Northern Ireland
Assembly

COMMITTEE FOR FINANCE AND PERSONNEL

OFFICIAL REPORT
(Hansard)

Damages (Asbestos-related Conditions) Bill

2 February 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Daithí McKay (Chairperson)
Dr Stephen Farry
Mr Paul Frew
Mr Paul Girvan
Mr Mitchel McLaughlin
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Daniel Holder	)	
Professor Monica McWilliams	)	Northern Ireland Human Rights Commission
Mr Ciarán Ó Maoláin	)	

The Chairperson (Mr McKay):

I welcome the Human Rights Commission representatives to the meeting. Professor Monica McWilliams is the chief commissioner, Mr Ciarán Ó Maoláin is head of legal services, policy and research, and Daniel Holder is a policy worker. I invite Monica to give the presentation.

Professor Monica McWilliams (Northern Ireland Human Rights Commission):

Thank you, Chairperson. As you are probably aware, the Commission has a statutory function to advise on the compatibility of legislation with the European Convention on Human Rights (ECHR) incorporated under the Human Rights Act 1998. We welcome the opportunity to do

that. We understand that the main issue is contestation over the insurance industry issue and that the Bill might unduly interfere with the rights to property. Therefore, if it were incompatible with the convention rights, it would not be within the competence of the Assembly to legislate.

We deal briefly with the issues that the insurance companies raise in our written evidence. We will not go into that, as Members have copies of it. We feel that we have dealt with them in relation to article 1, protocol 1 of the convention, which is on the right to the "peaceful enjoyment of possessions"; in other words, the right to property. We have concentrated on the test that would be met to ensure that there was no violation of that article. Ciarán and Daniel will focus on the different parts of our submission. I will hand over to Daniel to focus briefly on the key points that we make about the compatibility test.

Mr Daniel Holder (Northern Ireland Human Rights Commission):
I will focus on outlining the test for the right to property and whether there has been a violation of that, given that that is what the insurance industry representations focus on. There are, basically, three stages to the test; the first stage is to define whether what is being referred to qualifies as being possessions or property. The general resources of insurance companies can count as possessions. It is much more tenuous an assertion that an immunity from claims could somehow represent a possession in its own right.

The second stage of the test, having established that the possession in question exists, is to ask whether the Bill would impact on the possession in question in a manner that would constitute interference for the purposes of the article. There are two main types of interference. The first is referred to as a "deprivation" of property, which is generally when a property is expropriated — for example, when a house is vested to build a road — or when assets are transferred directly. "Deprivation" of property is very difficult to establish in this scenario. Another form of interference that is recognised under that right are any measures that "control" the use of property, including rent controls, planning controls, fishing licences and so on. It is more likely that any challenge to the Bill would focus on that. Such a challenge would assert that the Bill is a "control", and, potentially, a court may accept that, or it may not accept that the measure constitutes an interference at all. In the Scottish judicial review, it was found that the impact on insurers' finances was too remote to constitute any sort of interference.

It is worth going through all of the stages, and if a court were to determine that a Bill

constituted an interference in property rights, that does not mean that the right is violated. The legislature is permitted to intervene in property rights under particular circumstances, which are quite broadly drafted.

There are three main elements to the final stage of the test, which is, effectively, a test of whether the interference is permitted. First, the interference must have a proper basis in law, and, in this instance, it is set out in law. As long as the law is sufficiently clear and precise, it should have no difficulty in meeting that test. The second element of the test is: is the interference in the general or public interest? It is worth noting that states have particular discretion in deciding what matter constitutes a general or public interest. They need to ensure that their position is not "manifestly without reasonable foundation", to quote a court ruling.

The final stage of the test is the proportionality test. The measure is to strike a fair balance between the general interest and the individual property rights of the complainant. In this instance, that is the insurance companies, and, again, the legislature has significant discretion in making that determination. Effectively, the court grants discretion so long as the measure does not constitute what is referred to as an "individual and excessive burden" on an individual party.

That sets out the elements of the test, and, clearly, it is beneficial for scrutiny of the Bill that the specific points on general interest and proportionality are addressed.

Professor McWilliams:

We are trying to be helpful to the committee in its scrutiny. As Daniel has shown, it falls to you to have that clarity in the legislation, but it also falls to you to show that, in your decision-making, you have given consideration to those human rights issues. Where we can be helpful on any questions that you might have, we are happy do that.

