The reality of US-style litigation

Commentators have sounded the alarm that the UK is on the verge of a tidal wave of asbestos litigation. Is this speculation accurate and, if so, how should companies respond? Terry Budd, Jane Harte-Lovelace, and Chris Michael Temple write

Commentators have speculated that the UK may soon see a significant increase in asbestos-related lawsuits. Although sometimes exaggerated in tone, such warnings are grounded in fact. Recent medical statistics and legal and social developments suggest that concerns about rising asbestos claims rates and the importation of US-style aggressive litigation to present those claims may well be legitimate. The spectre of American litigation tactics poses risks to businesses which historically had only slight contact with asbestos, such as product or equipment manufacturers. These ‘remote’ users (indeed, ‘customers’) of asbestos are well-advised to position themselves now to answer future claims should they materialise.

Asbestos is a generic name for several naturally-occurring fibrous minerals used extensively in industrial applications through the twentieth century. The UK began importing asbestos in the 1800s, but asbestos use only grew rapidly in the post-World War II reconstruction, peaking in the mid-1960s and remaining at a high level until the early 1980s. Exposure to asbestos is potentially linked to five primary medical conditions ranging in severity from the typically non-impairing lung scarring known as pleural plaques (which is, at least for the moment, not a compensable injury under UK law) to the typically fatal mesothelioma, a cancer some say is caused only by asbestos exposure. Asbestos-related diseases are reported to cause over 3,500 deaths per year in the UK. A recent study collected data on the number of yearly asbestos-related claims made in the UK and concluded that insurance claims for asbestos-related illnesses have been rising since the 1960s. Claims for mesothelioma, in particular, have increased steadily since the 1970s.

Recent UK medical statistics as well as legal and social developments predict this trend will continue. The conclusion that the number of yearly UK mesothelioma deaths has yet to peak has been a constant in seemingly all major studies addressing the issue. A recent study concluded mesothelioma deaths will continue to rise, eventually peaking between 1,950 and 2,450 deaths per year between 2011 and 2015. Since 2000, key rulings have made a number of the legal elements easier to prove. The fact that the House of Lords recently saw a need to limit the effect of one of these decisions suggests just how revolutionary, and claimant-favourable, they are. The UK’s increasing acceptance of group litigation and litigation financing arrangements, such as conditional fees and after-the-event insurance, has similarly laid the groundwork for an increase in personal injury claims generally and asbestos claims specifically. First, these mechanisms potentially allow claimants to reduce, or eliminate, the costs of litigation. Second, class suits (already used in the asbestos context) can generate substantial media attention, raising the profile of the alleged problems giving rise to the case.

In business and legal communities, there is an increasing perception that the US, with its massive asbestos litigation framework built with billions of verdict and settlement dollars, is exporting asbestos lawyers and litigation tactics to the UK. Since the early 1990s, when one observer concluded that British lawyers disapproved of tactics used by US lawyers in asbestos litigation, the landscape has dramatically changed. Now, observers see UK litigation becoming increasingly Americanised. Given the US experience with asbestos litigation, this is not a development which bodes well for potential UK defendants.

The rising tide of asbestos claims must ‘go’ somewhere. To date, the parties involved in UK asbestos litigation have resembled the parties involved in US asbestos litigation of the 1970s and early 1980s. During this first flood of litigation, claimants were typically employees who had handled large quantities of asbestos during their careers, and defendants were typically companies that supplied raw asbestos or used it as a major component of a product capable of releasing asbestos fibres. A new tide of US asbestos litigation, with new defendants, began just before 2000. Today, few US claimants have directly worked with asbestos. Rather, they claim incidental exposure on a site or through a co-worker’s handling of a product. Defendants are often businesses which incidentally used asbestos in facilities or manufacturing processes or in small amounts in encapsulated products like plastics, resins, pastes, or liquids.

There appears to be little reason why the defendant shift witnessed in the US could not occur in the UK. The reality is that companies facing massive numbers of claims become unattractive targets as they are drained of capital. The insolvency of Turner & Newall Ltd, the major UK asbestos company, shows that this is already happening. In the US, the defendant shift was an effective way to substitute fresh sources of funds for exhausted sources.

For UK companies, a response to the possibility of rising claim rates and a defendant shift should begin with a re-evaluation of potential liability which poses the right question. The right question is not whether a company ever extensively used asbestos. It is whether they had any interaction, however slight, with asbestos. Whatever the findings of this initial re-evaluation, companies should consider involving lawyers experienced in asbestos insurance litigation to guide the further steps needed to prepare for this new potential threat.

2 Rothwell v Chemical & Insulating Co. Ltd, [2006] EWCA 27 CA
3 Health & Safety Executive, Asbestos (Jan 10, 2006)
http://www.hse.gov.uk/ asbestos/disease.htm
5 UK Asbestos – the Definitive Guide, supra note 4, at 6.3
6 UK Asbestos – the Definitive Guide, supra note 4, at 5-5.9;
8 Hodgson, supra note 6, at 591
9 Eg Fairchild v Glenhaven Funeral Services Ltd., [2002] UKHL 22 (HL)

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