Liability for Asbestos Related Disease in England and Germany

By Richard Best

A. Introduction*

Newspapers abound with stories of corporate difficulties in connection with asbestos-related lawsuits. Internationally, most litigation to date has taken place in the United States, where high damages awards, comparatively liberal liability theories, and countless claims by not only the sick but also the so-called "worried well" – those who claim to have been exposed to asbestos but who have not yet contracted an asbestos-related disease – have clogged the judicial system and landed many companies in strife. Insurers have also been hit hard.

As more cases of asbestos-related diseases surface and tales of mounting pressure in the United States continue to hit the headlines, in conjunction with those concerning a possible mammoth trust fund to put an end to US litigation,[1] companies on both sides of the Atlantic are asking themselves about potential exposure in Europe. Companies across Europe have been affected by asbestos-related liabilities but the extent to which they have been or can be affected depends in significant part upon the legal system of their seat or seats of operation. For companies who currently only fear future claims, the liability regimes and litigation cultures of European jurisdictions may remain obscure, making it difficult for them to estimate potential exposure.

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[1] See, e.g., "Democrats Urge More Talks to End Asbestos Fund Bill Impasse", 19 June 2003, available online via www.bloomberg.com and www.news.google.com

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With that in mind, the purpose of this paper is to outline the liability regimes in two major European jurisdictions – England and Germany – and to canvass some practical issues one might need to consider if faced with asbestos-related personal injury claims.[2] Before getting to these regimes and issues, it may be useful to outline the main asbestos-related diseases and to sketch both the historic use of asbestos in these countries and what that use has left in its wake.

B. Asbestos-Related Diseases[3]

The asbestos-related diseases which give rise to claims against, amongst others, manufacturers and employers, are principally as follows:

Asbestosis: Scarring of lung tissue through inhalation of airborne asbestos fibres. Although mild asbestosis may not cause any noticeable disability, in severe cases asbestosis can be fatal. Asbestosis will often not develop until up to 20 years after the first exposure to asbestos (and for many it will not develop at all).

Mesothelioma: A rare type of cancer, mesothelioma most commonly occurs in the lining of the lung. It can arise between 20 and 60 years after exposure, occasionally earlier. The typical latency period is 30-40 years.

Pleural Thickening: Thickening of the lining of the lungs which in some cases may progress to breathlessness.

Pleural Plaques: Localised areas of pleural thickening. Although usually without symptoms they may cause lung impairment.

Lung Cancer: Malignant tumour of the lung.

C. Historic Use of Asbestos in England and Germany and its Aftermath

Asbestos was used in Europe from the early 1900s onwards in all manner of applications, from building products to insulation materials to brake pads and clutch

[2] Members of the firm are also well versed in asbestos-related liabilities in other European jurisdictions but discussion of potential liabilities in these countries' legal systems is beyond the scope of this paper.

[3] For further information on asbestos related diseases see, e.g., American Academy of Actuaries "Overview of Asbestos Issues and Trends", December 2001, p. 2, available online at www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf and Asbestos Diseases Foundation of Australia Inc "Understanding the Disease" available online at www.smarta.com.au/asbestos/disease.html

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linings. It was considered a "magic mineral"[4] and was used in abundance: imports into the European Union are reported to have peaked in the mid-1970s and remained above 800,000 tonnes per year until 1980, falling steadily to 100,000 tonnes in 1993.[5]

Since the turn of the 20th century, about 6 million tonnes of asbestos, mainly chrysotile, were imported into the UK. Sales of asbestos products in the UK are said to have been vigorously promoted after the Second World War, with annual asbestos imports reaching a peak of around 172,500 tonnes in the 1960s and 1970s.[6]

The picture in Germany is also one of extensive use of asbestos. After the Second World War, asbestos consumption in the Federal Republic of Germany increased sharply until 1965, with an annual consumption rate of 180,000 tonnes. Consumption remained at this rate until the late 1970s and then decreased substantially. A similar pattern was seen in the former German Democratic Republic although actual consumption levels were significantly lower. For example, in 1975 annual consumption stood at approximately 65,000 tonnes.[7]

As is well known, this high and historical use of asbestos (historical because, with few exceptions, the use of asbestos is now banned in the European Union[8]), has left in its wake large numbers of people who have contracted, and will continue for some time to contract, asbestos related diseases, as well as an untold number of buildings lined with what is now seen as a killer dust. For example, statistics from the UK Government's Health Safety Executive for 2000/2001 reveal, among other things, that the annual number of mesothelioma deaths has increased rapidly from 153 in 1968 to 1535 in 1998 and 1595 in 1999. Projections suggest that male deaths from mesothelioma may peak around the year 2011, at about 1700 deaths per year,

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[4] For an historical account of the use of asbestos in the UK, see G Tweedale *Magic Mineral to Killer Dust: Turner & Newell and the Asbestos Hazard* (Oxford University Press, Oxford, 2000).

