

# **DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL**

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## **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 Damages (Asbestos-Related Conditions) (Scotland) Bill introduced in the Scottish Parliament on 23 June 2008:

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

A Policy Memorandum is printed separately as SP Bill 12-PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Scottish Government 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 schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

4. The House of Lords (HoL) decision in *Johnston v NEI International Combustion Ltd* published on 17 October 2007<sup>1</sup>, ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action because they do not signify damage or injury that is sufficiently material to found a claim for damages in tort. The Judgment is not binding in Scotland, but is highly persuasive. The equivalent cause of action in Scotland is “delict”: in a delictual action a person may claim civil damages against another person responsible for a wrongful act that has caused loss or injury.

5. The purpose of the Bill is to ensure that the HoL Judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to *Johnston* as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Bill also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Scotland. The Bill does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person’s condition deteriorating in the future.

### **Section 1 – Pleural plaques**

6. This section addresses the central reasoning of the Judgment in *Johnston* by providing that asbestos-related pleural plaques are an actionable personal injury. Subsections (1) and (2) provide that pleural plaques are a non-negligible personal injury in respect of which damages may be recovered, i.e. that pleural plaques are material damage that is not *de minimis* for the purposes of claiming delictual damages. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the *Johnston* judgment, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining delictual liability.

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

## **Section 2 – Pleural thickening and asbestosis**

7. This section makes provision against the possibility that the ruling in *Johnston* may be applied in relation to asymptomatic pleural thickening and asbestosis (because the courts may consider that the *ratio* (principles of law underlying and justifying the decision) in *Johnston* provides authority in these cases). Subsections (1) and (2) provide that where asbestos-related pleural thickening or asbestosis has not caused, is not causing or is not likely to cause a physical impairment it is a non-negligible personal injury i.e. the condition is material damage that is not *de minimis* for the purposes of claiming delictual damages. In subsection (1) the phrase “for the avoidance of doubt” is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are *not* actionable. Subsections (3) and (4) provide that a person suffering from pleural thickening or asbestosis need only prove symptoms, or the likelihood of symptoms developing, if they wish that matter to be reflected in the amount of damages awarded.

## **Section 3 – Limitation of actions**

8. To ensure that claims do not become time-barred during the period between the date of the Judgment (17 October 2007) and the date the Bill comes into force, this section provides that this period does not count towards the three-year limitation period for raising an action of damages in respect of the three conditions covered in the Bill. Subsection (1)(a) addresses the kinds of claims to which this section applies, that is, claims involving the asbestos-related conditions covered by sections 1 and 2. This includes claims that have been raised in the courts before the Bill comes into force as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date the Bill comes into force, this section will apply only if they are ongoing at that date. The effect of this section is to address cases that may be at risk of being dismissed by the courts on time-bar grounds, e.g. a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising their case thinking they had no right of action under the *Johnston* judgment. The person may then have lodged their case in January 2008 because of the Government’s announcement that it intended to bring this Bill forward. Without this provision, which would stop the time-bar clock running from October 2007 until the date the Bill comes into force, that person’s claim could be dismissed as having been raised beyond the three-year limitation period.

## **Section 4 – Commencement and retrospective effect**

9. This section details the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Bill will come into force on a date appointed by Scottish Ministers by commencement order. The remaining subsections explain the retrospective effect of the provisions of the Bill. Subsection (2) provides that sections 1 and 2 of the Bill are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the judgment in *Johnston*, because an authoritative statement of the law by the HoL is considered to state the law as it has always been. Subsection (3) qualifies the effect of subsection (2) by providing that sections 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Bill comes into force. The effect of subsections (2) and (3) is that pursuers in cases which had not been settled, or determined by a court, before the Bill comes into force will be able to raise, or continue, an action for damages.

## **Section 5 – Short title and Crown application**

10. This section gives the short title of the Bill and provides that the Bill binds the Crown.

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

11. Pleural plaques' incidence is thought to be rising largely as a result of asbestos exposure, most commonly associated with industries such as shipbuilding. However, they can only be detected on x-ray or CT (computed tomography) scan so are usually diagnosed incidentally during the course of medical investigations. There is no accurate record of how many cases are diagnosed each year in Scotland. It has been estimated that up to half of those occupationally exposed to asbestos will have pleural plaques thirty years after first exposure.<sup>2</sup> Mesothelioma is the only asbestos related disease for which projections of the future burden are available. Given pleural plaques also have a long latency, and in the absence of other evidence, predictions of future mesothelioma deaths may provide the best guide to the potential scale of further rises in cases of pleural plaques. Annual mesothelioma deaths in Great Britain are expected to rise by up to 20% between now and a peak around 2015. Following this, indications are that the mortality rate will then decline. (Although these projections rest on a number of uncertain (and largely unverifiable) assumptions, the timing and scale of the maximum annual death toll is not highly sensitive to these uncertainties.)

