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Insurance and Reinsurance Newsflash

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Pleural Plaques: Scottish Court declines to set aside legislation to make pleural plaques actionable

**Opinion of Lord Emslie
In the Petition of
AXA GENERAL INSURANCE LIMITED, and others
for Judicial Review of the Damages (Asbestos-related
Conditions) (Scotland) Act 2009 [2010] CSOH 2**

(Click [here](#) to see judgment in full on the Scottish Courts website)

Background

The Act

The Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the Act") was passed by the Scottish Parliament on 11 March 2009, received the Royal Assent on 17 April 2009, and came into force on 17 June 2009. It was passed to allow people with pleural plaques to seek compensation from their former employers in certain circumstances. The Scottish Parliament reached the conclusion that although pleural plaques are generally symptomless, the resulting scarring on the lungs is a physical palpable change and one that signals exposure to asbestos, which itself gives rise to a greater risk of developing more serious conditions such as mesothelioma. Individuals diagnosed with asymptomatic plaques can also suffer a great deal of anxiety as a result of the fear that they may develop a more serious asbestos-related illness.

The Act was passed in order to reverse the decision of the House of Lords in *Rothwell v. Chemical & Insulating Co. Ltd.* [2008] 1 AC 281 as applied in Scotland. In the 20 years or more before *Rothwell*, employers and insurers had routinely settled claims for asymptomatic pleural plaques. In *Rothwell*, they changed their approach and denied the claims entirely. The House of Lords held that asymptomatic pleural plaques, areas of fibrous thickening of the pleural membrane surrounding the lungs ("plaques") resulting from exposure to asbestos, do not constitute damage capable of giving rise to a cause of action in damages for negligence, even when aggregated with consequent anxiety and increased risks of future illness.

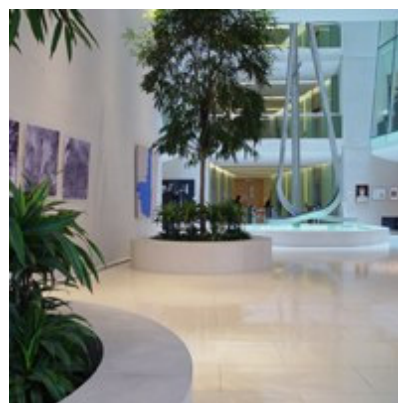
The insurers' challenge

Following the Royal Assent given to the Act, a number of insurers alleged that the Act was outwith the legislative competence of the Scottish Parliament, as incompatible with Article 6 of the European Convention on Human Rights (the "Convention") (right to a fair trial) and Article 1 of the First Protocol thereto ("A1P1") (protection of property).

The insurers also challenged the Act on grounds of irrationality, or so-called "*Wednesbury* unreasonableness" (after the leading case on the point), and arbitrariness.

The challenge based on the Convention was made under Article 6 and A1P1. It was said that these cases, or at least this issue in these cases, were being decided not by an independent and impartial tribunal established by law, as required by Article 6 of the Convention, but by legislative *fiat*.

Further, the insurers said, since an established claim is a "possession" for the purpose of A1P1, so is it a clearly established defence. The effect of the Act was said to be to deprive the insureds of a defence at common law or a legitimate expectation that they would succeed in defeating the claim.



Contacts

Peter Taylor
peter.taylor@lovells.com
+44 (0) 20 7296 5197

Sara Bradstock
sara.bradstock@lovells.com
+44 (0) 20 7296 2518

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Where to now?

On a proper analysis, said the insurers, there was no public or general interest sufficient to justify overriding their Convention rights.

In April 2009, the insurers sought interim interdict to prevent the Act coming into force before their challenge to its validity could be heard and determined. That petition was refused and the Act came into force on 17 June 2009. The case proceeded to a full hearing which has now, finally, come to end with judgement being given in favour of the legislature.

Commentary

The legal issues

A lively debate about the petitioners' locus standi to bring the challenges at all took up quite a lot of the Court's time.

Not everyone is recognised by the Convention as having the right to complain. Could the insurers portray themselves as the "victims"?

There was also a potentially volatile and nationalistic issue ("*competency of the challenge*") as to whether an Act of the Scottish Parliament could be assailed at all.

After all, if "*Westminster*" primary legislation was not capable (save in *extremis*) of challenge by the Courts, why should Holyrood be regarded as some form of colonial delegate legislature?

Also, did the Convention allow persons at one (or more) remove from the real actions, such as an insurer of the affected party, themselves to have a right to invoke the Convention rights under Article 6?

In the event, the Court agreed that even "*mere insurers*" had a sufficient *live and practical interest* in the complaint to be heard.

Moreover, the Scottish Parliament and even its primary legislation were not of equal stature with those of Westminster, however much certain sections of the Scots population might wish it to be otherwise.