[5] FitchRatings Special Report "Asbestos: Too Hot to Handle for European Insurers?", 31 March 2003, available online at www.fitchratings.com

[6] UK Department of the Environment, Transport and the Regions "Asbestos and Man-made Mineral Fibres in Buildings: Practical Guidance" (February 2000), para 3.1, available at: www.environmental-center.com/articles/article725/article725.htm#3

[7] These statistics are taken from HVBG Report on Occupational Diseases / Fibre Years, 1/1997, available via www.hvbg.de

[8] See, e.g., "Europe Bans Asbestos!", British Asbestos Newsletter, Issue 35, Summer 1999, available online at http://www.lkaz.demon.co.uk/ban35.htm

although this admittedly is only an educated guess. Significantly higher projections have been made and later dates of peak incidence have been estimated. Mesothelioma deaths in women are said to be running at about one-sixth of the level in men.[9]

Similar disease rates are seen in Germany. In 2001, 931 deaths from asbestos-related occupational illnesses were registered with the industrial statutory insurance schemes. Since 1980 there have been over 11,000 such deaths. In December 2002 the German Federation of Institutions for Statutory Accident Insurance and Prevention said they do not expect the rate of asbestos-related illnesses to drop until some time between 2005 and 2015. The Federation's Managing Director is reported to have said he fears there will be 20,000 asbestos related deaths in Germany by the year 2020.[10]

D. Liability for Asbestos Related Disease in the United Kingdom

In the United Kingdom, common law negligence is usually a claimant's mainstay cause of action for asbestos related disease. In some fact scenarios additional causes of action have been raised, such as actions in nuisance, actions for breach of statutory duty premised on duties in health and safety legislation and actions under occupiers' liability legislation, but in many instances these are peripheral to the main cause of action in negligence. England does have a "strict liability" statute – the Consumer Protection Act 1987 ("CPA"), which implemented the European Product Liability Directive of 1985[11] – under which producers can be held strictly liable (*i.e.*, without proof of fault) for injury caused by defective products. However, in the vast majority of asbestos-related cases that Act will have no application because, among other reasons, it only came into force in 1988 whereas claimants were largely exposed to asbestos years if not decades earlier. That said, for completeness sake, liability in both negligence and under the CPA are outlined below.

[9] The Health Safety Executive's statistics are available online at: www.hse.gov.uk/statistics/2001/hsspt2.pdf. See further the FitchRatings report at note 5 above.

[10] Figures taken from HVBG articles "Asbest: Berufsgenossenschaften befürchten bis zu 20.000 Todesfälle bis zum Jahr 2020" (17.12.02) and "Berufsgenossenschaften: 957 Todesfälle durch Asbest im Jahr 2000", available on the HVBG website: www.hvbg.de

[11] 85/374/EEC.

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I. Liability in Negligence

1. Outline

In England this form of liability is a creature of the common law. In cases of personal injury it consists of the following principal elements:[12]

*** The defendant must have owed a duty of care to the claimant. In personal injury cases a duty of care will usually be found where there is reasonable foreseeability of the kind of harm in question occurring.**

*** The defendant must have breached that duty of care, which involves consideration of a mix of factors such as the gravity of the potential harm and the practicability of remedial measures.**

* The claimant must have suffered physical harm.

*** The defendant's breach of duty must have caused or materially contributed to that physical harm.**

With one notable exception (discussed below), the burden of proof is on the claimant to establish each of these elements. The standard of proof is the balance of probabilities.

2. Causation Issues

The notable exception referred to above regards the issue of causation in the so-called "all or nothing" category of asbestos-related diseases such as mesothelioma, in cases involving multiple exposures to asbestos. In a series of asbestos cases between 2000 and 2002, the English courts drew a distinction between "cumulative" asbestos-related diseases, of which asbestosis is treated as one, and "single hit" or "all or nothing" diseases, such as mesothelioma, in multiple exposure cases.[13] As-

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[12] This is but a simple outline; see generally A Dugdale (Ed) *Clerk & Lindsell on Torts* (18 ed, Sweet & Maxwell, 2001). For example, the notion of "physical harm" can include psychological harm, recoverability for which depends in part on either the pre-existence of outright bodily injury, the law's definition of and distinction between primary and secondary victims of psychologically harmful events and the different proximity requirements for each, or, in cases falling outside these categories, case-by-case analyses of proximity. See further note 24 below.

[13] See, e.g., *Holtby v Brigham & Cohen (Hull) Limited* [2000] 3 All ER 421 (CA) (cumulative disease case); *Fairchild v Glenhaven Funeral Services and Others*, unreported, High Court, 1 February 2001 and *Matthews v*

bestosis is a cumulative disease because, although there is a minimum dose of asbestos below which there is no risk that the disease will develop, above that minimum dose the severity of the condition, if it does develop, increases in relation to the total dose of asbestos inhaled. Mesothelioma, by contrast, is an all or nothing, or indivisible, disease, because it is triggered by a single unidentifiable occasion when one or more asbestos fibres initiate the process which leads ultimately, many years later, to diagnosis of the disease.[14]

In "cumulative" disease cases (*e.g.*, asbestosis) where there are two or more sources of exposure, but where for example only one source is pursued or liable, the negligent defendant might be liable but only to the extent that it caused the disability, usually by reference to the period of the claimant's employment with that defendant relative to the other periods of exposure.[15]

