

*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

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## EXPLANATORY NOTES

### INTRODUCTION

1. These Explanatory Notes relate to the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2011, which received Royal Assent on 25 July 2011. They have been prepared by the Department of Finance and Personnel (“DFP”) in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes should be read in conjunction with the Act. They do not, and are not meant to, provide a comprehensive description of the Act. So, where a section or part of a section does not seem to require an explanation or comment, none is given.

### BACKGROUND AND POLICY OBJECTIVES

3. In *Johnston v NEI International Combustion Ltd*, published on 17 October 2007<sup>1</sup>, the House of Lords (“HoL”) 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.
4. The decision in the Johnston case was welcomed by the insurance industry. However, several early day motions, which called for the decision to be overturned, were set down in the UK Parliament and the matter was the subject of adjournment debates. During the debates, many MPs spoke in favour of the decision being overturned by legislation.
5. On 29 November 2007 the Scottish Government announced that it would legislate to “overturn” the decision. The Damages (Asbestos-Related Conditions) (Scotland) Act 2009 (“the 2009 Act”), which provides for asbestos-related pleural plaques to be a non-negligible personal injury for which damages can be recovered, came into force on 17 June 2009. As it is possible that the courts might look to the Johnston case as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the 2009 Act also provides that asymptomatic pleural thickening and asymptomatic asbestosis,

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

when caused by wrongful exposure to asbestos, should continue to give rise to a claim for damages.

6. On 25 February 2010 Jack Straw, the then Secretary of State for Justice and Lord Chancellor, announced that the UK Government had decided not to “overturn” the decision in the Johnston case in England and Wales. Mr Straw went on to say that an extra-statutory payment scheme, which would allow for payments of £5000, would be introduced in that jurisdiction. However, payments would only be available to individuals who had already begun, but not resolved, a legal claim for compensation for pleural plaques at the time of the HoL’s ruling in October 2007. The scheme was duly launched on 1 August 2010 and is set to run to 1 August 2011.
7. Following consultation in Northern Ireland (paragraphs 8-9 below refer), it was decided that the law should be amended to ensure that the decision in the Johnston case does not have effect in Northern Ireland. The purpose of the Act is, therefore, to reinstate asymptomatic pleural plaques as an actionable condition under the law of negligence. 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 Northern Ireland. 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 he or she receives can include sums, for example, for anxiety or the risk of the condition deteriorating in the future.

## **CONSULTATION**

8. On 13 October 2008 DFP issued a consultation paper which considered the impact of the decision in the Johnston case and sought views on a range of options, from increased support, help and information for people with pleural plaques to the introduction of amending legislation to “reinstate” civil claims in negligence for asymptomatic pleural plaques. The consultation period concluded on 12 January 2009 and, ultimately, the option of legislative change commanded the most support. However, there was also general support for awareness-raising and information gathering/sharing, provided such activities were undertaken in a careful and sensitive way.
9. From 9 July 2010 to 6 September 2010 the Department consulted on the terms of the Bill which would become the Act. Twelve responses were received. Most of the responses came from the insurance industry, which restated its opposition to legislative change.

## **OVERVIEW**

10. The Act consists of 5 sections.

## **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.

### **HANSARD REPORTS**

16. The following table sets out the date of the Hansard report for each stage of the Act's passage through the Northern Ireland Assembly.

<i>STAGE</i>	<i>DATE</i>
Introduction	14 December 2010
Committee for Finance and Personnel-evidence from Oonagh McClure and Martin Hanna, solicitors	12 January 2011
Second Stage debate	17 January 2011
Committee for Finance and Personnel-evidence from insurers and Kennedys Law	19 January 2011
Committee for Finance and Personnel – evidence from the Northern Ireland Human Rights Commission	2 February 2011

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<i>STAGE</i>	<i>DATE</i>
Committee for Finance and Personnel – evidence from Professor Anthony Seaton and Dr Richard Shepherd	9 February 2011
Committee for Finance and Personnel – evidence from officials in the Department of Enterprise, Trade and Investment	16 February 2011
Committee for Finance and Personnel – evidence from individuals and Dr Allan Henderson	23 February 2011
Consideration Stage	28 February 2011
Further Consideration Stage	8 March 2011
Final Stage	21 March 2011
Royal Assent	25 July 2011