



# FOIL UPDATE

March 2009

## Pleural plaques

The Damages (Asbestos-related Conditions) (Scotland) Bill, introduced by Kenny MacAskill MSP on 23 June 2008, passed its third reading on 11 March 2009 and just requires the formality of royal assent before becoming law.

The five-clause Bill provides that asbestos-related plaques are a personal injury which is not negligible. Accordingly they constitute actionable harm for the purposes of an action for damages for personal injury. The Bill as passed removes the impact of any rule of law which asserts that pleural plaques do not constitute actionable harm but all other principles of personal injury law which would determine liability are left intact. For the avoidance of doubt the same provisions as above will apply to asbestos-related pleural thickening and asbestosis.

On limitation, in relation to actions which were commenced before the Act comes into force but which have not been determined, the period from 17<sup>th</sup> October 2007, (the date of the House of Lords decision in *Johnson v NEI International Combustion Ltd and conjoined cases*, which held that pleural plaques did not constitute actionable or compensatable damage), to the date the new Act comes into force shall be ignored for limitation purposes.

The Act will come into effect on a date to be appointed. Its provisions will be treated as having always had effect although any cases already concluded by court action or settlement are unaffected by the new provisions.

*"If the legislation in Scotland is all we can get, it is great for the people in Scotland, but there is a real worry that if we have different legislation in this part of the United Kingdom, we will end up creating another bun feast for the lawyers".*

David Anderson, Labour  
MP for Blaydon,  
Commons debate – 11  
February 2009

The Bill followed a government consultation process in Scotland, similar to that underway in England and Wales. The issues raised in the responses to the Scottish consultation have been aired thoroughly in the Commons debates on this issue. Those in favour argue for 'justice' and for the psychological impact of a pleural plaques diagnosis to be recognised, and claim that the removal of the right of action provided a windfall to employers and insurers. The arguments against a change in the law were over three times more numerous than those in favour. Issues raised included:

- the medical evidence that pleural plaques have no effect on health;
- the consequences of a dangerous precedent opening the floodgates to all types of 'exposure' claims;
- the dangers of overturning a longstanding legal principle which applies in most of the developed world, that material harm is necessary to found a claim;

- the cost implications for insurers, employers, and the Government, particularly as claims and cost were felt to have been underestimated;
- and the argument that education could provide more peace of mind to those with pleural plaques in contrast to legislation which would create more anxiety.

The consultation process in England and Wales was conducted between July and October last year. It focused on four main issues:

- the commissioning of independent reviews of the medical evidence from the Industrial Injuries Advisory Council and the Chief Medical Officer;
- action to improve understanding of pleural plaques to provide support and reassurance to those diagnosed.
- the issues which arise in relation to changing the law of negligence
- the merits of a 'no fault' payment scheme either for those diagnosed at the time of, or within a fixed period of, the House of Lords decision; or for those diagnosed now and in the future.

*"It [a change in the law of negligence] might also raise the possibility of compensation claims being made much more widely for the risk of an illness occurring or for worry that something might happen (for example in relation to the effects of passive smoking in the workplace or exposure to the sun in the building industry or other jobs involving outdoor work). If developments in the law of this nature occurred, this could considerably increase the level of litigation and the possibility of weak or spurious claims and could have damaging effects on business and the economy."*

Ministry of Justice  
 Consultation Paper on Pleural Plaques. 11 July 2008

The paper estimated that the cost of changing the law would be between £3.7bn and £28.6bn, indicating the uncertainty regarding the number of likely claims. The Government's view was that in view of the unanimous decision of the House of Lords based on fundamental principles of the law of negligence very strong reasons would be needed to interfere, and it was not minded to do so. Any such change in the law would have to have retrospective effect to provide compensation in those cases not settled in 2007 or stayed subsequently, which would raise Human Rights Act issues. In addition the issue of whether a particular disease or condition constituted a compensatable injury has traditionally rested with the courts under common law.

Concerns were also expressed at the potential knock-on effect to other symptomless conditions.

The Government considered that the position in Scotland was a matter for the Scottish Parliament alone.

The Government has not yet responded to the consultation. In the latest debate on the issue on 11 February 2009 Bridget Prentice, The Parliamentary Under-Secretary of State for Justice, stated that the focus was on getting the response out quickly.

Concerns were expressed during the course of the debate at the effect an Act in Scotland would have without similar legislation in England and Wales. As David Hamilton Labour MP for Midlothian stated "how will employers be dealt with in

Scotland? Will they not be disadvantaged by heavier premiums and insurance than apply in England?". Bridget Prentice echoed the concerns: "what would happen to someone who worked in Scotland but lived in England, and vice versa".

Although Bridget Prentice was pressed for a response on an employers' liability insurance bureau and a compulsory insurance register for employers, whilst she indicated that that would be a constructive way forward she was not prepared to go further on those issues during the debate.

Her only commitment was to express an absolute intention that something should happen well before the general election, which could push the time-scale into next year. In conclusion, when pressed to confirm that she agreed that the law should be changed across the UK she responded:

"I think that I can probably agree with my hon. Friend on that subject. We need to find a way of ensuring that people get some recompense, because another unwelcome effect of the House of Lords judgment was that people diagnosed with pleural plaques were no longer able to establish the employer's liability of negligence at an early stage. That potentially creates difficulties, especially if people eventually get mesothelioma, or another asbestos-related disease, as that delay inevitably affects the speed with which they can obtain compensation".

*"I agree with the hon. Member for Cambridge [David Howarth] that there is a solution. If we were to change the law and go back to the status quo ante, then build into the system a number of insurance safeguards and possibly tag on a levy on the industry, we could well have a way forward".*

Henry Bellingham,  
Conservative MP North West  
Norfolk, Commons debate  
11 February 2009

This issue of delay was discounted in the published consultation paper.

In the meantime, with the Scottish legislation almost on the statute book the response from the insurance industry has been immediate. It is reported that the ABI's view is that the SMPs have ignored the facts and the new Act could have far-reaching unintended consequences.

In the Insurance Times Nick Starling, the ABI's director of general health is reported to have commented that the Bill is "fundamentally flawed" He went on, "It ignored clear medical opinion that plaques are symptomless and do not cause other asbestos-related conditions. And the full cost implications of the measure, which will be paid for by all Scottish taxpayers and firms, have been ignored. The Scottish government has already admitted that its initial costs estimates were too low".

The Insurance Post reports that insurers are "seriously considering mounting a judicial review against the Bill, having taken legal advice".

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