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Assembly

Research and Library Service Bill Paper

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Damages (Asbestos-related Conditions) Bill

NIAR 644-10

This paper provides an overview and discussion of the Damages (Asbestos-related Conditions) Bill.

Executive Summary

Background

- The Damages (Asbestos-related Conditions) Bill is concerned with the issue of *pleural plaques*; these are a thickening of the lining of the lung, caused by asbestos exposure. The medical consensus is that pleural plaques are not harmful, and do not develop into other life-threatening diseases.
- The Bill is intended to negate a decision, taken by the House of Lords in October 2007 (*Johnston v NEI International Combustion Ltd*), which held that asymptomatic benign pleural plaques do not constitute an injury for which compensation may be sought.
- Prior to the *Johnston* case, the courts in NI appeared to have accepted that pleural plaques, in and of themselves, were actionable. However, post-*Johnston*, damages for symptomless pleural plaques are no longer available in the courts in Northern Ireland.
- The Bill would reverse this decision; it would then be up to the courts to decide how much to award in damages depending on severity, etc.

Key Issues

- The key issue around the proposed legislation appears to be the argument as to whether people *should* be compensated for a condition which is without symptoms. However, this might be balanced against the argument that people should be compensated for the anxiety associated with confirmed exposure to asbestos and the future risks that this might imply. It could also be argued that employers should be held accountable for not having prevented/managed the exposure to asbestos.
- Another issue with the Bill is that there is considerable uncertainty around the number and costs of previous and potential claims.
- Should the Bill be passed, it may have implications for the cost of insurance, which is already considered to be comparatively high in Northern Ireland.
- Comparable legislation in Scotland continues to be the subject of legal challenge. If the Scottish legislation was found to be in breach of the European Convention on Human Rights, the NI legislation (assuming the Bill is passed), could similarly be found to be in breach.
- Concerns have been raised as to the proposed timetable for the Bill, and in particular the time allowed for committee scrutiny.
- Finally, the argument has been made that the proposed legislation could be counter-productive, if, in reinstating the condition as being compensatable, it

enhances people's anxiety that they are going to develop other related conditions.

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1 Background to the Bill

The Damages (Asbestos-related Conditions) Bill is concerned with the issue of *pleural plaques*¹; these are a thickening of the lining of the lung, caused by asbestos exposure. Pleural plaques are distinct from diffuse pleural thickening², asbestosis³, mesothelioma⁴ or asbestos-related lung cancer. The medical consensus is that pleural plaques are not harmful, and do not develop into other life-threatening diseases; however, their presence does indicate exposure to asbestos⁵.

The Bill is intended to negate a decision, taken by the House of Lords in October 2007 (*Johnston v NEI International Combustion Ltd*), which held that asymptomatic benign pleural plaques do not constitute an injury for which compensation may be sought. It is worth highlighting that the House of Lords decision did not necessarily imply that there was no *negligence* associated with exposure to asbestos, resulting in pleural plaques; just that this did not constitute *damage*. The proposed bill would reverse this decision and say that this does constitute damage. It would then be up to the courts to decide how much to award depending on severity, etc⁶.

The Bill was introduced to the Northern Ireland (NI) Assembly on 14 December 2010 and is scheduled to reach second stage on 17 January 2011.

2 Position in Northern Ireland

2.1 Legal Position in Northern Ireland before/after *Johnston Case*

Prior to the *Johnston* case, it would appear that the courts in NI had accepted that pleural plaques, in and of themselves, were actionable. In paragraph 12 of the judgment in *Bittles v Harland and Wolff*⁷, Mr Justice Girvan (as he then was), stated that:

“In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant’s negligence and has in consequence developed pleural plaques, the development of the pleural plaques even if asymptomatic represent bodily damage and a personal injury... Thus the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions, such as asbestosis and mesothelioma.”

¹ The House of Lords ruling and the proposed bill are concerned with pleural plaques that are asymptomatic

² Non-malignant disease in which the lining of the pleura becomes scarred
Consultation Paper: Pleural Plaques, *DFP*, 13 October 2008

³ Non-malignant scarring of lung tissue which impairs lung elasticity.

