Neutral Citation Number: [2020] EWHC 3118 (Admin)

Case No: CO/2608/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2020

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE QUEEN
on the Application of

(1) AVIVA INSURANCE LIMITED
(2) SWISS REINSURANCE COMPANY LIMITED — **Claimants**

- and –

THE SECRETARY OF STATE FOR WORK AND PENSIONS — **Defendant**

- -
- -

Michael Kent QC, Benjamin Tankel and Kate Boakes (instructed by **Keoghs LLP**) for the **Claimants**
Edward Brown and Brendan McGurk (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 8 and 9 July 2020
Further evidence and written submissions filed 17 July 2020

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Mr Justice Henshaw:

(A) INTRODUCTION

1. By this claim for judicial review the First Claimant ("***Aviva***"), an insurer with a substantial book of long-tail employers' liability ("***EL***") insurance, and the Second Claimant ("***Swiss Re***"), a reinsurer with contractual responsibilities in respect of this and other long-tail books, contend that provisions of the Social Security (Recovery of Benefits) Act 1997 ("***the 1997 Act***" or "***the Act***"), as currently interpreted and applied by the Defendant through its Compensation Recovery Unit ("***CRU***"), are incompatible with their rights under Article 1 of the First Protocol ("***A1P1***") to the Convention for the Protection of Human Rights and Fundamental Freedoms ("***the Convention***") as incorporated in the United Kingdom by the Human Rights Act 1998 ("***HRA***").

2. The 1997 Act and regulations made under it require liability insurers to pay to the CRU amounts equal to certain social security benefits received by claimants in

personal injury cases. The Claimants do not complain of the legislative scheme as a whole. They accept that the scheme which, with modifications, Parliament has maintained since 1989, enabling the State to recoup some part of its substantial outlay on social security benefits where the injury or disease (and therefore the need for the benefits) has been caused by wrongdoers, has never as a generality infringed the Convention rights of liability insurers.

3. The aspects which the Claimants do challenge relate to what they describe as an unintended but increasingly onerous by-product at the margins of the scheme, which involves obligations imposed on a dwindling number of liability insurers holding long-tail disease legacy policies (including Aviva), arising from liabilities for long-tail asbestos-related diseases. The Claimants' complaint is not that they or their insureds have to meet long-tail claims of this kind. It is, rather, that statutory and common law developments since the 1997 Act, designed for the protection of victims of asbestos-related diseases, have led to a situation where those in the position of the Claimants are required to pay to the State amounts equal to State benefits that do not correspond in any real way to any injury caused by their respective insureds.

4. The Claimants seek declarations as to the correct interpretation of such provisions as required by HRA section 3, alternatively a declaration of incompatibility under section 4(2) of the HRA; a declaration as to a failure to introduce regulations to remove the incompatibility; a quashing order in relation to a specimen CRU certificate; and an inquiry into damages.

5. Linden J granted permission to proceed, on the papers, on 21 January 2020.

6. For the reasons set out below, I have concluded that the claim succeeds in part. To the extent that it requires payments to the State which (in summary) do not correspond to the insured's real contribution to the injury, it fails to strike a fair balance between the rights of the State and those of the Claimants and is incompatible with A1P1.

(B) SUMMARY OF THE CLAIMANTS' CLAIMS

7. As part of the social security system in the UK, the Defendant Secretary of State pays a range of benefits to individuals. Some of these benefits relate to the effects of disabling diseases and injuries; others are for different purposes entirely. Where the victim of an injury or disease also brings a successful claim against an employer (including one which results in a settlement), the 1997 Act requires that employer, or its liability insurer (together, the "*compensators*"), to make a payment to the Defendant equal to a prescribed portion of specified types of benefits.

8. The list of benefits which are required to be thus paid by compensators to the CRU is set out in Schedule 2 to the 1997 Act, which currently lists 20 benefits including Universal Credit and several of its predecessor benefits, statutory sick pay, and the two components of Personal Independence Payment (PIP) and of its predecessor Disability Living Allowance (DLA). In any claim by an injured person against his/her former employer, the care and mobility components of PIP (and, where still available, DLA) are offset against any compensation for the costs of care and mobility respectively during the relevant period. All other listed benefits are set off only against compensation for earnings lost during the relevant period. Due to the long-tail nature of asbestos-related diseases, many claimants are above retirement age and

therefore do not have a claim for loss of earnings. Compensators are therefore often required to make a payment to the Defendant in respect of benefits that cannot be offset against any part of the compensation paid to the injured person. The Claimants say this results in insurers being required to repay benefits that do not compensate for a type of damage that their policyholders have caused.

9. Since the 1997 Act came into force, there have been far-reaching changes in the common law and statutory provisions in relation to asbestos-related diseases. These changes have been driven by the express objective of readjusting the balance between tortfeasors and victims in asbestos cases in favour of the victim, as Males LJ noted in *Equitas Insurance Limited v Municipal Mutual Insurance Limited* [2019] EWCA Civ 718 §§ 90-91. However, they have also had the consequence of increasing the amount the Defendant considers she is entitled under the 1997 Act to recoup from insurers on account of the benefits the State has, as a matter of public policy, decided to provide to such victims.

10. These changes in the legal framework are summarised in *McGregor on Damages* (20th ed.) §§ 8-006 to 8-029, and include the following developments:

    i) *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32: the usual "*but for*" test for causation in fact was exceptionally relaxed, on policy grounds, to enable mesothelioma victims to prove causation in circumstances where due to the aetiology of the disease, medical science did not permit identification, even on the balance of probabilities, of the source of asbestos fibres which caused it in a given case. The mesothelioma might have started from a single fibre inhaled when working for a particular employer, and the court concluded that a modified approach to proof of causation was justified, under which it would be sufficient to prove that the defendant employer had materially increased the *risk* of contracting the disease.

    ii) *Barker v Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572: held that the *Fairchild* principle makes a tortfeasor liable only for a share of damages, in proportion to his contribution to the overall exposure.

    iii) Section 3 of the Compensation Act 2006: reversed *Barker v Corus* and thus imposed full liability upon a tortfeasor who was only responsible for part of the asbestos exposure.

    iv) *Durham v BAI (Run off) Ltd (in scheme of arrangement) & conjoined appeals* [2012] UKSC 14; [2012] 1 W.L.R. 867 (the "*Employers' Liability Trigger Litigation*"): held that on the correct construction of EL insurance policies, in a mesothelioma case injury is "*sustained*" or "*contracted*" at the moment when the employee is wrongfully *exposed* to asbestos, rather than the moment when the disease is later established in the employee's body.

    v) *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UKSC 33; [2016] AC 509: concluded that the common law rule in *Barker v Corus* of aliquot share liability continues to apply in cases not covered by the Compensation Act 2006.

vi) *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86: held that the *Fairchild* exception applies to asbestos-related lung cancer cases because, in aetiological terms, mesothelioma and lung cancer are legally indistinguishable. It is convenient to refer to diseases of this type as being "*indivisible*", the term used in *Carder* (below).

vii) By contrast, *Carder v University of Exeter* [2016] EWCA Civ 790 concerned asbestosis, which is regarded as a "*divisible*" disease in the sense that periods of exposure can be linked on a causal basis to the onset or severity of the disease. It is a dose-related disease, whose extent and severity is related to the quantity of fibres ingested (judgment § 2). The Court of Appeal held the claimant to be entitled to damages from a former employer who had been responsible for only 2.3% of his total exposure to asbestos dust because, although very small, the contribution made a material contribution to the claimant's condition.

11. The present Claimants' complaint is that the combination of the 1997 Act (as interpreted by the Defendant) and the developments outlined above has given rise to five situations where liability insurers are obliged to reimburse the State for benefits that do not correspond to any damage caused by their insured, or (or including) where the insured is only one of two or more employers liable for such damage and the insurer's contribution to the victim's exposure was limited (and in some cases very limited):

i) the requirement to repay 100% of the recoverable benefit even where the employee's own negligence also contributed to the damage sustained;

ii) the requirement to repay 100% of the recoverable benefit even where the employee's "divisible" disease is, as in *Carder*, in part unconnected with the insured's tort;

iii) where 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. A particular instance of this, relating to a Mr Bainbridge, is cited as an example for the purposes of the present claim. This situation has become a particular problem in asbestos cases where (a) the events causing the injury were usually decades earlier; (b) employees often did contract work for many different employers; and (c) the rules on causation have been relaxed in various ways so that a relatively minimal contribution to asbestos exposure can nevertheless result in an award in damages. The legal and public policy underpinning these developments was designed to ensure full recovery for the victims of torts but, the Claimants say, can provide no justification for the State being allowed, parasitically, to recover 100% of its outlay on benefits connected with that injury;

iv) the requirement to repay certain benefits that do not correspond to a recognised head of loss. The choice as to which benefits to pay to a disabled person is a matter of government policy. Only some of these are prescribed benefits which the Claimants are required to repay. Nevertheless, the nature and amounts of those prescribed benefits do not always correspond to heads of

compensation that would be payable by way of damages following a successful negligence claim. For example, Universal Credit is now a listed benefit referred to in Schedule 2 to the 1997 Act, but is deductible only against *"Compensation for earnings lost during the relevant period"*. Universal Credit now includes a number of benefits that were previously not recoverable, including housing benefit. However, the Claimants' evidence indicates that, as one would expect (and as exemplified by the case of *Bainbridge*), claims for loss of earnings are often not made by those suffering from mesothelioma given their average age; and

v) the requirement to repay 100% of the recoverable benefit despite the element of compromise that is present in most settled claims. This requirement even extends to claims that are settled without admission of liability.

