


Asbestos Claims

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Spring 2010

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Tom Rennell reviews the current medical thinking about asbestos-related diseases

Just one fibre of asbestos has the potential to kill. As it happens we, all of us, will have thousands, even hundreds of thousands of asbestos fibres in our lungs at any one time, more so depending on your age and where you live. And, importantly, most of us won't suffer from an asbestos-related disease. So what then are asbestos-related diseases and why do some of us get them and others not — and what is a safe dose? For those who don't already know, asbestos comes in three forms: blue (crocidolite), brown (amosite) and white asbestos (chrysotile). Blue and brown asbestos are part of the amphibole mineral group and are characterised as having straight fibres. White asbestos is part of the serpentine group of minerals characterised as having curly fibres.

Of the three, blue and brown asbestos are by far the most dangerous and are now banned in the UK as well as many other countries. Nevertheless, despite some reports to the contrary, white asbestos exposure still presents a significant risk.

In short, no dose of asbestos is without risk and can lead to asbestosis, pleural plaques and thickening, mesothelioma and lung cancer.

Mesothelioma

Mesothelioma describes a cancer, a malignant tumour, generally on the pleural tissue surrounding the lungs. A mesothelial cell (that makes up the tumour) is a cell that has undergone a variety of mutations due to contact with asbestos fibres.

First, a healthy cell acquires a mutation in its DNA. When this happens it continues to behave normally, however it will pass on the mutation to any daughter cells when it replicates. In turn, any of these daughter cells may develop a second mutation, again passing this on to its daughter cells.

A mesothelial cell is a cell that has acquired up to five or six mutations. When this happens the cell will no longer continue to behave normally; rather it will become malignant, dividing rapidly and uninhibited, invading surrounding tissue and possibly spreading throughout the

body via the blood. At this point the mesothelial cell has developed into mesothelioma.

Crucially, contact with asbestos fibres increases the rate at which mutations occur in a cell. Whilst most people through the course of their life will never develop the number of mutations needed to give rise to a mesothelial cell, the level of exposure required is much lower than for asbestosis or lung cancer. Also, the more asbestos fibres there are, and the longer the time has elapsed, the more mutations are likely to occur.

The latency period for mesothelioma is very long. From first exposure it may take up to 30 years for a microscopic tumour to develop. This tumour, unless specifically looked for (which is extremely unlikely) will go unnoticed for a further 10 years, developing into a clinical tumour. From this point of diagnosis death, on average, usually occurs within a year. Mesothelioma is always fatal.

Pleural plaques and diffuse pleural thickening

The pleura is the name given to the

soft membrane surrounding the lungs. Contact with asbestos fibres can irritate the membrane causing it to scar and harden. If this occurs in only isolated areas in the lung they are known as pleural plaques. In cases where the plaques spread in to larger areas it becomes known as diffuse pleural thickening.

Whilst plaques do not display any symptoms, diffuse pleural thickening can reduce the capacity of the lungs, causing breathlessness. Whether this in itself constitutes a disability is now the subject of a debate in the Scottish courts.

Pleural plaques and pleural thickening are not malignant and in themselves are not fatal, nor do they lead to more serious asbestos-related diseases. They are, however, an indication of asbestos exposure and thus a risk of developing other conditions. As with mesothelioma, pleural plaques only require low levels of asbestos exposure.

Asbestosis

Like pleural plaques, asbestosis is not malignant. However, unlike pleural plaques and mesothelioma cases, asbestosis only occurs following heavy asbestos exposure. Asbestosis is a result of the scarring of the lung tissue caused by asbestos fibres inflaming the inside of the lungs (as opposed to the pleura). The latency period between exposure and the onset of the disease can be between 10 and 20 years.

Asbestosis causes an extreme shortness of breath in the sufferer. However, generally speaking, it is not fatal, although in extreme cases it can lead to respiratory failure and/or right-sided heart failure due to a reduction in the total lung capacity. Whilst benign, asbestosis is an indication of heavy asbestos exposure and a potential to develop lung cancer. Whereas lung cancer can have a number of causes, if a patient has asbestosis as well, the likelihood is that the cause is asbestos-related.

Lung cancer

As with asbestosis, lung cancer caused by asbestos fibres indicates high levels of exposure. Asbestos fibres within the lungs provoke mutations that can develop into broncho-pulmonary cancer. Importantly, whilst asbestosis is an indication of high levels of asbestos exposure and therefore a potential to develop lung cancer, high asbestos exposure can still lead to lung cancer even where there is no asbestosis.

Smoking can also exacerbate the risk of lung cancer by up to 10 times the likelihood at the same levels of exposure. Nevertheless, as asbestos-related diseases practitioner and expert Dr John Moore-Gillon points out, given that the risk of developing lung cancer from exposure to asbestos is far greater than that of smoking, smoking should not be considered the cause of the illness when asbestos is present. The latency period for lung cancer caused by asbestos exposure can be up to 30 years.

The rise in cases — a medical view

Despite the belief that cases of asbestos-related diseases in the UK should have begun to peter out it is now widely held that cases will continue to rise, reaching a peak in 2016. During that year over 2,000 people in the UK are expected to die

No dose of asbestos is without risk

from mesothelioma or lung cancer caused by asbestos exposure. The reasons for this unexpected increase are numerous.

First, the latency period of mesothelioma is much longer than anticipated, roughly 40 years from an initial exposure. This means that deaths in 2016 will generally have occurred from exposure in the 1970s.

Second, due to medical advancements, people in general are living for



longer. As such, rather than dying from other causes, people are living long enough to experience the onset of asbestos-related diseases.

A third cause is the increase in the

of law, they do not for doctors whose 'sole concern is the health of the patient'. He compared the situation to a lawyer attending his GP with a stomach ache only to be asked 'do

As with mesothelioma, pleural plaques only require low levels of asbestos exposure

efficiency and regularity of CT scans. Whereas in the past the high levels of radiation and the cost and time taken to perform CT scans meant they were reserved for a small number of cases, scans are now becoming more a matter of routine. As Dr Moore-Gillon notes, while scans previously would take some 30 or 40 minutes they now take a matter of seconds.

In addition, the results of scans have become much more accurate making the identification of, for example, pleural plaques, far easier. As such, patients who undergo CT scans for unrelated issues are now more easily being identified as suffering from asbestos-related diseases. In the future, Moore-Gillon comments, whilst the accuracy of CT scans may not increase, the speed and therefore the number of scans undertaken on a daily basis will increase and there-

you mean a pain in your gall bladder, your intestines, or your appendix?'

