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Pleural plaques: the North South divide

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In *Axa General Insurance and ors v The Lord Advocate and ors [2011] CSIH 31*, four insurers failed in their bid to have the Damages (Asbestos-related Conditions) (Scotland) Act 2009 (the "Act") declared unlawful. This article examines recent developments in the approach to compensation for pleural plaques, focussing in particular on the contrast between the Scottish and English jurisdictions.

Pleural plaques are areas of fibrous thickening of the pleural membrane which surrounds the lungs. In general, they are asymptomatic and do not, of themselves, lead to other asbestos-related diseases. However, pleural plaques indicate an exposure to asbestos fibres which have penetrated into the membrane surrounding the lung. These fibres may independently cause life-threatening or fatal diseases such as asbestosis and mesothelioma. In consequence, a diagnosis of pleural plaques confirms an exposure to asbestos and that may itself cause the patient anxiety or to suffer from clinical depression.

History of asbestos use in Scotland and England

The UK was a global leader in the manufacture of products containing asbestos and is now facing the reality of caring for individuals left with asbestos related disease. Quite who compensates the victims of this asbestos related legacy, the amount of compensation and the circumstances under which compensation is available has been a matter of parliamentary and judicial debate for the last thirty years.

In 1871, two Scottish businessmen imported the first asbestos into the UK from Canada, marking the beginning of what became the extensive use of asbestos in Scotland. The asbestos minerals' ability to resist high temperatures made it a useful manufacturing material. It was used for its heat resistant and insulating properties in shipyards across Scotland but particularly in Clydeside, in locomotive construction, motor engineering and at the oil refineries in Grangemouth to name but a few areas. The result is that West Dunbartonshire in Scotland has the highest incidence of mesothelioma in the UK, with Inverclyde, Renfrewshire and Glasgow similarly affected[1].

Asbestos use was similarly prevalent in England, particularly in the railway industry, the heavy manufacturing industries in the North East (Tyneside is classed as an area of high risk for mesothelioma deaths[2]) and in the nationwide construction industry as asbestos and asbestos containing materials were used in a large number of buildings.

For a long time the dangers of asbestos use were observed but not widely understood. Increased life expectancy and advances in medical science have meant that asbestos related disease, which often takes several decades to develop after exposure, has become more prevalent. It is difficult to estimate the number of asbestos related cancer deaths per year in the UK but the Health and Safety Executive estimates it as "around 4000", the greatest cause of work related fatalities in the UK[3].

Any employer carrying on any business in Great Britain must insure and maintain insurance against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment. This has been the case since the passing of the Employer's Liability (Compulsory Insurance) Act 1969.

As there is often significant passage of time between exposure to asbestos and medical confirmation of asbestos-related disease, there are a number of hurdles to be overcome by the affected individuals when pursing a claim for compensation. One of the most frequently encountered problems is identifying the employer who was responsible for the exposure to asbestos (and who may have long since gone into liquidation or merged) and the employer's liability insurer (who themselves may have ceased to exist). Assuming that these can be identified, there are issues of proof and causation to be overcome which are compounded by the fact that events took place several decades before. The question of when an employer's liability for asbestos related disease is triggered (and therefore which insurance policy should respond) has been the subject of a separate string of litigation[4]. In the case of pleural plaques however, there may be a bar to commencing a claim at all for the reasons set out below.

Constituent elements of the tort (in England) and delict (in Scotland) of negligence

The actionability of pleural plaques in England and Scotland has led to judicial examination of what constitutes damage for the purposes of the tort/delict of negligence. For the purposes of this article, the elements required to found a cause of action in negligence under the laws of both England and Scotland are the same.

First, there must be a duty of care owed by one party to the other (in asbestos related cases, the most common scenario is employer's duty of care to the employee). Second, there must have been a breach of the duty of care by the employer (the breach usually takes place in the form of exposure to the harmful asbestos). Third, the employee must have suffered damage as a result of the employer's negligence. It is this third element that has been the subject of the recent pleural plaques cases decided by the higher courts of England and Wales.

