



Current issues in UK asbestos

Sarah MacDonnell and Richard Bulmer
discuss the latest developments
in mesothelioma claims.

Insurers are seeing higher than expected increases in reported numbers of mesothelioma claims. At the same time, continuing changes in the legal and statutory environment make the job of estimating asbestos-related liabilities even more uncertain.

Increases in mesothelioma claims

Mesothelioma is the most serious type of asbestos-related disease. It is a type of cancer affecting the chest or abdomen. Mesothelioma is caused by (what can be very low) exposure to asbestos, and claimants are usually those who have worked with asbestos. After exposure, the onset of the disease takes around 30 to 50 years. This long latency period contributed to the late recognition of the link between asbestos and mesothelioma. The use of asbestos in

the UK began in the late 1800s, however the link between cancer and asbestos was only made in the 1940s and 1950s and asbestos continued to be used until the 1980s.

Future estimates of the number of mesothelioma claims are made by reference to the Peto and Health and Safety Executive (HSE) models. Put simply, these models analyse the number of deaths due to mesothelioma each year and look at how these relate to exposure to asbestos (taking into account certain factors such as those influencing the latency of the disease and the age of the claimant) in an attempt to enable the future pattern of deaths to be predicted.

As highlighted in Figure 1, the latest published models suggest that the asbestos peak is nearing (that is, that the number of deaths each year should be starting to level off, before decreasing sometime during the period 2011 to 2015). However,

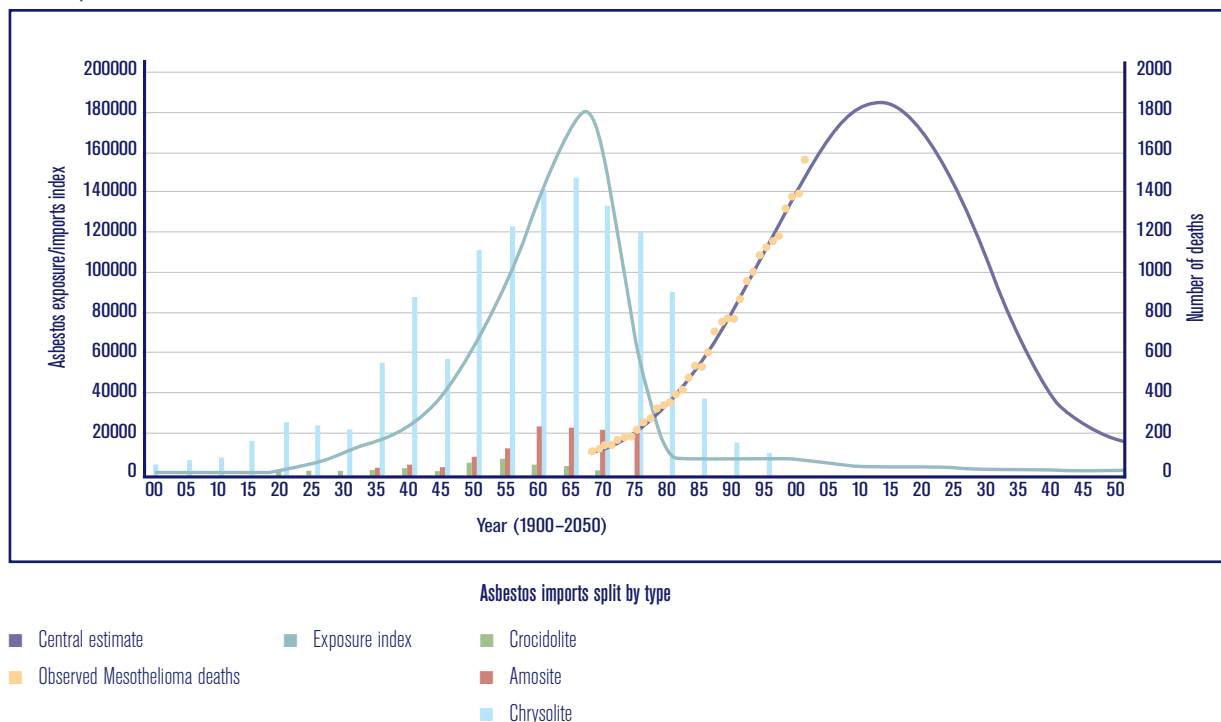
insurers are continuing to see numbers of mesothelioma claims increase at an alarming rate.

So what is causing this unexpected increase in the number of mesothelioma claims – have Professor Peto and the HSE got it wrong? It appears that the primary cause is likely to be due to the fact that more individuals diagnosed with



Richard Bulmer

Figure 1 | HSE model of mesothelioma in Britain



Source: HSE, Mesothelioma mortality in Great Britain: Estimating the future burden, December 2003



the disease are now claiming. The Institute of Actuaries UK Asbestos Working Party has estimated that the proportion of mesothelioma sufferers who are making claims has increased by over 50 per cent (from 36 per cent to 56 per cent between 2003 and 2007).

The major reason for this increase in the claim rate is most likely that an individual is now more likely to take legal action due to a greater awareness of the ability to obtain compensation and better access to information, though there are other factors which may have contributed to an increase in the rate. These include:

- Improved diagnostic techniques mean more claimants are being diagnosed whilst still alive (it is not uncommon for diagnosis to be made after death or even after a death certificate has been issued). The success rate of claimants is seen to be higher when the diagnosis occurs before death.
- An increase in the insurance industry's exposure to asbestos over time. Employers' Liability cover became compulsory in 1972 and many nationalised industries have been privatised, meaning a larger proportion of the population are increasingly covered by the insurance industry.
- Individual claims are being shared amongst more insurers (in other words, one death may appear as numerous claims).

