

Department of Finance and Personnel (Northern Ireland)

Consultation Paper CP 02/08

Pleural Plaques



A response by the Association of Personal Injury Lawyers

January 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

APIL Northern Ireland welcomes any proposals to raise awareness of the nature of pleural plaques and believes that there is merit in a general awareness campaign if it helps victims to understand their condition. We question though to what extent this will allay concerns. A diagnosis of pleural plaques signifies significant exposure to asbestos, the diagnosis follows victims for the rest of their lives, and no amount of reassurance is likely to allay their concerns of dying from an asbestos-related disease, particularly where they have worked with many other individuals who they have seen developing, and probably dying from, asbestos related diseases, such as mesothelioma.

APIL Northern Ireland does not support the creation of a centralised register or database of people diagnosed with pleural plaques, particularly as this would, in our view, undermine any general awareness campaign and would make victims feel stigmatised.

APIL Northern Ireland believes that the consequences of the House of Lords decision on pleural plaques in *Johnston v NEI International (and conjoined cases)*¹ should be overturned by legislation. We submit that asbestos victims are a special category in highly exceptional circumstances and that it is right and proper that they should be able to obtain full and just compensation. The Scottish Government has taken the

¹ [2007] UKHL 39

decision to change the law in Scotland by introduction of the Damages (Asbestos-related Conditions) (Scotland) Bill. We believe that the Northern Ireland Executive should do likewise in Northern Ireland.

APIL Northern Ireland believes that, if legislation is to be introduced, it would be fundamentally wrong for claims to be restricted to those pleural plaques victims diagnosed prior to the *Johnston* case and legislation must cover all future cases. We believe that it is also essential that any provisions are retrospective to ensure that there is no injustice between claimants who have become statute barred between the Court of Appeal decision and those who will have a right to bring a claim once legislation is enacted.

APIL Northern Ireland supports the extending of any legislation to asymptomatic pleural thickening and asymptomatic asbestosis.

APIL Northern Ireland does not support the option of a payment scheme for pleural plaques as we believe this is an inappropriate method of compensating pleural plaques sufferers. In *Johnston*, the House of Lords (and, indeed, the lower courts) accepted that all of the claimants had been owed a duty of care and all of the defendants had breached that duty of care.

APIL Northern Ireland believes that if a payment scheme were to be introduced it would have to be on the basis of a provisional award with no detriment whatsoever to the applicant at a later stage should he develop an actionable condition. The scheme must guarantee to provide claimants with compensation equivalent to the level of damages that were being awarded to claimants before the High Court decision in *Rothwell v Chemical & Insulating Co Ltd (and conjoined cases)*¹, whilst retaining the right to pursue a common law claim in the event of the development of an actionable asbestos condition, without limitation being affected.

APIL Northern Ireland believes in the principle that the polluter must pay and it is fundamentally wrong for the state to be responsible where there is an identifiable wrongdoer. Insurance premiums have already been collected and it is entirely right and proper that the negligent party should make recompense for its negligence.

APIL Northern Ireland believes that if a scheme were to be introduced there is no justification for the application of a limitation period. This adds a legalistic aspect where none is required. A limitation period risks substantial prejudice to claimants. If, however, a limitation period is to be introduced, this should not be less advantageous than the common law with a similar discretion to disapply any limitation period.

¹ [2005] EWHC 88 (QB)

Introduction

APIL Northern Ireland welcomes the opportunity to respond to this consultation paper on pleural plaques.

We have noted that this consultation paper is said to be partly based on the corresponding paper produced in England and Wales by the Ministry of Justice (MoJ) (“the MoJ paper”) to which APIL has already submitted a response.¹ Additionally, APIL has also previously submitted evidence to the Justice Committee of the Scottish Parliament following publication of the Damages (Asbestos-related Conditions) (Scotland) Bill.²

Consultation Questions

Question 1: Do you think information leaflets on pleural plaques would be useful? If not, why not?

APIL Northern Ireland welcomes any proposals to raise awareness of the nature of pleural plaques to those diagnosed with the condition and to the wider general public. We agree that there is merit in a general awareness campaign but we note that the consultation paper gives no guidance on the content of the leaflets suggested or any indication on how such an awareness campaign will be undertaken.

