Recovery of Social Security Benefits in Certain Asbestos Cases a Breach of Convention Rights

By Jack Castle

The High Court in *R. (on the application of Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2020] EWHC 3118 (Admin) has found aspects of the application of the Social Security (Recovery of Benefits) Act 1997 relating to asbestos-related injury to be a breach of Article 1 Protocol 1. This decision will have significant impact on insurers and personal injury practitioners, as well as potential wider implications for human rights judicial review.

Introduction

1. The Social Security (Recovery of Benefits) Act 1997 and Regulations made under it (collectively, the 'Act') requires anyone who makes a compensation payment for any accident, injury or disease to refund to the Secretary of State an amount equal to the total amount of benefit paid related to that accident, injury or disease.

2. In *R. (on the application of Aviva Insurance Ltd) v Secretary of State for Work and Pensions* [2020] EWHC 3118 (Admin) ('*Aviva*'), the High Court has found that statutory and common law developments since the passing of the Act mean that the way it currently applies to certain asbestos-related cases is in breach of Article 1 Protocol 1 ('A1P1') of the European Convention on Human Rights ('ECHR').

3. This will have a significant impact on insurers, personal injury practitioners, and has wider implications for human rights judicial review.

The Act

4. Section 6 of the Act requires anyone who makes a compensation payment for accident, injury or disease '*liable*' to reimburse the Secretary of State for Work and Pensions ('SoS') for the cost of any benefits the victim became eligible for as a result of the tort. This liability is currently managed by the DWP's Compensation Recovery Unit, who certify the amount of benefit resulting from the tort and manage repayment.

5. Section 22 of the Act effectively inserts a clause in all insurance contracts so that, where an insurance policy covers liability for accident, injury or disease, it will also cover that person's liability to repay benefits to the SoS. So, where an employer is insured against damages arising from the tort, subject to the detailed rules of the CRU scheme, the SoS will generally expect to receive reimbursement from the tortfeasor for benefits which have been paid as a result of the tort.

6. This was the Act's effect in 1997, and the scheme still operates this way today, largely compliant with the ECHR.

Developments in asbestos claims since 1997: the Claimants' case

7. Since 1997 the law relating to compensation for asbestos-related injury has progressed considerably to its current state on: causation (*Fairchild*), classification of 'divisible' and 'indivisible' asbestos-caused diseases (*Carder v University of Exeter* [2016] EWCA Civ 790 being particularly relevant to the *Aviva* decision), and approach to compensation for divisible and indivisible disease (s.3 Compensation Act 2006; *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UKSC 33).

8. The scheme in the Act reflects and follows these developments in the law of liability for asbestos-related injury. Currently, insurers are required to reimburse the SoS 100% of the recoverable benefit even when (at [11] and [126]):

    a. The employee's own negligence also contributed to the damage sustained;

    b. The employee's "divisible" disease is, as in Carder, in part unconnected with the insured's tort (such as when more than one tortfeasor exposed the claimant to asbestos);

    c. Others would also be liable in full for an "indivisible" disease (which by section 3 of the Compensation Act 2006 but not at common law applies to mesothelioma), but they or their insurers cannot be traced.

9. The Claimants were Aviva and Swiss Reinsurance Company, both involved in the market for 'long-tail' employers' liability insurance. They argued that, due to legal developments in asbestos-related tort claims, the Act as it now applies (or is being applied to) the Claimants gives rise to certain situations where insurers must reimburse the SoS for benefits that do not correspond to any damage caused by the insured.

10. Of the five pleaded, the three above requirements under the Act constituted disproportionate interference in the Claimants' A1P1 rights, by tracking changes in the tort law relating to asbestos claims since the Act came into force. They are therefore incompatible with the ECHR.

Justiciability and standing

11. The Court held that as s.22 of the Act inserts a clause into all existing and future insurance contracts, the potential interference with A1P1 '*thus arises, on an ongoing basis, each time a compensator incurs a liability under s.6 and the insurer incurs a corresponding liability under s.22*' (at [85]). It rejected the SoS's argument that the

Act was a 'one-off' interference that took place in 1997. As such, the matter was justiciable even though the Act was passed before October 2000 – the date on which the Human Rights Act 1998 ('HRA') came into force.

12. In order to bring a human rights judicial review, a prospective claimant must be a 'victim'. The SoS advanced a number of arguments that the Claimants were not 'victims', as the insurance market has absorbed the costs of reimbursing the SoS in its pricing.

13. Of particular interest is the SoS's argument, dismissed by the Court, that Swiss Re reinsured Aviva's book in full knowledge of its s.22 liabilities, so its victimhood arose from private law obligations to which it had voluntarily committed itself (based on *Aston Cantlow v Wallbank* [2004] 1 AC 546). The Court said: '*the mere fact that the 1997 Act existed, and was being operated as it is today, when the reinsurance contract was made does not in itself prevent Swiss Re from being a victim*' (at [108], drawing on *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816). Knowledge would not insulate Swiss Re from any possible adverse effect, even if the market had reacted to it.