The HSE is understood to be updating and revising its projections, which may include changes to its methodologies. In addition, Professor Peto is in the process of publishing his latest study. One theory he is said to be considering is that brown (amosite) asbestos has a greater influence on mesothelioma than previously assumed. The effect of this would be for the model to predict a significantly higher and later peak of notifications (the Institute of Actuaries UK Asbestos Working Party Update 2008 paper suggests Professor Peto is looking at a peak 20 per cent higher and five years later than the current HSE projections). This would imply that substantial increases in mesothelioma reserves could be necessary for some insurers.

Uncertainties in the legal and statutory environments

Mesothelioma

A test case was ordered by the English High Court in 2008 which sought to clarify the trigger point for mesothelioma claims on employer's liability policies. Historically, insurance market practice has been for policies to be triggered by the period of exposure to asbestos. The test case questioned whether the trigger should instead be the injury (defined as the first malignant cell mutation). In mesothelioma sufferers, the injury tends to occur approximately 10 years prior to the onset of symptoms. This contrasts with the 30 to 50 year latency period between initial exposure to asbestos and manifestation of the disease.

The impact on the industry would be that mesothelioma claims would start to be linked back to employers' liability policies in force approximately 10 years before the claim is reported, as opposed to the typically 40 years prior as is current practice. This change could leave gaps in coverage for some claimants, not to mention upheaval as insurers examine specific policy wordings, revisit individual's employment histories, and reassess thousands of claims as decades of accepted practice are turned on their head.

This is the latest in a string of litigation surrounding mesothelioma liabilities, and the Government has intervened to legislate on this issue in the past. In the 'Fairchild' case of 2002, the House of Lords ruled that mesothelioma victims were able to seek full compensation without proving which employer caused the illness. This was overturned in 2006 when the Law Lords further ruled that workers exposed to asbestos with several employers must seek a proportionate share of compensation from each employer. In response to this, the UK Government introduced an amendment to the Compensation Act 2006 to class all former employers as sharing overall responsibility, as the fear was that there would be gaps in cover due to insolvent, untraceable or uninsured employers.

The test case was decided in November 2008 in favour of the status quo; the trigger for mesothelioma claims is the period

Peto and HSE mesothelioma model publications

- 1995: 'Continuing increase in mesothelioma mortality in Britain.' Peto et al – produced by the HSE and the institute of Cancer Research and co-authored by John Hodgson of the HSE.
- 1999: 'The European mesothelioma epidemic.' Peto et al.
- 2003: 'Mesothelioma mortality in Great Britain: Estimating the future burden.' HSE paper.
- 2009: New research expected to be published by Professor Peto. Updated projection model from the HSE anticipated.

of exposure to asbestos. However, it is likely that the decision will be appealed and it remains possible that the Government will intervene in the future, so the outcome remains uncertain.

Asymptomatic diseases as admissible claims

Pleural plaques is a condition that can be diagnosed by X-ray or CT scan. It is, in fact, symptomless. However, pleural plaques are thought to develop only from exposure to asbestos, and so in the past, claimants have been compensated for the anxiety of potentially developing a more serious asbestos-related disease in the future.

The ability to claim for pleural plaques has been placed into question. In October 2007, the House of Lords upheld the 2006 ruling of the Court of Appeal which found that pleural plaques are not an 'actionable damage' and therefore should not result in a claim payment.

The Scottish and UK Governments have since become involved. The Scottish Assembly passed the Damages (Asbestos related conditions) (Scotland) Bill in March 2009. This overturns the House of Lords ruling, meaning that pleural plaques claims are again liable in Scotland. However, there have been objections to the Bill; some insurers are seeking a judicial review on the basis that it would breach European Law.

It also remains possible that the UK Parliament will legislate to overturn this ruling. The Ministry of Justice published a consultation paper in July 2008 which proposes a number of alternative actions and assesses their costs and benefits:

- Option 1 – do nothing.
- Option 2 – increase support, help and information for people with pleural plaques.
- Option 3 – change the law of negligence so that those diagnosed with pleural plaques as a result of negligent exposure to asbestos would be able to claim compensation through the civil courts in the same way as was the case prior to the Court of Appeal decision.
- Option 4 – a statutory no fault scheme to provide a payment to those who could show that they had been diagnosed with pleural plaques within a fixed period before the date of the House of Lords decision in October 2007 and had not already received compensation. (The no fault element would mean that an applicant to the scheme would not have to prove negligence.)
- Option 5 – a statutory no fault scheme to provide a payment to those people as in Option 4 and also to those diagnosed with pleural plaques following the judgment or in the future.

The closing date for the consultation was 1 October 2008 and the Government is expected to announce its decision imminently.

On the back of the House of Lords decision that pleural plaques should not result in a claim payment, a series of court cases have started in January 2009 which will determine if cases of asbestosis, for which there are no symptoms, are compensable.

Summary

2009 will see a number of outcomes that could alter approaches to, and the quantum of, UK asbestos liability reserving. The HSE and Peto model updates, the ongoing question of the mesothelioma trigger, decisions of the UK and Scottish Governments on pleural plaques and further developments in asymptomatic claims all mean that it is an area that those with an interest in asbestos liabilities will be watching closely.

For more information, contact:

Sarah MacDonnell

+ 44 (0) 1737 274550

sarah.macdonnell@watsonwyatt.com

Richard Bulmer

+ 44 (0) 1737 274135

richard.bulmer@watsonwyatt.com