

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

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill introduced in the Scottish Parliament on 27 September 2006. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 75-EN.

POLICY OBJECTIVES OF THE BILL

Background

2. Mesothelioma is a cancer of the cells that make up the lining around the outside of the lungs and inside of the ribs, or around the abdominal organs. It rarely develops in people who have never been exposed to asbestos. Mesothelioma does not usually develop until 20 - 40 years after exposure to asbestos. There is no cure for mesothelioma and once diagnosed, sufferers survive on average some 14 months. In the great majority of cases, the disease is associated with occupations where there was a greater likelihood of asbestos exposure, such as shipbuilding and construction. There are strong geographical concentrations around shipbuilding areas, centres of railway engineering, and asbestos plants.

3. Mesothelioma incidence is rising. 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.

4. Under the Damages (Scotland) Act 1976 (the 1976 Act) where a person dies as a result of personal injury their relatives may be entitled to claim damages for patrimonial loss and/or non-

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

² Source: General Register Office for Scotland

patrimonial loss (NPL). Patrimonial damages are awarded for loss of financial support, while non-patrimonial damages are awarded in respect of:

- distress because of the suffering of the injured person before death;
- grief and sorrow at the death of injured person; and
- loss of deceased's society and guidance.

5. Only those relatives who are members of the deceased's immediate family can claim damages for NPL under section 1(4) of the 1976 Act. Section 35 of the Family Law (Scotland) Act 2006 redefined which relatives of a deceased person should be entitled to sue for NPL under the 1976 Act.

6. Changes to the 1976 Act, through the Damages (Scotland) Act 1993 (the 1993 Act), allowed the executor to claim the sufferer's *solatium* (pain and suffering; expectation of loss of life) to the date of death after his or her death. Previously the claim for *solatium* died with the sufferer. The 1993 Act also amended section 1(4) of the 1976 Act to replace the previous loss of society award with 3 heads of claim (past and future) as set out in paragraph 4 above. These changes were designed to correct a previous wrong that awards to relatives were too low. Following these changes, the level of NPL payments has increased (see paragraph 7). Broadly speaking, payments under all other heads of claim are similar whether settlement is before or after the death of the sufferer. The section 1(4) damages constitute an additional amount paid to the immediate family only if the sufferer does not settle their claim in full prior to death.

7. The courts have recently substantially increased the amount of damages which they are prepared to award the relatives under section 1(4) of the 1976 Act. In 1992, the amounts awarded to a widow ranged from £5,500 to £12,500 and to a child from £600 to £10,500. However, recent awards of section 1(4) damages have increased from £20,000 to £28,000 to a widow and £5000 to £10,000 for an adult child and £3,000 to £10,000 for an elderly parent losing an adult son.

8. Under section 1(2) of the Damages (Scotland) Act 1976 (the 1976 Act), the immediate family of an injured person is prevented from claiming damages on the death of that person if the deceased has already settled in full a claim prior to death for damages for his or her own loss. Currently, mesothelioma sufferers face the dilemma 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 (around 80%) are not pursuing their own claims in order not to disadvantage their families.

Origins of Bill

9. There have been representations for some time to the Scottish Executive and the Scottish Parliament for a change in the law relating to the rights of mesothelioma sufferers' close relatives to claim damages for grief and suffering. Campaigners on behalf of mesothelioma sufferers proposed an amendment to section 1(2) of the 1976 Act which would remedy the

dilemma described at paragraph 8. Des McNulty, MSP lodged a proposal for a Member's Bill to address the issue in May 2006. On 22 June 2006, the Minister for Parliamentary Business announced in her statement to the Parliament on the legislative programme that the Executive would be bringing forward its own Bill in session 2006-07. Mr McNulty withdrew his proposal for a Member's Bill on 23 June 2006.

Consultation

10. Because of preparatory work on a draft Bill carried out by Mr McNulty and his colleagues and advisers, the Executive was able to move swiftly to issue a consultation paper on 7 July 2006. Consultees were asked the following questions:

- **Question 1** - Do you agree that the existing law, which prevents the immediate family of mesothelioma sufferers from claiming damages for their non-patrimonial loss on the death of the sufferer if that person has already recovered damages or settled their claim during his or her lifetime, causes problems?
- **Question 2** - Do you agree that these problems should be remedied by disapplying section 1(2) of the 1976 Act so as to enable the immediate family of mesothelioma sufferers to claim damages for non-patrimonial loss, even although the deceased had already recovered damages or obtained a settlement in his or her lifetime?
- **Question 3** - Do you agree that the Bill should be confined to cases where the sufferer has contracted asbestos related mesothelioma with Scottish Ministers having the power to extend the new provision to apply to other diseases or other kinds of personal injury if experience shows this to be necessary?

