

# EMERGING ISSUES IN INDUSTRIAL DISEASE CLAIMS

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# THE EMERGING ISSUES



- The Future Asbestos Battleground
- Noise Induced Hearing Loss
- An Occupational Cancer Epidemic?

# EMERGING ISSUES IN INDUSTRIAL DISEASE CLAIMS

THE FUTURE ASBESTOS  
BATTLEGROUND



# THE PLEURAL PLAQUES STORY



- The search for a solution
  - Numbers rising & Damages rising
  - Claims Farmers harvesting
- Position in other jurisdictions
  - USA
  - Australia
  - Europe

# THE PLEURAL PLAQUES STORY



## ➤ Claimants Case

- PP=Cellular changes=Personal Injury
- C suffers a future risk of mesothelioma
- PP causes C to suffer anxiety
- Courts have awarded damages for over 25 years

## ➤ Defendants Case

- Identifying the true Medical Issues
- Personal Injury requires some “Impairment”
- Cellular changes do not constitute “Damage”
- Stand Alone Anxiety not recoverable
- PP is De Minimis
- Public Policy Arguments

# THE PLEURAL PLAQUES STORY



## A NEW CAUSE OF ACTION?

- Permanent penetration of the chest by asbestos fibres
- An assessable risk of future disease
- Present and prospective suffering represented by anxiety engendered by the asbestos and by the future risk

# THE PLEURAL PLAQUES STORY



## HOUSE OF LORDS DECISION

- Negligence requires proof of damage
- “Damage” is not to be equated with mere bodily change
- Any injury absent symptoms which does not lead to any other medical condition is De Minimis
- Psychiatric injury not foreseeable

# A REVERSAL OF THE PP DECISION?



## ➤ The Meddling Scots

- Damages (Asbestos-Related Conditions) (Scotland) Bill
- PP is a “Personal Injury which is not negligible”
- Asymptomatic Pleural Thickening and Asbestosis included
- Retrospective effect : Limitation suspended
- Challenges
  - ❖ Quantum
  - ❖ Jurisdiction & Cross-Border issues
  - ❖ Policy Trigger issues
  - ❖ Potential breach of European Convention of Human Rights

# A REVERSAL OF THE PP DECISION?



## ➤ Legislation for England & Wales?

- MOJ Consultation Paper 9<sup>th</sup> July 2008

### (1) Overturning the PP Decision

(a) Cost between £3.7b and £28.6b

(b) Difficulties with changing Common Law

### (2) Alternative no-fault payment scheme

(a) Pre-HL Decision: cost £52m - £196m

(b) Pre/post Decision : £780m - £4.8b

(c) Difficulties with both proposals

# OTHER ASYMPTOMATIC ASBESTOS CONDITIONS



## ➤ Asymptomatic Asbestosis

- Medical Issues
- Legal Argument

## ➤ Asymptomatic Diffuse Pleural Thickening

- Medical Issues
- Legal Argument

# PLEURAL PLAQUES WITH SYMPTOMS



- Less than 1% have symptoms
- Breathlessness
- Pain
- Types of Claimant:
  - Genuine
  - Mistaken
  - Bandwagon

# BREACH OF CONTRACT



- Implied Terms in Contract of Employment
- General rule: no damages for non-pecuniary loss
- Exceptions
- Limitation
- Foreseeability
- Policy Coverage

# BREACH OF CONTRACT



## ➤ C's case against D

- Employer failed to take reasonable care to guard C from injury in order thereby to:

(a) Give him peace of mind; and

(b) Enable him to avoid the distress caused by the risk that he might contract mesothelioma in the future

# FUTURE ASBESTOS CHALLENGES



- Scottish Legislation for asymptomatic conditions
- Developing the law of Asymptomatic Asbestosis and Diffuse Pleural Thickening
- Handling PP claims with symptoms
- Attack from Breach of Contract claims

