



Northern Ireland
Assembly

**COMMITTEE FOR
FINANCE AND PERSONNEL**

**OFFICIAL REPORT
(Hansard)**

**Damages (Asbestos-Related Conditions)
Bill**

12 January 2011

NORTHERN IRELAND ASSEMBLY

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FINANCE AND PERSONNEL**

Damages (Asbestos-Related Conditions) Bill

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Members present for all or part of the proceedings:

Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Dr Stephen Farry
Mr Paul Frew
Mr Paul Girvan
Mr Simon Hamilton
Mr Daithí McKay
Mr Mitchel McLaughlin
Mr Adrian McQuillan
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Martin Hanna) Francis Hanna and Co Solicitors
Ms Oonagh McClure) Thompson McClure Solicitors

The Chairperson (Ms J McCann):

I welcome Ms Oonagh McClure from Thompson McClure Solicitors and Mr Martin Hanna from Francis Hanna and Co Solicitors. You may make an opening statement, after which I will open the meeting up for questions.

Ms Oonagh McClure (Thompson McClure Solicitors):

Members may have a copy of the response to the consultation paper that Thompson McClure submitted. We felt that perhaps the Bill did not cover all the people intended and that that should be addressed before the Bill becomes law.

Mr O'Loan:

What is your rationale for supporting the legislation? Apparently Thompson McClure Solicitors previously questioned the value of a campaign to inform people about the nature of pleural plaques in order to allay concerns. The Ministry of Justice in London is of a mind to issue such information. I would not be surprised if the relevant Departments here did the same.

Ms McClure:

I will deal with the information campaign first. That opinion was expressed as a direct response to whether we thought that such a campaign would be an answer to the situation that arose after the House of Lords decision. Information is available, although perhaps there is not as much as there should be. However, we did not feel that it was sufficient to deal with what we consider now to be the injustice that was being caused to people who were suffering from the disease. In our response we said that any information would be helpful. However, it would not ultimately be any better than what we propose, which is that the Bill be passed with some amendments.

Mr O'Loan:

Would a public information campaign allay concerns?

Ms McClure:

To be honest, from personal experience, I do not believe so. I have clients, as does Martin, who have been told that pleural plaques are asymptomatic and that they have nothing to worry about. However, they are very worried. They do not believe that they are safe, because they know people who have suffered from other asbestos-related diseases and they think that that is what will happen to them.

Mr O'Loan:

OK. What is your fundamental rationale for supporting the Bill?

Ms McClure:

Before the Court of Appeal decision, people in Northern Ireland received compensation for pleural plaques. The judiciary in Northern Ireland recognised that pleural plaques are a personal injury; they were not de minimis, and, therefore, should be compensable.

Mr O'Loan:

My second question is about the financial consequences of the Johnston case. I believe that Thompson McClure previously told the Department of Finance and Personnel (DFP) that it had commissioned a firm of accountants to produce a report on the financial consequences of that case. Have you done so? Do you have any information about the possible financial consequences of the Bill? The Association of British Insurers told us that the Department of Enterprise, Trade and Investment (DETI) has made provision for more than £31 million over the forthcoming four-year Budget period in relation to asbestosis and pleural plaques. I have not seen that sum subdivided between the two conditions, which would be a very important matter. That is a significant sum of money.

Ms McClure:

Not for Northern Ireland. The accountants' response was in relation to the position in England and Wales when there was lobbying in that regard. I know what our caseload is. I know about the number of pleural plaques cases that we stayed and subsequently withdrew after the House of Lords decision. I know what the average value of those cases would have been had it not been for the House of Lords decision. I can do only a very basic calculation.

Mr O'Loan:

How many cases is your firm dealing with?

Ms McClure:

I had 80 cases, which had to be withdrawn, discontinued or abandoned following the House of Lords decision; of that number, 10 have become asbestosis or mesothelioma cases. At present, I have 60 or 70 cases, allowing for the possibility that some of those people may have passed away for other reasons.

Mr O'Loan:

Is your firm one of the local specialists in that area of work?

Ms McClure:

There are possibly four such firms of solicitors: Francis Hanna and Co, ourselves, Agnew Address Higgins, and Hollywood Higgins Deazley.