¹ <http://files.apil.org.uk/pdf/ConsultationDocuments/1013.pdf>

² <http://files.apil.org.uk/pdf/ConsultationDocuments/1010.pdf>

The consultation paper issued by the MoJ did suggest certain steps, such as a guidance note for doctors and/or leaflets being available in various outlets¹. Such leaflets may be of some help to victims in understanding their condition if they provide a definition of the diagnosis and an indication of what to do next. We do not believe though that such steps are likely to allay many concerns for the future.

A diagnosis of pleural plaques is only possible after an x-ray or a CT scan. This will only arise where the patient has been referred to hospital for investigation of other symptoms and the diagnosis is therefore incidental. On diagnosis a patient will undoubtedly want to know the cause. It is likely a doctor will confirm that the condition is due to exposure to asbestos and that there is evidence of asbestos fibres in the lungs. Whatever reassurance a doctor gives to a patient, the patient will be concerned that the exposure to asbestos could lead to other asbestos related conditions.

Asbestos exposure traditionally occurred in 'pockets' around the country and so a single isolated exposure is rare. Thus, a patient receiving a diagnosis of pleural plaques is likely to have worked with many other individuals, who he has seen developing, and possibly dying from, asbestos related diseases, such as mesothelioma. No amount of reassurance is likely to allay such a patient's fears when he is told that he has asbestos in his lungs.

¹ Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 24, page 16

A diagnosis of pleural plaques follows a patient for the rest of his life and his concern is a genuine one. He has inhaled a sufficient amount of asbestos to cause a physical change in his body and he will have genuine feelings of fear and anxiety. This is echoed by Dr. Robin Rudd, a leading expert on asbestos related diseases, who provided opinion about the increased significant risk of the development of mesothelioma following a diagnosis of pleural plaques. In the pleural plaques debate held in the Westminster Parliament on the 4th June 2008, Michael Clapham MP quoted from a letter he had received from Dr Rudd (the letter being received by Mr Clapham in his role as chair of the all-party group on occupational safety and health and its asbestos sub-group):

“People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population.”¹

“People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. Despite reassurance offered by doctors that the condition is harmless often they know of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. For many the anxiety is ever present. Every ache or pain or feeling of shortness of

¹ Hansard 4 June 2008: Column 251WH

breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life.”¹

Therefore, whilst we support the proposals to improve understanding of the nature of pleural plaques we question to what extent this will be effective, particularly in light of the fact that doctors, to date, do not appear to have allayed many concerns. Allaying concerns is no substitute for action on a different level.

Question 2: Would you support the creation of a register? Please give reasons for your answer.

APIL Northern Ireland does not support the creation of a centralised register or database of people diagnosed with pleural plaques, particularly as this would, in our view, undermine any general awareness campaign and would make victims feel stigmatised.

Although the MoJ paper indicated that a suggested rationale for a register was that it could help avoid delays in obtaining details of employment history and insurance in the event that a person with pleural plaques subsequently develops an asbestos-related disease at some future point, this is very much dependent upon what the register would contain. At the time that a pleural plaques victim receives a diagnosis this will be many years after the trigger event and, in all probability, the information able to be entered into a register by the victim will be very limited (for example, he is unlikely to have any employers’ liability insurance details).

¹ Hansard 4 June 2008: Column 252WH

We believe that the greatest potential difficulty for a pleural plaques victim who subsequently develops an asbestos-related disease is that of actually tracing employers and their insurers many years later, not to mention the difficulties of compiling evidence.

We believe, therefore, that a statutory central database of employers' liability insurance policies should be set up supported by an Employers' Liability Insurance Bureau (ELIB), providing a fund of last resort for workers suffering injury and occupational disease, and operating in a similar way to the Motor Insurers' Bureau (MIB). People injured at work who find they are unable to pursue a claim against their employer (for example, because the employer is no longer in existence) and who also cannot trace the employer's insurer are at a distinct disadvantage when compared to the victim of an uninsured or untraced driver, who will be able to recover from the MIB.

Question 3: Do you have any information on settlement figures and associated legal costs or any estimates regarding:

- **The number of people currently diagnosed with pleural plaques;**
- **The future number of people who will develop pleural plaques;**
- **The future distribution of pleural plaques cases;**
- **The period of time over which people will develop pleural plaques;**
- **The number of people diagnosed with pleural plaques prior to the House of Lords' decision and who have not received compensation.**

The consultation paper, at paragraph 28, suggests that prior to the *Johnston* case awards of provisional damages of between £5,000 and £7,500 were considered appropriate. These figures appear to stem from cases decided in 2002.

