ROHAN ATHERTON, VIC

Asbestos litigation: *Will it survive?*

Asbestos litigation has escaped relatively unscathed from recent changes to public and product liability law. Many of the changes specifically exclude claims for asbestos-related conditions in respect of limitation periods and threshold requirements. The reasoning behind this is complicated, but in many cases these injuries were contracted in the course of employment, and accordingly there is an overlap with workers compensation laws. Of equal importance is government reluctance to make changes to the law in an area where many people suffer from terminal conditions.

Rohan Atherton is a Consultant Lawyer to Ryan Carlisle Thomas in Melbourne. **PHONE** (03) 9240 1414
EMAIL ratherton@rct-law.com.au

What does the future hold for asbestos claims? With most scientific material indicating that the number of people with asbestos-related conditions will peak within the next 15 years, will the current system of common law claims remain in place? To gain some insight into this, it is necessary to look at the actions taking place in other jurisdictions and the attitude to change shown by the insurance industry and plaintiff lawyers.

UNITED KINGDOM

The United Kingdom decision of *Fairchild v Glenhaven Funeral Services Ltd*,[1] which was latter overturned on appeal, significantly weakened the position of plaintiffs. In that case, the plaintiff contracted mesothelioma as a result of exposure to

asbestos with two separate employers.

Justice Curtis declared himself unable to apportion liability for Mr Fairchild's premature death. Although two defendants admitted having exposed the former joiner to substantial quantities of lagging-derived asbestos containing debris and dust, the judge found it:

'...impossible to decide from which source of exposure came the single asbestos fibre, or if it be the case, the fibres, responsible for the malignant transformation of the pleural cell. It follows the exposure causing the disease could be at either of the named premises or in combination – and none are more likely than the other.'

The decision's effect was that a plaintiff could not succeed in a claim for damages if he was exposed to asbestos with more than one employer, as it could not be shown which employment period was responsible for the infliction of damage.

On appeal to the House of Lords, the Law Lords considered matters of public policy and justice over 'exclusive criterion of causation' in cases where there were multiple guilty parties.

Lord Bingham concluded that: 'There is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.'

Before the House of Lords decision, great uncertainty surrounded the future of asbestos litigation in the United Kingdom. The insurers had the upper hand and proposed a claim-based scheme, which would effectively end all future asbestos litigation.

The over enthusiasm of insurers to maximise their profits led to the rejection of the scheme by plaintiff lawyers. The scheme proposed compensation at unacceptably low levels. It set low awards for damages, and compensation was to be paid on a 'proportionate time-exposed basis', further decreasing the size of awards.

Furthermore, the burden of proof would remain on claimants to show that they were negligently exposed to asbestos. The proposal also contained no indication as to who would assess damages in the court's absence. The implication was that it would somehow be left to insurers to assess damages in each case.

The insurance fraternity hoped it could exploit this advantage and bully plaintiff lawyers into accepting the terms on the basis that if the House of Lords appeal did not succeed, they would be left with nothing at all.

History shows that the House of Lords found in favour of ▶

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the plaintiffs, and the one chance that the insurers had to implement a new system was lost due to their unwillingness to act reasonably. The common law system therefore continues to operate in the United Kingdom.

UNITED STATES

In the United States there is currently a perception that the country is being gripped by an 'asbestos litigation crisis'. Over 60 companies have declared bankruptcy because of asbestos claims, with more than 20 of those bankruptcies having occurred in the past three years.

Leading actuarial firms predict that total losses due to asbestos liability in the United States will rise from US$200 billion to US$275 billion, with a large portion of that total (between US$78 billion and US$175 billion) not covered by insurance. Further, a recent government commissioned report estimates that asbestos-related bankruptcies have led to as many as 60,000 lost jobs.

In response to this crisis, Senator Orin Hatch, a Republican from Utah, has pushed a Bill,[2] called the Fairness In Asbestos Injury Resolution Act (FAIR), onto the Senate floor. The Bill supports the abolition of litigation for asbestos claims and in its place the development of a US$108 billion dollar fund to compensate United States victims of asbestos disease.

If it is passed, the Bill will not only provide relief to insurers and companies with asbestos liabilities, but according to its supporters will also result in a fairer compensation system for victims.

David Austern, president of the Claims Resolution Corporation, said in his testimony before the Senate Committee Hearing[3] that:

'The system is unfair to victims, and is plagued by fortuity. Whether victims receive compensation at all and, if so, how much they receive depends on the fortuity of where and when they file claims, who the defendants happen to be, whether those defendants are solvent at the time the claims are filed, and the leverage and skill of the trial lawyer. The amount of victim awards diverge wildly - some victims receive grand slam awards, while others receive little or nothing. Sadly, some victims die before their case is heard. While this fortuitous system creates some windfalls, it leaves the unlucky without compensation, and it is only getting worse. In order for victims to be compensated, they need to be able to look to solvent companies for resources.

Mr Austern also said that a major problem with the current system was the cost of litigation, which saw plaintiffs paying legal costs of up to 60 cents in each dollar. In his view, the FAIR Bill would significantly reduce transaction costs and attorneys' fees and create more money in the system to compensate victims.

