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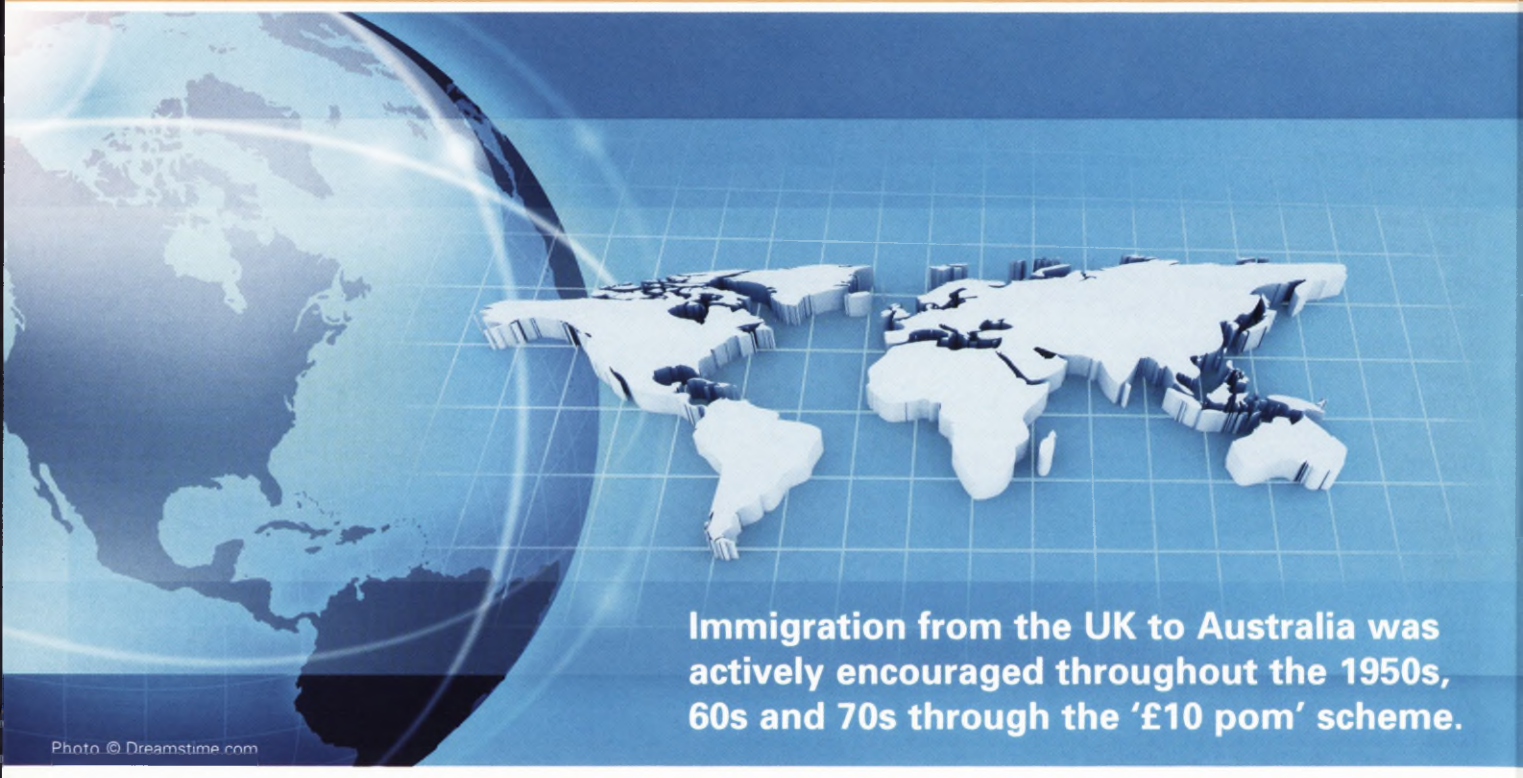
Where does the dust settle?

