



## SCOTTISH EXECUTIVE

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Your ref:  
Our ref:

7 July 2006

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Dear Colleagues

### PROPOSED AMENDMENTS TO SECTION 1(2) OF THE DAMAGES (SCOTLAND) ACT 1976

1. In a statement on 22 June 2006 on the Legislative Programme, the Minister for Parliamentary Business announced that the Scottish Executive would introduce a Damages Bill later this year to address a problem relating to relatives' claims for damages for non-patrimonial loss.
2. Currently, mesothelioma sufferers face the dilemma of either settling their damages claim while still alive or not settling their claim before death so that their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to. Some sufferers are foregoing the compensation which would comfort them before they die in order to help their families.
3. Ministers propose to remedy this situation by amending section 1(2) of the Damages (Scotland) Act 1976 so that relatives' claims for damages for non-patrimonial loss are not extinguished by the settlement of the person's own claim while still alive. This will enable damages for loss and suffering to be claimed by the immediate family in any case where a person has sustained a personal injury consisting of asbestos-related mesothelioma, which makes their date of death earlier than it would have been had they not sustained the injury, and they subsequently die of that injury. We also propose that Scottish Ministers should have the power to extend the new provision to apply to other diseases or personal injury if experience shows this to be necessary.
4. The purpose of the enclosed consultation paper is to invite your views on this proposal. The paper sets out in detail the nature of asbestos-related mesothelioma, the existing law, the problem with the existing law and the proposed solution. We invite your views by **18 August 2006** on the questions in the enclosed consultation paper and on the accompanying partial Regulatory Impact Assessment.
5. In reaching their decision to propose amending legislation to the Scottish Parliament, Ministers took account of earlier work done by the Justice 2 Committee of the Parliament on the handling of personal injury claims by mesothelioma sufferers; and of the recent public debate on the issues prompted by Des McNulty MSP and fellow members.

6. The consultation period for these proposals is shorter than the Executive normally offers; but we aim nonetheless to ensure that the issues are properly aired and that all the relevant stakeholders have a chance to participate. Representatives of mesothelioma sufferers and of trades unions and agents acting for the majority of mesothelioma claimants have already made their views clear - in their submissions to the Parliament and in correspondence and meetings with Ministers and officials. We have had discussions with a number of those campaigning for a change in the law and will be happy to engage further with them. It is also important to us to hear the views of other stakeholders including representatives of employers and the insurance industry: we will be glad to have their responses to this consultation and also to arrange meetings during the consultation period. In this way we intend to ensure that all those with an interest have a good opportunity to register their views by 18 August.

7. This consultation deals with an issue which bears directly on the choices that claimants make during the last months of their lives. Ministers believe that a change to the law should be proposed to Parliament at the earliest possible opportunity consistent with satisfactory prior consultation so that mesothelioma sufferers and their families can be relieved of the added worry and distress posed by the current rules. For this reason, as well as in light of the considerable public attention which this issue has already attracted, Ministers feel it is right to ask for comments within a relatively short timeframe.

8. The three key questions posed by this consultation are set out in Annex A which provides details on responding to this consultation. Please ensure that Annex B, the Respondent Information Form, is completed and returned along with your response. Further information on the Scottish Executive consultation process is contained in Annex C. Consultees are welcome to comment on aspects of the proposals other than those covered in the questions but need not feel obliged to do so.

#### House of Lords Judgment (“Barker”)

9. Finally, you may be aware that the UK Government announced on 20 June 2006 its intention to legislate to reverse the effect of the House of Lords ruling of 3 May 2006 in the case of *Barker v Corus*. The Government has said that it intends to do this as quickly as possible by introducing an amendment to the Compensation Bill. The “*Barker*” judgment ruled that mesothelioma damages should be apportioned in cases involving several former employers even when some of those employers were insolvent or untraceable. The Minister for Parliamentary Business said in her statement that the Scottish Executive would also legislate to overturn this ruling, either through its own Damages Bill or through the Compensation Bill in the UK Parliament by Legislative Consent Motion (LCM). On 29 June 2006 the Scottish Parliament agreed an LCM so that the proposed amendment to the Compensation Bill should also amend the law of damages in Scotland to provide for joint and several liability in mesothelioma cases. The following link will take you to the Official Report of the debate on the LCM:

<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-06/sor0629-02.htm#Col27047>

Thank you for taking the time to respond to this consultation.

Yours sincerely

**Lorna Brownlee**

AMENDMENTS TO SECTION 1(2) OF THE DAMAGES (SCOTLAND) ACT 1976

QUESTIONS

To assist in taking forward this proposal, we would like to hear your views on the following questions:

**1. Do you agree that the existing law, which prevents the immediate family of mesothelioma sufferers from claiming damages for their non-patrimonial loss on the death of the sufferer if that person has already recovered damages or settled their claim during his or her lifetime, causes problems?**

If you do not agree, it would be helpful if you would say why.

**2. Do you agree that these problems should be remedied by disapplying section 1(2) of the 1976 Act so as to enable the immediate family of mesothelioma sufferers to claim damages for non-patrimonial loss, even although the deceased had already recovered damages or obtained a settlement in his or her lifetime?**

If not, what do you see as an alternative solution?

**3. Do you agree that the Bill should be confined to cases where the sufferer has contracted asbestos related mesothelioma with Scottish Ministers having the power to extend the new provision to apply to other diseases or other kinds of personal injury if experience shows this to be necessary?**

If not, why do you think it should not be mesothelioma specific?

**Responding to this consultation paper**

We are inviting written responses to this consultation paper by **18 August 2006**. **Please send your response to:**

[Anne.Hampson@scotland.gsi.gov.uk](mailto:Anne.Hampson@scotland.gsi.gov.uk) or

Anne Hampson, The Scottish Executive Justice Department, Civil Law Division, 2 West Rear, St Andrew's House, Regent Road, Edinburgh, EH1 3DG

If you have any queries contact Anne Hampson on 0131 244 2442.

This consultation, and all other Scottish Executive consultation exercises, can be viewed online on the consultation web pages of the Scottish Executive website at <http://www.scotland.gov.uk/consultations>. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is.

The Scottish Executive now has an email alert system for consultations ([SEconsult: http://www.scotland.gov.uk/consultations/seconsult.aspx](http://www.scotland.gov.uk/consultations/seconsult.aspx)). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SE distribution lists, and is designed to allow stakeholders to keep up to date with all SE consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

### **Handling your response**

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** at Annex B of this letter as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Executive are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### **Next steps in the process**

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Executive Library by 16 September. We will check all responses where agreement to publish has been given for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangements to view responses by contacting the SE Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

### **What happens next?**

Following the closing date, all responses will be analysed and considered prior to introducing the Damages Bill into the Scottish Parliament.

