

**Discussion paper from the Occupational and
Environmental Health Research Group**

Pleural plaques: obtaining social justice and equity in addressing compensation issues in Scotland

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Pleural plaques are physical changes in the tissue which lines the lungs and the chest wall. They do not actuate or contribute to potentially fatal conditions such as lung cancer, mesothelioma or asbestosis

Introduction

This briefing paper has been produced by the Occupational and Environmental Health Research Group, University of Stirling following discussions with members of UNITE Thermal Insulating Engineers SC/162 branch who have a long history of campaigning on asbestos issues¹.

It is clear that because of the barriers to achieving better outcomes for people negligently exposed to asbestos, recent experience suggests that in certain circumstances they are poorly served within the current arrangements.

The paper highlights a number of concerns in the civil compensation process as it applies to people in Scotland who have been exposed to asbestos in the course of their working lives. The main cause for concern centres on people who have made a claim for pleural plaques and pleural thickening and then agree to accept what is known as a full and final settlement from an insurance company or former employer to conclude a civil damages case.

- People who agree to accept a full and final settlement in preference to a provisional settlement for pleural plaques or pleural thickening not only preclude themselves from a future claim but also may hinder their family members from accessing their legal entitlement to damages in respect of their loss

This discussion paper presents the proposition that settlements in pleural plaques (and other) cases should have 'stand alone' status and hence have no bearing on any future settlement. The preferred outcome is that in pleural plaques cases the victims are paid at least the current full & final level. This condition (pleural plaques), as confirmed by the Supreme Court October 2011 judgement, has no influence on claims following a future diagnosis of Mesothelioma, Lung Cancer, Asbestosis or Pleural Thickening.

During the process of researching and publication of this paper concerns arose regarding potential gender inequality within the pleural plaques compensation process which need to be explored further. There is a possible negative impact on **women** if the rights of relatives to damages are not clarified in respect of provisional and full and final settlements.

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Harry McCluskey spent all of his working life as an insulating engineer. He suffers from asbestosis and despite poor health continues to campaign on behalf of asbestos sufferers. Harry was secretary of Clydeside Action on Asbestos for 23 years and has been involved in many high profile campaigns on behalf of asbestos victims and bereaved relatives.

Jimmy Cloughley is an active campaigner on behalf of asbestos victims despite suffering himself from asbestosis. A former shipyard worker and shop steward Jimmy is a veteran of the UCS work-in.

According to international estimates, 20 to 50 % of people regularly exposed to asbestos get pleural plaques. 20 to 50% of people with pleural plaques get diagnosed with this condition.

Background

From the 1980s onwards, where pleural plaques arose from negligent exposure to asbestos, courts throughout the UK made compensation awards. Those awards were paid by the negligent party or their insurer. However, on 17th October 2007 the House of Lords unanimously ruled in *Johnston v NEI International Combustion Ltd* and conjoined cases, that asymptomatic pleural plaques do not give rise to a cause actionable for civil compensation.

On 23 June 2008, the Scottish Government introduced the Damages (Asbestos-related Conditions) (Scotland) Bill. This measure was intended to ensure that people who are negligently exposed to asbestos in Scotland, and go on to develop certain asbestos-related conditions, can continue to raise and pursue actions for damages. The Bill received royal assent on 17th April 2009 to become the Damages (Asbestos-related Conditions) (Scotland) Act 2009. In doing so, it ensured that the House of Lords judgement (*Johnston v NEI International Combustion Ltd*), which ruled unanimously that pleural plaques do not give rise to a cause of action under the law of damages in England and Wales, was not followed in Scotland. The Scottish legislation did not have an impact in England and Wales, where the UK Government in February 2010 decided against passing legislation intended to change the law on pleural plaques. The purpose of this paper attempts to build on the progressive actions already taken by the Scottish Parliament.

Insurers appeal

A number of insurers including Aviva, AXA Insurance, RSA and Zurich sought to challenge the Damages (Asbestos-related Conditions) (Scotland) Act 2009 by way of judicial review their challenge was dismissed by the Scottish Court of Session. Their primary complaint was that the Act infringed their human rights. However, they also argued that the decision to bring forth the legislation was irrational. The insurers argued that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 was irrational, disproportionate and went against the European Convention on Human Rights (ECHR). They argued that insurance companies would be deprived of their assets to settle claims under the law and was an interference with their right to property under the ECHR. The insurers sought to overturn a decision from the Scottish Court of Appeal and argued that the law which allows people with pleural plaques to claim compensation was irrational or not lawful.