Asbestos disease cases in multi-tort jurisdictions



Many UK citizens worked in trades in Australia, only to return home again in retirement years. Alternatively, many immigrants to Australia have settled here after having worked in both the UK and Australia. In both cases, employment-related exposure to asbestos, a deadly carcinogen, has been common.

Difficult issues of forum, entitlements to compensation and forensic challenges arise, both with divisible and indivisible asbestos-related diseases. Providing expedient and comprehensive advice in this difficult area is of vital importance, not least because quite often the victim is dying as a result of a terminal, aggressive and incurable asbestos related cancer.

AUSTRALIAN JURISDICTION

In Australia, common law prevails with the governing law being the law of the place where the tort occurred. The current authority that sets out the principles governing forum with particular reference to asbestos disease claims is *BHP Billiton Limited v Schultz & Ors.*[1] In broad terms, forum of a particular court or territory will be determined according to '*the interests of justice*', a phrase common to the cross-vesting legislation of respective states in Australia. The test is whether, in the interests of justice, the court of another state or territory is more appropriate. The convenience and expense of the parties, and the ability to deal with these cases in a timely fashion, are also taken into account.

UK JURISDICTION

Until 2009, UK jurisdictional law focused on the country where the tort occurred.[2] Proceedings could be moved where it was 'substantially more appropriate', but this turned exclusively on the facts of the case.

The leading case on jurisdiction in the UK concerns an accident in Australia – an Englishman was rendered tetraplegic when the (Australian-insured) car his (Australian) girlfriend was driving overturned in NSW.[3] The 5 per cent discount rate imposed by NSW under the *Motor Accidents Compensation Act* 1999 (MACA), would have reduced the claim by £1.5 million.

The House of Lords held that the substantive law (that is, liability issues, recoverable heads of damage) was to be assessed by the applicable law (*lex loci delicti* – Australia). However, procedural law (the 'remedy'), importantly including quantification of heads of damage, was to be determined by the law of the forum (England).

ROME II

International law has recently been turned on its head with the 'Rome II' regulations,[4] which certainly affect proceedings commenced after 11 January 2009 and probably apply to any case where diagnosis occurred after 19 August 2007. Although Rome II is an EU regulation, it still applies in relation to proceedings in the UK courts that straddle Australian borders.

The general rule under Article 4(1) defines the applicable law as the place where the injury occurred (*lex loci damni*), irrespective of the country in which the event giving rise to the damage occurred. Arguably, with asbestos diseases, the 'damage' could have been the exposure itself, but it seems almost inevitable that the damage occurs later.[5] This effectively turns PILA on its head.

Article 4(2) may shift proceedings back to UK where the parties concerned have a common 'habitual residence', but this seems a long shot, particularly when the claimant is likely to have lived in Australia for decades. More persuasive is the 'escape clause', Article 4(3), which states that the applicable jurisdiction will be the country where the tort occurred if it is '*manifestly more closely connected*' with that country.

However, issues of procedure may now fall to be assessed by the applicable law following Article 15, which states that the *'law applicable to non-contractual obligations under this regulation shall govern in particular [Compensation] within the limits of powers conferred on the court by its procedural law'*. *Harding v Wealands* may have resulted in a very different result following Rome II.

PRIMARY PRINCIPLES

A number of factors determine the appropriate forum. These include the *lex loci delicti*, the convenience and expense of the parties and, in cases where the claimant has a short life expectancy, whether the court of a particular forum is able to dispose of the case expeditiously.[6]

To the writers' knowledge, issues as to damages that are enlivened by the decisions of *Harding v Wealands* and *Cooley v Ramsey*[7] have generally not been raised in prosecuted asbestos claims in Australia, usually because the claims are brought where the tort occurred. As a consequence, the introduction of 'Rome II' is unlikely to have a significant impact on multi-jurisdictional asbestos disease claims from the Australian perspective, but will do so from English eyes.

