

BRIEF UPDATE

From Diana Hall of the Health, Safety & Environmental Division

Pleural Plaques Defeat for British Insurers

Scotland's appeal court has refused an appeal by insurers challenging the legality of legislation that allows sufferers of asbestos related pleural plaques to seek compensation in Scotland.

AXA General Insurance Ltd & Ors v The Lord Advocate & Ors [2011] CSIH 31 challenged the legality of the **Damages (Asbestos-related Conditions) (Scotland) Act 2009**.

Pleural plaques are changes in the lining of the lung often referred to as "scarring". They are caused by asbestos exposure but are usually asymptomatic.

The 2009 Act provides that if a claimant can prove that negligent exposure to asbestos has caused them to develop pleural plaques, then that injury gives rise to a right to claim compensation. It was passed to prevent the application in Scotland of the earlier landmark English decision in **Rothwell v Chemical & Insulating Company Ltd. [2008] 1 AC 281**, in which it was held that pleural plaques do not give rise to compensation.

In an important decision, Scotland's most senior Judge, Lord Hamilton, delivered the judgement of the Inner House of the Court of Session on 12 April 2011. Refusing the insurers' appeal, the court determined that insurers were entitled to bring a challenge of this type. However:

- While Acts of the Scottish Parliament can be challenged at common law, strict requirements must be met for a challenge to succeed;
- The 2009 Act was neither illegal nor irrational and could not be struck down on that basis;

- Insurers' rights under **Article 1, Protocol 1** of the **European Convention on Human Rights** had not been breached. While the legislation interfered with their possessions, that interference was justified in response to the perceived social injustice created by the **Rothwell** decision. The Act had been passed in legitimate pursuit of the public interest.

While the decision contains interesting commentary on the circumstances in which Acts of the Scottish Parliament may be challenged, its practical impact is straightforward: pleural plaques are, at least for now, still compensable in Scotland.

It is estimated that the number of plaques claims will continue to increase until 2015. It has been suggested that the consequent cost to the insurance industry will be at least tens of millions of pounds, and possibly higher.

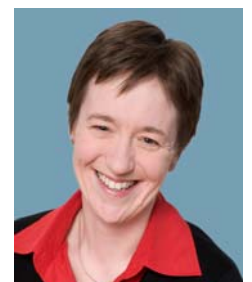
The stakes are accordingly high, and the possibility of insurers mounting a further appeal cannot be discounted.

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