

Response to the Northern Ireland Assembly, Committee for Finance and Personnel's call for evidence- Damages (Asbestos-related conditions) Bill (NIA Bill 10/10)

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Table of contents

1.	SECTION ONE: INTRODUCTION	1
2.	SECTION TWO: SUGGESTIONS FOR AMENDMENTS TO THE BILL	1
3.	SECTION THREE: OPPOSITION TO SPECIFIC CLAUSES	1
4.	ADDITIONAL COMMENTS	4

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1. SECTION ONE: INTRODUCTION

The Committee for Finance and Personnel (the Committee) has called for evidence from stakeholders with an interest in the Damages (Asbestos-Related Conditions) Bill (NIA Bill 10/10). This Bill is intended to negate the House of Lords decision in *Johnston v NEI International Combustion Limited and conjoined cases [2007]* which held that asymptomatic and benign pleural plaques do not constitute a compensatable injury. Kennedys act for a wide range of clients who face claims involving asbestos induced injuries, to include, insurers, self insured corporations, health authorities and local authorities. We are uniquely placed to respond to this call for evidence which we note is to be restricted to:

- Suggestions for possible amendments to the Bill; and
- Opposition to specific clauses.

2. SECTION TWO: SUGGESTIONS FOR AMENDMENTS TO THE BILL

We submit that however well intentioned the Committee believes this proposed Bill to be, it is fundamentally at odds both with the upholding of the Rule of Law and is potentially both discriminatory and in contravention of the Human Rights Act. We therefore cannot suggest any amendments to the Bill as we oppose its existence.

3. SECTION THREE: OPPOSITION TO SPECIFIC CLAUSES

Following devolution of policing and justice, the newly formed Northern Ireland Courts and Tribunal Service (NICTS) has, since 12 April 2010, been charged with improving access to justice, promoting confidence in the justice system and supporting an independent judiciary. In order to achieve these aims they rely upon various organisational values which include: integrity, impartiality, openness, professionalism, accountability and fairness.

The intent of this Bill is to circumvent or usurp a decision of the highest court which binds the Northern Ireland Judiciary and is therefore inconsistent with its stated aim of maintaining and supporting an independent judiciary in which the public may have confidence. It is of course accepted that if a person sustains injury and loss by reason of another's negligence or breach of duty, the wrongdoer should compensate the injured party. However, for a person to be compensated in respect of an injury which (a) causes him no pain, (b) causes him no disability and (c) can

only be detected radiologically; is illogical and inconsistent with the principle of awarding damages to compensate an injury.

The Judiciary apply the law to the factual matrix and the inbuilt safety mechanism is the right of appeal to a higher court be it the High Court, Court of Appeal or indeed the Supreme Court (and thereafter in some instances the European Court of Justice). This is so that justice is done and seen to be done by the public who put its confidence in the system.

We have considered the clauses as requested and make the following points.

3.1 Clause 1: Pleural Plaques

This Bill seeks to define what personal injury is (albeit it is apparently restricted to asbestos associated conditions). This is clearly something which is not within the remit of the elected officials to decide. In the Johnston case a joint expert report was prepared by experts who specialised in the area of asbestos related lung conditions. This report concluded after expert consideration of the medical evidence that pleural plaques are:

- Wholly benign;
- They very rarely lead to symptoms of any kind; and
- They do not in any way progress or trigger any other possible asbestos related conditions such as mesothelioma or asbestosis.

The Law Lords therefore concluded on the cogent evidence before them that as pleural plaques were asymptomatic, they did not constitute 'damage' which was compensatable. The position adopted by the Committee in the draft Bill controverts established legal principles of precedent and independence of the judicial system. The Bill also effectively decides upon medical issues; that is, *what constitutes personal injury?* We submit that this is not within the expertise and thus the gift of the Assembly to do.

If it is now to be accepted that asymptomatic diseases constitute personal injury, will this logic extend to other asymptomatic conditions such as personal injury through smoking at work? Otherwise, the Bill is potentially discriminatory against other individuals with asymptomatic diseases. Is it envisioned that the Assembly will enact further legislation to deal with other asymptomatic diseases arising from work related activities?

3.2 Clause 2: Pleural thickening and asbestosis

The points made above in relation to clause 1 are repeated in relation to this clause.

3.3 Clause 3: Limitation of actions.

This clause should not be applied. There is an inherent discretion for any Judge to extend time in any claim provided that it is just to do so. This clause endangers the application of Article 6 of the Human Rights Act for defendants whose right to a fair hearing is incrementally prejudiced by the passage of time especially when there may have already been inordinate delay in the bringing of a claim.

How can legal certainty be achieved if a court decides on all the evidence yet the legislature turn the decision on its head by negating its effect? Claims will be brought where there is no physical symptomology just because it has been deemed to be personal injury.

Claimants will be compensated not on the basis of being put back into the position they would have been in had they not suffered personal injury, pain and suffering; but on the basis that, "I am told that I have a personal injury and whilst I have not suffered any pain and suffering I can still claim even if there is no actual harm caused to me".

To categorise as 'personal injury' conditions which are asymptomatic only serves to promote litigation and will cause unnecessary anxiety to claimants who might otherwise be expected to lead normal healthy lives. Giving a person with an asymptomatic condition the right to bring a claim conveys the wrong message. It makes them focus on the negligible risk that they will one day develop adverse physical symptoms, rather than encourage them to put such risk to the back of their mind and get on and enjoy life.

3.4 Clause 4: Commencement and retrospective effect

We would simply comment that to apply legislation retrospectively does not sit comfortably with the principles of openness and fairness and may contravene the overriding intent of achieving justice between claimants and defendants.

4. ADDITIONAL COMMENTS

4.1 Access to justice and increase in jurisdictional limits

The Assembly Committee seeks to follow the position of the Scottish Assembly in negating the decision of the House of Lords in relation to a condition which is asymptomatic and which by a decision of the courts was not considered to be actionable and therefore not compensatable. The Department of Justice is keen to ensure access to justice in an environment that is seeing changes to the funding of access to justice and in the light of potential increases to the jurisdictional limit of the County Court in Northern Ireland.

The Assembly Committee has not provided any clear and cogent evidence of the amount of claims that may materialise as a result of this legislative negation of the rule of law. The only support provided by the Committee is to say that the population of Northern Ireland is about one third of that of Scotland so that we can simply divide the Scottish number of claims by three. This arbitrary approach to the looming economic realities of government cuts in spending is unnerving. Allowing an unknown number of claims which are likely to require Legal Services Commission backing raises very real implications about the further strain on an already 'stressed out' Legal Aid fund.

4.2 Impact on the Court Service and wider population

Depending on the value of awards that these 'new claims' may attract; it is likely that if the county court limit is raised, these claims will fall within the county court jurisdiction. Whilst efficient at present, these courts may struggle with the added workload, thereby reducing the timely disposal of actions and access to justice of the larger population.