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CUMULATIVE INJURY/DISEASE CLAIMS AND OTHER POTENTIAL DISASTERS FOR THE 1990s

by DAVID JAMES ROGERS

Whilst I am an English lawyer primarily concerned with personal injury and ill-health claims throughout the United Kingdom my involvement with maritime personal injury litigation and product liability claims has also exposed me to and given me considerable experience of the manner in which many other countries, and in particular the United States, deal with such claims.

My experience is that, in the main, and despite the existence of a number of no fault and workmen's compensation programmes, the question of "fault" is a significant and relevant factor in the determination and disposal of these claims throughout the world. My belief is that, following recent changes in legislation and, in particular, the EEC convention on the jurisdiction and enforcement of judgments, the question of "fault" will become an even more significant and relevant factor in the determination and disposal of these claims throughout the world.

In the circumstances and whilst I suspect that in some respects a straightforward no fault or workmen's compensation programme is easier to underwrite than a system which involves a dispute and investigation into whether or not an individual is entitled to recover any compensation at all and recognise that many of you will be primarily concerned with the concept of no fault liability, I make no apologies for raising the question of "fault" in this paper and hope that you will all find what I have to say of some interest and relevance.

In essence we are discussing the "new" types of claims which we can expect to see in the 1990s, the manner in which these claims are likely to develop and the steps that insurers and risk managers should take to prepare themselves for and to meet these claims.

It is easy to be pessimistic without just cause but before I give you my view of what I believe is in store for us in the 1990s, may I first ask you to look backwards because I believe that we will learn from this and it will give you a basis for understanding my concerns for the future.

By the end of the 1960s the first claims involving industrial deafness and pneuniconiosis had begun to succeed.

In 1967 a case called Smith v. Central Asbestos Ltd. came before the English Courts. At that time the asbestos industry was well established in the United Kingdom and it was well known that the employees within the industry suffered a risk of respiratory illness. It was however thought that this was simply one of the inevitable risks of such employment and that it had to be accepted as such and for many years the industry had done little or nothing to protect the employees believing that no fault or liability could possibly arise. How wrong the industry was.

The end result of Smith v. Central Asbestos Ltd. was that it opened the floodgates for literally thousands upon thousands of claims and, even today, my firm still processes, every year, well over 150 of these claims where the cost of settlement ranges between £10,000 and, in many instances, in excess of £100,000. The burden which this has imposed upon particular companies, for example Cape Industries and Turner & Newall, can be seen simply by looking at their accounts where year on year provision is made for asbestosis claims. The burden which this has imposed on insurers and the Lloyds market is even greater.

In 1967 if I had suggested to this audience that there were problems which might well bring the insurance industry to its knees, people would have laughed at me. As we now know experience of asbestosis and industrial deafness claims certainly for one insurance company almost caused it to fail. Lloyds and the London insurance companies are now having to

grapple with the disastrous experience of asbestosis claims in the United States. The question is, where is the next disaster both for industry and for insurers?

There are three areas. Industry remains a potential source for a great deal of claims of a certain type namely those involving cancer. The office environment which I separate from the industrial environment in a way which I will explain, I believe is going to be the hotbed of claims in the coming years, claims for which in my opinion, both employers and insurers are ill prepared. Finally, there are the environmental claims which will cause havoc not only in terms of substantial damages for people who suffer injury outside of the concept of the employment arrangement i.e. simply people who live in the area, but will also lead to industrial plants being shut down as their contribution to the ill health of the nation is established.

Let me deal first with the situation in industry. With the greatest respect to those of you who are Safety Officers, certainly it was my experience acting both for Plaintiffs and Defendants in the 1960s and early 1970s, that the Safety Officer in British industry was a somewhat puny and ineffective individual. Although I believe that the Safety Officers were knowledgeable and skilled men, their ability to influence decisions relating to the production of materials and the methods of production came a long way behind the views of the Production Manager. In the United Kingdom that has changed. There is now legislation throughout the United Kingdom which is detailed and imposes significant obligations upon employers and, indeed, upon employees. The growing theme of this legislation is to identify individuals and make them responsible. For example, in the North Sea oil industry each installation now has an Oil Installation Manager who is statutorily responsible for many aspects of the operation of those rigs. Tell an individual that he can be brought before the Courts and punished personally and you will find that he will be a very responsible person in terms of the

enforcement of the safety legislation. Safety legislation in the United Kingdom is policed and enforced by the Health & Safety Executive. Since November 1987 they have made it clear that they intend not to prosecute companies but individuals, company directors and site foremen etc. where they believe there has been a blatant disregard of the safety rules and injury has followed.

