



**RESPONSE BY FORUM OF INSURANCE LAWYERS
(FOIL) (SCOTLAND)**

TO

THE SCOTTISH GOVERNMENT CONSULTATION PAPER -

**Partial Regulatory Impact Assessment
on a Proposed Bill to Reverse House of Lords Judgement
in *Johnston v. NEI International Combustion Ltd.***

Although the House of Lords Judgment in *Johnston –v- NEI Combustion Ltd* of 17th October 2007 is not legally binding in Scotland, it is extremely persuasive, given that two highly respected Scottish Judges (Lords Hope and Rodger) concurred with the English Law Lords that there was no actionable damage in these cases reflecting the long established Scots Law principle that in order for an action to succeed, there must be a concurrence of *damnum* and *injuria*. The *damnum*/damage must be more than minimal. Lord Rodger referred to the Scottish case of *Brown v. North British Steel Foundry* where it was held “the mere possibility of *damnum* will not found a claim for reparation”.

Lord Hope stated: “No action lies for a wrong which has not resulted in some element of loss, injury or damage of a kind that was reasonably foreseeable and for which the claimants can sue” and “damages are for injuries that cause harm, not for injuries that are harmless.”

The intention of the Scottish Parliament is therefore to entitle pleural plaques sufferers to damages despite not having suffered harm, so making this group an exception to the normal rules and principles of Scots Law. Indeed, the Scottish Parliament seeks to extend this exception to individuals suffering from asymptomatic pleural thickening and asbestosis.

As such a fundamental change to the law of negligence may have far reaching consequences, we are firmly of the view the Scottish Parliament should seek the advice of the Law Commission of Scotland.

There are a number of reasons of policy identified by the Court of Appeal in England in the pleural plaques test cases as to why it is undesirable that the development of pleural plaques should give rise to a cause of action –

- i) On discovery of the existence of pleural plaques a claimant will be advised that he should bring a claim in order to protect his position, even if he would not otherwise wish to do so unless and until he developed symptomatic disease.
- ii) Bringing legal proceedings is stressful. It will result in the claimant’s attention being drawn to all the possible consequences of exposure to asbestos and may well create or augment the anxiety for which compensation will be claimed.
- iii) There is a danger that those, such as claims managers, who make a business out of litigation, will encourage workers who have been exposed to asbestos to have CT scans in order to see

whether they have pleural plaques for the sole purpose of bringing claims for compensation. Such a practice will tend to create stress and anxiety where none exists.

- iv) Some claimants will be tempted to claim a final award, thereby, in effect, gambling, to the possible prejudice of themselves and their families, that they will not contract an asbestos-related condition.
- v) The costs of litigation in cases such as those before us tend to be disproportionate to the damages recoverable.
- vi) It is unjust that the right to recover damages should depend upon the fortuity of whether or not the particular claimant has developed pleural plaques.

This approach is supported by medical experts such as Professor Anthony Seaton who in an article in the Scotsman Newspaper in the days after the Judgement advised MSP's to scrutinise the scientific issues surrounding pleural plaques as closely as the Law Lords did. Indeed he emphasized that pleural plaques in themselves imply no risk of other disease, they simply indicate that an individual has been exposed to asbestos. They do not develop into cancer and mesothelioma, nor do they interfere with the function of the lungs. He explained the dichotomy for doctors seeing patients with pleural plaques – on the one hand giving reassurance about their condition whilst on the other hand being obliged to advise them to consult a lawyer – “a mixed message with the obvious consequence of causing anxiety”. He pointed out the main beneficiaries would be lawyers and expert witnesses such as himself. He went on “I believe we have better things to do to prevent real diseases”.

Lord Rodger of Earlsferry in the House of Lords also touched on another policy issue – the matter of workers all exposed to asbestos where only some developed pleural plaques. Lord Rodger illustrated the point by identifying two individuals with similar exposure to asbestos. Both are anxious in relation to the risk of developing asbestos related disease in the future. If one of those individuals has pleural plaques but the other has not, should the former be entitled to damages? The anxiety felt by both men is the same. Lord Rodger said that would be an illogical result.

