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McCarthy, Frankie (2010) *Actionable rights and wrongs: human rights challenges in Axa General Insurance Ltd.* Edinburgh Law Review, 14 (2). pp. 284-290. ISSN 1364-9809

<http://eprints.gla.ac.uk/41795/>

Deposited on: 03 April 2012

but the delivery is. Or it can mean pure e-missives, i.e. electronic documents with electronic signatures. No paper, no ink. Seemingly the profession wants e-missives,<sup>14</sup> though the distinction between the two types is not always recognised. The Scottish Law Commission has recommended that the 1995 Act be amended to allow pure e-missives,<sup>15</sup> and there could also be secondary legislation under section 8 of the Electronic Communications Act 2000. One way or another, legislation seems likely.<sup>16</sup>

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EdinLR Vol 14 pp 284-290  
DOI: 10.3366/E1364980910001356

## Actionable Rights and Wrongs: Human Rights Challenges in *AXA General Insurance Ltd*

Lord Emslie's recent opinion in *AXA General Insurance Ltd, Ptrs*<sup>1</sup> comprises 249 paragraphs of thoughtful and well-reasoned argument on the lawfulness of the Damages (Asbestos-Related Conditions) (Scotland) Act 2009. The decision contains useful guidance on a number of issues including the parameters of victim status in terms of article 34 of the European Convention on Human Rights and the extent to which Acts of the Scottish Parliament, as a *sui generis* form of subordinate legislation, are open to judicial review. This note will focus on the two substantive human rights challenges to the legislation's competency, made under article 6 and article 1 of the first protocol to the ECHR. Lord Emslie dismissed each of these challenges, and the petition as a whole. The petitioners have, however, indicated an intention to appeal.<sup>2</sup>

### A. BACKGROUND

Pleural plaques are scarring to the lung tissue caused by inhalation of asbestos fibres. They are almost invariably asymptomatic and do not trigger or develop into more

14 See eg J Ley, "Law out of step?" (2009) 54 JLSS Oct/56; E Sinclair, "Never waste a good crisis" (2009) 54 JLSS Nov/56; E Sinclair, "E-missives: it's time for delivery" (2009) 77 SLG 114; A Duncan, "Concluding missives in 2009? On your bike" (2009) 103 Greens Property Law Bulletin 5.

15 Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222 (2010), available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk)) para 34.

16 This note draws on material which appears in K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 85-89.

1 [2010] CSOH 2, 2010 SLT 179.

2 See Association of British Insurers, "News release: insurers lodge appeal against Scottish judgment on pleural plaques" 14 Jan 2010, available at [http://www.abi.org.uk/Media/Releases/2010/01/Insurers\\_lodge\\_appeal\\_against\\_Scottish\\_judgment\\_on\\_pleural\\_plaques.aspx](http://www.abi.org.uk/Media/Releases/2010/01/Insurers_lodge_appeal_against_Scottish_judgment_on_pleural_plaques.aspx).

serious asbestos-related conditions such as mesothelioma. Diagnosis of plaques does, however, confirm exposure to asbestos, indicating an elevated risk of development of such conditions, which may be grounds for significant anxiety. Over several decades, UK indemnity insurers of employers who negligently exposed workers to asbestos have settled personal injury claims in respect of plaques. Insurers adopted this policy on the basis of a “commercial decision”<sup>3</sup> rather than as the result of any clear authority as to the legal basis on which plaques might found a claim.<sup>4</sup>

The position changed two years ago. In *Rothwell v Chemical and Insulating Co Limited*,<sup>5</sup> a conjoined group of English test cases, the House of Lords unanimously affirmed the majority decision of the Court of Appeal in finding that pleural plaques could not form the basis of a damages action. Scarring which did not cause disability, disfigurement, or the risk of development into a more serious condition could not, it was held, amount to a harm for the purposes of the law of tort.<sup>6</sup> The Scottish Parliament responded to this decision with the 2009 legislation, which provides that pleural plaques, along with pleural thickening and asbestosis, are to be considered as actionable harms. The petitioners in *AXA General Insurance*, a group of insurance companies, argued that this Act had the effect of unlawfully imposing millions of pounds of additional liabilities upon them.