# EMERGING ISSUES IN INDUSTRIAL DISEASE CLAIMS

NOISE INDUCED HEARING LOSS



# INTRODUCTION TO NIHL



- NIHL is a cumulative process
- Occurs randomly in exposed persons
- Some individuals are more susceptible than others
- Every increase in noise by 3 dB is effectively a doubling of sound intensity

# INTRODUCTION TO NIHL



## ➤ Noise levels in occupations

- Compressor 101 – 123 dB
- Diesel generator 107 – 111 dB
- Grinder 87 – 110 dB
- Wood planer 94 – 95 dB
- Belt sander 82 – 92 dB

# INTRODUCTION TO NIHL



## ➤ Non-occupational noise levels

- Centre of live music pop concert\* 101-105 dB
- Loud music in bars/clubs\* 95-98 dB
- Heavy city traffic 83-85 dB
- Normal conversation 60-62 dB
- Humming of a refrigerator 38-40 dB

[\*Except those employed in the entertainment industry]

# INTRODUCTION TO NIHL



- HSE estimate 1m workers exposed to damaging noise levels
- TUC claim over 170,000 UK workers already suffer NIHL
- Damaging Noise Levels
  - Over 90 dB: hazard increases rapidly
  - Down to 85 dB: some hazard from prolonged exposure
  - Down to 82 dB: some residual risk

# INTRODUCTION TO NIHL



- ABI stats: NIHL accounts for 80% of occupational disease claims
- Generally a long latency period before the effects of damage may be noticed Eg
  - Continuous exposure to 90 dB would result in 5% of the population sustaining a 30 dB loss in 10yrs
  - But this rises to 50% over a working lifetime

# NEW NOISE REGULATIONS



## ➤ The Noise at Work Regs 1989

- First Action Level                      85dB
- Second Action Level                    90 dB
- Peak Action Level                        140 dB

# NEW NOISE REGULATIONS



## ➤ The Control of Noise at Work Regs 2005

In force: 6<sup>th</sup> April 2006

- Lower Exposure Action Value 80dB (Peak Sound Pressure 135dB)
- Upper Exposure Action Value 85dB (Peak Sound Pressure 137dB)
- Exposure Limit Value 87dB\*

[\*Account taken for hearing protection]

# NEW NOISE REGULATIONS



## ➤ Main Changes of the 2005 Regs

- Noise levels for action has more than halved
- Noise assessments can be carried out weekly
- New Exposure Limit Value of 87dB

# NEW NOISE REGULATIONS



## ➤ Main Changes of the 2005 Regs

- More specific assessments
- More specific requirements to eliminate or control noise in the workplace
- Specific requirement for health surveillance of employees at risk, including audiometric tests

# NEW NOISE REGULATIONS



**TABLE 1**

Numbers exposed to different noise levels

| 80-80<br>dB(A) | 85-90<br>dB(A) | 90-95<br>dB(A) | 95-100<br>dB(A) | 100-<br>110<br>dB(A) | >110<br>dB(A) |
|----------------|----------------|----------------|-----------------|----------------------|---------------|
| 1,097,000      | 696,800        | 273,000        | 124,000         | 37,000               | 4,200         |

Source: HSE 1995 Survey

# NEW NOISE REGULATIONS



## TABLE 2

Numbers exposed to different noise levels  
*Adjusted for weekly averaging*

| 80-85<br>dB(A) | 85-90<br>dB(A) | 90-95<br>dB(A) | 95-100<br>dB(A) | 100-<br>110<br>dB(A) | >110<br>dB(A) |
|----------------|----------------|----------------|-----------------|----------------------|---------------|
| 1,619,600      | 419,900        | 138,900        | 45,790          | 7,490                | 420           |

Source: HSE

# NEW NOISE REGULATIONS



- Accuracy of the 13 year old HSE estimates?
  - One Claimant Solicitors estimate
    - ❖ over 2.2m exposed to noise over 80dB
    - ❖ over 1m exposed to levels above 85dB
    - ❖ Over 450,000 exposed to levels above 90dB
  