Treatments for pleural plaques & asbestosis

Since pleural plaques are non-life threatening their removal is uncalled for. Nonetheless, since pleural plaques are an indication of asbestos exposure, patients are encouraged to attend regular check-ups to look for early symptoms of mesothelioma or lung cancer. No specific treatment exists for asbestosis aside from alleviation of the symptoms. As with pleural plaques, patients are encouraged to attend regular check-ups.

Treatments for lung cancer and mesothelioma

Depending on the nature and development of the tumour, the options for treating lung cancer vary from surgical removal to chemotherapy and radiotherapy. Although the chances of survival are extremely poor, lung cancer can be cured, especially if spotted early.

There are a number of treatments for mesothelioma sufferers including radiotherapy, chemotherapy and various ongoing drug trials. Unfortunately, these measures are largely palliative, serving to postpone eventual death. Surgical removal of the diseased lung along with the pleural membrane is possible, but so far the indications are that this course of action does not result in any significantly prolonged survival period among mesothelioma patients. When asked if a cure exists for mesothelioma, Dr Gillon-Moore replied unequivocally: 'No, tragically.' ●

The latency period for lung cancer caused by asbestos exposure can be up to 30 years

fore so will the chances of identifying asbestos-related diseases.

Given the long latency periods involved with asbestos-related diseases, diagnosis can be difficult and often at a late stage, but sufferers are now beginning to be identified at earlier stages. It is crucial to note, as Dr Moore-Gillon pointed out recently during the recent C5 Asbestos Claims and Liabilities conference in London, that, not being lawyers, doctors use words such as 'contracted' or 'sustained' interchangeably. Whilst these words have vastly different technical meanings in a court

Peak preparation

2009 saw the publication of new research into mesothelioma claims by insurance broker and risk advisor Marsh together with a research team from the University of East Anglia (UEA).

Tom Rennell reports on their findings

The report, entitled 'Mesothelioma Claims', urges all organisations to examine their potential exposures to asbestos-related claims ahead of what is expected to be a peak in claims in 2016. The research also revealed various findings concerning the concentrations of mesothelioma cases with regards to geographical, industry and chronological considerations.

The report is commended in a foreword by Senior Master Whitaker of the Supreme Court who hopes that its findings and advice will add to the speedy conclusion of mesothelioma claims. He notes that cases where the makers of claim are still alive 'introduces urgency into the process, because the prospects for anyone with mesothelioma are bleak, and death usually occurs within one year of diagnosis. Consequently, my objective is to handle claims from service to judgment in four to six months.' Thus he urges 'any companies that may be exposed to asbestos-related risk to do their due diligence well in advance — and bear in mind that risk may result from simply having owned, or even occupied, a building containing asbestos at some point in the company's history.'

Barry Jones, UK head of claims at Marsh, echoes these sentiments, noting that 'for many companies the extent of the risk is not well known' and adding: 'It is clear from our study that a large number of industry sectors have been affected by mesothelioma claims, and therefore the risk remains a real one for large sections of UK plc.'

Of the 91 cases of mesothelioma studied in the report the majority occurred in clusters, predominately in the North-West of the UK and the West Midlands, as well as the London area and East Anglia. These clusters, according to the report, confirm that those at higher risk tended to work in engineering, chemical production and construction industries that were concentrated in the North-West and West Midlands. Of the cases reviewed almost a half were working in one of these industries.

The study shows that the highest percentage of cases, 27.5 per cent, was found in the mechanical, electrical and process engineering industries, also the source of many of the first wave of mesothelioma sufferers. Eleven per cent of the cases were within the chemical sector and the third highest were in the construction industry, accounting for

7.5 per cent, which can be attributed to the post-war construction of over 250,000 homes. In all these sectors, asbestos use was prominent in the insulation of pipes and boilers and factories themselves, as well as being present in many products. As such, many claimants tended to be former maintenance staff although, in the case of the construction industry, 'as a result of the widespread use of this material, Marsh regularly sees construction firms receiving claims from all classes of employee.'

Nevertheless a spread of cases of mesothelioma was to be found across a variety of industries which was, according to the report, 'to be expected, because asbestos was historically used in a number of industry sectors. As a result, companies as diverse as banks and ship builders have been impacted by claims.' Of the claimants reviewed, occupations ranged from firemen to drivers, to chemists and plumbers, with the report commenting:

'Few if any industries are immune to the possibility of mesothelioma arising from past employment practices. If companies have not yet investigated their potential future liabilities, it would be prudent to do so now.' ●

An end in sight?



Asbestos remains the most material reserving issue for many insurance portfolios in run-off. **Gregory Overton, Robert Brooks and Sebastien Delfaud** of

PricewaterhouseCoopers look at the latest chapter in the asbestos saga as new estimates for the UK emerge and governments and insurers across Europe seek to tackle the issue

UK Asbestos *Mesothelioma insurance claims experience*

Over the last five years or so, insurers have experienced deterioration in the levels of mesothelioma claims against previous expectations. The Institute of Actuaries UK Asbestos Working Party (AWP) was reformed in 2007 to investigate the observed deteriorations. The AWP has recently published a paper including an updated estimate of the potential future claims to the UK insurance industry (see page 20). The Institute's press release highlights 'The total undiscounted cost of UK asbestos-related claims to the insurance market could be around £11 billion for the period 2009 to 2050. Of this figure, 90 per cent relates to mesothelioma and over £9 billion relates to the period 2009 to 2040, which compares to the working party's 2004 estimate for the same period of £4.7 billion.'

The deterioration in experience has been seen over the last five years and so insurance company reserves may already have reacted to the increase.

Data the AWP collected shows a significant increase in the number of insurance claims above those anticipated as shown in *figure 1*.

The AWP has investigated a number of different factors that may

be causing the deterioration in mesothelioma experience. Their findings indicate that the increase in mesothelioma claims is due to the following:

- An increase in the proportion of mesothelioma sufferers making a claim for compensation (up from 33 per cent in 2001 to 60 per cent in 2007), driven by a trend for older mesothelioma sufferers to be more likely to make a claim;
- A speeding up in the reporting of claims; and
- Claimant solicitors becoming more successful at tracing responsible parties.

There are a number of underlying reasons for this change in experience. One of them is the success of the NHS National Mesothelioma Framework (published in February 2007) which was designed to improve the access of mesothelioma sufferers to specialist advice, diagnosis and support. This is a great initiative for improving patient care and can only be applauded for the improvements to the patient experience that it has brought about. It does, however, lead to a couple of side effects:

The first is an increase in pre-death diagnosis rates for mesothelioma. Quite apart from the injustice felt by a sufferer and their family at the

potential negligence of the former employer, pre-death diagnosis allows claimant solicitors to obtain a witness statement from the injured party. This will have better information in respect of the employer, the working conditions, how exposure to asbestos occurred and identification of relevant asbestos products than could ever be provided by the next of kin. This regularly enables the case for a successful compensation claim to be made and the responsible party to be identified.