The legal position regarding "single hit" or "all or nothing" diseases (*e.g.*, mesothelioma) was the subject of uncertainty until the House of Lords finally resolved it in June 2002 when giving its reasons in *Fairchild v Glenhaven Funeral Services Ltd*.[16] It is in this area that the burden of proof for causation has been relaxed. Prior to this decision the Court of Appeal in the *Fairchild* case had held, in agreement with one line of competing High Court authorities, that where in mesothelioma (and like) cases there are two or more sources of exposure, claimants are unable to recover from either or any defendant. [17] Although the Court had sympathy for the claimants, it had held that their position, which required the Court to bridge by way of inference an evidential gap as to causation of the disease, both defied logic and was susceptible of unjust results. The claimants' position, the Court said, "may impose liability for the whole of an insidious disease on an employer with whom the claimant was employed for quite a short time in a long working life, when the

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The Associated Portland Cement Manufacturers Limited and British Uralite plc, unreported, High Court, 11 July 2001 (competing High Court authorities regarding "all or nothing" disease cases); the Court of Appeal and House of Lords decisions in which this competing line of authority in "all or nothing" disease cases was addressed are discussed in the text following the reference to this note.

[14] See *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052, 1063-1064, paras 21-26 (CA).

[15] See *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421 (CA); *Fairchild,* cited above at note 14, at p. 1073, paras 68-70.

[16] [2002] 3 All ER 305.

[17] [2002] 1 WLR 1052.

claimant is wholly unable to prove on the balance of probabilities that that period of employment had any causative relationship with the inception of the disease."[18] The Court considered that were it to accede to the claimants' arguments, "it would be distorting the law to accommodate the exigencies of a very hard case."[19]

The House of Lords was unanimous in reversing this decision although their Lordships differed in their reasoning. They all agreed that, in general, the burden is on the claimant to show that the defendant's breach of duty caused the injury and to do so by showing that but for the breach the claimant would not have suffered the injury. This general principle was not in question. The issue was whether in the special circumstances of these cases it should be varied or relaxed. Their Lordships recognised that there was a clash of policy considerations. On the one hand, as the Court of Appeal had identified, there was a risk of imposing liability on a party who had not been shown, even on the balance of probabilities, to have caused damage. On the other, there was an argument in favour of compensating those who had contracted serious injury in circumstances where employers were in breach of duty to protect them against the very injury contracted and science did not permit the claimant to identify, as between those employers, the precise responsibility for the injury. In the circumstances of this case, their Lordships decided that the injustice suffered by the claimant who is left without a remedy is greater than that suffered by the party who was in breach but who may not have caused the actual damage. Lord Rodger said:

"The men did nothing wrong, whereas all the defendants exposed them to the risk of developing a fatal cancer, a risk that has eventuated in these cases ... The defendants, in effect, say that it is because they are all wrongdoers that the claimants have no case." [20]

The majority of their Lordships agreed that in the particular circumstances of this case, a breach of duty which materially increased the risk that the claimant would contract the disease should be treated as if it had materially contributed to the disease. Accordingly, they held:

"... that, by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the

[18] [2002] 1 WLR 1052, 1080, para 103.

[19] [2002] 1 WLR 1052, 1080, para 103.

[20] [2002] 3 All ER 305, 377, para 155.

claimants are taken in law to have proved that the defendants materially contributed to their illness." [21]

This decision, a real victory for mesothelioma sufferers, has adversely affected and will continue to so affect both employers and insurers in relation to asbestos exposure claims.[22]

3. General Precedent

There are numerous cases in the UK in which companies involved in the manufacture and/or use of products containing asbestos have been found liable for personal injury, in negligence for example, to both employees and third parties, and in which the courts have remarked on early corporate knowledge of the hazards of exposure to asbestos.[23]

4. The Worried Well

In the United Kingdom, substantial damages are not available for claims by the "worried well," that is, those who claim to have been exposed to asbestos who are not yet ill but fear contracting an asbestos-related disease such as mesothelioma. The minimum required is a recognised psychiatric illness with a high degree of proximity to the defendant's negligence.[24]

II. Liability under the Consumer Protection Act / Product Liability Directive

As noted above, seldom will cases be able to bebrought under the CPA given that most cases will involve exposure before 1988. The Act is not retrospective.[25] The discussion that follows assumes the Act's application but, as stated, this is likely to be so only in the smallest class of cases, and even then, such cases are not likely to

[21] [2002] 3 All ER 305, 382, para 168.

[22] For some of the reported reactions to the House of Lords' decision, see British Asbestos Newsletter, Issue 50, Spring 2003, available online at www.lkaz.demon.co.uk/ban50.htm. For a recent insurance case in which the effects of *Fairchild* were felt, see *Phillips v Syndicate 992 Gunner and others* [2003] EWHC 1084 (QB).

[23] See, e.g., *Margereson and Hancock v J W Roberts Limited*, unreported, 27 October 1995, High Court; *O'Toole v Irish Rail, British Rail and J W Roberts Limited*, unreported, High Court, 19 February 1999; *Shell Tankers UK Ltd v Jeromson and others* [2001] EWCA Civ 101. In many cases liability has been admitted; numerous others have been settled before trial.

