

British Asbestos Newsletter

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1. United Kingdom Bans Chrysotile

The asbestos century is over. One month after the European Union (EU) banned chrysotile, the UK followed suit. The Asbestos (Prohibitions) (Amendment) Regulations 1999, signed on August 24 by Deputy Prime Minister Prescott, come into force on November 24, 1999 five years ahead of the European deadline. Chrysotile had been the only type of asbestos permitted in the UK since amosite and crocidolite were banned in 1985. Statutory Instrument No. 2373 forbids the import of crude fiber, flake, powder or waste chrysotile and the new use of asbestos cement, boards, panels, tiles and other products. Chrysotile-containing products installed prior to November 24, 1999 can remain in place until they reach the end of their service life. The sale of second-hand asbestos cement products and building materials covered with asbestos-containing coatings is forbidden. Two pages of time-limited derogations apply to specialist items such as "diaphragms in electrolytic cells in existing electrolysis plants for chloralkali manufacture," and "split face seals of at least 150 millimetres in diameter used to prevent leakage of water from hydro-electric power generation turbines..." The residual problem of brake linings was dealt with in a complementary piece of national legislation that implemented European Commission Directive 98/12/EC. Laid under the Consumer Protection Act, the Road Vehicles (Brake Linings Safety) Regulations 1999 prohibit "the supply, exposure for supply or fitting to a motor vehicle or trailer of brake linings containing asbestos" as of October 1, 1999.

While the government's decision on chrysotile was anticipated, its arrival during the dog days of the Summer parliamentary recess was surprising. Perhaps Ministers believed vacationing representatives of the asbestos industry and producer governments would remain unaware of the new legislation. The low-key announcement was understandable

in light of the industry's increasingly desperate attempts to counter growing anti-asbestos sentiment. Diplomatic threats and sabre-rattling had delayed UK legislation for two years. When Labour first came to power, Prime Minister Blair expressed his determination to "deal effectively with the problems of asbestos." Environment Minister Angela Eagle told the House of Commons that "a mechanism for introducing a domestic ban on the import, supply and use of asbestos" was being investigated. In the weeks and months that followed, it became clear that more cautionary counsels had prevailed. A year after her first statement, Eagle commented: "Any decision by the UK Government to proceed with further restrictions on the importation, supply and use of chrysotile will be based on robust scientific evidence, thereby fulfilling obligations under World Trade Agreements." The reason for the deceleration was simple: on May 28, 1998 the Government of Canada lodged a request with the World Trade Organization (WTO) for consultations with the European Commission "concerning certain measures taken by France for the prohibition of asbestos and products containing asbestos." Should the UK follow the French lead, it might well receive similar attention. A decision was taken to adopt a more circuitous strategy: a UK ban would be pursued under the protective cover of European mobilization. Health and Safety Executive (HSE) personnel worked closely with their counterparts at Directorate General (DG) III of the European Commission. In 1997, a senior HSE official had been seconded to DGIII to work on the draft legislation. In response to an EU appeal for information, the HSE commissioned a report entitled *Chrysotile and Its Substitutes: A Critical Evaluation* for submission to the Scientific Committee on Toxicity, Ecotoxicity and the Environment. From recent statements by government spokesmen, the importance of the HSE's input into the consultation and decision-making process is clear. Sir Frank Davies, Chairman of the Health and Safety Commission, said: "We have worked long and hard to secure a ban for the good of Europe as a whole, taking a leading role in helping to establish a solid scientific foundation for it." John Prescott believes that the UK "played a leading role in securing sound science around the safety of alternatives, without which there most probably would have been no ban."