The insurers' petition was dismissed by the Outer House of the Court of Session and, on appeal, by the Inner House of the Court of Session. The insurers then appealed to the UK Supreme Court. On 12 October 2011 the UK Supreme Court rejected the appeal and ruled that the 2009 Act was within the competence of the Scottish Parliament.

The appellants are insurance companies which have undertaken to indemnify employers against liability for negligence. They sought to challenge the lawfulness of an Act of the Scottish Parliament (the Damages (Asbestos-related Conditions) (Scotland) Act 2009, "the 2009 Act") which provides that asbestos-related pleural plaques and certain other asbestos-related conditions constitute personal injury which is actionable under Scots law. Pleural plaques are physical changes in the tissue which lines the lungs and the chest wall. They do not actuate or contribute to potentially fatal conditions such as lung cancer, mesothelioma or asbestosis, but their existence evidences significant previous exposure to asbestos, which of itself represents an increased risk of contracting such diseases. (Supreme Court Press Summary 12th October 2012)

Scottish law

In reaching its decision on 12 October 2011, the Supreme Court rejected the insurance companies' arguments that the new Scottish law recognizing the rights pleural plaques sufferers to compensation breached their human rights. Scotland continues to lead the UK in recognizing the rights of asbestos sufferers and bereaved relatives. The Supreme Court landmark ruling means a total of four pieces of progressive asbestos legislation have been passed since 2006 by the Scottish Parliament each of which reinforce the rights of asbestos sufferers and their relatives to compensation for exposure to asbestos dust in Scotland. Much of this legislation received cross-party support in the Scottish Parliament.

1. The Family Law (Scotland) Act 2006,
2. Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007,
3. Damages (Scotland) Act 2011
4. Damages (Asbestos-related conditions) (Scotland) Act 2009

This Scottish legislation confirmed the rights for asbestos sufferers (and family members) to seek compensation for the devastating effects of asbestos exposure.

In certain circumstances bereaved relatives can claim for loss of support, funeral expenses, distress, grief and loss of association. These claims are separate from the deceased's own claims for damages. Prior to the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 terminally ill cancer patients faced the dilemma of either pursuing their damages claim while still alive or not pursuing their claim before death so that their executor and relatives could claim awards which in most cases would total more than the financial sum of damages the sufferer would have been entitled to in life. Before the 2007 legislation was passed, in order to benefit their families, many sufferers did not claim the compensation which could have provided some comfort for them before they died

Public interest

The Supreme Court was clear that in issues involving questions of social policy, which the issue of civil compensation for pleural plaques clearly is, the court should respect the judgment of the elected body as to what is in the public interest. This would be the case unless that judgement is manifestly without reasonable foundation and it could not be said that the decision of the Scottish Parliament was without reasonable foundation. Therefore the Supreme Court accepted that the legislation pursued a legitimate aim. It is reasonable then to consider that further consideration should be given to resolve any unfairness that is contained within the asbestos compensation bargaining process that could have been identified in the consultation period running down to the Bill receiving royal assent on 17th April 2009 to become the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

Members of UNITE Thermal Insulating Engineers SC/162 branch with a long and distinguished history of campaigning for social and economic justice on behalf of their peers are concerned at the way in which cases are being settled under the current legal process in respect of members who have been exposed to asbestos at work and raised cases. They wish to highlight the fact that in pleural plaques and pleural thickening cases victims may be advised by a solicitor, acting on their behalf, that they have two choices. Either they can accept a provisional payment as it allows them to go back to court if they contract a more serious asbestos-related disease or they can accept a full and final payment which ends all legal liability against the defender.

Currently claimants are informed that if they opt for a full & final settlement they will be unable to pursue a case if they are diagnosed with mesothelioma, asbestos-related lung cancer or asbestosis. One claimant was advised recently² that in a full and final settlement you will be "compensated...for the extent of your asbestos illness at present" and that a little more money would be offered as "compensation for the risk" of developing an asbestos illness further down the line. To that extent the insurers are "buying off the risk." Even should the claimant "develop a condition such as mesothelioma" acceptance of a full and final settlement means s/he cannot make a further claim for damages.

² This claimant's case is in process at this time of writing.

This can have a significant negative impact on bereaved family members which requires to be more transparent than is currently the case.