12. The Claimants submit that in each of those situations, apart from the fifth, the anomaly is capable of being removed by a process of "reading down" or the making of regulations under the Act. As for the fifth, the Claimants accept that it would not be practicable to devise a scheme that took account of the element of compromise in a settlement without admission of liability; nonetheless, the Claimants say the fact that such settlements are caught remains a factor to take into account when deciding whether a fair balance is struck by the scheme for A1P1 purposes. The Claimants point out in this context that in the *Welsh Bill* case considered later, Lord Mance, in explaining why insurers were "*victims*" under the Bill, had regard to the fact that its scheme of NHS recovery made it irrelevant whether the compensation payment reflected actual or admitted liability.

13. The Claimants state that in addition to the burdens increasing as a result of developments in the law that could not have been within Parliament's contemplation in 1997, the number of asbestos claims has also increased significantly, and well beyond what government expected when enacting the legislation. The compliance cost assessment report prepared by the government in advance of the passing of the 1997 Act stated that in one quarter of 1995, only 49 asbestos disease claim settlements were reported to the CRU for the whole of the UK. The Claimants' evidence includes recent statistics for asbestos claims under legacy policies issued by Aviva alone, namely 295 cases in the most recent completed quarter of 2019. Allowing for the experiences of many other insurers holding similar legacy books of EL insurance, it is suggested that such claims (all in practice made under pre-1997 policies) must have increased at least tenfold.

14. Similarly, statistics obtained by a freedom of information request, published on 10 March 2014, set out new claims for industrial injuries disablement benefit (IIDB) each year from 2002 to 2012, broken down by disease type and showing the total number of new cases, as well as the discrete figures for three asbestos-related diseases: mesothelioma, lung cancer and pleural thickening. The number of asbestos-related disease claims increased over the period, from 2,680 claims in 2002 to 3,880 in 2012, and represented an increasingly high proportion of the total number of claims: up from 9% in 2002 to 27% in 2012. Mesothelioma claims represented 3% of the total number of claims in 2002, but 16% by 2012. A report published on 30 October 2019 by the Health and Safety Executive, "*Asbestos-related disease statistics in Great Britain*", includes a graph showing the growth in the number of deaths from

mesothelioma and asbestosis, as well as IIDB claims for mesothelioma, asbestosis and pleural thickening, over the period from 1980 to 2017.

15. Put shortly, the Claimants accept that it is proportionate for them to be required to pay for benefits which correspond to damages for losses which their insured caused; but complain about their significant obligation in such cases to pay for benefits which correspond to damages for losses not caused by their insured, or in respect of which there is no corresponding head of damage at all. They submit that the 1997 Act, as it now applies to (or is being applied to) them, constitutes a disproportionate interference in their A1P1 rights because, in summary:

    i) The Claimants are required to pay very significant amounts of benefits even where these are not the result of their insured's wrongdoing. That aspect of the scheme has never been considered by Parliament, no clear justification for it has been articulated or identified, and it is unnecessary in order to meet the (accepted) legitimate aim of ensuring that the tortfeasor should pay for the damage he has caused.

    ii) This excessive and individual burden is exacerbated by the fact that the legislation is retroactive. Thus, EL policies which were priced and paid for many years before the legislation came into force are now required to cover a liability for the repayment of benefits that could never have been anticipated at the time the policies were made.

    iii) In any event, the impugned measures do not strike a fair balance between the interests of the Claimants and those of the community. In particular:

        a) the 1997 Act does not correct a social injustice as between tortfeasor and victim, but rather involves the recoupment of State benefits by the Defendant – in many cases it actually works against victims;

        b) the 1997 Act does not build on established legal principles. Rather the Defendant has had the advantage of developments in the common law and statute which were expressly intended to benefit the victims of torts, without considering the impact of their extension to other areas;

        c) insurers are not tortfeasors and therefore the policy considerations which underpin the concept that "*the tortfeasor pays*" do not apply. The liabilities in practice fall on insurers because EL insurance has been compulsory since 1972; and

        d) it is impossible for the Claimants to mitigate the additional burden in relation to their many responding policies, which predate the coming into force of the 1997 Act.

16. The Claimants contrast this situation with similar legislative reforms which post-date the HRA, which have not operated retrospectively and have involved careful and proportionate transitional provisions. Such schemes show that it is perfectly possible to design a scheme that does not require insurance companies to fund State benefits paid for injury that is not, on analysis, the result of their insureds' wrongdoing. They cite as examples:

i) regulation 10 of the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008 (SI 2008/1596), which applies to the particular types of payment made to employees covered by section 1A of the 1997 Act. Regulation 10 has the effect of limiting a compensator's liability to the Defendant to the amount credited by the employee, with the result that there is no excess payment by the insurer;

ii) Part 3 of the Health and Social Care (Community Health and Standards) Act 2003, which concerns the recovery of NHS treatment charges from those responsible for injuries, but does not apply to diseases and is not retrospective. Section 153 of the Act (as amended) provides for payments to be reduced as regards a claim where a court has ordered a reduction of damages in accordance with section 1 of the Law Reform (Contributory Negligence) Act 1945;

iii) regulation 6 of the Personal Injuries (NHS Charges) (Amounts) Regulations 2015 (SI 2015/295), which provides for apportionment where each of two or more compensators has made a compensation payment or is (or is alleged to be) *"liable to any extent in respect of the injury"*: with the result that one compensator and his insurer will be liable for only an apportioned part of the NHS charges, even where the other person responsible for the injury does not make a contribution (e.g. because he is untraceable or uninsured);

iv) the proposed Welsh legislation, struck down by the Supreme Court in the *Welsh Bill* case, which contained a provision requiring the charges arising to be *"reduced where appropriate to reflect any contributory fault on the part of the sufferer"* (judgment § 3); and

v) a bill going through the Scottish Parliament relating to NHS charges in industrial disease cases, which is not retroactive, and provides for abatement for contributory negligence and apportionment of recoverable amounts between harmful events occurring before and after the coming into force of the legislation.

17. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3, [2015] AC 1016 (*the "Welsh Bill case"*), the Supreme Court held provisions relating to recovery of NHS charges in proposed legislation in Wales to be incompatible with the rights of insurance companies under A1P1. The aim of the Bill was the recovery of the cost of NHS treatment for any asbestos-related disease, by requiring compensators to make payment against certificates under a scheme similar to the benefit recovery scheme under the 1997 Act (save that it allowed a deduction to reflect any contributory negligence on the part of the victim). The Bill included a provision similar to section 22 of the 1997 Act, quoted below, deeming liability insurance to cover this new liability with retrospective effect.

18. The Supreme Court held that the Bill fell outside the legislative competence of the Welsh Assembly, in that it did not relate to any of the subjects listed in paragraph 9 of Part 1 of Schedule 7 to the Government of Wales Act 2006. Lord Mance, giving the majority judgment, stated that in the light of that conclusion, the question of whether the Bill infringed A1P1 did not strictly arise for decision: however, as it had been fully argued, and involved a disagreement about the applicable principles which had

general importance, he would express his views on it. That view was that the Bill was incompatible with the rights of liability insurers under A1P1 as it failed to strike a fair balance between the interests of the community and the interests of insurers.

19. The Claimants submit that the present case is *a fortiori* the *Welsh Bill* case in that (a) medical treatment costs are in principle recoverable at common law, but there is no equivalent common law principle in relation to the payment of State benefits; (b) the Welsh Ministers expressly considered the impact of the legislation upon insurers when seeking to enact the legislation, whereas in the instant case Parliament did not consider the impact of those aspects of the scheme about which the Claimants complain; and (c) the aspects of the scheme about which the Claimants complain relate to damage that their insureds have *not* caused (or where such causation is wholly or partly based on a legal fiction designed to assist victims of torts). Accordingly, the Claimants submit that the decision in the *Welsh Bill* case is binding as a matter of precedent, and that in any event it shows the correct outcome on the merits in the present case. I return to the *Welsh Bill* case later in this judgment.

