



Partial regulatory impact assessment on a proposed bill to reverse House of Lords' judgment in *Johnston v NEI International Combustion Ltd*

The ABI's Response to the Scottish Government's Consultation

1. About the ABI

- 1.1 The Association of British Insurers (ABI) represents the collective interests of the UK's insurance industry. The ABI speaks out on issues of common interest; helps to inform and participate in debates on public policy issues; and also acts as an advocate for high standards of customer service in the insurance industry

2. Executive summary

In October 2007, the House of Lords unanimously concluded that pleural plaques do not give rise to a cause of action under the law of negligence (delict in Scotland).

They reached this conclusion on the basis of medical evidence that showed that pleural plaques:

- are symptomless;
- do not lead to, nor increase susceptibility to, mesothelioma or any other asbestos-related condition;
- have no effect on health at all.

The Scottish Executive has committed to introducing legislation to make pleural plaques compensatable. It rationalises its proposed 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.

The ABI is fundamentally opposed to the Scottish Government's decision to introduce legislation.

Legislating to make compensation payable for anxiety rather than damage will set a dangerous precedent, which could lead 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.

Higher costs would likely be passed onto customers in the form of higher insurance premiums. The higher premiums would only apply to Scottish customers. This could make Scottish businesses less competitive than their English and Welsh counterparts.

For any legislation to be effective, it would have to be retrospective in effect. This could undermine the extent to which businesses and citizens are able to rely on Scotland's stable and principled legal framework.

The best way of responding to any anxiety suffered after being diagnosed with pleural plaques is to reassure people that the diagnosis does not mean that they will develop a terminal illness or that their quality 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. The insurance industry would be happy to play its role in this.

The ABI would look closely at the legality of any proposed legislation.

3. Introduction

The ABI is fundamentally opposed to the Scottish Government's decision to introduce legislation to 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. That decision was based on fundamental legal principles and a detailed examination of expert medical evidence. Political intervention to reverse that judgment would undermine Scotland's stable and principled legal framework, and would interfere with the rights and property of insurers.

We are aware that the Scottish Government has already made a strong commitment to introduce legislation. However, this consultation on the regulatory impact assessment provides an opportunity for all stakeholders to consider afresh the advantages and disadvantages 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.

4. The facts

The RIA helpfully sets out a number of undisputed facts about pleural plaques, which we have summarised below.

The House of Lords' unanimously upheld a Court of Appeal ruling that pleural plaques are not a compensatable condition. This ruling was based on new expert medical evidence. The evidence showed that pleural plaques:

- are, except in a very few cases, asymptomatic
- neither increase susceptibility to, nor lead to, other asbestos-related conditions
- have no effect on health at all.

Pleural plaques can only be detected on x-ray or computed tomography (CT) scan, so they are usually diagnosed incidentally during the course of routine medical investigations. As such, the majority of people with pleural plaques will likely never know that they have the condition. However, making compensation available for the condition will likely lead to a resurgence of scan vans – claims farmers who offer free scans on the understanding that if pleural plaques are detected, they will 'sell' the claim onto a lawyer for a referral fee. Because they are trying to generate new claims, it is highly doubtful that scan van operators will provide proper reassurance to anyone in whom plaques has been diagnosed that the condition should have no

effect on their quality of life. Therefore, more people will be diagnosed with the condition, but will not receive appropriate reassurance about what it means for their health. The best way to tackle anxiety is to make people aware of the real implications of pleural plaques.

There is no risk of anyone developing mesothelioma or any other asbestos-related condition as a result of pleural plaques. Pleural plaques are an indicator of exposure to asbestos. It is exposure to asbestos, not pleural plaques themselves, which increases a person's risk of developing an asbestos-related condition. Development of any asbestos-related condition is a completely separate process and not linked to pleural plaques. Exposure to asbestos can cause several quite separate and independent conditions.

Regardless of whether the Scottish Government introduces the legislation it proposes, people with pleural plaques will continue to be able to raise an action for damages if they later develop an asbestos-related disease. Insurers are committed to paying fast, fair and efficient compensation to claimants and, through the ABI, are working on initiatives to streamline the claims process for people with asbestos-related diseases, such as the mesothelioma pre-action protocol, which is currently being considered by the UK Government. We are keen to discuss the protocol's possible application in Scotland.

5. Misrepresentations of the facts

5.1 There are important points in the RIA that are either misrepresented or incorrect.

The legal process

5.2 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 incorrect.

5.3 The law has always required that a claim in tort based on negligence should 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 despite this new medical evidence would constitute a fundamental change to the law of negligence.

5.4 The legal principle on which the House of Lords based their ruling – that actionable damage requires a perceptible effect on health – can be applied to other asymptomatic asbestos-related conditions. Should a person with such a condition later develop symptoms, they will of course be entitled to compensation.

The condition

- 5.5 The RIA asserts that pleural plaques signify a greatly increased lifetime risk of developing mesothelioma. In fact, pleural plaques are an indicator that someone has been exposed to asbestos. It is the exposure to asbestos, not the plaques themselves, which signifies a greater lifetime risk: a person who has worked with asbestos and been diagnosed with pleural plaques has no greater risk of developing another asbestos-related condition than a colleague who has had the same exposure but has not developed plaques.
- 5.6 The lifetime risk of developing mesothelioma for a person who has had occupational exposure to asbestos is low - between 1% and 5%. To put this in context, the lifetime risk of a male developing prostate or lung cancer is 7% and 8% respectively; the lifetime risk of a female developing breast cancer is 11%.

