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Civil and International Justice Directorate
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Your reference

Our reference

Date 3 April 2008

Consultation - Partial Regulatory Impact Assessment on a Proposed Bill to Reverse
House of Lords Judgment in Johnston v NEI International Combustion Ltd. Response from
Zurich Financial Services Ltd

Zurich Financial Services

Dear Mrs Hampson,

The Zurich Centre
3000 Parkway
Whiteley
Fareham
PO15 7JZ
United Kingdom

Zurich is an insurance-based financial services provider, with headquarters in Zurich, Switzerland. The core of our business is General Insurance and Life Insurance. Founded in 1872, we now have a global network of subsidiaries and offices in North America, Europe, Asia Pacific, Latin America and other markets. Our 60,000 employees serve customers in more than 170 countries, with around 8000 staff in the UK.

We provide insurance and risk management solutions and services for individuals, small and mid sized businesses, large corporations and major multi-national companies. We distribute third-party financial services products.

<http://www.zurich.co.uk>

Zurich welcomes the opportunity to share its views directly on the proposal. As one of the two lead insurers that actioned the test litigation on pleural plaques, Zurich has invested four years of research, resource, legal expertise and liaison with medical experts towards the litigation which accumulated in the House of Lords ruling in October 2007. Zurich has therefore a close interest in this proposal and will examine the legality of the proposed legislation.

Zurich has also contributed to the Association of British Insurers (ABI) response on behalf of the industry

General Comments

Zurich is opposed to the decision by the Scottish Executive to introduce legislation to make pleural plaques compensatable and believes it should be revisited. The House of Lords concluded, in October 2007, that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages.

In his summary Lord Hoffman stated that pleural plaques do not cause or develop into asbestos-related disease, are symptomless and do not progress into other asbestos related conditions. This decision was based on agreed medical evidence applied to fundamental principles of the law of negligence.

Zurich is of the view that legislating to make compensation payable for anxiety rather than a recognised medical illness will set a dangerous example and would open the floodgates to people with exposure only claims. As a consequence this would have an impact on employers, insurers, local authorities and the Government. The implication of the proposed legislation means higher costs being passed onto customers by the way of higher insurance premiums, resulting in Scottish businesses being at a disadvantage to their English and Welsh competitors.

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The RIA document states that the proposed legislation is to be retrospective in its application and effect. This creates a question regarding legal framework in Scotland and whether it can be regarded as one founded on stable and equitable principles that can be relied upon. Zurich would look carefully at the legality of the proposed legislation.

Please find attached our Respondent Information Form and full response. We hope this feedback assists the impact assessment. If you wish to discuss this in further detail with us, please do not hesitate to call me on Tel: 01489 561459.

Yours sincerely

Bill Paton
Chief Claims Officer

Annex B Respondent Information Form: Consultation - A Partial Regulatory Impact Assessment on Proposed Pleural Plaques Damages Legislation

Name: Bill Paton

Postal Address: Zurich Financial Services, 3000B Parkway, Whiteley, Fareham, PO15 7JZ

1. I am responding as part of an organisation
3. Zurich is content for its response to be made available to the public in the Scottish Executive Library and/or on the Scottish Government Website
4. Zurich is content for the Scottish Government to contact us again in the future in relation to this consultation response

Zurich Insurance response to the Partial Regulatory Impact Assessment on a Proposed Bill to Reverse House of Lords Judgment in *Johnston v NEI International Combustion Ltd.*

1. EXECUTIVE SUMMARY

1.1 The House of Lords concluded, in October 2007, that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. In his summary Lord Hoffman stated that pleural plaques:

- do not cause or develop into asbestos-related disease
- are symptomless;
- do not progress into other asbestos related conditions.

This was based on agreed medical evidence applied to fundamental principles of the law of negligence.

1.2 Zurich believes that the decision by the Scottish Executive to introduce legislation to make pleural plaques compensatable is wrong and we are completely opposed to it.

1.3 The Partial Regulatory Impact Assessment (RIA) consultation document states that the aim of the proposed legislation is to ensure that asymptomatic pleural plaques should continue to be actionable in Scotland. We consider the consultation process itself to be flawed, as it follows the decision to legislate rather than informs it.