  - The HSE figures are considered to be out of date and on the low side

# NEW NOISE REGULATIONS



- A new pool of NIHL claims now enter the market
- The numbers range from 1.6m to 2.2 workers
- History tells us that employers will be slow to comply with noise regs
- Need to introduce a “Low Noise Purchasing Policy”

# NEW NOISE REGULATIONS



## ➤ The Entertainment Sector

- Compliance by 6<sup>th</sup> April 2008
- Wide application
- Music often above 90dB
- Use of weekly averaging may benefit calculation
- But individual exposed to 100dB in a nightclub would reach the new 80dB threshold within 15 minutes
- Entertainment sector faces a number of difficulties with compliance

# NEW NOISE REGULATIONS



## ➤ The Entertainment Sector

Hugh Robertson, TUC Health & Safety Officer

*“If bar and club owners don’t protect their staff from ear-splitting noise they will end up in court. The industry must get its act together quickly before it’s hit with a huge wave of compensation claims and enforcement action”*

# THE LOW FENCE DEFENCE



- Means: Hearing impairment has not caused a significant disability
- Industrial Injuries Benefits: low fence 50dB (equivalent to 20% disability)

# THE LOW FENCE DEFENCE



## ➤ WHO grading system for hearing impairment

- 0 = No impairment (below 25dB loss)
- 1= Slight impairment (between 26-40dB loss)
- 2= Moderate impairment (between 41-60dB loss)
- 3= Severe impairment (between 61-80dB loss)
- 4= Profound impairment (81dB or greater loss)

# THE LOW FENCE DEFENCE



- NIHL test case: *Parques v Meridian* (2007)
  - Judge rejected Low Fence argument on the basis that it makes no allowance for the fact that impairment may develop only in later life once the NIHL is added to presbycusis
  
  - Damages for low level NIHL
    - ❖ £3,000 (without tinnitus)
    - ❖ **£5,000** (with tinnitus)

# THE LOW FENCE DEFENCE



- NIHL is cumulative: the longer the exposure, the greater the dB loss
- Table 3 estimates the median hearing loss at different noise levels, assuming 10 years and 40 years exposure to noise

# THE LOW FENCE DEFENCE



**TABLE 3**

Median hearing threshold loss by noise levels  
over 10 and 40 years

|        | 80-<br>85dB | 85-<br>90dB | 90-<br>95dB | 95-<br>100dB | 100-<br>110dB | >110<br>dB |
|--------|-------------|-------------|-------------|--------------|---------------|------------|
| 10 yrs | 4.4         | 6           | 9.1         | 14.1         | 25            | 46         |
| 40 yrs | 16.5        | 18.9        | 23.6        | 31.7         | 50            | >50        |

[Source: International Organisation for  
Standardisation ISO 1999]

# THE LOW FENCE DEFENCE



- Table 2 suggests 2 million NIHL individuals below 90dB exposure
- Table 3 shows that non of these sustain hearing loss greater than 25dB
- Yet if half of this number make claims (on the basis of £10,000 average per claim), insurers will pay out approximately **£10 billion**

# THE LOW FENCE DEFENCE



- Is the Low Fence Defence sustainable?
  - The NIHL case of Parkes was before the HL PP test case judgment
  - Below 25dB loss does not amount to an “Impairment” similar to PP
  - Loss of Hair Cells caused by the noise amounts to bodily change, but it is doubtful that this actually equates to “Damage”
  - No present “Injury” more than de minimis

# THE LOW FENCE DEFENCE



- Is the Low Fence Defence sustainable?
  - But there are a number of differences from the PP case, such as the tinnitus complication.
  - Any NIHL test case will involve a number of very complex medico/legal arguments
  - Yet there remains a reasonably good prospect of successfully arguing the Low Fence Defence and saving the Insurance Industry up to £10 billion

# FUTURE NIHL CHALLENGES



- The 2005 Regs
  - (i) Significantly reduce the noise threshold
  - (ii) Imposes much more stringent requirements on employers
  - (iii) Entertainment Sector vulnerable
  
- The Low Fence Defence would eliminate most NIHL claims

# EMERGING ISSUES IN INDUSTRIAL DISEASE CLAIMS

AN OCCUPATIONAL CANCER  
EPIDEMIC?