The timing of the ban is of interest vis-à-vis the ongoing WTO case. According to the EU: "The new directive does not in itself have any legal impact on this particular case. However, it introduces a measure which is very similar to the French ban, thereby confirming support for France at Community level. The scientific justification for the Directive is also based on the justification given by France for its national measures." The machinations of the WTO remain shrouded in secrecy. The ruling, originally expected in early December, will be delayed until March, 2000 according to an article for the Bureau of National Affairs. Although no reason was given, informed observers believe that the original timetable has been derailed by the need to commission independent scientific advice. Should the unthinkable happen and Canada win its case, chrysotile prohibitions in ten EU countries could be in jeopardy. The member states which still permit the use of chrysotile - Spain, Portugal, Greece, Ireland and Luxembourg - have been urged by

Deputy Prime Minister Prescott to "act swiftly to implement the Directive, so that all forms of asbestos will be banned in Europe as soon as possible."

The clandestine workings of the WTO have attracted condemnation from environmental, consumer and citizen groups world-wide. According to Barry Coates, Director of the World Development Movement, over the last four years the WTO "has overturned laws to protect turtles and dolphins, banned the EU's support for banana farmers in the Caribbean, undermined restrictions on the use of leg traps in the fur trade and overruled the EU's ban on imports of beef injected with growth hormones" in the name of trade liberalization. On November 30, Ministers from the WTO's member nations meet in Seattle for four days of talks. Trade issues involving agriculture, services and intellectual property rights are on the agenda; the decisions made could dramatically affect sectors as diverse as farming, energy, education, health-care, tourism, teaching, medicine and entertainment in each of the 135 signatory countries. The unresolved case of Canadian chrysotile is bound to cast a spectre over the economic free-for-all. Barry Castleman, international asbestos specialist, believes that the Canadian complaint has far-reaching implications: "We are dealing here with the leading known cause of occupational cancer in human populations all over the world, one of the most thoroughly studied toxic substances. If there isn't enough evidence to ban the use of asbestos (mainly used in building panels and pipes and vehicle brakes, hazardous uses where safer substitutes are available), what can be banned?"

2. British Justice

In his seventy-two years, Cupido Adams has seen his wife, parents and brothers die. Like one in seven people from his home-town of Prieska, they had asbestosis. The fact that he is ill comes as no surprise to Mr. Adams; he remembers all too clearly working with the deadly dust all day and everyday. In the absence of protective gloves, he handled and sorted asbestos with his bare hands: "The dust was everywhere. It lay up to an inch thick. There were no warnings, nothing. Children played in it. I lived half a kilometre from the factory but in order to drink I had to scrape a layer of asbestos off the top of my water jug." Mining, milling and manufacturing operations in three South African provinces belonged to UK asbestos giant Cape Asbestos Co. Ltd. and its subsidiaries. Incorporated in 1893: "to purchase, take on lease, hire or otherwise acquire any asbestos or other mines, quarries, workings, rocks...containing or supposed to contain asbestos or other minerals in South Africa, Canada, Italy or elsewhere," the company spent eighty-six years doing just that. In 1979, Cape sold up and left its former workers to fend for themselves. No settlement was made, no trust set up, no medical scheme put in place. To our knowledge, Cape has not paid one rand in compensation to any of its South African workers; nor has it contributed to government efforts to decontaminate asbestos dumps, industrial sites and derelict mines in the Northern Cape, the Northern Province and Gauteng. The company refuses to discuss its South African obligations; phone calls to the

Uxbridge headquarters resulted in a "no comment" from Company Secretary Stephen Smith.