1.4 Zurich is of the view that legislating to make compensation payable for anxiety rather than a recognised medical illness will set a dangerous precedent and would open the floodgates to people with exposure only claims. As a consequence this would have an impact on employers, insurers, local authorities and the Government.

1.5 The proposed legislation will mean higher costs for customers by way of increased premiums or payments within policy deductibles. These will place Scottish businesses at a disadvantage to their English and Welsh competitors.

1.6 The RIA document states that the proposed legislation is to be retrospective in its application and effect. This calls into question the application of the Rule of Law in Scotland and whether the legal framework can be regarded as one founded on stable and equitable principles that can be relied upon. Zurich has already taken legal advice on challenging any proposed legislation.

2. LEGAL POSITION

2.1 In the past, pleural plaques were compensatable because it was believed that people suffered ill-health as a result of the condition.

2.2 The decision in *Johnston* was unanimous. It proceeds upon well-established principles of the law of tort (delict). It affirms, first, that in order to be compensatable, any damage must be more than *de minimis*, which is to say that it requires to reach a threshold of seriousness if it is to justify the intervention of the law. Pleural plaques do not reach this threshold. As Lord Uist put it in a Scottish case which followed the decision in *Johnston*, "it is not that pleural plaques cause harm which is *de minimis*: it is that they cause no harm at all." Secondly, it affirms the principle, vouched by the majority decision of the House of Lords in *Gregg v Scott*, that a risk of future damage

is not itself compensatable: only if the risk materialises will a cause of action emerge. Thirdly, it affirms the principle established by the decision of the House of Lords in *Hicks v Chief Constable of the South Yorkshire Police*, that mere anxiety about a risk of future damage is not itself compensatable. Since neither the plaques alone, nor the risk of disease in the future, nor anxiety about that risk are individually actionable, it follows that they are not collectively actionable either. "Aggregation" is not a permissible route to compensation. This is a matter both of logic and principle. The law would be brought into disrepute if claims for substantial damages based on anxiety and risk were capable of being pursued only in cases where, adventitiously, there was also some physical change which was itself asymptomatic, would remain asymptomatic, and was not itself responsible for the associated anxiety.

- 2.3 There are compelling reasons to adhere to the traditional principles of the law of tort and delict which underpin the decision in *Johnston*. The *de minimis* principle was explained by Lord Hope in his speech in *Johnston* (at paragraph 47) in the following terms:

"It is well settled in cases where a wrongful act has caused personal injury that there is no cause of action if the damage suffered was negligible. In strict legal theory a wrong has been done whenever a breach of the duty of care results in a demonstrable physical injury, however slight. But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue. The policy does not provide clear guidance as to where the line is to be drawn between effects which are and which are not negligible. But it can at least be said that an injury which is without any symptoms at all because it cannot be seen or felt and which will not lead to some other event that is harmful has no consequences that will attract an award of damages. Damages are given for injuries that cause harm, not for injuries that are harmless."

- 2.4 The decision to broaden the proposed legislation to other asymptomatic conditions represents a further tampering with the jurisdiction of the courts. Not only is the Government proposing to overturn a unanimous House of Lords decision, it is also contemplating legislation which would affect pending cases in the courts (paragraph 32). The Government is thereby indicating that it has no confidence in the judicial system to produce the correct legal outcome. This sends a very negative message to companies that might be viewing Scotland as a stable system in which to conduct business and resolve disputes.

Indeed the position in Scotland on pleural plaques is also still a pending issue before the courts. As is noted in paragraph 5 of the RIA, the House of Lords' decision is not strictly binding on the Scottish Courts, although it is seen as highly persuasive. The one Scottish case which is referred to in the RIA (*Wright v Stoddard International plc*) has not been taken to appeal and so there has as yet been no definitive decision on the Scottish position. Individual cases remain sisted. The Government is therefore effectively interfering with the outcome of a pending judicial process, which has implications in terms of Article 6 of the European Convention on Human Rights: see *Stran v Greek Refineries v Greece* (1994) 19 EHRR 293:

"The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute."