The second side effect of the National Mesothelioma Framework is in the access to information on not only care and support but also compensation. Along with the increase in access to affinity groups on the internet, this has led to better access to information on routes to compensation and encouragement that it is worth pursuing such a path from others who have made successful claims. Exacerbated by high profile cases such as Fairchild and Barker, one can argue that this is just part of a shift in culture in the UK to a more litigious society as seen to greater extremes in the US.

Mesothelioma deaths experience

Unlike insurance claims, the number of mesothelioma deaths has remained

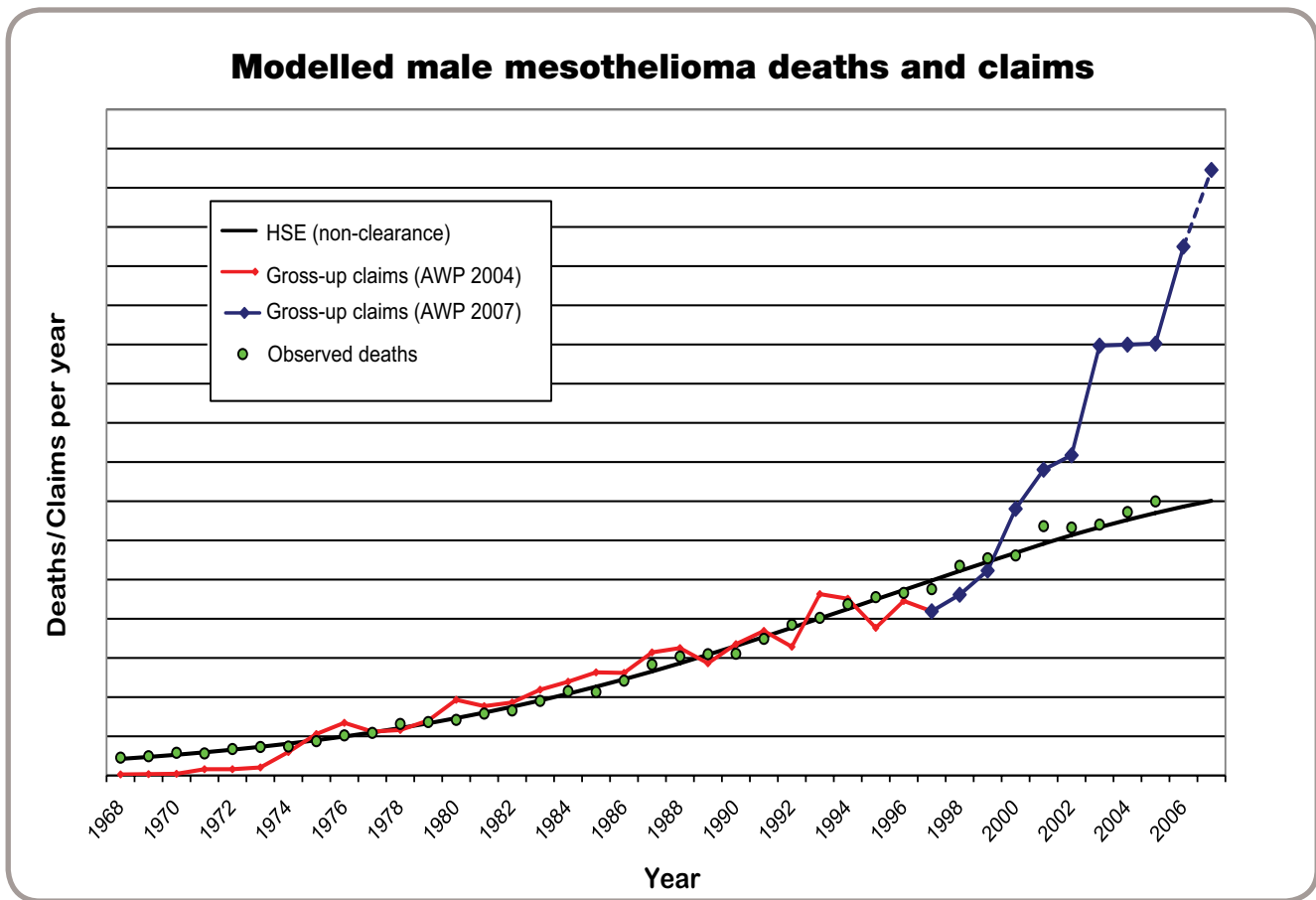


Figure 1 - Source, Institute of Actuaries Working Party presentation at GIRO, Glasgow, October 2009

within predicted levels. The Health & Safety Executive (HSE) have, however, engaged the Health and Safety Laboratory (HSL) (an agency of the HSE) to update the model they had used for new deaths data and the latest population projections.

The updated projections from the HSL estimate that the number of deaths will peak in 2016 at 1,990 males aged between 20 to 89. This is three years later than the HSE estimated previously and represents a peak of approximately 8 per cent more deaths. For 2009 and subsequent years, the HSL project approximately 23 per cent more deaths than the HSE had anticipated. The increase in number of deaths projected by the HSL is predominantly due to two factors:

- The increase in projected population numbers from the Office for National Statistics (ONS) in their

2006 report due to people living longer and more recent data on immigration and emigration; and

- An increase in the estimated exposure between 1978 and 2000.

The HSE and HSL projections are shown in *figure 2* together with the latest actual mesothelioma deaths in Great Britain. The dotted line shows the impact of using the old HSE projection updated only for the more recent ONS mid-2006 population estimates and not the change in post 1978 exposure.

Blue vs Brown

Professor J Peto¹, the eminent epidemiologist, has been talking recently of his new theory that brown (amosite) asbestos is actually the cause of more mesothelioma deaths in the UK, owing to the way it was used. Accepted wisdom says that blue (crocidolite) asbestos is the more

deadly form but Peto's research with the HSE looking at the lungs of mesothelioma sufferers has shown many contain brown and not blue asbestos fibres.

Peto notes that brown asbestos was heavily used in construction including asbestos cement boards. These boards and other brown asbestos products would have been cut up on site by carpenters, electricians and plumbers using power tools spraying fibres across a work site for individuals to breathe in without any protective breathing apparatus. Potentially, though less deadly than blue asbestos, brown asbestos may have been more widespread.

