

UK asbestos: looking for answers

Despite recent government pronouncements and legal developments, future claims costs in the UK arising from asbestos-related diseases remain clouded in uncertainty. Steve Mathews and John Coe summarise the latest rounds in the continuing debate.

Introduction

Asbestos-related injury claims in respect of past and current employees is an escalating issue for British industry.

With usage of asbestos having peaked in the 1960s and 1970s, the full extent of the potential cost is only now starting to be seen. The most serious disease resulting from asbestos exposure, mesothelioma, typically emerges on average 35-40 years after first exposure to asbestos. However, there is no known upper limit on time until manifestation.

Confusion and frustration have pervaded the debate about fair treatment for sufferers and employers in past years and, as a consequence, there has recently been much activity surrounding UK asbestos claims, comprising:

- an announcement on asbestos-related diseases from the Justice Secretary
- an update from the UK Actuarial Asbestos Working Party and
- legal developments on the trigger required for an insurance policy to respond to an asbestos claim

This paper summarises those developments and what the implications may be for employers and insurers.

February 2010 announcement from the Justice Secretary

Pleural plaques

Pleural plaques are small areas of scarring on the lungs frequently caused by exposure to asbestos. They usually occur around 20 years after asbestos exposure and can be detected by radiograph or CT scan. They are a benign condition, but an indication that asbestos exposure has occurred.

In October 2007 the House of Lords ruled to uphold a Court of Appeal decision that pleural plaques were not compensable as they do not give rise to any physical symptoms. After a strong public response, the government published a consultation paper in July 2008 seeking external views on the ruling.

As a result of this consultation, the Justice Secretary has announced that the government has no intention of legislating to overturn the House of Lords decision and has currently decided against setting up an open-ended, no fault compensation scheme subject to one relatively small exception. This relates to the relatively small and known number of individuals who had already lodged (but not resolved) compensation claims prior to the House of Lords ruling who will receive a one-off payment of £5000 under an extra-statutory scheme.



This scheme has been brought into effect as the sufferers would have had an understandable expectation that the claim would result in compensation (at a level of roughly £5000) and would have made plans accordingly.

The underlying medical evidence used to substantiate these decisions concludes that:

- The vast majority of pleural plaque cases do not cause a loss of lung function or physical symptoms. However, if either of these effects occur, a civil case can be brought
- It is the initial asbestos exposure which can lead to other asbestos-related diseases, not pleural plaques themselves

However if medical evidence comes to light that pleural plaques can lead to other asbestos-related diseases, the government has said it will re-assess the situation.

The scheme will only apply in England and Wales due to the different legal situations in Scotland and Northern Ireland:

- The Scottish Parliament put out a bill which overturned the House of Lords 2007 decision and made pleural plaques compensable, but this has recently been the subject of ongoing legal action. Representatives from the insurance industry challenged the Scottish Parliament on their decision with a judicial review in April 2009 which failed in January 2010. The representatives have since appealed against this decision
- Ministers in the Northern Ireland Assembly are also considering overturning the ban on compensation for pleural plaques sufferers under their jurisdiction

Employers' Liability Tracing Office / Employers' Liability Insurance Bureau

Since 1999 the Association of British Insurers (ABI) and the London Market Association (LMA) have had a voluntary code of practice in place to aid the tracing of employers' liability (EL) policies for employees who develop asbestos-related diseases. This has been quite successful, but there are many thousands of individuals who have been unable to trace any insurance coverage. Due to this the government has released a consultation paper (with responses due back by 5 May 2010) on two proposals to aid these sufferers:

- The creation of an Employers' Liability Tracing Office. This will be an electronic database of EL policies, which will initially be voluntary and populated with existing trace data, but ultimately there will be a requirement for insurers to publish all their new and renewed policies
- The creation of an Employers' Liability Insurance Bureau. This will be a fund of last resort for individuals across the UK who are unable to trace any EL coverage for their employment

Immediate compensation increases

The government will increase up-front payments to mesothelioma sufferers and their dependents from 1 April 2010.