APIL Northern Ireland members had considerable experience of dealing with these types of claims prior to the decision in *Johnston* and their evidence is that provisional damages awards in Northern Ireland were closer to £10,000 with awards in full and final settlement being closer to £20,000.

We are not able to provide any specific figures relating to the estimates of numbers posed in the remainder of the question.

Question 4: Do you think legislation should be introduced to overturn the decision in the *Johnston* case?

APIL Northern Ireland believes that the House of Lords decision on pleural plaques should be overturned through legislation in the same way that the effects of the House of Lords decision in *Barker v Corus*¹ was overturned by the Compensation Act 2006.

We do not believe that this would in any way interfere with the fundamental principles on which the Law Lords' decision was based; indeed, it was the Court of Appeal, and, subsequently, the House of Lords that disturbed the status quo whereby, historically, claimants diagnosed with pleural plaques had been able to recover compensation.

¹ [2006] UKHL 20

We believe that it is entirely justifiable and proportionate that the House of Lords judgment should be overturned. In the House of Lords there was no dispute that the claimants had been owed a duty of care and that their employers had been in breach of that duty; but the employers resisted the claims on the ground that none of the claimants had suffered actionable damage.¹

Lord Hope of Craighead held that pleural plaques are a form of injury but they are not harmful.² The rest of their lordships held that pleural plaques are not an injury or disease in any event.³

APIL Northern Ireland maintains that pleural plaques are a physiological change to the body signifying the permanent introduction of asbestos. There is a breach of bodily integrity amounting to a physical change in the body. In *Parkinson v St James and Seacroft University Hospital NHS Trust*⁴ Hale LJ (as she then was) said:

"The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindsell on Torts*, 18th ed (2000), para 1-25. "The fundamental principle, plain and incontestable, is that every person's body is inviolate": see *Collins v Wilcock*[1984] 1 WLR 1172, 1177. Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily

¹ [2007] UKHL 39, per Lord Scott of Foscote, paragraph 64

² *Ibid*, paragraph 49

³ *Ibid*, per Lord Hoffman, paragraph 19; per Lord Scott of Foscote, paragraph 73; per Lord Rodger of Earlsferry, paragraph 88; per Lord Mance, paragraph 102

⁴ [2002] QB 266 at 284

injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them.”

In *Chester v Afshar*,¹ the House of Lords had to address the difficult issue of causation following a failure to warn of a small but unavoidable risk of potentially serious adverse consequences of an operation. Two of their lordships made reference to the purpose of the law that applies equally to the issue of pleural plaques.

Lord Steyn said: ‘..... I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society’.²

Lord Hope of Craighead said: ‘..... The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content.....on policy grounds therefore I would hold that the test of causation is satisfied in this case’.³

APIL Northern Ireland submits that asbestos victims are a special category in highly exceptional circumstances and that it is right and proper that they should be able to obtain full and just compensation.

¹ [2004] UKHL 41

² *Ibid*, paragraph 25

³ *Ibid*, paragraph 87

As alluded to in the consultation paper, the Scottish Government has taken the decision to change the law in Scotland by introduction of the Damages (Asbestos-related Conditions) (Scotland) Bill. It is inherently unfair for Northern Ireland not to follow suit and such an anomaly may well lead to 'forum shopping' if there are any cross-border issues. In Annex A to the Policy Memorandum accompanying the Scottish Bill, the Scottish Government said: '..... The Scottish Government's interest and duty is in doing what is best for the people of Scotland'. APIL Northern Ireland contends that the Northern Ireland Executive should do exactly the same for the people of Northern Ireland.

APIL Northern Ireland believes that if the House of Lords decision is not overturned and victims do not obtain some form of 'closure' through the courts then there is likely to be an ongoing significant cost to the Government. A pleural plaques sufferer will need to have regular check-ups, possibly annually, to ensure that his condition has not developed into a more serious asbestos-related condition.