# THE HEADLINES 2007



- **Britain faces 'occupational cancer epidemic' THE DAILY MAIL**
- **Cancer cases 'to increase a third by 2020' THE TIMES**
- **Epidemic that may kill 388m in 10 years GUARDIAN**

# TYPES OF OCCUPATIONAL CANCER



|                   |                          |
|-------------------|--------------------------|
| Bladder Cancer    | Lung Cancer              |
| Bone Cancer       | Melanoma                 |
| Brain Cancer      | Mesothelioma, peritoneal |
| Breast Cancer     | Mesothelioma, pleural    |
| Colorectal Cancer | Nasal Sinus Cancer       |
| Esophagus Cancer  | Nasopharynx Cancer       |
| Liver Cancer      | Pancreatic Cancer        |
| Kidney Cancer     | Skin Cancer              |
| Laryngeal Cancer  | Stomach Cancer           |
| Leukaemia         | Thyroid Cancer           |

# FACTORS WHICH CAUSE CANCER



- Personal characteristics such as age,sex,etc
- Family history of cancer
- Diet and personal habits such as cigarette smoking and alcohol consumption

# FACTORS WHICH CAUSE CANCER



- The presence of certain medical conditions
- Exposure to cancer-causing agents in the environment
- Exposure to cancer-causing agents in the workplace

**N.B. In many cases, these factors may act together or in sequence to cause cancer**

# THE O'NEILL REPORT



- Stirling University research: October 2007
- “Burying the Evidence: How Great Britain is Prolonging the Occupational Cancer Epidemic”

# THE O'NEILL REPORT



- Occupational Cancer deaths 24,000 a year
- Four times greater than the HSE estimate
- Cost to the economy at least £29 billion
- HSE dispute this research, but claim that the true figure is an increase of only 22% of their 25 year old estimate of 6,000 cancer deaths

# THE O'NEILL REPORT



➤ O'Neill outlines a number of key flaws in the HSE approach, some of which are:-

- Safety oversight
- Estimates of Chemical use
- Vulnerable Populations
- Complex Exposures
- Inaction on known risks

# THE O'NEILL REPORT



- O'Neill outlines a number of key flaws in the HSE approach, some of which are:-
  - Outdated and complacent data
  - Low level exposures
  - Mistakes on short latencies
  - Changing industry
  - Work and lifestyle interactions

# HSE REPORT (2007)



- Only 6 occupational cancers considered
- Many of the factors mentioned by O'Neill not considered
- HSE admit that the report has its limitations and that further work will be required

# HSE REPORT (2007)



- British Occupational Hygiene Society highly critical of the HSE in a report for Government

*“...insufficient effort has been made to reduce chronic work-related ill-health such as occupational cancer”*

# AN EPIDEMIC OF CANCER CLAIMS?



- Unions and Claimants Solicitors have considered the O'Neill Report
- Given the multiple causes of cancer, an occupational link is often very difficult to prove
- Most cancer claims are speculative from the outset and evidence gathering can be very expensive