Mr McLaughlin:

I want to examine the issue of tariffs. Your company responded to the DFP consultation by supporting the payment of a fixed sum. Will you elaborate on that? I presume that you know the departmental position or do you need me to quote it to you?

Ms McClure:

Sorry; I am not following you.

Mr McLaughlin:

We asked the Department about tariffs, and the reply was that the level of compensation is usually determined by the court or negotiated by experts in the insurance/legal field. It recognised that there have been instances where a legislator has prescribed a particular level of damages and gave the example of the Fatal Accidents (Northern Ireland) Order 1977, which prescribes the level of bereavement damages, conceding that it is therefore technically possible to set a ceiling. However, the ceiling would have to be adjusted periodically and will not take account of individual circumstances.

Therefore the Department argues that damages should be set by the courts on the basis of submissions by experts in the field. You argued for fixed compensation. Do you want to elaborate on that? My information is that your response to the consultation supported the payment of a fixed sum in every case. Is that your position?

Ms McClure:

I think that that is in relation to the position in England and Wales.

Mr McLaughlin:

It does not say that here. It says that it was in response to the policy consultation, so it is our legislation that we are talking about. Perhaps the best thing would be for you to respond to us. It would be helpful for the Committee to know the counter-arguments. If you are not prepared for it today, we would be happy to receive it in writing.

Ms McClure:

It is not that. We had some discussion about it. Perhaps Martin wants to address the issue. There is a 'Judicial Studies Guidelines' booklet.

Mr Martin Hanna (Francis Hanna & Co Solicitors):

I think that that was Thompson's position in England. I am from a separate firm, Francis Hanna & Co Solicitors. In Northern Ireland it has been established practice for 30-plus years, before the decision of the House of Lords, that pleural plaques were a compensable condition. The damages arrived at in those cases were always dictated by the judiciary. Myriad factors are taken into consideration when determining the value of a pleural plaques case: the age of the individual, his life expectancy, other relevant conditions — asbestos or non-asbestos — and the level of anxiety.

When we talk about a campaign to advise people in that area, we forget that most of those people get that diagnosis in their twilight years — in their 60s, 70s or sometimes 80s — and many of them cannot be reassured. They are simply told that they have asbestos on the lungs, and they may have simple pleural plaques that merely witnessed exposure. However, they may also have asbestosis or more serious asbestos-related lung conditions. That is a very relevant point, which we, as practitioners, see at the coalface in that area of litigation.

The courts recognise all those factors. The legislation will not introduce something new but will re-establish what had been established practice for 30-plus years in this jurisdiction. Asbestos has been a significant aspect of this part of the world, particularly because of the shipyard, the power stations, the construction industry, and all the other industries that used asbestos. For such a small part of the world, the incidence of asbestos-related conditions — from plaques to malignant mesothelioma — is incredible. The courts in this jurisdiction have always

been sympathetic to victims of pleural plaques as well as of all the other conditions. Numerous judgements have been handed down over many years setting the tariffs, and those judgements differed in every case depending on the circumstances of an individual.

Mr McLaughlin:

It would not be the North, where there are four companies and possibly four different positions. I suggest that we invite a written answer to that question to help the Committee to address the matter, because there is a strong argument in relation to the local experience. That last point was particularly telling for me. We may need to be able to say that we looked at both sides of the argument. It is not so critical that we need to have an answer today, but we will write to you if that is OK, and you can respond.

Mr Hanna:

Absolutely.

Mr Frew:

In your response, you said that you are concerned that the Bill will not cover those cases that, post-Johnston, were struck out by the courts, discontinued or withdrawn. You also suggest an amendment to clause 3. Will you elaborate on that?

Ms McClure:

The 80 cases to which I am referring were commenced before the High Court decision. The High Court decision in England was successful, so all was well and good for the cases that had been settled before the Court of Appeal decision. However, the Court of Appeal decision went against the plaintiff, so we stayed many of those cases pending the House of Lords decision.

In point of fact, during that period, some cases became statute-barred, as it were, and in most cases we sought the consent of the defendant company not to issue proceedings because we did not want to incur expense on behalf of our clients. After the House of Lords decision, there was no indication, as there was in Scotland, that something would be done about it. Cases were then either withdrawn or discontinued, depending on what stage they had got to. In some cases, proceedings had been issued; in others, a letter of claim had gone out; while in others, nothing

had been done. People came in and said: “I have this condition.” We told them: “I am sorry, but we do not know what the situation is at the moment. However, as soon as we have the House of Lords decision, we will get in touch.”

