

These notes refer to the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2011 (c.28) which received Royal Assent on 25 July 2011

Damages (Asbestos-related Conditions) Act (Northern Ireland) 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1 – Pleural plaques

11. This section addresses the central reasoning of the judgment in *Johnston* by providing that asbestos-related pleural plaques are actionable damage. Subsection (1) provides that pleural plaques can be the subject of a claim for damages. In other words, pleural plaques are material damage that is not *de minimis* for the purposes of a claim in negligence. Subsection (2) disapplies any rule of law, such as the common law principles referred to in the *Johnston* case, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (3) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 2 – Pleural thickening and asbestosis

12. This section prevents the ruling in the *Johnston* case from being applied in relation to asymptomatic pleural thickening or 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) and (2) provide that asbestos-related pleural thickening and asbestosis, which have not caused, and are not causing, physical impairment, constitute actionable damage. 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 (3) and (4) are consistent with subsections (2) and (3) of section 1. 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 asymptomatic pleural thickening or asbestosis being considered non-actionable. Subsection (4) ensures that section 2 does not otherwise affect the operation of statutory or common law rules for determining liability.

Section 3 – Limitation of actions

13. This section provides that the period between the date of the decision in Johnston (17 October 2007) and the date on which any change to the law comes into operation does not count towards the three-year limitation period for raising an action for 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 any change to the law comes into operation, as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date on which the change to the law comes into operation, this section will apply only if those cases 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. For example, a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising his/her case because s/he thought s/he had no right of action because of the decision in Johnston. That person may then have lodged a claim because DFP announced that it was recommending a change to the law. Without this provision, which will, for a specified period, stop the time-bar clock running, that person's claim could be dismissed as having been raised beyond the three-year limitation period.

Section 4 – Commencement and retrospective effect

14. This section sets out the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Act will come into operation on a date appointed by the DFP 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 decision 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 operation. The effect of subsections (2) and (3) is that claimants in cases which have not been settled, or determined by a court, before the Act comes into operation will be able to raise, or continue, an action for damages.

Section 5 – Short title and Crown application

15. This section gives the short title of the Act and provides that the Act will bind the Crown.