Mr. Adams was in London last Summer to talk about a landmark case which has been three years working its way through the English judicial system. The claimants are South African asbestos victims; the defendant is Cape plc, a multinational conglomerate with an annual turnover of £238.6 million and net assets of £53.6 million. From the start, the plaintiffs faced almost insurmountable hurdles including jurisdictional problems and evidentiary difficulties. Solicitors at Leigh Day & Co., the London firm representing most of the plaintiffs, maintained that the legal action should be brought in England, the country in which Cape is incorporated and domiciled. The defendant's solicitors argued strenuously that South Africa was the appropriate forum. On appeal, the five plaintiffs won the right to sue in England. On December 16, 1998, the House of Lords confirmed that the cases of Rachel Lubbe et al could proceed. One month later, writs alleging occupational or environmental exposure were issued on behalf of Hendrik Afrika, Cupido Adams and 1,537 others. The increase in numbers was the basis for another defense application to stay proceedings "so that the claims could be returned to South Africa as a group action." This manoeuvre succeeded. On July 30, 1999, Mr. Justice Buckley found: "The operation of asbestos mines and mills in South Africa appears to have caused widespread injury, suffering and death over many years. An enquiry into the circumstances including, local standards, conditions, regulations and state of knowledge of the parties and, if appropriate, assessment of damages to compensate the South African victims are overwhelmingly matters in which the South African jurisdiction has far greater interests." Politicians and campaigners denounced the verdict. Ben Jackson of Action for Southern Africa urged that: "Cape and other British companies that profited from the apartheid system cannot be allowed to walk away from their responsibility." In a letter to The Independent, Labour MPs and MEPs criticized a legal system which "is failing to deliver justice to people overseas who have suffered through the negligence of British companies." When the Court of Appeal upheld Buckley's decision, plaintiffs' Solicitor Richard Meeran responded: "To deny our clients the opportunity of facing Cape in a UK court is the same as denying them justice. The likelihood that a class action will be brought in South Africa is remote. Undoubtedly, an appeal to the House of Lords will be made."

The situation in which Cape's former workers find themselves is a far cry from that promised during the company's heyday. In 1953, a publication issued on the occasion of Cape's Diamond Jubilee predicted a glowing future for its workforce: "Cape's achievement is no more and no less than the total contribution of every member of the Company over these sixty years... recognising this fact (we) have seen to it that the first to benefit from prosperity, when it came, were the employees in mine and factory, laboratory and office, at home and abroad." The text stressed the "magnificent work done by the men and women in our mining establishments." Half a century later, these men and women are struggling to obtain a fraction of the compensation their UK counterparts have received.

They are, unfortunately, not alone in their disappointment. A product liability lawsuit brought by American workers failed in 1988 because English courts refused to enforce a \$15.6 million default judgement issued by a United States District Court in Tyler, Texas. Cape Industries plc, the UK parent company, contested the court's jurisdiction and did not appear in the proceedings. According to a Law Report of June 21, 1988: "Cape had no assets in the USA and so was prepared to allow default judgments to be obtained. In addition, NAAC (Cape's marketing subsidiary for the USA) was put into liquidation. Alternative marketing arrangements were implemented with a Liechtenstein corporation selling asbestos in the USA, through an agent, a new Illinois corporation, Continental Productions Corporation (CPC)." Once again a jurisdictional defense mounted by Cape succeeded; Jimmy Wayne Adams, the lead plaintiff, and 200 plus claimants left the Court of Appeal empty-handed.

There is an important difference between the US and South African cases. In the earlier case, Cape refused to submit to a foreign court's jurisdiction; in the later it has "agreed to submit to the jurisdiction of the South African court in respect of the claims." This decision could prove very costly. South African environmental policy is based upon the concept of "the polluter pays." In September, a parliamentary environment committee was told that where the original polluter could not be traced, the government was responsible for decontamination costs. Until now, the financial burden of the asbestos clean-up has meant that only the most rudimentary steps in the worst affected areas could be taken. A review of techniques such as covering exposed asbestos with topsoil, planting trees and shrubs and fencing designated sites is being undertaken by the Department of Environmental Affairs (DEA). Now that Cape has volunteered to be sued in South Africa, perhaps it's a good time for the DEA to think big. Sophisticated systems and state of the art equipment are surely not beyond the pockets of a company whose success derived "from the life blood which flows from our Blue and Amosite mines." A company which believed that "the future will enable us to continue to pay the highest regard for human values" would gladly do the right thing - wouldn't it?

