“Worldwide when it comes to asbestos there is growing public awareness of damage done, of culpability – and increasing demands for compensation, whether it be from the state, the company or their insurer – whichever is the easiest target.”
With greater medical, social and legal awareness in many countries, it is no surprise that asbestos claims are on the increase globally. Whether it is being done through the courts, directly by corporates through insurance policies or trusts, or through state compensation systems, more and more people are claiming for asbestos related damages.

Generally speaking in common law jurisdictions (eg. UK, Ireland, US, Canada, South Africa, New Zealand, Australia) asbestos victims are entitled to a relatively modest compensation from the state, but it is fairly straightforward – and common – to sue employers/their insurers for larger sums. Whereas in codified jurisdictions (most of Western Europe excluding UK/Ireland) victims are typically entitled to a more generous state compensation and it is relatively rare to sue employers/their insurers. However, times are changing and in many of these countries, victims are increasingly taking to the courts to receive what they feel to be a fairer level of compensation.

Although most people would agree that the courts are not the place for asbestos claims, few alternative compensation systems are proving to have the financial stamina to function adequately and withstand the increasing flood of claims – which is why the level of subrogation by compensation schemes is rising. In a number of countries such as France, Spain and Italy the burden of proof is on the defendant companies not the victims – the proof of causation between place of work and illness is decided by the Social Security system with, say critics, limited medical evidence having to be presented. Defendant companies and their lawyers also point to what they regard as a generally plaintiff friendly environment in Europe – with a localised system of justices of the peace presiding over cases involving plaintiffs who are their neighbours and friends.

Increased medical knowledge among doctors, and increased research by health organisations plus the many NGOs and associations for victims – (see page 21) means that those exposed to asbestos in the past or present are aware of their rights and the legal and social mechanisms are in place to help them get compensation.

In Europe, growing anger against what is often viewed as a corporate conspiracy has led to numerous public demonstrations, some of them attracting thousands and lasting for several days. Strong feelings in some countries have led to criminal prosecutions (see page 109) or the determination to take cases to a higher level; for example Maltese dock workers have recently turned to the European Court of Human Rights (ECHR) after their compensation case against the Malta shipyards was turned down by the Maltese Government. Class actions are also becoming more popular, and were recently introduced in Italy and Poland for example, and the European Commission is pushing for collective redress mechanisms at EU level.

Asbestos victims, aided by their lawyers, are extending their reach – not just geographically, but also in terms of ‘piercing the corporate veil’ and successfully holding parent companies responsible for the actions of their subsidiaries. Increased globalisation and exchange of knowledge means that victims are very well aware of the level of compensation being awarded in, for example, some of the US courts, and will grasp any chance to sue a US company.

The lines of exactly what is compensable in ARDs are also blurring; for example in France, anxiety over the fear of contracting ARDs is now compensated by the state scheme, and in Scotland pleural plaques are also compensable.

In some countries, timebars have prevented victims from pursuing their cases in the courts, however a number of countries – Australia for example – are looking to amend their laws to accommodate the long latency period of asbestos and start the clock ticking from diagnosis.

Clearly corporate defendants – and any company in the world is a potential defendant when it comes to asbestos – are on the back foot when it comes to liability and culpability. And that is before the impact of asbes-
trends in claims and compensation

Materials, such as the state railways and the shipyards. Claims are also being generated by public and private sites where asbestos was used for insulation. There is a regularly updated list of all asbestos sites in the country – there are currently over 1,000 listed, with most of them in the northwest of the country. This list is updated monthly and everyone working at these listed sites is entitled to early retirement at age 50.

>>> Legislation and compensation

Asbestosis was recognised as an occupational disease in France in 1945. In 1978 the domestic use of spraying glue with more than one per cent asbestos fibres was banned; in 1994 the use of amphibole asbestos was banned; and in 1996 the manufacturing, importing and selling of asbestos and asbestos containing materials was made illegal.

France has added mesothelioma to the list of notifiable diseases which means that the Regional Health Agency must be notified by doctors of any new cases of mesothelioma. It is hoped that this mandatory reporting procedure, which is part of the 2009-2013 Cancer Plan, will improve monitoring of the number of cases and improve the understanding of their possible link with non-occupational exposure to asbestos. Environmental investigations will be implemented when no occupational exposure has been identified, targeting three particular groups of people: women, people up to age of 50 and people with mesothelioma in the pleura.

The project complements monitoring by the National Surveillance Programme of pleural mesothelioma in 23 metropolitan departments which was established back in 1998.