Peto compares the exposure and deaths in the UK and US to illustrate his point. The UK ceased using blue asbestos before the US but continued using brown asbestos for some time after the US had ceased using asbes-

¹ Asbestos-related cancer deaths – the past, present and future - Melbourne April 22nd 2008

tos altogether. The level of mesothelioma deaths in the US has started to level out whereas, in the UK, deaths have continued to increase.

Legal experience

The action continues in the courtroom. There are two legal cases of note, one on the trigger for Employers Liability (EL) claims and the other on whether pleural plaque claims should be compensable.

EL trigger litigation

EL policies were written historically using a variety of different descriptions for the basis of applicable cover. Some policies relate coverage to the date of 'causation' of an injury or disease; others link coverage to the date of 'manifestation' of the injury. Until recently the majority of insurers interpreted EL cover in respect of claims being triggered by the date of exposure rather than manifestation of the disease.

Then came the 'Bolton' judgment. In the case of Bolton MBC v Municipal Mutual Insurance, which concerned a public liability (PL) policy, the Court of Appeal interpreted cover as being triggered by manifestation of the disease itself rather than exposure to the substance that caused the disease. This was interpreted to be around the time that the malignant tumour developed, not when the fibres were breathed in. Medical evidence suggested the development of mesothelioma was around 10 years prior to diagnosis of the condition. Therefore, the Court ruled that the insurance covering the nine to 11 years before the claimant was diagnosed with mesothelioma were the policies that should pay for his mesothelioma claim.

Many (re)insurers undertook a review of the policy wordings used with a view to establishing the correct trigger point for cover in respect of mesothelioma claims for EL as well as PL.

Late in 2008 five test cases were heard in the High Court for EL policies with similar wording to that discussed in Bolton. The High Court ruled that EL contracts are liable to pay compensation for mesothelioma caused by the exposure to asbestos in the work place if they insured the employer at the time the asbestos exposure occurred. This ruling rejects the contract PL wording argument used in the Bolton case.

The judgment has been appealed and, at the time of writing, the Appeal Court ruling has not been announced.

Pleural plaques

Arguments continue to rage over compensation for pleural plaque claims. Are they a harmless shadow on the lungs or a sign of a potentially more serious asbestos related injury down the road which leads to anxiety?

On 18 October 2007, the House of Lords unanimously upheld the judgment of the Court of Appeal, dismissing all claims for symptomless pleural plaques whether or not accompanied by psychiatric conditions.

In response to the House of Lords judgment, there has been political pressure from unions and asbestos groups to make pleural plaques compensable again.

The Scottish Government responded, introducing a Bill to make pleural plaques compensable for exposure to asbestos in Scotland. The Bill allows people who have developed asymptomatic asbestosis or pleural thickening, together with pleural plaques sufferers, to claim damages from negligent employers. The Bill has been passed through is currently subject to a judicial review.

The UK Government issued a consultation paper on a possible no fault scheme, but is still to announce its findings. In the meantime a private member's bill has been tabled in the UK Parliament to make these claims compensable again, however the

Parliamentary under Secretary of State stated that the Government was prepared to step in and block it if necessary.

Is this just a UK phenomenon?

Far from it. For example France produced and imported asbestos and it was widely used in the public and private sectors.

According to the Institut national de la santé et de la recherche médicale (National Institute for Health and Medical Research) (INSERM), in France there are now 800 cases of mesothelioma and 1,200 cases of other asbestos related diseases per year, and these figures are rising. Estimates place total deaths from asbestos causes at between 100,000 and 150,000 by 2020.

France banned asbestos in 1996 making it the 10th European country to do so and in 1999 the European Union banned the use of white (chrysotile) asbestos, this being phased in by the end of 2005.

The peak consumption year for France was in 1975 and Peto predicts 1,550 mesothelioma deaths per year in the period 2015-2019.

Victims can pursue several avenues for compensation through either the Le Fonds d'indemnisation des Victimes de l'amiante (Fund for Compensation of Asbestos Victims) (FIVA) or may file a direct lawsuit against employers through Social Security Courts. Additionally some may benefit through an early retirement benefit pension scheme although restrictive conditions apply to this. FIVA was created in 2000 in order to reduce the number of asbestos-related claims brought before French courts and is providing compensation to all victims of asbestos-related illnesses. After accepting a lump sum award offer, and taking into account indemnity already granted by claims filed with the Social Security System or from actions brought before special courts against their employers (Tribunaux des Affaires de Sécurité

