

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

[AS INTRODUCED]

REVISED FINANCIAL MEMORANDUM

CONTENTS

1. This revised Financial Memorandum is published to accompany the Damages (Asbestos-related Conditions) (Scotland) Bill in order to reflect further information provided to the Parliament during the Bill's Parliamentary passage prior to Stage 3. Changes to the text since the original Financial Memorandum (SP Bill 12–EN) was published are indicated (except in the summary table of costs) by sidelining in the right margin.

2. The revised Financial Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

INTRODUCTION

3. 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.¹ 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.)

4. It is recognised, however, that while both conditions are asbestos-related with a long latency, there may be some divergence between future trends in (i) deaths from mesothelioma and (ii) compensation claims for pleural plaques. For example, it is possible that:

¹ Chapman SJ et al, "Benign Asbestos Pleural Disease", *Curr Opin Pulm Med* 2003;9(4), 266-271.

- the clearly symptomatic nature of mesothelioma and the generally asymptomatic nature of pleural plaques may lead to a divergence in diagnostic trends;
- any increase/decrease in the “propensity to sue” may lead to divergence between trends in diagnosed cases and trends in compensation claims.

5. Therefore, it may be that – as an alternative guide to the potential scale of further rises in compensation claims for pleural plaques – account should be taken of recent historical trend data on reports of diagnoses of “benign pleural disease” (adjusted as far as possible to reflect potential changes in propensity to sue), rather than utilising predictions of future mesothelioma deaths. Unfortunately, conclusive data are lacking in relation to past diagnoses of benign pleural disease. But taking account of the data which are available, an extremely tentative assumption might be that there has been an increase in the order of 4.5% per annum on average in recent years². There is little basis for determining how this figure might then be adjusted in order to capture potential changes in propensity to sue, but for indicative purposes a very rough and ready option might be to double it to 9% per annum.

6. Applied cumulatively and with a peak around 2015, this would imply that claim numbers might be 55% to 137% higher than recently (rather than 20% higher, as under the original scenario).

7. As regards estimating the future trend in claims for compensation for pleural plaques, the relative merits of utilising these two options (i.e. projections of future mesothelioma deaths or records of historic pleural disease diagnoses) has been discussed with HSE who have confirmed that the degree of uncertainty is significant and that, therefore, it is not possible to conclude which would be the more accurate.

Basis for calculating costs in this memorandum

8. The Scottish Government consulted on a Partial Regulatory Impact Assessment (PRIA) for the Bill from February to April 2008.³ 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) and at <http://www.scotland.gov.uk/Publications/2008/09/Johnston-NEI-responses/content>. 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 was used in preparing the original (June 2008) 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. On past experience, however, it seems that a more realistic estimate would result if calculations incorporated a conservative assumption that only 75%-80% of claims will be successful, with the rest being unsuccessful (e.g. due to time-bar, or inability to identify a relevant defender).

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

Numbers of cases

9. 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 200⁴ 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.

10. 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 may be: 200 cases a year at the outset as explained in footnote 4, within which are cases against Government Departments (see paragraphs 16 and 27) and cases against local authorities (see paragraph 20) as well as cases against private sector employers and their insurers. In relation to asymptomatic pleural thickening and asymptomatic asbestosis, our best estimate of an average number of cases raised per year is 20 and, 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. This gives an overall total of 220 claims annually for the conditions covered by the Bill.

11. On our original assumption, 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: this includes 218 backed up cases against the Scottish Government, other Government Departments and local authorities (see paragraphs 16, 20 and 27). We understand that there may be a total backlog of around 60 cases involving asymptomatic pleural thickening and asymptomatic asbestosis and, within this, we have made a notional allocation of 5 cases to local authorities and none to Government Departments (based on

⁴ 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

enquiries), with the rest (55) falling to business. This gives an overall total of 690 backed-up claims.

12. However, correspondence from insurers' representatives has provided new data and has again challenged the assumptions underlying the Scottish Government's figures⁵. If the alternative scenario outlined by this correspondence were utilised⁶, it could suggest that:

- there may be 325 claims created each year for pleural plaques and 33 claims created each year for asymptomatic pleural thickening and asymptomatic asbestosis, totalling 358;
- there may be backed-up around 945 pleural plaques claims and around 95 claims for asymptomatic pleural thickening and asymptomatic asbestosis, totalling 1040.

Cost per case

13. 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 successful case of **£25,000**. However, for those claims which conclude unsuccessfully there is no compensation payment and, on average, the legal costs are also likely to be lower (i.e. because the reasons for lack of success are often linked to the early termination of a case): we think that a reasonable working assumption for the purposes of this memorandum is an average cost per unsuccessful case of **£10,000** at most. (Separate figures have been provided by other Government Departments and are used in paragraph 27).