# AN EPIDEMIC OF CANCER CLAIMS?



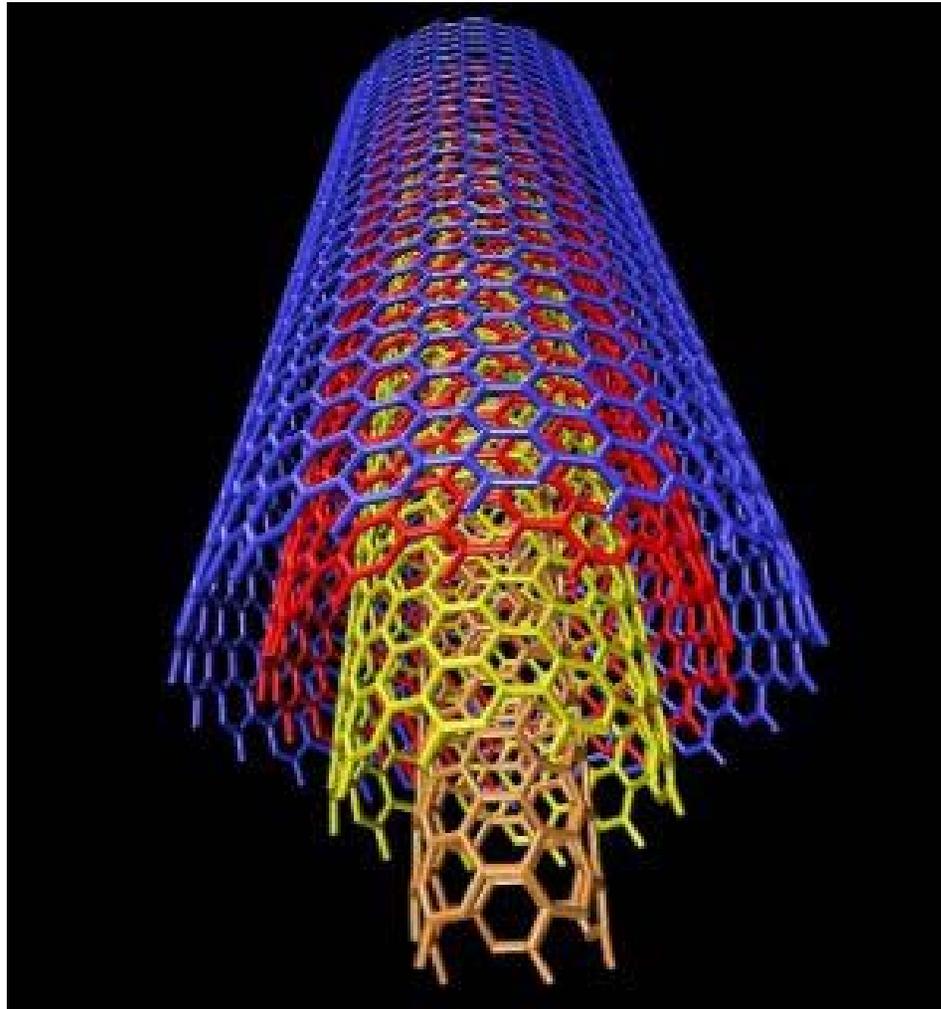
- Likelihood is that Claimant Solicitors will look for a straightforward cancer claim (eg asbestos related lung cancer) and then seek to exploit this en masse
- Insurers must be vigilant to this type of “Trojan Horse” strategy

# NANOTECHNOLOGY: THE NEW ASBESTOS?



- Carbon Nanotubes (CNT) discovered 20 years ago
- CNT dimension less than 100 nm
  - Human hair is 70,000 nm wide
  - Red blood cell is 5,000 nm wide