⁴ Asbestos related cancer which affects the mesothelium (the protective lining which covers most of body’s internal organs)

⁵ NI Assembly Research Paper: Pleural Plaques: numbers, costs and international approaches, *October 2010*

⁶ Official Report (Hansard), 15 September 2010

⁷ [2000] NIQB 13, as cited in: Consultation Paper: Pleural Plaques, *DFP*, 13 October 2008

It would also appear that awards of provisional damages of between £5,000 and £7,500 were previously considered appropriate in Northern Ireland. However, post-Johnston, damages for symptomless pleural plaques are no longer available in the courts in Northern Ireland⁸.

2.2 Consultation

In October 2008, DFP issued a consultation paper which considered the impact of the decision in the Johnston case and sought views on the following options:

Option 1 – increased support, help and information for people with pleural plaques;

Option 2 – introduction of a register of those with pleural plaques;

Option 3 – introduction of a no fault payment scheme for pleural plaques; and

Option 4 – introduction of amending legislation to “reinstate” civil claims in negligence for asymptomatic pleural plaques⁹.

The consultation period concluded on 12 January 2008 and 94 responses were received. According to DFP, the option of legislative change commanded the most support. Options 2 and 3 were generally not supported. However, option 1 also received some support.

DFP also consulted on the terms of the Bill from July to September 2010. Only 12 responses were received and the majority of these came from the insurance industry, which reinstated its opposition to legislative change.

3 Position in Scotland, England and Wales

3.1 Scotland

The Scottish Executive has introduced legislation which curtails the effect of the Johnston judgement. On 23 June 2008, the Damages (Asbestos-Related Conditions) (Scotland) Bill was introduced to the Scottish Parliament. This created a reaction from insurers and business interests regarding the possibility of increased costs associated with claims and insurance premiums, and the possible involvement of claims management companies. The Scottish Executive defended the Bill, stating that the wider implications were misplaced and that the Bill only deals with three asbestos-related conditions – pleural plaques; symptomless pleural thickening; symptomless asbestosis – and would have no effect beyond these. The Bill completed its final stage in the Scottish Parliament in March 2009, received Royal Assent in April 2009 and came into force in June 2009¹⁰.

⁸ Consultation Paper: Pleural Plaques, *DFP*, 13 October 2008

⁹ The legislation would also cover asymptomatic pleural thickening and asbestosis

¹⁰ Consultation by DFP on the Draft Damages (Asbestos-Related Conditions) Bill (Northern Ireland) 2010

In April 2009, five insurance companies (Axa General Insurance Ltd, Axa Insurance UK Plc, Norwich Union Insurance Ltd, Royal and Sun Alliance Insurance and Zurich Insurance Plc) launched a judicial review of the 2009 Act. The companies sought a declaration that the 2009 Act is incompatible with their rights under Article 6 of, and/or Article 1 of the First Protocol to, the European Convention on Human rights. They also sought a declaration that the 2009 Act was the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred on the Scottish Parliament. This hearing concluded in October 2009 and was dismissed in January. However, the companies have since appealed and the legal challenge is ongoing¹¹.

3.2 England and Wales

In July 2008, the UK Government issued a consultation paper on pleural plaques. There were a number of failed attempts to introduce a Damages (Asbestos-Related Conditions) Bill. In February 2010, Jack Straw announced that the law in England and Wales would not be amended, but that the Government had decided to introduce an extra-statutory scheme, which would make payments of £5,000. However, these payments would be limited to those individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the Law Lords' ruling in October 2007¹².

4 Bill Clauses

The Bill consists of the following five clauses¹³:

Clause 1 – Pleural Plaques

This clause addresses the key issue in the Johnston judgement, by providing that asbestos-related pleural plaques *are actionable damage*. Subsections (1) and (2) provide that pleural plaques can be the subject of a claim for damages. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston case, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining liability.

Clause 2 – Pleural thickening and asbestosis

This Clause prevents the ruling in the Johnston case from being applied in relation to asymptomatic pleural thickening or asbestosis. Subsections (1) and (2) provide that asbestos-related pleural thickening and asbestosis, which have not and are not causing physical impairment, constitute actionable damage. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston judgement, to the extent that their application would result in asymptomatic pleural thickening or

¹¹ Ibid

¹² Ibid

¹³ Damages (Asbestos-related Conditions) Bill, Explanatory and Financial Memorandum, Session 2010-2011

asbestosis being considered non-actionable. Subsection (4) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining liability.