It was explained to their Lordships that a plaque is the body's physiological response to the presence of foreign fibres within the lung – the body surrounds them with fibrous tissue forming a plaque – and it is only those fibres which are not swept up which may go on to cause more significant asbestos diseases.

If that is indeed the case, then in the analogy given by Lord Rodger of the two individuals with the same degree of exposure to asbestos, it should be the one who does not have plaques who should be more anxious, and is more likely to go on to more specific asbestos related disease such as mesothelioma.

For these reasons it remains our view that damages in asbestos related claims should be restricted to situations where the claimant does in fact suffer harm. This also means there is no requirement to legislate in order to deal with situations where an individual may have been diagnosed with asymptomatic asbestosis or asymptomatic pleural thickening. Legislation seeking to do so again clearly seeks to reverse the long established law of negligence in Scotland. Maintaining the status quo, removes the illogicality of some individuals receiving damages, and others not, purely on the basis of a diagnosis made by CT scan.

The concern at diagnosis goes beyond the fact that pleural plaques can only be picked up by CT scan, and unless it is identified during other medical procedures, will only be diagnosed as a consequence of the actions of claims farmers.

There is a concern that allowing damages in respect of pleural plaques, asymptomatic asbestosis and asymptomatic pleural thickening, will in fact prejudice the position of claimants. As highlighted by the Court of Appeal in the cases of *Rothwell* and *Johnston*, claimants may well be tempted to seek a full and final award, as opposed to provisional damages. This in effect is a gamble on their part that they will not contract a more serious asbestos related condition, or that their condition will not worsen significantly.

Turning to the Partial Regulatory Impact Assessment itself, there are a number of matters which arise. The rationale for Government intervention is set out at paragraphs 10 and 11. Concern is raised in relation to any potential award for anxiety following a diagnosis of pleural plaques. This comes back to the fact that anyone exposed to asbestos, whether or not they have any diagnosis of pleural plaques, pleural thickening etc, may well be anxious. By seeking to legislate to allow awards of damages for anxiety for some individuals exposed to asbestos but not others defeats the whole purpose of the legislation. The fact that claims are raised if someone goes on to develop asbestosis, involves awards of damages being made. There is nothing to suggest that awards have not included, or could not include, an element of take account of the anxiety caused as a result of worry about developing asbestos related conditions, before any condition does arise.

OPTIONS

Sectors & Groups Affected

It is accepted that by not legislating, and therefore allowing the Scottish Courts to follow the House of Lords Judgment, claimants with asymptomatic pleural plaques would not recover damages. This would reflect the present law of negligence in Scotland. We would support this approach. To do otherwise would allow an exceptional group of "worried well" to recover damages despite having suffered no harm. In addition, it would leave those fully exposed to asbestos without evidence of plaques unable to recover damages. In addition, many of the employers/former employers are no longer in existence. Sometimes it is impossible to trace insurance cover for these entities.

Benefits

There is no doubt that by not legislating, those who would require to make payment in respect of claims, will benefit. There would be savings in relation to the damages, but also considerable savings in relation to expenses paid to solicitors. The benefit of legislating will be that claimants with pleural plaques will again be able to recover damages, a practice that grew up over several years when payments made were initially small, with little or no solicitors involvement. Laterally the bulk of these cases were litigated with solicitors costs often equaling or exceeding the damages payments. The lawyers involved in this litigation will also benefit.

Costs

By not legislating the individuals with pleural plaques will not receive damages. They will only be in a position to raise claims if they develop a harmful injury as a consequence of an asbestos related condition. There is a suggestion that even those who do go on to develop a more serious condition are losing out on the basis that payments in respect of a serious condition such as asbestosis and/or mesothelioma do not recognise anxiety suffered by the person from the time of diagnosis of pleural plaques. The factual position is that the diagnosis of pleural plaques is often made at or around the time of the diagnosis of the serious condition. In any event the law of Scotland does not presently award damages for anxiety alone.