### **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to Anne Hampson whose contact details are above.

**RESPONDENT INFORMATION FORM:****AMENDMENTS TO SECTION 1(2) OF THE DAMAGES (SCOTLAND) ACT 1976**

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

Name:

Postal Address:

1. Are you responding: (please tick one box)
- (a) as an individual  go to Q2a/b and then Q4
- (b) **on behalf of** a group/organisation  go to Q3 and then Q4

**INDIVIDUALS**

- 2a. Do you agree to your response being made available to the public (in Scottish Executive library and/or on the Scottish Executive website)?
- Yes (go to 2b below)
- No, not at all  We will treat your response as confidential

- 2b. Where **confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)
- Yes, make my response, name and address all available
- Yes, make my response available, but not my name or address
- Yes, make my response and name available, but not my address

**ON BEHALF OF GROUPS OR ORGANISATIONS:**

- 3 The name and address of your organisation **will be** made available to the public (in the Scottish Executive library and/or on the Scottish Executive website). Are you also content for your **response** to be made available?
- Yes
- No  We will treat your response as confidential

**SHARING RESPONSES/FUTURE ENGAGEMENT**

- 4 We will share your response internally with other Scottish Executive policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Executive to contact you again in the future in relation to this consultation response?
- Yes
- No

## THE SCOTTISH EXECUTIVE CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Executive working methods. Given the wide-ranging areas of work of the Scottish Executive, there are many varied types of consultation. However, in general, Scottish Executive consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Executive encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Executive consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Executive web site enabling a wider audience to access the paper and submit their responses<sup>1</sup>. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Executive library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Executive consultation papers and related publications (e.g., analysis of response reports) can be accessed at:

[Scottish Executive consultations](http://www.scotland.gov.uk/consultations) (<http://www.scotland.gov.uk/consultations>)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

**While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.**

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<sup>1</sup> <http://www.scotland.gov.uk/consultations>

## RECIPIENT LIST

Abbey  
Advocates Personal Injury Law Group  
Aegon UK  
Aerospace Industry  
Amicus  
Anderson Strathern  
Association of British Insurers  
Aviva Plc  
Bonnar and Co  
Chartered Insurance Institute  
Chemicals Industry Association  
Clerk of Justice 1 Committee  
Clerk of Justice 2 Committee  
Clydeside Action on Asbestos  
Clydeside Asbestos Group  
Citizens Advice Scotland  
Commission for Racial Equality  
Confederation of British Industry (CBI) Scotland  
Confederation of Paper Industries  
Confederation of Shipbuilding and Engineering Union  
Convention of Scottish Local Authorities (COSLA)  
Des McNulty MSP  
Disability Rights Commission  
Equal Opportunities Commission  
esure  
Federation of Small Businesses  
GMB  
Government Departments  
Institute of Directors  
Law Commission  
Law Society of Scotland  
Legal Deposit Libraries  
Legal Libraries – Scotland  
Lord Advocate’s Department  
Manufacturing Industry  
Norwich Union  
Scottish Chambers of Commerce  
Scottish Consumer Council  
Scottish Council for Development and Industry  
Scottish Law Commission  
Scottish Local Authorities (Chief Executives)  
Scottish Engineering  
Scottish Financial Enterprise  
Scottish MEPS  
Scottish Mainstream Political Parties  
Scottish Textiles Manufacturers Association  
Scottish Trade Union Congress  
Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)  
Standard Life  
TGU  
Thomsons  
UCATT  
Women’s National Commission



# **AMENDMENT TO SECTION 1(2) OF THE DAMAGES (SCOTLAND) ACT 1976**

## **CONSULTATION PAPER**

**SCOTTISH EXECUTIVE  
JULY 2006**

### **ACKNOWLEDGEMENT**

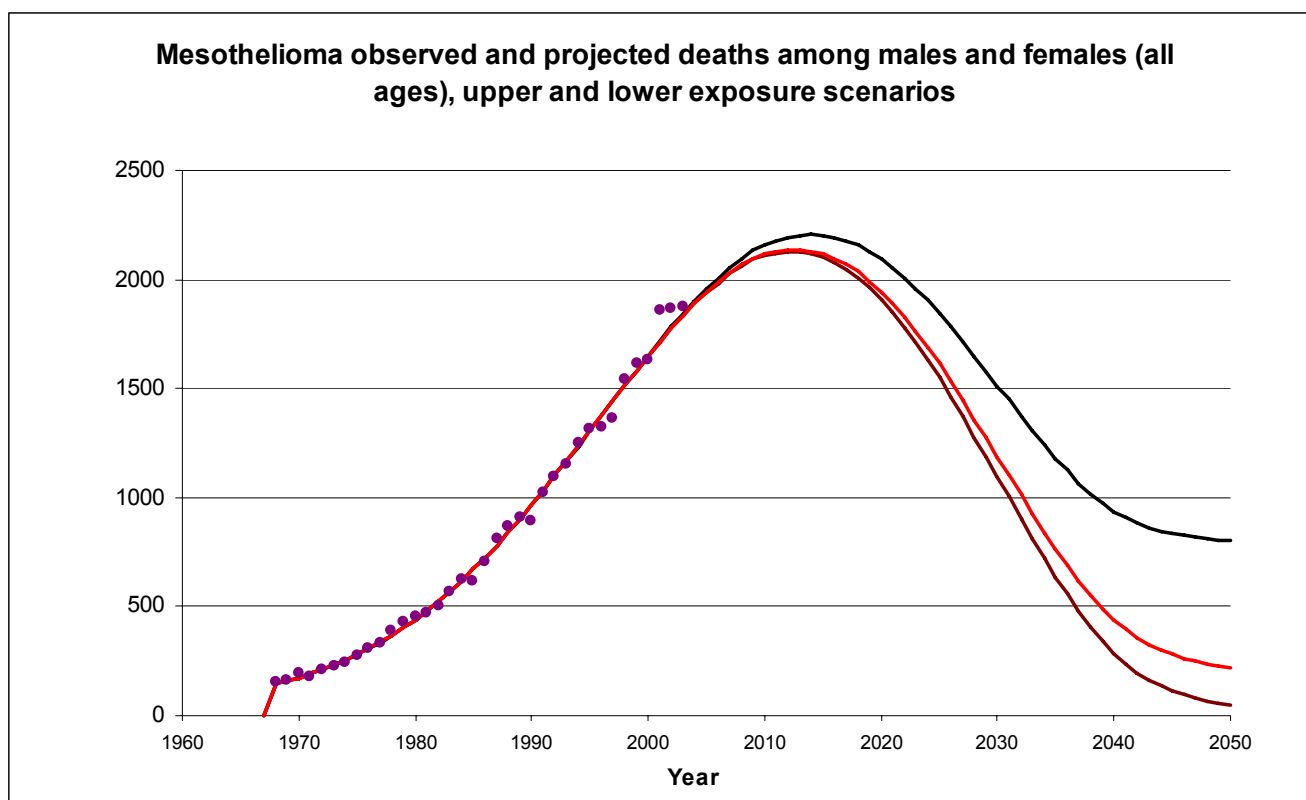
The Executive is very grateful for preparatory work on a draft Member's Bill and consultation carried out by Des McNulty MSP, trades unions, voluntary bodies and advisers. Following the statement in the Scottish Parliament by the Minister for Parliamentary Business on 22 June, Mr McNulty withdrew his draft Bill. With Mr McNulty's permission, this consultation paper draws mainly from his work. Scottish Ministers wish to pay tribute to Mr McNulty and all those who have campaigned tirelessly for this change in the law on behalf of mesothelioma sufferers and their families.