### **Basis for calculating costs in this memorandum**

12. The Scottish Government consulted on a Partial Regulatory Impact Assessment (PRIA) for the Bill from February to April 2008.<sup>3</sup> Responses to this consultation (where confidentiality has not been requested) are available in the Scottish Government Library, K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD (Tel:0131 244 4565). A summary of responses is available at <http://www.scotland.gov.uk/consultations>. The final RIA is available at <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full>. Information gained from responses to the consultation on the PRIA has been used in preparing this financial memorandum as well as the final RIA. The main components for calculating costs are numbers of cases and cost per case. The calculations result in maximum costs, in the sense that they proceed on the basis that all claims will be successful.

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<sup>2</sup> Chapman SJ et al, "Benign Asbestos Pleural Disease", *Curr Opin Pulm Med* 2003;9(4), 266-271.

<sup>3</sup> <http://www.scotland.gov.uk/consultations>.

## **Numbers of cases**

13. There is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim. In the PRIA we used a figure of 200<sup>4</sup> actions raised per year in relation to pleural plaques in Scotland. Insurers' representatives take the view that this figure is too low in relation to estimates of future claims for a number of reasons:

- the figure of 200 in the PRIA was described as being cases raised in court. Cases are also settled without going to court. However, as indicated in footnote 4, the figure we used in the PRIA was actually based on new cases created, which is a combination of cases settled without being raised in court, and actions raised in court. We inadvertently referred to cases created as "actions raised" in the PRIA and apologise for any confusion caused. The ratio is roughly 75% raised in court to 25% settled without going to court;
- publicity about pleural plaques could lead to more people claiming;
- increasing numbers of older people getting scans for other reasons could lead to more claims;
- there could be increased use of speculative fee arrangements (no win, no fee) which could lead to more claims. Our understanding is, however, that most asbestos-related cases are already funded in this way;
- there could be increased activity by claims management companies which would increase scanning and numbers of claims. Our understanding is that claims management companies have not had much of a presence in Scotland to date.

14. Clearly there is a degree of uncertainty about future numbers of pleural plaques claims. However, in the absence of any firm figures to the contrary, we consider that a reasonable basis on which to proceed is: 200 cases a year as explained in footnote 4; plus cases against Government Departments (see paragraphs 19 and 28); plus cases against local authorities (see paragraph 23). In relation to asymptomatic pleural thickening and asymptomatic asbestosis, our best estimate of an average number of cases raised per year is 20. Within this we have made a notional allocation of 2 cases to local authorities and none to Government Departments (based on enquiries), with the rest (18) falling to business.

15. There is currently a build up of around 630 pleural plaques cases because of the House of Lords Judgment and earlier judgments in the English courts. Approximately 250 of these cases are currently sisted (suspended) by the courts and roughly 380 are backed up with solicitors. There are also 216 backed up cases against the Scottish Government, other Government Departments and local authorities (see paragraphs 19, 23 and 28). We understand that there may be a total backlog of around 60 cases involving asymptomatic pleural thickening and asymptomatic asbestosis. Within this we have made a notional allocation of 5 cases to local authorities and none to Government Departments (based on enquiries), with the rest (55) falling to business.

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<sup>4</sup> Figures provided by Thompsons Solicitors, who deal with approximately 90% of pleural plaques cases. The figure of 200 is an annual average of the figures for new cases created in the years 2004-2006, and extrapolated for Scotland

## **Cost per case**

16. Following consultation on the PRIA, the best information available to us is that settlement costs are in the region of £22,000 per case (made up of £8,000 compensation payment, £8,000 pursuer's costs and £6,000 defender's costs). This figure is an average derived from litigated and unlitigated claims, which we understand it would be difficult for insurers to disaggregate. The figure is based on final settlement costs, but some pursuers opt for provisional damages, which would be lower. This figure is based on the known 2003-04 settlement figures, from the period prior to the legal challenges which culminated in the HoL Judgment. It is therefore open to speculation as to whether this will be the average cost per case in Scotland by the time legislation is passed by the Scottish Parliament. We think that a reasonable working assumption for the purposes of this memorandum is an average cost per case of **£25,000**. (Separate figures have been provided by other Government Departments and are used in paragraph 28).

