

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

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On 23 June 2008, the Scottish Government introduced the Damages (Asbestos-related Conditions) (Scotland) Bill.

The Bill is intended to ensure that people who are negligently exposed to asbestos in Scotland, and go on to develop certain asymptomatic asbestos-related conditions, can continue to raise and pursue actions for damages.

In doing so, it will ensure that a recent House of Lords judgement (*Johnston v NEI International Combustion Ltd*), which ruled unanimously that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages in England and Wales, is not followed in Scotland.

Although political debate in Scotland has, so far, been overwhelmingly supportive of ensuring that the House of Lords judgement is not followed in Scotland, broader discussion has been more polarised between those who stand to benefit and those who may have to meet the costs of doing so, such as the insurance industry.

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KEY POINTS OF THIS BRIEFING

- The Damages (Asbestos-related Conditions) (Scotland) Bill is intended to ensure that people who are negligently exposed to asbestos in Scotland, and go on to develop certain asymptomatic asbestos-related conditions, can pursue actions for damages
- The Bill will ensure that a House of Lords judgement in 2007 (*Johnston v NEI International Combustion Ltd*), which ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages in England and Wales, is not followed by the courts in Scotland
- The asbestos-related conditions covered by the Bill are pleural plaques, pleural thickening and asbestosis (the pleura is a thin membrane covering the lungs and lining the inside of the chest walls)
- Pleural plaques are small areas of scarring on the membrane surrounding the lungs. They do not generally cause any symptoms or disability, and do not cause other asbestos related conditions. They are, however, an indicator that a person has had significant exposure to asbestos – exposure which does increase the risk of developing other asbestos related conditions
- Pleural thickening is a non-malignant disease in which the lining of the pleura becomes scarred. It can, if extensive, restrict the expansion of the lungs and lead to breathlessness.
- Asbestosis is a non-malignant scarring of the lung tissue which impairs the elasticity of the lungs and can lead to inadequate oxygen intake to the blood
- Although some of the asbestos-related conditions covered by the Bill can produce symptoms, the purpose of the Bill is to ensure that such conditions can give rise to a claim for damages even when they do not cause symptoms
- To date, political debate within Scotland has overwhelmingly favoured taking steps to ensure that the House of Lords judgement in *Johnston v NEI International Combustion Ltd* is not followed in Scotland. However, strong opposition to the proposals now contained in the Bill is evident amongst some outside groups, especially within the insurance industry

INTRODUCTION

The Damages (Asbestos-related Conditions) (Scotland) Bill ('the Bill') was introduced in the Parliament on 23 June 2008.

The Bill is intended to ensure that people who negligently exposed to asbestos in Scotland, and go on to develop certain asymptomatic asbestos-related conditions, can pursue actions for damages.

The Bill will ensure that a 2007 House of Lords judgement – [Johnston v NEI International Combustion Ltd](#) ('the Johnston case'),¹ which ruled unanimously that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages in England and Wales, is not followed in Scotland. As it is possible that the Scottish courts may look to the Johnston case as an 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.

This briefing describes the background to the Bill, explains the health implications of asymptomatic asbestos-related conditions and considers the broader legal and financial implications of the Bill.

BACKGROUND

The House of Lords decision in the Johnston case ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages in England and Wales because they do not signify damage or injury that is sufficiently material to found a claim for damages.

Although this judgement is not binding in Scotland, it is persuasive and may be used in defending related claims in Scottish courts.

In the 1980s, three cases in England found in favour of those claiming damages for pleural plaques.² Subsequently, for much of the period before the House of Lords judgement in the Johnson case, damages were awarded for pleural plaques. However, in 2004, insurers brought ten test cases before the High Court in England and Wales. Although the High Court ruled that pleural plaques were actionable, the insurers successfully appealed to the Court of Appeal (which reversed the High Court ruling). Four of the original claimants subsequently appealed to the House of Lords. However, the appeal was refused, confirming that pleural plaques are not actionable in England and Wales.