No mention is made of other cancers and serious illnesses that might develop from exposure to asbestos. Nor is reference made to the devastating effects of asbestos-related cancers including mesothelioma on the individual and his (or her) family. This is left to the imagination and perhaps a little research by the claimant. A practical awareness of the reality of that might provide a stronger case against the short term thinking involved in even considering a full and final settlement in the present circumstances. A crucial consideration is the effects of such a terminal illness on the wider family. An individual who has accepted the earlier full and final settlement and later contracts mesothelioma or another asbestos-related terminal cancer may be horrified to learn not only that his own right to a more fitting compensation was “sold” in the earlier settlement but that of their family members. In that sad event the family of a deceased claimant appears to have a right to make a posthumous claim in respect of the deceased if - and only if - mesothelioma was the illness so contracted. This, however, is a murky area and so far appears untested in Court.

Pleural plaques – settlement process

The main cause of concern for a person who is diagnosed with pleural plaques would be contracting mesothelioma, asbestos-related lung cancer or another asbestos-related condition because of confirmed previous exposure to asbestos dust. A provisional payment is normally around half the value of a full and final settlement. Notional figures used by UNITE SC/162 branch are; around £10,000 (full & final), £5,000 (interim award). The problem is that members accepting the lower provisional amount lose out financially when it seems fairer that a claim for pleural plaques should be a single transaction that has no bearing in the event of the claimant contracting another asbestos-related illness. This should be a new claim. UNITE SC/162 branch members are concerned this is another example of the insurance industry avoiding their responsibility to people who have been exposed to asbestos at work.

Their view is that the Scottish Parliament Justice Committee should investigate any circumstances that could result in bereaved relatives being disadvantaged through an inability to exercise their legal entitlement under the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 to claim if a family member goes on to contract a more serious asbestos-related condition, for example, after accepting a full and final settlement in a pleural plaques case. The full legal validity of provisional damages within the settlement process requires clarification. If people in Scotland are precluded from claiming because of a previous legal bargain in a pleural plaques case, that process requires examination so that justice is administered in the spirit of current Scottish Parliament legislation which was passed with all-party support.

Alternative payment system

An alternative solution to the current arrangements that could remove certain disadvantage from people who find themselves diagnosed with pleural plaques is to introduce an alternative payment system that is a component of the social security system in Scotland.

To reduce formalities and administration costs, awards could be distributed following medical confirmation of diagnosis through a scheme similar based on the administration practices of the Scottish Welfare Fund which is operational in each of the 32 local authorities in Scotland.

This could be a fairer, more resource-effective option for the Scottish Government and could under certain circumstances reduce public expenditure. It would remove uncertainty and layers of bureaucracy from the system. It could also eliminate or significantly reduce legal costs for all parties. This procedure would solely deal with the presence of pleural plaques on the basis of approved medical evidence being available. The pleural plaques matter would then be a settled issue with no need for these small claim cases going through the courts. If later in life the person was unfortunate enough to contract mesothelioma, asbestos-related lung cancer or asbestosis they would then be able to raise a legal action for civil damages without prejudice. This would remove the circumstance that a spouse, son daughter, son-in-law, daughter-in-law, grandchild, being denied compensation for their loss because of any unfairness in the bargaining process that takes place between the defender and pursuer.

- An alternative payment system would remove unnecessary adversarial pressures from claimants and families
- Increase access to compensation for people affected by asbestos exposure
- Reduce claimant costs in self-funded cases
- Reduce legal aid expenditure
- Reduce trade union legal costs
- Reduce defenders legal costs

The combined aggregate reduction in legal expenditure (all parties) could facilitate a, more cost-effective and fairer alternative to current arrangements through the introduction of a model of service delivery that is based on an alternative payment system that delivers a fairer outcome for people in Scotland who have been exposed to asbestos at work or in the community. If total legal costs are in excess of the amount of damages a plaintiff received in an occupational injury civil claim that would be an immoral situation. It should also be noted that the interests of the legal profession and the people they represent are not always the same.

Other issues that require consideration

The limitation period

The limitation period as set out in the Prescription and Limitation (Scotland) Act 1973 has no significant impact on the substantive points raised in this paper. The three year time frame relates to damages claims in civil courts. Pleural plaques claims could be dealt with under a range of different procedures if the Scottish Government so decides and especially as limitation is not an absolute rule. The proposed scheme would not be under the courts' umbrella but operate under the social security system with lower administrative and other

costs. With pleural plaques, recognition comes only after a specific clinical examination and only then will the individual will then be made aware of the injury.