Wider implications

14. 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.

⁵ having surveyed several of its member companies, the Association of British Insurers suggested that Thompsons Solicitors may deal with nearer 60% of pleural plaques cases. It has also been suggested that the figures for new cases created in the year 2006 may have been depressed below normal by the impact of the Appeal Court judgement in January of that year.

⁶ again utilising figures provided by Thompsons Solicitors, but i) excluding data post-2005 (which may have been affected by the litigation before the Appeal Court and House of Lords) and ii) assuming that they deal with approximately 60% rather than 90% of cases.

15. 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

16. 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 13). Less than one case is raised against SG annually. The future cost for such cases is therefore expected to be negligible; even if there were an increase in caseload it seems unlikely that at its peak it would exceed £50,000 p.a. 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 27). 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

17. 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 annual cost to the court of settling these cases is likely to be in the region of £72,500 – £101,500⁷ initially and by the peak year may be in the region of £112,375 – £240,555⁸. 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; new subordinate legislation was made by the Scottish Ministers in June 2008 and came into force on 1 August 2008.

⁷ £72,500 = 220 cases x 2% = 5 cases x £14,500 (i.e. utilising the original assumption of caseload, see paragraph 10) whereas £101,500 = 358 cases x 2% = 7 cases x £14,500 (utilising the alternative assumption of caseload, see paragraph 12)

⁸ £112,375 = £72,500 + 55%, whereas £240,555 = £101,500 + 137% (as per paragraphs 5 and 6)

18. With reference to the backlog of cases (see paragraph 11), 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 £203,000 – £304,500⁹.

Legal aid

19. 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

20. 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, assuming that there are no co-defenders and that all are successful, is likely to be £500,000 per annum and £1,000,000 to settle the backlog (see paragraph 13). However, on the more realistic assumption that the proportion that would be successful would be in the region of 75%-80%, the cost would be:

- between £425,000 p.a. and £440,000 p.a.¹⁰
- with between £850,000 and £880,000 for the existing backlog¹¹.

21. With reference to paragraph 3, based on a 20% increase in cases by 2015, the annual figures above of £425,000 - £440,000 can be extrapolated to a peak of around £510,000 – £528,000¹². However, with reference to the alternative approach outlined at paragraph 5, based on an increase in cases of 4.5% per annum or 9% per annum, the annual figures can be extrapolated to a peak of around £660,000 – £1,042,000 in 2015¹³. 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.

⁹ £203,000 = 690 cases x 2% = 14 cases x £14,500, whereas £304,500 = 1040 cases x 2% = 21 x £14,500, utilising respectively the original assumption in paragraph 11 and the alternative assumption in paragraph 12.

¹⁰ £425,000 p.a. = 20 claims x 75% successful x £25,000 plus 20 claims x 25% unsuccessful x £10,000, whereas £440,000 p.a. = 20 claims x 80% successful x £25,000 plus 20 x 20% unsuccessful x £10,000.

¹¹ £850,000 = 40 claims x 75% successful x £25,000 plus 40 claims x 25% unsuccessful x £10,000, whereas £880,000 = 40 claims x 80% successful x £25,000 plus 40 claims x 20% unsuccessful x £10,000).

¹² £510,000 p.a. = £425,000 + 20%, whereas £528,000 p.a. = £440,000 + 20% (as per paragraph 3)

¹³ £660,000 p.a. = £425,000 + 55%, whereas £1,042,000 p.a. = £440,000 + 137% (as per paragraphs 5 and 6)

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on business

22. 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.

23. 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.

24. With reference to paragraphs 10 – 13, the cost for the backlog of all outstanding claims would range from £14,663,000 to £22,880,000¹⁴. Deducting the elements attributable to local authorities¹⁵ and Government Departments¹⁶, would suggest that within the overall total the costs for the remaining cases would range from £11,843,950 to £20,033,950¹⁷.

25. The overall base-point annual cost would range from £4,675,000 to £7,876,000¹⁸. Deducting the elements attributable to local authorities¹⁹ and Government Departments²⁰, would mean the annual costs for the remaining cases would range from £3,761,000 to £6,947,000²¹.

26. With reference to paragraph 3, based on a 20% increase in cases by 2015, the figures above of £3,761,000 - £6,947,000²², for costs falling to organisations outwith local government and Government Departments, can be extrapolated to a peak of around £4,513,200 – £8,336,400.

¹⁴ £14,663,000 = 690 claims x 75% successful x £25,000 plus 690 claims x 25% unsuccessful x £10,000), whereas £22,880,000 = 1040 claims x 80 % successful x £25,000 plus 1040 claims x 20% unsuccessful x £10,000.