3. Asbestos Not Tobacco Caused Cancer

Two years after his death, a ruling by the Court of Sessions in Edinburgh vindicated the efforts of William Smith's family to gain recognition and compensation for his asbestos-related illness. A plaintiff's verdict by Lord Bonomy awarded damages totalling £97,100 against Upper Clyde Shipbuilders (UCS), successors to John Brown Shipbuilders Ltd., Smith's former employers. This case was complicated by several factors: disputed medical evidence, the lack of a post-mortem and the decedent's history of heavy smoking. During the 1960s, Smith worked for five years as a coppersmith's assistant; UCS agreed that asbestos exposure could have occurred during this time. The company asserted however that Mr. Smith's death at age 54 was due to adenocarcinoma, a type of lung cancer, not mesothelioma; defence experts believed that the lung cancer had been caused by the patient's lifelong smoking habit. Although the procurator-fiscal had been informed

of Mr. Smith's death, no post-mortem was conducted as mesothelioma had already been diagnosed. The judge regretted this oversight saying: "A post-mortem would probably have been conclusive... it would be of assistance in any case where mesothelioma is suspected if fiscals were to advise relatives that a post-mortem would be appropriate if a firm diagnosis was likely to be required for any purpose." Knowing that his patient was a heavy smoker, Dr. John MacDonald, a consultant physician at Crosshouse Hospital in Kilmarnock, initially suspected lung cancer, a disease which, like mesothelioma, is characterized by breathlessness and chest pain. CT scans, however, revealed the "classic features" of mesothelioma. This diagnosis was supported by evidence from Dr. James Kerr, consultant physician from Glasgow's Western Infirmary, and consultant radiologist Dr. Brian Moule. The Judge concluded that asbestos not tobacco had caused the fatal cancer.

4. Asbestos Prosecutions

Environment Agency (EA) and Health and Safety Executive (HSE) prosecutions relating to asbestos cement products, chrysotile tiles and risk assessments continue to draw attention to unacceptable practices throughout the country. A recent case before Welsh Magistrates highlighted "the need for anyone using recycled building waste in construction projects to make absolutely sure that the wastes are uncontaminated and suitable for the purpose." Bridgend farmer David Williams was fined £3,000 plus £1,469 costs after pleading guilty to waste offences including one of tipping asbestos after an inspection revealed that asbestos-containing rubble had been used in the maintenance of road surfaces on his farm. Asbestos cement debris in unsealed bags and scattered around a yard belonging to a Devon building contractor cost the Exeter firm of WH Tolley and Son £7,000 last Summer when three charges of storing asbestos waste on unlicensed land were admitted. In October, magistrates at Arundel Court fined a new company £5,000 for infringements which occurred two years ago before the current owners took over. Improper storage of asbestos waste and the presence of uncovered sheet asbestos were found during a site visit by EA officers. Despite a change of ownership and management, the EA persisted in the court case for two reasons: "Firstly to send a clear message to the public that we will not hesitate to investigate and prosecute any abuse of the legislation governing the disposal of waste. Secondly, the directors at the time of the offences now have the stigma of these convictions, This means that if at any time in the future they wish to become involved in the waste industry, these offences will be taken into account when they apply for the necessary licences to operate." The same month, Graham Law, a Sheffield builder, was fined £4,800 for offences under the Environmental Protection Act 1990. Sheffield Magistrates were told that Law had illegally buried chrysotile roofing tiles at a house in Nelson Road, Stannington.

Unsafe working conditions and administrative oversights were pivotal to convictions obtained by the HSE last Summer in England and Scotland. Green Contract Services admitted breaching health and safety guidelines during the removal of asbestos from the