It is again the position that people exposed to asbestos are going to be anxious whether or not they have pleural plaques.

There are obvious costs which will arise if legislation is introduced to prevent the House of Lords Judgment being adopted in Scotland. It is unclear as to what the level of damages will be if

legislation is introduced. If the damages are as they were prior to the Judgment, then the only additional costs which may arise are as a result of an increase in the number of workers previously exposed to asbestos who have CT scans carried out to establish whether or not they have pleural plaques. This may well result in an increased number of claims with the obvious costs involved. It is also the position that individuals who present to their General Practitioner and claim to be anxious in relation to asbestos exposure may be referred for a CT scan. That will have an obvious effect of increased costs to the health service and increase risk to patients as CT scans are not without their own risks (see COMARE 12th Report [Committee on Medical Aspects of Radiation in the Environment]).

Turning to the figures themselves there is a suggested average settlement in terms of damages of £8,000. The paper at paragraph 24 suggests that Defender's legal costs are of a similar order. It is unclear where this understanding came from, but it is more realistic to suggest a figure of approximately £6,000.

In addition to the damages and the Defender's costs, there are of course the claimants costs which may well be in the region of £8,000. A typical pleural plaques case which is litigated will therefore have a total cost in the region of £20,000 to £25,000. If there are 630 claims outstanding, then the cost may well be around £13,860,000.

200 actions raised on an annual basis may well involve a total cost, including expenses, of £4.4m.

Clearly if claimants are prepared to settle on a provisional basis against the background that they may suffer an injury in the future due to one of the serious conditions, then the figures will reduce. In those cases the total cost may be in the region of £16,000.

One further possible implication of the Scottish Government legislating is that individuals who previously would have raised their action in England, are likely to seek to raise proceedings in Scotland if legislation is introduced here but not in England. We are likely to see a significant increase in forum shopping. Claimants who may have had minimal exposure in Scotland, and much greater exposure in England, will be entitled to raise their claims in the Scottish Courts. The numbers involved cannot readily be estimated at this stage. It has to be borne in mind that the population of England is approximately ten times greater than Scotland. If only a fraction of those claims can be raised in Scotland, this will still have a significant impact on the total costs facing the Insurance industry and also numerous Government Departments.

Given the uncertainties in relation to the costs, there is merit in seeking to have in place some form of scheme which would govern the appropriate levels of awards and legal costs. This would also hopefully result in a reduction in terms of the numbers of cases which are litigated. This will have an obvious saving to the parties ultimately liable for payments, in terms of legal costs. A figure of £10,000 in respect of full and final damages is suggested. A figure in relation to a provisional award of £2,500 is appropriate.

Possible Wider Implications of House of Lords Judgment

The matter of pleural thickening and asbestosis has been considered at an earlier stage. The factual position is that asbestosis is a clinical condition and requires a clinical diagnosis. Fibrosis may well be seen on CT scan. It is for a chest physician however to provide the diagnosis of asbestosis setting out the extent of any disability or impairment suffered. Without a disability, there should not be a diagnosis of asbestosis.

There is a suggestion that a person with a diagnosis of asymptomatic asbestosis or pleural thickening has the worry of possible very serious disease such as mesothelioma plus the worry that whichever asymptomatic condition they suffer from will itself progress. The Partial Regulatory Impact Assessment suggests that anxiety will exist unless that individual can be told categorically that their condition is non progressive. This highlights the illogicality in seeking to allow damages in circumstances where individuals have pleural plaques, asymptomatic asbestosis and/or asymptomatic pleural thickening. There is of course a very small risk that these individuals who may have been exposed to asbestos go on to develop mesothelioma. There is also a risk that an individual exposed to asbestos but who does not have any of the conditions, will also go on to develop mesothelioma. Any individual who has pleural plaques will have been advised by medical practitioners that it is simply a marker of asbestos exposure, which in themselves do not increase the risk of any other disease developing. The risk of disease is as a consequence of asbestos exposure, not the existence of pleural plaques. This places a person with pleural plaques in exactly the same position as someone exposed to asbestos who does not have the condition.