As Lord Hoffmann observed in the House of Lords decision in *Rothwell and ors v Chemical and Insulating Co Ltd [2007] UKHL 39*, damage is an abstract concept of being worse off, physically or economically so that compensation is the appropriate remedy[5]. How much worse off the Claimant needs to be is a question of degree. The concept of degree needs to be looked at against the background of the underlying principle in both Scots and English law of *de mimimis non curat lex* – the law is not concerned with inconsequential things.

Are pleural plaques, for the most part asymptomatic, inconsequential?

Pleural plaques litigation in England

In 1980s England, the actionability of pleural plaques was considered in three first instance decisions. In *Church v Ministry of Defence (1984) 134 NLJ 623*, Mr. Justice Peter Pain held that they could found an action in negligence, deciding that it was an error to treat pleural plaques on their own. Damage for the purposes of a cause of action was caused by the asbestos passing through the lungs and causing the plaques to form. Pleural plaques were not, the Court decided, so *de minimis* that the law should disregard it.

In *Sykes v Ministry of Defence (The Times 23 March 1984)* Mr. Justice Otton found that the fact that there had been a definite change in the structure of the pleura was enough to found an action in negligence, the change representing damage.

In *Patterson v Ministry of Defence [1987] CLY 1194*, what later became known as the aggregation theory emerged. In *Patterson,* Mr. Justice Simon Brown held that the plaques, when combined together with the risk of future disease and attendant anxiety could add up to a cause of action. The proposition was that physiological damage which is not itself compensatable damage could be aggregated with both risk and anxiety (neither of which would by themselves give rise to a cause of action) to create a cause of action.

Rothwell - rewriting the history of compensation for pleural plaques

Based on the above three decisions, employers' liability insurers settled claims from (ex) employees which were founded upon the presence of pleural plaques from 1984 onwards, on the understanding that these were actionable injury. Typical payouts amounted to £1500 per individual in the 1980s[6].

Faced with an increase in the number of pleural plaques based claims and concerns about the costs of these cases to the insurance industry, in 2004 a group of insurers decided to challenge the practice of indemnifying for pleural plaques claims. The challenge was mounted on the basis that none of the claimants in these cases had suffered an injury sufficient to found a claim in negligence and that the quantum in such cases was far too high.

Ten test cases were tried at first instance in the English Courts[7]. In all of the cases it was admitted that the employer had negligently exposed the employee to asbestos such that there could be a liability in negligence upon him were sufficient damage to the employee found by the Court to have been caused.

In the test cases, the Claimant (ex) employees relied upon what became known as the "aggregation theory" to argue that they had sustained damage sufficient to found a cause of action. The aggregation theory was based upon the English common law principle set out in *Brunsden v Humphrey (1884) 14 QBD 141* which said that where a Claimant suffered actionable personal injury as a result of the Defendant's breach of duty, he can and must claim damages in the same action for all of the damage he has suffered or will suffer in consequence of that breach of duty. This principle gave certainty to both parties and meant that actions were only tried once.

The Claimants argued that whilst pleural plaques may not, of themselves, constitute actionable injury, when combined with the anxiety of knowing that asbestos fibres had penetrated the pleural membrane and risk of future asbestos-related disease, this led to something which was more than *de minimis* and therefore they should be entitled to claim now for what may be more serious harm in the future.

At first instance, Mr Justice Holland found that plaques were not damage which could found a cause of action. He held that the identification of pleural plaques had an evidential rather than substantive significance. Their existence confirmed significant physical penetration by asbestos fibres but did not add in any way to resultant disabilities, actual or prospective[8].

He was, however, persuaded that when anxiety is engendered by tortiously inflicted physiological damage it can properly contribute to "damage" or "injury" so as to complete the foundation of a cause of action.

Mr Justice Holland having found in favour of the Claimants, seven of the ten test cases were appealed to the Court of Appeal[9]. The Court of Appeal overturned the first instance decision, rejecting the aggregation theory by a majority (Lady Justice Smith dissenting).