## 1. INTRODUCTION

### Mesothelioma

1.1 Mesothelioma is a cancer of the lining of the lungs or abdomen. It is almost always caused by exposure to asbestos. It is almost invariably fatal, with many deaths occurring within a few months of diagnosis and most within 14 months. Everyone has breathed in small amounts of asbestos fibres, and while mesothelioma can arise with only low levels of exposure it is more likely to present in people with more extensive exposure to asbestos, particularly exposure to the more dangerous forms of asbestos. It has a long latency period – always at least a decade following exposure but normally thirty years or more. It can be difficult to diagnose from biopsy specimens and a confident diagnosis is often only made after death.

1.2 Mesothelioma used to be a rare cancer but there are now over 1800 cases a year in the UK. However, the long latency means that despite far better controls on asbestos exposure and the elimination of asbestos imports, the rate is still rising. It could reach 2400 deaths a year by around 2013 and then fall away to perhaps 500 cases per year by 2050. These projections are unstable and highly sensitive to assumptions on life expectancy, residual exposure levels and latency. The table below shows Health and Safety Executive's latest caseload data and projections for the UK.



1.3 Most sufferers are men (85%). Most deaths (about two-thirds) occur between the ages of 60 and 80, with only 18% before the age of 60. The age profile of deaths is rising and many cases still involve exposure during the 1960s. About 80% of cases can be associated with occupations where there was a greater likelihood of asbestos exposure, such as shipbuilding and construction, and although all areas of the country show some level of asbestos-linked mesothelioma, there are strong geographical concentrations

around shipbuilding areas, centres of railway engineering, and asbestos plants. Cases are more likely to come from lower and middle social class groupings, but not overwhelmingly so.

## **Compensation**

1.4 Persons suffering from asbestos-related diseases can usually take legal action against employers who exposed them to dangerous quantities of asbestos. They can also apply to the Benefits Agency for industrial injuries benefit if they suffer from various asbestos-related conditions known as 'prescribed diseases'. This is typically £127 per week until death. If exposure occurred while working for an employer who is no longer trading, they may also receive a lump sum (typically £13000) under the Pneumoconiosis (Workers' Compensation) Act 1979.

1.5 In Scotland, the Justice 2 Committee in the first session of the Parliament took evidence and consulted with interested parties in dealing with Petition PE336 concerning the award of compensation for sufferers of asbestos-related diseases. After a 20 month inquiry, the Committee recommended special additional measures to speed up settlement of these personal injury cases. This coincided with a view that had been reached by a Court of Session working party chaired by Lord Coulsfield that recommended a new procedure for all personal injury cases that were raised in that Court. New procedures were therefore implemented by the Court of Session in April 2003. Pending those reforms Lord Mackay of Drumadoon was appointed to oversee asbestos-related cases that were proceeding under the old procedures and this resulted in the expediting of these cases. Central to the new arrangements is a timetable created to manage claims in court from start to finish which is then closely monitored. In practice this has meant cases are being concluded within the shortened period of 12 to 13 months.

1.6 However, the introduction of the accelerated claims processing arrangements has served to highlight a predicament arising from the legislative provisions on relatives' claims. This is due to section 1(2) of the Damages (Scotland) Act 1976 (the 1976 Act) which means that claims by the relatives of injured persons are extinguished following an award to a living claimant. In practice this means that mesothelioma sufferers face the dilemma of having to choose whether or not they should pursue their claim for damages and live their remaining months with the dignity and comfort which compensation could provide or to defer making their claim so that the family they leave behind would be better off. The faster processing introduced by the Coulsfield reforms means that more sufferers are surviving the claims period and are therefore faced with this difficult dilemma.

## **2. WHAT IS BEING PROPOSED**

2.1 The purpose of the Bill is to amend section 1(2) of the 1976 Act to enable the immediate family<sup>1</sup> to claim non-patrimonial damages even when the deceased have settled their own claims while alive.

2.2 Section 35 of the Family Law (Scotland) Act 2006 redefines which relatives of a deceased person should be entitled to sue for non-patrimonial loss under the 1976 Act. In doing so it retains the concept of the deceased's immediate family; ensures that it consists of those relatives who are likely to have had a close tie of love and affection with the deceased in the context of present-day family structures; and gives appropriate weight to relationships which can arise between persons who have lived and/or been brought up in the same household. We believe that it is right that the proposed amendment is only advanced to the people closest to the mesothelioma sufferer and do not propose to re-open the question of whom the immediate family comprises.

2.3 We propose to amend the 1976 Act to disapply section 1(2) to allow the immediate family of a mesothelioma sufferer to claim damages for loss and suffering under section 1(4) of the 1976 Act in any case where (i) a person has contracted mesothelioma; (ii) as a result the sufferer dies earlier than would have been the case had he or she not sustained the injury; and (iii) the sufferer has subsequently died of the disease. We also propose that Scottish Ministers should have the power to extend the new provision to apply to other diseases or personal injury if experience shows this to be necessary through developments in science. These provisions will apply to all cases where the death of the mesothelioma sufferer occurs after the date on which the legislative provisions are brought into force. They will not affect cases settled before that date. Ministers propose that cases in progress (but not settled) at the date of commencement will be subject to this change. This proposed amendment is the subject of the partial Regulatory Impact Assessment at Annex B because of its potential implications for employers and the insurance industry.

### 3. THE NEED FOR CHANGE

#### Existing law

3.1 A detailed summary of the existing law relating to the right of an injured person, his executors and relatives to claim damages in respect of personal injury is given in Annex A to this Consultation Paper. The key points are as follows.

3.2 Where a person suffers personal injuries as the result of a wrongful act or omission of another (“the responsible person”), the injured person may claim damages from that person. Those damages are intended to compensate the injured person for any loss or damage which that person has suffered. The damages which may be claimed fall under two heads -

- damages for any patrimonial (or financial) loss i.e. for any pecuniary loss, such as loss of past or future earnings resulting from his injuries or loss of expectation of life; and
- damages for *solatium* (or non-patrimonial loss i.e. for any pain and suffering, loss of faculties and amenities and loss of expectation of life suffered by the injured person.

3.3 Under section 2 of the 1976 Act, if an injured person dies without having recovered any damages, any claim to damages which that injured person had at the time of his or her death transmits to his or her executor subject to certain modifications to ensure that certain damages are limited by reference to the period before death. Prior to 1993, the injured person’s claim for *solatium* did not transmit to the executor but the 1976 Act was amended to provide for this by the Damages (Scotland) Act 1993 (c.5) (“the 1993 Act”).