Following that, we were under pressure to finalise the cases concerned, so we had to withdraw, discontinue or abandon them. We are concerned that this legislation may mean that those cases are regarded as having been determined. I understand that if a case has been settled and determined properly before a court, it cannot be touched. However, we are afraid that discontinued or withdrawn cases will be regarded as having been determined in a strict interpretation of the legislation.

Ms Purvis:

The response from the Department said:

“The Bill may cover claims which were withdrawn or discontinued on foot of the Johnston case as well as future claims.”

It also said:

“However, as a subsection 1(b) of the Bill makes clear, the clock has only stopped in respect of an action which has been commenced but not determined. For example, if a claim was already out of time before the Johnston case, the Bill will not adjust the position in respect of that claim, and it cannot be resurrected.”

That seems to say that there would not be any difficulty in bringing back an outstanding claim.

Ms McClure:

On the contrary, I think that it says that if a case has been determined, we are stuck with that. In fact, I was going to suggest that instead of the date in the Bill going back to the House of Lords decision, it should probably, to avoid any doubt or argument, go back to the Court of Appeal decision, which was made on 26 January 2006.

Clause 3(2) states:

“For the purposes of Articles 7 and 9 of the Limitation (Northern Ireland) Order 1989 (NI 11) (special time limits for actions in respect of personal injuries and actions under the Fatal Accidents (Northern Ireland) Order 1977), the period beginning with 17 October 2007 and ending with the day on which this section comes into operation is to be left out of account.”

That should go back to the Court of Appeal decision, because there will have been cases that

became statute-barred between the Court of Appeal decision and House of Lords decision.

Mr Purvis:

Is it the definition of “determined”?

Ms McClure:

Yes. Even for settlements, the interpretation of “determined”, for the purposes of this Bill, will not include cases that were withdrawn or discontinued.

Mr Hanna:

The difficulty that this legislation will arguably pose to everybody is that there was a defined period of years where individuals were told that they had pleural plaques but, similarly, were not told whether they were eligible for compensation. If the Bill becomes law, those individuals will lose out because of how the legislation is drafted and will be prejudiced because they received their diagnosis beyond the three-year period before the legislation’s coming into force. Thompson McClure is proposing that that gap be plugged so that people have at least the right to get advice.

Mr Hamilton:

Other evidence to the Committee suggested that legislating to allow for compensation for pleural plaques could open the floodgates and create a precedent whereby others who have been exposed to a whole range of toxic substances could claim that the anxiety caused by such exposure should now be compensable. That is something of which the Committee and this legislature should very mindful. One could argue that there is a difference between being exposed to a toxic substance and pleural plaques, which, although asymptomatic, are nonetheless a physical change. What is your perspective on the argument that allowing for compensation for pleural plaques might allow others to come forward with similar arguments about the anxiety and concern that exposure to certain things in the course of work or daily life causes?

Ms McClure:

If the Bill became law, it would be an acceptance that pleural plaques are not de minimis. The law is that if an injury is de minimis — that is, insignificant — it should not be compensable.

That has always been the legal position. The High Court decision was that, because pleural plaques cannot be seen and do not have any symptoms, they should be regarded as de minimis. Obviously, that is a medical point. However, it is our position that if you can see it on an x-ray and if someone has little scars on their lungs, it is very hard to tell that person that they do not have the condition. It follows, therefore, that if it is accepted that someone has a physical condition they are entitled to any anxiety that relates to that physical condition and its development. That is a different position from someone saying that they are worried that in the future — which is what happened in the House of Lords — they may contract a disease and want compensation because of that anxiety. There is no connection between the two. Therefore, I cannot envisage any other cases to which the legislation could be expanded.

Mr Hamilton:

I understand your argument. However, in many ways, this hinges on the anxiety point. It was raised in earlier evidence that it is the existence of anxiety almost as much as, if not more so, than a physiological change that is the trigger point.

Mr Hanna:

There are all sorts of legal principles as to what is compensable and what is not. Before the House of Lords decision, the physical manifestation of asbestos on the lung, the anxiety of the person involved and the risk of pleural plaques developing into something more serious was very much part of pleural plaques litigation. Pleural plaques litigation was all about those three strands. It was not just about anxiety; it was about the physical presence of asbestos on a person's lung, the anxiety of having it and what it may develop into.

