

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) ACT 2009

EXPLANATORY NOTES

THE ACT

3. The House of Lords (HoL) decision in *Johnston v NEI International Combustion Ltd*, published on 17 October 2007¹, ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action because they do not signify damage or injury that is sufficiently material to found a claim for damages in tort. The judgment is not binding in Scotland, but is highly persuasive. The equivalent cause of action in Scotland is “delict”: in a delictual action a person may claim civil damages against another person responsible for a wrongful act that has caused loss or injury.
4. The purpose of the Act is to ensure that the HoL judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to *Johnston* as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Act also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Scotland. The Act does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person’s condition deteriorating in the future.

Section 1 – Pleural plaques

5. This section addresses the central reasoning of the judgment in *Johnston* by providing that asbestos-related pleural plaques are an actionable personal injury. Subsections (1) and (2) provide that pleural plaques are a non-negligible personal injury which constitutes actionable harm in respect of which an action for damages may be raised and for which, if the action is successful, damages may be recovered. In other words, pleural plaques are material damage that is not *de minimis* for the purposes of a claim for delictual damages. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the *Johnston* judgment, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining delictual liability.

Section 2 – Pleural thickening and asbestosis

6. This section makes provision against the possibility that the ruling in *Johnston* may be applied in relation to asymptomatic pleural thickening and asbestosis (because the courts may consider that the *ratio* (principles of law underlying and justifying the decision) in *Johnston* provides authority in these cases). Subsections (1), (2) and (3) provide that asbestos-related pleural thickening and asbestosis, which have not and are

1 ¹<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm>

not causing physical impairment, are a non-negligible personal injury i.e. the condition constitutes actionable harm for the purposes of raising a claim for delictual damages. In subsection (1) the phrase “for the avoidance of doubt” is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are *not* actionable. Subsections (4) and (5) are consistent with subsections (3) and (4) of section 1. Subsection (4) disapplies any rule of law, such as the common law principles referred to in the *Johnston* judgment, to the extent that their application would result in asymptomatic pleural thickening or asbestosis being considered non-actionable. Subsection (5) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining delictual liability.

Section 3 – Limitation of actions

7. To ensure that claims do not become time-barred during the period between the date of the judgment (17 October 2007) and the date the Act comes into force, this section provides that this period does not count towards the three-year limitation period for raising an action of damages in respect of the three conditions covered in the Act. Subsection (1)(a) addresses the kinds of claims to which this section applies, that is, claims involving the asbestos-related conditions covered by sections 1 and 2. This includes claims that have been raised in the courts before the Act comes into force as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date the Act comes into force, this section will apply only if they are ongoing at that date. The effect of this section is to address cases that may be at risk of being dismissed by the courts on time-bar grounds, e.g. a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising their case thinking they had no right of action under the *Johnston* judgment. The person may then have lodged their case in January 2008 because of the Government’s announcement that it intended to bring this Act forward. Without this provision, which would stop the time-bar clock running from October 2007 until the date the Act comes into force, that person’s claim could be dismissed as having been raised beyond the three-year limitation period.

Section 4 – Commencement and retrospective effect

8. This section sets out the provisions for commencement and retrospectio. Subsection (1) provides that the substantive provisions of the Act will come into force on a date appointed by Scottish Ministers by Commencement Order. The remaining subsections explain the retrospective effect of the provisions of the Act. Subsection (2) provides that sections 1 and 2 of the Act are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the judgment in *Johnston*, because an authoritative statement of the law by the HoL is considered to state the law as it has always been. Subsection (3) qualifies the effect of subsection (2) by providing that sections 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Act comes into force. The effect of subsections (2) and (3) is that pursuers in cases which had not been settled, or determined by a court, before the Act comes into force will be able to raise, or continue, an action for damages.

Section 5 – Short title and Crown application

9. This section gives the short title of the Act and provides that the Act binds the Crown.