The following extract (House of Lords 2008, para 2) from the opinion of Lord Hoffman in the Johnston case explains the rationale behind the judgement:

“Proof of damage is an essential element in a claim in negligence and in my opinion the symptomless plaques are not compensatable damage. Neither do the risk of

¹ This case was known at earlier stages as *Rothwell v Chemical & Insulating Co Ltd*.

² *Church v Ministry of Defence* (1984), *Sykes v Ministry of Defence* (1984) and *Patterson v Ministry of Defence* (1987).

future illness or anxiety about the possibility of that risk materialising amount to damage for the purpose of creating a cause of action, although the law allows both to be taken into account in computing the loss suffered by someone who has actually suffered some compensatable physical injury (...) in my opinion the development of pleural plaques, whether or not associated with the risk of future disease and anxiety about the future, is not actionable injury. The same is true even if the anxiety causes a recognised psychiatric illness such as clinical depression. The right to protection against psychiatric illness is limited and does not extend to an illness which would be suffered only by an unusually vulnerable person because of apprehension that he may suffer a tortious injury.³ The risk of the future disease is not actionable and neither is a psychiatric illness caused by contemplation of that risk.”

Those who support reversing the House of Lords judgement contend that pleural plaques are a physical injury and should, therefore, be compensatable.

HEALTH IMPLICATIONS

Pleural plaques

The pleura is the thin, transparent membrane which covers the lungs and lines the inside of the chest walls. Pleural plaques are small areas of scarring on the membrane surrounding the lungs. It is generally accepted that pleural plaques are a marker of asbestos exposure but do not necessarily increase the risk of any other disease developing. By the Scottish Government’s own admission, pleural plaques are not in themselves harmful (2008, para 10). They do not generally cause symptoms or disability and do not cause or develop into asbestos-related diseases such as asbestosis or mesothelioma. They do, however, indicate that a person has had significant exposure to asbestos and such exposure does increase lifetime risk of developing mesothelioma (Policy Memorandum, para 2). Unlike pleural plaques, mesothelioma is symptomatic, has no known cure and is invariably fatal.

Those diagnosed with pleural plaques are reported to suffer anxiety as a consequence. They may also be aware of an uncomfortable grating sensation on respiration.

There is no definitive data on the number of people affected by pleural plaques.⁴

Given the general absence of symptoms, the presence of pleural plaques is usually established only by way of chest x-ray or CT scan (or on post-mortem autopsy). A full description of the medical evidence in relation to pleural plaques is available from a variety of sources, including the Ministry of Justice [consultation on pleural plaques](#) (2008).

The following two comments from the House of Lords judgement in the Johnston case are indicative of how the Law Lords interpreted the health implications of pleural plaques:

“It was not merely that the plaques caused no immediate symptoms (...) The Important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other

³ The reference to “a tortious injury” is a reference to an injury giving rise to a claim under the law of damages in England and Wales – referred to as the law of tort (the equivalent of the law of delict in Scotland).

⁴ Although some estimates have been made (eg Prof Anthony Seaton’s response to the Justice Committee’s call for written evidence).

diseases or shorten their expectation of life. They had no effect upon their health at all.” [Lord Hoffman]

“It is common ground that the plaques are not symptomatic: they do not cause the claimants pain nor do they disable them in any way.” [Lord Rodger of Earlsferry]

That a significant number of workers were negligently exposed to asbestos is beyond doubt. A central question is, therefore, whether pleural plaques constitute ‘an injury’ to the pursuer’s body. It is argued that they do not on the grounds that pleural plaques are benign and asymptomatic. However, even if pleural plaques do constitute a relevant injury, the House of Lords took the view in the Johnston case (para 87) that they do not cause sufficient material damage to give rise to a cause of action.

Pleural thickening and asbestosis

Pleural thickening is a non-malignant disease in which the lining of the pleura becomes scarred. If it is extensive it can restrict the expansion of the lungs and lead to breathlessness.

Asbestosis is a non-malignant scarring of the lung tissue which impairs the elasticity of the lungs which can lead to inadequate oxygen intake to the blood.