11. The consultation closed on 18 August 2006 and both the consultation package and a summary of responses can be viewed at <http://www.scotland.gov.uk/consultations>. Fifteen substantive responses were received. The majority of respondents agreed that the law creates a problem for mesothelioma sufferers and their families in relation to claims for NPL and that the way to deal with this is by the proposed amendment to section 1(2) of the 1976 Act. Three respondents expressed the view that legislation is unnecessary and the problem identified could be resolved by greater use of interim awards of damages and sisting (suspension) of the case until after the death of the person with mesothelioma. The majority of the respondents agreed that the Bill should be confined to cases where the sufferer has contracted asbestos related mesothelioma. There was a mixed response to the suggestion that Scottish Ministers should have the power to extend the new provision to apply to other diseases or kinds of personal injury if experience shows this to be necessary. Responses have been taken into account in the drafting of the Bill and accompanying documents. (See also paragraphs 13 and 22.)

Specific Objectives

12. The policy behind the Bill is to remove the dilemma which mesothelioma sufferers find themselves in, as described at paragraph 8 above. 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 NPL under section 1(4) of the Act where the sufferer has sustained personal injuries as a consequence of mesothelioma and dies as a result of those injuries, irrespective of whether the deceased has already recovered damages or obtained a settlement. The Bill does not disapply section 1(2) of

1976 Act in relation to section 1(3) of the Act, which relates to compensation to relatives for loss of financial support. To do so would give rise to double-counting of compensation payments because the deceased person's damages would have taken into account his/her financial support to his/her family.

13. The Bill disapplies section 1(2) only in relation to damages for NPL for the immediate family of people who die as a result of mesothelioma. In the consultation paper, the Executive sought views on Scottish Ministers having a power to extend the new provision to apply to other diseases or kinds of personal injury if experience shows this to be necessary. There was a mixed response to this suggestion. Of the 15 substantive responses received, seven consider that it might be helpful (one with reservations) and two of these seven suggested asbestos-related lung cancer as a condition which could be added. Six respondents do not think that Scottish Ministers should have such a power for a variety of reasons: mesothelioma is unique and there are no other diseases which share its characteristics; they do not believe a change in law is necessary at all (see para 22); there is an urgent need to address the specific position of mesothelioma sufferers while a wider review is undertaken; they are worried about the impact of use of the power. Three respondents want the Bill widened: suggestions were made to include asbestos-related lung cancer and to include all personal injury cases involving terminal illness.

14. Scottish Ministers have carefully considered the points made by respondents. The issues arising from the consultation are extremely difficult. They are linked to some of the most painful family situations imaginable. Ministers are very alive to the suffering endured by personal injury victims and their families. But that is not the issue here. In committing to legislation to address the dilemma faced by mesothelioma victims and their families, Ministers are taking a highly unusual step: they are proposing that a body of law based on general principles should be modified in relation to one particular condition. The central question for Ministers in light of the consultation is whether there can be any sound justification – in this Bill and at this time – for introducing a further new development into the law.

15. Ministers have concluded that the Bill should not contain a power enabling them to extend the Bill's provisions by order. The following paragraphs set out the reasons for this decision.

16. Mesothelioma is unique in having the following characteristics :-

- It is almost invariably caused by exposure to a particular substance - asbestos (and in the other cases negligence does not arise);
- No other exposure causes the disease;
- In the current state of medical science, there is no effective treatment which will cure anyone with the disease;
- The average life expectancy for the disease is 14 months.

Essentially therefore, all victims of mesothelioma due to asbestos know they have a terminal illness and the issue of a compensation claim arises immediately they are diagnosed. Consultation has borne out the unique character of mesothelioma.

17. In bringing forward this Bill so quickly, Ministers' clear objective is to help mesothelioma sufferers and their families. However, what the need to take this action has pointed up is that there are areas of the law of damages which should be reviewed. The way the law relating to damages recoverable in respect of deaths resulting from personal injury and recoverable by relatives of an injured person has evolved has resulted in provisions which are complex and which, together with practice and procedures, can have unintended consequences. Ministers have therefore asked the Scottish Law Commission (the SLC) to undertake a review of the 1976 Act and the relevant elements of Administration of Justice (Scotland) Act 1982, taking into account underlying practices and procedures.

18. Alongside this review of the wider law, Ministers are taking this urgent action to address the problem which has arisen specifically for victims of mesothelioma. They have no intention of encroaching more widely into the law of damages without advice and recommendations from the Scottish Law Commission and the opportunity to consider and consult on these. Any extension in this Bill beyond mesothelioma would be such an encroachment. Because there is no other "class" of condition or disease which forces people to choose whether or not to pursue their own claim for damages, it could be said that, beyond mesothelioma, the only logical step would be to remove altogether the restriction on relatives' rights in section 1(2) of the 1976 Act. That is not a matter for swift legislation and very limited costing and consultation. At common law, a relative could only claim damages if the deceased could still claim damages at the time of his death. This provision has been enshrined in Scottish statute since 1976. To in effect do away with it, with no appraisal of its rationale, no assessment of the impact on the rest of the legal and procedural framework, and no assessment of the costs to and effect on insurance providers and policy holders, would be unwise and indefensible.

