

Subject: Compensation Bill – new Clauses (re Asbestosis)

Note of key matters:

Attendees:

Presenters	APPG	Others
Justin Jacobs, Head of Liability, Motor & Risk Pricing at the ABI Graham Gibson, Director of Claims at Groupama Tom Jones of Thompsons Solicitors	John Greenway Baroness Turner Lord Brookman Lord Davies Lord Sheikh	David Worsfold David Morey (PwC)

Background:

The meeting was held to discuss different views on certain of the new Clauses of the Compensation Bill – relevant Clauses attached to this note (extracted from Notices of Amendments given up to and including Thursday 13th July 2006).

During the meeting, it was noted that:

- There are some 2,000 asbestosis related deaths per annum
- It can take up to 40 years for asbestosis to manifest itself
- Typically, sufferers are over 50, although have been known as young as 25
- The average life expectancy for mesothelioma after diagnosis is 12 to 18 months
- Cases where exposure is before 1955 tend not to succeed
- The average settlement is £150,000

1. Justin Jacobs, ABI

Justin indicated that ABI felt that the new clauses were a knee-jerk reaction to change the law following the Barker case and a missed opportunity to speed up the claims process.

At present, the claims process takes some 2 years to reach settlement, by which time the sufferer may have died (as average life expectancy after diagnosis is 18 months).

Specifically, the ABI is looking for:

- A faster, more efficient claims system
- A simpler process for claims notification
- A menu based tariff system for claims determination (facilitating a much more efficient settlement process; cf the industrial deafness settlement tariff system)

ABI feels that the court based system creates further delays and the new Clauses do not deal with the need for improved claims notification and settlement processes.

On the Clauses, ABI is looking for:

- Confirmation that exposure is defined in terms of 'workplace'
- A need for claimants to provide a full workplace exposure history (wherever practicable), in order to help establish liability

- Legislative change to enable lead insurers to recover from the Financial Services Compensation Scheme amounts payable to claimants in the event of sub insurers that have gone into insolvency
- Clarity on apportionment of liability – traditional ‘time on risk’ basis is appropriate and workable (no need to adopt new measures such as ‘intensity of exposure’, as referred to the Barker case)

2. Graham Gibson, Groupama

Whilst Groupama is not specifically impacted by asbestosis claims, it feels that there is a danger that a quick and dirty legislative change brought about through these new Clauses could bring about a period of extended and costly litigation. It feels that there has been insufficient time for proper assessment of the amendments and that the wordings need to be as watertight as possible to avoid the possibility of protracted litigation.

Groupama believes the industry needs a more formal framework to specify what the Government is seeking to achieve and that the current Clauses are too open to lead to clarity.

Although the wording needs careful examination, as an example the following were of concern:

- ‘has contracted’ – this wording is not specific as to how contracted; whether contracted in or out of the workplace; the impact on partners of people exposed to asbestosis (e.g. a wife washing the clothes of someone exposed to asbestosis)
- ‘responsible class’ – not defined; how does this relate to insurers, Government, self insured parties etc and how does it deal with bodies not insured at the time (i.e. before such insurance became obligatory).

3. Tom Jones, Thompsons

By way of background, Tom indicated that Thompsons deals with significant numbers of asbestosis cases and acts for Trade Unions in respect of these.

He noted that by early 1900s, asbestos was recognised as a known killer. By the 1950s/60s/70s, there was no excuse not to know of the dangers of asbestos and he believes insurers should face up to their exposures arising from this time onwards.

A key feature of asbestosis related disease is that one can not prove who gave the fatal fibre. Many of those affected when asbestos use was at its height may have been exposed whilst employed by a variety of employers. Each case has to be determined on its merits by solicitors with specialist expertise in this field.

As regards the need for a faster and fairer notification and settlement system, Tom believes the current system, if all parties operate within it properly, is fine. He believes insurers, in their changing operational practices (e.g. claims inspectors replaced by call centres), are leading to cases taking longer, needless litigation and greater costs.

However, the current position is now confused by two conflicting judgments – the Fairchild case and the Barker case.

On the new Clauses, Tom believes that whilst not necessarily perfect, the wordings are workable and no individual wordings are fatal to the substance of the objectives. In this regard, a sensible approach can continue to be adopted – in essence, establishing whether a duty of care existed, whether there was a breach of this duty and determining a compensation amount. In any event, the Courts can look at the intent of Parliament.

On the 'responsible class' point, Tom believes that as this is not relevant to the claimant, it should be dealt with behind the scenes.