3.4 In addition, if the injured person dies in consequence of personal injuries and has not recovered damages during his or her lifetime, section 1 of the 1976 Act confers upon certain relatives of the deceased the right to claim damages. These damages are intended to compensate the relatives for their own loss and not that of the injured person. In terms of that Act, the damages are of two different kinds :-

- the relatives may claim damages for patrimonial (or financial) loss which are defined in section 1(3) of the 1976 Act as damages to compensate the relative for such matters as loss of support suffered by the relative since the deceased’s death, or likely to be suffered, and reasonable funeral expenses; and
- if the relative is a member of the deceased’s immediate family (for the definition of “immediate family see footnote 1), that relative may claim damages for *solatium* (or non- patrimonial loss or

injury to feelings) which are defined in section 1(4) of the 1976 Act, as amended by the 1993 Act, to consist of three elements of injury to feelings

- grief and anxiety suffered by the relative in contemplation of pre-death suffering of the deceased,
- grief and sorrow of the relative caused by the deceased's death and
- loss of the deceased's society and guidance.

## The Problem

3.5 Under the existing law, the immediate family of an injured person is prevented from claiming damages on the death of that person if the deceased has already recovered damages for the deceased's own loss during his or her lifetime<sup>2</sup>.

3.6 This means that mesothelioma sufferers are faced with the prospect that, if they pursue their own claim, this would extinguish the claims of their immediate family. In order to protect their family, their instinct may be to forego their own claim in order to allow the claims of their immediate family to proceed later. On the other hand, the future widow (or widower) and children are likely to press the sufferer to pursue his or her claim so that he or she can obtain the benefit of some damages before death, even although this means that the immediate family forfeit the right to claim damages when the sufferer dies.

3.7 This dilemma has intensified in recent years. This is because the courts have recently substantially increased the amount of damages which they are prepared to award the immediate family for *solatium* to compensate for any grief and suffering and emotional distress which they suffer and loss of society and guidance under section 1(4) of the 1976 Act. Prior to 1993, after allowing for inflation, the amounts awarded for what was then called loss of society seemed to have changed very little from the amounts awarded pre-1976 for *solatium* at common law<sup>3</sup>.

3.8 In 1992, the amounts awarded to a widow ranged from £5,500 to £12,500 and to a child from £600 to £10,500<sup>4</sup>. However, recent awards of section 1(4) damages have increased from £20,000<sup>5</sup> to £28,000<sup>6</sup> to a widow and £5000<sup>7</sup> to £10,000 for an adult child<sup>8</sup> and £3,000 to £10,000 for an elderly parent<sup>9</sup> losing an adult son.

3.9 This dilemma occurs in those cases where the sufferer has sustained personal injuries which diminish his or her life expectancy and where the sufferer dies in consequence of his or her injuries. This is likely to happen where

- the sufferer contracts a terminal industrial disease, such as mesothelioma, which substantially reduces that person's expectation of life, and
- death is inevitable a short time after diagnosis, but
- there may still be sufficient time for the sufferer to seek to recover damages and, therefore, to be faced with the problem.

3.10 The dilemma does not occur in fatal cases where death occurs immediately or a short time after some traumatic accident and where the sufferer does not have the opportunity to recover damages before his or her death. Neither does the dilemma occur in cases where there is no diminished life expectancy and where there is little or no prospect of any substantial claim for damages for *solatium* by the immediate family of

the sufferer. Currently, 80% of mesothelioma sufferers decide to wait and let their relatives pursue the claim after their death.

### Proposed solution

3.11 This problem is caused by the existing rule of law which means that relatives of a mesothelioma sufferer can only claim damages if the sufferer dies **without** having recovered damages for their own loss or otherwise discharged or excluded or waived the liability of the responsible person for that loss.

3.12 There may be thought to be some justification for the rule so far as regards patrimonial loss. This is because the view may be taken that, if the deceased has already recovered damages for future earnings<sup>10</sup>, there would be some duplication of damages if the relatives were also allowed to recover damages for loss of support even although there is no exact correspondence or equivalence between the two claims.

3.13 However, the same argument does not apply in the case of *solatium*. There is no correspondence or equivalence at all between the injured person's own claim for *solatium* and the claims of the immediate families claim for *solatium* to compensate for their grief, suffering and emotional distress and loss of society and guidance under section 1(4) of the 1976 Act.

3.14 This rule restricting the immediate family's title to sue in these circumstances has its origins in the common law. In the report which led to the 1976 Act, the Scottish Law Commission considered whether it should be abolished<sup>11</sup>. They took the view that, as the rights of both the deceased and the relatives arise from the same wrong, a balance has to be struck between the interests of the pursuers and those of the defender, in particular, that the defender should not be exposed to successive claims perhaps separated by long intervals. Accordingly, they decided to retain it and the rule is now contained in section 1(2) of the 1976 Act.

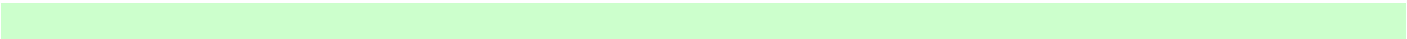
3.15 Successive claims appear to be less of a problem now than in 1976. The current law permits successive claims to be made in those cases where a person is allowed to sue for provisional damages and then come back later for a further award. It also allows the relatives to claim damages where the deceased has obtained provisional damages<sup>12</sup>.

3.16 It is proposed that section 1(2) of the 1976 Act should be disapplied so as to allow the immediate family of a mesothelioma sufferer to claim damages for non- patrimonial loss under section 1(4) of the 1976 Act even where the deceased has already recovered damages or obtained a settlement, but only:

- where the sufferer has sustained personal injuries as a consequence of mesothelioma which have diminished his or her expectation of life and dies as a result of those injuries;
- where the sufferer has recovered damages or obtained a settlement after the date when the Bill comes into force. Where the liability of the responsible person has been discharged prior to that date, that discharge should continue to bar any claim by the immediate family.

The immediate family will have the normal limitation period of three years after the death of the mesothelioma sufferer in which to make their claim.

3.17 The proposal is that the Bill is mesothelioma specific. The exposure of defenders to the proposed extension of relatives' rights to claim has to be delimited in order to give clarity and to link the change to the particular circumstances that have given rise to the dilemma faced by the mesothelioma sufferer and the immediate family in these particular cases. In principle, this could be done either by applying a time limit between the mesothelioma sufferers settling their claim and dying, after which the relatives' claim would be



extinguished, or by specifying the diseases which fall into the category described in paragraph 3.9 and which give rise to the dilemma. On the first, there would inevitably be cases which fell on the wrong side of the time limit. On the second, we are not at present aware of any conditions other than mesothelioma that give rise to the predicament facing sufferers and their families in relation to claims. The better way therefore to address the problem, and to circumscribe the circumstances in which the claims of the immediate family can be raised after the sufferer has settled and subsequently died would seem to be to refer explicitly to mesothelioma. If we do so it seems only prudent to cater for the possibility that other diseases or other types of personal injury might produce a very similar dilemma in the future. For this reason we are proposing that Scottish Ministers should have the power to extend the new provision to apply to other diseases or kinds of personal injury if experience shows this to be necessary.

