

RIGHTS OF RELATIVES TO DAMAGES (MESOTHELIOMA) (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill introduced in the Scottish Parliament on 27 September 2006:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 75-PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

4. Section 1 of the Damages (Scotland) Act 1976 (the 1976 Act) confers on the relatives of people who die as the result of a wrongful act certain rights to damages. Those relatives listed in Schedule 1 to the Act may claim under subsection (3) for loss of support and funeral expenses. Immediate family may also claim under subsection (4) for distress, grief and loss of society. These claims are separate from the deceased's own claims for damages. But subsection (2) of that section provides that there shall be no liability to relatives of a deceased person where that person's claim has been settled, or damages have been awarded, prior to death. Currently, mesothelioma sufferers face the dilemma of either pursuing their damages claim while still alive or not pursuing their claim before death so that their executor and relatives can claim awards which total more than the award of damages the sufferer would have been entitled to. Most sufferers are foregoing the compensation which would provide some comfort for them before they die in order to help their families.

5. The Bill will disapply section 1(2) of the 1976 Act so as to allow the immediate family of a mesothelioma sufferer to claim damages for distress, grief and loss of society under section 1(4) of the Act after the sufferer's death irrespective of whether the deceased has already recovered damages or obtained a settlement. The new provision will apply only where the sufferer recovers damages or obtains a settlement on or after the date the Bill comes into force. The immediate family will have the normal limitation period of three years after the death of the sufferer in which to make their claim.

Section 1 – Rights of relatives of a deceased person to damages

6. This section amends section 1 of the 1976 Act. At present, section 1(2) of the 1976 Act prevents the deceased's immediate family from claiming damages for distress, grief and loss of society under section 1(4) of the 1976 Act where the deceased has settled his or her own claim while still alive. This amendment provides at section 1(2) of the Bill for an exception to this rule. The amendment at section 1(3) inserts new subsections (2A) and (2B) which set out the parameters of the exception.

Section 2 – Short title and commencement

7. This section gives the short title of the Bill and provides that the Bill will come into force on the seventh day after Royal Assent.

FINANCIAL MEMORANDUM

INTRODUCTION

8. At present, mesothelioma sufferers must decide, in the closing months of their lives, whether to pursue their damages claim while still alive or allow the claim to be pursued after their death so that their family can benefit from larger awards. Under section 1(2) of the Damages (Scotland) Act 1976 (the 1976 Act) claims by the immediate family of someone who dies as the result of a personal injury are extinguished if the injured person settles their own claim before they die. A dilemma arises for mesothelioma sufferers of either pursuing their own damages claim or not pursuing their claim before they die so that their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to. Most sufferers are not pursuing their own claims in order not to disadvantage their families.

9. The intention of the Bill is to remedy this situation by amending section 1(2) of the 1976 Act to enable damages for loss and suffering to be claimed by the immediate family in any case where a person has sustained a personal injury consisting of mesothelioma, and they subsequently die of that injury. The Bill will not amend section 1(2) in relation to compensation to relatives for loss of financial support because the deceased person's damages would already have taken into account his/her financial support to his/her family.

10. Mesothelioma incidence is rising, largely as a result of asbestos exposure, most commonly associated with industries such as shipyards. There were 1969 mesothelioma deaths in Great Britain in 2004. However, the long latency means that despite far better controls on asbestos exposure and the elimination of asbestos imports, the overall incidence rate is still rising. Future projections (based on mesothelioma deaths to 2001) suggest that the incidence could reach 2400 deaths per year around the year 2013 before falling away to a background rate (perhaps 500 cases per year) by 2050¹. Projections of the eventual annual incidence following the peak are unstable and highly sensitive to assumptions about life expectancy and residual exposure levels. Latest available figures for Scotland show that there were 197 cases of mesothelioma diagnosed in 2003 and that in 2004 there were 161 deaths². Predictions of future incidence for Scotland are not available.

¹ Source: Health and Safety Executive <http://www.hse.gov.uk/statistics/causdis/meso.htm>

² Source: General Register Office for Scotland

COSTS ON THE SCOTTISH ADMINISTRATION

11. There will be no significant additional costs to the Scottish Administration arising from this amendment.

Scottish Courts

12. The amendment means that there will be more damages claims raised because mesothelioma sufferers themselves will not be inhibited from raising their own claims, but it is not anticipated that the proposed changes will significantly increase the costs to the Scottish courts. In 2005, around 100³ mesothelioma claims were settled. Most will have been raised in court, but settled extra-judicially (98% of all personal injury cases raised in court settle extra-judicially). Of these 100 estimated cases, 85% included payments in respect of relatives' claims. In 80% of cases sufferers had decided to wait and let their relatives pursue their claim after death and 5% died before settling their own claim. Based on the estimated figure of 100 cases, the increase in the number of cases suing through the Scottish courts would therefore be a maximum of 95 i.e. the relatives – if there are any - of the 15 sufferers who settle at the moment prior to death and the 80 sufferers themselves who currently choose not to pursue their own claims. No extra costs will arise in the 5% of cases where the mesothelioma sufferer has chosen to pursue his/her own claim but dies before settlement: as happens now, two actions will be raised as these cases will be taken forward by the executor and the family after the death of the sufferer. The figure of 95 will increase each year until the anticipated peak as described in paragraph 10 above. This maximum figure assumes that all mesothelioma victims pursuing their own claim will live to accept settlement or be awarded damages: this is not the case but it is not possible to break the figure down.

