

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

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill introduced in the Scottish Parliament on 23 June 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 12–EN.

### **POLICY OBJECTIVES OF THE BILL**

#### **Background**

2. Pleural plaques:
- are an indicator of exposure to asbestos in someone with an appropriate occupational history;
  - are small areas of scarring on the pleura (the membrane surrounding the lungs);
  - do not generally cause symptoms or disability;
  - do not cause or develop into asbestos-related disease such as asbestosis or mesothelioma; and
  - signify greatly increased lifetime risk for developing mesothelioma and a small but significantly increased risk of developing bronchial carcinoma as a result of exposure to asbestos.
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 be detected only 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>1</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

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

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.)

## **Origins of Bill**

4. From the early 1980s until 2005-06 damages were awarded for pleural plaques in a number of court cases, on the basis that:

- exposure to asbestos dust is a breach of the common law duty of care and of various statutory duties under health and safety at work legislation;
- asymptomatic pleural plaques are an injury caused by that breach of duty;
- persons with pleural plaques have an increased risk, in relation to the general population, of developing other more serious asbestos-related conditions, e.g. asbestosis, mesothelioma and cancer;
- pursuers suffer anxiety as a result of the presence of the pleural plaques and the increased risks.

5. Damages have been awarded for pleural plaques in a number of reported Scottish cases. However, in 2004, insurers brought ten test cases before Mr Justice Holland in the England and Wales High Court. Mr Justice Holland gave judgment in February 2005 in favour of the claimants but reduced the amount they were able to claim. In seven cases the insurers appealed to the Court of Appeal in England and Wales, which in 2006 reversed the decision of the High Court judge. The Court of Appeal's decision was subsequently appealed to the House of Lords

6. The House of Lords (HoL) Judgment in *Johnston v NEI International Combustion Ltd* published on 17 October 2007<sup>2</sup> ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. This Judgment reversed over twenty years of precedent and practice as described above. In brief, their Lordships ruled that since pleural plaques cause no symptoms and do not cause or lead to other asbestos-related diseases, or shorten life expectancy, their mere presence in the claimants' lungs is not a material injury capable of giving rise to a claim for damages in tort<sup>3</sup>; that although the development of pleural plaques is proof that the claimants' lungs have been penetrated by asbestos fibres which could independently cause other fatal diseases, neither the risk of developing those other diseases nor anxiety about the possibility of that risk materialising could amount to damage for the purposes of creating a cause of action in tort.

7. The Judgment is not binding in Scotland, but is highly persuasive. Scots and English principles of negligence<sup>4</sup> are very similar and English negligence cases are often cited and followed in the Scottish Courts. *Johnston* has already been cited in a Court of Session case<sup>5</sup>.

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<sup>2</sup> <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

<sup>3</sup> "Tort" is the English legal term for the area of law known as "delict" in Scotland. Under the law of delict people who cause loss or injury to others may be held civilly liable to pay compensation.

<sup>4</sup> Negligence is a particular type of tort or delict.

8. Following the HoL Judgment there were calls for the Scottish Government to overrule the decision. Concerns were expressed in and beyond the Scottish Parliament and the Scottish Government received in the region of 250 personal testimonies about the devastating effect of a diagnosis of pleural plaques and the very real anxiety caused by living with a condition which indicates a significant exposure to asbestos.

9. At the Member's Business Debate<sup>6</sup> on 7 November in the name of Stuart McMillan MSP on the House of Lords Ruling it was clear that Members considered that this was a wrong that had to be put right and that they would welcome and expect positive action from the Scottish Government.

10. Pleural plaques are part of the unintended and unwelcome consequences of our industrial heritage. The HoL Judgment has raised serious concerns for people with pleural plaques. Although plaques are not in themselves harmful they do give rise to anxiety because they signify an increased risk of developing very serious illness as a result of exposure to asbestos. In areas associated with Scotland's industrial past, people with pleural plaques are living alongside friends who worked beside them and are witnessing the terrible suffering of those who have contracted serious asbestos-related conditions, including mesothelioma. This causes many of them terrible anxiety that they will suffer the same fate. The Scottish Government believes that people who have negligently been exposed to asbestos and who are subsequently diagnosed with pleural plaques should be able to raise an action for damages as has been the practice in Scotland for over twenty years.