[24] For a discussion of the law on this general issue (not regarding asbestos claimants), see the UK Law Commission's report no. 249 *Liability for Psychiatric Illness* (10 March 1998) available online at www.lawcom.gov.uk/files/lc249.pdf. See also *The CJD Disease Litigation: Schedule 2 Plaintiffs v Medical Research Council and Secretary of State for Health* (1998) 41 BMLR 157 and (2000) 54 BMLR 111.

[25] Section 50(7).

arise for some time yet, given the long onset of asbestos-related diseases. Subject to local variation in its interpretation, this discussion applies equally to Germany because the Product Liability Directive has also been implemented there.[26] For ease of reference so far as the German position is concerned (as well for other European Member States), the provisions of the Directive are referred to below rather than the implementing provisions of the CPA.

The starting point of the Directive is that a "producer shall be liable for damage caused by a defect in [its] product."[27] "Product" is defined in article 2 to include "all movables… even though incorporated into another movable."[28] A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation.[29] "Producer" is broadly defined to catch not only manufacturers of finished products, producers of raw material and manufacturers of component parts (at whom the Directive is primarily directed) but also companies which, by putting their name, trade mark or other distinguishing feature on the product, present themselves as a producer.[30] Those who import products into the EU for sale or distribution are also treated as producers.[31] Where the producer of a product cannot be identified, each supplier is treated as its producer unless it informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied it with the product.[32] The same applies for imported products which do not indicate the identity of the importer.[33]

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[26] Produkthaftungsgesetz of 15 December 1989 which, under § 19, came into force on 1 January 1990. Available online at http://dejure.org/gesetze/ProdHaftG

[27] 85/374/EEC, article 1.

[28] Article 2.

[29] Article 6.

[30] Article 3(1).

[31] Article 3(2).

[32] Article 3(3).

[33] Article 3(3).

What the injured consumer is required to prove is set out in article 4: "injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage."

The principal defences to a claim, if one could otherwise be made in connection with an asbestos-related disease, can be summarised as the non-circulation defence ("I did not put the product into circulation"), the post-circulation defect defence ("the product was not defective when put into circulation"), the non-manufacture or non-distribution defence ("I did not manufacture the product for sale or distribution" or "I did not manufacture or distribute it as part of my business"), the compliance with mandatory regulations defence ("the product is only defective because it had to comply with mandatory regulations"), and the development risks defence ("at the time of circulation it was not scientifically possible to discover the defect").[34] Although it is axiomatic that each case depends on its facts, in the asbestos context at least some of these defences would be difficult to sustain.

Both the concept of product "defectiveness" and the development risks defence have been strictly construed by English courts. For example, the High Court has held that the following are irrelevant in determining whether a product is defective: whether the harmful characteristic was avoidable; the impracticality, cost or difficulty of taking precautionary measures; and the benefit to society or utility of the product, except in the context of whether – with full information and proper knowledge – the public does and ought to accept the risk.[35] Thus, for example, the historical utility of asbestos *per se* is irrelevant to the potential defectiveness of products containing it (which is not to say that a product containing asbestos is, for that reason alone, defective). As regards the development risks defence, if there is a known risk, *i.e.*, the existence of the defect is known or should have been known in the light of reasonably accessible information, then the producer continues to produce and supply at its own risk. The Court held that the *existence* of the defect is generic, in that once the existence of the defect is known, there is then the *risk* of that defect materialising in any particular product; and that a risk ceases to be a development risk and becomes a known risk not if and when the producer in question has the requisite knowledge, but if and when such knowledge is reasonably accessible anywhere in the world.[36] Hence it only protects the producer with respect to the unknown (*i.e.*, the objectively unknown). It probably goes without say-

[34] Article 7.

[35] See *A & Others v The National Blood Authority* [2001] 3 All ER 289 (HC).

[36] *National Blood Authority*, note 35 above.

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ing that the health risks of exposure to loose asbestos fibres have been known in Europe, as elsewhere, for a considerably long time.

There is a limitation period of 3 years for filing claims for damages, which commences from the day on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.[37] There is also a "long-stop" limitation period of 10 years, from the date on which the producer put into circulation the actual product which caused the damage.[38] This limitation period is likely to operate to prevent claims under the CPA for asbestos-related diseases in connection with products sold before 1993 (given that 2003, the year this paper was written, is more than 10 years later).

III. Damages Awards in the United Kingdom for Asbestos Related Diseases

Victims of asbestos related diseases may in UK proceedings claim both general damages and special damages. Punitive damages against corporate entities as known in the United States are not available. General damages compensate for pain, suffering and loss of amenity ("PSLA"), whilst special damages represent the costs incurred in treating the condition and losses resulting from unemployment, nursing and other medical expenses.

Indicative damages awards for PSLA, that is, general damages, for particular conditions are set out in the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases* (the "JSB Guidelines")[39] based on pre-existing case law. The JSB Guidelines recommend that in the most serious cases of asbestos-related disease, such as that of a young person with serious disability where there is a probability of progressive worsening leading to premature death, general damages awards should be in the area of £60,000.

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[37] Article 10.

[38] Article 11.

[39] Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases* (6th Edition, 2002).