Mr Hamilton:

There is medical conjecture around what pleural plaques may develop into. Much of the evidence suggests that pleural plaque does not develop and is not a sign that someone will get anything else.

Mr Hanna:

I do not want to cross into the medical field. However, we deal with medical reports day and daily and know what doctors and consultant chest physicians say in this area. There is a very

small chance — less than 10% — of somebody with asbestos-related pleural plaques developing something more sinister. Without crossing into the medical field — essentially, I am just saying what the medical reports in those cases say — there is a risk, and, before the House of Lords decision, compensation claims dealt with and paid off that risk.

Mr Hamilton:

Some of what you said delves into the medical side. It is not pleural plaques that cause other developments; it is the exposure to asbestos.

Mr Hanna:

Yes, but pleural plaques are an indicator that someone has been exposed.

Mr Hamilton:

We are getting into the finer points. It is not pleural plaques that cause —

Mr Hanna:

I am coming back to your point about somebody approaching a firm of solicitors to say that they want to pursue a claim for anxiety. They cannot do that. They have to have the physical presence of a physical condition, and there may be anxiety on top of that.

Plenty of people who had pleural plaques were not worried and, because of that, they were not compensated. It is another aspect of the case. A person cannot simply say that they have been exposed to a carcinogenic substance and are worried and, therefore, have a claim. The law is very particular that a person has to have the physical condition before an anxiety claim can be compensable.

Ms McClure:

Lord Justice Girvan's 2002 decision broke it down by awarding £11,000 for the physical injury and £7,500 or so for the anxiety. Therefore, he accepted that there was a physical injury. That is why if a person of a young age were to come to a firm of solicitors and did not want to rule out the possibility of bringing a claim in future, we would have entered into a provisional damages claim and, hopefully, obtained for them compensation of about £11,000 or £12,000. That ruled

out anxiety, because, if they developed something in the future, they could come back. There was that division.

Dr Farry:

I welcome our guests. If someone had a mole on their skin and had been exposed to a carcinogenic substance, should they be compensated if they were anxious about developing skin cancer?

Ms McClure:

No, because the mole would be regarded as de minimis; it would be regarded as being so insignificant that it should not be compensable.

Dr Farry:

How, therefore, does the presence of a pleural plaque on the lung differ from a mole on the skin?

Ms McClure:

Before the House of Lords decision, the courts' view was that pleural plaques was not de minimis because it could be seen in an X-ray and the damage to someone's lungs could be seen.

Dr Farry:

Damage to lungs implies that something is affecting the lung.

Ms McClure:

Scarring on a person's lung is not visible to them.

Dr Farry:

Does the scarring on the lung affect its ability to function?

Ms McClure:

No.

Dr Farry:

Therefore, it is not damage to the lung.

Ms McClure:

The lung of a person with pleural plaques does not look the same as that of someone without pleural plaques.

Dr Farry:

What is your definition of damage then?

Ms McClure:

It is an area of fibrosis and slight marks on the lung. That is the position of the courts.

Dr Farry:

It could be argued that a mole on the skin is damage to the skin.

Mr Hanna:

The issue is that individuals at work were exposed to a carcinogenic substance — asbestos. Twenty or 30 years later, they are diagnosed with pleural plaques as a consequence, so there is a link to their work. Where and to what would one need to have exposure to get a mole?

Dr Farry:

Someone who worked in Sellafield might develop a mole.

Mr Hanna:

There would need to be a recognised medical body of opinion to say that a person who is exposed to something will develop a certain condition.

Dr Farry:

Where is the medical evidence that suggests that pleural plaques are damage?

Mr Hanna:

The issue has been debated in the courts for decades across the world. In Northern Ireland pleural plaques was always a recognised actionable injury; that was established by our judiciary.

Dr Farry:

If something has been the case in the past, does that mean that it should always be the case in the future?

Mr Hanna:

Not necessarily, but I respectfully suggest that pleural plaques should be a recognised compensable condition.

Dr Farry:

Why?

Mr Hanna:

People went to work at the shipyard and were exposed to terrible conditions and horrible environments.