Thus, the dangers of the ordinary workplace in terms of tripping, falling over, contact with machinery, are now well known and safety programmes well enforced and here I hope the insurance industry and industry at large, will see a bonus with a substantial reduction in the accident rate. It is no longer the traumatic injuries with which the insurance industry will be caught out. The real problem for industry remains the insidious injuries which occur as a result of exposure to various chemicals. I have no doubt that there is another asbestosis situation lurking somewhere in industry. I suspect that in the course of the next few years a chemical which is widely used in industry will be identified as a particularly vicious carcinogen. More importantly, I fear that these types of claims will reek havoc with industry and with insurers because of what I call the establishment of the "link". We have all known for many years that there is a vague connection between certain illnesses and industries. However, with the development of medical science I believe that there is a greater probability that in future the workers will be able to establish that link which they need to establish between some feature of their employment and the injury or illness from which they suffer. A classic example of this occurred in the 1970s where a series of employees from a factory presented themselves to their local doctor with cancer of the scrotum. The doctor developed the link and was able to establish that the cooling agent used in the machinery which the men utilised soaked their overalls and from here the men were exposed to excessive amounts of the chemical which was otherwise thought to be contained within the machine and suffered the cancers. The initial cancers were merely written

off as one of the risks of life but slowly as a pattern developed the doctors were able to establish the link. As more and more information becomes available relating to the causal connection between employment and illness, so we will see more claims of this type coming forth from industry.

Another example of the way in which the link will be established is to identify that the employees who were otherwise thought to be safe, were in fact exposed to excessive levels of chemicals. Either the chemical exposure levels will be reduced as they are found to be more and more dangerous, or the procedures will be shown to be defective. Throughout the 1980s for example, the United States' Coastguard carried out research into the exposure to chemicals on board chemical tankers. Even with first class systems they have often found that the threshhold level of exposure is constantly exceeded.

I have been asked in preparing this paper to look into a crystal ball to identify the dangers for particular industries. This is one that I foresee for industry at large and perhaps it would be interesting to come back in 5 years time and see what has happened to my prediction.

Let me now move on to the situation in the office environment but first let me define a little terminology. "Blue collar" is basically a manual worker who works with his hands; "white collar" is somebody who works in an office and rarely gets his hands dirty. "White collar" workers are increasingly beginning to realise that they may have substantial claims for damages arising out of their working environment.

First on the agenda must be repetitive strain injuries. What is repetitive strain injury? It is an ill defined condition which affects the upper limbs, usually the forearms and the hands causing pain and discomfort.

We have known for many years that working in a particular manner repeatedly using the same muscles can cause disability often referred to as tenosynovitis in the claims that have been brought out of industry. My area of concern for the future relates to keyboards. Keyboards dominate office life. Even I, a fairly ham fisted individual, will shortly have my own keyboard to operate several of the administrative functions which I need to work at within an office environment. The operation of the keyboard is, of itself not likely to cause injury, but the demands which are placed upon people can cause injury. Take for example secretaries and computer personnel they may be working at keyboards 5 or 6 hours a day, with overtime sometimes they can work 10 hours a day or longer. Within the office environment I have rarely come across a routine for regular breaks or for regular exercises to allow the muscles to recover. The complaint by an individual that at the end of the day his arms ache or he feels pain along the side of his forearm is often disregarded as simply one of the aches and pains of everyday life. Ergonomists are aware that this activity causes problems but really little or no action has been taken. It seems to me that the approach falls into the same syndrome as the asbestos industry adopted throughout the 1950s and 60s. They knew there was a problem; they knew their employees were suffering some form of injury but treated it as simply one of the risks of the job. We already have a significant number of claims; journalists and computer operators are issuing their proceedings. Whether those claims will succeed I think is open to considerable doubt. Often the periods for the journalists for example, would not be regarded as excessive and they do have breaks. Computer operators are somewhat different. Even the staff within my own office who input information into our computer have no regular system of breaks because it is not a problem which has been identified. I am sure that as we speak there are many people in what I would call the white collar industries with disabilities or sensitisation of tendons or muscles which are likely to be affected by their continued use in keyboard operation and that

these will explode into claims in the next few years. I know from experience that insurers did not anticipate the explosion of claims for industrial deafness when calculating their rates for industry in the 1950s and 1960s. I believe insurers are not cognizant of the risks to which office staff are exposed and that they are not building the potential for those claims into their premiums.