## **Conclusion**

3.18 Ministers believe this relatively minor adjustment to the law will remove a source of much anxiety to mesothelioma sufferers and their families and that once the law has been changed they will be free from the distressing choice that they face at the moment. The Executive is keen to present its proposals to Parliament and, before doing so, to take account of the views of consultees.

3.19 The need to make this amendment has illustrated that the current law in this area is unclear and anomalous. The proposal is only to disapply section 1(2) in the limited circumstances which are necessary to deal urgently with this specific problem. It may be helpful in due course for the Scottish Law Commission to undertake a wider review of this area of the law. Scottish Ministers will give further consideration to this.

## QUESTIONS

To assist in taking forward this proposal, we would like to hear your views on the following questions:

**1. Do you agree that the existing law, which prevents the immediate family of mesothelioma sufferers from claiming damages for their non-patrimonial loss on the death of the sufferer if that person has already recovered damages or settled their claim during his or her lifetime, causes problems?**

If you do not agree, it would be helpful if you would say why.

**2. Do you agree that these problems should be remedied by disapplying section 1(2) of the 1976 Act so as to enable the immediate family of mesothelioma sufferers to claim damages for non-patrimonial loss, even although the deceased had already recovered damages or obtained a settlement in his or her lifetime?**

If not, what do you see as an alternative solution?

**3. Do you agree that the Bill should be confined to cases where the sufferer has contracted asbestos related mesothelioma with Scottish Ministers having the power to extend the new provision to apply to other diseases or other kinds of personal injury if experience shows this to be necessary?**

If not, why do you think it should not be mesothelioma specific?

The covering letter to this consultation provides at *Annex A*, details on responding to this consultation; at *Annex B*, the Respondent Information Form which you should ensure is completed and returned along with your response; and at *Annex C*, further information on the Scottish Executive consultation process

We are inviting written responses to this consultation paper by **18 August 2006**. Please send your response to:

[Anne.Hampson@scotland.gsi.gov.uk](mailto:Anne.Hampson@scotland.gsi.gov.uk) or

Anne Hampson, The Scottish Executive Justice Department, Civil Law Division, 2 West Rear, St Andrew's House, Regent Road, Edinburgh, EH1 3DG

If you have any queries contact Anne Hampson on 0131 244 2442.

## 1. Summary of existing law relating to damages on death

1.1 In this Annex-

“the 1976 Act” means the Damages (Scotland) Act 1976 c 13;

“the 1982 Act” means the Administration of Justice (Scotland) Act 1982 c.53;

“the 1993 Act” means the Damages (Scotland) Act 1993 c.5;

“the 1973 Report” means the Scottish Law Commission Report on the Law relating to Damages for Injuries causing Death (Scot Law Com No 31) (HMSO 1973); and

“the 1992 Report” means the Scottish Law Commission Report on the Effect of Death on Damages (Scot Law Com No 134) (HMSO 1992).

## 2. Injured person’s right to claim damages

2.1 Where a person suffers personal injuries as the result of a wrongful act or omission of another (“the responsible person”), the injured person may claim damages from that person.

2.2 The damages which an injured person may claim may be said to fall broadly under two main heads:-

(a) *Solatium*.

This is compensation for any pain and suffering, loss of faculties and amenities and loss of expectation of life suffered by the injured person<sup>13</sup>;

(b) Patrimonial Loss

This is compensation for any pecuniary loss, including such items as loss of past or future earnings and loss of employability. Where the injuries have diminished the injured person’s expectation of life, future patrimonial loss is calculated in accordance with section 9 of the 1976 Act; and

Under the 1982 Act, an injured person can also claim compensation for any necessary services rendered to an injured person by a relative in consequence of the injuries<sup>14</sup> and for any personal services to a relative which the injured person is unable to render by reason of their injuries<sup>15</sup>. Although strictly the loss is suffered by the relatives, under the 1982 Act they have no direct title to sue to recover damages for such loss<sup>16</sup>. Such loss is generally regarded as being part of the injured person’s patrimonial loss.

2.3 Usually, the injured person has to seek all the damages in one action against the responsible person. This is to avoid the defender being subject to a multiplicity of claims arising out of the same incident. However, in certain circumstances, the injured person may claim provisional damages and come back later for further damages. These circumstances are where there is a risk that the injured person may at some time in the future develop some serious disease or suffer some serious deterioration in his physical or mental condition and the defender is a public authority or insured in respect of the claim<sup>17</sup>.

### 3. Claim by executors

3.1 If the injured person dies, any right to damages in respect of those injuries which the injured person still had at the time of death (and which has not been extinguished or discharged etc) transmits to his executor.

3.2 However the damages payable to the executor for

(a) *solatium* and loss of expectation of life is limited by reference to the period immediately before death<sup>18</sup>, and

(b) any patrimonial loss is limited to patrimonial loss attributable to the period up to the date of the injured person's death<sup>19</sup>. This would be for example loss of earnings. It would not allow damages for future loss of income in terms of section 9 of the 1976 Act to be claimed. (This may be offset by the relative's claim for loss of support - see paragraph 4.4 below).

3.3 Under the 1976 Act, as originally enacted, the injured person's claim for *solatium* did not transmit to the executor. This meant that the existence of a right to *solatium* depended on the ability or otherwise, often in circumstances well beyond their control, of the injured person achieving resolution of the claim for *solatium* before they died. This caused particular hardship in the case of claims arising from terminal industrial disease, such as mesothelioma, where injured persons frequently died from their injuries before they could recover damages and where the defenders, and their insurers, had an incentive to prolong legal proceedings until their deaths. To resolve this problem, the Scottish Law Commission recommended in their 1992 Report that the injured persons' claim for *solatium* should transmit to their executors. This recommendation was given effect by amendments made to the 1976 Act in the 1993 Act<sup>20</sup>.

### 4. Claim by relatives

4.1 If injured persons die in consequence of their personal injuries, their relatives may, in certain circumstances, claim damages for their own loss.

4.2 The claim for damages by the relatives is different from that by the deceased or by the deceased's executors because it is intended to compensate the deceased's family for their own losses rather than those of the deceased<sup>21</sup>. However, at common law a relative could only claim such damages if the deceased could still claim damages at the time of his death. If the deceased had excluded or discharged that liability, this excluded the relatives' claim<sup>22</sup>.

