

**THE CBI RESPONSE TO THE SCOTTISH GOVERNMENT'S PARTIAL REGULATORY IMPACT ASSESSMENT ON A PROPOSED BILL TO REVERSE THE HOUSE OF LORDS' JUDGMENT IN JOHNSTON V NEI INTERNATIONAL COMBUSTION LTD**

CBI Scotland represents the interests of over 26,000 Scottish businesses from every sector of the economy and businesses of all sizes.

The CBI is fundamentally opposed to the Scottish Government's decision to introduce legislation to seek to reverse the House of Lords judgement and make compensation available for asymptomatic pleural plaques.

The House of Lords, including two Scottish judges, unanimously concluded that pleural plaques do not constitute any damage to health and that neither the risk of future disease, nor anxiety about the possibility of that risk materialising, amounts to damage.

The Scottish Executive has committed to introducing legislation to make pleural plaques compensatable. It proposes the intervention on the basis that people with pleural plaques suffer anxiety that they will contract mesothelioma, and that they should be compensated for that anxiety.

However, this consultation on the regulatory impact assessment provides an opportunity for all stakeholders to consider afresh the pros and cons of legislative action. We urge the Scottish Government to delay taking a final decision until all the implications of legislative action have been fully considered, full legal advice has been taken and considered, and the results of this consultation exercise have been analysed

Legislating to make compensation payable for anxiety rather than damage will set a dangerous precedent, which could open the floodgates to a raft of new 'exposure only' conditions. This would have significant cost implications for defendants, including employers, former employers, local authorities, the Government and insurers.

The best way of responding to any anxiety suffered after being diagnosed with pleural plaques is to provide information and education to reassure people that the diagnosis does not mean that they will develop a terminal illness or that their quality

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of life will be impaired. By contrast, the very fact that a condition might be worthy of compensation sends the message that it is a serious condition. This causes concern to people with plaques and their families.

Compensation in the Scottish courts inevitably raises the costs of insurance for businesses in Scotland. This could make Scottish businesses less competitive than their English and Welsh counterparts.

We are concerned that the RIA states at several points that the House of Lords' judgment reversed over twenty years of precedent and practice, and that the proposed bill would ensure legal consistency. This is misleading.

The law has always required that a claim in tort based on negligence have proof of damage that is more than minimal. Compensation has therefore only ever been granted where it can be shown that a claimant has sustained damage that is more than minimal. In the past, pleural plaques were compensatable because it was believed that people suffered ill-health as a result of the condition. Medical evidence now exists which shows that pleural plaques "have no effect on health at all" (Lord Hoffman); consequently, the 'more than minimal' criterion is not met. If this evidence had existed twenty years ago, people with pleural plaques would never have been paid compensation. Therefore, in stopping compensation for pleural plaques, the law is being consistent: the Lords applied the existing law to the latest facts about the effect of plaques on a person's health. Making compensation available for pleural plaques in light of this new medical evidence would constitute a fundamental change to the law of negligence.

For the proposed legislation to be effective, it would have to be retrospective in effect. This brings into question fundamental principles around whether Scotland has a stable and principled legal framework that business and citizens can rely upon.