(C) THE DEFENDANT'S POSITION IN OUTLINE

20. I consider the Defendant's response in more detail in sections (G) and following below, but it is convenient at this stage to state it in brief outline. The Defendant submits that:

i) The real target for the Claimants' claim is the 1997 Act itself. Although the Claimants refer to the Defendant's interpretation of the Act, its language is clear, and it requires insurers to meet the relevant liabilities to the State.

ii) The real challenge is therefore to primary legislation passed 23 years ago, and on the basis of which the Claimants have written and priced EL policies in the intervening period, and the Defendant has provided social security benefits to eligible claimants in knowledge of the fact that (contributions to) those payments would be recoverable from insurers under the 1997 Act.

iii) The challenge is not justiciable because the HRA does not apply to conduct before it came into force. In the present case, the insertion by section 22 of the 1997 Act of a provision, deeming insurance policies to cover the insureds' liabilities under section 6 of the Act, was a one-off pre-HRA event.

iv) The challenge is also out of time at least in so far as concerns any claim for damages under HRA section 6. Further, any claim based on failure to make regulations under the 1997 Act has not been made promptly and in any event within 3 months of the grounds first arising.

v) The Claimants are not 'victims' for HRA purposes, because Aviva has reinsured its liabilities to Swiss Re, and Swiss Re will have provided such reinsurance in full knowledge of the facts and priced any higher costs resulting from the 1997 Act into the premium it charged Aviva.

vi) Any failure to make regulations under the 1997 Act (specifically, under section 22(4): see section (L) below) cannot be challenged under the HRA.

vii) In any event, there has been no violation of the Claimants' A1P1 rights. The relevant measures pursue a legitimate aim, to which they are rationally connected, and strike a fair balance between the Claimants' interests and the public interest. The Claimants are in substance seeking to reverse a balance struck in the 1997 Act, for good socio-economic reasons, and return the relevant costs (amounting to tens of millions of pounds a year) to the taxpayer. Changes in market conditions, including changes that arise from latent liabilities and judgments of the higher courts on principles of personal injury and insurance law, are part of the lot of being an insurer. Moreover, the Claimants' contentions are founded on the proposition that primary legislation cannot proportionately require insurers to meet any liability that extends beyond the common law liabilities to which their insureds were subject on ordinary tortious principles. In reality, it is obvious that Parliament can impose burdens in excess of those arising at common law, and there are numerous examples of this, both general (e.g. taxation), and specific in the field of insurance (e.g. the Motor Insurers' Bureau, which requires that every insurer underwriting compulsory motor insurance contribute to its funding).

viii) The statements in the *Welsh Bill* case on which the Claimants rely were *obiter* and are distinguishable.

(D) LEGISLATIVE BACKGROUND

(1) Pre 1989 position

21. At common law a claimant had to give credit against particular heads of loss for State benefits that in effect provided a form of compensation for the same head of loss: *Hodgson v Trapp* [1989] AC 807; *Ballantine v Newalls Insulation Co Ltd* [2001] I.C.R. 25. Such State benefits fell outside the rule that the proceeds of insurance or third party benevolence should be ignored. No credit had to be given for so much of the State benefits as exceeded the comparable head of loss recovered, or which had no counterpart in a head of claim against which they could be offset.

22. By section 2(1) of the Law Reform (Personal Injuries) Act 1948 (later consolidated in Schedule 2 § 8 to the Social Security (Consequential Provisions) Act 1975, itself amended in 1984) the common law was modified so that the claimant had to give credit for only half of certain listed benefits payable over a period of five years from the date when the cause of action accrued.

23. Over time, it was recognised that this meant that the taxpayer was effectively providing a cross-subsidy to the tortfeasor for the damages awards which the tortfeasor would otherwise have had to pay. The 1978 report of the Royal Commission on Civil Liability and Compensation for Personal Injury ("***the Pearson report***") considered the question of credits for State benefits in chapter 13 entitled *"Offsets"*. At § 472 the Pearson report stated:

> "Secondly, it was argued that the defendant should not be relieved of part of his liability by the state; the tortfeasor should pay in full. This view seems to us to be based on a wrong conception of the tort system, which is directed at the compensation of loss rather than the punishment of

> wrongdoing. The aim should be for the damages to be equal to the actual net loss suffered. We think the argument is also undermined by the fact that tort compensation is usually paid, not by the defendant, but by his insurers."

24. The Pearson report recommended instead that "*where damages are reduced on account of contributory negligence, only the equivalent proportion of the relevant social security benefits should be deducted*." (§ 498)

25. The financial advantages of a system allowing such recovery were further considered by the Comptroller and Auditor General in a report dated 21 July 1986 "*Recovery of Social Security Benefits when Damages in Tort are Awarded*".

(2) The 1989 and 1992 Acts

26. The developments outlined above led to the Social Security Act 1989, which was later consolidated into Part IV of the Social Security Administration Act 1992. The 1989 Act sought to rectify State cross-subsidising of damages awards by, for the first time, introducing a CRU-style system. Under the new scheme, the compensator was required to deduct from any payment made to the injured person any relevant benefits, and then pay the amount so deducted over to the (then) Department of Social Security. (The change in relation to the position of claimants led to an unsuccessful challenge under the ECHR in *Stevens and Knight v UK* [1999] EHRLR 126). The Pearson recommendation that the tortfeasor's credit against damages should be reduced in line with any contributory negligence on the part of the plaintiff was not implemented. The essential effect of the scheme was to remove the State's cross-subsidy of damages awards, and ensure instead that the tortfeasor paid the full amount of the damages that he would otherwise (but for the injured person's receipt of State benefits) have had to pay.

27. Section 22 of the 1989 Act provided, so far as material:

> **"Recovery of sums equivalent to benefit from compensation payments in respect of accidents, injuries and diseases**
>
> (1) A person (the "compensator") making a compensation payment, whether on behalf of himself or another, in consequence of an accident, injury or disease suffered by any other person (the "victim") shall not do so until the Secretary of State has furnished him with a certificate of total benefit and shall then—
>
> (a) deduct from the payment an amount, determined in accordance with the certificate of total benefit, equal to the gross amount of any relevant benefits paid or likely to be paid to or for the victim during the relevant period in respect of that accident, injury or disease;
>
> (b) pay to the Secretary of State an amount equal to that which is required to be so deducted; and

(c) furnish the person to whom the compensation payment is or, apart from this section, would have been made (the "intended recipient") with a certificate of deduction.

(2) Any right of the intended recipient to receive the compensation payment in question shall be regarded as satisfied to the extent of the amount certified in the certificate of deduction.

(3) In this section—

"benefit" means any benefit under—

(a) the Social Security Acts 1975 to 1988, or

(b) the Old Cases Act,

and the "relevant benefits" are such of those benefits as may be prescribed for the purposes of this section;

"certificate of total benefit" means a certificate given by the Secretary of State in accordance with Schedule 4 to this Act;

"certificate of deduction" means a certificate given by the compensator specifying the amount which he has deducted and paid to the Secretary of State in pursuance of subsection (1) above;

"compensation payment" means any payment falling to be made (whether voluntarily, or in pursuance of a court order or an agreement, or otherwise)—

(a) to or in respect of the victim in consequence of the accident, injury or disease in question, and

(b) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of that accident, injury or disease,

and includes, in particular, so much of the payment as represents reimbursement for costs incurred in procuring it, but does not include benefit or an exempt payment;

…

"relevant period" means—

(a) in the case of a disease, the period of 5 years beginning with the date on which the victim first claims a relevant benefit in consequence of the disease; or

> (b) in any other case, the period of 5 years immediately following the day on which the accident or injury in question occurred;
>
> but where before the end of that period the compensator makes a compensation payment in final discharge of any claim made by or in respect of the victim and arising out of the accident, injury or disease, the relevant period shall end on the date on which that payment is made whether or not any subsequent payment falls to be made in respect only of taxed costs.
>
> (4) For the purposes of this section the following are the "exempt payments"—
>
> (a) any small payment, as defined in paragraph 4 of Schedule 4 to this Act;
>
> …
>
> …
>
> (6) Except as provided by any other enactment, in the assessment of damages in respect of an accident, injury or disease the amount of any relevant benefits paid or likely to be paid shall be disregarded.
>
> (7) Schedule 4 to this Act shall have effect for the purpose of supplementing the provisions of this section; and this section shall have effect subject to the provisions of that Schedule.
>
> (8) This section and that Schedule shall apply in relation to any compensation payment made after the coming into force of this section to the extent that it is made in respect of—
>
> (a) an accident or injury occurring on or after 1st January 1989; or
>
> (b) a disease, if the victim's first claim for a relevant benefit in consequence of the disease is made on or after that date."

28. Schedule 4 contained detailed provisions regarding interpretation, payments, deductions and certificates, administration and adjudication, and miscellaneous matters. The administration and adjudication provisions included paragraph 19, which was headed "*Recovery of relevant payment in cases of default*" and included the following:

> "(1) This paragraph applies in any case where the compensator has made a compensation payment but—
>
> (a) has not requested a certificate of total benefit in respect of the victim, or

> (b) if he has done so, has not made the relevant payment within the time limit imposed by paragraph 2 above.
>
> (2) Where this paragraph applies, the Secretary of State may—
>
> (a) if no certificate of total benefit has been issued to the compensator, issue to him such a certificate and a demand for the relevant payment to be made forthwith, or
>
> (b) if a certificate of total benefit has been issued to the compensator, issue to him a copy of that certificate and such a demand,
>
> and that relevant payment shall, to the extent that it does not exceed the amount of the compensation payment, be recoverable by the Secretary of State from the compensator.
>
> …"

29. The 1989 Act provisions (including those of Schedule 4) were reproduced in substantially similar form in sections 81-104 of the 1992 Act. The definition of compensation payment was in section 81(1):

> ""compensation payment" means any payment falling to be made (whether voluntarily, or in pursuance of a court order or an agreement, or otherwise)—
>
> (a) to or in respect of the victim in consequence of the accident, injury or disease in question, and
>
> (b) either—
>
> (c) [sic] by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of that accident, injury or disease; or
>
> (ii) in pursuance of a compensation scheme for motor accidents,
>
> but does not include benefit or an exempt payment or so much of any payment as is referable to costs incurred by any person"

The main operative provision was section 82:

> "**Recovery of sums equivalent to benefit from compensation payments in respect of accidents, injuries and diseases**
>
> (1) A person ("the compensator") making a compensation payment, whether on behalf of himself or another, in consequence of an accident, injury or disease suffered by any other person ("the victim") shall not do so until the Secretary of

> State has furnished him with a certificate of total benefit and shall then—
>
> > (a) deduct from the payment an amount, determined in accordance with the certificate of total benefit, equal to the gross amount of any relevant benefits paid or likely to be paid to or for the victim during the relevant period in respect of that accident, injury or disease;
> >
> > (b) pay to the Secretary of State an amount equal to that which is required to be so deducted; and
> >
> > (c) furnish the person to whom the compensation payment is or, apart from this section, would have been made ("the intended recipient") with a certificate of deduction.
>
> (2) Any right of the intended recipient to receive the compensation payment in question shall be regarded as satisfied to the extent of the amount certified in the certificate of deduction."