11. The Scottish Government acknowledges that, if it were to take no action, people with pleural plaques would be able to raise an action for damages if they develop a more serious asbestos related condition. However, such damages would not compensate them for having pleural plaques or for the anxiety suffered following a diagnosis of pleural plaques.

12. On 29 November 2007 the Scottish Government announced that it intended to introduce a Bill to overrule the HoL Judgment in Scotland and that the provisions of the Bill would take effect from the date of that Judgment<sup>7</sup>. Kenny MacAskill, Cabinet Secretary for Justice in the Scottish Government, announced on 13 December 2007 that, subject to Parliamentary timetabling, he expected to introduce a Bill before the summer recess.

13. The UK Government indicated on 29 October 2007 that it had decided that it would not be appropriate to legislate<sup>8</sup>. On 12 March 2008, the Prime Minister indicated that a consultation document on pleural plaques would be published and that the Government was determined to take some action.<sup>9</sup>

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<sup>5</sup> *Helen Wright v Stoddard International plc*: <http://www.scotcourts.gov.uk/opinions/2007CSOH173.html>. .

<sup>6</sup> <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-01.htm>

<sup>7</sup> Scottish Government News Release - <http://www.scotland.gov.uk/News/Releases/2007/11/29102156>

<sup>8</sup> <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071029/text/71029w0045.htm#07103034000624>

<sup>9</sup> <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080312/debtext/80312-0002.htm#08031240000103>

## **Specific objectives**

14. The policy behind the Bill is to make sure that people negligently exposed to asbestos in Scotland who go on to develop an asymptomatic asbestos-related condition can pursue an action for damages. The means of achieving this is by ensuring that the HoL Judgment in *Johnston v NEI International Combustion Ltd* does not have effect in Scotland as regards these conditions.

15. The HoL Judgment was concerned with asymptomatic pleural plaques. Ensuring that this condition is actionable in Scotland is the primary intention of the legislation. However, it is possible that the courts might look to *Johnston* as authority in relation to claims in respect of other asymptomatic asbestos-related conditions. At the end of 2006 there was an English county court case<sup>10</sup> which ruled that someone who had been negligently exposed to asbestos and had developed asymptomatic pleural thickening and asbestosis (as well as pleural plaques) did not have an actionable case. In the period since the Judgment was issued in *Johnston*, indications have been given to the Court by defenders in cases in the Court of Session of an intention to pursue cases in which the cause of action is minimal symptomless asbestosis as likely test cases.

16. Asbestosis is a non-malignant scarring of the lung tissue which impairs the elasticity of the lungs, restricting their expansion and hampering their ability to exchange gases. This leads to inadequate oxygen intake to the blood. Pleural thickening is a non-malignant disease in which the lining of the pleura becomes scarred. If it is extensive then it can restrict expansion of the lungs and lead to breathlessness. Asbestosis and pleural thickening can both be detected while asymptomatic. In contrast with pleural plaques, they are usually (but not always) progressive and symptoms/impairment will occur. A person with a diagnosis of asymptomatic asbestosis or pleural thickening has, as with pleural plaques, an indicator of significant exposure to asbestos and the worry of possible very serious disease such as mesothelioma plus the worry that their condition will itself progress and cause impairment (unless they can be told categorically that their condition is non-progressive).

17. Scottish Ministers consider that there is a risk, if the Bill dealt only with making pleural plaques actionable, that this could lead to an inconsistent and unfair result. A person with plaques, which are symptomless and almost always non-progressive, could raise an action for damages but a person with pleural thickening or asbestosis, which was currently symptomless but which was likely to progress, could not. It would be unfair if a person with thickening or asbestosis had to wait for symptoms to develop before claiming when a person with plaques could do so straight away. The Bill therefore provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by negligent exposure to asbestos, continue to give rise to a claim for damages in Scotland.

18. In summary, the Bill:

- provides that asbestos-related pleural plaques amount to a material personal injury capable of founding a claim in damages;
- clarifies that asymptomatic asbestos-related pleural thickening and asymptomatic asbestosis continue to be actionable;

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<sup>10</sup> *Terwyn Owen v Esso Exploration & Production UK Ltd*, 16 November 2006: <http://www.corries.co.uk/cgi-bin/template.pl?t=npd&ID=96>. The claimant has decided not to take this case to appeal: <http://www.corries.co.uk/cgi-bin/template.pl?t=npd&ID=157>

- has retrospective effect.