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The additional sums that may be awarded by way of special damages depend very much on claimants' individual circumstances. In one case, for example, £700,000 was awarded.[40]

In certain cases, provisional damages may be awarded. Provisional damages are awarded in cases where the claimant, having established liability for the occurrence of injury, satisfies the Court that there is a real danger of further injury arising. Such awards enable the claimant to apply to the court for further substantial damages should that further injury arise. A fairly common example is where a claimant establishes liability for asbestos-related pleural plaques or asbestosis and wishes to be able to apply to the court for further damages should he or she contract mesothelioma.

IV. Litigation Framework in the United Kingdom

Although the United Kingdom does not have a claimant bar like that in the United States (although there are signs it is moving in that direction), its civil procedural framework does in certain respects, and in contrast with some of its continental European counterparts, facilitate the bringing of personal injury claims.[41] For example:

* There are detailed disclosure rules pursuant to which personal injury claimants (among others) are entitled to inspect and copy all non-privileged documents in the possession or control of the producer upon which the producer relies, or which may be harmful to the producer's case or upon which the claimant may otherwise wish to rely.

* Conditional fee agreements (loosely speaking, the "no win, no fee" agreement) are permissible in the UK, including in cases of personal injury. (By contrast, contingent fee agreements are not allowed in personal injury cases.)

* The UK has fairly new group litigation procedures by which, where there are or are likely to be a number of claims which give rise to common or related issues of fact or law, a Court may make a Group Litigation Order ("GLO") pursuant to which all those claims can be managed. Judgments or orders given or made in a claim being managed under a GLO are binding on the parties to all other claims that are on the group register.

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[40] *Ward v Newalls Insulation Co Ltd and Cape Contracts Ltd* (1998) 1 WLR 1722.

[41] See generally *Civil Procedure: The White Book Service* (Sweet & Maxwell, London, 2003).

* Although, in general, personal injury claimants are not able to receive state funding for their claims, on the basis that such claims are more appropriately funded using conditional fee agreements, state funding may be granted for those personal injury claims which have a "wider public interest." Widespread asbestos-related disease claims have, at least in one case, been held to qualify. For example, the UK body which makes funding decisions concluded that the appeal to the House of Lords in the asbestos-related disease claims brought in *Lubbe v Cape Plc*[42] on behalf of South African miners merited a high to exceptional wider public interest rating.

E. Liability for Asbestos Related Disease in Germany

A company's potential liability for asbestos-related disease in Germany depends very much on whether potential claimants are employees, or non-employee third parties such as consumers and people living in the vicinity of asbestos use or production. In the former category – claims against employers – civil action in the courts is all but precluded, whereas claims by third parties may be brought in the courts.

I. Claims by Employees: The Statutory Insurance Scheme for Occupational Accidents and Disease

1. Outline of the Scheme[43]

In Germany, employee claims for asbestos-related diseases are covered by a statutory insurance scheme which dates back to 1894. There are approximately 35 German *Berufsgenossenschaften* (institutions providing for statutorily mandated accident insurance and promoting prevention of injuries in trade and industry) divided according to the branch of industry with which they are concerned and (in some cases) region. The *Berufsgenossenschaften* are corporations under public law with statutory duties regarding the prevention of accidents and accident insurance in cases of, among other things, occupational diseases. They function within a system of autonomous administration with equal representation of employers and the insured (*i.e.*, workers). Legal supervision lies with the Federal Government. Every individual in trade and industry with an employment or training contract or serv-

[42] [2000] 4 All ER 268.

[43] See generally the German Berufsgenossenschaften website, which contains background information in both German and English: www.hvbg.de

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ing an apprenticeship is covered by the accident insurance scheme. Coverage is, therefore, comprehensive.

The German *Berufsgenossenschaften* are exclusively funded by employer contributions.
They are non-profit making organizations and the contributions they levy do not exceed the amount required to fulfil their legislative duties (there is an adjustable contribution procedure). The total amount of the contributions paid by the employers must cover the financial needs of the preceding financial year.

The legislation underlying the scheme can be outlined as follows:

* Part Seven of the *Sozialgesetzbuch* (SGB – German Social Code) forms the legal basis of the industrial *Berufsgenossenschaften*.[44] Under the Code, employees are entitled to medical and related costs and compensation if they suffer from, among other things, a recognised occupational disease. Fault on the part of the employer is not a prerequisite.

* Recognised occupational diseases are determined by an ordinance promulgated by the Federal Government.[45]

* The occupational diseases are listed in an annex to the *Berufskrankheitenverordnung* (BKV – Ordinance on Occupational Diseases) [46] Paragraph 4 of that annex concerns "Diseases of the airways, the lungs, the pleura and the peritoneum." Subparagraph 41 deals with "Diseases caused by inorganic dust" and sub-subparagraphs 4103, 4104 and 4105 deal with diseases caused by asbestos. Pursuant to these provisions there is comprehensive coverage for asbestos-related diseases.

* The employer is only liable to an employee (*i.e.*, can only be pursued in a civil claim for damages before the courts) if its intentional acts caused the occupational disease, and even then the amount of liability is reduced by the amount received under the insurance scheme;[47] in other words, there can be no double recovery.