# A CARBON NANOTUBE

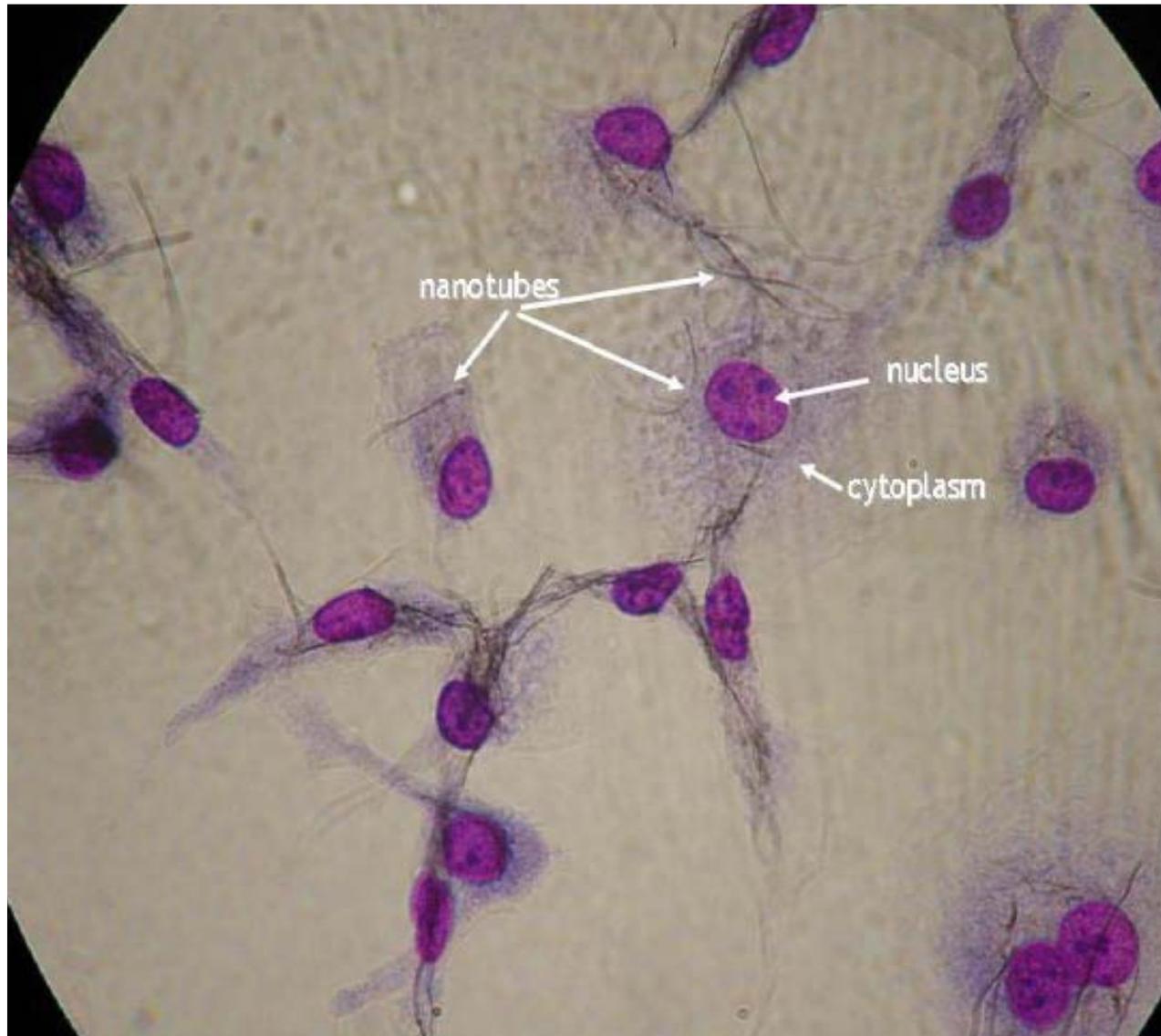


# NANOTECHNOLOGY: THE NEW ASBESTOS?



- Professor Ken Donaldson research on the potential for CNT to mimic long and short asbestos fibres
- Research commenced in 2004 with a warning to those exposed to CNT
- Most recent study 20<sup>th</sup> May 2008: mice injected with CNT developed **granulomas** on their lungs

# CNT IN LUNG TISSUE



# AN ASBESTOS FIBRE IN LUNG TISSUE



# CAN CNT CAUSE CANCER?



- 2008 Study does not prove that CNT can reach the cells where Mesothelioma develop
- Donaldson recommends further research, but urges caution in CNT use in the meantime
- Harsh lessons learned from asbestos diseases means that cancer risks associated with CNT cannot simply be ignored

# FUTURE CANCER CHALLENGES



- The true numbers of occupational cancer deaths most likely in the region of 24,000
- O'Neill Report may trigger Unions and Claimant Solicitors into taking steps to “Farm” potential cancer claims
- Insurers should be wary of “Trojan Horse” cancer claims
- Cancer risks associated with Carbon Nanotube Technology should be kept under review

# EMERGING ISSUES IN INDUSTRIAL DISEASE CLAIMS



**QUESTIONS?**