Impact on insurance premiums

- 5.7 The Scottish Government suggests that legislation may lead to insurers raising premiums for “policies covering liability and death”. It is not clear what range or types of policies are meant by this statement. Making compensation available for exposure rather than health effects could lead to a raft of new compensatable conditions that would significantly increase costs for defendants. This could make ‘third party’ insurances (where an organisation purchases cover to indemnify it against any claims from a third party), such as employers’ liability and public liability insurance, more expensive. These increases would only apply to businesses in Scotland and this could affect their competitive position compared to their English and Welsh counterparts: there would be cheaper insurance and wider availability of cover in England and Wales.
- 5.8 For first party insurance policies, such as life, critical illness and income protection, it is the exposure to asbestos, not the diagnosis of plaques, which would affect the premium. This is because asbestos is one of the risk factors that life companies take into consideration about a person’s past medical history.

6. Assessing the options

Option 1: Do nothing

- 6.1 The RIA suggests that to do nothing would be of no benefit to people with pleural plaques, but would be of benefit to relevant employers, former employers, the Government and insurers.
- 6.2 We recognise that there was confusion about the prognosis for someone with pleural plaques. The House of Lords’ judgment provides the opportunity to end that confusion, and definitively state – based on clear medical evidence - that having pleural plaques does not mean that a person is going to develop mesothelioma or another terminal disease.
- 6.3 Legislating to make compensation available for pleural plaques will not do anything to resolve this confusion. Instead, it will send mixed messages about the condition: the very fact that pleural plaques could be worthy of compensation suggests that it will affect a person’s health. These mixed messages will understandably cause concern to the very people the legislation is trying to help. This was a point made recently by Professor Anthony Seaton, Emeritus Professor of Occupational and

Environmental Medicine at Aberdeen University in a letter to The Scotsman on 30 October.

- 6.4 Education, not compensation, is the best way of providing peace of mind to people with the condition. The Government, the NHS, health care providers, and support groups should provide information to people with pleural plaques and their families that, despite the diagnosis, they can still lead a normal, healthy life and that they are not at a high risk of developing mesothelioma or any other terminal disease. The insurance industry would be happy to play its role in this.
- 6.5 Linked to peace of mind, a decision not to legislate would curtail “scan van” operations, which focus on scanning and diagnosing members of the public for the sole purpose of promoting a compensation claim, without providing necessary reassurance about their general health and well-being.
- 6.6 A decision not to legislate would also provide legal certainty and avoid any risk of a more widespread challenge to the clear and longstanding legal principle that compensation is only paid for those who suffer material harm from acts of negligence. Despite the Scottish Government’s commitment to “encroach into the law of damages no more than necessary”, once the principle is established for one group of people that anxiety rather than damage is worthy of compensation, there would be serious political and possibly legal difficulties in justifying a denial of similar rights to others in the future.
- 6.7 Legal certainty is extremely important to businesses, which require assurance that Government is committed to a stable and certain legal environment that enables them to understand their risks fully.

Option 2: Legislate to reverse the House of Lords’ judgment

- 6.8 The House of Lords’ decision is founded in basic principles of the law of negligence. To change the law to make pleural plaques compensatable would create rights based on worry about the prospect of a future disease, rather than damage itself. It would be extremely difficult , both politically and legally, to restrict this to asymptomatic asbestos-related conditions only. This could have severe cost implications for employers, former employers, the Government and insurers. Higher costs for insurers would push up the cost of insurance for Scottish customers, harming their competitiveness. They may even lead to some insurers leaving the Scottish liability insurance market altogether and therefore reduce choice and competition for Scottish businesses.
- 6.9 Further, any legislation would represent a significant interference with the rights and property of defendants and their insurers with exposure to such claims. 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. We would look closely at the legality of any proposed legislation.
- 6.10 As well as the mixed messages coming from the Government itself, legislation is likely to lead to a resurgence in ‘scan vans’; effectively claims farmers who actively seek potential claims to ‘sell on’ to claimant lawyers for a referral fee. Wanting to generate claims, these operations are unlikely to reassure people in whom they

have just diagnosed plaques that in fact the condition will likely have no impact on their health.

- 6.11 There is one group of people who will significantly benefit from the proposed legislation, but whom the RIA neglects to mention – claimant lawyers. On the basis of the Scottish Government's figures, there are currently 630 outstanding cases (sisted or backlogged with solicitors), with a further 200 actions a year anticipated. The average value of compensation for pleural plaques was £8000. The same amount was payable in legal costs per case. If compensation were to be set at the pre-Court of Appeal level, lawyers would stand to make £5million in the first instance, and a further £1.6million each year thereafter – a significant proportion of which would be payable directly to claimant lawyers.
- 6.12 In any event, legislation to reverse the judgment is not the best way to help people with the condition. Reassurance through education is key. All stakeholders have a role to play in this.