- 2.5 Quoting the RIA consultation document which says that “The intention is to encroach into the law of damages no more than necessary” Zurich believes that if the claimants with Pleural Plaques are allowed to get compensation for anxiety without physical injury then there is a real danger that this sets a precedent for other non-plaques related claimants with anxiety. There is no assessment within the RIA of the wider implications of providing compensation for one faction of the so-called “worried well”: this could have an impact on the Government itself as a compensator, as much as on private businesses.
- 2.6 Zurich believes that if this legislation was allowed to proceed it will have an adverse impact on the competitiveness of Scottish business.

3. MEDICAL CONSIDERATIONS

- 3.1 Zurich would like to draw attention to the fact that all the medical experts involved in the *Johnston v NEI International Combustion Ltd et al* cases were agreed as to the benign nature of pleural plaques and the extreme rarity of them producing physiological effects in anyone diagnosed with the condition.
- 3.2 It should be clearly understood that in those rare cases where physical symptoms are attributed to pleural plaques, the claimant will be able to pursue a claim in the normal way irrespective of the *Johnston* decision.
- 3.3 Pleural plaques can only be detected on x-ray or computed tomography (CT) scan. They are usually discovered during routine medical examinations. As such the majority of people with pleural plaques may not know they have the condition.
- 3.4 The danger in making the condition compensatable is that this could lead to an increase in 'scan vans' whereby claims farmers offer CT scans to potential claimants. There is real cause for concern as COMARE¹ recommends that regulation of these commercial CT services should be reviewed. They also recommend that clients should be provided with comprehensive information regarding dose and risk of the CT scan, as well as rates of false negative and false positive findings. It seems unlikely that people diagnosed in this way would get the proper support or information about the condition and that it has no impact on their quality of life.
- 3.5 The House of Lords decision in *Johnston v NEI International Combustion Ltd et al* established that pleural plaques do not multiply or progress to become any of the other recognised asbestos related conditions. The development of pleural plaques is an indicator that a person has been exposed to asbestos, but it is that exposure that gives rise to the risk of developing other asbestos related conditions. It is not the pleural plaques that mutate into these conditions.
- 3.6 We would add that, quite apart from its intrinsic unfairness and absence of rational basis, the proposed legislation serves to reinforce the impression that plaques are themselves an illness and that they signify an increased risk of developing mesothelioma or other terminal disease. Neither is true. Perpetuating the uncertainty does a disservice to the very people the legislation is intended to help, as was recently pointed out by Professor Anthony Seaton, Professor Emeritus of Occupational and Environmental Medicine at Aberdeen University. The uncertainty and anxiety experienced by all those who were exposed to asbestos during their working lives – meaning those who have developed plaques and those who have not – is surely better

¹ The Committee on Medical Aspects of Radiation in the Environment, in their 12th report published in December 2007

addressed by the provision of accurate information and support to all than by furnishing some, but not others, with a right to claim compensation.

- 3.7 Professor Mark Britton, a respected chest physician, reported to a briefing in Westminster on 26th March 2008 that a pathologist had estimated that 10% of the cadavers that he saw had pleural plaques. As reported in the RIA, the principal identified cause of pleural plaques is exposure to asbestos. It seems likely that the Government has significantly underestimated the incidence of pleural plaques (and therefore claims for compensation).

4. OTHER FACTUAL ISSUES

- 4.1 The RIA quotes figures produced by Thompsons solicitors (who themselves have a vested interest in such claims succeeding – see below). Those figures are inaccurate in our view. The average damages settlement at £8,000 would reflect that a proportion of the cases are settled by final award, i.e. claimants who prefer to gamble (on legal advice) against the limited risk of contracting a serious disease, notwithstanding the anxiety they are said to feel. Provisional awards would typically be lower, although the cost of a subsequent award would have to be factored in.
- 4.2 Thompsons suggest that the figure for Defender's costs would be in the order of £8,000. This is overstated and the true figure is likely to be nearer £6,000. However Thompsons appear not to have disclosed their own costs in acting for the claimants, which are typically around £8,000 per case – this is a curious oversight. It is believed that 90% of Scottish plaques cases are handled by Thompsons: if there are 630 cases outstanding, the likely revenue for Thompsons from those cases would be over £4.5 million.
- 4.3 A typical claim for pleural plaques will therefore involve a total cost of up to £25,000. The trend is that damages and to a greater extent legal costs have been rising: this was one of the reasons that the test cases were brought by Zurich and others.
- 4.4 The RIA is generally and oddly silent as to the interest of the claimant lawyers. According to an article in the Mail on Sunday (30th March 2008), quoting the Electoral Commission, Thompsons has given a total of £132,080 to the Labour party in the past seven years and may stand to earn millions from a new taxpayer-funded scheme being introduced by the UK Government. The article also goes on to say that the law firm provides funding for 'action groups' which help sufferers to sue for compensation and concludes:

"While there is no direct connection, it is likely that much of the resulting business would go straight back to Thompsons."

