

Asbestos litigation in the UK

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Introduction

If an Australian resident has been exposed to asbestos dust whilst working in the UK they may be entitled to claim compensation in the UK even if a claim for compensation has been made successfully in Australia.

There are three sources of compensation in the UK for people suffering from an asbestos-related disease caused by exposure to asbestos dust at work in the UK. These are:

- A weekly pension from the DSS called Industrial Disablement Benefit (IDB)
- An ex gratia payment from the Department of Environment
- A common law claim against the relevant employer

Industrial Disablement Benefit (IDB) is payable when exposure to asbestos with an employer is established and the applicant is suffering from bilateral pleural thickening, asbestosis, lung cancer in the presence of asbestosis or mesothelioma. The benefit is payable to applicants no longer resident in the UK as long as the exposure to asbestos occurred in the UK. The maximum weekly payment is currently £101.10.

If IDB is granted, an application can be made to the Department of Environment for a lump sum ex gratia payment. Payments should only be made if there is no employer against which a common law claim can be made. The scheme is applied in a haphazard way and it is almost always worthwhile making an application if IDB is granted. The application must be made before a common law action is started. As with IDB, payments are made to those no longer resident in the UK. The maximum payment is currently £51,277.00. This is for someone assessed at 100% disabled and aged 37 or under.

This article will concentrate on common law claims against employers.

Jurisdiction

Generally, if the exposure to asbestos occurred in the UK, a court action must be brought in the UK. The main excep-

tion to this rule is if the employer has a place of business in both Australia and the UK. The plaintiff may then choose in which country to bring proceedings.

Compensation received in Australia

It is likely that any compensation awarded by an Australian Court for the asbestos-related illness will be offset against an award of compensation in the UK.

Liability

Claims are based in tort. It is necessary to establish the following:

- The employer owed the employee a duty of care. This can be taken for granted.
- The employer breached the duty of care. This is rarely a problem. The Asbestos Industry Regulations were introduced in 1931 and largely ignored. Effective extraction equipment was available in the 1930's, as were respirators such as the Siebe Gorman Mark IV respirators. From about 1930 onwards employers in the UK will be fixed with constructive knowledge of the dangers of the inhalation of substantial quantities of asbestos dust. Therefore if they failed to take adequate steps to prevent inhalation they will be in breach of their duty of care.
- The exposure to asbestos must have made a material contribution to the injury of which the claimant complained. Again, this is rarely a problem.

Particular difficulties in establishing liability:

1. Limitation

For claims involving exposure to asbestos after 1954, the *Limitation Act* 1980 applies. The plaintiff has three years to start a court action from the date when he or she knew that a significant injury had been contracted and that this was caused by an act or omission of the defendant. In most cases, this will be the date an asbestos-related illness is first diag-

nosed. If this date is missed, section 33 of the Act gives the court a discretion to allow a claim to proceed if it would be equitable to do so. In disease cases, this discretion is generally exercised in favour of the plaintiff.

In cases involving exposure prior to 1954, the position is not so straightforward. The *Limitation Act* 1939 applies. Under this Act, the plaintiff has six years from the date of "actionable damage" to start a court action and there is no discretion to extend the period. It is therefore necessary to show that there is no "actionable damage" prior to 1954 to succeed in full. This is a medical issue and there is disagreement amongst chest physicians as to the time at which asbestos fibres first cause damage to the lung. It is necessary to choose the medical expert carefully in these cases.

2. Company no longer in existence

If the company for which the plaintiff was employed has been dissolved, it is possible to restore the company to the register for the purpose of bringing a court action against that company. It is only worthwhile doing this if the employer's liability insurers can be traced.

3. Low/intermittent exposure to asbestos dust

Where there is exposure to low levels of asbestos dust on an intermittent basis (for instance, as a roofer) it may be difficult to establish liability for exposure prior to the early 1960's.

4. The manufacturer of the asbestos product as a defendant

In the UK the two main manufacturers of asbestos products were Turner & Newall and Cape and their various subsidiary companies. Where one of these companies supplied an asbestos product to an employer, it is a growing trend for the employer when sued to join in the manufacturer as an additional defendant. The effect of this is to generally delay but not defeat the plaintiff's claim for compensation.