Section 100, headed "**Recovery of relevant payment in cases of default"**, included the following:

> "(1) This section applies in any case where the compensator has made a compensation payment but—
>
> > (a) has not requested a certificate of total benefit in respect of the victim, or
> >
> > (b) if he has done so, has not made the relevant payment within the time limit imposed by section 83 above.
>
> (2) Where this section applies, the Secretary of State may—
>
> > (a) if no certificate of total benefit has been issued to the compensator, issue to him such a certificate and a demand for the relevant payment to be made forthwith, or
> >
> > (b) if a certificate of total benefit has been issued to the compensator, issue to him a copy of that certificate and such a demand,
>
> and the amount so certified shall, to the extent that it does not exceed the amount of the compensation payment, be recoverable by the Secretary of State from the compensator."

30. I raised with the parties during the hearing the question of whether under the 1992 legislation, as the immediate predecessor of the 1997 Act, the compensator could be required to make a payment to the Defendant greater than the amount it could deduct from the compensation payment otherwise due to the injured person; or had been

applied in that manner. The parties submitted on 17 July 2020 a Note setting out their respective positions on this point and attached certain potentially relevant materials.

31. On the question of construction, the Defendant submits that the amount *"required to be so deducted"* in section 82(1)(b) could exceed the compensation payment from which it fell to be deducted, thus resulting in a payment to the Defendant larger than the amount of the compensation payment. I do not accept that submission:

    i) On their natural meaning, the words "*required to be deducted*" in section 82(1)(b) did not refer to sums that could not be deducted from the compensation payment because they exceeded the amount of that payment: rather, they referred to sums which the compensator could and should have deducted from the compensation payment.

    ii) Section 81(1) defined "*certificate of deduction*" as "*a certificate given by the compensator specifying the amount which he has deducted and paid to the Secretary of State in pursuance of section 82(1) below*", thus tending to suggest that the amount payable to the Defendant equalled, rather than potentially exceeded, the amount deducted.

    iii) Section 100, quoted above, provided for the Defendant to be able to recover the certified benefits only *"to the extent that it does not exceed the amount of the compensation payment"*.

    iv) The heading to section 82 referred to recovery of sums equivalent to benefit *"from compensation payments"* rather than as freestanding obligations owed by compensators to the Defendant.

32. As to practice, the parties' Note indicated that (*per* the Defendant) the view of individuals within the CRU is that the scheme would in principle have operated in accordance with the Defendant's interpretation; however, they consider that such cases would have been negligible because in any case where the injured person's compensation would have been reduced to nil (leaving an excess liability), it would have been sensible simply to agree a settlement below the £2,500 small payments limit. A document entitled "*Deduction from compensation: a guide for companies*" written by the CRU appears to have provided guidance on the operation of the scheme governed by the 1992 Act, and included the statements:

> "• We will issue the Certificate [of Total Benefit] within four weeks of receiving a valid application.
>
> • The Certificate tells you the amount to be deducted from the compensation award.
>
> …
>
> • On the date compensation is actually paid, the amount you have deducted is due to be paid to CRU. We must receive it from you within 14 days.

> • If you fail to deduct the amount due to CRU from the payment to the plaintiff, you still remain liable to pay us. We can take legal action to enforce recovery"

Whilst not expressly stating the position either way, this guidance envisages the amount payable to the Defendant being no more than the amount deducted from the compensation payment.

33. I therefore conclude that under the 1992 legislation (which was in materially the same terms as the 1989 legislation), compensators' liability to the State was limited to sums deducted from compensation payments.

(3) Background to the 1997 Act

34. The position summarised above changed as a result of the 1997 Act to one where insurers *could* be required to make a payment exceeding any amount deducted from the compensation payment. The fact that this was a change is reflected in the following commentaries:

i) The summary by Lord President Rodger in *Mitchell v Laing* 1998 SC 342 (Court of Session, Inner House, First Division) of the changes introduced by the 1997 scheme:

> "In the first place, however small the amount of compensation which they have to pay, compensators are liable to pay to the Secretary of State the amount of the recoverable benefits paid to the victim in respect of the accident, injury or disease (secs 6, 1(1)(b) and (4)(c)). <u>This is a change from the previous system under which the compensators paid over only what they could deduct from the compensation due to the victim—which might not always be as much as the benefits which the victim had received.</u> In this respect the new provision imposes a heavier burden on compensators, the intention being that they, rather than the state, should bear the cost of the results of the wrong done to the victim." (p344G-H, my emphasis)

ii) A note produced by the social policy section of the House of Commons library entitled "*Recovery of social security benefits from compensation awards*" (last updated 4 May 2007) explaining that under the previous scheme the CRU collected from the compensator only the "*deductions*" from the award made to the victim, and that one of the differences under the 1997 scheme was that:

> "Compensators are now liable to repay the full amount of benefits which have been paid as a result of an accident, injury or disease. They are allowed to reduce compensation payments to take account of benefit recovery, but only where the benefits and compensation meet the same need. So compensators bear the extra cost of benefits paid where the compensation payment cannot be reduced."

iii) The article by "*Social Security (Recovery of Benefits) Act 1997 and Regulations*", Andrew Dismore, J.P.I.L. 1998, Mar, 14-64, summarising the *"reforms"* under the 1997 Act as including the point that "*any excess*" which could not be offset against the corresponding heads of damage "*will be met by the insurer and refunded to the DSS*".

35. It is relevant to consider the reasons why Parliament chose to make this change, because they have a bearing on the Defendant's contentions that the features of the current scheme of which the Claimants complain reflect a *"social policy consensus that underpinned a package of measures which sought to respond to a range of social problems arising from workplace injuries"*; and there was a "*social policy consensus*" that "*it was fair for the insurance industry, and not taxpayers, to meet the full cost of tortious injuries for which insured employers were liable, even though such liabilities exceeded those which had been agreed by contract".*

36. The legislative history materials to which both parties referred me indicate that the relevant reforms made in 1997 flowed to a very large degree from two significant problems that had emerged under the 1989/1992 scheme:

i) There was a "small payment limit" of £2,500 below which benefits were not deducted or payable to the State, on the ground that it had not been thought worthwhile recouping benefits in such low value claims. However, this had created a perverse incentive for parties to settle claims at just below the threshold, to the disadvantage of injured persons.

ii) Under the 1989/1992 scheme, the compensator's deduction was made against all damages payable to the injured person, including general damages such as those for pain, suffering, and loss of amenity. That was regarded as grossly unfair: benefits were not paid in relation to pain, suffering or loss of amenity, so there was no risk of double recovery, and the effect of the deduction was to deprive the injured person of compensation to which he was entitled.

37. These concerns loom large in the legislative history I was shown. For example, the Social Security Select Committee's Fourth Report on Compensation Recovery (June 1995) referred at § 26 to feature (ii) above of the 1989 scheme, saying *"Most crucially, recovery was extended to total damages, including those for pain and suffering and injury, rather than simply those for lost earnings"* and stating at § 34 that *"We believe that recovery from damages other than those for loss of earnings is central to the unfairness with the present scheme"*. This was described at § 43 as the most serious failing of the scheme. Paragraphs 46ff discussed the small claims cap, the way in which in practice it benefitted compensators and insurers rather than injured persons or the taxpayer, and the perverse incentives to which it gave rise. Contributory negligence was discussed at §§ 61ff, including the way in which injured persons might as a result receive no compensation after deductions for State benefits, and proposals were set out for a solution.

38. The Committee's proposals for change reflected its view that *"It is the compensator who is responsible for the accident or injury and therefore it is right that responsibility for recompense for benefits paid by the taxpayer as a result of their actions should lie with them"* (§ 70). The premise was thus that compensators and

their insurers should compensate the State for benefits that were payable *"as a result of their actions"*.

39. The evidence the Committee had received included a Memorandum from the Law Society favouring redress of *"the less fair aspects of the present scheme, particularly (a) [t]o exempt general damages from benefit recovery and (b) [t]o provide for pro rata recovery in circumstances where the victim is found to have been contributorily negligent".* The Association of British Insurers also submitted a memorandum dated 3 February 1995 , which among other things commented on contributory negligence:

> "As all awards below the small payments limit are subject to the recoupment provisions, the scheme does not make allowance for contributory negligence on the part of the claimant. However, we recognise that there would be practical difficulties in taking contributory negligence into account. Most claims are concluded by negotiation and the dividing line between quantum and liability can be very blurred. From a claimant's point of view, he is simply concerned with what he is likely to receive at the end of the day and, in achieving this amount, he may be equally reluctant to concede an apportionment of liability during early negotiations.
>
> Accordingly the Association does not consider that contributory negligence should play a role in the operation of the scheme. It would be appropriate to leave things as they are." (§§ 8.1 and 8.2)

40. The appendices to the Committee's report included a Report by Touche Ross, commissioned by the Department of Health and Social Security in 1988, which had estimated then that if compensators were required to reimburse to the State 100% of all social security benefits paid in consequence of an injury, then the total annual cost to insurers would be £57.5 million in respect of benefits and £6.60 million administration costs.