## **Wider implications**

17. Some respondents to the consultation on the PRIA have expressed concerns that the legislation will have wider implications and will pave the way for claims for other conditions which are not compensatable at present, with consequential costs for defenders. However, the legislation, as drafted, will apply only to 3 asbestos-related conditions and will have no effect beyond these conditions. Legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.

18. We have been informed that, in response to the legislation, the cost of employers' liability and public liability insurance premiums in Scotland is likely to increase (see also paragraph 29).

## **COSTS ON THE SCOTTISH ADMINISTRATION**

### **Scottish Government**

19. There are currently 3 ongoing cases for which the Scottish Government (SG) has responsibility as a defender. The cost of settling these cases is unknown but is likely to be around a maximum of £75,000 (see paragraph 16). Less than one case is raised against SG annually. The future cost for such cases is therefore expected to be negligible. However, there is a possibility of the UK Government invoking the Statement of Funding Policy between itself and the devolved administrations, which would mean that the Scottish Government would be asked to meet any additional costs incurred by UK Government Departments (see paragraph 28). The Statement says that, where decisions taken by any devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the United Kingdom Government or, alternatively, decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust such extra costs, the body whose decision leads to the additional cost will meet that cost. It is, however, by no means certain that the Statement would apply in relation to this legislation.

## **Scottish courts**

20. It is not anticipated that the proposed legislation will significantly increase the costs to the Scottish courts. Most cases are raised in court, but settled extra-judicially (98% of all personal injury cases raised in court settle extra-judicially). The costs arising from cases settled extra-judicially (e.g. registration of cases) will be absorbed within existing resources and can be regarded as negligible. It is not possible to quantify accurately either current or future costs to the courts in dealing with cases settled judicially. While the cost of a sitting day to the court is known, this covers both appeal work (with 3 judges) and first instance work (with a single judge). Information held does not break down the appeal and first instance costs, therefore the cost cannot be equated or broken down to a particular type of case. Bearing this in mind, the average cost of a case (which will be heard over 4 days and based on Inner House costs) is likely to be in the region of £14,500. However, as noted above, only 2% of cases raised are actually settled in court. Therefore the cost to the court of settling these cases is likely to be in the region of £72,500 (220<sup>5</sup> cases x 2% = 5 cases x £14,500) Around 33% of the cost of any increased workload flowing from the legislation will be recouped from the parties, in the form of court fees in accordance with normal costing and recovery procedures in the Scottish courts. The Scottish Court Service consulted in February 2008 on an increase in court fees to increase the proportion of costs recovered from court users.

21. With reference to the backlog of cases (see paragraph 15), the extent to which court costs will be incurred will depend on how the sisted and other pending cases are taken forward and in particular how many are settled without further court action. However, on the basis of what is in the preceding paragraph the costs are likely to be in the region of £261,000 (906 cases x 2% = 18 cases x £14,500).

## **Legal aid**

22. In cases 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. However, except for medical negligence cases, almost all personal injury actions are now funded by speculative fee agreements and/or trade union assistance. Therefore, there is unlikely to be any increased cost to the Legal Aid Fund.

## **COSTS ON LOCAL AUTHORITIES**

23. The proposed change has implications for local authorities in relation to employer liabilities. We do not have firm information about the overall costs incurred by local authorities in defending claims. Only 3 local authorities responded to the consultation on the PRIA. However, follow-up enquiries with authorities lead us to think that reasonable estimates would be an annual figure of 20 claims and a backlog of 40 claims, including cases involving asymptomatic pleural thickening and asymptomatic asbestosis. The cost of settling these claims is likely to be £500,000 per annum and £1,000,000 to settle the backlog (see paragraph 16). With reference to paragraph 11, based on a 20% increase in cases, the figure above of £500,000 can be

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<sup>5</sup> 75% (see paragraph 13) x 218 cases plus 75% x 20 local authority cases plus 75% x 56 other Government department cases (with notional annual figure of 44 used for BERR, based on backlog, plus figure of 12 provided by MoD)

extrapolated to a peak of around £600,000. Local authorities may experience an effect on insurance premiums as the insurance industry has indicated that to legislate could make third party insurance (e.g. employer's liability, and public liability) more expensive in Scotland, but this possible increase has not been quantified.