Both conditions can be detected whilst asymptomatic.

LEGAL IMPLICATIONS

The purpose of damages is to compensate a pursuer for a loss suffered as a result of the defender’s breach of a legal duty. The law in Scotland currently requires that a claim for compensation under the law of negligence can succeed only if there is an identifiable harm suffered as a result of the act of negligence and that such harm must be more than ‘de minimis’ (ie it is required to exceed a minimal threshold of harm). The following three elements must combine before there is a cause of action for damages for personal injury:

- a negligent act or breach of statutory duty by the defender, which causes
- an injury to the pursuer’s body
- with the pursuer suffering material damage as a result

According to the House of Lords judgement in the Johnston case, the risk of future damage arising from a breach of duty is not in itself sufficient to justify compensation. Similarly, anxiety about the risk of sustaining future damage is not sufficient to warrant an entitlement to compensation.

It is suggested (mainly by the insurance industry) that the House of Lords judgement in the Johnston case has simply applied existing legal principle (common to both the law in England and Wales and the law in Scotland) to the latest medical understanding of pleural plaques. The suggestion is that, in the past, pleural plaques were considered compensatable because it was believed that people suffered ill-health as a result of the condition and that it is now generally considered that pleural plaques are asymptomatic and not, therefore, actionable.

It is well established that damages for mental distress, anxiety or loss of enjoyment may be recovered under the law of damages in Scotland provided that such elements of the claim are upheld *along* with damages for some physical injury or other relevant loss (the aggregation theory). Thus, a person pursuing a claim for physical injury may also be entitled to compensation for mental distress arising as a consequence of the physical injury. However, successful claims for purely psychiatric injuries require pursuers to establish that they suffered something beyond the normal emotional responses to an incident such as grief, distress or fear (Scottish Law Commission 2004).

Although the House of Lords judgement in the Johnston case is not binding in Scotland, it is persuasive and has already been influential in a Court of Session case ([Helen Wright v Stoddard International plc](#)). Indeed, in this case, Lord Uist reserved his opinion on the question of damages for pleural plaques until the House of Lords decision had been issued and then issued a supplementary opinion of his own. In his judgement, Lord Uist used the House of Lords ruling to conclude that pleural plaques cause no harm at all.

FINANCIAL IMPLICATIONS

The Bill has financial implications for the Scottish Government, local authorities and businesses operating within Scotland.

It has been suggested that any increased costs to the insurance industry will be passed on to business and consumers in the form of increased insurance premiums. It has also been suggested that such increased costs could put businesses within Scotland at a competitive disadvantage to their English and Welsh counterparts. The Scottish Government has stated that:

“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.” (Financial Memorandum, para 30)

A number of respondents to the partial Regulatory Impact Assessment (‘RIA’) (Scottish Government 2008) questioned the impact that the proposed legislation would have on “the extent to which businesses and citizens are able to rely on Scotland’s stable and principled legal framework”.⁵ The insurance industry has observed that such uncertainty will have an adverse impact on the competitiveness of Scottish business,⁶ and went as far as to suggest that the instability created by the proposed legislative change could be sufficient to lead insurers to exit the Scottish liability insurance market altogether.⁷

Most asbestos-related cases are funded on a speculative fee arrangement (no win, no fee) (Explanatory Notes, para 13). Those law firms that operate in the personal injury/speculative fee arrangement market are likely to benefit financially from the legislation. In his response to the partial RIA, Neil Mackenzie (advocate) argued that as “[a]sbestos litigation is big business”, “the loss of that business would be keenly felt by lawyers for pursuers and defenders”. However, it should be noted that pleural plaque cases are not as lucrative as those involving the more serious asbestos related conditions and that the sums involved are comparatively minor.

⁵ See, for example, ABI response to RIA, para 2.7.