If someone has asbestosis and/or pleural thickening then they currently can raise a claim and can seek damages. If they do not suffer from any symptoms, and there is medical evidence to suggest that their condition is non progressive, then these individuals are in exactly the same position as anyone else who has been exposed to asbestos. They too will be at some risk of developing mesothelioma. In order to avoid confusion and possibly increased litigation, retaining the status quo

in terms of the law of negligence in Scotland, will mean that those negligently exposed to asbestos, who suffer from symptoms as a consequence of an asbestos related disease will continue to be able to recover damages. This will avoid the illogicality of allowing individuals to receive damages if a CT scan picks up pleural plaques, fibrosis or pleural thickening, while former colleagues who have been equally exposed to asbestos, but who do not have these markings, are not in a position to recover damages.

There is also a concern that this proposed legislative change to the law of negligence in relation to asbestos litigation will require to be considered in relation to other potential areas.

There are claims regularly raised indicating that activities carried out in the workplace have caused degenerative change to joints and the spine which mean that at some point in the future a previously asymptomatic degenerative condition is going to become symptomatic. If an individual has degenerative changes in their spine, then they may well be anxious that at some point in the future they are going to suffer symptoms and require either to give up work or change their job.

The intent of the Scottish Government in legislating to allow individuals who have been exposed to asbestos and have developed pleural plaques to recover damages is to compensate them in relation to the anxiety faced that they may develop a more serious condition in the future. A similar scenario exists in relation to degenerative changes. Those changes could be picked up by CT scan or MRI. Those changes will be present despite the fact that no symptoms currently exist. There is a risk in the future however that the degenerative change will become symptomatic. This causes anxiety to the individual. Should that individual be entitled to raise a claim before they have developed any symptoms?

Another similar situation arises in relation to noise induced hearing loss. Everyone negligently exposed to excessive noise will suffer a damage to their hearing. That damage can be established by way of audiogram even before the individual is aware of the loss. In many situations the awareness of hearing loss will only occur in later years as a consequence of the natural aging process which in itself causes hearing loss. An individual who has their hearing assessed before being aware of any loss, can be advised that a hearing loss already exists which will become more significant in due course. By applying the same rules to this situation, it would allow individuals to raise proceedings and recover damages before they were aware of any hearing loss. That of course is not desirable. It is the case that the claims can only be raised once the individual is aware of the actual hearing loss.

One other obvious concern in relation to allowing damages for asymptomatic asbestosis and asymptomatic pleural thickening is what level of damages are appropriate. It may well be the case that the individual is not going to suffer any progression. If that is the case then should the award of damages be the same as for pleural plaques?

Small Firms Impact Test

There is little doubt that legislation to allow damages in relation to pleural plaques, asymptomatic asbestosis and/or asymptomatic pleural thickening is going to involve increased costs to the ultimate paymasters, be that Insurance companies, limited companies, Government Departments etc. It is for the Insurance industry to attempt to quantify, but it is inevitable that the increased costs would require to be passed on to business and possibly individuals, by way of increase in premiums.

Enforcements , Sanction and Monitoring

The impact of any legislation is to be reviewed after 2 years. This is to determine whether legislation has had any unexpected consequences. Many of the expected consequences of the legislation have been raised in this document, and presumably will be raised by others. Any consequences within that two year period are therefore unlikely to be unexpected. Accordingly if there is a significant increase in the number of claims due to claims farmers, forum shopping etc this will inevitably have had significant additional cost to the parties liable for damages and expenses. That however is not unexpected given the concerns in reversing the long established law of negligence in Scotland.

ON BEHALF OF FOIL

GLASGOW
3rd April, 2008

