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Asbestos: Manx Law Lags Behind UK



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July 2016

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Advocate Chris Brooks of M&P Legal reports on how those made ill through exposure to asbestos on the Isle of Man are at a disadvantage compared to those in the UK in three separate ways ...

Asbestos is a naturally occurring mineral characterised by the presence of long thick fibrous crystals each of which are comprised of millions of microscopic fibrils that are readily released into the atmosphere when a piece of asbestos is disturbed.

Notwithstanding that the risks of breathing in asbestos dust have been widely known since before the Second World War, asbestos was increasingly used in a wide range of building and industrial applications after the war, particularly because of its fireproofing qualities. The mineral was used in lagging, cement, pipes, ceilings, insulation board, protective clothing and a wide range of other things - even oven gloves.

Breathing asbestos can cause scarring of the lungs (asbestosis) if inhaled in significant amounts. Since asbestos has ceased to be produced industrially, attention has turned more to a cancer called mesothelioma which is very closely associated with exposure to asbestos. This is a type of cancer which grows around the lining of the lungs and makes it increasingly difficult for a sufferer to breathe. It typically develops more than thirty years after exposure. It does not require significant exposure to cause the disease. There is, as yet, no cure.

Whilst the disease is relatively rare, there is a relative epidemic of mesothelioma arising from the post-war use of asbestos and the UK has the highest mortality rate in the world. In the UK, 17.8 people per million will die of the disease with 2,667 people being diagnosed in the UK in 2013.

In comparison, the Isle of Man has seen 24 people admitted to Nobles between 2008 and 2016 and 8 people died of the disease between 2011 and 2016. This means that the Isle of Man appears to be experiencing levels of mesothelioma in line with those in the UK.

For victims, there are three things that make it harder to obtain compensation than in the UK.

Statutory Compensation Scheme

In the UK there are several statutory compensation schemes available to victims. These compensation schemes cover claims against employers who cannot now be traced and claims where the precise manner of exposure cannot be specified - provided that it has taken place in the UK. It is possible that people contracting the disease on the Isle of Man may have caught it in the UK (and thus be able to benefit from schemes like the UK Diffuse Mesothelioma Scheme 2008) but this will not always be the case. These schemes also cover claims by the self-employed or by relatives indirectly exposed to asbestos e.g. by washing the clothes of somebody who worked with asbestos.

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In the Isle of Man, whilst victims may qualify for Industrial Injuries benefit (£168 p/w), there appear to be no schemes providing lump sum benefits - which means that for compensation to be payable here, a claim would need to be successfully brought against a former employer. Because the disease starts so long after the exposure, it can be difficult to prove where a victim came into contact with asbestos. Moreover, many ex-employers will no longer be in existence when symptoms develop and tracing may be difficult. Others will contract the disease while being self-employed. The lack of a compensation scheme means that some victims will likely be without redress.

Proving Causation

If a victim knows where he came into contact with asbestos then a claim against a former employer or even the occupier of a building containing asbestos might be considered. Although making a claim for compensation against an ex-employer may be relatively straight forward if the victim worked for his whole career for one employer where asbestos was known to be present, it may be much harder if the victim might have worked with asbestos in two or more places.

Would such a victim have to prove that it was a particular exposure to asbestos which caused the disease? If so, that could be very difficult. However, the common law in England (and almost certainly in the Island also) gives judgment against an employer where, by a breach of duty, the employer has materially

increased the risk that the employee would contract mesothelioma (*Barker v Corus* [2006] UK HL20). A victim would not therefore have to prove which exposure caused the disease – that may well be impossible – simply that he had been exposed to the risk.

There is a problem, however, regarding damages. The common law holds that liability should be attributed or shared out according to the defendant's relative degree of contribution to the risk. That would probably be measured by the duration and intensity of exposure involved.

What this means is that, for example, consider a victim who worked for two employers, one of whom no longer existed but who had both wrongly exposed the former employee to asbestos for the same length of time and increased his risk of contracting the disease. He could sue the one remaining employer but might only recover 50% of what he would have recovered. As Lord Hoffman said, "The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether but he should not be liable for more than the damage [ie the increased risk of contracting the disease] which he caused..."

Immediately following *Barker v Corus* in the UK, the law was changed by statute (Compensation Act 2006) so that every employer who has wrongly exposed an employee to asbestos is liable for all the loss caused and cannot reduce that liability by reference to any other exposure. The employer might be able to seek contribution from anyone else that it can

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find to be liable but that does not affect the compensation awarded to the claimant. This means that, in the above example, the victim would be able to claim 100% of his loss from the one surviving employer notwithstanding that he also had exposure elsewhere.

This change has not been effected in the Isle of Man. Whilst it may be the case that the common law is fairer to defendants or their insurers, English law is more favourable to victims in this respect.

Permission to Defend

Following on from the Compensation Act, the Courts in England and Wales issued a Practice Direction in 2008 aiming to make it easier for victims of mesothelioma specifically to bring civil claims and, in the case of a living victim (rather than cases brought by their families after their death) for cases to be dealt with on an urgent basis.

The claimant should file evidence about liability at the outset setting out the history of the exposure. At the first case management conference, the defendant will normally now be expected to show cause why judgment on liability should not be entered against it and why a standard interim payment on account of damages should not be made. If the defendant fails to show cause then judgment will normally be entered on liability and a standard interim payment ordered.

This special procedure does not shut out defendants from defending but rather imposes

upon them an initial hurdle to overcome to show that they have a reasonable prospect of defending. It is designed to weed out defences filed denying liability purely on tactical grounds.

Whilst a claimant in the Isle of Man could make application for summary judgment or for an interim payment, the onus would be on the claimant to do so and the hurdle would be higher because there is no equivalent of the English Practice Direction in the Isle of Man. This is a further disadvantage for Manx claimants.

Concluding Remarks

Even if the number of people affected is small, the above differences between Manx and English law might have a significant effect upon victims. As well as the prevention of asbestos exposure, the Government should consider amending the law to assist victims to obtain compensation if they contract this horrible disease.

Contact Local Officer, Eric Holmes (eric.holmes@unitetheunion.org) for more details.

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This article does not constitute medical or legal advice; specialist advice should be sought in each case.




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