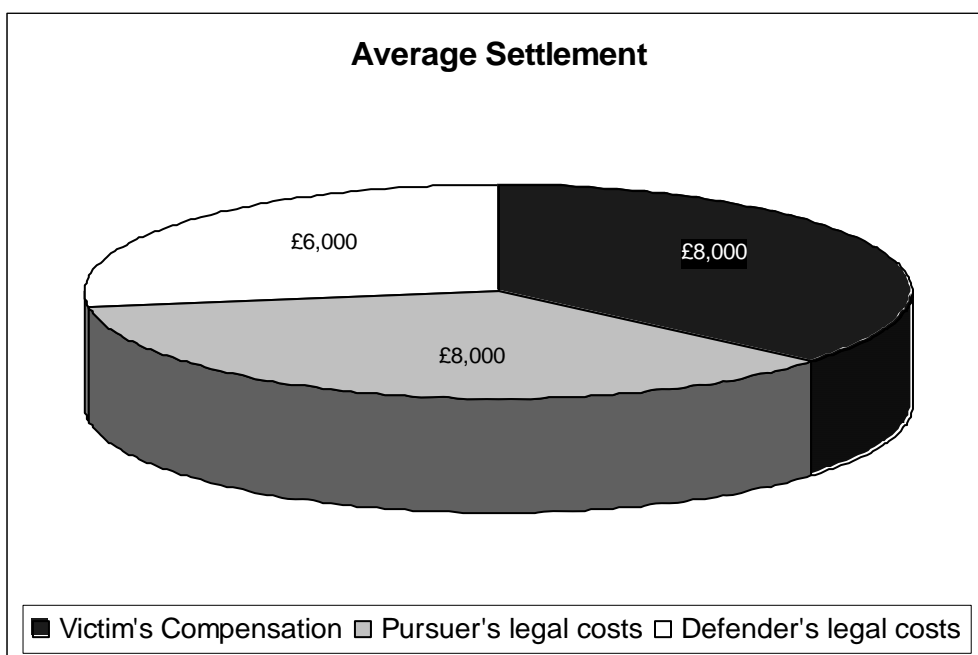
⁶ See, for example, AXA Insurance response to RIA, para 3.6 or Norwich Union response to RIA, para 1.7.

⁷ AXA Insurance response to RIA, para 4.7.

In addition, any legal costs awarded would have to cover any expenditure incurred in pursuing the claim.

Thompsons Solicitors is one of the key players in the field of personal injury and employment rights law and consistently wins over £150 million every year in compensation for clients.⁸ Concern has been expressed as to the validity of the consultation process on the grounds that it appears to have been driven by a potential beneficiary of the decision to legislate. AXA Insurance, for example, has noted that Thompsons provided much of the information contained within the partial RIA and a draft bill to MSPs.⁹ On the other hand, it is perfectly legitimate for any organisation to lobby Parliament and Government on any aspect of public policy, especially where the work of the organisation provides it with expertise in a relevant area.

The following chart, based on data provided in the Financial Memorandum, illustrates how average settlement awards are estimated to be divided in pleural plaque cases.



In such cases, therefore, the compensation awarded to the injured party represents around one third of the overall settlement.

DEBATE AND CONSULTATION

To date, political opinion in Scotland, as evidenced by the recent [Scottish Parliament debate](#) (2007), has overwhelmingly favoured taking steps to ensure that the House of Lord's ruling in the Johnston case is not followed by Scottish courts. Similar debates on the subject took place in the House of Commons on [23 January](#) (2008a) and [4 June](#) (2008b) in which most participating MPs spoke in support of introducing legislation to reverse the House of Lords decision.

However, opposition to these proposals has been expressed outside Parliament, most strongly by those in the insurance industry. In addition, a number of local authorities (North Lanarkshire

⁸ Thompsons Solicitors, The Firm - An Introduction, <http://www.thompsons.law.co.uk/ltxt/10710001.htm>.

⁹ AXA Insurance response to RIA (para 4.12) (see also Neil Mackenzie response to RIA).

Council and Angus Council) have also expressed opposition (in their responses to the partial RIA) to the proposal to introduce legislation to make pleural plaques actionable. Despite this, Scottish Ministers “remain convinced of the need to take forward a Bill to ensure that the HoL Judgement does not have effect in Scotland” (Policy Memorandum, para 21).