Ultimately, an assessment of which forum to recommend will depend upon what forum is likely to deliver the most favourable outcome for the claimant, having regards to the types of principles that the courts use in determining the appropriate forum. In the authors' opinion, the application of forum ought be assessed against two primary principles – the jurisdiction with the most favourable damages and the quickest possible time it can be brought: 'time and money'.

PLEURAL PLAQUES

Following the decision in *Rothwell*, claims can no longer be pursued in the UK for asymptomatic pleural plaques. The English government recently confirmed that it would not introduce legislation to restore pleural plaques compensation. However, this reflects the current state of the law in all Australian states for many years. Generally speaking, claims are actionable in Australia only when the asbestos-related disease results in quantifiable damage.

However, when a case encompasses exposure in the UK, care must be taken to check whether there may be a Scottish element – the *Damages (Asbestos-related conditions) (Scotland) Act* 2009 restored the right to claim damages for pleural plaques in Scotland on 17 June 2009. Northern Ireland looks likely to follow suit.

PLEURAL THICKENING AND ASBESTOSIS

In the UK, there is an ongoing debate between claimant and defendant lawyers as to whether *asymptomatic* pleural thickening and asbestosis are compensable, but with at least two decisions now finding against claimants, the prospects are not encouraging.[8]

This situation may give rise to limitation issues, where victims have been unaware of their right to claim. The fact that case law has demonstrated a degree of flexibility highlights the need to obtain medical records at a very early stage, and examine them properly for issues of diagnosis.

The UK allows claimants to claim 'provisional damages' which allow them to return for further compensation if their condition deteriorates or they develop a more serious disease. The claimant's preference for a provisional award may dictate that the proceedings must be pursued in the UK. >>

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In Australia, different states adopt different approaches with respect to provisional damages. In the Dust Diseases Tribunal, provisional damages are created through statute. Victoria has recently introduced legislation in relation to same. Quite often, a statutory payment for work-related asbestos disease in other states that do not have provisional damages can achieve substantially the same result. However, the different approaches in different states reflect the need to proceed with caution.

LUNG CANCER

Experience shows that, where lung cancer cases in the UK and Australia are concerned, leading experts – both in medical and engineering – should be involved. Where exposure straddles jurisdictions, advice should be sought from leading occupational hygienists in Australia.

In Australian courts, the impact of smoking in relation to lung cancer cases has recently been considered by the High Court of Australia in the case of *Amaca Pty Ltd and Ors v Ellis* [2010] HCA 5. The late Paul Cotton was a 42-year-old father of four, who was exposed to asbestos in two separate instances of employment, and was a regular smoker right up until he was diagnosed with lung cancer. He had no identifiable non-malignant asbestos-related disease, nor did he have any tobacco-related disease. The court at first instance accepted the evidence given by the medical experts that asbestos, acting synergistically with tobacco smoke, combined to increase a risk of lung cancer in a manner where the exposure to asbestos materially contributed to the increase in risk (which subsequently eventuated).

The court rejected the Helsinki criteria[9] as a measuring stick by which causation at common law is measured; rather, they accepted the argument that causation in lung cancer cases is a medical question to be resolved with regard to expert medical evidence and the occupational history of a claimant. This largely reflects the same view adopted by the UK High Court in *Shortell* (see below).

While the defendants appealed the decision, the first instance judgment was upheld on appeal, with an increased tariff applied for contributory negligence (from 10 per cent to 50 per cent).[10] The defendants appealed the Court of Appeal decision to the High Court of Australia.