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[44] The Sozialgesetzbuch is available online (in German) at www.sozialgesetzbuch-bundessozialhilfegesetz.de/

[45] Section 9, SGB VII.

[46] Section 1 of the Berufskrankheitenverordnung.

[47] Section 104, SGB VII.

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This qualification on the bar to civil claims translates into intentional breach of the employer's duties of care or occupational safety. Under German law the reference to "intentional acts" would arguably include what, to English or American lawyers, would be known as subjectively reckless conduct, that is, actually knowing of a substantial risk that not taking due care might cause harm but accepting the risk and proceeding nevertheless (*dolus eventualis / bedingter Vorsatz*). Claimants nevertheless face a high threshold for pursuing civil claims, and even if that threshold can be reached, they can only claim for amounts not covered by the scheme, such as damages for pain and suffering and perhaps the percentage of lost income not obtained under annuity payments under the scheme.

* The *Berufsgenossenschaft* which meets an employee's claim for medical and related costs and compensation is able to pursue the employer for its costs (which in this context are not allowed to exceed the amount available in a civil action for damages) if it can be established that the employer intentionally or with gross negligence caused the events giving rise to the harm (*e.g.*, the unsafe exposure to asbestos).[48]

2. The Scheme in Practice

According to the HVBG's website, employers and doctors are obliged to report the suspicion of an occupational disease to the competent *Berufsgenossenschaft*.[49] In this sense asbestos-related diseases caused by occupational exposure to asbestos are routed to the insurance scheme.

So far as action by the *Berufsgenossenschaften* against individual employers is concerned, there is no reported example of a *Berufsgenossenschaft* claiming against an employer for costs paid out in connection with asbestos-related disease (although they are known to do so for other breaches of safety regulations). Although one cannot rule out the possibility of such action being taken in the future, in the absence of something startling emerging that does not seem to be particularly likely given the number of asbestos-related claims with which the *Berufsgenossenschaften* have already dealt.

One may note that the right of a *Berufsgenossenschaft* to take action against individual employers becomes time-barred after three years. The limitation period starts to run from the point in time at which the injured person is served with an adminis-

[48] Section 110, SGB VII.

[49] www.hvbg.de; see further sections 193(2) and 202, SGB VII.

trative notice issued by the social security authorities granting payments under SGB VII, or a judgment issued by a Social Court becomes non-appealable.[50]

II. Claims by Consumers and Other Third Parties (non-employee claims)

There are two principal bases of product liability on which, in theory, consumers and other third parties suffering from asbestos-related diseases could found claims in Germany. In essence, and similar to the position in England, they are strict liability based on the *Produkthaftungsgesetz* (PHG – Product Liability Act) , which implemented the Product Liability Directive, and negligence as set out in the *Bürgerliches Gesetzbuch* (BGB – German Civil Code). The Directive has been discussed above. For the reasons there given, it is likely to be of limited if any application to asbestos related disease cases. Accordingly, the following discussion of liability focuses on negligence.

1. Statutory Basis for Negligence Claims

In Germany, tort liability is founded on statutory provisions and its application in product liability cases has formed the subject of judicial pronouncement and development in a number of cases before the Federal Court of Justice.

Section 823(1) of the German Civil Code provides:

"A person, who intentionally or negligently [i.e., recklessly or carelessly], unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom."

Negligent breach of a statute designed for the protection of people is also actionable.[51] Although there does not appear to be any case law on the issue of whether negligent breach of asbestos regulations in particular would fall within this provision, given the purpose of such regulations it is likely that they, or at least some of them, would. The real question would be the timing of exposure and hence existence of applicable regulations.

[50] Section 113, SGB VII and section 195, BGB.

[51] Section 823(2), BGB.

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2. Judicial Reversal of Burden of Proof

There is a notable difference of approach in German negligence case law regarding product liability (which, unusually for a civil law country, provides the most guidance in this area) compared to that of many common law jurisdictions. The civil senates of the *Bundesgerichtshof* (BGH – Federal Court of Justice) have, through a series of decisions, shifted the burden of proof from claimant to defendant on the issue of whether the defendant breached its duty of care.[52] Product liability negligence in Germany is, therefore, somewhere between negligence liability as known to the common law (where the burden to prove negligence is on the claimant) and strict liability.

3. Limitation of Negligence Claims

Limitation periods are worth noting in the German context because, in addition to the usual 3 year limitation period for civil claims, there is also a 30 year limitation period commencing at the date on which negligent exposure to asbestos ceased, regardless of the claimant's awareness of damage.[53] (There is no equivalent in England for negligence cases.) Where the onset of an asbestos-related disease occurs more than 30 years after the end of exposure, a claim for personal injury may be held to be time-barred. Whilst this may be seen to produce an unjust result, commentators argue that, for the sake of legal certainty, it is precisely what the legislators intended.[54]

4. Available Damages

If a claim in negligence could be established, compensation could be awarded for lost income/profit[55] and medical and similar treatment,[56] an annuity or lump sum payment could be awarded for occupational impairment[57] and an annuity could be

[52] See, e.g., BGH judgment of 9 May 1995, ZIP 1995, p. 1094 (an English translation of which can be found at www.iuscomp.org/gla/judgments/tgcm/z950509.htm); BGH judgment of 2 February 1999; NJW 1999, p. 1028.