Question 5: If you do think legislation should be introduced, would you favour legislation which –

- a) Restricts claims to those who had been diagnosed with pleural plaques before the Johnston case?**
- b) Allows anyone who has been diagnosed with pleural plaques to claim?**
- c) Follows the Bill in Scotland by covering asymptomatic pleural plaques, pleural thickening and asbestosis?**

- a) No. APIL Northern Ireland believes that it would be fundamentally wrong for claims to be restricted to those pleural plaques victims diagnosed prior to the *Johnston* case and legislation must cover all future cases. A diagnosis of pleural plaques signifies significant exposure to asbestos many years previously. As pleural plaques are asymptomatic, the diagnosis is usually incidental to other medical investigations. Individuals exposed to asbestos over the same or similar period of time may therefore receive their diagnoses at widely different times, maybe several years apart – why should one individual be able to proceed with a claim whereas the other cannot?

We believe that it is entirely justifiable and proportionate that the House of Lords judgment should be overturned by legislation. If the judgment is to be overturned by legislation it is essential that any provisions are retrospective to ensure that there is no injustice between claimants who have become statute barred between the Court of Appeal decision and those who will have a right to bring a claim once legislation is enacted.

- b) No. APIL Northern Ireland believes in the principle that the polluter must pay where, in accordance with the law of tort, the pleural plaques victim is able to prove that he was owed a duty of care by another party and there has been a breach of that duty of care. It is entirely right and proper that a negligent party should make recompense for its negligence in such circumstances.

c) Yes. APIL Northern Ireland supports the extending of any legislation to asymptomatic pleural thickening and asymptomatic asbestosis. It is only necessary, however, to extend the legislation to asymptomatic conditions since, where the conditions are symptomatic, or, on a balance of probabilities, are likely to prove so in the future, then such cases will be successful on normal tortious principles in any event.

Question 6: Do you think there is a danger that legislation will create a privileged class of claimant or set an unhelpful precedent?

No. APIL Northern Ireland does not believe that pleural plaques sufferers can ever be described as 'privileged', nor are pleural plaques a 'good thing' as submitted by Pamela Abernethy of the Forum of Insurance Lawyers to the Scottish Parliament Justice Committee on the 2nd September 2008.¹ A diagnosis of pleural plaques follows a sufferer for the rest of his life and his concern is a genuine one. He has inhaled a sufficient amount of asbestos to cause a physical change in his body and he will have genuine feelings of fear and anxiety.

We believe that introducing legislation will not create an unhelpful precedent - indeed, it was the Court of Appeal, and, subsequently, the House of Lords that have created the unhelpful precedent by disturbing the status quo whereby, historically, claimants diagnosed with pleural plaques had been able to recover compensation.

¹ <http://www.scottish.parliament.uk/s3/committees/justice/or-08/ju08-1902.htm#Col1024>

Question 7: Do you support the option of a payment scheme for pleural plaques? If so, how would you see the scheme working? In particular, what level of payment would be appropriate and should a limitation period be applied?

APIL Northern Ireland does not support the option of a payment scheme for pleural plaques as we believe this is an inappropriate method of compensating pleural plaques sufferers. The House of Lords (and, indeed, the lower courts) accepted that all of the claimants had been owed a duty of care and all of the defendants had breached that duty of care.

One problem with any type of payment scheme is how this will affect those pleural plaques sufferers who do go on to develop an asbestos-related disease, such as mesothelioma. Prior to the Court of Appeal's decision a successful claimant had the option of either seeking a provisional damages award or an award in full and final settlement. In either case, the question of liability would be fully investigated at this early stage thus avoiding the enormous potential difficulties of tracing employers and their insurers many years later, not to mention the difficulties of compiling evidence.

The difficulty in tracing insurers is so profound that we believe a statutory central database of employers' liability insurance policies should be set up supported by an Employers' Liability Insurance Bureau (ELIB) (as indicated earlier in our answer to Question 2, above).

Claimants choosing a provisional damages award have the considerable advantage of being able to reopen their claim very quickly, if necessary, and thus being able to secure a final award for their asbestos-related condition before they die. Alternatively, claimants choosing an award in full and final settlement accept the risk of developing future problems thus allowing them some 'closure' on the issue.

Whilst we do not support the option of a payment scheme, if any scheme were to be introduced, we consider that it would have to be extremely simple, with the minimum of administration, and should not result in a fixed sum payment any less than that which would have been awarded prior to the High Court hearing in Johnston. Any scheme that does not accord with this may mean complicated forms to fill in and difficult concepts to deal with. Victims, at a very vulnerable time, may need to seek help.

We are extremely concerned that victims, because they would no longer need to seek legal advice, will seek help elsewhere, where there is a risk that they could be exploited, possibly by claims management companies.