The High Court, in a unanimous judgment (3 March 2010), upheld the appeal. It was held by the Court that, on the facts in Mr Cotton's case, no scientific or medical examination could say whether his lung cancer was caused by inhalation of tobacco smoke, respirable asbestos fibres, both or neither. Further, they said that *'...deciding only whether the aggregate exposure to asbestos was a cause of Mr Cotton's cancer did not answer the question about the particular responsibility of each defendant'*.[11] The High Court further stated that, with the epidemiology in this case, it was not shown to be more probable than not that asbestos was a cause of (a necessary condition for) Mr Cotton's cancer. It was not shown that exposure to asbestos made a material contribution to his cancer. Material contribution was not shown, because a connection between Mr Cotton's inhaling asbestos and his developing cancer was not demonstrated.

As such, it would seem that each lung cancer case involving a combination of cigarette-smoking and asbestos exposure must be looked at carefully in its own right, to establish whether it is likely to succeed or not. On one end of the scale is a case where there is a very long and heavy smoking history but a small exposure to asbestos, with no other markers such as pleural plaques; as compared with a case involving a light smoker with very heavy exposure to asbestos, who has asbestosis.

In the UK, the yardstick applied to such cases is whether the asbestos exposure more than doubled the risk of developing lung cancer, *not* whether the Helsinki criteria have been satisfied.[12]

While lung cancer and mesothelioma are indivisible illnesses, and are treated as such in Australia, the UK case of *Barker v Corus (UK) Plc*[13] has effectively introduced divisibility to UK lung cancer claims, so caution must be applied in multi-defendant cases, particularly those spanning jurisdictions. Where smoking is a contributory factor, recent UK judgments dictate that a reduction in damages will also be applied.[14]

MESOTHELIOMA

Following the threat of divisibility with the decision in *Barker*, s3 of the *Compensation Act* 2006 has restored the 'Fairchild principle'[15] to UK law, giving joint and several liability for damages in mesothelioma claims. While s3 provides for 'contributory negligence', this is yet to be tested in the courts; arguments are likely to be raised over whether the definition of this contribution entails only circumstances where the victim had knowledge comparable to employers, or goes so far as to cover DIY and sole-traders. Arguably, only the former applies.

Although the principles in *Barker* are yet to be raised in any of the Australian courts, it seems that now the dust has settled in England, divisibility in mesothelioma claims is unlikely to occur in Australia.

In UK cases, the argument of *de minimis* exposure is often raised where defendants try to avoid liability,[16] and this may particularly be the case if there was heavy exposure overseas. The first court analysis of s3 was given in *Sienkiewicz (Estate of Costello, deceased) v Greif (UK) Ltd*,[17] where Mrs Costello had been exposed to a low level of asbestos in the general

atmosphere slightly increased (by just 18 per cent) by dust in the factory atmosphere where she worked. The leading judgment confirmed that the claimant does not need to confirm that the risk (of mesothelioma) was doubled, but simply that that *'the tortious exposure materially increased the risk [of developing mesothelioma]'*. Undoubtedly, this gives mesothelioma claimants a significant argument to advance low-level UK exposure cases.

In Australia, causation in mesothelioma cases is increasingly being argued in cases where there is often a relatively low level of exposure, in rare cases with success (see *Amaca v Moss*[18]). As with all cases, witness evidence must be obtained at the very earliest opportunity, and this is often best performed face to face by an agent in overseas cases.

TERMINAL AND FATAL CLAIMS

A telling difference in jurisdictions, particularly with reference to malignant claims, concerns the ability for a claimant to claim general damages for the victim's disease posthumously. In the UK, proceedings are *not* required to be issued during the victim's lifetime,[19] but in Australian jurisdictions, proceedings must be issued in the victim's lifetime for the claim for general damages to 'survive' the claimant. Otherwise, damages are severely restricted, with awards being made only for past loss of earnings, past medical expenses and care (for the estate) and financial dependency on lost future income and loss of non-financial services (for a dependant, if there is one).

The main difference in quantum in both jurisdictions usually depends on whether or not the victim has dependants. There are pros and cons to pursuing damages in the victim's lifetime, or postponing until after their death. Although not a hard and fast rule, where dependants exist, deceased claims often end up being higher value than those pursued during the claimant's lifetime, whereas if no dependants exist, the sums claimable are typically higher if concluded during the claimant's lifetime.