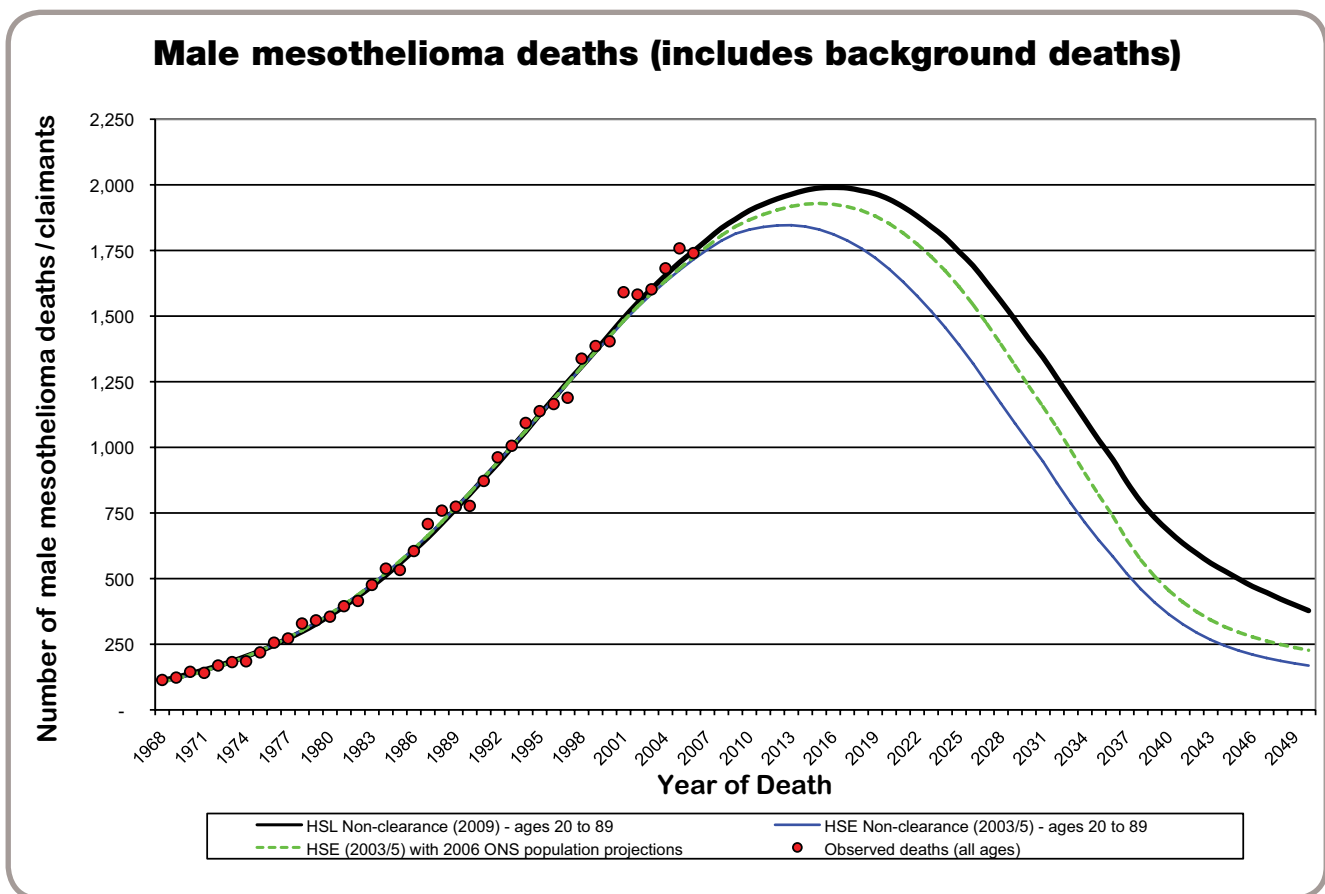


Figure 2 - Source, Institute of Actuaries Working Party presentation at GIRO, Glasgow, October 2009

Sociale) (TASS), the asbestos victims must waive all claims against their former employers.

Since its creation, the recourse to the FIVA continues to grow and more than €2 billion has been granted so far. The fund has recorded 53,000 files in total and 10,771 in 2007 alone, an increase of 20.4 per cent on 2006. In 2008, the number of agreed claims fell sharply to 6,653 but for an offer amount of €416.6 million an increase of 19 per cent when compared to 2007 despite the fall in the number of claims.

Despite an increase in the size of the indemnity offered, FIVA is increasingly facing challenge by claimants in respect of the amounts offered. Since 2004, the number of cases where the level of compensation has been challenged has risen continuously, reaching 1500 cases in 2008. Ninety per cent of the employ-

ees and 56 per cent of the beneficiaries were granted an increase in their compensation.²

Meanwhile, in the Highest Court in France (Cour de Cassation) a recent decision on 'Inexcusable misconduct or gross negligence' may well have an impact on the level of subrogation pursued by the FIVA against employers. The Court decision, likely to set a precedent, sustained that 'gross misconduct' can be retained against an employer that exposed its workers to asbestos dust even if there was no legislation banning asbestos use at the time. The first legislative decision restricting the use of asbestos was 17 August 1977 fixing the level of asbestos dust in the air and employers defending claims had previously referred to this date, arguing that no liability could be proven before such a ban. Whilst this may open up opportu-

nities for FIVA to seek subrogation from employers and their insurers the FIVA has a lack of resources for pursuing such actions

This decision will not only throw uncertainty on future FIVA settlement offers and subrogation recourses, it may also lead to some claims being reopened as one of the peculiarities of gross negligence tort in France is that any right to reparation from the victim is transmissible to family dependents and other relevant third parties when the victim has not obtained a full level of compensation.

Developments in the UK and Europe, France being a prime example, in both the Courts and wider society show the asbestos issue is far from settled. Indeed the only thing we can say for certain is that we will still be talking about the legacy of asbestos for many years to come. ●

² Lovells, *Asbestos Litigation in France* September 2009

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 around claims management

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

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

there 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 con-

duct 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

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



Act and that would ensure there 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 under-

pleural plaques being so out of line 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

Court of Appeal ruled that the state 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 Grief*¹⁰. 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 expo-

The issue of pleural plaques remains uncertain because in Europe plaques remain actionable as they also do in Scotland

stood and binding usage. Whilst all 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 *Rothwell*⁷ 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 compensable 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.

The UK Parliament may find it difficult to sustain their position on

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 *Margereson*⁸ 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-re-

The UK Parliament may find it difficult to sustain their position on pleural plaques being so out of line with the rest of Europe and Scotland

lated diseases. Accordingly the Court ruled that the defendant's duty of care extended to individuals outside the factory.

Maguire — this case involved 'secondary exposure'. In *Maguire*⁹ 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

sure to asbestos had been minimal 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

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

to low level asbestos during her 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

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?

The Government has conceded that the voluntary scheme adopted by insurers , overseen by the ABI, was 'not delivering'

claims for professional negligence 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

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

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



as a prudent move. This is manifesting 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 comparative-

ly 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. ●

The global experience



Asbestos is the most expensive word in history. In the UK, the US and most of Europe this much we know at least. Unfortunately the same cannot be said of the rest of the world, especially in those developing countries that have become leading exporters or importers of this dangerous substance. Tom Rennell reports

Just as the West has, rightfully, over the past 20 years, gradually weaned itself off its addiction to asbestos, the industry now grows at a disquieting rate in countries such as Russia, China, and India. The situation is certainly an alarming one, comparable to that of a ticking bomb — and what's more, a bomb that this time around we know is going to explode and with just how much

impact. At the recent C5 conference on asbestos litigation, Lovells' Peter Taylor neatly summed up the asbestos situation in the East as being 'like the 1970s in Britain'.

It's not that the problems associated with asbestos are unknown; rather that in many countries that have yet to witness the enormity of the cost, both financially and in human life, asbestos is seen, in the words of

Munich Re's Jakob von Uckermann, as a problem belonging to the past. Worse still, in Russia for example, it is considered by some as a 'Western' problem or even a propaganda attempt to undermine one of the country's leading industries.

This, sadly, is not the case. With latency periods for diseases like mesothelioma standing at around 40 years following initial exposure, the

past and the future are set to collide with disastrous consequences. From an insurer's perspective, one is encouraged to be extremely alert to development in Asia. As Uckermann notes: 'Doing business in these emerging countries has great possibility but it is not without enormous risk.'

Japan

First reports of asbestos diseases came much later in Japan than they did in the US or the UK. Despite this, however, there is a healthy media interest in the substance, contributing to substantial public pressure on the government. For this reason, as with South Korea, asbestos has been almost entirely banned. In fact, asbestos consumption is virtually non-existent now compared to the early 1980s when around 400,000 metric tons were consumed annually.

Nevertheless, the legacy of exposure to asbestos still persists and yet for many Japanese underwriters, according to Uckermann, the problem is a historical one. But with asbestos consumption peaking between 1970 and 1990, some estimates put male deaths from mesothelioma at over 100,000 in the next 40 years.

