

RESPONSE

by

THE FACULTY OF ADVOCATES

to

THE SCOTTISH GOVERNMENT

on

A PARTIAL REGULATORY IMPACT ASSESSMENT OF A PROPOSED BILL

TO REVERSE HOUSE OF LORDS JUDGEMENT IN

Johnston v NEI International Combustion Ltd

COMMITTEE

M.G. Thomson, Q.C. (Joint Convener)

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The Faculty has been asked to formulate a Response to a Consultation Document by the Scottish Government on A Partial Regulatory Impact Assessment Of A Proposed Bill To Reverse House Of Lords Judgement In *Johnston V Nei International Combustion Ltd*. The response is attached hereto.

**Edinburgh
April 2007**

IN NAME OF THE COMMITTEE

Convener

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*Johnston v NEI International Combustion Ltd***

The Faculty of Advocates has been invited to provide information in relation to the draft partial Regulatory Impact Assessment (RIA) relating to the proposed Bill to negate the effect of the decision in *Johnston v NEI International Combustion Ltd*.

In relation to the general policy objective, it is submitted that that the proposed legislation to reverse the House of Lords' judgement in *Johnston v NEI International* is both justified and reasonable. The basic premise of the proposed legislation is sound, i.e. that those who have been negligently exposed to asbestos and who go on to develop pleural plaques (or, for that matter, asymptomatic pleural thickening) should continue to be able to raise an action for damages in Scotland and that accordingly *Johnston* should not have any effect within

Scotland. A justification for such a view can be obtained from the minority decision of Lady Justice Smith in the Court of Appeal in *Johnston (sub nom Rothwell v Chemical & Insulating Co Ltd*, [2006] EWCA Civ 27 at paras. [116] to [118]) where she states that pleural plaques themselves constitute a physical injury. This view was, in effect, only a restatement the law already being applied in Scotland, England and Wales and Northern Ireland. The proposed legislation properly proceeds upon the basis that the rights and needs of claimants and insurers have been properly weighed up and merely restores the *status quo* that existed prior to *Johnston* and *Rothwell* and indeed since the 1980s. It is to be welcomed and should be extended to all asymptomatic asbestos-related conditions. The question of the quantification of such claims must, of course, remain with the courts.

Specific areas where views are sought

Costs

Option 2: Legislate to reverse the House of Lords Judgment

Para 24: The figures used in this paragraph and the following one are based on final settlement costs. Views are sought on an appropriate adjustment to reflect provisional settlements

- Any award of provisional damages should reflect the court's assessment of the value of the claim as at the time the award is made, on the basis of the pursuer's condition at that time. In cases of pleural plaques the provisional award should not differ significantly from the sum that would be awarded had it been a final award. If any further damages are to be awarded on the subsequent development of a more serious asbestos related condition, then these will be assessed at that time and on the basis of the new condition. Accordingly, it is submitted that no adjustment is necessary, although it should be made clear the listed figures relate solely to final awards.

Para 27: The projections of future costs in paragraphs 24 to 26 assume quantum remains unchanged (after the legislation comes into force). Views are sought on this approach and whether it should be adopted in the final RIA

- As noted in the draft RIA, the issue of quantum is properly a matter solely for the discretion of the court, taking into consideration the particular facts and circumstances of each case. It is submitted that there is no basis for concluding that the courts would, or should, approach any claim for quantum in relation to pleural plaques under the proposed legislation differently from the way they approached them in the past.

Possible wider implications of House of Lords judgment

(refers to cases involving asbestosis and pleural thickening)

Para 34: ...we do not know the extent to which *Johnston* would be regarded as authority or the extent to which defenders would seek to have it so regarded...Responses are requested to assist in preparing what the final RIA will say on this aspect

- It is noted that the stated policy intention of the new legislation is to extend to other asymptomatic asbestos related conditions – namely asbestosis and pleural thickening. It is thought likely that defenders would seek to ask courts to apply the decision in *Johnston* in such cases, and although such arguments may be few in number, and not ultimately be successful, it is submitted that it would be prudent to make it clear in primary legislation that all people suffering from asymptomatic conditions have a right to claim. This will avoid the risk of an adverse decision by a court, and the consequent confusion, uncertainty and lengthy appeal process that may then be involved. As noted, it would plainly be inequitable to allow claims

for those suffering the asymptomatic non-progressive condition of pleural plaques, and to risk the denial of claims for those suffering from a progressive condition where the consequent fear and anxiety may well be greater.