¹⁵ as per paragraph 20

¹⁶ as per paragraphs 16 and 27

¹⁷ £11,846,950 = £14,663,000 less £850,000 for local authorities, £75,000 for the Scottish Government and £1,891,050 for UK Government Departments, whereas £20,033,950 = £22,880,000 less £880,000 for local authorities, £75,000 for the Scottish Government and £1,891,050 for Government Departments.

¹⁸ £4,675,000 = 220 claims p.a. x 75% successful x £25,000 plus 220 claims p.a. x 25% unsuccessful x £10,000, whereas £7,876,000 = 358 claims p.a. x 80 % successful x £25,000 plus 358 claims p.a. x 20% unsuccessful x £10,000, utilising the original assumption in paragraph 10 and the alternative assumption in paragraph 12 respectively.

¹⁹ as per paragraph 20

²⁰ as per paragraph 27 (NB the figure of £4,973,500 from BERR cover a 15-year period - for current purposes an assumption is made that this begins at around £321,000 p.a., rises by 20% to a peak of around £385,000 p.a. in the middle of the next decade, and then falls away again).

²¹ £3,761,000 p.a. = £4,675,000 less £425,000 for local authorities and £489,000 for UK Government Departments, whereas £6,947,000 p.a. = £7,876,000 less £440,000 for local authorities and £489,000 for UK Government Departments.

²² £4,513,200 p.a. = £3,761,000 + 20%, whereas £8,336,400 p.a. = £6,947,000 + 20%.

However, with reference to paragraph 5, based on an increase of between 4.5% p.a. and 9% p.a. until 2015, the figures can be extrapolated to a peak of around £5,841,000 - £16,555,000²³.

27. 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; and
- 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)** with the Department of Energy and Climate Change (DECC) have 138 open Scottish pleural plaques cases. The cost of settling these cases, including legal costs, is likely to be in the region of £1,373,050. Based on actuarial reviews undertaken on their coal and shipbuilders liabilities, BERR has informed us that 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 £4,973,500 for about 580 cases (i.e. 540 in relation to British Shipbuilders and 40 in relation to British Coal). There is no indication that pleural plaques cases have been raised against any other Government Department.

28. These figures have been supplied by the UK Government Departments²⁴ based on their current assumptions. For comparative purposes, however, if the assumptions outlined at paragraph 5 were applied (i.e. rates of increase between 4.5% p.a. and 9% p.a.) then the peak year might have MoD incurring costs of between £261,000 and £398,000, and BERR/DECC incurring costs of between £498,000 and £760,000.

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

²³ £5,841,000 p.a. = £3,761,000 + 55%, where £16,555,000 p.a. = £6,947,000 + 137%.

²⁴ it is understood that the average cost per case for UK Government Departments is lower than that assumed generally partly because they have taken account of the fact that they will be co-defenders in a significant proportion of cases, therefore not bearing the entire cost, and partly because of different treatment accorded to defenders' legal costs.

*This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12)
as introduced in the Scottish Parliament on 23 June 2008*

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

Costs on Scottish Administration	Costs on Local Authorities	Costs on Business and the State	Costs on other Bodies
<p>Scottish Government (see paragraph 16) – £75,000 to settle existing cases Future annual cost negligible, but possibly reaching up to £50,000 per annum by 2015</p> <p>Courts (see paragraphs 17 and 18) - £203,000 - £304,500 for existing cases For the future £72,500 – £101,500 per annum, possibly rising to £112,375 – £240,555 per annum by 2015 and then decreasing.</p> <p>Legal Aid (see paragraph 19) - Negligible For the future, negligible.</p>	<p>(see paragraphs 20 and 21) £850,000 – £880,000 to settle existing cases For the future £425,000 – £450,000 per annum increasing to a peak of £660,000 – £1,042,000 per annum around 2015 and then decreasing</p>	<p>Business (employers, former employers and their insurers) (see paragraphs 24 to 26) – £11, 843,950 – £20,033,950 to settle existing cases For the future, £3,761,000 – £6,947,000 per annum increasing to a peak of £5,841,000 – £16,555,000 per annum around 2015 and then decreasing.</p> <p>MoD (see paragraph 27) – £518,000 to settle existing cases For the future £168,000 per annum, but alternatively by 2015 may be in the region of £261,000 - £398,000 per annum, and then decreasing.</p> <p>DBERR (see paragraph 27) – £1,373,050 to settle existing cases For the future, around £321,000 per annum, rising by 2015 to around £385,000 per annum, then falling (with £4,973,500 overall liability over 15 years), but alternatively by 2015 may be reach £498,000 - £760,000 per annum and then decreasing.</p>	<p>Individuals (see paragraph 30) – None For the future, none.</p>

(Shaded areas relate to future claims, unshaded areas relating to back-up existing claims.)

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