council-run Frances Withers Home in Sutton Coldfield. The HSE prosecutor told Birmingham Magistrates Court: "None of the precautions you would have expected to see actually took place. People were ripping out asbestos with claw hammers, and workers were changing in the car park at the site instead of a proper decontamination unit." The company was fined £15,000 with £830 costs. In Falkirk, Scotland, the Sheriffs Court heard how fourteen employees of Cameron Furnace Ltd., a Rutherglen contractor, had been exposed to asbestos while working at BP Chemicals' G4 Plant in Grangemouth. The men had been stripping and relining a 1960s waste boiler during a routine shutdown. The boiler's calcium silicate cladding contained asbestos fibers which were liberated during the removal of the refractory material. According to the prosecution: "The dust was a quarter of an inch thick and while employees had protective clothing, they did not have enough and even had tea breaks while wearing these and even took some of the dust home." Procurator fiscal Caroline Dickson believed that: "With the age of the boilers it should have been known that there was a danger of asbestos in the lining:" a risk assessment should have been carried out. In defense, BP's solicitor said: "The whole operation to remove the cladding had been carefully planned but it wasn't known that the material contained asbestos particles." Sheriff Andrew Murphy was dismissive: "It seems to me BP has the resources and shouldn't have failed to identify the possibility of the substance." BP received a £5,000 fine, the maximum penalty permitted by law; the contractors were fined £1000 for the unlicensed removal of asbestos insulation.

5. News Round-up

Asbestos Exposure and Dust Control is the 20th volume in the authoritative textbook series: Sourcebook on Asbestos Diseases. Working through some of "the most tragic documents in British industrial history," G Tweedale, author of the chapter entitled Sprayed "Limpet" Asbestos: Technical, Commercial and Regulatory Aspects, demonstrates the "failure of Turner & Newall between the 1940s and 1970s to warn workers adequately and enforce even the most basic safety standards." He continues: "Perhaps the saddest aspect of the SLA (Sprayed Limpet Asbestos) tragedy was that satisfactory substitutes were available even before asbestos was commercialised in the 1880's."

In Ecological Relationship between Mesothelioma Incidence/Mortality and Asbestos Consumption in Ten Western Countries and Japan K Takahashi et al find that: "Among the ten Western countries, a clear linear relationship was shown between the mesothelioma incidence/mortality rate and the preceding per capita asbestos consumption."

A Study of Lung Cancer Mortality in Asbestos Workers: Doll, 1955 by M Greenberg looks at the circumstances and results of Dr. Richard Doll's research into lung cancer mortality among workers for Turner Brothers Asbestos: "Despite the limitations of the data, Doll convincingly demonstrated so substantial an excess of lung-cancer in heavily exposed long-term asbestos workers as to overcome honest doubt." The publication of

these findings "produced so profound a lack of sense of urgency," that legislation to tackle the cancer problem was not passed until 1976. In the absence of the political will to safeguard occupational health, asbestos-related deaths were an acceptable price to pay for a robust export industry.

Comparative Hazards of Chrysotile Asbestos and Its Substitutes: A European Perspective by PTC Harrison et al concludes that "the continued use of chrysotile in asbestos-cement products is not justifiable in the face of available and technically adequate substitutes. Likewise, there seems to be no justification for the continued residual use of chrysotile in friction materials."

This Autumn, the subject of asbestos was discussed at a series of annual conferences including those of The International Mesothelioma Research Group, The International Association of Cancer Registries, The European Respiratory Society and The International Symposium on Particle Toxicology. At the last meeting, David Bernstein told a sceptical audience that "pure chrysotile is rapidly cleared from the lung. Fibres longer than 20µm are cleared with a half-time of 1.3 days..." Drs. Arnold Brody and Bruce Case challenged these findings quoting alternative research such as that of MM Finkelstein and A Dufresne. Their paper: Inferences on the Kinetics of Asbestos Deposition and Clearance Among Chrysotile Miners and Millers found a compartment clearance for chrysotile similar to that for amphiboles.

Two years of sponsorship has been obtained for an initiative to assist asbestos victims and their carers. The Mesothelioma Information Project has produced a free booklet which is available from Macmillan Nurse Mavis Robinson, the Project Manager, at mavisro@ulth.northy.nhs.uk Alternatively, a request can be made to the information helpline: 0113 2066 466. According to Mrs. Robinson: "A major part of the project is to establish a network of specialist nurses throughout the country who can advise and assist in their own areas."

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