41. The Department of Social Security's Reply, dated October 1995, to the Committee's report noted that the Committee's central recommendation *"would resolve the issue of erosion of damages for pain and suffering, a problem which can affect those exposed to asbestos"* (§ 20) and stated the Government's belief that:

> "the fundamental principle is that the taxpayer should be protected from the effects of injury or disease for which a third party is responsible" (§ 23)

The Reply attached a consultation document which among other things invited views on whether contributory negligence and the overall strength of the claim were factors that should be taken into account.

42. In January 1996 Price Waterhouse produced a compliance cost assessment in relation to the Select Committee's proposals. It indicated that:

i) the introduction of a separate head of damage to encompass social security benefits would have a modest effect on insurance claims, estimated at between £0.9 million and £5.2 million a year (including £0.48 to £2.43 million of EL liabilities), along with administrative costs in the region of £3m a year; and

ii) abolition of the small payments limit would increase insurance claims by an estimated £51.1 million to £66.9 million a year (including £36.14 to £45.31 million of EL liabilities), plus administrative costs of between £2.5 million and £3.8 million a year. The reason why this change was thought likely to increase liabilities was because the incentive to settle below £2,500 would disappear and *"Consequently the overall settlement size would probably increase. The extra cost to the insurer in such cases is the difference between the two settlement levels. (There is an equivalent gain to the taxpayer in terms of increased benefit recovery.)"* (Price Waterhouse report § 53) At the time, it was said that 65-70% of cases were being settled at or below the small payments limit.

It is therefore apparent that the then understanding was that any additional burden due to limiting deduction of recoverable benefits to specific heads of claim, and having to repay to the CRU amounts for which no such credit had been received, would give rise to only modest additional costs. It was the removal of the small payments limit that was identified as giving rise to significantly increased potential liabilities for insurers.

43. Price Waterhouse also costed a proposal to remove benefit recovery in asbestos-related settlements, which it estimated would lead to a reduction in the region of £1.75 million in the annual amount of benefit recovered. The estimate was based on the 49 such settlements notified to the CRU in June, July and August 1995. Thus at that time, asbestos disease claims (which formed a significant proportion of long-tail liabilities for EL insurers) provided a relatively modest part of benefit recovery by the State.

44. The Department of Social Security in October 1996 issued a Note referring to the above compliance cost assessment, and stating *inter alia* that the Government proposed that *"rather than create a separate head of damages to encompass recoverable benefits, a separate free-standing liability to repay such benefits should instead be placed on defendants. This is essentially a technical change, and has no effect on the compliance cost estimates."*

45. During the second reading debate in the House of Lords on 19 November 1996, the sponsoring minister (Lord Mackay of Ardbrecknish) referred to the Bill's objectives, and mentioned the objectives of ensuring that victims retain their compensation for pain and suffering, whilst ensuring *"that public funds do not subsidise the negligence of others"*. He referred also to the compliance cost assessment, saying that the compliance cost assessment estimated that insurers would face increased claims costs of between £52 million and £72 million each year following reform but if passed on to policyholders the increase in costs was likely to produce only moderate increases in premium rates.

46. The Minister indicated that the scheme would take effect from October 1997 and affect "*all claims not determined before implementation and those arising*

subsequently"; he said that in order to avoid the situation where two victims in comparable situations could receive markedly different compensation depending purely on the point at which their claims had been lodged, *"we propose that the new scheme should benefit cases in the pipeline at implementation as well as those arising afterwards".* The compensator would be liable to pay all recoverable benefits whether or not the insurance contract were taken out before the point of change, and that the Government had *"concluded that giving insurers a full year's notice of reform is the right approach"*. Towards the end of the debate the Minister referred to the aim of catching *"cases in existence as well as new cases at the time of change"* and proposed that *"we should take the unusual step of making the changes retrospective so that they will catch existing cases going through the pipeline as well as new cases"*.

47. The Minister was asked about how contributory negligence would be dealt with, responding that it was a complex issue to which the House would no doubt return in Committee. (I understand that the parties to the present case were not, however, able to access records of any such committee discussion.)

48. Viscount Chelmsford, who had been briefed by the ABI, stated that the broad thrust of the proposals was fully agreed by the insurance industry, as were the need to protect awards for pain, suffering and loss of amenity, and the additional cost to the industry which had been estimated by the industry at between £51 million and £71 million. He added that some increase in the premiums was to be expected.

49. Summarising, the Minister referred to the reasons for the proposed measures as follows:

> "The first is that in the present scheme, compensation payable for pain and suffering can be eroded, which means that the victim can lose out. All noble Lords agree with me that that is wrong. Secondly, manipulation of the present scheme is taking place around the £2,500 limit which means that the taxpayer is losing out. Therefore, I believe that the case is strong and your Lordships have agreed that the new scheme will be fairer to the victim; it will enable compensation for pain and suffering to be paid in full; and it will be fairer to the taxpayer to recovering all social security benefits in the cases where compensation is payable. I believe also that it will be fair to business, allowing compensation to be reduced where a corresponding benefit has been paid."

50. The draft provision which became section 22 of the 1997 Act (liability of insurers) was added to the Bill by amendment at the Report stage. As regards what became section 22(4), the Minister explained that it was to cater for cases where an upper limit had been agreed on the insurer's liability to pay compensation in the event of injury, but that *"we still intend to seek full repayment of benefits from the compensator in all other circumstances"*.

51. During the third reading debate, Viscount Chelmsford expressly recognised the possibility that an excess payment may be due to the State if the benefits payments exceed the loss of earnings from which a deduction could be made.

52. In the House of Commons debate on 25 February 1997, the speech of the Minister (Mr Peter Lilley) included reference to the reforms applying *"to cases settled from the date of implementation, including those in the pipe line. ... Otherwise, two accident victims in similar circumstances could receive different compensation on the same day simply because their claims were not initiated at the same time"*. A similar statement was made by the junior Minister (Mr Roger Evans): *"This is not quite "no retrospection". When the accident occurred is immaterial. We will catch claims if they are in the pipeline. ..."*

(E) KEY PROVISIONS OF THE 1997 ACT

53. Section 1 of the 1997 Act (as amended) provides:

> "(1) This Act applies in cases where—
>
> (a) a person makes a payment (whether on his own behalf or not) to or in respect of any other person in consequence of any accident, injury or disease suffered by the other, and
>
> (b) any listed benefits have been, or are likely to be, paid to or for the other during the relevant period in respect of the accident, injury or disease.
>
> (2) The reference above to a payment in consequence of any accident, injury or disease is to a payment made—
>
> (a) by or on behalf of a person who is, or is alleged to be, liable to any extent in respect of the accident, injury or disease,
>
> (b) in pursuance of a compensation scheme for motor accidents, or
>
> (c) under the Diffuse Mesothelioma Payment Scheme (established under the Mesothelioma Act 2014);
>
> but does not include a payment mentioned in Part I of Schedule 1.
>
> (3) Subsection (1)(a) applies to a payment made—
>
> (a) voluntarily, or in pursuance of a court order or an agreement, or otherwise, and
>
> (b) in the United Kingdom or elsewhere.
>
> (4) In a case where this Act applies—
>
> (a) the "injured person" is the person who suffered the accident, injury or disease,

> (b) the "compensation payment" is the payment within subsection (1)(a), and
>
> (c) "recoverable benefit" is any listed benefit which has been or is likely to be paid as mentioned in subsection (1)(b)."

54. Section 2 provides that the Act *"applies in relation to compensation payments made on or after the day on which this section comes into force, unless they are made in pursuance of a court order or agreement made before that day"*.

55. Section 3 limits the liability under the Act to the "*relevant period*" being, in essence, the period between claim and settlement but up to a maximum of 5 years.

56. Pursuant to sections 4 and 5, before a person ("*the compensator*") makes a compensation payment he must apply to the Defendant for a certificate of recoverable benefits. That certificate must state, for each recoverable benefit, (a) the amount which has been or is likely to have been paid on or before a specified date, and (b) if the benefit is paid or likely to be paid after the specified date, the rate and period for which, and the intervals at which, it is or is likely to be so paid. The Defendant may estimate, in such manner as she thinks fit, any of the amounts, rates or periods specified in the certificate.

57. Section 6(1) provides that *"A person who makes a compensation payment in any case is liable to pay to the Secretary of State an amount equal to the total amount of the recoverable benefits"*.