Insurers' challenge on grounds of irrationality was possible ("*competent*"); but was it justified on the merits?

The debate on these fascinating (to lawyers) technicalities served to highlight some key factors which then played a role in the argument on the merits.

The Court found it significant that no employers had challenged the legislation. One was alleged to be holding out the possibility of doing so, as a second bite at the cherry, if insurers failed in their challenge; Lord Emslie gave that rather fond hope short shrift (para 65).

As non-parties to the actual cases that were said to be affected by the challenge, the insurers could make no claim to protection under Article 6 of the Convention.

But they were entitled to be heard on the other grounds.

The financial implications and a real "order of magnitude" of deviation between the lower and the higher end estimates of exposure also figured large in this debate (see below for the numbers).

Having cut through the complex technicalities of standing and entitlement to be heard at all, in a manner favourable to the insurers, the Court then proceeded to demolish their petition on the merits.

Summary of conclusions

When dealing with the merits of the allegations, the Court said that it had at various stages entertained a degree of sympathy with the petitioners' arguments; they were certainly not without substance; and they seemed to have had a rather rough ride at the hands of some of the more enthusiastic promoters of the Bill - but in the end, their grievances all failed, in the face of the principle that a legislature - even one of lesser rank than the mother Parliament in Westminster - was entitled to disagree with a legal decision (especially an English one) and to legislate to change the law or to clarify the position in the interests of the public at large.

The actions of the Scottish Parliament were in no sense disproportionate or excessive.

"In the Parliament's view pleural plaques did not deserve to be treated as a trivial consequence of asbestos exposure. They had not been so treated in the past when many awards of damages had been made, and they should not be deemed trivial or de minimis for the future." (para 205).

Insurers' specific allegations

Turning now to each of the specific grievances raised:

The petitioning insurers, Axa, Norwich Union/Aviva, RSA and Zurich, contended that:

(i) *Premature decision to legislate:*

In reaching a firm decision to legislate in advance of any process of policy formulation, consultation or assessment, the Scottish Government had abused its legislative discretion.

(ii) *Controverting established fact or legal principle:*

By declaring harmless and asymptomatic pleural plaques to be "... a personal injury which is not negligible", the Act **irrationally controverted established fact or, alternatively, legal principle.**

(iii) *Irrational generosity:*

This was **an exercise in irrational generosity**, not only in favour of **a small group who had sustained no harm, but also in favour of the firm of solicitors by whom the legislation was promoted.**

(iv) *Unconscionable burden on private insurers:*

Without any offer of compensation, the private funds of **insurance companies had been targeted to fund public philanthropy.**

(v) *Alleged "reconfiguration" of policies:*

Policies had retrospectively been "**reconfigured**" so as to cover liabilities which were not initially in contemplation and for which no premiums were taken.

(vi) *Deliberate concealment of a key objective of the Act:*

As evidenced by a letter from the Scottish Government of 28 November 2008, an essential objective of this Act, namely the engagement of past insurance arrangements, had been **deliberately concealed** during the legislative process.

(vii) *Unresolved financial uncertainties:*

Massive **unresolved uncertainties as to the financial impact** of this legislation had unconscionably left insurers (including those standing in for insolvent colleagues under the Financial Services Compensation Scheme) facing **potential liabilities running into billions of pounds.**

(viii) *Jurisdiction and forum shopping:*

Since it applied to Scotland only, the Act created a **potential for forum shopping** which standard procedural safeguards were unlikely to restrain.

The Court's rulings

The Court found that:

"individually and collectively, the petitioners' contentions ...fall short of what would be required to justify reduction of a primary Act of the Scottish Parliament. Properly analysed, they do not ...come close to meeting the "... extremes of bad faith, improper motive or manifest absurdity" nor the traditional standard of "Wednesbury unreasonableness"

"...if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. ... but to prove a case of that kind would require something overwhelming...": Wednesbury, per Lord Greene MR at p. 230 ...

"Wednesbury unreasonableness"... applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The Scottish Parliament was allowed a "*discretionary area of judgment*", especially where political, social and economic considerations are in play.

Premature decision to legislate:

- This was, said the Court, more a complaint against the Scottish Government promoting the Bill than against the Parliament itself. By the time the Parliament finally voted to pass the Bill in March 2009, issues of policy had been widely considered and disclosed; interested parties, including the petitioners, had been consulted and afforded an opportunity to comment on the proposals; evidence was taken from inter alios insurers' representatives as the Bill progressed; and the financial aspects were the subject of ongoing assessment from at least February 2008 onwards. The Court was unable to accept that over the period following its introduction in June 2008 the Bill received inadequate consideration, or that the Parliament could properly be charged

with abusing its legislative discretion in this regard. Significantly, it was not until November 2008 that the general principles of the legislation were formally debated and approved.

