Justice Committee
Courts Reform (Scotland) Bill

Written submission from Clydeside Action on Asbestos

“In our view, the Court of Session should deal only with most complex and important cases and that most routine litigation should be conducted in the Sheriff Court.”

Gill Report
September 2009

- Our members’ cases must fall into the definition of “the most complex and important cases” and must remain within the Court of Session.
- Our members must have a fighting chance against the deep pockets of the insurance industry which has done so much to deny them compensation over the past 20 years and continues to do so.
- Our members must have as much certainty and consistency that a legal system can offer.
- Our members must have access to experienced Advocates and Solicitor Advocates who have knowledge of this specialised area of Law.
- Our members must have swift access to justice at the highest level.

Clydeside Action on Asbestos is gravely concerned that the Civil Court reforms proposed in the Courts Reform Bill fail to address the specific difficulties raised by asbestos cases.

Approximately 95% of our members’ cases will have a value of less than £150,000. Regardless of value, the complexities are significant. Regardless of value, our members are elderly and suffering the effects of their asbestos related condition, with many facing a reduced life expectancy.

This submission seeks to highlight the complexities of asbestos related claims and the persistent efforts of the insurance industry to avoid liability. Asbestos related claims have generated an astonishing level of Supreme Court involvement which shows just how difficult the issues can be. There has also been significant legislation produced by both Westminster and Holyrood Governments, much of which seeks to improve the compensation available to those diagnosed with these dreadful diseases.

The following are some of the complex issues raised by asbestos related disease cases:

1. Employment History

The nature of these diseases means that the people affected were exposed to asbestos many years ago. Their memory of those days can be fading and there is little by way of documentary evidence prior to 1962. This can cause evidential problems in civil claims.
2. **Employers’ Liability Insurance**

Often, the employer who exposed the victim to asbestos is no longer in existence. If employers’ liability insurance cannot be traced for the exact period when the victim was working there, then there is no hope of compensation in relation to that exposure. Insurance records are scanty and employers’ liability insurance was not compulsory until 1972.

3. **Divisible Conditions**

Many of the asbestos related conditions are considered to be “divisible”. This means that the compensation is apportioned between the various employers who exposed the victim to asbestos. The various Defenders will spend significant amounts of time disputing the level of their respective shares which causes considerable delay in the resolution of the claims. In combination with the problems surrounding employers’ liability insurance, this can also result in greatly reduced levels of compensation.

4. **Medical diagnosis**

Diagnosis of asbestos related conditions is not always straightforward. Conditions such as pleural thickening and asbestosis can mimic other lung related disorders and there is frequently dispute between the medical experts as to diagnosis as well as the level of disability the asbestos related condition might be causing.

5. **Causation**

The most striking example of legal causation causing difficulties in asbestos related cases is in relation to asbestos related lung cancer. The medical evidence is highly complex and the legal approach is constantly developing. The victims are gravely ill and need swift resolution of their claims.

6. **Knowledge**

The dangers of asbestos have been known for decades however, the level of knowledge of the dangers increased significantly between 1945 and the present day. The issue of negligence is therefore an ever moving target and a fertile ground for dispute.

7. **Provisional/Full & Final**

The majority of asbestos victims are given the opportunity to settle their case on either a provisional or full and final basis. This is not an automatic right and falls ultimately to be determined by the Court, dependant on medical evidence of the likelihood of a worsening in the individual’s condition. This can be an exceptionally difficult area on which to give advice and the medical evidence can be exceptionally complex. Additional difficulties arise with provisional settlement because of a requirement for insurance which is not always in place given the historical nature of the exposure.
8. **Time-bar**

Time-bar is proving an increasingly difficult area in asbestos disease cases. Following the decision of the Court of Session in a case called *Aitchison v- Glasgow City Council*, if someone has decided for whatever reason not to make a claim for say pleural plaques and then more than 3 years later develops mesothelioma, they will be considered to be out of time. This is an utter travesty, particularly given that mesothelioma is an entirely different disease from pleural plaques. Unfortunately, the Scottish Government’s recent Bill on limitation has failed to address this issue. Victims are now reliant on the discretion of the Court being exercised to allow their claims to continue. Most of the case authorities are from the Court of Session which will bind a Sheriff Court and most of the case authorities are not in favour of the claimants. If time-bar is an issue in cases before a Sheriff then it seems increasingly likely that Appeals will be required until the matter is resolved.

The following are some of the attempts which have been made by the insurance industry to avoid payment of compensation over recent years. Note should be taken of how many issues were only finally resolved by the Supreme Court or through legislation. Hundreds of victims were kept waiting each time a new barrier went up. The legal disputes have been complex and novel.