Ms Purvis:

Thank you for your presentation and your paper. Paragraph 20 and footnote 23 of your paper refers to the case of Pine Valley and others v Ireland. In that case, the court, noting that:

> "applicants were engaged on a commercial venture which, by its very nature, involved an element of risk",

found no violation of article 1, protocol 1. Could the same be said for insurance companies? I foresee that, if any challenge were to be made to the legislation, it would come from insurance companies.

Mr Ciarán Ó Maoláin (Northern Ireland Human Rights Commission):

The Pine Valley case was slightly different in that that company had been granted planning permission, was facing revocation of that planning permission and had a claim. Insurance companies do not have a claim to make but are trying to protect themselves against claims by other parties. It could be said that, before the Johnston case in the House of Lords, people who had been diagnosed with pleural plaques had the basis for a claim. The insurance companies, on the other hand, are not able to make a claim and are the potential defendants in a claim. It is, of course, true that insurance is based on a negotiation of risk against reward, but it is a legitimate commercial enterprise. The facts in the Pine Valley case are too different to be directly relevant to the situation of insurance companies.

Mr Holder:

I want to go back to the test. The test is to see whether there is an individual and excessive burden. Pine Valley is an example of one case where there was retrospective legislation, and the court determined that it was not an individual and excessive burden. There have been other cases, such as the Provincial Building Society v the UK, where the building society thought that it could keep money because it had found a tax loophole. The legislature decided to close that tax loophole and to take the money from them. Although that was considered to be an interference in the sense that it was a control of property, it was held to be entirely legitimate and proportionate in the circumstances.

There were other cases in which the court looked at retrospective legislation and found a violation. Again, however, that was because it was determined that it provided an individual and excessive burden on the claimants. None of those claimants in the examples that we have looked at have been insurance companies; they have been individual victims. One example that we mentioned was Lecarpentier v France, in which the consumer code was changed retrospectively. Some applicants had won damages from a mortgage lender, and they were to be paid. The legislature changed the law, and, subsequently, the mortgage lender appealed and took the money off them. The court regarded that the impact that that had on those individuals was excessive.

There is another case, which refers to negligence claims, but it is the other way round as it was an affected individual. The case was Draon v France. That state intervened retrospectively to stop people claiming compensation for medical negligence in particular circumstances and

deprived them of an established claim that they had a legitimate expectation to. That was found to be individual and excessive and, hence, a violation. The fact that an individual had a claim and a legitimate expectation to it is not the same as an insurance company arguing that it, somehow, has immunity from claims. That would seem to be a very different circumstance. It is not necessarily the case that the court would find a violation when it is done the other way round. The proportionality test is different between the circumstances of an individual and the circumstances of a large company with resources, etc.

Ms Purvis:

If the Bill was not to apply retrospectively, would there be a case for those who had lodged previous cases or whose cases were not heard to challenge the legislation? Say, for example, that the legislation will say that pleural plaques is an injury and that people can, therefore, sue and make a compensation claim. Will those who made their cases prior to the Johnson case have a case to pursue, if that body of individuals is excluded from the legislation?

Mr Holder:

I refer to the answer that Ciarán gave earlier. It is more or less a question of whether the victims could have a similar right to property. It would be difficult for them to establish that. Remember that the right to property protects only the property that exists or property that there is a legitimate expectation of receiving. If, for example, a court awards you money, you have a legitimate expectation that that money will be received. It tends not to be counted as property when the matter is still under dispute in the courts. In other cases, such as Anheuser-Busch v Portugal, the so-called Budweiser case, it was found that the legitimate expectation or right to property of those individuals cannot be said to arise when there is a dispute going on and until that dispute has been determined by the courts. The fact that the House of Lords made that judgement at that point extinguishes the right to property and the legitimate expectation that the individuals had. It would be difficult to argue that.

Professor McWilliams:

Ciarán will clarify the issue of retrospection.

Mr Ó Maoláin:

The key point with the Bill is that retrospection is not a problem, per se, in respect of convention compliance. The convention abhors criminal legislation that creates offences that apply

retrospectively before the passage of the law. However, in respect of civil matters, it is entirely within the discretion of a legislature to pass legislation that has retrospective effect, as far as the civil rights of the parties are concerned.

There would be no particular reason to pass the law without making it retrospective other than to protect the interests of insurers or other carriers of liability. In this case, that might be the Department of Enterprise, Trade and Investment (DETI). However, there is no objection in convention law to retrospective application of the measure. If that were not done, there would be a small class of people whose claims arose during the period between the Johnston case and the passage of the law who would be denied remedy, and that would create, on the face of it, an injustice.