4.3 These provisions are now contained in section 1 of the 1976 Act. Section 1(2) of that Act provides that the relatives cannot claim for damages if the responsible person's liability to pay damages to the deceased has been excluded (whether by an exemption clause or waiver) or discharged (by the recovery or settlement of damages) by the deceased before his death<sup>23</sup>. The claim by the relatives is not excluded if the deceased has been awarded a provisional award of damages but there is an adjustment to prevent duplication of damages for patrimonial loss<sup>24</sup>.

4.4 The relatives of the deceased may claim damages for certain kinds of patrimonial loss, namely

(a) compensation for loss of support suffered by the relative since the date of death, and/or likely to be suffered by the relative for the future, as a result of the act or omission in question;

(b) payment in respect of the reasonable expenses incurred by the relative in connection with the deceased's funeral; and

(c) payment of a reasonable sum in respect of loss of personal services (otherwise obtainable on payment) which the deceased might have been expected to render gratuitously but for the injury<sup>25</sup>.

4.5 Members of the deceased's immediate family may also claim damages for certain kinds of non-patrimonial loss (previously called "*solatium*" or "loss of society award") which are now defined in section 1(4) of the 1976 Act as being "all or any of the following

(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death; and

(c) the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died"<sup>26</sup>.

4.6 This definition of non-patrimonial loss needs further explanation. At common law, damages were awarded for *solatium* or the grief and suffering of the relative caused by the injured person's death. This tended to be a relatively modest amount. In their 1973 Report, the Scottish Law Commission recommended that this should be replaced by a "loss of society award" which was intended to place less emphasis on the past suffering of the relatives and more upon their future or continuing loss arising from deprivation of the deceased's society and guidance and to encourage more generous awards<sup>27</sup>. "Loss of society award" was defined essentially in terms of section 1(4)(c) above. This was given effect in section 1(4) of the 1976 Act as originally enacted.

4.7 However, in their 1992 Report, the Scottish Law Commission discussed how the courts had in practice interpreted the "loss of society award". The Commission found that the courts had continued to award damages for the past suffering of the relatives<sup>28</sup>. In these circumstances, the Commission recommended "clarifying" and "reformulating" what was meant by "the loss of society award" in order to bring it into line with, and make the statutory wording reflect, the way in which the courts had interpreted it<sup>29</sup>. In particular, as it appeared that the courts continued to award damages for the past suffering of the relatives, this was reflected in section 1(4)(a) above<sup>30</sup>. These recommendations were given effect to by amendments to the 1976 Act in the 1993 Act.

4.8 The rights of the relatives to claim damages are not affected by the making of a claim by the deceased's executor and vice versa<sup>31</sup>.

## REFERENCES

See Endnotes 1-31

<sup>1</sup> For deaths on or after 4 May 2006 the definition of 'immediate family' is any person who, immediately before the deceased's death was the spouse or civil partner of the deceased; any person not being the spouse or civil partner of the deceased who was, immediately before the deceased's death, living with the deceased as husband or wife or in a relationship which had the characteristics of the relationship between civil partners; any person who was a parent or child of the deceased; any person who was accepted by the deceased as a child of this family; any person who had accepted the deceased as a child of the family; any person who was the brother or sister of the deceased or was brought up in the same household as the deceased and who was accepted as a child of the family in which the deceased was a child; and any person who was the grandparent or grandchild of the deceased.

<sup>2</sup> This rule was at common law but is now contained in section 1(2) of the 1976 Act.

<sup>3</sup> The Scottish Law Commission Report on the Effect of Death on Damages (Scot Law Com No 134) (HMSO 1992) ("the 1992 Report") paragraph 2.21

<sup>4</sup> The 1992 Report paragraph 2.12

<sup>5</sup> *McManus' Executrix v Babcock Energy Ltd* 1999 SC 569

<sup>6</sup> *McLean –v- Wm Denny and Bros Ltd* OH 2004 SLT and IH 2004 SLT 1099 and *Murray and Others –v- Greenock Dockyard Co Ltd* OH 2004 SLT 346 and IH 2004 SLT 1104

<sup>7</sup> *McManus' Executrix v Babcock Energy Ltd* (above)

<sup>8</sup> *Murray and Others –v- Greenock Dockyard* (above)

<sup>9</sup> *Little –v- Fairfield Rowan Lord Brodie* 11 Jan 2005

<sup>10</sup> This is particularly so if the injuries have diminished the injured person's expectation of life and future patrimonial loss is calculated in accordance with section 9 of the 1976 Act.

<sup>11</sup> Paragraphs 40-43 of the 1973 Report

<sup>12</sup> See Annex A paragraphs 2.3 and 4.3

<sup>13</sup> Section 9A of the 1976 Act and paragraphs 4.17-4.21 of the 1992 Report

<sup>14</sup> Section 8 of the 1982 Act

<sup>15</sup> Section 9 of the 1982 Act

<sup>16</sup> Section 8(2) and 9(4) of the 1982 Act.

<sup>17</sup> Section 12 of the 1982 Act.

<sup>18</sup> Section 2(3) of the 1976 Act and paragraphs 4.7-4.12 of the 1992 Report

<sup>19</sup> Section 2(2) of the 1976 Act and paragraph 19 of the 1973 Report

<sup>20</sup> Section 2 of the 1976 Act as substituted by section 3 of the 1993 Act.

<sup>21</sup> *McKay v Scottish Airways* 1948 SC 254

<sup>22</sup> *McKay v Scottish Airways* (above)

<sup>23</sup> Section 1(2) of the 1976 Act, paragraphs 26 to 43 of the 1973 Report, and *McKay v Scottish Airways* (above) per Lord Mackintosh at p.258.

<sup>24</sup> Section 1(5A) of the 1976 Act, as inserted by section 1(3) of the 1993 Act.

<sup>25</sup> Section 1(3) of the 1976 Act and section 9(2) of the 1982 Act

<sup>26</sup> Section 1(4) of the 1976 Act, as amended by section 1(1) of the 1993 Act and paragraphs 102-112 of the 1973 Report and paragraphs 2.19-2.33 and 4.38 of 1992 Report. Section 1(4) has also been amended by section 35(2) and (3) of the Family Law (Scotland) Act 2006 to provide that no award of damages should be made under section 1(4) to a person related by affinity to the deceased.

<sup>27</sup> The 1992 Report paragraphs 2.21 and 3.21

<sup>28</sup> The 1992 Report paragraphs 2.21-2.33

<sup>29</sup> The 1992 Report paragraph 4.38

<sup>30</sup> The 1992 Report paragraphs 3.21, 4.38 and 4.39

<sup>31</sup> Section 4 of the 1976 Act and paragraphs 46-52 of the 1973 Report.

**AMENDMENT TO SECTION 1(2) OF  
THE DAMAGES (SCOTLAND) ACT  
1976**

**PARTIAL REGULATORY IMPACT  
ASSESSMENT**

**SCOTTISH EXECUTIVE  
JULY 2006**

## **TITLE OF PROPOSAL**

1. Proposal to amend section 1(2) of the Damages (Scotland) Act 1976 (the 1976 Act) to enable damages for grief and suffering to be claimed by the immediate family in any case where a person has sustained a personal injury which consists of asbestos-related mesothelioma, which makes their date of death earlier than it would have been had they not sustained the injury, and they subsequently die of that injury. The proposal is the subject of this regulatory impact assessment because of its potential implications for employers and the insurance industry. The assessment is ‘partial’ until consultation has been carried out, and will then be published again, in final form, taking account of comments received during consultation.