>>> No fault system

Traditionally, workers suffering from accident and occupational diseases in France came under the ‘no fault’ system – victims were compensated through social security.

>>> France

France was a relatively late, but substantial, user of asbestos compared to other developed countries. The bulk of its use started after the Second World War. The amount of asbestos imported into France peaked in 1974 and decreased slowly afterwards. However, in 1995 alone, France imported approximately 30,000 tonnes of Canadian chrysolite, equivalent to about three per cent of the world’s output for the year and asbestos was still used well into the 1990s.

France banned the use of asbestos in 1997 after experiencing a surge in victim numbers during the mid 1980s and early 1990s. An estimated 3,000 people currently die prematurely every year in France as a result of asbestos and there have been pessimistic predictions that the death rate could easily treble over the next decade because of exposure in the 1970s and 1980s. Based on the current information, asbestos related claims in France should peak in 2020, with the last cases emerging between 2030 and 2040. This period might be longer than in other countries as the more dangerous asbestos fibres were only banned in 1994 (against 1972 for crocidolite and 1980 for amosite in the UK, for example). The French Federation of Insurers (FFSA) has forecasted that up to 200,000 asbestos-related claims will be made over the next 20 years, with an ultimate cost of at least €10 billion that will be borne by the social security system, employers and insurers.

>>> Exposure

In France, the main sources of asbestos claims are the manufacturers of asbestos products and companies using asbestos-containing materials, such as the state railways and the shipyards. Claims are also being generated by public and private sites where asbestos was used for insulation. There is a regularly updated list of all asbestos sites in the country – there are currently over 1,000 listed, with most of them in the northwest of the country. This list is updated monthly and everyone working at these listed sites is entitled to early retirement at age 50.
funded by the CPAM employers’ community, with no legal involvement.

It was a straightforward and quick process but financially this system proved woefully inadequate for asbestos victims, as they were only compensated for loss of earnings. An important change took place in February 2002 when the Cour de Cassation Chambre Sociale introduced a new definition of gross negligence for asbestos claimants. The ‘faute inexcusable’ is an exception to the French no fault system. As a direct result a special fund for asbestos victims – the ‘Fond d’Indemnisation des Victimes de l’Amiante’ (FIVA) was established with standardised compensation awards far higher than the amounts traditionally received through social security, taking into account pain and suffering.

FIVA is open to all victims and their families; it covers all asbestos related diseases. FIVA is able to subrogate any payments it makes to victims against relevant employers.

>>> Inexcusable fault

Inexcusable fault can be invoked against employers who failed to provide a safe workplace; as part of a contract of employment, the employer has an obligation to provide a safe workplace for employees, especially in relation to the products manufactured or used by the company. A failure under this obligation is considered as an inexcusable fault when the employer was aware or should have been aware of the danger to which the employees were exposed, and did not take necessary precautionary measures.

In practice, courts tend to consider three factors in determining whether there was inexcusable fault negligence by the employer:

1. The company’s business activities: it is generally acknowledged by the courts that large companies specialising in asbestos products were the most likely to be aware of the risks incurred by their employees.

2. The exposure period: awareness of the dangers has been increasing since the 1970s. In France the first regulations relating to the handling of asbestos were introduced in 1977 and the use of asbestos was banned in 1997. However, in some cases, even exposure prior to 1977 can lead to a verdict of criminal negligence, based on a 1913 law which specified that employers should protect their workers against the inhalation of dust.

3. The safety measures in place: inexcusable fault is established when specific, legally mandated safety measures were not in place after 1977.

Statutes of limitation have been lifted on asbestos-related occupational diseases provided that the first medical observation occurred between 1 July 1947 and 21 December 2001. For future victims, the statute of limitation had been two years after diagnosis, but this was extended to ten years by FIVA in May 2011.

As a result, trials for criminal negligence on the part of employers are being won against large companies and also against the French state – with increased awards for pain and suffering and punitive damages. Also in 2012, the Court of Cassation recognised the damage caused to asbestos workers by anxiety over fears of contracting ARDs and court cases are expected to see higher awards to victims in the future on that basis.

>>> FIVA

In 2003 FIVA introduced an indicative table of awards, based on age, to be used as a starting point to determine the compensation level; for example, mesothelioma: €125,414 per victim; pleural plaques: €18,731 per victim.

FIVA’s settlement offers are full and final; victims have two months to accept what is offered and if dissatisfied they can go to a local court of appeal within this time frame. Once an offer is accepted, victims cannot then choose to go to court – unless they wish to pursue a criminal case.