Whilst compensation in Japan has hitherto been considerably less than that in the US or the UK (following the Kubuto Shock in 2005 the Kubuto Corporation paid between \$200k - \$380k in compensation), these figures may see an increase as the media throw more fuel on the fire of public opinion. According to Uckermann there are 12 asbestos suits pending: 260 plaintiffs filed for approximately \$102 million in total, hitting an average at the top-end of Kubuto's previous payouts five years previously.

China

China is now the biggest consumer of asbestos in the world, outdoing second place India by over 300,000

metric tons a year. Production has also been steadily increasing since the 1950s, placing China second only to Russia, albeit by some margin.

Publically available data on the numbers of asbestos-related diseases is in short supply, however, and until 2003 only 7,907 cases were officially reported. The first reported case occurred in 1954, later than in Japan and some 50 years after the first case in the UK.

With 13 middle to large asbestos mines operating within China, Munich Re estimates the number of workers engaged in mining and producing asbestos products at around one million. Whilst certain laws do exist to curb the effects of asbestos (for instance in 2003 asbestos was banned in the brake linings for cars and, in 2007, for bicycles) since around a third of asbestos factories operate without a licence, these regulations, as Uckermann puts it, 'aren't worth much'.

Unsurprisingly, public awareness of the dangers of asbestos is extremely low, but given a rapidly emerging upper-middle class who themselves are at risk from asbestos used in construction materials, the potential for a large number of claims is increasing. Pressure is also coming from

annual production exceeding one million metric tons. Whilst production dipped during the 1990s, since 2000 it has been rapidly increasing again. Consumption, whilst dropping drastically in the 1990s along with production has, however, continued to fall, although at a far more gradual pace from around 2000 onwards. Nevertheless, Munich Re reports that approximately 50 per cent of all roofing sheets in Russia contain asbestos and around 20 per cent of water distribution pipes.

Russia is also home to the world's largest producer of white (chrysotile) asbestos, the Ural Asbestos Mining & Ore Dressing Company. Its mine, 11.5 km long and located in the town of Asbest in the Sverdlovsk region, alone produces more than 500,000 tons annually. Asbestos is an extremely powerful industry in Russia and, to date, authorities continue to deny the health risks, particularly of white asbestos. (They are, of course, not alone in this. Canada, fourth biggest producer, has also persistently argued for the safety of chrysotile).

Russia continues to oppose a global ban on asbestos. Despite this, mesothelioma cases remain comparatively low with an average inci-

China is now the biggest consumer of asbestos in the world, outdoing second place India by over 300,000 metric tons a year

overseas; some Chinese products sold abroad have been found to contain traces of asbestos dust. In 2007 a popular Christmas toy in the US was found with traces of asbestos and in 2009 a baby powder was pulled from the shelves in South Korea for the same reason.

Russia

Russia is by far and away the world's biggest producer of asbestos with

dent rate of just over one per million per year. (The UK rate in 1999 was 33 per million per year). However these figures do not necessarily tell the whole story and the level of actual and potential mesothelioma morbidity in Russia is still largely unknown.

Production of asbestos peaked in the 1980s, so with a 30-40 year latency period mesothelioma cases can be expected to rise sharply over

the next decade. With production up again since 2000 a subsequent peak of mesothelioma cases can be expected in 20 to 30 years' time.

Asbestos is an extremely powerful industry in Russia and, to date, authorities continue to deny the health risks, particularly of white asbestos

Furthermore, whilst life expectancy in the West is rising, contributing to more reports of mesothelioma, life expectancy in Russia for the average male is only 61. Many simply do not, or will not, live long enough for the disease to be identified.

India & Brazil

Brazil and India are the rising stars of asbestos production and consumption respectively. India's asbestos consumption has risen drastically in the past 10 years, outstripping Russia to become the second biggest producer behind China. Since 1995 the Indian government has repeatedly lowered the import tax on asbestos far beneath that of substitute PVA fibres. Roughly 100,000 people are employed in the nation's mining industry, but by far the most problematic area is the asbestos manufacturing industry.

Some 30 million Indians work in the construction industry which accounts for the largest share of asbestos use. Worryingly, the internet is littered with eye-witness reports of factory workers slashing open bags of asbestos with knives to be mixed with cement without any protection whatsoever. As in the case of China, awareness is extremely low among workers.

Compensation for the time being remains acutely low in comparison to other countries around the world (in 1995 the Supreme Court ordered several asbestos mines and industries to pay Rs. 100,000, roughly \$2,000, to any worker suffering from asbestosis). More importantly, as a more

prosperous middle class India emerges, and given the latency period of mesothelioma it has some 30 years to do so, one can expect the level of compensation to rise accordingly.

In Brazil asbestos has become something of a political battleground. Since 1970 production has increased to around 250,000 metric tons a year, the majority of which is consumed at home. Well over half a million people work directly with asbestos from mining to manufacturing and, increasingly, in car repair where asbestos lined brake pads and clutches are still used. As important is the prevalence of asbestos in many housing structures, including many of the shanty towns of the major cities.

Accurate figures of cases of asbestos-related diseases are difficult to estimate, given that most workers do not have access to any healthcare, meaning diseases such as lung cancer and mesothelioma go undiagnosed. To date compensations have ranged from around \$2,000 – \$3,500. Unlike India, however, public awareness of the dangers associated with asbestos are high and increasing.

In 1995 the Brazilian Association of People Exposed to Asbestos (ABREA) was founded and has fought to provide adequate compensation to afflicted workers and to ban asbestos production and use across the country. So far local governments of several regions, such as the Sao Paulo region, have banned all asbestos material (including chrysotile). Nevertheless the central Brazilian government has failed to implement a complete ban and asbestos production remains on the increase.

Conclusion

Clearly the insurance industry would be wise to brace itself for a potentially huge leap in asbestos claims from the developing world when the disease latency period and rising middle class compensation expectations combine to create a deadly mix. ●

Revised expectations

The actuarial profession's UK Asbestos Working Party (AWP) recently published its findings which suggest that UK asbestos-related claims could be far higher than originally estimated

The AWP's 2009 update paper estimates that the potential cost of mesothelioma, asbestos-related lung-cancer, pleural thickening and asbestosis claims for the UK insurance market from the period 2009 to 2050 could be as high as £11 billion. Of this figure, over £8 billion relates to the period 2009 to 2040 (which is approximately double the estimate of £4 billion for the same period that was presented in the 2004 report which only went up to 2040); mesothelioma-related claims give rise to the vast proportion (over 90 per cent) of the total estimate.