## **PURPOSE AND INTENDED EFFECT**

### Background

2. Mesothelioma is a cancer of the cells that make up the lining around the outside of the lungs and inside of the ribs, or around the abdominal organs. It rarely develops in people who have never been exposed to asbestos. Mesothelioma does not usually develop until 20 - 40 years after exposure to asbestos. There is no cure for the asbestos-related disease of mesothelioma and once diagnosed, sufferers survive on average some 14 months. In the great majority of cases, the disease is associated with occupations where there was a greater likelihood of asbestos exposure, such as shipbuilding and construction. There are strong geographical concentrations around shipbuilding areas, centres of railway engineering, and asbestos plants.

3. Under the Damages (Scotland) Act 1976 where a person dies as a result of personal injury their relatives may be entitled to claim damages for patrimonial loss and/or non-patrimonial loss. Patrimonial damages are awarded for loss of financial support, while non-patrimonial damages are awarded in respect of:

- distress because of the suffering of the injured person before death;
- grief and sorrow at the death of injured person; and
- loss of deceased’s society and guidance.

4. Only those relatives who are members of the deceased’s immediate family can claim damages for non-patrimonial loss under section 1(4) of the 1976 Act. Section 35 of the Family Law (Scotland) Act 2006 (the 2006 Act) redefined which relatives of a deceased person should be entitled to sue for non-patrimonial loss under the 1976 Act. The table at Appendix A shows entitlement to claim non-patrimonial loss before and after commencement on 4 May 2006 of section 35 of the 2006 Act. It will be evident from the table that certain classes of relative (relatives by affinity) have lost their entitlement to claim, whilst others have newly acquired a right to claim. We cannot demonstrate the effect of these changes as there have been no cases so far before the Scottish courts involving immediate family who, prior to the 2006 Act, were unable to make a claim. However it seems reasonable to assume that the net effect of the changes introduced by the 2006 Act on levels of compensation paid to relatives for non-patrimonial loss will be neutral; and this RIA proceeds on that assumption.

5. Changes to the 1976 Act, through the Damages (Scotland) Act 1993 (the 1993 Act), allowed the executor to claim the sufferer's *solatium* (pain and suffering; expectation of loss of life) to the date of death after his or her death. Previously the claim for *solatium* died with the sufferer. The 1993 Act also amended section 1(4) of the 1976 Act to replace the previous loss of society award with 3 heads of claim (past and future) as set out in paragraph 3. These changes were designed to correct a previous wrong that awards to relatives were too low. Following these changes, the level of non-patrimonial loss payments has increased (see paragraph 8). Broadly speaking, payments under all other heads of claim are similar whether settlement is before or after the death of the sufferer. The section 1(4) damages constitute an additional amount paid to the immediate family only if the sufferer does not settle their claim prior to death.

6. The courts have recently substantially increased the amount of damages which they are prepared to award the relatives under section 1(4) of the 1976 Act. In 1992, the amounts awarded to a widow ranged from £5,500 to £12,500 and to a child from £600 to £10,500. However, recent awards of section 1(4) damages have increased from £20,000 to £28,000 to a widow and £5000 to £10,000 for an adult child and £3,000 to £10,000 for an elderly parent losing an adult son.

7. Under section 1(2) of the 1976 Act, relatives' claims for compensation for non-patrimonial loss are extinguished if the sufferer settles their own claim before death, even though the relatives' claims are for their own loss and suffering. If the sufferer does not settle their claim, the relatives (plus executor) can make claims and the total amount paid to the family can be substantially more than if the sufferer settles the claim before death. This poses a dilemma for mesothelioma sufferers in particular, who face certain but not immediate death. Some are choosing not to settle their claims in order not to deprive their families of the additional sums and are therefore foregoing the comforts which compensation might provide before they die.

### Objective

8. We propose to amend the 1976 Act to lift the restriction in section 1(2) of the Damages (Scotland) Act 1976 to allow the immediate family of the sufferer to claim damages for loss and suffering under section 1(4) of the 1976 Act (as amended by the 1993 and 2006 Acts) in any case where a person has sustained a personal injury consisting of asbestos-related mesothelioma, which makes their date of death earlier than it would have been had they not sustained the injury, and they subsequently die of that injury. The restriction would continue to apply to all other personal injury cases. We also propose that Scottish Ministers should have the power to extend the new provision to apply to other diseases or personal injuries if experience shows this to be necessary. These provisions will apply to all cases where the death of the mesothelioma sufferer occurs after the date on which the legislative provisions are brought into force. They will not affect cases settled before that date. Ministers propose that cases in progress (but not settled) at the date of commencement will be subject to this change.

### Rationale for government intervention

9. It is unacceptable that mesothelioma sufferers and their families should be faced with a choice between claiming compensation while the victim is alive or waiting until the victim dies so that the family is not disadvantaged.. There is no way other agencies can address the

problem because of the express provision in the current law for the relatives' claim to be extinguished if the mesothelioma sufferer settles before death.

## CONSULTATION

### Within government

10. The Scottish Executive Justice Department, which has policy responsibility for the law of damages, has consulted with the Scottish Law Commission and with the Enterprise, Transport and Lifelong Learning Department which has responsibility for business liaison including liaison with the financial services industry. [**Note: to be expanded following consultation**]

### Public consultation

11. A consultation paper issued on 7 July set out in detail the nature of the asbestos-related illness mesothelioma, the existing law, the problem with the existing law and the proposed solution. [**Note: to be expanded following consultation**]

## OPTIONS

### *Sectors & Groups affected*

12. As indicated earlier, mesothelioma is strongly associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries. Some of the victims have been employed at some point in their lives in one of the former nationalised industries. Detailed information on the distribution of cases, by size of firm and by geographical area, is sought through this RIA [**Note: to be expanded following consultation**] On the basis of information available at present, there is nothing to suggest that other groups, such as groups of individuals or charities, are affected by this proposal.

13. The options are essentially to make this change to the law in relation to relatives' damages claims or not to make it.

### *Option 1: Do nothing*

This would mean making no change to the law and leaving mesothelioma sufferers and their families in the predicament described earlier. The **costs** arising from this option are twofold. There is first of all the cost in human terms arising from the dilemma created by the operation of the current rule, and the distress to victims and families in having to reach a view about when and on what basis to enter claims. Secondly, there is the cost to families in terms of benefits foregone if victims do settle in life. The sums foregone are not trivial: they could make a substantial difference to the lives of immediate family who have lost a loved one. The **benefits** of this option are nil.