Further, a failure to follow normal parliamentary consultation and assessment procedures, would be irrelevant, "procedural invalidity" being statutorily excluded as a legitimate ground of review.

The insurers' complaint came "*nowhere near 'manifest absurdity'*"; and the petitioners did not overtly accuse the Parliament of bad faith or of having legislated from some improper motive.

Controverting established fact or legal principle:

- In deciding to legislate on the actionability of pleural plaques, the Parliament plainly took a different view from the House of Lords in *Rothwell*. Whether, in all the circumstances, pleural plaques should be regarded as a trivial or negligible consequence of asbestos exposure, thus failing to qualify as "damage" or "harm" for the purposes of a cause of action in delict, was a value judgment as to the seriousness with which pleural plaques should be regarded, and one which the Parliament was entitled to consider from the standpoint of its own knowledge of the social and economic evils flowing from asbestos-related conditions within Scotland's communities.

Alternatively, the Parliament was addressing questions of mixed fact and law on which courts had come to different conclusions since at least 1984. It was not, as the petitioners had insisted, just seeking to turn established fact on its head and declare black to be white.

A legislature was quite entitled to depart from the general trend of the common law: a classic example was section 8(6) of the Prevention of Harassment Act 1997 which made free-standing anxiety actionable - in certain limited cases - at a time when the common law was moving in the opposite direction.

Irrational generosity:

- To make and shape law is a primary function of any legislature, especially where existing rules and principles are perceived as unsatisfactory or unfair. Controversy had arisen after a period of some 20 years during which the legal actionability of pleural plaques had been judicially affirmed and then conceded by the UK insurance industry. Even the *Rothwell* decision contained indications from their Lordships of a measure of regret that claimants might be left without a remedy. The petitioners' argument that pleural plaques claimants "... have suffered no harm" was too rigid an approach. The Scottish Parliament had taken a different view on a matter of mixed fact and law, creating a statutory cause of action for affected individuals, and that was a course which it was entitled to take.

Parliament's "generosity" was limited to removing a bar or hindrance in connection with the threshold requirements for a cause of action. Otherwise the fate of pleural plaques claims was left to be determined by the courts in the ordinary way. The position of defenders was not mentioned, nor was any contractual or other relationship which they might have with insurers or other third parties. No transfer or appropriation of funds or property was provided for. In short, the Act essentially re-affirmed the pre-*Rothwell* status quo, with damages claims being allowed to proceed against those allegedly responsible (whether solvent or insolvent, insured or uninsured, or in the public or private sector).

So far as the involvement of Messrs Thompsons, solicitors, went, the Act did not actually give them anything. There was no guarantee that the work would remain with them, or that they would not actually earn their remuneration by the normal course of investigative and preparatory work. The Act left all that to be regulated by market forces.

As regards the "prominent role" which Messrs Thompsons and others were allowed to play in the genesis of the 2009 Act, lobbying was a legitimate part of the political process. Moreover, the decision to introduce a Bill before the Parliament could be taken only by the Scottish Government; passing the Bill was in the hands of the Parliament alone; the solicitors were plainly advancing their many clients' interests as well as their own; and the fees involved would relate to work necessarily arising in individual cases.

During the progress of the Bill the Scottish Government was in any event receiving advice from its own Legal Directorate, and furthermore all cost estimates included fees incurred on the defenders' side as well. For all of these reasons, no question of irrational generosity arose in the case.

Unconscionable burden on private insurers:

- The thinking behind this part of the petitioners' argument was seen by the Court as simply that state generosity should be paid for out of public funds, and conversely that victims of state appropriation should be compensated. The Court felt that it was unrealistic to talk of compensating a negligent party found liable in damages, or of burdening the public purse with such liability instead.

If there was nothing irrational or outrageous about holding a negligent party liable in damages for resultant harm, it was hard to see why the same liability

should suddenly become irrational and outrageous where the party concerned happened to be insured.

In neither case was the State appropriating funds or property from anyone. A *fortiori*, solvent insurers standing in for insolvent colleagues under regulatory arrangements were even further removed from the reach of the legislation than those who actually undertook to indemnify employers against legal liability in the first place.

The petitioners' arguments might have a certain "superficial attraction", but the Court felt that they failed to take proper account of the realities of the situation. It was only by ignoring (i) the primary legal liability of negligent parties to pay damages for relevant harm, (ii) the remoter (and so far unconfirmed) contractual basis for any involvement of indemnity insurers, (iii) the even more remote regulatory basis on which solvent insurers stand in for insolvent colleagues, and (iv) the absence of any State appropriation of funds or property from anyone that the notion of an unconscionable burden inflicted on insurers would appear to have arisen.