## **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

### **Costs on business**

24. Pleural plaques are particularly strongly associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries, including the former nationalised industries. However, there is evidence from occupational analyses of mesothelioma deaths that exposure may have occurred across a fairly wide range of jobs in the past both within and outwith these sectors. End users of asbestos products had substantial risks as well as those manufacturing the products themselves.

25. The Bill will have implications for employers and former employers in the relevant sectors and for their insurers. There would be savings to insurers and employers if the Scottish Government were to take no action. Whether employers and insurers incur additional costs over what they might otherwise have expected will depend on whether there is an increase in the number of claims and whether the cost of settling claims increases.

26. With reference to paragraphs 14, 15 and 16, the cost to defenders, other than local authorities and Government Departments, of the 630 pleural plaques claims and the 55 other symptomless asbestos-related claims outstanding would be around £17,125,000 (630+ 55 x £25,000). The annual cost would be around £5,450,000 (200+18 x £25,000) including pursuers' and defenders' expenses.

27. With reference to paragraph 11, based on a 20% increase in cases, the figure above of £5,450,000 can be extrapolated to a peak of around £6,540,000.

28. We understand that there are 37 backed up Scottish cases raised against the Ministry of Defence (MoD). The average reserve placed on each claim by MoD is £14,000 (including legal costs). Therefore settlement of these Scottish cases is likely to cost around £518,000. On the basis of the 37 cases being backed up over 3 years we can assume, with caution, that there are likely to be in the region of 12 pleural plaques cases raised against MoD per year with an annual cost of £168,000. Primarily for their interest in British Shipbuilders and to a lesser extent the former British Coal Corporation, the Department for Business, Enterprise & Regulatory Reform (BERR) has 136 open Scottish pleural plaques cases. The cost of settling these cases, including legal costs, is likely to be in the region of £1,200,000. Based on actuarial reviews undertaken on their coal and shipbuilders liabilities, BERR has informed us that its overall liability in Scotland (going forward to a peak in 6 to 8 years time and then falling away) is likely to be in the region of £5,300,000. There is no indication that pleural plaques cases have been raised against any other Government Department.

29. As already noted, insurers anticipate that they will incur additional costs as a result of the legislation. They have indicated that higher costs for insurers would be passed on to Scottish



business customers in the form of higher insurance premiums. Only when the insurance industry has considered the legislation as introduced, and taken a view on the risks it presents, would any quantification of increased cost of insurance premiums be possible.

### **Costs on individuals**

30. There will be no significant costs to individuals arising from this amendment. The effect of the legislation is that individuals who develop the asbestos related conditions in the Bill through negligent exposure to asbestos in Scotland will be able to raise a claim for damages. In Scotland, most asbestos related actions are funded by Speculative Fee Agreements and/or trade union assistance. The insurance industry has confirmed that premiums for first party insurance policies (e.g. life, critical illness, income protection) would not be affected by the legislation.

### **SUMMARY OF ADDITIONAL COSTS ARISING FROM THE BILL**

<b>Costs on Scottish Administration</b>	<b>Costs on Local Authorities</b>	<b>Costs on Business and the State</b>	<b>Costs on other Bodies</b>
<p><b>Scottish Government</b> – £75,000 to settle existing cases Annual cost negligible - see paragraph 19</p> <p><b>Courts</b> - £261,000 for existing cases £72,500 per annum – see paragraphs 20 and 21</p> <p><b>Legal Aid</b> - Negligible – see paragraph 22</p>	<p>£1,000,000 to settle existing cases £500,000 per annum increasing to a peak of £600,000 per annum around 2015 and then decreasing – see paragraph 23</p>	<p><b>Business (employers, former employers and their insurers)</b> – £17,125,000 to settle existing cases £5,450,000 per annum increasing to a peak of £6,540,000 per annum around 2015 and then decreasing – see paragraphs 26 and 27 <b>MoD</b> – £518,000 to settle existing cases £168,000 per annum see paragraph 28 <b>DBERR</b> – £1,200,000 to settle existing cases £5,300,000 overall liability see paragraph 28</p>	<p><b>Individuals</b> - None - see paragraph 30</p>

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### **SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE**

31. On 23 June 2008, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:

*These documents relate to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008*

“In my view, the provisions of the Damages (Asbestos-related Conditions) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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**PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE  
COMPETENCE**

32. On 20 June 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Damages (Asbestos-related Conditions) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”



*These documents relate to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008*

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