunately, in the UK, two large insurers have “gone bust” in the last 3 years, partly due to the escalating number of claims for asbestos-related diseases.

6. Causation

Causation must also be established medically. Without causation, there is no case. Unfortunately, in December 2001 the Court of Appeal, in the conjoined cases of Fairchild, Fox and Matthews, held that, in cases where a claimant has suffered asbestos induced mesothelioma, after being exposed to asbestos dust whilst working for more than one employer, a claimant cannot recover damages. Why? The reason is that mesothelioma, unlike asbestosis, is a single indivisible disease, and a claimant "cannot establish, on the balance of probabilities, when it was that he inhaled the asbestos fibre, or fibres, which caused a mesothelial cell in his pleura to become malignant". The Court of Appeal observed that, in these circumstances, claimants may have a claim under the Pneumoconiosis etc (Workers' Compensation) Act 1979 scheme, in which event they accepted that the cost to the Exchequer may run into £10's of millions of pounds each year. If they do not, the Appeal Court Judges said (and I quote) that "these cases have revealed a major injustice crying out to be righted either by statute, or by an agreed insurance industry scheme". The House of Lords (the highest court in the UK) heard the three "Fairchild" appeals in May 2002 and rightly reversed this iniquitous decision of the lower court.

Legal time limits can still cause problems. Damages always come last after all other points are dealt with.

7. Level of damages

What sort of compensation is paid to asbestos victims? In most cases, the answer is easy. Nothing like enough. The level of damages in the UK is far too low. A mesothelioma victim, for example, might be awarded between £40k and 50k for "general damages" (to compensate for pain and suffering), plus care costs and financial losses. The largest award, so far, for a mesothelioma victim

in the UK is £4.37m, paid to the widow of a very successful entrepreneur (a client of mine). His case was unusual, however, because his earning capacity was so great. Awards for asbestosis are less common now. The largest award was made, in February 1998, to Bryan Ward, a very successful Yorkshire-based businessman (another client of my firm). Although the total amount was just under £750k, only £40k was awarded for pain and suffering. It was, in fact, very much in line with other cases as the vast majority of the damages were for financial loss (loss of income). Awards in pleural plaques cases, paid on a provisional damages basis, are much lower still. A typical award for asymptomatic pleural plaques is between £5k and 7k. Perhaps if we had juries, not judges, assessing damages, things might be different. In the USA, by contrast, a jury in California recently awarded the sum of \$33m in damages to a former electrician who claimed he was exposed to asbestos whilst working on ship boilers during the 1970s.

8. The future

The real crime is that it is still going on. Dust-covered workers were a common sight as recently as 15 years ago, or even less. It is a world-wide problem. Who is at risk today? Asbestos product manufacturing workers, asbestos product users, facility workers; those exposed domestically and those exposed in the environment. The youngest mesothelioma victim I am aware of is just 35 years of age. World wide, the number of victims can only be guessed at. At present, the number of people pursuing civil claims for compensation in the UK and the USA combined is well in excess of 300,000. The scale of the asbestos tragedy is, like the substance itself, literally breathtaking. No one can do more than guess at how many lives, world wide, will be claimed in the end. The only thing, which is certain about the future, is that the legacy will be here for decades to come.

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