

# Keoghs Client ALERT

10 February 2015

## The Definite Article

### Recovery of Medical Costs For Asbestos Diseases (Wales) Bill Declared Unlawful

The Association of British Insurers (ABI) has succeeded in challenging the Welsh Assembly's attempt to make insurers pay NHS charges in asbestos cases.

The ABI had argued that the relevant Bill was:

- 1) outside the Assembly's specific powers and
- 2) contrary to Article 1 of Protocol No 1 of the European Convention on Human Rights (A1P1).

The Supreme Court agreed by a three to two majority with the ABI on both points.

On the first issue, the Assembly had argued that the Bill was within its general powers for funding the NHS.

On the second, it doubted that the Article was engaged and argued that to breach A1P1 the Bill had to be manifestly without reasonable foundation.

A1P1 says:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law..."*

The Supreme Court majority noted that the Bill imposed a novel liability, reflected no loss to the sufferer, was due regardless of any formal finding of legal liability, and was based on actions carried out decades before.

So far as insurers were concerned the Bill also extended cover to a new head of claim, took no account of any policy exclusions, applied to decades old policies and generally reflected a liability which could never otherwise fall to insurers to pay.

The majority decided that the Bill was indeed outside the Assembly's powers. Even if the legislation gave them power to raise funds for the NHS, it did not permit them to levy charges on other parties.

The Supreme Court majority also decided that the Bill was unlawful under A1P1. It rejected the Assembly's view that it had to be 'manifestly unreasonable'. The decision had to be reached by fair and balanced consideration of both public and private interests.

Ultimately, the retrospective imposition of unforeseeable liabilities onto existing policies without benefit to individual sufferers meant that the Bill was in breach of A1P1. Even the imposition of such liabilities onto the tortfeasors themselves would be unlawful.

The minority felt that the Bill was within the competence of the Assembly but that the direct application to insurers took it outside A1P1. The overall purpose of the Bill struck a fair balance.

Had it worked by imposing a charge on sufferers (which could then be recovered from compensators under normal rules of tortious recovery), it would have been lawful.

As it was, the Bill impermissibly added additional liabilities to existing contracts of insurance. This was a step too far.

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## What this means

The immediate effect of this decision is likely to stop the current efforts in Scotland to introduce similar measures there.

A consultation has been launched on those measures. It is difficult to see how measures which breach A1P1 in Wales would not be unlawful in Scotland.

Insurers might ask what the wider significance of this case might be. A1P1 was used unsuccessfully by the insurers in [AXA v Lord Advocate](#) to try to block the Scottish Parliament's restoration of compensation for pleural plaques.

Part of the answer lies in foreseeability. Could the additional liability have been foreseen? If not it is more likely to be unlawful.

Part of the answer lies in the old Latin question *Cui Bono* - to whose benefit? If a measure benefits individuals with a loss, the balance may swing in favour of lawfulness.

If instead it brings financial benefits only to Government, an A1P1 challenge is more likely to succeed.

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