- Payments made as a result of the Pneumoconiosis Workers Compensation Act (PWCA) 1979 will increase by 1.5%
- Payments made under the Child Maintenance and Other Payments Act 2008 will be increased so they equal payments made under PWCA 1979
- There will be an increase in payments to dependents of up to £5000 so awards are closer to those actually paid to sufferers

Asbestos research

The government will consult with the Department of Health and the National Cancer Research Institute on the creation of a National Centre for Asbestos-Related Disease. This is intended to be a funded centre to advance medical research on cures for and alleviation of the symptoms of mesothelioma (and other asbestos-related diseases).

This recognises the fact that mesothelioma is the 12th most common cancer killer in men and has the fastest growing incidence rate for cancers in women. The insurance industry will be contributing £3m towards this centre.

Asbestos Working Party 2009 report

The Actuarial Profession set up the UK Asbestos Working Party (AWP)* to look at the liabilities likely to arise from asbestos-related diseases in the future in the UK. It reported its initial findings in 2004, but it has recently released an update. The key findings are:

- Asbestos-related claims will result in an £11bn cost to the UK insurance industry between 2009 and 2050
- The vast majority of this (90%) relates to mesothelioma
- There is significant uncertainty around this estimate with alternative scenarios giving costs of between £7bn and £20bn
- There has been an increasing trend in recent years of mesothelioma sufferers making claims; approximately two thirds of sufferers are now likely to claim
- The UK is yet to reach the expected annual peak of insurance claims, with an increasing number of claims being brought each year

Insurance policies trigger

Public liability (PL) insurance policies generally have an 'injury sustained' wording (when the malignant tumour starts to form which, subject to legal and medical debate, is between five and 10 years prior to diagnosis). EL policies generally have an 'injury caused' wording (which is taken to mean when the asbestos fibres were inhaled which could be roughly 35-40 years prior to diagnosis). Some EL policies have an 'injury sustained' wording however, which could be interpreted to mean that no compensation is available to employees whose employer has ceased trading.

In November 2008, the High Court ruled that EL policies written on an 'injury sustained' wording should be interpreted as 'injury caused'. This decision has currently been sent to the Court of Appeal. The resulting judgment should decide which period of insurance cover should respond to a claim.

Other recent developments

In November 2009, the Third Parties (Rights Against Insurers) Bill was introduced which enables claims against insolvent employers to be brought directly against the employer's insurer, in a bid to simplify court procedures. It is expected that this will become law in the near future.

Potential changes to the treatment of asymptomatic (where no symptoms are displayed) asbestosis claims could have wider implications. Historically, asymptomatic asbestosis claims have not been payable, but a recent case involving Newcastle County Council resulted in an award, (although the decision is now on appeal). If there is a change to the current situation to allow all asymptomatic asbestosis claims to be compensable, then this could potentially increase the number of claims being notified from pleural plaque sufferers who present their claim as an asymptomatic asbestosis claim.

Very few asbestos-related lung cancers have been compensated in the UK due to the difficulty in proving that the lung cancer has been caused by asbestos exposure and not by some other cause such as smoking. However, it has been estimated that there are typically between one and two asbestos-related lung cancers for every mesothelioma case. If it were to become easier to assert asbestos-related lung cancer claims in the future there could be a significant increase in the number of these claims.

Conclusion

It will be evident having read this paper that despite all the efforts taking place to bring some clarity and equity to the situation surrounding asbestos-related disease compensation, there are still many grey areas.

The potential future liability for some employers, their insurers and reinsurers could be substantial and companies should make efforts to quantify it. This is complex, but not insurmountable, since the future number of asbestos cases for a particular company will depend on a number of factors including years of exposure, types of asbestos used and the age of employees when first exposed.

Such an exercise will not provide all the answers, but it will at least put companies' efforts to assess their potential liabilities on a firmer footing.

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Steve is a Fellow of the Institute of Actuaries and has extensive experience of valuing and commuting long tail and latent claims in the London insurance and reinsurance market. He has assisted many UK industrial companies to value their liabilities in respect of future asbestos-related liabilities.

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John Coe, Consultant, EMB

John has experience of both the run-off and live sectors. Within the run-off sector he has worked on and managed projects including analyses of asbestos exposures, IBNR valuations for schemes of arrangement and commutation valuations. He has also recently built an in-house stochastic implementation of the 2009 AWP mesothelioma model.

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* EMB has a representative on the UK Asbestos Working Party, working at the forefront of actuarial asbestos liability estimation.

For more information on EMB's work and expertise in the fields of asbestos-related claims and run-off in general, go to www.emb.com/uk/asbestos

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