However, the paper stresses that the updated figures are highly uncertain, pointing out that alternative scenarios, for example, give costs ranging from £5 billion to over £20 billion for the period 2009 to 2050.

Whilst there have been some changes to its original model, it was the increase in the number of mesothelioma insurance claims since 2004 which led the AWP to revisit its assumptions and methodology when researching this new paper. The change in the estimated cost of asbestos-related claims to the UK insurance market compared to that estimated in 2004 is in Table 1.

As well as an increase in relation to mesothelioma claims the AWP found that asbestos-related lung cancer claims have also been higher than previously expected. However asbestosis claims have been broadly in line with expectations, whilst pleu-

ral thickening and pleural plaques claims have been less than expected following legal developments affecting asymptomatic pleural plaques.

The main impact on the UK insurance market from mesothelioma claims, according to the AWP, is that the number of insurance claims has been increasing faster than the level of population mesothelioma deaths for the last few years (see Figure 1). This has given rise to an increase in the actual incurred costs of mesothelioma claims for the period 2004-2008 compared to that expected within the projection made in 2004. The 2004 paper gave a range of £396 million - £437 million, compared to the current incurred costs of £924 million for the period 2004-2008.

Mesothelioma deaths

The AWP's revised mesothelioma population death projections have increased the insurance market cost for the period between 2009 and 2040 by around £0.6 billion. Although the level of population mesothelioma deaths has not been too different to that expected since 2004, there is a high level of uncertainty surrounding the future number of people in the UK that will be diagnosed with mesothelioma, the paper explains.

The HSE¹, Professor Peto², and the HSL³, have each made projections of the number of mesothelioma deaths expected in Great Britain in the future. Both the HSE and Peto agree that the models used are only reli-

able in the short term, eg. over the next 10 years.

The AWP considered a number of different model structures to project the future level of population mesothelioma deaths. Although each of the models used fit the past data well, they have produced materially different future projections which is the main reason for such a wide ranging estimate of the future cost of mesothelioma-related claims in the paper, according to the AWP.

The AWP considered the HSE/HSL model structure to be the most appropriate to use to project future mesothelioma deaths but it has used different assumptions to those used by the HSL 2009 to estimate the future number of mesothelioma deaths within its estimate of the total cost to the UK insurance market.

Mesothelioma deaths that result in a compensation claim

Revised assumptions for the proportion of mesothelioma sufferers that will make a claim for compensation from their former employer have increased the insurance market cost for the period between 2009 and 2040 by around £3.7 billion. The AWP explains that in 2004 there seemed to be a close correspondence between the number of deaths due to mesothelioma and the number of insurance claims being notified.

It was observed that around one third of deaths resulted in an insurance claim and this relationship

1 'The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050' (HSE 2005)

2 'The European mesothelioma epidemic' (Peto et al, 1999)

3 'RR728 — Projecting Mesothelioma mortality in Great Britain' (HSL 2009)

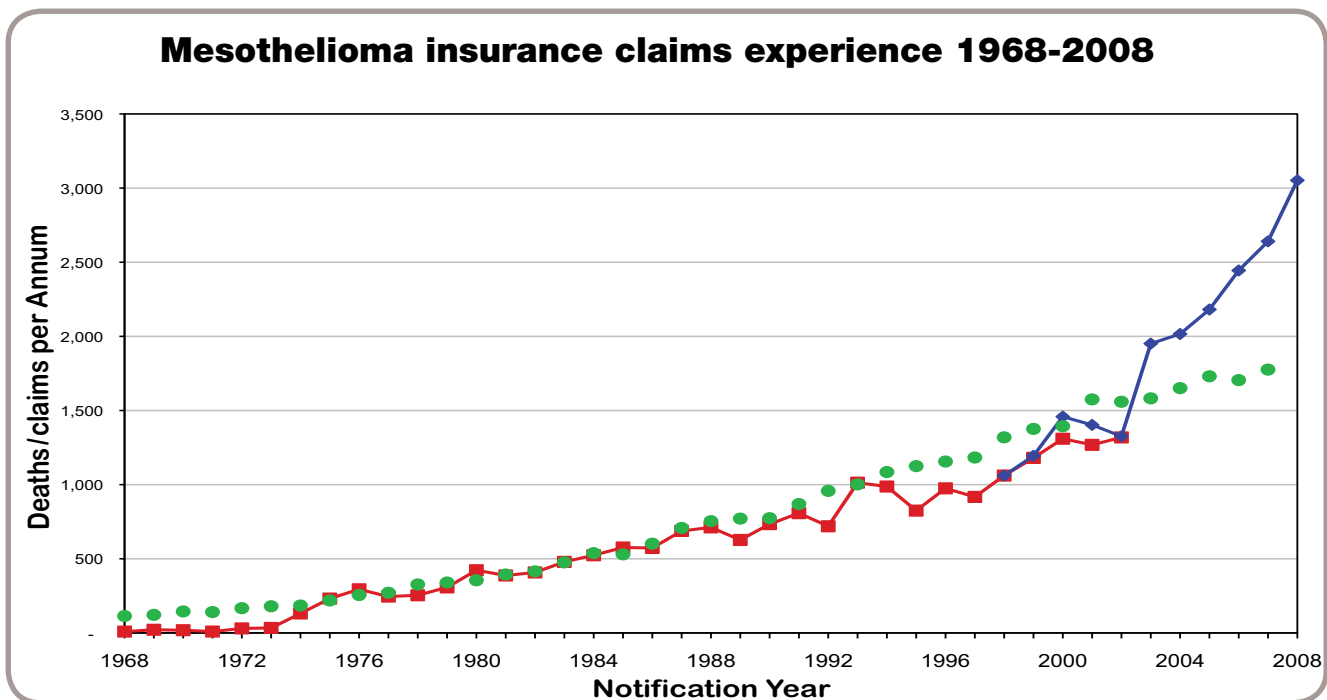


Figure 1

was assumed to continue. The 2004 paper made the observation: ‘In our projections...we have assumed there is no change in the proportion of people claiming’.

In fact, since 2004, the AWP points out, the proportion of mesothelioma deaths that result in an insurance claim has almost doubled. This is the main reason why the insurance market claims experience has been worse than expected in the period 2004 to 2008, and why the insurance market estimates for the period post 2008 have increased compared with those outlined in 2004.

The AWP found that there is no single driver behind the increase, but the following have had an influence:

- Publicity. With the various legal cases that have taken place over the last few years, compensation for mesothelioma has often been in the news headlines, and hence public awareness of the availability of compensation is likely to have increased.
- The increased use of the internet over the last few years means there is a wealth of information availa-

ble on the web to help patients and their carers find out more about asbestos-related conditions, treatment, symptom management and support.