58. Section 8 states:

> "(1) This section applies in a case where, in relation to any head of compensation listed in column 1 of Schedule 2—
>
> (a) any of the compensation payment is attributable to that head, and
>
> (b) any recoverable benefit is shown against that head in column 2 of the Schedule.
>
> (2) In such a case, any claim of a person to receive the compensation payment is to be treated for all purposes as discharged if—
>
> (a) he is paid the amount (if any) of the compensation payment calculated in accordance with this section, and
>
> (b) if the amount of the compensation payment so calculated is nil, he is given a statement saying so by the person who (apart from this section) would have paid the gross amount of the compensation payment.
>
> (3) For each head of compensation listed in column 1 of the Schedule for which paragraphs (a) and (b) of subsection (1) are

> met, so much of the gross amount of the compensation payment as is attributable to that head is to be reduced (to nil, if necessary) by deducting the amount of the recoverable benefit or, as the case may be, the aggregate amount of the recoverable benefits shown against it.
>
> (4) Subsection (3) is to have effect as if a requirement to reduce a payment by deducting an amount which exceeds that payment were a requirement to reduce that payment to nil.
>
> (5) The amount of the compensation payment calculated in accordance with this section is—
>
> (a) the gross amount of the compensation payment, less
>
> (b) the sum of the reductions made under subsection (3), (and, accordingly, the amount may be nil)."

59. Section 8 thus establishes the right of deduction, or credit, against sums paid to an injured employee under certain heads of claim. The table in schedule 2 to which it refers lists three heads of compensation (for lost earnings, for cost of care and for loss of mobility) and all the benefits which can be set off or deducted against them. Each benefit is related to the equivalent head of loss even if that head of loss is not or cannot be claimed on the particular facts. In other words, although all of the listed benefits may in principle be deductible, they cannot in practice be deducted if the relevant head of claim stipulated in Schedule 2 is not made (or is insufficient in amount). The effect of section 6, nonetheless, is that that benefit remains payable to the Defendant by the compensator.

60. Section 22 deems insurance policies to include cover for liabilities under section 6. It provides:

> "(1) If a compensation payment is made in a case where—
>
> (a) a person is liable to any extent in respect of the accident, injury or disease, and
>
> (b) the liability is covered to any extent by a policy of insurance,
>
> the policy is also to be treated as covering any liability of that person under section 6.
>
> (2) Liability imposed on the insurer by subsection (1) cannot be excluded or restricted.
>
> (3) For that purpose excluding or restricting liability includes—
>
> (a) making the liability or its enforcement subject to restrictive or onerous conditions,

> (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy, or
>
> (c) excluding or restricting rules of evidence or procedure.
>
> (4) Regulations may in prescribed cases limit the amount of the liability imposed on the insurer by subsection (1).
>
> (5) This section applies to policies of insurance issued before (as well as those issued after) its coming into force.
>
> (6) References in this section to policies of insurance and their issue include references to contracts of insurance and their making."

61. The 1997 Act thus aims to rectify the flaws referred to in § 36 above. The small payments cap is removed, and the compensator is now able to deduct a benefit-related sum only against specific heads of special damage payable to the injured person. If the recoverable benefit has no corresponding head of special damage, or exceeds it, then the compensator is nonetheless liable to pay sums to the State that are not matched by a corresponding deduction from the compensation payment. As a result, benefit-related deductions can no longer be made from sums due to injured persons in respect of general damages; but compensators remain liable to the State for the benefits payable to the injured person.

62. This move from a purely deduction based system (under the 1989 and 1992 legislation) to one where the compensator has a freestanding liability to the Defendant resulted from, and achieves, the objective of avoiding the iniquity of unfair deductions from compensation. It does not, on the evidence I have seen, reflect any broader intention or consensus regarding the shifting of long-tail liabilities away from the State and onto groups of compensators or their insurers.

63. The Defendant submits that the policy of the 1997 Act involved giving preference to the State's ability to recover all welfare costs arising in respect of tortious accidents, injuries and disease over the tortfeasor's (and his insurer's) common law right only to bear a liability for the victim's losses as calculated at common law; and that that was a perfectly sensible way in which to address the particular mischief that had arisen in relation to long-tail disease as outlined above.

64. It is true that, in the context of the particular mischief that had arisen, namely the unfairness of deduction of benefits payments from general damages, Parliament made a policy decision to shift the cost of the benefits onto compensators and their insurers rather than for the State to assume them. However, such policy consideration and consensus as this involved was, on the evidence I have seen, limited to the context of the particular mischief actually being addressed. What Parliament did not have in contemplation was that, as a result of future developments in the law as between compensators and victims, compensators or their insurers would become liable for the cost of State benefits having no real relationship to the degree of injury or risk that those compensators had inflicted on the injured person.

65. It is also true that ever since the 1989 Act, the scheme had applied to compensation payments due "*by or on behalf of a [compensator] who is, or is alleged to be, liable to any extent in respect of that accident, injury or disease*" (my emphasis): see the definition of "*compensation payment*". However, the major statutory and common law developments referred to in § 10 above, hugely extending compensators' liabilities vis-à-vis injured persons, still lay in the future. There is no evidence or reason to believe that in 1989, 1992 or 1997 Parliament could or did have in contemplation the imposition on compensators and insurers of commensurately vastly extended liabilities to the State, based on such future developments of the law in favour of victims. The words *"to any extent"* may have been intended mainly to exclude from the provenance of the Act payments made on a purely *ex gratia* basis. I do not consider that the words "*to any extent*" can therefore bear the weight the Defendant seeks to attribute to them (a conscious Parliamentary intention to make any identifiable tortfeasors pay in full without regard to their degree of responsibility for the damage); and in any event their inclusion could not of course be decisive when considering the impact of A1P1, especially its impact in the circumstances that have arisen since the 1997 Act has passed.

(F) A1P1 – LEGAL FRAMEWORK

66. A1P1 provides:

> "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 and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

67. In assessing the proportionality of a measure, including primary legislation, with individual Convention rights, the court adopts a four-stage test. See, e.g., *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 § 20 *per* Lord Sumption:

> "...the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

68. The Claimants do not have to show that the matters complained of, at any rate at the fourth stage (*"whether on a fair balance the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant*

protected right" (per Lord Mance in the *Welsh Bill* case) represents a manifestly unreasonable choice by the legislature. Lord Mance at § 52 of that case said:

> "...at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the Convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

69. The Defendant cited *Pye v UK* (2008) 46 EHRR 34 for the contrary proposition. The ECtHR in that case, which concerned the acquisition of land by adverse possession, stated that in spheres such as housing the court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without foundation (§ 75). At § 81 the court said:

> "The Court would first note that, in the case of *James*, the Court found that the view taken by Parliament as to the tenant's "moral entitlement" to ownership of the houses at issue fell within the State's margin of appreciation. In the present case, too, whilst it would be strained to talk of the "acquired rights" of an adverse possessor during the currency of the limitation period, it must be recalled that the registered land regime in the United Kingdom is a reflection of a long-established system in which a term of years' possession gave sufficient title to sell. Such arrangements fall within the State's margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable. The acquisition of unassailable rights by the adverse possessor must go hand in hand with a corresponding loss of property rights for the former owner. …"

70. I would not read that decision as laying down a general rule that a manifestly unreasonable standard is always applicable at the fourth stage of the A1P1 analysis. Lord Mance in §§ 44-54 of the *Welsh Bill* case carried out a careful analysis of the leading ECHR case law, including *James* (cited in the above passage from *Pye*), reaching the conclusion quoted in § 68 above. He noted (at § 47) that in *James* itself, having addressed the question whether the aim of the legislation was a legitimate one, in principle concluding that the United Kingdom Parliament's belief in the existence of a social injustice "*was not such as could be characterised as manifestly*

unreasonable", the ECtHR then went on to consider the *"means chosen to achieve the aim"* and said:

> "This, however, does not settle the issue. Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, amongst others, and mutatis mutandis, the above-mentioned *Ashingdane judgment (1985) 7 EHRR 528*, 57). This latter requirement was expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ((1982) 5 EHRR 35, para 69). The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden' (para 73). Although the court was speaking in that judgment in the context of the general rule of peaceful enjoyment of property enunciated in the first sentence of the first paragraph, it pointed out that 'the search for this balance is … reflected in the structure of article 1 (P1–1) ' as a whole (para 69)." (§ 50)

71. Lord Mance also noted that:

> "It is also clear that the European Court of Human Rights scrutinises with particular circumspection legislation which confiscates property without compensation or operates retrospectively. In the case of confiscation, it will normally be disproportionate not to afford reasonable compensation, and a total lack of compensation will only be justifiable in "exceptional circumstances". In the case of retrospective legislation, "special justification" will be required before the court will accept that a fair balance has been struck: paras 48-49 above.…" (§ 53)

and:

> "At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature's margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173 ; *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200, at paras 71, 163 and 230, per Lord Neuberger, Lord Mance and Lord Sumption. However, domestic courts cannot act as primary decision makers, and principles of institutional competence and respect indicate that

> they must attach appropriate weight to informed legislative choices at each stage in the Convention analysis: see *AXA* , para 131, per Lord Reed, *R (Huitson) v Revenue and Customs Comrs* [2011] EWCA Civ 893, [2012] QB 489 , at para 85. But again, and in particular at the fourth stage, when all relevant interests fall to be evaluated, the domestic court may have an especially significant role" (§ 54)

72. It is common ground in the present case that:

    i) rights and obligations under a policy of liability insurance constitute 'possessions' for the purposes of A1P1;

    ii) a liability imposed by the State that reduces the value of an existing contract can amount to an interference with possessions;

    iii) the obligation imposed by the 1997 Act upon liability insurers to repay to the State relevant benefits engages A1P1 as it establishes an obligation to make "*contribution akin to taxation*";

    iv) the question whether A1P1 rights are unlawfully interfered with or whether such interference is justified requires the court to be satisfied both that the measures adopted pursue a legitimate aim by a legitimate means and that the impact on the Claimants satisfies the test of proportionality; and

    v) where the impact has retrospective effect "*special justification*" is required.