Second on the agenda but nevertheless associated with the use of computers are VDU screens. There are many risks attached to the use of VDUs and I will not at this point concern myself with the risks of radiation. I am however concerned with one particular risk because I believe it is being ignored by industry at large. VDU operations are, in my opinion, likely to produce in the 1990s, a significant number of claims relating to eyestrain and disabilities affecting the eyes. The risks are indeed already known and catalogued. British Telecom has strict instructions as to the use and the level of use of their VDUs for their employees. There is an EEC Directive which is about to come into force which lays down particular requirements. As a person who visits offices up and down the United Kingdom and indeed abroad, I have to tell you that I do not believe that those VDU requirements will be enforced. They are certainly not standard practice at the present time. Virtually every secretary in every office now has a VDU screen attached to her typewriter. In my own practice secretaries will work for several hours continuously in the morning without a break and again in the afternoon. If there is a rush job, they will work into the early evening. Eyestrain, sensitisation of the eyes to particular forms of light, development of disabilities, all of these situations are already with us and are likely to develop further in the next few years. As those people attend their medical practitioners for advice upon their injuries and disabilities, so the link will be developed and as a result the claims will be forthcoming. The strict instructions that are contained within the EEC Directive and which are already applied by the better employers in the United Kingdom will provide those

individuals who have worked excessively at VDUs with a very substantial chance of success in pursuing any claims for damages.

Third on the agenda and another aspect which has not yet developed to my knowledge other than beyond two or three claims, involves exposure to a gas called ozone. We have too little ozone in the atmosphere where it protects us from the rays of the sun. We have too much ozone in the office environment. I know of no person or company who measures the amount of ozone within their office environment yet ozone is often created by the installation of electrical equipment for example, photocopiers. It is known that exceeding the threshhold level or the safe recommended level will certainly cause initial injury. Whilst, fortunately, the recovery period is short and the vast majority of people recover with no continuing ill effects the percentages are such that if one considers the millions of people exposed there will still be thousands of people who are likely to be left with a sensitisation to ozone. The effects upon the respiratory passages are well known and there has been considerable research. The expert who advised me on my last case had little doubt that (a) the level of ozone was excessive and (b) that this caused sensitisation which had left the claimant with a permanent disability. The link is already there, it is simply that the claimants have not yet found the appropriate advisers. When they do, there will be a significant level of claims and it should be borne in mind that the sensitisation is often such that the individuals cannot return to the office environment because there is already so much ozone there from the electrical equipment that has already been installed.

Fourth on the agenda is "sick building syndrome". This of course does not refer to the condition of a building itself but to the environment that is created within a building. It relates to the use of air conditioning and the recirculation of what is in effect stale air with only small quantities of fresh air being inducted. The circulation of

stale air helps build up the level of microbes and dust within the atmosphere. Once again, as in the case of ozone, the risks are well known. The development of the equipment to the point or the failure to maintain the equipment to the point where it is likely to cause respiratory complaint will, in my view, initiate a series of claims from unfortunate sufferers who have been sensitised by this condition. At the moment, we only have one claim with which to consider but then of course I am one lawyer within one firm. There are probably 20 or 30 other claims but even so I regard this as the tip of the iceberg. I believe that the incidence of risk is likely to be sufficiently high that there will be justifiable claims because people have been exposed to an unnecessary risk of injury and often the complaint can be based upon inadequate maintenance or inadequate provision within the air conditioning units themselves.

The fact that claims will come in respect of RSI, exposure to ozone and VDUs and sick building syndrome I regard as certainties because there are already claims in the pipelines. There are other less certain claims as well relating to, for example, passive smoking and stress related to the workplace. Whether we shall see these claims in the 1990s or we will have to wait to the next century I am not sure but they are there hovering on the horizon waiting to make life difficult for industry and insurers.

Let me now turn to the question of environmental claims. For those of you who are unaware of Sellafield, this is British Nuclear Fuel's processing or reprocessing plant on the north west coast of England. Despite the assertions that relevant precautions have been taken, claims have been launched and proceedings issued in respect of the incidence of leukaemia and various other cancers affecting the local population. Grangetown is a town on the north east coast of England. Here it is said that the local population are affected by emissions from plants operated by major industries within the area. The incidence of asthma is said to be much

higher than in the population at large and at the present time claimants are seeking to prove a causal link between the emissions and the number of children affected by asthma.

It is clearly going to be increasingly common in the next decade for the medical profession to establish with the help of greater background data, a causal link between injuries or disabilities which, for many years, were simply dismissed as one of the ordinary risks of life. Indeed, I often wonder if in the next 50 years we will get back to a situation where every thing that we eat, everything that we do and everything that we breathe will be identified as doing us either harm or good. It is not a situation which I look forward to with any great relish, I suspect it will spoil the things that I enjoy and make me do things that I do not enjoy.

To conclude, somebody reading this paper will no doubt consider me a pessimist. If I may say so, my pessimism is well justified, the insurance industry since the war is littered with scenarios which were neither anticipated nor were thought could actually exist or develop to the extent to which they have developed. I have given you a few examples in the forms of asbestosis claims and deafness claims but in reality, there are many others. If, therefore, my pessimistic attitude encourages insurers and industry to be more cautious and to appreciate that the unexpected will catch up with them, then at least this lecture will have served one important purpose.

Thank you for your attention.