The Lord Chief Justice and Lord Justice Longmore considered there were strong policy reasons why pleural plaques should not give rise to claims for compensation. In particular the Lords Justice were critical of "claims farmers" who made a business from litigation, and who encouraged workers who had been exposed to asbestos to have CT scans to see whether they might have grounds for a claim. They saw this as a way of creating stress and anxiety that was often unjustified.

Following the decision of the Court of Appeal, four of the seven cases were appealed to the House of Lords in *Rothwell v Chemical and Insulating Co Ltd [2007] UKHL 39*.

The House of Lords upheld the Court of Appeal's judgment. Their Lordships decided that it is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at an actionable injury.

As Lord Scott observed, the question of whether the formation of pleural plaques suffices to complete a tortious cause of action in negligence depends on what the law recognises as damage, not on how the medical experts may classify the condition in question. Pleural plaques are not visible or disfiguring. None of the Claimants suffered from any disability or impairment of physical condition caused by the pleural plaques. The plaques were asymptomatic and were not the first stage of any asbestos related disease. The inhalation of fibres and the formation of plaques involved no physical pain or physical discomfort. The presence of pleural plaques could not therefore suffice to complete a tortious cause of action in negligence.

The Scottish government's response to Rothwell

Rothwell was concerned with the appeal of four English cases. As such, it was not a decision that was binding upon the Scottish Courts. The Scottish Courts had previously held that pleural plaques were actionable[10]. Shortly after the House of Lords' decision in *Rothwell*, the Scottish government expressed concern that were pleural plaques cases to reach Scotland's higher Courts, those Courts may draw the same conclusions as the House of Lords.

On 28 November 2007, the then Cabinet Secretary for Justice, Kenny MacAskill MSP, confirmed the Scottish government's intention to introduce a bill which would reverse the effect of *Rothwell* in Scotland, permitting those negligently exposed to asbestos and diagnosed with pleural plaques to continue to be able to raise an action in delict for negligence[11].

The Scottish government's rationale was as follows: "Plaques have been regarded as actionable for over 20 years. Although plaques are not in themselves harmful, they do give rise to anxiety because they signify an increased risk of developing serious illness as a result of exposure to asbestos. In areas associated with Scotland's industrial past, people with pleural plaques are living alongside friends who worked beside them and are witnessing the terrible suffering of those who have contracted serious asbestos related conditions including mesothelioma. This causes terrible anxiety that they will suffer the same fate. The Scottish government believes that people who have negligently been exposed to asbestos who are subsequently diagnosed with pleural plaques should be able to raise an action for damages as has been the practice in Scotland for over twenty years"[12].

The Scottish government's position was that legislation would not introduce any liability not in existence prior to *Rothwell*, it would restore a right of action to those who enjoyed that right before. It did not alter the Scots law relating to negligence in any way, but rather permitted a cause of action that England had ruled out.

The challenge by insurers

Following Royal Assent given to the Act, a number of insurers alleged that the Act was outwith the legislative competence of the Scottish Parliament by virtue of s. 29(2) (d) of the Scotland Act 1998, which states that an act of the Scottish Parliament is not law in so far as any provision of the act is incompatible with any of the rights under the European Convention on Human Rights or by Community law. It was further alleged that the Act was, of itself, incompatible with Article 6 of the European Convention on Human Rights (right to a fair trial) and Article 1 of the First Protocol (right to protection of property and possessions).

Insurers cited the financial cost of the Act and relied upon figures given by the ABI which estimated annual cost of the Act in Scotland at £76,000,000 to £607,000,000 and the total cost at £1.1 billion to £8.6 billion[13]. The Scottish government put the figures much lower at £11,843,950 to £20,033,950 for insurers, employers and ex-employers to settle existing cases with annual costs thereafter of £3,761,000 to £6,947,000 rising to £5,841,000 to £16,555,000 in 2015 before decreasing[14].