73. The ECtHR has held that systems of taxation or which impose positive obligations on persons constitute systems of control (rather than amounting to deprivation): *Gasus-Dosier and Fordertechnik v Netherlands* (1995) 20 EHRR 403; *Denev v Sweden* (1989) 12 EHRR 391 (and also *Mellacher v Austria* (1990) 12 EHRR 391). The test is whether the interference was provided by law, and achieves a 'fair balance' between the demands of the general interests of the community and the protection of the fundamental rights of individuals. The ECtHR affords a wide margin to states to determine what the public interest demands: *James v UK* (1986) 8 EHRR 123 (see also *R (Countryside Alliance) v Attorney General* [2008] 1 AC 710 per Hord Hope: *"It was open to [the legislature] to form their own judgment as to whether [the relevant activities] caused a sufficient degree of suffering…for legislative action to be taken to deal with them."*). There must be a reasonable relationship of proportionality between the means employed and the aim pursued (see *Hutten-Czapska v Poland* (2007) 45 EHRR 4, para 167).

(G) TARGETS OF THE CLAIMANTS' CLAIM

74. As expressed in the Judicial Review Claim Form, the Claimants seek to challenge the legality of three decisions:

    i) *"Failure to read and give effect to provisions of the 1997 Act so as to ensure its compatibility with the Convention rights of liability insurers as required by section 3 of the Human Rights Act"* ("***Decision 1***");

ii) *"Failure to make Regulations under section 22(4) of the said Act so as to ensure such compatibility in relation to insurance policies issued before its commencement" ("**Decision 2**")*; and

iii) *"Certificate of recoverable benefit issued by the Compensation Recovery Unit ref JXR-123"* ("***Decision 3***").

75. The Defendant submits that the attack on Decision 1 is in reality a challenge to the lawfulness of the 1997 Act itself. She accepts that in general terms failures to act are treated as continuing decisions and thus amenable to judicial review because they involve a public authority deciding (usually by refusing) to take some positive act (eg the refusal to bring into force a statutory scheme, withdraw a direction or to give a consent). However, Decision 1 is not such a decision. In identifying the real target of a claim, the court will look to "*the decision which in substance is being challenged not a later claimed acknowledgment of its validity*": *R v Newbury District Council ex parte Chieveley Parish Council* (1998) 10 Admin LR 676. In *R(P) v Essex County Council* [2004] EWHC 2027 (Admin) it was held that *"The Administrative Court exists to adjudicate upon specific challenges to discrete decisions. It does not exist to monitor and regulate the performance of public authorities"* (§ 33).

76. I am inclined to the view that the Defendant is correct to characterise the challenge to 'Decision 1' as being in substance a challenge to the balance struck by the 1997 Act itself, at least in the circumstances to which the Act applies today. On that basis, the Defendant submits that the challenge is non-justiciable and/or out of time. I consider those submissions in sections (H) and (I) below.

77. The Defendant submits that Decision 2 (i.e. the alleged failure to make regulations under s.22(4) of the 1997 Act) is not amenable to judicial review because:

i) it does not involve any additional interference over and above that which occurred when the 1997 Act was passed. The Claimants' real complaint concerns the insertion of the insuring clause by section 22 (retrospectively and prospectively), and that it was at that moment that any extant property rights (i.e. contractual rights) were disturbed, and not subsequently: I consider this argument in section (H) below; and

ii) it falls outside the HRA by reason of HRA section 6(6): I consider that provision in section (L) below.

78. The Defendant submits that Decision 3 is not a decision amenable to judicial review either. The certificate was issued pursuant to the proper application of the 1997 Act and, therefore, it is dependent on the challenge to Decision 1. Decision 3 is not analogous to, say, a social security decision which establishes entitlement to a benefit. On the contrary, the issue of the certificate simply requires the payment of contingent liabilities to the State that were created in 1997, and involves no new arguable violation of A1P1 rights. As with Decision 2, the Defendant argues that the Claimants' real complaint concerns the insertion of the insuring clause by section 22 in 1997.

(H) JUSTICIABILITY

79. The Defendant argues that the insertion by section 22 of the Act of the insuring clause into existing and future insurance policies was a one-off event that occurred on 6 October 1997 when ECHR rights were non-justiciable in domestic courts.

80. It is well established that the HRA does not apply to conduct that took place before it came into force: see *R v Kansal (No 2)* [2002] 2 AC 69; *R v Lambert* [2002] 2 AC 545; *Wilson v First County Trust Ltd* (No 2) [2004] 1 AC 816. Lord Hope in *In re McCaughey and another (Northern Ireland Human Rights Commission and others intervening)* [2011] UKSC 20, [2012] 1 AC 725 said:

> "The policy choice [of the HRA] was that, save to the limited extent referred to in section 22(4), the Act was not to apply retrospectively. As Lord Nicholls of Birkenhead said in *Wilson v First County Trust Ltd* [2004] 1 AC 816, para 12, sections 6 to 9 are forward looking in their reach: one would not expect a statute promoting human rights values to render unlawful acts which were lawful when done. I would add that, as section 6(6) provides that "an act" includes a failure to act, one would not expect it to apply to failures to act which were not unlawful when the alleged failure occurred." (§ 67)

81. In *McCaughey* the Court considered the effect of the House of Lords' earlier decision in *In re McKerr* [2004] 1 WLR 807, which had held that the procedural obligations to investigate killings under Article 2 ECHR were inextricably linked to the substantive obligation, such that even after the entry into force of the HRA no procedural obligation arose in relation to a death which occurred prior to the commencement of the HRA. Following the decision of the Strasbourg court in *Šilih v Slovenia* (2009) 49 EHRR 996 to the effect that the investigative obligation under Article 2 ECHR was a freestanding obligation, the issue came back before the Supreme Court in *In Re McCaughey*. Lord Hope said:

> "The deaths with which these appeals are concerned took place in October 1990. The papers were passed to the coroner in 1994, but they were incomplete as they omitted statements from the soldiers who committed the killings. Those statements were not provided to him until 2002. It was not until 14 September 2009 that the coroner held the preliminary hearing in which he was asked to hold an inquest which complied with the procedural requirements of article 2. It is common ground that, as the deaths occurred before article 2 was made part of domestic law, the substantive aspects of that article cannot be applied to them under the Human Rights Act 1998. Section 22(4) of the Act precludes this. Sections 6(1) and 7(1)(a) of the Act do not apply because the killings occurred before the Act came into force. Any attempt that might have been made in domestic law prior to 2 October 2000 to require the coroner to carry out an investigation into them that met the requirements of article 2 would have been bound to fail. Human rights had not yet been brought home. The simple fact is that from the

> date when the deaths occurred to the date immediately before the Act came into force there was no obligation to investigate these deaths in the manner that meets the procedural requirements of article 2 under domestic law. The House of Lords held in *In re McKerr* [2004] 1 WLR 807 that, where there had been no breach of the procedural obligation before 2 October 2000, there could be no continuing breach thereafter." (§ 68)

82. These cases indicate that it is necessary for the HRA to be in force at the time of the alleged violation in question. There is no exception in relation to A1P1 corresponding to the freestanding investigative obligation arising under Article 2 of the ECHR (where the duty to conduct a Convention-compliant investigation into a death involving state officials may arise even though the death took place before October 2000, so long as there is a sufficient connection between the death and the subsequent investigation: see the discussion in *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 §§ 82ff).

83. In the present case, the Defendant submits, the only conceivably relevant rights are those established under the policies of insurance, and the only identifiable interference with those rights was the insertion of the insuring clause under the 1997 Act. That was a one-off event which occurred on 6 October 1997, before domestic law had incorporated the specific rights conferred by the ECHR. The incurring of further liabilities under the insurance policies pursuant to section 22 does not amount to a further interference. Further, the insertion of a clause by section 22 into Aviva's insurance policies did not interfere with Swiss Re's property rights, as they did not exist at the time.

84. I do not accept those submissions. Section 22(1) provides:

> "(1) If a compensation payment is made in a case where—
>
> (a) a person is liable to any extent in respect of the accident, injury or disease, and
>
> (b) the liability is covered to any extent by a policy of insurance,
>
> the policy is also to be treated as covering any liability of that person under section 6."

85. Section 22 does not give rise to a 'one-off insertion' of deemed wording into policies of insurance on 6 October 1997 (or, if later, when relevant insurance contracts were made). It creates a deemed contractual liability as and when the circumstances set out in section 22(1) arise, namely when a compensation payment is made following the incurring of a liability by a compensator that is covered (to any extent) by the insurance policy. The interference thus arises, on an ongoing basis, each time a compensator incurs a liability under section 6 and the insurer incurs a corresponding liability under section 22.

86. Moreover, as the Claimants note, when the 1997 Act came into force there will have been millions of extant policies of insurance written on a "causation" basis (every employer, large or small, having been required to have such insurance since 1972 and the majority having it well before then), each policy year giving rise to a separate contract of insurance. Any one of those contracts might potentially have had to respond to claims yet to be made by or on behalf of former employees. The possibility that any one of those pre-existing contracts might subsequently give rise to future obligations to make payments to the CRU of the type about which complaint is made in these proceedings would give rise to, at most, purely contingent liabilities of the sort considered in *Law Society v Sephton* [2006] 2 AC 543. It is artificial for the Defendant to characterise section 22 of the 1997 Act as having interfered with rights only in 1997.