19. It follows from the position set out above that if an order-making power were included it would be restricted to diseases which share the characteristics of mesothelioma. However, there is no likelihood of such a power being needed in the foreseeable future. Ministers therefore consider that the Bill should not contain such a power. This will avoid any doubt about their position and false hope that they would consider widening the provisions in the legislation to conditions which could not be said to share the characteristics of mesothelioma.

20. Ministers do accept that there will be some other personal injury victims whose individual circumstances put them in a dilemma in relation to claiming damages or allowing their relatives to claim. They understand and sympathise with the pain and anxiety this may cause. They are clear, however, that they cannot tackle that wider point through this short Bill, for reasons explained above. They are examining this through the wider look at the continuing appropriateness of the section 1(2) exclusion which the SLC will carry out as part of its review of this area of damages law.

Applicability of new provision

21. The new provision will apply only where the sufferer recovers damages or obtains a full settlement on or after the date the Bill comes into force. Where the liability of the responsible person has been discharged prior to that date, that discharge will continue to bar any claim by the immediate family. Where the new provision does apply, the immediate family will have the existing limitation period of three years after the death of the mesothelioma sufferer in which to make their claim.

Alternative approaches

22. Three respondents to the consultation expressed the view that the problem identified could be resolved by greater use of interim awards of damages and sisting (suspension) of the case until after the death of the person with mesothelioma. We understand why this point has been made, but we do not consider, for the reasons given in the following paragraphs, that it offers a reliable solution to the urgent problem which has arisen.

23. A new procedure for personal injury actions, Chapter 43 of the Rules of the Court of Session, was introduced in April 2003. Chapter 43 is intended to simplify procedures and expedite settlement discussions. It also provides a timetable to which parties must adhere. Once defences are lodged in an action for damages, the court allocates all actions to a hearing at which evidence is led (called a proof diet) approximately 12 months ahead and the court expects to hear the case within this timetable. Liability is often not admitted until the day of proof, or a few days before. A sist would be granted only if the court is satisfied that it is appropriate, balancing the interests of justice and the interests of the parties. For Chapter 43 personal injury actions in particular, a sist would normally be expected to be time-limited by the court.

24. Ministers cannot forego this opportunity to address the problem quickly through a change in the law because of the existence of this procedural mechanism. For interim awards to become a useful way to provide some (but not of course all) damages due to a mesothelioma victim would require changes in behaviour on the part of pursuers and defenders, including earlier and more productive negotiation between all parties and earlier admission of liability. It has, however, been the case for many years that the lines between firms representing defenders and pursuers are firmly drawn. Ministers believe that legislative change has the merit of providing an early and certain solution to the problem.

25. The University of Edinburgh has been commissioned by the Scottish Executive to evaluate and monitor the impact of these reforms on the Court of Session and its users, and to make recommendations for further review and amendment. The Scottish Executive's understanding, albeit ahead of finalisation of the research, is that amongst practitioners the rules are considered to be effective and are a welcome development in court procedures. A variation of these rules is being piloted for personal injury litigation at Glasgow Sheriff Court, with a view to possible roll-out to the Sheriff Court system. Ministers will look with interest at whether the report makes any recommendations in the area of sisting and interim damages.

26. In relation to the speedy settlement of claims, Ministers are aware from experience in England that pre-action protocols can lead to a substantial reduction in litigation³. A Scottish pre-action protocol was adopted on 1 January 2006 and it is too early to draw conclusions as to its effectiveness. In any event, the Scottish pre-action protocol is voluntary and does not cover industrial diseases nor claims in excess of £10,000. The Executive believes that, if shown to be successful, there could be scope to expand the application of the protocol as an effective tool in reducing litigation.

³ See "The management of civil cases: the courts and post-Woolf landscape"; DCA Research Series 9/05, November 2005. http://www.dca.gov.uk/research/2005/9_2005_full.pdf

27. The only real alternative approach is making no change to the law and leaving mesothelioma sufferers and their families in the predicament described earlier. The difficulties arising from this approach would be twofold. There is first of all the distress to sufferers and their families in having to reach a view about when and on what basis to enter claims. Secondly, there is the financial loss to families in terms of benefits foregone if victims do settle in life. Legislative change is the only means to achieve the desired outcome.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal Opportunities

28. The Bill's provisions are inclusive; no impact on equal opportunities is envisaged.

Human Rights

29. The Executive believes that the proposed changes are in line with the European Convention on Human Rights.

Island Communities

30. The proposals will have no specific effect for island communities.

Local Government

31. The proposals have 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.

Sustainable development

32. The proposed changes will not have any effect on sustainable development issues.

This document relates 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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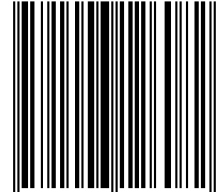
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