In April 2009, four insurers took the very unusual step of petitioning for an interim interdict (injunction) to prevent the Act coming into force before the challenge to the Act's validity could be heard by the Scottish Courts[15]. That petition was refused and the Act came into force on 17 June 2009.

In January 2010, the Outer House of the Court of Session gave judgment on Insurers challenge to the validity of the Act[16]. The Insurers sought to argue that the passing of the Act was irrational in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680), i.e. it was so unreasonable that no reasonable person acting reasonably could have made it. Lord Emslie, however, found that the challenge did not come anywhere near meeting the extremes of bad faith, improper motive or manifest absurdity which would be required to justify reducing an act of the Scottish parliament. The Scottish government was allowed a discretionary area of judgment especially where social, economic and political considerations were in issue[17].

Similarly, the two challenges brought under the Convention also failed. The Insurers argued that the Act infringed Art 6 of the Convention (right to a fair trial) by its indirect interference with the determination of the cases which had been sisted (stayed) pending the decision in *Rothwell*. They argued that the Act would impose new liabilities on insurance contracts which were not reflected in the premium taken.

This submission was rejected by Lord Emslie who said that whilst the Act may have a financial impact upon insurers, it could not be said that the Act itself interfered with any rights of the insurers. Either the policies underwritten by the insurers covered damage or they did not – confirming a cause of action did not alter an insurer's contractual obligations to their insureds. All that the Act did was to remove a bar (Rothwell) to a cause of action in Scotland – the claims themselves would be left to be determined by the Scottish Courts in the ordinary way.

The second challenge was made under Article 1 of Protocol 1 ("A1P1") to the Convention – the right to enjoy possessions. Insurers argued that their right to enjoy their capital resources (their "possessions") had been unlawfully interfered with by the passing of the Act and that they would be required to maintain large reserves against future liabilities. The Outer House held, along similar lines to the Article 6 challenge, that Insurers were one step removed in that the Act could not sensibly be said to authorise individuals diagnosed with pleural plaques to withdraw funds from the insurers' capital resources. An action must be successfully pursued before damages would be awarded and it could not be said that the passing of the Act itself was directly responsible for any decrease in insurers' capital resources.

The insurers appealed to the Inner House of the Court of Session. The Lord President, Lord Eassie and Lord Hardie gave judgment on 12 April 2011[18]. The appeal proceeded on two bases: (1) a challenge to the validity of the Act on the basis of irrationality and (2) that the Act infringes insurers' rights under A1P1 of the Convention. The challenge under Article 6 of the Convention was not pursued.

Once again, insurers' challenge to the validity of the Act was dismissed on all grounds.

The Inner House held that the Scottish government and Parliament were entitled to take into account that the insurance industry had proceeded since 1984 on the basis that their insured were liable to meet pleural plaques claims and hence the premia charged would, in general, be reflective of that belief and understanding. Further, costs to insurers could be more widely diffused to employers through the level of premia charges.

The Court observed[19] that the absence of any provision for compensation from public funds is inherently part of the decision making capacity of the Scottish government. The legislation was framed in such a way as to make pleural plaques claims financially realistic from the standpoint of the affected individual by ensuring that liability of the negligent employer could be passed to the insurer.

It is perhaps worth pointing out that not every claim based upon the Act will succeed. All the Act does is remove one procedural bar to recovery. Issues of proof, causation and liability remain in each case. In fact, issues of proof and causation may become particularly acute given that, post *Rothwell,* pleural plaques are not actionable in England. The pursuers will have to persuasively demonstrate that their pleural plaques resulted from exposure to asbestos whilst working in Scotland. For those individuals who worked both North and South of the border, it may be particularly difficult to prove which exposure led to the formation of the plaques. As all cases under the Act have been sisted (i.e. stayed) pending insurers' appeal (and now to the Supreme Court) it will be some time before these issues of proof and causation are subject to judicial scrutiny.