The central argument in support of the Bill is that workers were negligently exposed to asbestos by their employers and that pleural plaques constitute a physical injury which has a detrimental impact on the health and well-being of those concerned, and is considered likely to precede the development of mesothelioma. It is argued, by those who support the introduction of legislation, that pleural plaques cause irreversible damage to the lining of the lung which, if the damage was to visible tissue, would constitute an actionable injury.

Although respondents to the partial RIA were not specifically asked whether they supported the proposed legislation, of the 22 responses received, 17 did not support the proposals. One observer described the debate as “one sided, over-emotional and ill-informed”.¹⁰ Another respondent to the partial RIA was “disappointed that confidence in the stability, integrity and independence of the Scottish legal system may be undermined by what is a purely political intervention” and argued that the House of Lords decision was “based on a detailed examination of all the relevant up to date medical evidence”.¹¹ On the other hand, one speaker in the above mentioned House of Commons debate (Jim Sheridan MP) wondered whether the Law Lords were “more interested in trying to keep the courts free of what they consider petty compensation claims than in serving justice” (2008).

Some respondents to the partial RIA expressed concern that legislating to make compensation payable for anxiety about the possibility of future injury/illness, rather than an actual injury/illness, would set a dangerous precedent and could open the floodgates to a raft of new ‘exposure only’ conditions. It was suggested that legislating in this way may constitute a departure from the existing principle whereby anxiety in the absence of harm does not give rise to a claim for damages and that other potential litigants, such as those negligently exposed to radiation, contaminated food and stress at work (described by some in the insurance industry as ‘the worried well’) may increase in number. Anxiety over possible degenerative changes in the spine and noise induced hearing loss are two examples of conditions to which, it is suggested, the current proposals could foreseeably be extended.¹²

The Scottish Government, however, considers that pleural plaques should be treated as a material personal injury for which damages may be awarded and that the anxiety felt by people with pleural plaques comes from the known risks associated with asbestos (Policy Memorandum, para 25). On the specific issue of opening the floodgates to claims for other conditions, the Scottish Government has responded that the Bill is drafted in such a way as to make the minimum incursion into the law, is concerned with only three asbestos related conditions and any legislation about any other conditions would need to be argued on its merits and approved by Parliament (Policy Memorandum, Annex A).

The UK Government decided that “it would not be appropriate to legislate” to reverse the House of Lord’s judgement in England and Wales (House of Commons 2007), a position which it reiterated during the above mentioned House of Commons debate (2008a). However, on 9 July 2008, the Ministry of Justice published a consultation document (2008) on pleural plaques which proposed that action should be taken to improve understanding of pleural plaques and invited

¹⁰ Neil Mackenzie, Advocate, Response to RIA, page 11.

¹¹ Niall McIntosh, Ecclesiastical Insurance, Response to RIA.

¹² Forum of Insurance Lawyers response to RIA, page 8.

views on whether changing the law of negligence would be appropriate, a position reflected in the later House of Commons debate (2008b).

The Industrial Injuries Advisory Council, the body which provides advice to the Secretary of State for Work and Pensions about industrial injuries benefit, is currently undertaking a [review of asbestos and pleural plaques](#). Industrial injuries benefit is the scheme by which employed earners in the UK receive benefits for industrial accidents or certain scheduled occupational diseases (prescribed diseases). The review will consider whether pleural plaques should be designated a prescribed disease and advise the Secretary of State accordingly. The review follows a 2005 examination of the evidence in relation to asbestos-related diseases which concluded that “that there is a lack of evidence that pleural plaques cause impairment of lung function sufficient to cause disability” (Department for Work and Pensions 2005).

A number of other changes have recently been made to the law and to court procedure in respect of mesothelioma cases. These include changes to personal injuries practice in the Court of Session in 2003, the Compensation Act 2006,¹³ and the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007.

¹³ This act, which overturned an earlier House of Lords judgement, was the subject of a Legislative Consent Motion in the Scottish Parliament. Section 3 (Mesothelioma: damages) applies to Scotland.

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