Alleged "reconfiguration" of policies:

- The Court felt that this was a problem for the insurers, and if the law evolved, then policies drafted with an eye to the general law would have to evolve with that law. In *Lymington Marina Ltd v MacNamara & Others* 2007 2 AER (Comm) 825. In the latter case, Arden LJ (at para. 33) said:

"In my judgment there can be no necessary implication that, where parties come to an agreement, that agreement must be interpreted on the basis of the law as it stood when the agreement was made as if it were in some time warp. It is part of the factual matrix known to both parties that both statute law and the common law develop over time. ... If the parties have been content to leave a matter to the general law, they must be taken to have agreed that their agreement should be interpreted in the light of the general law from time to time."

The Court declined to speculate as to whether the 2009 Act actually did engage particular policies written under different conditions in the past.

Deliberate concealment of a key objective of the Act:

- The Court was not persuaded that any such concealment occurred. It was clear that insurers would continue to pay damages for which their insured were found liable in much the same way as they had done in the pre-*Rothwell* period.

Unresolved financial uncertainties:

- On the assumption that the petitioners' policies were "caught", by section 4 (2) or otherwise, there was nothing irrational or outrageous about the Parliament's reluctance to prolong what had proved to be a fruitless quest for precision in the estimated number and value of future damages claims.

Jurisdiction and forum shopping:

- The Court noted that parallel legislation was pending at various stages in England, Wales and Northern Ireland. But even if that did not happen, issues of jurisdiction would fall to be regulated by the courts along ordinary lines, and any plea of *forum non conveniens* would require to be considered on its particular merits.

The Court was unable to accept that the petitioners' complaints, either individually or collectively, came anywhere near the standard of "irrationality" which would be necessary in order to invalidate a primary Act of the Scottish Parliament.

The implications for insurers and reinsurers

The insurers' complaints ultimately came down to the issue of principle about allegedly compensating undamaged people - on which parliament simply took a different view of the effect and seriousness of the lesions represented by the pleural plaques, and, inevitably: **money** - which was an issue compounded by the uncertainties which bedevil the resolution of such wide-spread, long-latent and insidious diseases.

The estimates that were proffered to the Court were wildly variant.

Insurers (according to the Court) were reluctant to give away any commercially sensitive detail about their own reserving and capital impairment resulting from the revival of the actionability of pleural plaques. The estimates that were made available were acknowledged to uncertain, and probably wrong, whichever way they were taken.

The debate therefore proceeded in quite a rarefied, and occasionally apocalyptic atmosphere regarding the net effect of the Act.

The value of the claims that had been stayed ("*sisted*") awaiting the outcome of the petition was calculable, and just over £10million. The potential for acceleration of claims levels and numbers was however very real.

The Government estimated the cost of **existing** claims for Scotland to be **£17.125 million**, with an **annual** cost thereafter of **£5.5 - 6 million**.

Insurers however, suggested (para 34) that the annual cost in Scotland would be **between £76 million and £607 million**.

The total cost in Scotland could be **as high as £8.6 billion**, and the UK figure for pleural plaques **potentially as high as £28.64 billion**.

The case presented on behalf of the legislature was not improved (but equally was not materially impaired, in the Court's view) by some rather cutting remarks by the Minister promoting the Bill to the effect that from what he saw of insurance companies' profits, they could afford it...

The Court concluded that, faced with an inexact science with massive uncertainties, it was not irrational for the Parliament to have called a halt to the quest for certain figures. The outcome was "by no means ideal", but not a ground to impugn the legislature's decisions.

Where to now?

The insurers are said to be considering an appeal.

How far that will go may depend in part on the likelihood of whichever Government is in power at Westminster passing parallel legislation - along the same sort of lines as the reversal of Fairchild by the Compensation Act. If that should occur, then *Rothwell* will be history; the decision of the primary and sovereign (sed quaere) legislative entity will be far less susceptible to attack on grounds of subordinate powers; and more importantly for the insurance industry, the rather wildly varying estimates of exposure to loss which were canvassed in argument will begin to take on concrete - and no doubt disturbing - characteristics.

At Prime Minister's Question-time on 6th January 2010, just two days before the emergence of the decision of the Outer House in Scotland, Gordon Brown, in a response to a Question from David Anderson (Blaydon, Lab) indicated that it was his intention to "*get a resolution to what is a very dreadful disease-asbestosis-and what we can do about it, and also to deal with the problem that arises from pleural plaques.*"

The backlash from the insurers' failed challenge in Scotland may yet produce something approaching a resolution to a perennial and ever-more pressing problem.

Whether the resolution apparently being contemplated by the Prime Minister is more in favour of the insurance industry than of the claimants remains to be seen.

But with £29 billion allegedly riding on just this one - asymptomatic and "harmless" - part of the asbestos disease problem, any solution is probably better than none.

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