Ms Purvis:

Finally, the Scottish Parliament passed similar legislation, which is now undergoing a legal challenge. Have you looked in detail at that legal challenge?

Professor McWilliams:

Yes.

Ms Purvis:

What is your assessment of that to date?

Mr Holder:

The challenge made in the judicial review in Scotland was made on the basis of article 1, protocol 1 of the convention. Article 6 of the convention was thrown in as well. In that instance, the judge decided that the legislation was compatible with the convention and used a lot of the elements of the test that we have set out. That judgement is subject to appeal, and could again be subject to an appeal to the Supreme Court and, ultimately, the European Court. Therefore, if insurers seek to continue to appeal, it could be quite a long process.

Mr Ó Maoláin:

Lord Dempsey's judgement on the Scottish case was quite lengthy and disposed entirely of the three grounds that the insurance companies advanced. The insurance companies claimed that they had sufficiently close involvement with the pleural plaques litigation, but the judgement held

that they did not have sufficiently close involvement to give them party status. Secondly, they claimed that the outcome of the pleural plaques actions should be deemed to constitute decisions in relation to the insurance companies' civil rights and obligations. Again, the judge rejected that argument. Thirdly, insurance companies claimed that the Damages (Asbestos-related Conditions) (Scotland) Act 2009 interfered with judicial determination of those proceedings, but Lord Dempsey held that none of those points could be sustained. He particularly held that there was no basis from the convention to say that legislation could not be introduced that upset an existing court decision or that impacted on ongoing litigation, so there was no bar to either the Scottish Parliament — or this Assembly — passing legislation purely because of the existence of decided case law. The legislature is free to change the law at any time, and if it had to bow to the courts on every occasion, the legislative process would be impossible.

Mr O'Loan:

A fundamental point around the Bill is whether it is for the courts or for a legislature to determine whether pleural plagues are damage that might be open to remedy through compensation in law. I suppose one could regard that as a constitutional point. Bearing that in mind, is the ECHR the sole test that one might use around the matter, or are there any other potential tests? I know that your remit is exclusively human rights, but you also have considerable legal experience. Is there any other law that might be invoked in relation to a discussion of that constitutional point?

Mr Ó Maoláin:

As the Human Rights Commission, we can only comment on human rights law, but I am sure that the Committee and Assembly will want to consider the medical evidence, including the evidence of people who have been diagnosed with pleural plaques and who say that they have suffered psychological injury. However, we can only comment from the point of view of human rights law.

Mr O'Loan:

So, the ECHR is the sole test of human rights law?

Mr Ó Maoláin:

It is the only instrument that can be litigated in our courts at present.

Mr Holder:

As to what the right to a fair trial under article 6 of the European Convention provides for, some case law would protect against the direct intervention of a legislature to change the result of an ongoing case, effectively an intervention in that case, unless the court has held that there is a "compelling ground of general interest" for it to do so. That would not stop a legislature ever changing the law on a policy or matter that is being dealt with by a court, otherwise it would be impossible to legislate in a way that did not impact on ongoing litigation.

The first question is whether the Bill constitutes any direct involvement in an ongoing case. It does not appear to do so, but, if it did, the onus would be to demonstrate that there was a compelling ground of general interest to do that, which is the human rights test. Other arguments were brought into the Scottish case. Those were not human rights arguments but related to whether the measures were rational and reasonable in the context of the common law. Those were rejected by the court there, but that is not for us to comment on.

Mr McLaughlin:

It is good to see you again, Monica. Thank you for your presentation. I want to address the issues of what is understood to be in the general or public interest, the Assembly's expertise or ability to have a view on that in this region and proportionality. Given that there are current and threatened legal processes on those critical issues, have you had the opportunity to consult with or advise the Department on them?

Professor McWilliams:

We were invited to comment.

Mr McLaughlin:

You are advising the Committee, but my question was whether you had advised the Department.

Professor McWilliams:

We did not. Our advice is to you.

Mr Holder:

The Committee's was the first request for advice that we received.

Mr McLaughlin:

That is sufficient, because that advice is now on the record. Given that the issue is fraught and that there are significant and sensitive issues to be decided, it is incumbent on the Assembly and its Ministers and Departments to be sure-footed on the issues that they need to take advice on and be clear on. Having heard the evidence, I am convinced that there are issues of justice and damage — whether psychological, asymptomatic or otherwise — that must be addressed. It is as clear as day that the issue will be fought tooth and nail. We must take a close look at all the options, and, if we are to succeed, we must ensure that our system is robust enough to stand up to the most intense scrutiny.

