



SCOTTISH COURT RULES THAT COMPENSATION IS PAYABLE IN PLEURAL PLAQUES CASES

**Axa General Insurance Limited and others
v (1) The Lord Advocate, as representing
Scottish Ministers; (2) The Advocate General
for Scotland and (3)-(10) Daniel Fleming and
others [2011] CSIH 31 P490/09**

London

Paris

Rouen

Brussels

Geneva

Piraeus

Dubai

Hong Kong

Shanghai

Singapore

Melbourne

Sydney

The Scottish Inner Court of Session ruled on 12 April 2011 that the Damages (Asbestos Related Conditions) (Scotland) Act 2009 (the “Act”) was within the powers of the Scottish Parliament, despite being inconsistent with a decision of the UK House of Lords (now the Supreme Court) in the conjoined cases known as *Rothwell v Chemical Insulating Co Ltd* [2008] 1 AC 281.

The Act provides that certain asbestos-related conditions, including pleural plaques (scarring to the lining of the lungs, caused by exposure to asbestos fibres) constitute an actionable personal injury, despite pleural plaques being asymptomatic and not directly leading to more serious asbestos-related diseases, such as mesothelioma, lung cancer or asbestosis. This is not the position in England and Wales, where claims for pleural plaques alone will not succeed,

and was not the position at common law in Scotland, prior to the Act.

The decision, a judicial review of the Act following appeal, is estimated to cost the insurance industry millions, if not billions, of pounds. The Association of British Insurers (“ABI”) has already indicated that the insurers that appealed the earlier ruling - Axa General Insurance Ltd, Aviva, RSA Insurance and Zurich UK - will now take the case to the Supreme Court. The Scottish Court accepted that there is room for differences of opinion as to whether the Scottish Parliament is correct to legislate in a way which overturns a House of Lords decision, and it remains to be seen whether the Supreme Court agrees.

The insurers’ appeal was on the basis that the Act is irrational, disproportionate and in contravention of the European Convention on Human Rights (arguing that the Act interfered with their assets and capital reserves, and that such an interference could not be justified on the grounds of public interest). The Court disagreed that the Act was irrational and disproportionate,



and did not, in any event, accept that irrationality was a proper ground for reviewing an Act passed by the Scottish Parliament. It did accept that the Act was an interference with insurers' property rights, but found that the Scottish Parliament had chosen to pass the Act in order to remedy what is perceived to be a social injustice, and thus it was proportionately pursuing a legitimate aim in the public interest.

Insurers' reaction

The insurers argued that the total cost to insurers would be more than £1.1bn, and could possibly be as much as £8.6bn. The Scottish government has put this cost at between £7m and £19m over the next ten years, and the insurance industry has estimated that the cost over the next 20 years will be between £76m and £607m. According to estimates, there are around 1,000 pleural plaques cases in Scotland (principally shipyard and construction workers) which have been stayed pending the results of this hearing, and with simpler cases expected to be worth £10,000 to £25,000 each, it is likely that the total costs of this decision will be substantial. The insurers, however, remain hopeful that the Supreme Court will overturn this decision, as there was little surprise that a Scottish court did not overturn a Scottish Act of Parliament.

The ABI has stated that the Act is "fundamentally flawed" as it does not take into account the overwhelming medical evidence that pleural plaques are asymptomatic and (save in exceptional cases) do not impact on quality of life, and it ignores the principle that compensation should only be given when there is physical harm. The ABI stated that "insurers remain committed to paying

compensation and pay out £200m a year to those with asbestos-related conditions that impact on health, like mesothelioma".

Impact on future claims

Pleural plaques is a condition of which many claimants are unaware until they receive treatment for another condition, or until claimant law firms actively look for potential claimants who have been exposed to asbestos. There is now a concern that this ruling will open the floodgates to more claims, and that it might influence the current settled position in England and Wales.

Thompsons Solicitors, acting for the third to tenth Respondents (and who also act for claimants in around 90% of Scottish pleural plaques cases), commented that the decision "recognised the democratic right" of the Scottish Parliament to act for its citizens. Head of asbestos policy Ian McFall said to PostOnline, the online insurance news website, that "this means, in Scotland, the rights of people with pleural plaques are regarded as more important than the commercial interests of insurers, which is how it ought to be. Unfortunately, this changes nothing for pleural plaques sufferers in England and Wales and leaves only the Westminster

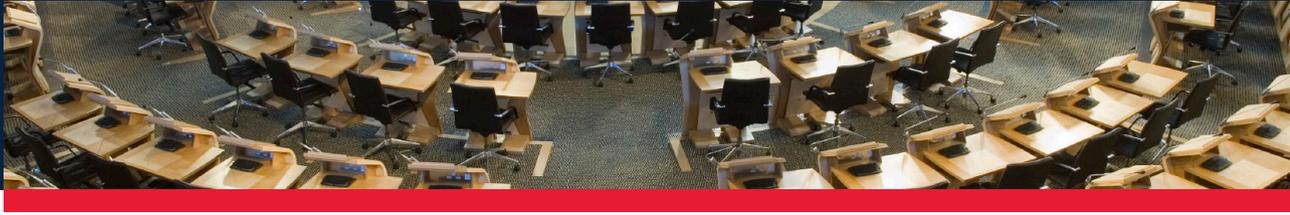
Government stubbornly refusing to act." It is likely that claimant solicitors and trade unions will continue to lobby for change south of the border.

In the meantime, the decision opens up the possibility of forum shopping, encouraging claimants in England and Wales to seek damages in the Scottish courts, and this possibility may well influence the findings of the Supreme Court.

For now, the House of Lords decision in *Rothwell* remains good law in England and Wales, following a decision by the Labour government in February 2010 against introducing similar legislation to the Act. In *Rothwell*, the majority of the House agreed that pleural plaques did not cause damage (whether by themselves or aggregated with the risk of developing other asbestos-related diseases and the consequent anxiety), and therefore did not constitute an injury giving rise to an action in tort. It was held that the fundamental requirement of a negligence action is that negligence causes injury and the claimant consequently suffers damage.

The pending claims will remain stayed until the outcome of the insurers' appeal to the Supreme Court. If the Supreme Court upholds the Scottish

"In the meantime, the decision opens up the possibility of forum shopping, encouraging claimants in England and Wales to seek damages in the Scottish courts, and this possibility may well influence the findings of the Supreme Court."



decision, it could have important consequences for both the future of asbestos-based personal injury claims and for the right of the Scottish Parliament to enact laws that are contradictory to other parts of the United Kingdom.

For more information, please contact **Eleanor Ayres** (pictured right below), Associate, on +44 (0)20 7264 8320 or eleanor.ayres@hfw.com, or **Rachel Butlin** (pictured left below), Associate, on +44 (0)20 7264 8121 or rachel.butlin@hfw.com. or your usual contact at HFW.

For further information, please also contact:

Paul Dean
London Partner and Head of
Personal Injury
T: +44 (0)20 7264 8363
paul.dean@hfw.com



“If the Supreme Court upholds the Scottish decision, it could have important consequences for both the future of asbestos-based personal injury claims and for the right of the Scottish Parliament to enact laws that are contradictory to other parts of the United Kingdom.”

Lawyers for international commerce

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

© 2011 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com

hfw.com