MULTIPLE EXPOSURE CASES

Where all of the exposure has been in Australia, the Australian jurisdiction is likely to be most appropriate for a claim. Likewise, where all exposure is in England, UK law will probably apply. The real question arises where exposure straddles both jurisdictions. Depending on other factors affecting the claim, the authors are of the view that proceedings can be issued in either jurisdiction against all culpable defendants and served overseas.[20]

Inevitably, situations arise where a claim has already proceeded and settled in Australia and the claimant now wishes to pursue the UK defendant. They are of course perfectly entitled to do so, but due care must be exercised not to duplicate costs unnecessarily. Australian proceedings are likely to be disclosable documents in the UK proceedings, so if agreement has already been reached with Australian defendants on apportionment, the claimant will be hard-pressed to deviate from the percentages in subsequent proceedings.

LIMITATION

Both jurisdictions generally share the three-year limitation period for living and deceased cases (except in NSW, where there is no limitation). Likewise, there is a generally accepted degree of flexibility in claims where proceedings are brought out of time, and the claimant relies on the court's discretion.

The UK courts have not yet considered whether a diagnosis of pleural plaques, made before the decision in *Rothwell*, starts the limitation clock ticking. In the authors' opinion, a claimant would need to fall foul of a very unsympathetic judge for his or her claim to fail on this basis.

EXPEDITION OF CLAIMS

Various Australian courts throughout the country have specialised lists dedicated to the expeditious progress of claims for victims of terminal asbestos disease. In NSW, the Dust Diseases Tribunal is a specialist tribunal specifically dedicated to the fast resolution of asbestos claims.

In England, the Mesothelioma Practice Direction gives claimants a general guidance of proceedings to trial in three to four months (living claims) and five to six months (deceased claims) from an initial case management conference. But there is provision to push matters through much more quickly for claimants with *'severely limited life expectancy'*. The same system can be used for lung cancer and severe asbestosis. >>

ENFORCEMENT

In both jurisdictions, it is often the case that a number of investigations need to be done to identify a viable defendant, whether a registered company or an insurer, usually as quickly as possible.

The usual starting place is with the claimant's own documents, such as apprenticeship papers, seaman's records, etc. The search can be broadened with company searches, company records and liquidator's records. In Australia, a search can also be undertaken at the National Archives or the various state libraries. In England, an application can be made for National Insurance records, giving a chronology of all employers from the 1960s onwards.

In both jurisdictions, steps may be required to 'resurrect' a de-registered (Australian) or dissolved (English) company. The law in England is being changed shortly to remove this requirement, so an insurer can be sued directly which will reflect the existing law in Australia – s601AG of the *Corporations Law*; and in NSW, s6(4) of the *Law Reform Miscellaneous Act* (NSW) 1946). However, there are limitations in proceeding against an insurance company directly, the most important being that some policies had limited cover and depending on the date of last exposure, the amount that can be recovered may be limited, no matter what the disease is.

In England, particular care must be taken to identify the insurer from the correct period. Following the decision in *Bolton MBC v MMI*,[21] in *public liability insurance* cases (for example, overalls, factory neighbourhoods, product liability, occupiers' liability) the relevant insurance policy will be the one in place at the *date the claimant's tumour* manifested (accepted as 10 years before symptoms for mesothelioma). An unsuccessful attempt was made to impose a similar rule on employers' liability cases, although the outcome of the appeal on this is awaited. For now, in cases of *employers' liability insurance*, the relevant insurer remains the one on risk during the period of the *claimant's exposure*.

STATE AND STATUTORY BENEFITS

Generally speaking, if a claimant in Australia contracts an asbestos-related disease in the course of their employment, they may be entitled to a payment under a 'no-fault' statutory scheme. Each state has different statutory schemes, and some offer extremely generous benefits, although others do not.