## **APPLICABILITY OF PROVISIONS**

19. The provisions have retrospective effect and apply to cases which have not been settled, or determined by a court, before the date the Bill comes into force.

## **CONSULTATION**

20. Prior to the decision to bring forward legislation, meetings were held with asbestos groups and their representatives and representatives of the insurance industry. The groups expressed their dismay about the HoL Judgment and its adverse effect on people with pleural plaques. The insurance industry representatives put forward the view that the Judgment should be allowed to stand and that pleural plaques should not give rise to a claim for damages. A consultation on a partial Regulatory Impact Assessment (RIA) was issued on 6 February 2008 to assess the potential implications of the legislation for the insurance industry, employers and Government Departments. A summary of the consultation responses has been published on the Scottish Government Consultation website.<sup>11</sup> The final RIA is available on the Scottish Government Business and Industry website.<sup>12</sup>

21. Although the consultation was not in relation to the decision to introduce legislation, the majority of respondents did offer comments on this. Of the 22 responses received, 17 did not welcome the proposal to legislate, with the biggest group within this being insurers. To put these figures into context, it should be borne in mind that, as there was no consultation on the general policy, parties supportive of the Bill would not necessarily have responded to the consultation on the partial RIA. Scottish Ministers have noted the concerns of those opposed to the legislation but they remain convinced of the need to take forward a Bill to ensure that the HoL Judgment does not have effect in Scotland.

22. The responses to the partial RIA were helpful in firming up numbers of pleural plaques claims and average settlement costs, based on the historical position. The information provided has been taken into account in the final RIA and the Financial Memorandum. The responses also raised questions about whether the numbers and costs of pleural plaques claims might be higher than the historical position would suggest; and whether the legislation would have wider implications which would lead to higher costs for Scottish business. These aspects are discussed in the final RIA and the Financial Memorandum. The table in Annex A to this Memorandum sets out what might be described as policy issues raised in the responses, and gives our comments.

## **ALTERNATIVE APPROACHES**

23. The only real alternative approach is making no change to the law. This would mean that the HoL Judgment, regarded as highly persuasive by Scottish courts, would almost certainly be followed in Scotland, so that claims in respect of asymptomatic pleural plaques, and possibly

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<sup>11</sup> <http://www.scotland.gov.uk/consultations>.

<sup>12</sup> <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full>

also in respect of asymptomatic forms of pleural thickening and asbestosis, would be dismissed by the courts.

24. This would result in a loss of compensation payments to people with pleural plaques, and a possible loss of compensation for those with pleural thickening and asbestosis who are not yet experiencing symptoms. This would be a permanent loss, both for those who do not go on to develop a more serious condition and those who do (because any payment in respect of e.g. a diagnosis of mesothelioma would not include damages in respect of pleural plaques and the anxiety suffered by a person from the time of diagnosis of pleural plaques).

25. Some respondents to the consultation on the partial RIA suggested that education not compensation would be the best way of providing peace of mind to people with pleural plaques. The Scottish Government agrees that people should have clear information about their medical conditions, but takes the view that education is no substitute for appropriate compensation. Pleural plaques are irreversible scarring on the lining of the lungs which the Scottish Government considers should be treated as a material personal injury for which damages may be awarded. The anxiety felt by people with pleural plaques comes from the known risks associated with asbestos.

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

### **Equal opportunities**

26. An Equality Impact Assessment (EQIA) has been carried out and can be viewed on the Scottish Government EQIA System website.<sup>13</sup> The Bill's provisions are inclusive; no impact on equal opportunities is envisaged.

### **Human rights**

27. The Scottish Government believes that the proposed changes comply with the European Convention on Human Rights.

### **Island communities**

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

### **Local government**

29. The proposals have implications for local authorities mainly in relation to employer liabilities. They will be exposed to claims in relation to pleural plaques as a result of the legislation and will have to make payments where there is a successful claim. Local authorities

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<sup>13</sup> <http://www.scotland.gov.uk/Topics/People/Equality/18507/EQIADetails/Q/Id/161>

may also 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, public liability) more expensive in Scotland.