The main features of FAIR Bill are as follows:

- 10 categories of injury, with sub-categories applying to some levels to take account of the varying degrees of impairment and whether cigarette smoke is a contributing factor. Compensation is then awarded in accordance with the classification of injury.
- Strict medical criteria for each condition.
- Medical examination by a certified practitioner as a means of quality control.
- Significant occupational exposure to asbestos for asbestosis and lung cancer claims.

The Bill has met opposition from plaintiff lawyers and members of the insurance industry. One major concern is whether the proposed US$108 billion is sufficient to meet the claims, and if not, what will happen to the national scheme? Plaintiff lawyers believe that the scheme is grossly under-funded and that the estimate of US$108 billion is simply not realistic to ensure the continued viability of the scheme. Without proper funding, the scheme will eventually have insufficient funds to meet claims meaning plaintiffs will miss out on fair compensation for their injuries.

The insurers, not surprisingly, believe that their required level of contribution to the scheme of US$45 billion is too great. Their position is that companies with asbestos liabilities should contribute a larger share to the fund. The insurers are also concerned that their future exposure to liabilities may exceed the estimated US$108 billion, and that they may be called upon at a later date to contribute more funds to the scheme.

From the plaintiff's point of view, there is a lot of talk about damages paid under the scheme being insufficient (US$1 million for a mesothelioma claim) and about the need to preserve

plaintiffs' rights to have access to the court system. Not surprisingly, no mention has been made of the economic impact of the FAIR Bill on plaintiff lawyers who operate on a contingency fee basis.

Recent reports from the United States indicate that debate on the Bill will now be held over until next year as Senator Hatch tries to broker a deal between insurers and companies with asbestos liabilities on contribution to the scheme. Even if such a deal can be struck, opposition is growing and it looks as though it will be defeated.

AUSTRALIA

Contrary to comments from insurers, Australia remains relatively free of any 'litigation crisis' such as described in the United States. This is despite the fact that on a per capita basis Australia has one of the highest numbers of asbestos-related injuries in the world.

However, in New South Wales there are rumblings of moves being made to limit access to the state compensation system. Rumours abound that the Dust Diseases Tribunal will soon hear only those cases where the plaintiff was exposed to asbestos in New South Wales. This is to prevent claimants from other states having their cases heard by the DDT, sometimes with the tribunal even sitting in their state. The desirability of the proposed change is debatable. Surely plaintiffs suffering from terminal conditions are entitled to seek legal representation from lawyers experienced in the area and capable of providing highest calibre legal advice, and before a tribunal specifically established to hear cases involving asbestos claims.

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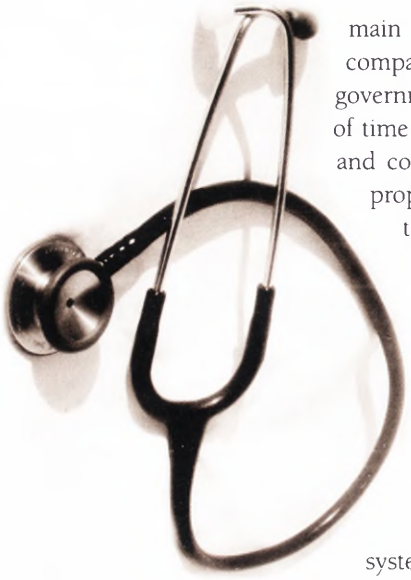
There are also unconfirmed reports of government investigations into the viability of a compensation scheme similar to that proposed by FAIR. The scant information available on this issue suggests that there would be a sliding scale of general damages compensation based on age and type of condition, with fixed allowances for other heads of damage and future care costs. In return for this scheme, plaintiffs would lose their rights to sue employers and manufacturers.

If the FAIR experience teaches us anything, it is that there are a lot of barriers to the implementation of such a system, the ▶



main one being money. Insurers, companies, and state and federal governments could easily spend a lot of time and money holding inquiries and commissioning reports into the proposals for the system. But at the end of it all, will insurers and governments be prepared to commit the necessary resources to such a scheme to allow it to operate? Or will they argue about how much each should contribute until the system falls apart?

Also at issue is whether the system would offer sufficient compensation to injured people to allow interested parties, such as plaintiff lawyers, to concede that it is a better way than litigation.

Such a system would require several key features in order to operate properly. These include:

- Establishment of a national claims administration body, comprised of insurance, medical and legal personnel experienced in asbestos claims management.
- No requirement for product identification by plaintiffs, or for companies to be still in existence in order for an injured person to be entitled to compensation.
- Medical criteria for classification of claims determined with precision.
- Lawyers to assist plaintiffs in the claims process to ensure that claims are managed properly and in a timely manner, and that compensation is paid appropriately.
- The scale of damages to reflect the amounts being paid by the courts in compensation for these injuries.
- Fixed reductions would apply where contributing factors such as cigarette smoking are relevant.
- Priority in claims processing and funds allocation to be directed to the most serious cases, namely mesothelioma and lung cancer cases.
- The availability of arbitration to resolve disputes.

The funds required to establish and operate a national system are of such an amount that it is unlikely that insurers and governments would commit the necessary resources to make this system a reality. It therefore appears likely that while there may be some tinkering with the current system in relation to the forum for hearing claims, asbestos litigation will not undergo significant change. PL

Endnotes: 1 [2002] 3 All ER 305. 2 S1125. 3 22 September 2002.