



Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill

Evidence from the Association of Personal Injury Lawyers

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,100 members across the UK who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with advocates, legal executives, paralegals and some academics.

The 'polluter pays' principle

When a person is made ill as result of the negligence of someone else, the principle that the responsible party should pay for the injured person's care and rehabilitation should be unarguable. It is inequitable that the tax-payer should have to foot the NHS bill for such treatment. The fact that this Bill is not retrospective, and therefore that any benefits of any legislation will not be felt for some years to come should make no difference.

The financial memorandum to the Bill makes the point that it is impossible to estimate how much will be saved by the provisions in the Bill. Again, that need not be a material consideration, as any level of recoupmnt by the NHS which helps to free up valuable resources for patients is to be welcomed.

Workplace safety

The second objective of this Bill is to incentivise employers to improve working conditions and to take a precautionary approach to working conditions which could lead to industrial diseases of the future.

As the financial memorandum points out, insurance premiums are likely to increase, as employers responsible for generating compensation claims by making their employees ill will pay the NHS costs through their insurance policies.¹ The reward for safer working practices is, however, likely to take the form of lower premiums for responsible employers in the long term and that is certainly likely to incentivise employers to develop safer workplaces and think more carefully about the hazards of the future. In the experience of our members, this follows a pattern of improvements in safety standards over recent years which can be attributed to a variety of factors such as legislation, awareness and education, litigation and insurance. The prospect of this Bill helping to continue that momentum is to be welcomed.

Impact on the conduct of insurers – delays in settlement of cases

Most industrial diseases have long latency periods. This is especially true of asbestos-related diseases, which can have latency periods going back decades, during which time the employee may have worked for several different employers, any or all of whom may bear some responsibility for exposing the employee to the cause of his illness. In personal injury claims for such diseases, one of the biggest challenges is to establish ‘apportionment’, or allocation of responsibility, to each of the employers involved in any single case.

It is the experience of our members that in such complicated cases, with multiple defenders and insurance companies, there is often significant delay in settling cases. Defenders’ insurers argue between themselves about issues such as who was most liable for different periods of exposure; identification of periods in the employee’s work history where there may have been no employers’ insurance cover at all; and what treatment is attributable to the disease itself. This latter issue is particularly difficult, for example, in cases of lung disease, where the sufferer may have smoked or is overweight, both of which could be contributing factors in addition to the employer’s negligence.

¹ Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill; Financial Memorandum page 11, paragraph 47

The prospect of having to pay NHS costs under the terms of this Bill will be an additional factor in those arguments and will almost certainly lead to delay in the settlement of cases and therefore in the delivery of redress to people who are often seriously ill.

When people are ill, their future care and the cost of that care is a major cause of anxiety for them and their families. This includes the cost of social, as well as medical, care. Those costs are borne by the employer responsible for the illness, and paid for by his insurer. Under the current law those costs, as well as compensation for lost years of life, must be calculated from the point that the case is settled. Any delay to that settlement while insurers are arguing among themselves will, therefore, have a significant impact on the pursuer while benefiting the insurer who will have to pay less in costs and compensation.

Insurance companies are, of course, aware of this and it is the experience of our members that anything which could be used to protract arguments and thereby delay settlements will be used to do just that. The introduction of an obligation to pay NHS costs for industrial disease will almost certainly have this effect.

Under the terms of the Compensation Act 2006, mesothelioma cases should be handled differently from other cases where there are multiple defenders. The life expectancy of people who are diagnosed with this terminal asbestos-related cancer is usually very short once a diagnosis has been made. Time is, literally, of the essence if the patient is to benefit from the compensation to which he is entitled. For that reason, any individual employer liable for exposing the pursuer to asbestos which has caused the mesothelioma has to pay full compensation to the patient and then claim contributions from any other responsible employers afterwards. It is the experience of our members, however, that this does not happen in reality and that, in fact, settlements are delayed even in mesothelioma cases while behind-the-scenes arguments take place between insurers about who is most liable. The proposals in this Bill are likely to make this completely unacceptable situation even worse.

Conclusion

We fully support the intention and principles behind this Bill. We are, however, extremely concerned that the benefits it may eventually deliver will be undermined by the unforeseen consequence of delays in the settlement of cases of sick and vulnerable people. Any delay at all, especially in mesothelioma cases, is a luxury they cannot afford.

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