

LEGAL FOCUS

UK MoJ distances itself from Scottish Parliament's ruling on pleural plaques

INSURANCE experts have welcomed Wednesday's publication of the UK Ministry of Justice's consultation paper regarding pleural plaques.

Charl Cronje, partner at consulting actuary Lane Clark & Peacock LLP, said: "As we hoped, commonsense has prevailed. The UK government is making it clear that it has no appetite for reversing the House of Lords judgment, citing 'implications for the fundamental integrity of the law of negligence'.

"Instead, it is proposing to improve education and understanding of the nature of pleural plaques. This should help to counteract some of the scare-mongering of recent years, which has probably caused unnecessary anxiety for those affected by the condition."

The insurance industry has been holding its breath since the Scottish Bill on June 23, which arbitrarily reversed the House of

Lords judgment. UK prime minister Gordon Brown's remarks in the Commons over the past few months, however, have been carefully worded and the consultation has a similar measured tone.

The government's response to this complex issue is level-headed and the paper distances itself from the Scottish approach, which is now left looking rather like an act of political grandstanding.

The government has commissioned a further review of the medical evidence surrounding pleural plaques. This is possibly an attempt finally to close the book on this issue. The government has also said that it is open to ideas for establishing "no fault" compensation schemes but is careful to state that there may be significant obstacles to the viability of such schemes.

After the Scottish decision last month, UK loss adjuster Garwyn was among the insur-



Scottish Parliament: controversial Bill on pleural plaques has been snubbed by the government

ance industry players to raise serious concerns about the Scottish Parliament's Bill, which will overturn the landmark decision by the House of Lords on retrospective pleural plaque claims.

Neil Hackett, manager of Garwyn's disease and industry claims unit, said: "It is sad to see politicians riding roughshod over carefully considered legal arguments. The MSP's are med-

dling with the independence of the highest court and will be debating this legislation without full knowledge of the issues.

"South of the border, Bridget Prentice had said that the Min-

istry of Justice would not legislate or risk meddling with the fundamental aspects of the law of negligence. However, I suspect if there is such legislation in Scotland providing retrospective entitlement to damages for plaques, an inequality between England and Wales and Scottish law will make it difficult for the government politically.

"If pleural plaques once again became compensatable, this could have a hugely negative impact on the funds available for other claims.

"For example, a run-off insurer may have the reserves to cope with genuine mesothelioma claims but if it also has to compensate the 'worried well', those reserves could be depleted significantly with the consequence that when mesothelioma claims are to be met, the funds may not be available to the victims and their families."

Addleshaw Goddard unveils its Contro£ dispute funding solution

ANECDOTAL reports concerning the costs of English litigation have not been exaggerated: it is a very (very) expensive process. Insurers should know.

As lawyers from Addleshaw Goddard explain, whether defending claims or pursuing subrogated recovery actions, the insurance industry spends a very significant amount each year on legal advice.

Often, however, it is not only the amount of the legal spend that causes concern but also the tendency for costs to spiral beyond what was initially contemplated. Unbudgeted or under-estimated legal expense can be a very real nightmare for any claims manager, in-house counsel or finance director.

Furthermore, no matter how good the advice regarding the merits of any case might be, ultimately, there is a binary outcome: you win or you lose. In short, uncertainty is all-pervading.

Alongside this inherent unpredictability, and perhaps as a direct result, there have been increasing calls on the legal profession, when it comes to invoicing costs, to be much more imaginative than the apparently universal default to the use of hourly rates.

The recent launch by City lawyers Addle-

shaw Goddard of "Contro£" – a dispute funding solution – may, however, signal a sea change in the pricing of legal services in relation to commercial dispute resolution.

Through Contro£, Addleshaw Goddard is bringing together a basket of dispute funding techniques: conditional fee agreements (CFAs), after-the-event (ATE) insurance and third-party litigation funding (TPLF). Further information can be found at www.fundingcontrol.co.uk/

Whether used separately or in combination, these funding techniques assist in transferring to third parties the cost risk of disputes, as well as managing and reducing retained dispute cost exposure.

Given the right case, Addleshaw Goddard considers that it is possible to reduce such exposure to zero. On the defendant side, new "risk swap" or outcome hedging products are also beginning to appear, such that a

potential liability exposure can be transferred to a third party for a fixed amount.

Much of this recent development has been driven by the capital markets identifying legal disputes as potential lucrative investment opportunities. At the more speculative end of the investment spectrum – albeit that the funders tend to only back cases with good prospects – the rewards can be significant, however.

Given insurers' (and reinsurers') exposure to disputes and the associated risks and costs, there is every incentive to explore these risk transfer and outcome hedging opportunities. Whether utilised or not as a means of reducing exposure across a book of disputes and claims, insurers will, at the very least, now need to educate themselves as to what funding products are available.

As the co-operation between the lawyers and the capital markets grows, a new type of claimant is emerging: one that is not paying any of its own costs (CFA and TPFL); and one that is not exposed (ATE) to the costs of losing. How defence strategies and tactics adapt, and how the dynamics of any dispute are affected, are questions that are, as yet, unanswered.

Mopani case raises interpretation issues

THE recent English High Court case of *Mopani Copper Mines v Millennium Underwriting* raised some interesting points on the interpretation of insurance policies, reports Peter Hirst, a partner in the (re)insurance department, and Michelle Radom, a professional support lawyer in the (re)insurance and litigation department, at Clyde & Co.

The insured was undertaking a construction project in Zambia and took out a construction/erection all-risks (CAR/EAR) policy, which was reinsured in London. Following losses that occurred when the plant had become operational, a dispute arose as to whether those losses were covered.

The reinsurance policy was contained in a slip (and endorsement) and there was considerable debate in this case as to what material was admissible as a guide to interpretation of the slip.

Court considers issues

Two issues that the court considered were:

- 1) The type of policy and what it was meant to cover. There is now an increasing trend in English cases for judges to look at the commercial purpose of a policy (and this can sometimes even override the express wording of the policy – an example of which is the recent case of *Tesco Stores v Constable*). In *Mopani*, the judge recognised a clear distinction between CAR/EAR

policies (intended usually to cover only the period of construction plus a short period thereafter for testing and commissioning) and property insurance policies, which should ordinarily be taken out when the site is no longer an active building site. The judge concluded that if the insured in this case had wanted cover after the construction phase had been completed, it ought to have negotiated that additional cover and paid a further premium.

- 2) Agreements between the parties prior to the final slip. In this case, an earlier scratched slip had deleted the words "cover extends to include operational all risks for completed phases of the project". These words had been deleted by being struck through with a pen, but had remained readable. The judge held that it was legitimate for him to look at the deleted words, because they demonstrated what the parties had agreed that they did not agree. Although the words "operational all risks" did appear elsewhere on the final version of the slip, the judge said that that had clearly been an error and those words should have been deleted too, in order to avoid a mismatch.

Care should therefore be taken when words are deleted from a slip. If they remain readable they could be used by the courts to interpret what the parties have agreed.