## B. THE ARTICLE 6 CHALLENGE

Article 6 of the ECHR begins: “In the determination of his civil rights and obligations... everyone is entitled to a fair and public hearing”. The contention put forward by the petitioners was that the 2009 legislation represented an unjustifiable Parliamentary interference in the determination of the petitioners’ civil rights and obligations. The scope of this challenge was admitted to be restricted to the several hundred pleural plaques claims which had been sisted since 2006 pending the decision in *Rothwell*. The 2009 Act, it was asserted, directly interfered in the outcome of these cases. It was additionally contended that this interference would operate to “reconfigure’ past indemnity insurance contracts in such a way as to impose new liabilities for which premiums were never taken”.<sup>7</sup>

The background to this challenge was in the nature of a debate between the parties as to the true purpose of the 2009 legislation. The petitioners’ position was essentially that *Rothwell* had been acknowledged by Holyrood as fatal to existing plaques claims, and the Act had been introduced specifically to prevent that result, deliberately targeting insurers. The argument for the Scottish government was that the legislation was designed to resolve uncertainty as to the applicability of *Rothwell*,

3 Paras 9 and 10.

4 See in England, *Sykes v Ministry of Defence*, *The Times* 23 Mar 1984, and in Scotland, *Gibson v McAndrew Wormald & Co Ltd* 1998 SLT 562. Neither case turned on this point, however.

5 [2008] 1 AC 281.

6 Lord Hope differed from the other judges in concluding that plaques might be recognised as an injury or a disease, but since no symptoms resulted, they must be considered *de minimis*. See paras 38 and 39.

7 *AXA General Insurance* at para 148.

a case decided under principles of English law, in Scotland and to give effect to the legal and political view that pleural plaques should be an actionable wrong.

Lord Emslie concluded from the Strasbourg authorities<sup>8</sup> that a successful challenge required the petitioners to demonstrate:<sup>9</sup>

- (i) that the close involvement which they claimed in pleural plaques litigation should be held equivalent to party status;
- (ii) that the outcome of pleural plaques actions should be deemed decisive for their own civil rights and obligations as indemnity insurers; and
- (iii) that the 2009 Act relevantly interfered with judicial determination of such proceedings.

The petitioners were unsuccessful in every element. Two key difficulties emerged. The first was that, regardless of the extent to which the resolution of the sisted cases might impact on insurers' finances, nothing determinative of their own civil rights and obligations could result. It seems that the "reconfiguration of policies" argument may have been intended to meet the criterion of direct determination, but Lord Emslie noted that, like the petitioners (and the writer), he did not find this contention easy to follow.<sup>10</sup> Either the policies covered actionable damage or they did not, and nothing in the legislation could rewrite the terms of those contracts. Secondly, Lord Emslie was not satisfied that the 2009 Act was designed to influence directly the determination of the sisted cases. The purpose of the legislation, on the evidence, was to ensure that individuals diagnosed with pleural plaques, pleural thickening or asbestosis, whether in the past or the future, would have an actionable basis for a claim in Scots law. The retrospective effect of the legislation on the sisted cases was a secondary issue.

It is difficult to imagine an alternative outcome to this challenge when the nature of the dispute between insurers and the Government is set alongside the authorities in the area.<sup>11</sup> Article 6 cannot operate to prevent a state from introducing legislation which may impact on ongoing litigation, for, if it did, legislating would be an impossible task. The cases where a challenge of this kind has found favour almost inevitably involve existing litigation between the applicant and the state itself in which the state has used legislation purely and specifically to evade an otherwise inevitable defeat.<sup>12</sup> Although Lord Emslie, probably correctly, placed little significance on the fact the government was not party to the sisted cases,<sup>13</sup> the reality remains that the battle between the government and insurers here is one of broad legal and political principle. Indeed, the fact that so many ongoing actions existed in the first place tends to support rather than undermine this conclusion. The legislation itself provides

8 Although various cases were canvassed, *Zielinski and Ors v France* (2001) 31 EHRR 19 was clearly the most influential.

9 *AXA General Insurance* at para 164.

10 Para 243.

11 The numerous cases referred to by the parties are listed at para 147. *Al-Fayed v United Kingdom* (1994) 18 EHRR 393 and *Perez v France* (2005) 40 EHRR 39 are also of interest in this context.

12 The exceptions are App No 16043/03 *Achache v France* 3 Oct 2006 and App No 67847/01 *Lecarpentier v France* 14 Feb 2006. The applicants in these cases were engaged in litigation with quasi-nationalised French banks, where the virtual party status of the state was easier to make out than in the sisted plaques actions, although the principle may be of wider application.

13 *AXA General Insurance* at para 169.

baldly that plaques, pleural thickening and asbestosis are actionable in Scotland, with no clarifications or restrictions. The point is of wide social and legal significance. An attempt to view it solely through the prism of article 6 could only ever be an artificial construction of the argument, and is evidently not what rights under article 6 were designed for.