**Sustainable development**

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

ANNEX A

Points raised by respondents to the consultation on the partial RIA	Scottish Government comments
<p>The Scottish Government has ignored medical evidence that plaques are harmless.</p>	<p>We are fully aware of the medical evidence. In the partial RIA we made clear that plaques do not generally cause symptoms or disability and do not cause or develop into diseases such as asbestosis or mesothelioma. Nevertheless, plaques are irreversible scarring to the lining of the lungs and what they signify (i.e. significant exposure to asbestos) causes great anxiety to those diagnosed and their families.</p>
<p>Claims were settled historically when medical evidence was unclear. The House of Lords' Judgment was based on medical evidence which was not available before: had it been, people with pleural plaques would not have been compensated. The Scottish Government is wrong to say that the Judgment overturns 20 years of precedent and practice.</p>	<p>We don't accept the point that pleural plaques were only compensatable before because they were thought to cause ill-health, and that <i>Johnston</i> proceeds on new medical evidence that they have no effect on health. In the three historic English cases referred to in <i>Johnston</i>, the medical evidence appears to have been that the pleural plaques caused no symptoms: similarly in the Scottish case: <i>Nicol v Scottish Power plc</i> (OH) 3 July 1997, Lord Nimmo Smith (1998 SLT 822). Damages have been awarded for pleural plaques in a number of reported Scottish cases. Several judgments of lower courts in England and Wales ruled that pleural plaques were compensatable, and this position was accepted by the industry in Scotland for over 20 years. (See also paragraph 4.)</p>
<p>Legislation would constitute fundamental change to law of negligence.</p>	<p>The Bill has been drafted in such a way as to make the minimum incursion into the law. It provides that plaques amount to a material personal injury capable of founding a claim in damages. Anxiety will be considered as a matter of quantum, not as an aspect of establishing liability.</p>



<b>Points raised by respondents to the consultation on the partial RIA</b>	<b>Scottish Government comments</b>
<p>Legislation would set a dangerous precedent and will open floodgates to claims for other conditions.</p>	<p>The Bill is concerned only with 3 asbestos-related conditions and will have no effect beyond those conditions. Legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.</p>
<p>Proposed retrospection brings into question the fundamental principles around whether Scotland has a stable and reliable framework which business can rely on. Question legality of proposed legislation.</p>	<p>We acknowledge that retrospective law is not something to be undertaken lightly. In the context of overruling a HoL Judgment we consider that making the Bill retrospective is necessary to fully overrule the effect of that Judgment and in order to maintain the coherence of the law. The intention that the legislation would be effective from the date of Judgment was made clear at the outset. It will not affect cases already settled before the Bill commences.</p>
<p>Legislation would be unfair to those without plaques who have been exposed to asbestos and have the same risks.</p>	<p>Persons diagnosed with pleural plaques have a definite physical manifestation of their exposure which becomes a focus for their anxiety about that exposure and the risk of developing serious illness. We do not consider the proposed legislation to be discriminatory because persons without pleural plaques do not have any physical change upon which they can found a claim, and this justifies different treatment.</p>
<p>The risk of developing mesothelioma as a result of exposure is very low (1%-5%). The Scottish Government would therefore be legislating for the “worried well”.</p>	<p>Many people who could be described as the “worried well” have fears which do not derive from others’ negligent behaviour. It is inappropriate to describe people with pleural plaques as the worried well. They have a physical, permanent change in their lungs which indicates that they have a significantly higher risk than the general population of developing serious asbestos-related disease.</p>

<b>Points raised by respondents to the consultation on the partial RIA</b>	<b>Scottish Government comments</b>
<p>Legislation in Scotland only would encourage “forum shopping” by those seeking to raise a pleural plaques claim.</p>	<p>Following legislation in the Scottish Parliament, people with pleural plaques will have a right of action in Scotland. If no such right of action exists in the rest of the UK, it follows that pursuers will choose to raise any cross-border cases, where the Scottish courts have jurisdiction in relation to some elements, in the Scottish courts. As now, any defender found liable would be liable to the extent that they had contributed to the negligent exposure to asbestos. Whilst we accept that forum-shopping may be attempted, we are satisfied that established rules of jurisdiction and applicable law will ensure that only cases with a substantial Scottish connection will be tried in Scottish courts under Scots law.</p>
<p>Very few countries award compensation for symptomless asbestos-related conditions.</p>	<p>The Scottish Government’s interest and duty is in doing what is best for the people of Scotland.</p>



*This document relates 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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