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MARSH

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Adviser

Claims update - legal changes that may affect you

Several recent legal developments have implications for insurance claims. This document sets out the changes and suggest actions businesses should consider. Marsh has a dedicated claims team who will be pleased to assist you with any of the issues raised.

- The Damages (Asbestos - related Conditions) (Scotland) Bill has passed its first stage and is expected to succeed into law, thereby enabling damages to be paid for 'pleural plaques.' This could result in a rise in claims and costs. Westminster may now issue a consultation paper on similar legislation for England and Wales.
- The Court of Appeal has made a judgment which may enable more stress claims to succeed. Specifically, the Court of Appeal has made changes to the tests that claimants must overcome in relation to reasonable foreseeability, breach and causation. The Court of Appeal has also ended the previous rule relating to apportionment of the claimant's damages between tortious and non-tortious claims.
- A recent High Court judgment has reaffirmed that Employers' Liability (EL) mesothelioma claims are triggered by the cause of the claim – i.e. when exposed to asbestos. This decision provides employers and the victims of asbestos poisoning with some clarity over who pays for asbestos-related claims. Media focus on this case highlights asbestos as a source of potential liability for many employers, increasing the risk of more claims.

Latest developments with 'pleural plaques' legislation

In October 2007 in the case of Johnston -v- NEI (also known as The Rothwell Case), the House of Lords unanimously upheld the previous decision in the Court of Appeal that pleural plaques did not constitute harmful bodily injury and therefore was not a compensatable condition.

It was only a matter of weeks before the Scottish Parliament took action. On 6th February, the Scottish Parliament issued a consultation paper, relating not only to plaques, but also stating that asymptomatic asbestosis and pleural thickening should also continue to be compensatable conditions in Scotland.

Following the consultation period, The Damages (Asbestos - related Conditions) (Scotland) Bill was introduced to the Scottish Parliament on 23rd June and published the next day, stating that asbestos related pleural plaques **are** a personal injury that is **not** negligible, meaning that pleural plaques sufferers can recover damages.

It also states that those seeking damages for asbestos related pleural thickening or asymptomatic asbestosis do not need to prove that it has caused, is causing or is likely to cause physical problems to succeed in their claims, although damages will be increased if such physical problems are proved. The provisions of the Bill will be retrospective, so will take effect from 17 October 2007.

Latest development in Scotland

Following the Bill's first stage debate, a vote was put to Parliament on 5th November 2008 and MSPs voted in its favour. The legislative process in continuing, with an acceptance that it has majority Parliamentary support.

The expected impact

Notwithstanding the above, the Association of British Insurers (ABI) has criticised the process, pointing out that the annual costs could be anywhere between £76m and £607m and there would be a likely knock on effect on employers' liability premiums. Also, a group of insurers (Zurich, Norwich Union, RSA and AXA) have indicated that they will seek a judicial review to prevent the legislation. The legal challenge will be mounted should the Bill pass as expected, and follows legal advice obtained suggesting that it beaches EU law.

On the face of it, such contradictory stances between Scottish jurisdiction and that of the rest of the British Isles can only lead to 'forum shopping', where claimant's with minimal exposure in Scotland, and much greater in England and / or Wales will seek to raise their claims in Scotland. Similarly claimants with minimal exposure by with an employer registered in Scotland will do likewise.

The position in England and Wales

It had been thought that there was no political appetite to counter the Lords' ruling in England and Wales. However, lobbying began in early 2008 to have the UK government look at changing the Lords' decision. A Private Members' Debate on the effects of the House of Lords Ruling followed on 4th June 2008 and the introduction of the Scottish Bill has created a push for Westminster to publish its planned consultation paper on the matter. Should the Scottish legislation survive any legal challenge, there now looks to be a real possibility that Westminster will follow the Scottish position.

The outcome is awaited with interest. In the meantime, businesses may contact the Marsh claims team for more information and assistance.

Landmark judgment on stress claims

The Court of Appeal has upheld the original decision in Dickins v O2 plc [2008] EWCA Civ 1144 which may enable more stress claims to succeed.

Dickins worked for O2. She was promoted to a position for which she did not have the necessary qualifications, although appropriate training and support was promised. The help was never provided and as a result, the claimant found her new role to be very stressful. She complained about the stress of her job and asked if she could be moved to a less stressful job, but as there were no vacancies immediately available she was told that this would be reviewed in 3 months time.

A little later Dickins told her line manager that she did not know how long she could keep going before she would become ill and requested a 6 month sabbatical. Her employer did not grant this and advised her to access the in-house counseling service. She did not use this as she was already undergoing private counselling.

Dickins repeated her concerns a month later in her personal development review and again asked for a 6 month break. Her employer referred her to occupational health; however, before the occupational health appointment took place she suffered a breakdown.