Generally from the plaintiff's point of

view, it is only worthwhile suing the manufacturer of the asbestos product if there is no employer to sue.

5. The Ministry of Defence as a defendant

If the plaintiff was exposed to asbestos whilst serving in the British army, air force or navy, the Ministry of Defence will argue that they have an immunity against any claim for compensation arising out of a tort. This is being challenged. The test case was due to be heard in the Court of Appeal in July 1997. The immunity does not apply to civilian employees of the Ministry of Defence.

Compensation

a) Pain suffering and loss of amenity

- Mesothelioma

The range extends from about £25,000 to in excess of £50,000. The duration of the illness and level of symptoms are primary factors taken into account. Typically the relevant bracket will be £35,000 to £45,000.

- Lung cancer

There are very few reported awards for lung cancer in the UK. Generally, similar arguments are put forward as for mesothelioma and the range appears to be similar.

- Asbestosis/pleural thickening

In full and final settlement, the range is from in excess of £50,000 to around £17,500. The higher awards are made where the disability is already moderate to severe and the attendant risks are high.

Claims can be brought on a provisional basis with the plaintiff being compensated for his or her current condition but maintaining the right to return to the court for further compensation should the lung disease worsen beyond an agreed level or should the plaintiff develop lung cancer or mesothelioma. Compensation is typically in the range £15,000 to £25,000.

- Symptomless pleural disease

In full and final settlement, taking into account the attendant risks, the range extends from about £10,000 (where the risk of more serious asbestos-related disease is very low) to £30,000 in a case where there was a greater than 50% risk

of a more serious asbestos-related disease developing.

On a provisional basis, such claims attract awards of between £3,000 and £5,000 with the opportunity to return to court for further compensation if a more serious asbestos-related illness develops.

b) Special damages

By way of example the main heads of special damage in a fatal asbestos case are:

- A fixed sum of £7,500 for bereavement
- Funeral expenses
- Nursing services provided to the deceased by the spouse/relative/friend (compensation is generally in the region of £5,000 in a mesothelioma case but can be more where the death is prolonged.)
- Loss of deceased services around the home: decorating, DIY, housework, gardening. Compensation is generally in the region of £1,000 per year but can be a lot more in specific cases.
- Loss of earnings to the date of death
- Loss of dependancy on the deceased's loss of earnings/loss of pension/loss of services in the home
- Any miscellaneous expenses, for instance, travel, medical expenses, and necessary aids and appliances

Funding

Legal costs follow the event. If the claim is successful, the defendants pay the costs of both parties and if unsuccessful the plaintiff pays the costs of both parties. Most claims are successful. To assist the funding of a claim and reduce the potential costs liability the following are available:

Legal Aid

Legal aid is available subject to a means test.

The Legal Aid Board looks at income and capital.

If net income exceeds £8,158, legal aid will not be available. If net income is between £2,498 and £8,158, legal aid is available subject to a monthly contribution to the legal aid board. If the net

income is below £2,498 legal aid is available with no contribution payable.

The maximum capital limit is £8,560, with a contribution payable if capital is assessed at between £3,000 and £6,750 and no contribution below £3,000.

If a claim is unsuccessful, the plaintiff is unlikely to have to pay legal costs exceeding the contribution paid to the legal aid board.

If a claim is successful, any contribution is usually returned to the plaintiff and in most cases there is no deduction from the compensation for costs.

Conditional Fee Agreements (CFA)

If a CFA is signed and the case is lost, the plaintiff's solicitors do not charge for their work. At the time the CFA is signed an insurance policy costing £85 is taken out. This covers the defendant's costs and both sides' disbursements. The maximum liability if the case is lost is £85.

If the case is successful, the plaintiff's solicitor takes a success fee out of the compensation. Most solicitors agree to limit the success fee to a maximum of 25% of the compensation. In asbestos cases, the success fee is unlikely to exceed £5,000 and is generally much lower. ■

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