### *Option 2: Proceed with proposal*

The Executive considers the rule contained in the current legislation unduly harsh in its consequences for mesothelioma sufferers and their families. It believes that legislation is needed to address this problem.

### *Costs and benefits*

14. The benefit of the amendment described in paragraph 8 will be that people dying from mesothelioma and their families will no longer face the dilemma described in paragraph 5. Sufferers will be able to derive what comfort they can from compensation payments and families will not be denied compensation for their own grief and suffering after the person dies. Executive Ministers place a high value on securing these benefits for the families of sufferers.

15. The amendment will have implications for the insurance industry and some UK Government Departments who have responsibility for liabilities in relation to cases arising from exposure to asbestos during the claimants' employment in former nationalised industries. It will extend their liability, in mesothelioma cases, to a sufferer's immediate family even when the sufferer has settled their own claim while still alive.

16. The effect of the amendment will be that the amount of damages payable by defenders will increase. The prospect of defenders facing claims by relatives after the discharge of liability to the mesothelioma sufferer might have the effect of raising insurance premiums for policies covering liability for personal injury and death. However, currently, in the region of 80% of claimants already decide to wait and let their relatives pursue their claim after death and around one quarter of the remaining 20% who go ahead with their claim die before settlement. Additional costs should therefore only be incurred in relation to around 15% of claims. In other words, new costs arising from claims newly facilitated by the proposed change in legislation will only arise in some 15% of cases settled annually - which currently total around 100.

17. Latest available figures show that there were 197 cases of mesothelioma diagnosed in Scotland in 2003 and that in 2004 there were 161 deaths. Mortality rates are currently 4.8 per 100,000 in men and 0.4 per 100,000 in women. These rates are expected to increase over the next few years and it is predicted that they will peak some time between 2011 and 2015. Following this, indications are that the mortality rate will then decline.

18. In 2005 around 100 mesothelioma cases were settled. Of these, 85% included payments in respect of relatives' claims. The typical award to relatives was £72,500. Based on these figures the increased amount of damages payable per year is likely to be in the region of £1,087,500 (15 x £72,000) increasing each year until the anticipated peak between 2011 and 2015, as described in the accompanying consultation paper. The increased costs are likely to be split with around 85% of the cost falling to the insurance industry and around 15% to the state (i.e. the Government as the bearer of liabilities associated with former nationalised industries)<sup>1</sup>.

19. Where employers are insured, the impact of such additional claims will be felt on premiums. (The additional claims by victims' families will have no impact on any other employer costs nor will they give rise to any requirement for action on the part of employers.) In terms of overall insurance business covering liability for personal injury the sums

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<sup>1</sup> Figures in paragraph 17 were kindly provided by Thompsons Solicitors who have advised that they deal with between 80% and 90% of mesothelioma damages claims in Scotland. They have been extrapolated to cover Scotland as a whole.

projected to arise from additional claims are unlikely to be substantial but would benefit from more precise estimation through this consultation. Responses to this paper will help to estimate the likely effect of these increased costs on employers' liability insurance premiums. **[Note: to be completed after consultation]**

20. Compulsory employers' liability insurance was introduced in 1972. Where claims pre-date that the impact of additional claims will fall on solvent employers. Again, responses to this paper will help to estimate the likely effect of these increased costs on solvent employers.

### **SMALL FIRMS IMPACT TEST**

21. As far as we have been able to ascertain, the majority of mesothelioma cases arise mainly from employment in heavy industries (many now in decline or closed down) such as steelworks and shipbuilding. We have no reason to believe that the proposal will impact disproportionately on small firms – quite the reverse given the sectors most associated with the disease and the size of firms typically operating in those sectors. We have no evidence of any link between size of firm and the decisions reached by victims and their families about the timing of their claims; and we have no reason to suppose that the immediate family of victims who worked (for some or all of their working lives) in small firms will be any more likely to avail themselves of the proposed relaxation of the rules on relatives' claims than other families. As with their larger counterparts, small firms – to the small extent that they may be exposed to additional claims from relatives as a result of the proposed change – will experience the impact through insurance premiums. At the projected additional caseload of 15 extra claims set out in paragraphs 16 & 18 above, that impact is unlikely to be substantial. Full details could only be extracted from individual cases.

### **“TEST RUN” OF BUSINESS FORMS**

No business forms will be involved in the implementation of the proposed legislation.

### **COMPETITION ASSESSMENT**

22. It is not expected that the Bill proposals would have any impact on competition in the insurance industry. Employers' liability insurance has been compulsory since 1972 therefore there is already an element of competition in relation to employers seeking the best deal available. Insurance companies already operate in an environment where there are differences in the law of damages north and south of the border.

### **ENFORCEMENT, SANCTIONS AND MONITORING**

23. The new arrangements would be delivered through the courts (where parties are unable to reach an earlier and negotiated settlement), which will assess claims brought by eligible relatives under the rules as revised. There is no question of sanctions, since what is proposed are new entitlements, not duties. The Executive will review the impact of this legislation after 2 years. It will be important to discover if our projections as to the likely increase in number and value of claims are well founded; and to investigate whether the change in the rules surrounding relatives' claims has had any unexpected results.

Justice Department: Civil Law Division

## Appendix A

List of relatives and their respective entitlement to sue for **non-patrimonial** loss under the Damages (Scotland) Act 1976 for deaths occurring pre and post Commencement of Section 35 of the Family Law (Scotland) Act 2006.

**Death Pre 4 May 2006**

**Death on or after 4 May 2006**

<b>Surviving spouse</b>	Yes	Yes
<b>Former spouse</b>	No	No
<b>Surviving Civil Partner</b>	No	Yes
<b>Surviving opposite-sex cohabitant</b>	Yes	Yes
<b>Surviving same-sex cohabitant</b>	No	Yes
<b>Biological parent and child</b>	Yes	Yes
<b>Adoptive parent and child</b>	Yes	Yes
<b>Parent and child by virtue of a parental order</b>	Yes	Yes
<b>Step-parent and step-child</b>	Yes	No <sup>2</sup>
<b>Any person who accepted the deceased as a child of his or her family</b>	No	Yes
<b>Any person who was accepted by the deceased as a child of his or her family</b>	Yes	Yes
<b>Parent-in-law and child-in-law</b>	Yes	No
<b>Other relations by affinity</b>	No	No
<b>Brother and sister</b>	No	Yes
<b><i>De facto</i> brother and sister</b>	No	Yes
<b>Grandparent and Grandchild</b>	No	Yes
<b>Further ascendant and Descendant</b>	No	No
<b><i>De facto</i> grandparent and Grandchild</b>	No	No
<b>Uncle, aunt, niece, nephew and cousin</b>	No	No

<sup>2</sup> It is important to bear in mind that, while step-child and step-parent would no longer automatically be entitled to sue for non-patrimonial loss, where they were accepted by the deceased as a child of the family or where they accepted the deceased as a child of the family, they would have an entitlement to sue for non-patrimonial loss.

