



Law Society
of Scotland

Written evidence

Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill

Evidence to the Scottish Parliament's Health and Sport Committee

September 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Civil Justice committee welcome the opportunity to consider and provide written evidence to the Scottish Parliament's Health and Sport Committee¹ on the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill.² We have the following comments to put forward for consideration.

General Comments

We agree that as a matter of generality, NHS charges should be recoverable in cases where a "compensator" has been identified. This is akin to the 'polluter pays' principle.

We note that steps have been taken in drafting the Bill to exclude provisions directly relating to insurance, which is a reserved matter.³ A provision is outside the legislative competence of the Scottish Parliament so far as it relates to reserved matters.⁴ The question of whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined by reference to the purpose of the provision.⁵ Whilst we note that the stated purpose of the Bill as introduced relates to devolved matters, we also note that the proposed amendments to the Health and Social Care (Community Health and Standards) Act 2003 are not at present drafted in such a way as to apply only in Scotland. Care must be taken to ensure that the Bill remains within the legislative competence of the Scottish Parliament.

1 <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115777.aspx>

2

https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65S052020.pdf

3

https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65PMS052020.pdf at para 10

4 Scotland Act 1998, s29(2)

5 Scotland Act 1998, s29(3)

Whilst we understand the rationale for excluding any retrospective effect, the practical consequence of this is that NHS charges will not be recoverable in relation to historic industrial disease claims, including the many historic asbestos-related claims. Whilst this will not impact adversely on individual Pursuers, it may mean that any practical positive financial impact on the NHS is limited. We also have concerns regarding the potential for complex apportionment exercises, which we have addressed further below.

We note that the Financial Memorandum accompanying the Bill makes reference to the ‘cap’ on the amount that can be recovered in NHS charges for any one injury (currently £53,278).⁶ However, we would have concerns regarding possible situations where the low value of the claim may be disproportionate to the high cost of NHS charges. Whilst many cases of industrial disease leading to significant NHS charges are in themselves high value claims, this is not necessarily always the case. We are concerned that disputes regarding NHS charges may be more likely to arise where such charges are disproportionate to the value of the claim, and that this may lead to delays in settlement whilst such disputes are resolved.

1. How will the Bill lead to improved working conditions, and health and safety practices, in workplaces?

We have no comments to make.

2. How will the Bill help prevent industrial diseases in the future?

We have no comments to make.

3. What impacts will the Bill have on the following:

Individuals

We note that the purpose of the Bill is to allow the Scottish Government to recover the cost of treating industrial diseases in National Health Service hospitals in cases where there is already a “compensator”.⁷ In this respect, the Bill will have neither a positive nor a negative impact on individuals who pursue claims

⁶
https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65FMS052020.pdf at para 27

⁷
https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65PMS052020.pdf at para 3

for compensation in respect of industrial disease (“Pursuers”). The Bill does not affect the level of damages which will ultimately be paid to Pursuers.

There is a potential negative impact on Pursuers if disagreements regarding apportionment of liability and damages lead to delays in making payments to individuals. Where there are multiple Defenders or insurers involved there is very often disagreement between them over apportionment of liability and damages. This can lead to insurers appealing the certificates issued by the DWP outlining what has to be repaid by way of NHS charges and that can result in months of a delay. Whilst it is important that appeal processes are available, it is appropriate that safeguards are in place to avoid prejudice to the Pursuer arising from disputes between Defenders and Insurers.

NHS boards

We note that one of the policy objectives of the Bill is to “to reduce the burden on the taxpayer-funded NHS (freeing up resources for others in need of treatment)”.⁸ As above, whilst we agree that it is appropriate that NHS charges should be recoverable in cases where a “compensator” has been identified, we are not best placed to comment on whether the Bill will meet this objective. As above, the lack of retrospective effect is likely to mean that any positive financial impact on NHS Boards will be limited.

Workplaces

We note that one of the policy objectives of the Bill is to “incentivise employers to improve working conditions, particularly in hazardous industries, and to take a more precautionary approach in respect of working conditions that could in future turn out to be the cause of industrial diseases”.⁹ We are not best placed to comment on whether the Bill will meet this objective.

Insurance

We note the terms of Section 3 of the Bill, which disapplies Section 164 of the Health and Social Care (Community Health and Standards) Act 2003 in industrial disease cases. Accordingly, we note that the Bill will have no direct impact on insurance law.

⁸

https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65PMS052020.pdf at para 4

⁹ Ibid at para 4

The insurance sector will be better placed to comment on the likely impact of the demand for additional insurance cover envisaged in the Financial Memorandum¹⁰ and Explanatory Notes¹¹ accompanying the Bill.

¹⁰
https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65FMS052020.pdf at para 46-49

¹¹
https://www.parliament.scot/S5_Bills/Liability%20for%20NHS%20Charges%20Treatment%20of%20Industrial%20Disease%20Scotland%20Bill/SPBill65ENS052020.pdf Para 22-24

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