13. Based on the 33%⁴ increase in the UK figures for deaths between now and the peak, the maximum figure of 95 can be extrapolated to a figure of around 125. However, we would not expect all relatives of deceased mesothelioma victims who had settled prior to death to have to sue through the courts. Liability will already have been established and insurance firms and relatives may be willing to settle these cases extra-judicially. It is not possible to quantify either current or future costs to the courts in dealing with mesothelioma cases. While the cost of a sitting day to the court is known, the cost cannot be equated or broken down to a particular type of case. However, as noted above, only 2% of cases are actually settled in court. The extra cases should be put in the context of 2,400 personal injury actions raised in the Court of Session per year. 95-125 extra cases per year maximum is therefore likely to increase clerical and judicial input by around 4% on personal injury actions. At least 29% of the cost of any increased workload flowing from additional cases will be recouped from the parties, in the form of court fees in accordance with normal costing and recovery procedures in the Scottish courts.

³ Figures in paragraphs 12 and 18 have been extrapolated to cover Scotland as a whole from figures kindly provided by Thompsons Solicitors who have advised that they deal with between 80% and 90% of mesothelioma damages claims in Scotland.

⁴ The 33% figure mentioned in paragraphs 13 and 18 was based on an earlier available figure of 1800 deaths increasing to 2400 and was consulted on in the partial Regulatory Impact Assessment. The most recent figures are set out in paragraph 10.

Legal Aid

14. Civil Legal Aid, subject to the usual statutory tests being satisfied, is also available for persons taking a damages claim through the courts. Legal aid costs will increase in line with an increase in numbers of applications being pursued by financially eligible applicants, the costs of which will require to be met out of the Legal Aid Fund. However, where legal aid is granted and the case is subsequently successful, the legal aid costs and outlays will in the majority of cases be offset against the award of expenses made against the unsuccessful party and, if relevant, against the award of damages. It is therefore not anticipated that legal aid costs will be significantly increased.

COSTS ON LOCAL AUTHORITIES

15. The proposed change has implications for local authorities in relation to employer liabilities. However, given that most (85% of) mesothelioma claims are already settled by executors and relatives, the additional costs falling on local authorities, within the overall employer sector, should be insignificant. Mesothelioma is strongly associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries. On the basis of the information available, there is nothing to suggest that local authorities are likely to be significantly affected by the proposal. No local authority commented on the figures set out in the partial regulatory impact assessment (see below).

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on Business

16. The Bill will have implications for the insurance industry and some UK Government Departments who have responsibility for liabilities in relation to cases arising from exposure to asbestos during the claimants' employment in former nationalised industries. (Given the context in which negligent exposure occurs, the Scottish Executive is unlikely to be affected as an employer.) It will extend their liability, in mesothelioma cases, to a sufferer's immediate family even when the sufferer has settled their own claim while still alive. The effect of the amendment will be that the amount of damages payable by defenders will increase. This, in turn, may have the effect of raising insurance premiums for policies covering liability for personal injury and death.

17. However, as noted above, currently around 85% of cases are settled by immediate family following the death of the sufferers. Additional costs arising from claims newly facilitated by the proposed change in legislation will only arise in some 15% of cases settled annually - which currently total around 100.

18. The typical award to relatives in 2005 was £72,500. Based on these figures the increased amount of damages payable per year is likely to be in the region of £1,087,500 (15 x £72,000) increasing each year until the anticipated peak between 2011 and 2015, as described in paragraph 10. Based on the 33% increase in the UK figures for deaths between now and the peak, the figure of around £1.1 million can be extrapolated to a figure of around £1.5 million. The increased costs are likely to be split with around 85% of the cost falling to the insurance industry

and around 15% to the state (i.e. the Government as the bearer of liabilities associated with former nationalised industries). The figures in this paragraph were included in the partial regulatory impact assessment (RIA) issued as part of the consultation package: no comments were received on these figures.

19. The impact of such additional claims may be felt on insurance premiums by employers who may potentially be defenders in mesothelioma cases. The impact of additional claims on the overall insurance industry is not expected to be substantial. No comments on these points were received in response to the partial RIA.

20. Compulsory employers' liability insurance was introduced in 1972. Where claims pre-date that, and the employer had no insurance, the impact of additional claims will fall on the employer if solvent. Again, no comments on this point were received in response to the partial RIA.

21. Whereas at present many mesothelioma sufferers leave settlement of their claim to their family, they will, when the Bill's provisions are brought into operation, be able to settle their own claim knowing that their family will retain their right to make a claim for non-patrimonial loss. This means that there may be two actions raised instead of one in some cases in future which may result in an increase – at present unquantifiable - in handling costs for defenders.

Costs on Individuals

22. There will be no significant costs to individuals arising from this amendment. Mesothelioma sufferers will be able to raise a claim which they are inhibited from making under the present legislation. Relatives will raise their own action after the sufferer's death. This is usually done at present as part of a single action by the executor and relatives. There may be two actions raised instead of one in some cases in future. This is unlikely to have associated costs for individuals since most asbestos related actions are funded by conditional fee agreements.

SUMMARY OF ADDITIONAL COSTS ARISING FROM THE BILL

Costs on Scottish Administration	Costs on Local Authorities	Costs on Business and the State	Costs on other Bodies
Courts Negligible – <i>see Paragraphs 12 and 13</i>	Negligible – <i>see Paragraph 15</i>	£1.1m per annum increasing to a peak of £1.5m per annum around 2013 and then decreasing – <i>see Paragraph 18</i>	Individuals None - <i>see Paragraph 22</i>
Legal Aid Negligible – <i>see Paragraph 14</i>			

EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

23. On 27 September 2006, the Minister for Justice (Cathy Jamieson) made the following statement:

“In my view, the provisions of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

24. On 26 September 2006, the Presiding Officer (Right Honourable George Reid MSP) made the following statement:

“In my view, the provisions of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill
(SP Bill 75) as introduced in the Scottish Parliament on 27 September 2006*

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