### C. THE CHALLENGE UNDER ARTICLE 1 PROTOCOL 1

Article 1 protocol 1 protects the right to peaceful enjoyment of possessions. This right can be interfered with by the state where necessary in the public interest, provided the state action is lawful and proportionate. Two main issues arose in respect of this challenge. In the first place, what was the nature of the “possession” which the petitioners alleged was entitled to protection? Secondly, had peaceful enjoyment of this possession in fact been interfered with by the introduction of the 2009 Act? The court also considered whether the interference, if any, could be justified on public interest grounds.

#### (1) Possessions

Contentious under this head was the petitioners’ submission that the *Rothwell* decision was, in itself, an asset of value to insurers. *Rothwell*, it was argued, constituted an immunity from pleural plaques claims. Strasbourg jurisprudence, it was said, indicates that a reasonably-based *claim* carrying a legitimate expectation of success is a “possession” within the meaning of article 1 protocol 1. Why, then, should an *immunity* carrying a significant economic value not also be considered a possession in the article 1 protocol 1 sense?<sup>14</sup>

It is an established principle of ECHR jurisprudence that “possessions” has an autonomous meaning.<sup>15</sup> Although the guidance offered by the case law on the exact parameters of what may constitute a possession is far from conclusive, it is possible to identify certain key factors. Thus the purported possession must have an economic value; and it must have been acquired by the time of the state action, or there must have been a legitimate expectation of future acquisition which was prevented by state action.<sup>16</sup> Within this framework, it is clear that a court order is a possession, effectively equivalent to a debt.<sup>17</sup> The position of as yet unresolved court actions is somewhat unclear. The general line is that an ongoing action cannot be a possession: hence dismissal of an action by the courts is not in itself interference with a possession.<sup>18</sup>

14 Para 181.

15 App No 33202/96 *Beyeler v Italy* 5 Jan 2000, accepted domestically in e.g. *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

16 The authorities are legion, but assistance may be found in *Inze v Austria* (1988) 10 EHRR 394; *Van Marle v Netherlands* (1986) 8 EHRR 483; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309; and domestically in *Adams v Scottish Ministers* 2004 SC 665 and *Catscratch Limited v City of Glasgow Licensing Board (No 2)* 2002 SLT 503.

17 A recent example is *Broniowski v Poland* (2006) 43 EHRR 1.

18 *Agneessens v Belgium* (1988) 58 DR 74; *Kopécky v Slovakia* (2005) 41 EHRR 43.

A few exceptions do exist for ongoing claims, but these tend to involve the state as a party to the litigation in circumstances similar to the article 6 cases discussed above.<sup>19</sup>

Within this context, Lord Emslie identified a number of difficulties with the assertion that *Rothwell* equated to a possession. Chiefly, the decision did not offer the immunity petitioners claimed. The case was decided under English law, and whether the same conclusion would be reached using Scots principles was at least debatable. The agreed evidence in *Rothwell* might not be replicated in future cases. The appellate committee had specifically not ruled on the likely success of potential future contract-based plaques claims. Finally, the decision dealt only with plaques, not with the pleural thickening or asbestosis which were also identified as actionable damage by the 2009 Act. Given all the imponderables, it would be inaccurate to describe *Rothwell* as representing immunity from future claims which had been removed by the 2009 legislation. Such immunity had never existed.

More critically, immunity in itself could never amount to a possession. Lord Emslie noted that “possession” is not wide enough to cover every interest which has an economic value: the interest has to be proprietary in nature. In other words, the interest must have been acquired in the sense that property rights can be exercised in respect of it.<sup>20</sup> Immunity from suit cannot be sold, assigned or otherwise disposed of. Security cannot be granted over it. The idea that immunity might prevent future impact on the financial standing of insurers is too far removed from the notion of a proprietary interest to qualify as an article 1 protocol 1 possession.

This interpretation of the Strasbourg case law is undoubtedly correct. Economic value is not the sole test of possessions, and construing the right in this way would render it meaningless.<sup>21</sup> The importance of proprietary rights has been emphasised repeatedly both in identifying when a possession is held and in clarifying when the possession has been lost.<sup>22</sup> A claim in which there is a reasonably-based expectation of success may, uncomfortably, equate to a possession in the Strasbourg jurisprudence. The expectation of a successful defence to a claim will not.

## (2) Interference

The petitioners’ second argument focused on their capital resources, which were unquestionably a “possession”. The 2009 legislation would have the effect of compelling insurers to pay damages for pleural plaques claims. This, it was argued, represented an interference with their capital resources.

As with the article 6 challenge, Lord Emslie was not satisfied that the relationship between the legislation and the impact on the petitioners’ finances was sufficiently proximate to engage rights under article 1 protocol 1. “A line has to be drawn”,

19 *Stran Greek Refineries v Greece* (1995) 19 EHRR 293; *Pressos Compania Naviera SA v Belgium* (1996) 21 EHRR 301.