Dr Farry:

If that is the starting point of what you are saying, the basis of the compensation is the exposure. Therefore, we have shifted from whether it is damage or injury to the lung, and the associated anxiety, to arguing that people should be compensated for exposure alone.

Mr Hanna:

No. I am making the link between their terrible working conditions and the fact that, some 30 years later in their twilight years, they are advised that they have asbestos on the lung, which may or may not develop into something more serious. They are anxious about it, and you cannot say anything to them to make it any better because they were at the funeral the week before of their friend who died of mesothelioma, and they do not know the difference between the spot of —

Dr Farry:

To be clear: are we talking about compensation for the fact a person was exposed, that they were anxious, that there is a risk of something else or because there is some asymptomatic change to the lung? Which of the four?

Mr Hanna:

They are being compensated because of the presence of asbestos plaques in their lungs.

Mr McLaughlin:

Is that a consequence of their employment?

Mr Hanna:

It is a consequence of their employment and the anxiety that goes with it.

Dr Farry:

Therefore it is all four.

Mr Hanna:

There has to be a link to their work, their working conditions, what they were exposed to, the fact that they were not protected and whether there was a duty of care.

Dr Farry:

Does either of your firms employ medical experts to back up your arguments?

Mr Hanna:

In every case, we obtain consultant physician reports, lung function test reports and consultant radiology reports.

Dr Farry:

Are they factual reports on the physiological state of the person concerned?

Mr Hanna:

Yes.

Dr Farry:

Do you employ a medical opinion on the wider argument about whether the presence of pleural plaque should be compensated?

Mr Hanna:

That is a legal not a medical issue. A radiologist can report only on what he sees on a high-resolution CT scan; a consultant chest physician can report that the complaint will not cause the patient any symptoms, per se, but that there is a risk of progression.

Dr Farry:

However, you do not dispute what we view, or what I view, as the medical consensus that pleural plaques of themselves are not harmful.

Mr Hanna:

I do not think that anyone would disagree with that.

Ms Purvis:

It therefore relates to the employer's duty of care to the employee and the exposure to the asbestos. That is when the harm is done.

Mr Hanna:

Yes.

Ms Purvis:

In your submission, you said that you thought that the Bill was human-rights compliant. In their submissions, others said that they feel that the Bill is in breach of the European Convention on Human Rights, with regard to employers' and insurers' rights. Why are you so definite that it is human-rights compliant?

Ms McClure:

They are taking that stance because if the Bill were passed it would be retrospective. There is always a legal argument about whether retrospective legislation is human-rights compliant. We are of the view that this has been tested before and that there was legislation in the past that managed that. Therefore we did not feel that this was in contravention of human rights.

Ms Purvis:

One of the arguments is that, since the House of Lords ruling, it is not within the legislative competence of the Assembly to make this legislation. Do you have a view on that?

Ms McClure:

It has been debated in the Scottish Parliament, and it is of the view that there are arguments both ways. That was tested, and the Scottish Parliament felt that it did have the competence. Our view is that the Assembly also has the competence to deal with it.

Mr Hanna:

The best example is probably the Barker case of the House of Lords, which related to malignant mesothelioma. The Labour Government of the time passed the Compensation Act 2006 to say that that was unfair. The basis was that if an individual was employed in five places of employment and exposed at those five places, he could pursue only one employer or one occupier. The case failed because the individual could not sue all the individuals or all the companies or occupiers. That was a tremendously onerous situation for cancer victims, and the Compensation Act 2006 said that individuals are entitled to pursue anyone whom they can pursue and that they are entitled to 100% of the compensation.

Ms Purvis:

It related to an employer's duty of care.

Mr Hanna:

Yes.

The Chairperson:

There are no more questions. I have just been made aware that you were waiting outside since 11.20 am; I was not aware of that when you came in. That was too long to wait, and I apologise for it.

Mr Hanna:

I appreciate that such things happen.

The Chairperson:

The issue will come before the Committee again, so will it be OK to write to you with any further questions?

Mr Hanna:

It is an emotive issue, so both of us will be happy to answer further questions. We will probably reply jointly, if that is ok.

The Chairperson:

Thank you. Again, I am sorry that you had to wait so long. I thank the DFP officials for attending and apologise that you were not called. We will write to you if we require clarification.