There is no suggestion of open-ended civil liability with the scheme proposed below but it will better safeguard the rights of individuals. It should be noted that other countries may operate a range of schemes for compensation those with a range of illnesses and conditions due to asbestos exposure. Such schemes are determined by governments in the first instance and not the courts. The pleural plaques scheme proposed in this document is ring fenced and should not, if government so decides, impact on established Scottish civil court actions for major asbestos-related diseases. An essential outcome of time-barring actions in asbestos cases is to provide defenders with a significant advantage and demonstrate, in many cases, inequality of arms.

One action, one harm

This Scottish legal principle is well understood. In the interests of justice, it would seem to us to be critical that there is recognition and compensation for pleural plaques when it is medically identified in an individual and this should not affect claims for separate diseases diagnosed perhaps decades later or sometimes not at all. That recognition should allow later actions to be taken in civil courts without breaching the 'same harm' provision if the Scottish government so decided. This also relates to protecting the principle of non-open ended civil liability because not all those with pleural plaques go on to develop for example mesothelioma or asbestos-related lung cancers.

Provisional damages

The basis for discriminating against individuals with regard to pleural plaques provisional and full and final settlements appears unclear in terms of justice. Individuals do not know if they will develop asbestos-related diseases later and it is clearly unjust that a £9,000 full and final award could ever compensate an individual or their family for an asbestos-related disease contracted later. Arguing that claimants should be given an informed choice by independent legal advisors begs the big questions. This proposal is not to make a flawed scheme work better but to introduce a much fairer scheme. Provisional claims are not a valid tool for those with pleural plaques who may develop asbestos-related cancers.

No fault compensation schemes

The current law on limitations, as discussed above, may not be relevant to the scheme proposed in this paper. An alternative payment system could be developed that would ensure a more effective use of resources and time, create a fairer scheme and also save distress for individuals, their families and carers. This would also address the current problem of long delays in settling cases that exist in the current scheme. As pleural plaques is not a 'disease' in the usual sense of the word and is covered by a proposed social security scheme, this should not impact on rights of individuals or indeed insurers in civil courts. This is an area that requires further discussion.

Eligibility would be assessed through evidence of the existence of pleural plaques provided by clinicians as is currently the case. Timescales for application would be contingent on that clinical trigger. Detailed procedures would need to be discussed in the development of an alternative payment system.

This paper is intended to provide the framework for a fairer, more equitable system that puts the needs of the people who have been negligently exposed to asbestos and their families at the forefront of the debate.

Recommendations

1. The Scottish Parliament Justice Committee should examine the social benefits of an alternative payment system in appropriate categories of asbestos claims in Scotland
2. The Scottish Parliament Welfare Reform Committee should examine the social benefits of an alternative payment system in appropriate categories of asbestos claims in Scotland and consider the merits of an alternative solution to the current arrangements
3. The Scottish Parliament Justice Committee should examine the economic benefits of an alternative payment system in appropriate categories of asbestos claims in Scotland
4. The Scottish Parliament Justice Committee should examine the presence of any anomalies in the current settlement process of asbestos claims in Scotland
5. Claimants should be paid what they are due in full with no onus on future unforeseeable health outcomes
6. The Scottish Parliament Justice Committee should examine any possible negative impact on women within the asbestos compensation process and identify appropriate remedies

All potential disadvantage should be removed from the rights of bereaved relatives in the spirit of the ethical aims of Scottish Parliament legislation.

The authors declare no competing interests.

Bibliography

Chapman SJ, Cookson WO, Musk AW, Lee YC (2003) Benign asbestos pleural diseases. *Curr Opin Pulm Med.* 9(4):266-71

Gislard A, Schorle E, Letourneux M, Ameille J, Brochard P, Clin B, Conso F, Laurent F, Luc A, Paris C, Pairon JC (2013) Compensation for occupational diseases after tomography screening for benign pleuro-pulmonary disease in a multiregional post-occupational medical surveillance program of asbestos-exposed retired workers]. *Rev Epidemiol Sante Publique.* 61(1):11-20

Paris C, Martin A, Letourneux M, Wild P (2008) Modelling prevalence and incidence of fibrosis and pleural plaques in asbestos-exposed populations for screening and follow-up: a cross-sectional study. *Environ Health.* 7:30. doi: 10.1186/1476-069X-7-30.

Pleural Mesothelioma Center (nd) Pleural Plaques and Effusion.
<https://www.pleuralmesothelioma.com/asbestos/related-diseases.php>

Reinhartz A (2004) Pleural Plaques. http://ibasecretariat.org/ar_pleural_plaque_faq.php