[53] Section 199(2), BGB.

[54] Palandt, Ergänzungsband, § 199 Rn. 42.

[55] Section 842, BGB.

[56] Sections 823 and 249, BGB.

[57] Section 843, BGB.

awarded to surviving dependants.[58] A comparatively modest sum for pain and suffering could also be awarded.[59] This list is not exhaustive.

5. The Worried Well

As in England, claimants known in the United States as "the worried well," whether employees, consumers or other third parties, would in all likelihood not have a valid claim before German courts. German courts are highly unlikely to accept claims for damages based only on the fear of contracting mesothelioma at some point in the future. Compensation could only be claimed if the legitimate fear of contracting an asbestos-related disease was so severe that it had somehow manifested itself as a personal injury, perhaps a psychiatric illness. This could only be argued in exceptional cases and there would be no sure prospect of success.

III. Litigation Framework in Germany

Even if there were signs of "intentional" conduct on the part of relevant German companies, so far as claims by employees are concerned, or even if negligence were suspected, so far as other claims are concerned, arguably there would still not be the same likelihood of civil action as one finds in the United States or even the United Kingdom. The reasons for this are as follows:[60]

* there is no discovery or disclosure regime by which claimants can access opponents' documents nor any US-style depositions procedure or UK-style written interrogatory procedure;

* both contingency fee and conditional fee agreements are prohibited;

* punitive damages are not available and there are no jury trials;

* there is no equivalent to a US-style class action or even a UK-style group action;

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[58] Section 844, BGB.

[59] Section 847, BGB.

[60] For a general introduction to civil procedure in Germany, see H Koch and F Diedrich *Civil Procedure in Germany* (Kluwer Law International/Beck, München, 1998). The author has also written a briefing comparing the differences between civil litigation procedures in England and Germany, copies of which are available via email or post on request.

* recovery of legal costs in the event of success is limited to fairly low statutorily set levels;

* it is difficult to obtain legal aid;

* the parties have comparatively less control over court proceedings because the questioning of witnesses is conducted primarily by the judge, there is no common law style cross-examination, and court rather than party-appointment of experts is the norm; and

* Germany is not an overly litigious society when it comes to personal injury claims; generally one finds neither an active claimant bar as in the United States nor a similar "blame culture".

Moreover, so far as employee claims are concerned, there is every reason for employees suffering from asbestos-related diseases to seek compensation under the statutory insurance scheme rather than contemplate action directly against employers: payments under the scheme are fairly favourable; there is no need to fight a protracted court battle nor establish fault; administrative procedures to examine benefit entitlements are free of charge; and there is no case law regarding asbestos-related disease from which would-be claimants contemplating court action could take a measure of positive guidance (the precedent that does exist is discussed below). Even if a claimant could meet the threshold for court action of intentional or subjectively reckless conduct, the economic gain in pursuing an employer would, assuming recovery under the statutory insurance scheme and given the costs and uncertainty of litigation, probably be fairly limited. Court action would probably only be likely if the claimant were more interested in publicly censuring the company than in obtaining compensation.

IV. Precedent

It appears that there are no decided and reported court cases in Germany involving asbestos-related disease claims brought against companies, whether by employees, consumers or other third parties. However, one case does, according to the media at least, appear to have been *commenced* against a company that used asbestos, and there is one decided case against a statutory insurance authority. There is also a decided case brought by a physical education teacher against a schools authority (rather than the school itself) involving exposure to asbestos. Because there is so little precedent in Germany, details of each of these cases follows.

As to case that reportedly has been commenced, on 3 September 2001 the magazine *Der Spiegel* reported on a case that had been filed with the *Landgericht* (Regional Court) of Hannover.[61] The claim for DM 1.9 million (approximately EUR 971,500) was said to have been brought against a German power provider, probably in negligence although that was not stated, by a former employee. He is reported to have alleged, among other things, that during his employment in a power station he was exposed to large volumes of asbestos without being supplied with dust respirators and protective clothing. The company vigorously denied these allegations as "completely unfounded." The same article reports that a state prosecutor was also investigating this matter.

The case against a statutory insurance authority, the Düsseldorf Health Insurance Association, concerned a claim by the wife of an asbestos worker who contracted mesothelioma through having been exposed to asbestos on her husband's work clothes. She argued that she had contracted mesothelioma as an occupational disease, but her claim was ultimately rejected by the *Bundessozialgerichtshof* (BSGH – Federal Social Court) on the ground that she had not, in fact, contracted mesothelioma as an occupational disease because the cleaning of her husband's work clothes mainly served the interests of the couple's household and not the employer's interests.[62] This case is significant because it means that this category of claimant, not being entitled to compensation under the statutory scheme, would have to sue under product liability/negligence regimes to recover compensation.