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Title</th>
<th>Description</th>
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<tbody>
<tr>
<td>2002</td>
<td>Fairchild -v- Glenhaven Funeral Services Ltd</td>
<td>Attempt to deny compensation to mesothelioma victims on the basis that the exact asbestos fibre which caused the mesothelioma could not be identified. House of Lords rejected this argument.</td>
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<td>2006</td>
<td>Barker -v- Corus (UK) Ltd</td>
<td>Attempt to find each employer responsible for only their share of exposure in mesothelioma case. House of Lords upheld this argument. Intervention from the Westminster Government reversed it.</td>
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<td>2007</td>
<td>Rothwell -v- Chemical Insulating Company Ltd</td>
<td>Attempt to deny compensation to those with pleural plaques. House of Lords upheld this argument.</td>
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<td>2010</td>
<td>Aitchison -v- Glasgow City Council</td>
<td>Child abuse case resulting in significant difficulties for time-bar in asbestos related disease.</td>
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<td>2011</td>
<td>Sienkiewicz -v- Greif Nowssley Metropolitan Borough Council -v- Wilmore</td>
<td>Attempt to deny compensation to mesothelioma victims where their exposure to asbestos had been light and intermittent. Supreme Court rejected this argument.</td>
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<td>2012</td>
<td>Bavaird -v- South Lanarkshire Council Anton -v- South Lanarkshire Council</td>
<td>Attempts by local authorities to avoid liability on the basis that they did not take over the rights and liabilities of previous local government entities. Inner House of the...</td>
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<td>2012</td>
<td>Durham -v- BAI (in Run off) Limited (The Trigger Litigation)</td>
<td>Attempt to avoid insurance liability where the disease did not become apparent until a later date. Supreme Court found that the employers’ liability insurer at the time of the exposure must pay the compensation.</td>
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<td>2013</td>
<td>IEG -v- Zurich</td>
<td>Inter-insurer dispute as to which insurer should pay where only part cover during dates of exposure. Delaying settlement of many cases.</td>
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The following is legislation which has arisen after campaigning by Clydeside Action on Asbestos to improve the rights of asbestos victims in Scotland.

**Compensation Act 2006**

A UK wide act to allow that where one party is found to have materially contributed to the risk of another contracting mesothelioma, then that party could be held liable in full for the relevant compensation.

**Family Law (Scotland) Act 2006**

An act which extended the range of relatives who could claim in fatal cases, of significant relevance in asbestos claims.

**Rights of Relatives to Damages (Mesothelioma) Scotland Act 2007**

An act which enables mesothelioma victims to settle their claims in life and still preserves the rights of their family to make claims on their death from mesothelioma. Previously, if the victor were to settle his or her claim in life then the rights of the family members were lost.

**Damages (Asbestos Related Conditions) (Scotland) 2009**

An action reinstate the action ability of asbestos related pleural plaques and other symptomless asbestos related conditions following the decision in Rothwell (see above).

**Damages (Scotland) Act 2011**

An Act which sought to simplify the calculation of financial losses in fatal cases and to speed up the process overall of obtaining compensation.

It is worth mentioning at this stage that in mesothelioma cases it is likely often to be the case that the individual’s claim is worth less than £150,000. The victim’s claim is likely to be worth less than £150,000. If the victim where to die and his family claims were added to his own, then the value of the case is likely to exceed £150,000. In
order to secure representation by Counsel and to ensure that the case is heard in the Court of Session, the victim may need to make a decision on settling his case in life or waiting until he dies. This invidious choice is one which we successfully eradicated in Scotland through the 2007 Act. It seems to us it would be a tragedy should this choice be presented to dying victims yet again.

We understand that claimants will be able to request that their case be considered for remit to the Court of Session but for that to happen the Sheriff will have to concede that he or she is unable to deal with it. With the greatest of respect to Sheriffs we consider this would be a difficult decision to make. The Court of Session will also then have to agree to accept the case. This will all take time and money, of which our members have neither. Very few qualify for Legal Aid and their cases are taken on on a no win no fee basis which means that they might end up paying some of their legal fees out of their compensation.

We further consider that our members must have automatic access to Advocates and Solicitor Advocates in order to match the firepower of the insurers who have deep pockets and will ensure that they have the best representation they can buy. These cases are so specialised that expert lawyers are needed to ensure the best arguments are made before the Court. If sanction to pay the Advocates’ fees is not automatic, our members will be facing the prospect of paying out of their compensation to secure an even playing field.

Conclusion

The Court of Session serves our members sufficiently and justly. Those dying of mesothelioma can get a Hearing within a couple of months of going to Court. Those with other conditions are secure in the knowledge that they have the best representation before the best Judges available and that they will get a Hearing of sufficient length within less than a year of raising their case.

We welcome this opportunity to raise our concerns with the Justice Committee and trust that the Committee will recognise that all that has been achieved by the Scottish Parliament for the victims of asbestos is at real risk of being undermined should these proposals go through as they presently stand.

Clydeside Action on Asbestos
10 March 2014