Regarding the points made by the ABI, Tom noted that:

- No need to specify 'workplace' as it was necessary to prove breach of duty anyway
- No specific concerns regarding the request for exposure history information
- Content not to move to 'intensity of exposure; accepts 'time on risk' basis.

4. APPG's view

JG noted that at this stage it was unlikely that the Clauses can be dropped and that as it appeared that there was no major difference between the views of the insurance industry and the legal profession on the new Clauses themselves, the most beneficial action was for each side to submit their proposed suggestions for any changes to the wordings. In reality, given the timings, it is likely that the amended wordings will be adopted on Monday, but are subject to review in the Lords in Autumn.

5. New Clause 13

New Clause 13 was subsequently published by the Government and added to the Bill during Report Stage on 17 July. Many of the concerns aired at this briefing appear to have been addressed. .

During debate outstanding concerns about compensation and timing were raised by the APPG Chairman John Greenway and others.

The Bill now returns to the Lords (in the Autumn) where there will be further opportunity to raise any further concerns.

DL Morey

18 July 2006

Mesothelioma: damages

Bridget Prentice

NC13

* To move the following Clause:—

‘(1) This section applies where—

(a) a person (“the responsible person”) has negligently or in breach of statutory duty caused or permitted another person (“the victim”) to be exposed to asbestos,

(b) the victim has contracted mesothelioma as a result of exposure to asbestos,

(c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and

(d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with damage caused to the victim by the disease (whether by reason of having materially increased a risk or for any other reason).

(2) The responsible person shall be liable—

(a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos—

(i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or

(ii) by the responsible person in circumstances in which he has no liability in tort), and

(b) jointly and severally with any other responsible person.

(3) Subsection (2) does not prevent—

(a) one responsible person from claiming a contribution from another, or

(b) a finding of contributory negligence.

(4) In determining the extent of contributions of different responsible persons in accordance with subsection (3)(a), a court shall have regard to the relative lengths of the periods of exposure for which each was responsible; but this subsection shall not apply—

(a) if or to the extent that responsible persons agree to apportion responsibility amongst themselves on some other basis, or

(b) if or to the extent that the court thinks that another basis for determining contributions is more appropriate in the circumstances of a particular case.

(5) In subsection (1) the reference to causing or permitting a person to be exposed to asbestos includes a reference to failing to protect a person from exposure to asbestos.

(6) In the application of this section to Scotland—

(a) a reference to tort shall be taken as a reference to delict, and

(b) a reference to a court shall be taken to include a reference to a jury.

(7) The Treasury may make regulations about the provision of compensation to a responsible person where—

(a) he claims, or would claim, a contribution from another responsible person in accordance with subsection (3)(a), but

(b) he is unable or likely to be unable to obtain the contribution, because an insurer of the other responsible person is unable or likely to be unable to satisfy the claim for a contribution.

(8) The regulations may, in particular—

(a) replicate or apply (with or without modification) a provision of the Financial Services Compensation Scheme;

(b) replicate or apply (with or without modification) a transitional compensation provision;

(c) provide for a specified person to assess and pay compensation;

(d) provide for expenses incurred (including the payment of compensation) to be met out of levies collected in accordance with section 213(3)(b) of the Financial Services and Markets Act 2000 (c. 8) (the Financial Services Compensation Scheme);

(e) modify the effect of a transitional compensation provision;

(f) enable the Financial Services Authority to amend the Financial Services Compensation Scheme;

(g) modify the Financial Services and Markets Act 2000 in its application to an amendment pursuant to paragraph (f);

(h) make, or require the making of, provision for the making of a claim by a responsible person for compensation whether or not he has already satisfied claims in tort against him;

(i) make, or require the making of, provision which has effect in relation to claims for contributions made on or after the date on which this Act is passed.

(9) Provision made by virtue of subsection (8)(a) shall cease to have effect when the Financial Services Compensation Scheme is amended by the Financial Services Authority by virtue of subsection (8)(f).

(10) In subsections (7) and (8)—

(a) a reference to a responsible person includes a reference to an insurer of a responsible person, and

(b) “transitional compensation provision” means a provision of an enactment which is made under the Financial Services and Markets Act 2000 and—

(i) preserves the effect of the Policyholders Protection Act 1975 (c. 75),
or

(ii) applies the Financial Services Compensation Scheme in relation to matters arising before its establishment.

(11) Regulations under subsection (7)—

(a) may include consequential or incidental provision,

(b) may make provision which has effect generally or only in relation to specified cases or circumstances,

(c) may make different provision for different cases or circumstances,

(d) shall be made by statutory instrument, and

(e) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.’.