- The NHS National Mesothelioma Framework has improved support for mesothelioma sufferers.

cess rate increases when the claim is made prior to death, due to the ability to obtain a witness statement from the sufferer. An increase in pre-death diagnoses has increased the likelihood of successful claims against former employers and/or their insurers.

Summary of the changes in the UK insurance market estimate

	Impact on UK insurance market cost (£ billion)
2004 estimate (2009 to 2040)	4.7
Change due to projection of population mesothelioma deaths	0.6
Change due to proportion of deaths that result in a claim	3.7
Change due to average cost	0.7
Change due to inflation	(0.6)
Change due to extension of projection period to 2050	1.7
Change due to non-mesothelioma claim types	0.5
2009 estimate (2009 to 2050)	11.3

Table 1

There has been an improvement in the pre-death diagnosis rate in a number of specialist centres. It is understood that the claim suc-

However, the AWP stresses that it is extremely difficult to get behind the key drivers, and to estimate the influence, if any, these factors will have in

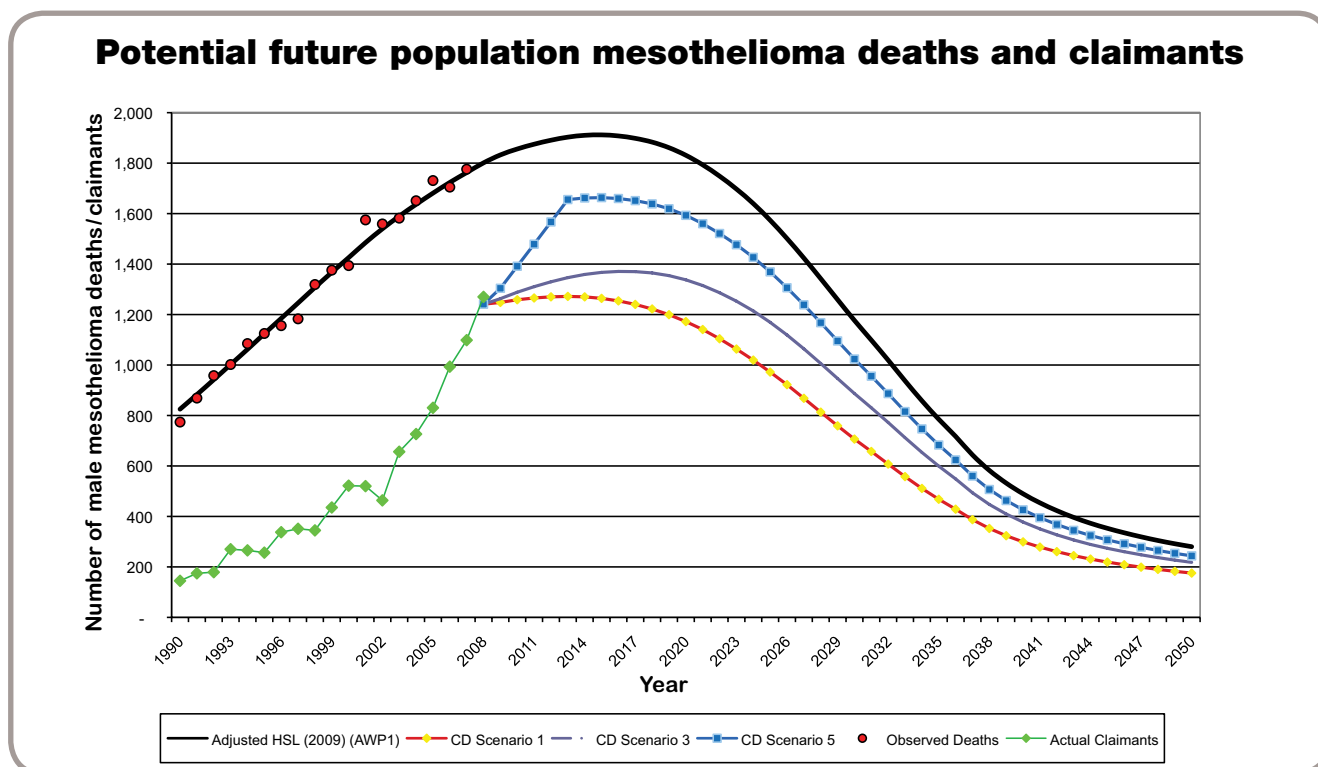


Figure 2

the future. This again increases the uncertainty surrounding the future projected cost (see figure 2).

Mesothelioma claim cost

The AWP’s revised assumptions for the average cost of compensation provided to mesothelioma sufferers have increased the insurance market cost for the period between 2009 and 2040 by around £0.7 billion. This is because the estimate made of the average cost of a mesothelioma claim paid to a claimant in 2004 turned out to be lower than the actual experience.

The average claimant cost experienced in 2008 is greater than that assumed in 2004 and this has increased the estimated total insurance market cost.

Future inflation

The paper’s revised assumptions for the expected future inflation affecting the cost of compensation provided to mesothelioma sufferers decreased the insurance market cost for the period between 2009 and 2040 by around £0.6 billion.

Projection to 2050

Extending the projection from 2040 to 2050 has increased the insurance market cost by around £1.7 billion. The 2009 insurance market estimate allows for all estimated past and future exposure, with explicit allowance for non-occupational exposure, and hence it is not considered appropriate to cut-off the projection at 2040.

The AWP now considers it more appropriate to cut off the projections at 2050.

Other asbestos-related claims

Revised projections for asbestos-related lung cancer, asbestosis and pleural thickening claims increased the insurance market cost by around £0.5 billion. The future cost of these claim types to the UK insurance market is estimated to be around £1.2 billion. Each of these non-mesothelioma claim types is difficult to project into the future, says the AWP.

‘We have taken a pragmatic approach for these claim types and have made future projections based on a number of alternative scenarios

given the past experience. Lung cancer claims are considered to be the most uncertain of these claim types.

We have developed a model that relates asbestos-related lung cancer claims to smoking-related lung cancer occurrences. This has helped produce alternative scenarios and hence illustrate the uncertainty surrounding claims of this type. The main reason for the increase in the cost of these claims is due to reflecting the greater than previously expected experience for asbestos-related lung cancer claims.’

Future monitoring

The paper concludes that although there is considerable uncertainty surrounding any estimate made for the total insurance market cost of asbestos-related claims, this uncertainty will reduce as the actual experience emerges, especially once the peak in claims and deaths is observed, and ‘hence it is critical that the assumptions made to derive the estimates contained in this paper are monitored closely and adjusted as appropriate in the future.’ ●