The MoJ paper does mention concerns about the possible future use of 'scan vans'.¹ We strongly support the enforcement of the regulations relating to the use of x-rays and CT scans, and totally abhors the idea of scan vans. We recommend that, should any type of scheme be implemented, consideration should be given to strengthening

¹ Ministry of Justice Pleural Plaques Consultation Paper CP 14/08 paragraph 65 page 23

the regulations to prevent, for instance, claims management companies taking advantage of the situation and introducing their own 'scan vans'.

We believe that, if a payment scheme were to be introduced it must be on the basis of an appropriate sum on a provisional basis and there must be no detriment to the applicant at a later date if they develop an actionable condition.

Previous court awards for pleural plaques have always been based on individual circumstances. Traditionally, awards have been for provisional damages although a claimant did have the option of seeking a full and final settlement award. The consultation paper, at paragraph 28, suggests that prior to the *Johnston* case awards of provisional damages of between £5,000 and £7,500 were considered appropriate. As indicated earlier, APIL Northern Ireland members had considerable experience of dealing with these types of claims prior to the decision in *Johnston* and their evidence is that provisional damages awards in Northern Ireland were closer to £10,000 with awards in full and final settlement being closer to £20,000.

We believe that the rationale behind any payment scheme, if it is to be introduced, must be to fully compensate victims of pleural plaques. We strongly believe that there can be no moral justification for a lower compensation figure than that which provides full and just compensation, particularly where insurers have benefited over many years from the premiums payable for employers' liability insurance which will have included provision for pleural plaques victims.

The question of who would fund a payment scheme is obviously a very important consideration. Pleural plaques are largely present as a result of negligent exposure to asbestos and therefore it is our opinion that the polluter must pay. We believe that it is fundamentally wrong for the state to be responsible in these circumstances as it is not the wrongdoer and this imposes a substantial burden upon the taxpayer in circumstances where there is an identifiable wrongdoer. The reasonable expectations of the public in contemporary society demand that the wrongdoer pays, not the state.

We believe that there is no justification for the application of a limitation period in respect of any payment scheme – it adds a legalistic aspect where none is required.

The rationale for any limitation period is to avoid prejudice to a defendant. In a simple, payment scheme, there is no question of evidence going 'stale' and thus no prejudice to the payer. However, there may be substantial prejudice to a claimant. The diagnosis of pleural plaques is generally incidental to other medical investigations and diagnoses and is thus a very vulnerable time for a victim. The last thing on their mind at that time may well be the need to complete a claim form.

If any limitation period were to apply this should not be less advantageous than the common law, together with a similar discretion to disapply any limitation period.

Question 8: Would any of the identified options lead to a higher or lower level of participation or uptake by the section 75 groups or have a differential impact on the groups?

APIL Northern Ireland believes that only the introduction of some form of payment scheme, if it were to relate solely to workplace exposure to asbestos, may have an impact upon the section 75 groups, in particular relating to equality of opportunity between men and women generally. If only workplace exposure qualifies for a payment under any scheme this would tend to favour men (who, traditionally in industry are the ones who were exposed to asbestos in the past) and potentially discriminate against women (who may, for example, have developed pleural plaques by washing their husband's clothing; such a group may well have been able to succeed with a tortious claim prior to the *Johnston* decision).

Question 9: Do you have any information about how a change to the law would impact on the business sector?

APIL Northern Ireland has no comment upon this question.

Question 10: Do you have any comments on the impact assessments prepared for England and Wales or Scotland?

APIL Northern Ireland's only comment on the impact assessments is that the figures provided show widely different variations; for example, the costs of legislation are said to range from £3.6bn to £28.6bn. This is a very striking difference.

The recent Queen's Bench Division case, in England and Wales, of *Durham v BAI (Run Off) Ltd*¹ has confirmed that an insurer which provided employers' liability insurance for "injury sustained or disease contracted" had to pay out in a mesothelioma case if it was the insurer at the time the employee inhaled the asbestos fibres.

This is an important consideration when looking at costs of pleural plaques claims if legislation is introduced to overturn the *Johnston* decision. Such legislation will simply restore the status quo whereby insurers at the time of asbestos exposure will be responsible for claims for which they had already charged the insurance premiums many years ago. Any other result represents a substantial windfall to the insurers.

- Ends -

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¹ [2008] EWHC 2692 (QB)