There is a further complication in relation to statutory schemes if a claimant is employed in Commonwealth employment; such employment gives rise to a separate statutory scheme also, with relatively generous dependency provisions.

In most (if not all) statutory schemes throughout Australia, there are provisions requiring repayment of any statutory amount awarded, if a claimant proceeds to obtain damages, whether by way of a common law claim against the employer or a third party.

Similarly, benefits can be claimed in the UK arising from exposure during employment. Furthermore, a scheme exists for lump-sum payments to mesothelioma victims who can demonstrate exposure in the UK, both occupational and non-occupational. However, it needs to be borne in mind that these benefits are recoverable, if a claim is pursued overseas.[22]

CONCLUSION

Given that asbestos disease cases often allow very little time for assessment, the work will be very heavily front-loaded to assess where your client's interests are better served. Often, the decision of what is in the best interests of the claimant boils down to practical considerations (time and money) rather than the pros and cons of complex legal argument.

Where cases arise from exposure in both countries, a careful assessment needs to be made as to whether proceedings are brought in one, the other or even both jurisdictions, with even more careful consideration as to the costs risks involved. The concept of purchasing insurance to protect claimants from adverse costs outcomes does not ordinarily occur in Australia as it does in the UK, where insurance is purchased in conjunction with a no-win, no-fee agreement.

Conditions are likely to be dictated with the development of case law in both jurisdictions, and Australian firms can ill-afford to ride roughshod over UK jurisdiction without advice from those in the know, and *vice versa*. ■

Notes: **1** (2004) 221 CLR 400. **2** *Private International Law (Miscellaneous Provisions) Act* 1995 (PILA), s11. **3** *Harding v Wealands* [2006] UKHL 32. **4** Regulation (EC) 864/2007 on the law applicable to non-contractual obligations. **5** See *Rothwell v Chemical and Insulating Company Limited* [2006] EWCA Civ 27 and Employer's Liability Policy 'trigger' Litigation [2008] EWHC 2692. **6** See *Eden v Amaca & Ors*, unreported, [2007] VSC 374, at paras 8 – 11. **7** [2008] EWHC 192. **8** *Owen v Esso Exploration and Production UK Limited & 1 Other* (16 November 2006); and *Beddoes & Others v Vinters Defence Systems Ltd and Others* (2009) unreported. **9** In 1997, a group of scientists met in Helsinki and agreed criteria for determining which lung cancer cases could be attributed to asbestos inhalation. See *Asbestos, asbestosis and cancer: the Helsinki criteria for diagnosis and attribution*, Scand.J.Work Environmental Health, 1997, 23:311-6. **10** *The State Of South Australia & Ors v Ellis* [2008] WASCA 200 (26 September 2008). **11** At para 42. **12** *Shortell v Bical Construction Limited* (2008), unreported. **13** [2006] UKHL 20. **14** 20 per cent in *Badger v Ministry of Defence* [2005] EXHC 2941; and 15 per cent in *Shortell* (above, Note 12). **15** In *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC, the House of Lords decided that, where an employee had been exposed to asbestos by different defendants during different periods of employment, and it could not be shown which defendant's wrongdoing was to blame, the increase of the risk of contracting the disease was sufficient to satisfy the causal requirements for each employer's liability for the consequent mesothelioma (Burton J). This allowed claimants to recover full damages from one employer, despite exposure with several. **16** See *Brett v Reading University* [2007] EWCA CIV 88; and, *Cox v Rolls Royce Industrial Power (India) Ltd* [2007] EWCA Civ 1189. **17** [2009] EWCA Civ 1159. **18** [2007] WASCA 162. **19** *Law Reform (Miscellaneous Provisions) Act* 1934. **20** Each Australian state has its own rules relating to civil procedure, but they are relatively uniform. For UK claims CPR Practice Direction 6B. **21** [2006] 1 WLR 1492. **22** Section 1(3) *Social Security Recovery of Benefits Act* 1997.

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