Professor McWilliams:

We look forward to the legislation providing that clarity. In another aspect of our work, we assist victims. Individuals have come to us in the past, and we have not had that clarity.

Mr Ó Maoláin:

There is no better forum to determine what the public or general interest is than a democratically elected legislature. When the European Court of Human Rights talks about the "margin of appreciation" that is given to states, it always looks to the opinion of its democratic representatives. Although we may offer our view of what the general interest constitutes, as long as the view of the Assembly is measured, reflects all the evidence before it and expresses whether it believes the Bill is in the general or public interest, that will weigh heavily in any future challenge to the legislation.

Mr O'Loan:

Following on from Mitchel's point, the explanatory and financial memorandum states that:

"The provisions of the Bill are considered to be compatible with the European Convention on Human Rights."

Do all Bills that come before us carry that statement?

Professor McWilliams:

Yes.

Mr O'Loan:

Most Bills originate in Departments. Do Departments come to you in some or most cases before they write that statement, or do they form their own view on that?

Professor McWilliams:

It is interesting that you should raise that point, because we have raised it also. We would very much like to be involved at the earlier stages, before that statement is made. However when we get a Bill, that statement is written on it already. We are then asked to comment, unless there is a consultation. If there is a consultation prior to the legislation, we will engage in that, and we prioritise our work by looking to see what pieces of work from the Assembly fit in with our key priorities. We do that because we have a limited number of staff, and we are commenting on that relationship with the Assembly for when it produces more legislation in the future.

The Speaker writes to me and sends any future legislation and asks the commission to comment. Much of what we might receive may not have any human rights implications. We then decide which pieces have human rights implications, and we respond by making a submission. Sometimes, we are interested to know why some of our points have not been taken on board as often as we want to know why they were taken on board. This is the opportunity at which we are able to come to the Committee, and the advantage of having the Committee's scrutiny is that that is where we can add our voice.

Mr Ó Maoláin:

There is no very good reason why that statement on Bills should not be accompanied by some discussion in the explanatory notes. It is easy to write that a Bill is convention compatible, but, in Bills such as this, where there are clear issues around the competing retrospective rights of insurers, other liability carriers and potential claimants, it would be at least useful to the legislative process if the people who came to the view that the Bill was convention compatible could address those issues and at least set out the grounds of their reasoning.

Mr McLaughlin:

It could state in the explanatory and financial memorandum that the Human Rights Commission agrees with the opinion that the legislation is convention compatible.

Professor McWilliams:

At least that would show that it is not just a standard statement and that someone has been asked to consider that and has set it out. The legal adviser to the Joint Committee on Human Rights at Westminster has advised that scrutiny Committee, which has sent forward the opinion that similar

legislation should not just have that statement on it. That advice has been acted on. The view was that, in future, some consideration would be given to elaborating on that very point in the explanatory document. Otherwise, it is seen as a standard statement and a stamp rather than an explanation.

Mr McLaughlin:

That is the only weight that is attached to it.

Professor McWilliams:

If the explanatory and financial memorandum is to be a true explanatory document, it would not take much consideration to add a further explanation of what convention compatibility means in relation to the Bill.

Mr Ó Maoláin:

There is, perhaps, not enough transparency in the process, due to the convention of not sharing legal advice. That is a matter that came up in the debates. Clearly, the Department's legal advisers will have considered in some detail the Bill's implications. The Speaker's Office also has to come to a judgement on whether the Bill should be admitted as convention compatible. The Bill will have been subjected to at least two sets of legal scrutiny already, and you do not have that information before you. It would be in the gift of the Minister or the Speaker to perhaps open up some of that advice to discussions.

Mr McLaughlin:

It is especially important if we know that the legislation will be contested.

Ms Purvis:

Monica talked about providing clarity in the law, particularly for victims. I want to put on record my disappointment that, unfortunately, due to the Minister's tabling of the Bill so late, it does not look as though the Bill will complete its passage in this mandate. Not only am I disappointed, I am sure that others who work with victims are disappointed. The Committee has not been given enough time for full and proper scrutiny of the Bill.

The Chairperson:

Monica, thank you for your presentation. As the Committee Stage progresses over the next

number of weeks, we will probably seek further written evidence from you.

Professor McWilliams:

We will be happy to provide that.

Mr McLaughlin:

Taking on board what Dawn said, perhaps the Committee should write to the Minister about the value of discussion and consultation with the Commission.

Professor McWilliams:

Thank you very much.