The court judgement

The court at first instance found the claimant had lost the chance of not descending so deeply into illness due to the defendant's failure to properly refer her to the occupational health department AND because they did not send her home once her condition was known to them, even though she had not been signed off by her GP.

Given the facts listed above, the Court of Appeal agreed that the claimant's stressful condition had been known to the defendant and, as such, her injury was reasonably foreseeable and had been caused by their failure to take action once they were on warning. The court decided that even though O2 referred Dickins to their helpline for confidential counselling, this was not adequate to discharge their duty.

The implications

The previous position was that an employer would only be liable to pay for that degree of psychiatric injury caused by the occupational stress that the employee had suffered, and not for any other part of the injury the employee had suffered which was caused by other factors.

The decision in Dickins is that, should a defendant's negligence make a material contribution to the injury, the claimant will recover 100% damages. There will be no apportionment made for any part of the claimant's injury that may have been contributed to by any stressful features of private life. Also, there will be no reduction in damages for any contribution to the illness made by any non-tortious claims the claimant makes.

Action points

- The ruling in Dickins will arguably make it easier for employees to successfully make a claim against their employer for psychiatric injuries caused by occupational stress. Therefore both employers and employees should take note of the changes to the legal tests outlined in Dickins.
- In particular, employees suffering stress and contemplating making a claim against their employer would be advised to notify their employer of their problems as soon as possible in order to show that any future injuries they suffer could have been anticipated.
- Equally, employers are advised to review their policies in relation to referring employees to confidential counselling, helplines or occupational health when they are notified that an employee is suffering from stress.
- If an employee is suffering from severe stress, employers should also consider whether further managerial intervention is necessary (for example, by referring the employee urgently to occupational health or making the employee stop working until further investigations are completed).

How Marsh can help

For more information and assistance with any of the issues outlined in this Adviser, please contact your usual Marsh representative or Marsh claims team contact.

Employers' Liability trigger litigation

On 21 November 2008 the High Court found against those insurers who had refused indemnity in respect of Employers' Liability (EL) mesothelioma claims. The High Court validated the long standing market practice that EL policy cover is triggered by the date of inhalation of asbestos (when the injury is 'caused') and not by the date the condition manifests itself.

This is not the first time asbestos related cases have reached the High Court. The 2006 Bolton case concerned a Public Liability (PL) claim and determined that a mesothelioma victim suffered an injury for the first time when the tumour started to develop (when the injury 'occurred' or was 'sustained' or 'contracted') rather than when exposed to the asbestos which caused it. However, this case created a grey area that prompted some insurers to refuse to pay out on many EL asbestos related cases, if their respective policies provided cover for injury 'occurring' or 'sustained' during the policy period, as opposed to injury 'caused'.

The judge in this case stated that the EL wordings were unclear and open to interpretation. However, in the past the insurance market has always assumed EL policies are triggered by the original cause of the injury or disease – in this case when exposed to asbestos. The High Court judge found that EL policies should continue to respond in this way.

While the judgement is good news for insured companies it is bad news for uninsured organisations or those who do not have access or information on the insurance purchased.

For these companies, in the absence of evidence of policy cover, the confirmation of the causal trigger for liability means that they will need to meet the cost of these claims.

The implications

This judgement does not end confusion around asbestos liabilities, especially as the insurers are planning to appeal. The final resolution will determine when the claims attach and whether or not it is the organisation or a solvent insurer that pays. Until then, the additional media attention on the latest court case will undoubtedly refocus minds on asbestos as a source of potential liability. This may increase claims activity and the size of the asbestos issue generally.

Issues to consider

Businesses should ensure that their insurance history is known and therefore the impact of any change in legislation is understood. All business should review whether or not they have exposure to asbestos related claims and if so check what resources are in place to meet them. Subject to appeal, organisations are covered by the insurances in place at the time their employees were exposed to asbestos. If the insurers are known and still in business at the time the claim is settled then there should be few issues. If the insurer is unknown then a potential source of capital to pay the claims will be unavailable.

A number of insurance companies have failed, partly as a result of asbestos related claims. If the insurers are insolvent, or in run-off, claims may revert back to the organisation which the employee worked for at the time of exposure to asbestos.

The information contained in this publication provides only a general overview of subjects covered, is not intended to be taken as advice regarding any individual situation and should not be relied upon as such. Insureds should consult their insurance and legal advisors regarding specific coverage issues.

Statements concerning legal matters should be understood to be general observations based solely on our experience as insurance brokers and risk consultants and should not be relied upon as legal advice, which we are not authorised to provide. All such matters should be reviewed with the client's own qualified legal advisors in these areas.

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