The case against the schools authority was a negligence claim by a physical education school teacher against the schools authority responsible for the particular school at which he worked. The claimant had worked in the school's gymnasium since 1978. In 1989, teachers at the school suspected asbestos had been used in the school's construction and communicated this suspicion to the defendant in May of that year. It was only in early 1991 that the defendant investigated the matter and discovered that the gymnasium's heater coverings contained asbestos which was already dissolving. The gymnasium was closed in February 1991. The claimant sought a declaratory judgment stating that the defendant would be obliged to pay

[61] "Ermittlungen wegen Asbest", Der Spiegel, 36/2001, 3 September 2001, available online, at cost, at www.spiegel.de/spiegel/0,1518,155951,00.html

[62] See *Janssen v Germany* ECHR Application No. 23959/94, 20 December 2001, at para 28.

all material and immaterial damages which might arise from the claimant's exposure to asbestos while working in the gymnasium from 1989 to 1991. On 3 April 1995 the *Landgericht* (Regional Court) of Kiel dismissed the claim because the claimant had not proved that he had suffered a personal injury and because, even if there had been a personal injury, the claimant could not prove that the personal injury would have been caused by exposure to asbestos in the gymnasium from 1989 to 1991.[63] When the *Oberlandesgericht* (Higher Regional Court) of the federal state Schleswig-Holstein was called upon to consider the value of this dispute on appeal (which affects the quantum of the court fee and recoverable lawyers' fee which the losing party is obliged to pay), it too commented on causation difficulties, stating that it would be difficult for the claimant to prove causation of a personal injury (if any) and to trace his exposure to the specific gymnasium where he worked.[64]

F. Practical Issues

A company which stands to be affected by asbestos-related claims will face numerous practical issues. Some of the questions it might wish to ask at an early stage are set out below:

* From which country or countries do or might the claimants hail? This question, which in some cases may raise significant jurisdictional questions, may be particularly important for parent companies which may have had multiple subsidiaries involved in the manufacture, sale or use of products containing asbestos. It is also important because the mere fact that a company had its seat of operation in England, for example, does not necessarily mean it cannot be sued in another jurisdiction by claimants affected in that jurisdiction.

* For each jurisdiction, are or were the claimants employees or are they, or some of them, non-employee claimants?

* What steps did the company take to reduce the risk of exposure to asbestos fibres in the way of, for example, protective equipment and warnings?

* Did the company (or perhaps any of its affiliates) manufacture, sell or use, or might have manufactured, sold or used, products containing asbestos and, if so,

[63] LG Kiel, judgment of 3 April 1995, case no. 9 O 436/92 (unreported).

[64] SchlHOLG, decision of 22 August 1995, case no. 11 W 29/95, OLGR 1995, 29.

when? It is possible that a company may, for example, have used or sold products, such as automotive products, without realising that they contained asbestos.

* In the corporate group context, have the claimants claimed against the right company? It is possible, for example, that the relevant company may no longer be in existence.

* For each jurisdiction, are or might the claims, or any of them, be time-barred by statutes of limitation?

* Does the company have an insurance policy covering this type of claim (in the United Kingdom, for example, employer liability policies have been compulsory since 1972) and, if so, what is the maximum coverage and when must the insurer be notified of the claims? Does the insurer have a history of dealing positively with these types of claims? This question is put because history tells us that, in addition to having to defend or settle claims brought against the company, the company may also have to pursue its insurer to obtain coverage.

* If the company sued appears to be burdened with asbestos liabilities as the result of a corporate acquisition, to what extent did the sale and purchase agreement address such liabilities by way of warranties and indemnities and/or contractual disclosures and what, if anything, was said about asbestos use and liability in negotiations? Does the financial status of the vendor suggest that claims against it ought to be filed expeditiously?

* Depending on the potential number of claims, ought the company to be considering either settlement or voluntary insolvency or administration proceedings as a means of dealing with the problem?

* To what extent may the claimants have had alternative or additional exposures to asbestos? Employees, for example, may have been exposed through several employers whilst non-employee claimants may also have had more than one source of exposure. The existence of multiple exposures may, at least, reduce the quantum of damages to which a claimant is entitled.

* Is the company prepared to deal with the media exposure and, where relevant, consequent risk to its share price that may follow from revelations of asbestos problems? Similarly, where relevant, is the company prepared to deal appropriately with questions from concerned members of the public or investors?

Given the long onset time of asbestos-related diseases and the possibility of corporate restructuring, investigating some of these issues can be a difficult task. More-

over, the relevant archives of larger companies, if they still exist, may occupy the space of a small village and may well have been compiled at a time when modern computer systems were still in the realm of imagination. Initial physical scoping exercises will probably need to be undertaken at an early stage to ascertain the location and extent of relevant documentation and thought will need to be given as to how best to go about investigating that material. Discussions with potential witnesses, such as officers of the company at the relevant times, is also likely to be useful. Depending on the number of claims and the quantity of documentation, it might also prove useful and cost-efficient to utilise modern database systems to organise one's evidence. At the same time, company employees need to be versed in the risks surrounding the generation of new documentation regarding actual or potential claims given the possibility that such documentation may eventually pass before a judge's eyes. Although this is particularly true for claims in common law countries like the United Kingdom where there are wide-ranging disclosure rules, the same diligence should be applied in civil law countries like Germany, particularly if there is a risk of being sued abroad.