14. The Court also held that although a human rights claim cannot be assigned (i.e. that 'victim' status cannot be transferred), assignment of title in an underlying asset that is being interfered with contrary to A1P1 means that the new owner will acquire a 'possession' or a 'claim' within the meaning of A1P1, applying *Novikov v Russia* (App. No 35989/02). Swiss Re therefore had become a victim by being assigned a contract to which s.22 of the Act applies (at [109]).

The Court's analysis of A1P1

15. Funds used to meet insurance liabilities can properly be regarded as 'possessions' attracting the protection of A1P1 (at [112]).

16. It is worth noting the care with which the challenge was put, in order that the requirements properly fell outside the 'legitimate aim' of the legislation. Following a detailed examination of the pre-Act law and the passing of the Act, the Court held that that the 'particular mischief' the Act was designed to correct was the unfairness of deduction of benefits payments from general damages. The Act therefore pursued the legitimate aim of shift the cost of the benefits onto compensators and their insurers rather than for the State to assume them. But it was not contemplated that developments in the law would make compensators or their insurers liable for State benefits having no real relationship to the degree of injury inflicted (at [64]).

17. As such, there was only a 'tenuous' (regarding the first measure, full payment even in contributory negligence cases) or no rational connection between the aims and the three measures above. There were less intrusive means of achieving the Act's objective. Only the first measure could be justified by broad social policy objectives, such as increasing the amount of public resources, but did not strike a fair balance between the Claimant's interest and the public interest. The common law developments in liability for asbestos-related additionally tipped the balance.

18. As such, the three requirements above breached A1P1.

Failure to make regulations

19. Of potential lasting significance are the *obiter* comments concerning the basis on which the High Court would have allowed *Aviva*'s alternative case, cast as a failure to make regulations, despite s.6(6) HRA which removes from scope of human rights challenge '*a failure to introduce in, or lay before, Parliament a proposal for legislation*'.

20. Section 22(4) reads: '*Regulations may in prescribed cases limit the amount of the liability imposed on the insurer*'. The power to make regulations by statutory instrument is given by s.30 of the Act, which subjects regulations made under s.22 to a 'negative procedure' – they are in force when made by the SoS unless annulled by Parliament.

21. The Court said that therefore regulations made under s.22(4) of the Act would not be a '*proposal for legislation*' – it would be actual legislation in force, albeit subject to 40 days' consideration for annulment in Parliament (per s.5(1) Statutory Instruments Act 1946 and comments of Lord Reed in *R(T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35 at [149]).

22. Therefore, a challenge based on a failure to make *these* regulations would not be outlawed by s.6(6) HRA. Failure to make regulations under s.22(4) would be an 'act' able to be judicially reviewed for compliance with ECHR (*Aviva* at [171]-[174]), and failure to make regulations to redress the breaches above would have been found an infringement of A1P1, for the same reasons.

What effect will *Aviva* have?

23. The Court invited further submissions on remedies. However, a declaration that the above requirements are unlawful will almost certainly be made – potentially with long-term retrospective effect (see Mr Justice Henshaw's stated inclinations at [181]).

24. In human rights terms, it is striking that breach of A1P1 was found on the basis of common law developments altering the application of statute. The *obiter* comments that failure to make regulations that are subject to the negative procedure are not caught by s.6(6) HRA may also have future resonance.

25. For insurance and personal injury practitioners, it seems likely that going forward the SoS will stand to be reimbursed only according to the insured's contribution to the injury. This will mean subtracting a percentage for contributory negligence, following the common law in *Barker v Corus UK Ltd* [2006] UKHL 20 (for mesothelioma and asbestos-related lung cancer), and paying a proportion equal to the insured's responsibility for causing asbestosis.

26. Additionally, although arguments on limitation for HRA damages were considered, it is possible that potentially very large sums could be sought in restitution from the SoS by insurers, particularly if the requirements are declared unlawful from 1997 (as Mr Justice Henshaw was inclined to order with respect to the contributory negligence point) or 2006 (the passing of Compensation Act 2006). This seems to be already in the minds of the Claimants (cf. [91(i)]-[92]).

27. Whether *Aviva* applies to non-insurer Defendants is not clear. Although it was found that s.6 of the Act interfered with possessions on an ongoing basis, in the strict terms of the judgment it was s.22 of the Act that was found to be justiciable, and the route into finding a breach of A1P1. A claim based on liability under s.6 of the Act was not explicitly considered in *Aviva*, and may be vulnerable to the counterargument that the interference arose before HRA came into force.

    The Act (or its application) may be changed to treat tortfeasors and insurers alike going forward. However, if *Aviva* does not apply to non-insurer Defendants then damages and/or restitution for past overpayments to the SoS would not be available: they would not have been in breach of the ECHR, and the overpayments would have been lawfully and unmistakenly paid to the SoS. How the Government will deal with this potentially unequal treatment remains to be seen.

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