So it seems that one firm stands to gain substantially if the decision was reversed.

5. THE OPTIONS

Option 1 – Do nothing

- 5.1 The RIA states that doing nothing would play into the hands of the relevant employers, former employers, the Government and insurers.

- 5.2 The RIA seems to suggest that people who go on to develop a symptomatic asbestos related illness will be grouped with those with pleural plaques when this is incorrect. Those people who do develop a symptomatic asbestos related illness are able to pursue a claim for compensation². Zurich insurance, and other insurers, remain committed to providing fair and efficient compensation to those diagnosed with symptomatic asbestos related conditions.
- 5.3 Deciding not to legislate would rein in the 'scan van' claims farmers. As COMARE recommends in its 12th report clients should be provided with comprehensive information regarding dose and risk of the CT scan, as well as rates of false negative and false positive findings. Not legislating would reduce the risk of people being given inaccurate or misleading diagnoses by unqualified medical persons for the sole purpose of promoting compensation claims.
- 5.4 Zurich believes that there is a need for clarity and the education of people about the condition. Zurich are willing to work with healthcare professionals, charities and the NHS to enlighten people about the condition. That way those people who have pleural plaques can understand that this condition and be given peace of mind that the condition will not have a detrimental effect on their health.
- 5.5 The recommendation to legislate to make compensation available for this condition would send out the wrong message and will only confuse those with pleural plaques even more. It would imply that pleural plaques are detrimental to a person's health when this is not the case. That is why Zurich feels that education and clear information about the condition is the best solution.

Option 2 - Reverse

- 5.6 Zurich believes that if the claimants with Pleural Plaques are allowed to get compensation for anxiety without physical injury then there is a real danger that this sets a precedent for other non-plaques related claimants. It would, in effect, create rights based on worry about the prospect of a future disease, rather than damage itself. This could have severe cost implications for employers, former employers, the Government and insurers. The higher costs for insurers would be passed on to Scottish customers, harming their competitiveness.
- 5.7 The proposed legislation signifies a potential interference with the rights and property of defendants and their insurers. For it to be effective, any such legislation would have to be retrospective in effect and this brings into question whether Scotland has a stable and principled legal framework that businesses and citizens can rely upon. Zurich has taken legal advice as to its right to challenge any proposed legislation once published.

6. SUMMARY

- 6.1 Zurich believes that the decision by the Scottish Executive to introduce legislation to make pleural plaques compensatable is wrong in principle. The development of pleural plaques is an indicator that a person has been exposed to asbestos, but it is that exposure that gives rise to the risk of developing other asbestos related conditions. It is not the pleural plaques that mutate into these conditions. All medical experts in *Johnston* agreed that pleural plaques are always benign. Legislating for compensation would not only give the false impression that pleural plaques will affect a person's

² In accordance with the ruling of *Johnston v NEI International Combustion Ltd et al.*

health, but could open up the flood gates for other non-pleural plaques claimants.

- 6.2 The only real winners, if the Scottish Government were to legislate, would be the claimants' solicitors. It is interesting to note that Thompsons have provided much of the information contained within the RIA and indeed were referred to in Scottish Parliament proceedings as having provided a draft copy of proposed legislation to overturn the House of Lords decision. Surely there must be questions asked of the validity of any consultation process, where it is underpinned by the very party who will benefit most from the decision to legislate.
- 6.3 Use of legislation to overturn, with retrospective effect, higher court decisions founded on basic legal principles, apparently in favour of one interest group with "special pleading", represents a real challenge to the concept of the Rule of Law. The Scottish Government proposes to go a stage further and to interfere retrospectively with pending cases on asymptomatic conditions. The RIA makes no attempt to assess the impact this would have on the willingness of companies to do business in Scotland.