The Act is not directly aimed at insurers but at negligent employers who may have employers' liability insurance which covers their negligent acts or omissions. The Act requires that the exposure to asbestos be shown to have occurred through the fault of the insured employer. The Inner House said that in that respect, when choosing to underwrite an employer's liability risk, the insurer takes the risk that the law may develop in a way which results in the insured employer having a liability in circumstances which at the time of concluding the contract of insurance may not have been envisaged as giving rise to a liability[20].

The Act does not, therefore, alter the insurer's contractual liability to its insured. The liability incurred by the insurance companies will be for the negligent behaviour of the person or persons who paid their premiums. The Act simply, and importantly, differentiates the circumstances in which a claim for negligence can be brought from those in England.

The English approach post Rothwell

So *Rothwell* decided that pleural plaques were not actionable harm and thereby prevented any new claim for compensation for pleural plaques from succeeding. In February 2010, however, the Government announced the creation of an extra-statutory scheme of fixed payments of £5000 for individuals who had begun but not resolved a claim for compensation for pleural plaques at the time of the House of Lords decision in 2007.

The extra statutory scheme was conceived on the basis that these claimants had a legitimate expectation of recovery before that date. The scheme is only open to those individuals who had commenced proceedings or contacted their trade union before October 2007 and they must have been working in England or Wales and exposed to asbestos in the course of employment[21].

A two tier system?

We are left with a situation where in one jurisdiction, actions in delict may be brought on the basis of pleural plaques and in another, the House of Lords and the government have decreed that they are not sufficient damage for the purposes of the tort of negligence.

Whilst constitutionally speaking this is arguably reflective of the impact of devolution in Scotland and the right of the Scottish Parliament to legislate for its people, from an insurance perspective it creates an interesting dichotomy where insurers straddle the two jurisdictions.

A nationwide employer with a single employer's liability policy will be indemnified for its liabilities stemming from pleural plaques in Scotland but not in England. Equally, employees of that nationwide company will be able to receive compensation for their pleural plaques in Scotland but not in England and this may bring with it attendant issues of employment law.

Scotland has decided that the country should not be responsible for the negligent mistakes of private employers who have the benefit of insurance, particularly where it is said that those insurers have been proceeding for the past thirty years at least that pleural plaques constitute damage for the purposes of an action in negligence. The passing of the Act was a political decision designed to assist the Scottish people. The insurers are said to be taking their appeal to the Supreme Court. Inviting the Supreme Court to interfere with constitutional rights is a brave move on the part of insurers. The issues at stake are much wider than compensation for pleural plaques.

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Endnotes

1 HSE Publication: "Mesothelioma Mortality in Great Britain: Analyses by Geographical Area and Occupation 2005" - Table 4

2 ibid Table 4

3 HSE report: "Asbestos related disease statistics" Updated August 2010

4 *Durham v BAI (Run-Off) Ltd [2010] EWCA Civ 1096*

5 paragraph 7

6 A. Horne: Parliamentary Briefing Paper - "Pleural Plaques - The Government's Response" 4 August 2010

[7] *Grieves and ors v F.T. Everard and ors [2005] EWHC 88*

[8] Ibid paragraph 64

[9] *Grieves v FT Everard & Sons [2006] EWCA Civ 27*

[10] *Gibson v McAndrew Wormald & Co* Ltd *1998 SLT 562*

[11] *Axa General Insurance Limited & Ors v The Lord Advocate & Ors [2011] CSIH 31*

[12] Ibid paragraph 12

[13] Ibid paragraph 15

[14] Ibid paragraph 19

[15] *Axa General Insurance Ltd, Petitioners: [2009] CSOH 57*

[16] *Axa General Insurance Ltd and ors, Petitioners [2010] CSOH 2*

[17] Ibid paragraph 230

[18] Axa *General Insurance Limited & Ors v The Lord Advocate & Ors [2011] CSIH 31*

[19] Ibid paragraph 148

[20] Ibid paragraph 144

[21] Ministry of Justice briefing "Government announces measures on asbestos related illness" 25 February 2010