20 *Anheuser Busch v Portugal* (2007) 45 EHRR 36.

21 These ideas are paralleled in a very different context in *M v Austria* (1984) 39 DR 85.

22 The keynote decision of *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 is instructive in this regard.

he indicated, “between on the one hand, primary and immediate effects and, on the other, effects which are only secondary and derivative. The ripples spreading outwards from a legislative measure cannot be thought to confer or infringe legal rights to an infinite degree”.<sup>23</sup>

This conclusion seems entirely consistent with the Strasbourg case law. In *Bramelid and Malmström v Sweden*,<sup>24</sup> the European Commission on Human Rights explained that article 1 protocol 1 dealt with “the action whereby the State lays hand – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest”.<sup>25</sup> The 2009 legislation could not sensibly be said to “authorise” individuals diagnosed with pleural plaques to withdraw funds from the petitioners’ capital resources. An action must be successfully pursued before damages would be awarded. The argument is similar to the article 6 challenge outlined above, and it fails for broadly the same reason.

### (3) Public interest

To bring the human rights arguments to a conclusion, and notwithstanding his earlier findings, Lord Emslie dealt fully with the petitioners’ assertion that any interference that might be established with their article 1 protocol 1 rights could not be justified in the public interest. Without rehearsing the arguments in full, some key points might be highlighted.

It had already been established that the aim of the legislation was much broader than the petitioners claimed. With that finding in place, many of the arguments under this head simply fell away. A legitimate aim had evidently been pursued and insurers had not been targeted. Lord Emslie was understandably unimpressed with the suggestion that legislating to reverse *Rothwell*, if the legislation even had that effect, was outrageous or irrational. The speeches of the appellate committee suggest that decision was reached with difficulty and by a very slender margin. In summing up, Lord Emslie notes:<sup>26</sup>

[A]wards of damages against negligent employers, at appropriate levels and under settled rules, cannot be thought to constitute an unwarranted or disproportionate end result. If that is right, alleged regulatory sterilisation of the petitioners’ reserves can in my view be no better placed...

This conclusion seems entirely in keeping with the Strasbourg approach to proportionality.

## D. CONCLUSION

With the clarification offered by Lord Emslie’s findings as to the fundamental purpose of the 2009 Act, it seems that insurers will have marked difficulty in mounting a

<sup>23</sup> Para 196.

<sup>24</sup> (1982) 29 DR 76.

<sup>25</sup> At 82.

<sup>26</sup> *AXA General Insurance* at para 225.

successful appeal. Regardless of the ECHR article in question, an effective challenge must concern clear violation of a person's rights. If the legislation in question is designed to clarify a broader point of legal principle, then it is difficult to imagine how such an individual violation could be found to exist.

Regardless of the view taken on the dismissal of the petition, the judgment is encouraging in its treatment of the Strasbourg jurisprudence. Both the parties and the court made thorough and thoughtful use of the authorities in areas where there has, as yet, been little opportunity for domestic exploration. In that sense, it may be that the appeal already marked will prove beneficial to us all.

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EdinLR Vol 14 pp 290-294  
DOI: 10.3366/E1364980910001368

## The Scottish DNA Database and the Criminal Justice and Licensing (Scotland) Bill

The collection and retention of DNA samples is universally seen as crucial for purposes of criminal investigation and prosecution, as a means of excluding innocent suspects and of exonerating the wrongfully convicted. However, there is less consistency across jurisdictions on the question of whose DNA should be obtained by the state and for how long it should be stored. In Scotland, DNA samples may at present be obtained from anyone arrested, and then retained indefinitely after conviction in the criminal courts or for limited periods following acquittal for certain serious offences. The Criminal Justice and Licensing (Scotland) Bill, currently before the Scottish Parliament,<sup>1</sup> proposes to extend this to allow retention of DNA data obtained from children who have committed sexual or violent offences and who are being dealt with by the children's hearings system. The Bill also articulates explicitly the permitted uses of retained DNA data.

### A. THE LEGAL FRAMEWORK IN SCOTLAND

The existing law relating to DNA collection, retention, use and destruction is contained in sections 18-20 of the Criminal Procedure (Scotland) Act 1995.<sup>2</sup> Section 18 permits the collection of bodily samples, from which DNA profiles may be

<sup>1</sup> The Bill was introduced on 5 March 2009 and passed Stage 1 on 26 November 2009. For details of progress, and the text of the Bill, see <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/index.htm>.

<sup>2</sup> As amended by the Criminal Justice (Scotland) Act 2003 and the Police, Public Order and Criminal Justice (Scotland) Act 2006.