

RESPONSE TO PARTIAL REGULATORY IMPACT ASSESSMENT

Proposed Bill to reverse House of Lords Judgment in *Johnston -v- NEI International Combustion Ltd*

THOMPSONS SOLICITORS  
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**Paragraph 19:**

If nothing was done then the insurers and employers would have benefited from what is in effect, a windfall of the Johnston judgment. Prior to Johnston they will have budgeted, with appropriate actuarial advice, for the losses for the future. The employers, former employers and insurers would also not benefit from full and final settlements in pleural plaques. Indeed they were very often keener on these than provisional settlements because it allowed them to have closure on their books for those which had settled on a full and final basis.

**Paragraph 20:**

Conversely the benefit is a benefit to employers, former employers and insurers where a full and final settlement is achieved. They will therefore gain in respect of closure on their books in not having to pay out future costs and damages (which would be substantial) where a serious condition did develop such as mesothelioma.

**Paragraph 21:**

Employers and insurers would also lose out by not having the opportunity to propose a full and final settlement whereby the risks of mesothelioma, especially with lung cancer, they will still therefore be exposed to the substantial damages and costs in these cases.

**Paragraph 23:**

We would also comment that the employers and insurers will have already budgeted for pleural plaques claims with appropriate actuarial advice.

**Paragraph 24:**

There would in fact be a cost to insurers and employers if the Scottish Government were to take no action. As I have indicated above, there would no longer be the prospect of an insurer and employer concluding a case on a full and final basis and therefore buying off the future risk of serious disease with the substantial damages and cost.

**Paragraph 28:**

We would point out that insurance premiums will have been taken and invested at the time of the employment. As any insurance company would do, the sums realised by these premiums will have been invested. This will either have been distributed by way of profit to insurers or re-invested in the capital created by the premiums. Many of the insurance companies are not involved in new business but are now dealing with the capital and historic liabilities. Those insurers who are still involved in the present day market are very large and the sums involved in the context of such large undertakings

would be minimal and we not envisage any increase in insurance premiums. We should also add that if the insurance premiums in the past collected for employers liability insurance for asbestos were too low then that is really the responsibility of the insurers and the employers. They should have collected adequate premiums and made long term investments to cover risk of future long-tail claims. It should have been obvious to the insurance industry that such claims were going to arise. Even by the 80's the long-tail liability should have been appreciated by research by Doll and Peto. Indeed if the insurance industry are complaining then they really only have to look to themselves.

**Paragraph 33 and 34:**

There is an additional problem if no action is taken. This relates to timebar.

In disease cases, timebar is 3 years from the date when the person first knew that they had a condition caused by their employment. If, therefore, they knew that they had pleural plaques, asbestosis or pleural thickening, irrespective of symptoms, then it would be 3 years from the date when they knew they had the disease.

The effect of Johnston is to change the above. Given that there is no actionable damage for pleural plaques, symptomless asbestosis or symptomless pleural thickening then timebar cannot run. However, timebar will start running as soon the condition does constitute actionable damage which will be when they first have symptoms. In other words, for asbestosis and pleural thickening, the timebar will not be when they were advised of these conditions but when they started having symptoms. A person can have respiratory difficulty, such as breathlessness, for all kinds of reasons. Many of the clients are older and will be susceptible to respiratory problems such as bronchitis, emphysema, obstructive airways disease and simple chest infections. When, in the midst of all of this, will we be able to ascertain when the symptoms caused by asbestosis or pleural thickening commenced?

The irony is that an insurer or employer will be arguing that symptoms were caused by the asbestosis or pleural thickening (as opposed to saying that such symptoms would not be caused by asbestosis or pleural thickening) to try and get a time as early as possible for there for to be actionable damage so that the 3 years would have passed and they can argue that the case is timebarred.

Needless to say, the foregoing will create considerable uncertainty for all concerned in ascertaining timebar. That, as a matter of public policy, should not be the case. It will also, no doubt, lead to considerable arguments on timebar which, in turn, will lead to more defences on timebar, costs and debates in court.

With the passing of the Act to include in particular symptomless asbestosis and symptomless pleural thickening, the timebar is clear. It will be what it has always been, that is, 3 years from the date when the person first knew that they had asbestosis or pleural thickening irrespective of symptoms.

**Paragraph 36:**

There is reference to Conditional Fee Agreements. These are really an English creature. Most cases are now funded by Speculative Fee Agreement and/or trade union assistance. However the same conclusion is there in that there is unlikely to be an increased cost to the legal aid fund. The number of cases, for example, that Thompsons have under civil legal aid for pleural plaques cases is nil.

**Paragraph 39:**

We note what the ABI are stating. However there is no specific example given in the paper or presumably by the ABI as to what kind of claims would be affected in other areas of Scots Law. It is, otherwise, a matter for speculation. The pleural plaques cases are not a matter for speculation. They are real. They arise from negligence in the past and give rise to considerable anxiety of contracting serious asbestos conditions, some of them terminal. Those affected have very often witnessed fellow workmates and other persons in their community suffering and dying by reason of their condition.

We finally mention that in terms of Article 8 of the European Convention of Human Rights and Fundamental Freedoms (ECHR), pleural plaques and the anxiety arising therefrom is clearly an invasion of a person's physical integrity and private life. It is pleasing to see that the Scottish Government, in bringing forward the legislation for pleural plaques, symptomless asbestosis and symptomless pleural thickening is conforming to that Article of ECHR.