Clause 3 – Limitation of actions

This Clause provides that the period between the date of the decision in Johnston (17 October 2007) and the date on which any change to the law comes into force does not count towards the three-year limitation period for raising an action for damages in respect of the three conditions covered in the Bill. Subsection (1)(a) addresses the kinds of claims to which the Clause applies, i.e. those involving the asbestos-related conditions covered in Clauses 1 and 2. This includes claims that have been raised in the courts before any change to the law comes into force, as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date on which the change to the law comes into force, this section will apply only if those cases are ongoing at that date (this is intended to address cases that could be at risk of being dismissed by the courts on time-bar grounds).

Clause 4 – Commencement and retrospective effect

This Clause sets out the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Bill will come into force on a date appointed by the DFP by Commencement Order. The remaining subsections explain the retrospective effect of the provisions of the Bill. Subsection (2) provides that Clauses 1 and 2 of the Bill are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the decision in Johnston¹⁴. Subsection (3) qualifies the effect of subsection (2) by providing that Clauses 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Act (if made) comes into force. The effect of subsections (2) and (3) is that claimants in cases which have not been settled, or determined by a court, before the Act (if made) comes into force will be able to raise, or continue, an action for damages.

Clause 5 – Short title and Crown application

This Clause gives the short title of the Bill and provides that the Act (if made) will bind the Crown.

¹⁴ This is because an authoritative statement of the law by the House of Lords is considered to state the law as it has always been.

5 Key Issues

- A key issue around the proposed legislation appears to be the argument as to whether people *should* be compensated for a condition which is without symptoms. However, this might be balanced against the argument that people should be compensated for the anxiety associated with confirmed exposure to asbestos and the future risks that this might imply. It could also be argued that employers should be held accountable for not having prevented/managed the exposure to asbestos.
- **Potential Cost:** Considerable uncertainty exists as to the number and costs of previous and potential claims. Since there is no current requirement to record a diagnosis of pleural plaques, there is no way of accurately knowing how many cases exist in NI. Accordingly, it is difficult to assess the financial implications of the Bill. DFP has estimated that the cost to NI could be between £1.3m and £2.3m. However, this is based upon a population-adjusted estimate, using data for Scotland, and fails to account for differences in the prevalence of, and exposure to, asbestos between Northern Ireland and Scotland. If the fact that compensation levels are likely to be higher in NI than in Scotland is accounted for, the department suggests that an annual figure of £2m-£3m may be more realistic. However, the Association of British Insurers' (ABI) has suggested that the *total* cost to Northern Ireland could be between £111m and £858m, (refer to previous research paper for further details on cost estimates¹⁵).
- **Potential Impact upon Cost of Insurance:** According to the ABI:

“A move towards legislation will also be extremely unhelpful in keeping a stable operating environment for insurance providers. We fear that it is likely to impact on consumers in terms of higher premiums¹⁶.”
- **Legal Challenge in Scotland:** The fact that the legislation is the subject of ongoing legal challenge in Scotland is noteworthy. If the legislation in Scotland was found to be in breach of the European Convention on Human Rights, the legislation in Northern Ireland (assuming the Bill is passed), would similarly be found to be in breach, unless local courts took a different view¹⁷.
- **Consultation:** the ABI is of the view that insufficient time is available for proper scrutiny of the legislation¹⁸. The Committee has also expressed concerns regarding the proposed timeframe for progress of the Bill.

¹⁵ NI Assembly bill Paper, *Pleural Plaques: numbers, costs, and international approaches*, 13 October 2010
<http://assist.assemblyni.gov.uk/services/rsrchlib/products/researchpubs/dept/fp/2010/pidgeon18310.pdf>

¹⁶ ABI letter to Committee clerk, 23 October 2009, as cited in NI Assembly bill Paper, *Pleural Plaques: numbers, costs, and international approaches*, 13 October 2010

¹⁷ Unless local courts took a different view; local courts are not bound by the decisions of Scottish courts. However, such a finding might be highly persuasive

Official Report (Hansard), 15 September 2010, p. 30

¹⁸ ABI letter to Committee chair, 10 January 2011

- **Counter-Productive?** The argument has been made that the proposed legislation could be counter-productive, if in reinstating the condition as being compensatable, it enhances people's anxiety that they are going to develop other related conditions. Evidence submitted to the committee suggests that categorising as 'personal injury' conditions which are asymptomatic would only serve to promote litigation and cause unnecessary anxiety to claimants. The submission also suggests that the logic behind the proposed legislation could be extended to other asymptomatic conditions such as personal injury through smoking at work¹⁹.

¹⁹ Response to NI Assembly Committee for Finance and Personnel's call for evidence – Damages (Asbestos-related conditions) Bill, January 2011