87. For essentially the same reasons, I do not accept the Defendant's contentions (a) that the failure to make regulations under section 22(4) did not involve any additional interference over and above that comprised by the one-off insertion by section 22, in October 1997, of a deemed insurance clause into existing policies, or (b) that the issue of the Certificate could not amount to an interference because it merely gives effect to that same one-off insertion.

(I) LIMITATION

88. The Defendant accepts that a claim for declaratory relief under HRA section 3 and/or generally, and a claim for a declaration of incompatibility under HRA section 4, can be brought at any time and no issue of time bar arises in that respect.

89. However, the Defendant contends that in so far as the Claimants claim damages under the HRA, then they must (implicitly) contend that the Defendant has acted in breach of HRA section 6(1). In that event, section 7(5) makes clear that such a challenge must ordinarily be brought within one year of the act complained of. As the 1997 Act come into force 23 years ago, the Claimants are plainly out of time to challenge it. Time will be treated as running in relation to any challenge under section 6 from 2 October 2000 (when the HRA came into force) at the latest.

90. Further, the Defendant submits, there should be no question of any extension of time under HRA section 7(5)(b) in the following circumstances:

    i) The Claimants have been pricing premia for the past 23 years on the basis that they are liable to cover the cost of all repayable benefits received by the employee. Requiring this position to be unwound would without more, lead to the unjust enrichment of the Claimants, which could not practicably be unwound.

    ii) The Defendant and her predecessors have been paying such benefits on the basis that they would be recovered in full from insurers under the 1997 Act. Requiring this to be unwound, for any period of time, would expose the Defendant to an enormous repayment liability at a time when public finances are obviously stretched as a result of the COVID-19 pandemic and the extreme financial measures (and consequences) that have resulted.

iii) Swiss Re made a further positive choice to accept the consequences of section 22(1) when in 2015 it agreed to reinsure Aviva's back book of long tail risks. That price would reflect the liability that each policy within that back book may give rise to under the Act. The Claimants are commercially sophisticated actors who would (or should) have factored those liabilities into the price of the book.

91. I do not accept the Defendant's contention that all potential claims under HRA section 6 became time barred, by reason of section 7(5), within a year after the HRA came into force. First, I have already concluded that sections 6 and 22 interfere with possessions on an ongoing basis. Secondly, the Claimants' complaint is in essence that those provisions now fail to strike a fair balance following various legislative and common law developments since 1997, some of which post-date the introduction of the HRA. Damages claims under section 6 may be *prima facie* time barred where the relevant Certificate was issued more than a year before the present proceedings were commenced. However:

i) the Claimants' claims as set out in their Judicial Review Claim Form and Detailed Grounds include an alternative claim for restitution on the basis of payment under mistake of law (citing *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349), to which the HRA time limit would not apply, and

ii) in oral submissions the Claimants indicated that they wished to reserve the right to contend, if necessary, that the limitation period should be extended pursuant to Limitation Act 1980 section 32(1)(c) (to the effect that where an action is brought for relief from the consequences of a mistake, then the period of limitation shall not begin to run until the claimant has discovered the mistake or could with reasonable diligence have discovered it).

92. The Claimants point out that they have not formulated their financial loss claims in their Detailed Grounds, on the basis that it would be impracticable pending the court's decision on the substance of the challenge; and in the event that other remedies are granted, they seek an order transferring the claim to the Chancery Division for an inquiry under CPR PD 40A into losses they have sustained. This proposed course was indicated in the Detailed Grounds themselves (§ 71) as being appropriate in what is likely to be a complex assessment of losses, by way of exception to the general rule identified by Singh LJ in *R (Nazem Fayad) v SSHD* [2018] EWCA Civ 54 as to the need to particularise claims for damages within judicial review proceedings. The Defendant in the present case has not taken issue with this approach, and I agree it is appropriate. In my view, questions of limitation (both under the HRA and at common law) are most appropriately addressed in the light of and following detailed formulation of any claim for financial loss that may be advanced in the light of the present judgment. Those questions will include the question of whether any necessary extension should be granted pursuant to HRA section 7(5)(b), in which context I should record that the considerations referred to in § 90 above are not common ground and are likely at least in part (most notably the contention recorded in § 90.i) above) to be hotly contested.

93. In relation to Decision 2 (failure to make regulations under section 22(4)), the Defendant makes the submission, which I have rejected earlier, that it adds nothing to the original 'one-off insertion' of an insuring clause in 1997. In addition, the

Defendant says the claim has not been brought promptly and in any event within three months after the grounds to make the claim when it first arose. She submits as follows:

i) The power conferred by section 22(4) was enacted in plain view. It was open to the Claimants at any stage to either (i) ask the Secretary of State how she proposed to use that power, (ii) make submissions that it should be used for the very purpose now relied upon, and/or (iii) to complain in the event that the Secretary of State did not do so. At no stage prior to these proceedings, however, has either Claimant ever made any such enquiry, submission or complaint.

ii) The Claimants cannot, having been fully aware for the past 23 years of both the existence of the power and the fact that it has not been used for the purposes now contended for, now seek to rely on the fact that the alleged public law failure is continuing so as to permit the Claimants to challenge the decision not to make regulations at any time of their choosing, no matter how much time has passed since s.22(4) was enacted.

94. The Defendant's objections on delay grounds as set out in her Summary Grounds of Resistance (§§ 5 and 19) appear to have been based on her contention regarding the alleged one-off effect of section 22 of the 1997 Act. Linden J when granting permission to proceed left the question of delay open. The Defendant's Detailed Grounds of Resistance recorded that fact (§ 5) but did not advance any positive case on delay. In any event, I do not consider the claim to be barred on grounds of delay. Although the 1997 Act was passed 23 years ago, and there has been an alleged failure since then to make regulations under section 22, it is only as a result of subsequent developments that, on the Claimants' case, the legislation has begun to infringe their A1P1 rights. It would be difficult to define precisely when that moment occurred. However, (a) the alleged infringement is a continuing act, such that a claim can in principle be brought under the HRA without the need for an extension (cf *O'Connor v Bar Standards Board* [2017] UKSC 78 § 30), and (b) the present claim was commenced promptly and within three months after the Bainbridge settlement (on 10 April 2019) which the Claimants have selected as an example of what they contend to be the unlawful effects of the legislation.

(J) WHETHER THE CLAIMANTS ARE 'VICTIMS' FOR HRA PURPOSES

95. Section 7(1), (3) and (7) HRA provide:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal,
>
> or

> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.
>
> …
>
> (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
>
> …
>
> (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

96. The Defendant contends that neither Aviva nor Swiss Re is a 'victim': in Aviva's case because it has reinsured the relevant risks to Swiss Re, and in Swiss Re's case because it reinsured them in full knowledge of the circumstances.

97. To the extent that this is a claim that legislation be read down pursuant to HRA section 3 or for a declaration of incompatibility pursuant to section 4 of the HRA 1998, rather than a claim brought pursuant to section 7, the Claimants submit that they do not have to demonstrate that they are "victims", citing the observation of Lord Steyn, with whom Lords Scott and Walker agreed, in *R (Rusbridger) v Attorney General* [2004] 1 AC 357 § 21 that that proposition in relation to section 3 is *"obvious on proper view of the place of section 3 in the scheme of the Human Rights Act"*). The Claimants argue that they need to demonstrate only that they have a sufficient interest in the matters complained of, for the purpose of satisfying the standing requirements for a judicial review claim.

98. Subsequently to *Rusbridger*, the Court of Appeal in *Joseph Taylor v Lancashire CC and Secretary of State for the Environment, Food & Rural Affairs* [2005] EWCA Civ 284 stated that:

> "… While in the field of human rights, as in public law generally, the courts are not attracted to arguments based upon a lack of standing if there is merit in the argument which is being advanced, here, it is hard to see how Mr Taylor's argument can be categorised as being other than purely hypothetical. As Lord Hutton, Lord Roger of Earlsferry and Lord Walker of Gestingthorpe pointed out in *R (Rusbridger) v The Attorney General* [2004] 1 AC 357 "*it is not the function of the courts to keep the statute book up to date. That important responsibility lies with Parliament and the Executive*." (Paragraphs 36, 58 and 61)" (§ 43)

and made the point that the circumstances of the case before it were very different from those in *Rusbridger*. After quoting Lord Steyn's statement cited above, the court said:

> "This desirably flexible approach to the grant of declarations, cannot appropriately be applied in the circumstances that exist here where Mr Taylor has not been and could not be personally adversely affected by the repealed legislation on which he seeks to rely. To allow him to do so would be to ignore section 7 of the HRA. On this ground alone, we could dispose of his appeal. However, in view of the other issues that have been fully argued before us we do not consider that it would be right to confine our decision to this point alone." (§ 44)

99. The Supreme Court in *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 said:

> "62. True it is that sections 3 and 4 of the HRA are not made expressly subject to the "victimhood" requirement which affects sections 6 and 7 : *R (Rusbridger) v Attorney General* [2004] 1 AC 357 , para 21, per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity to commence general proceedings to establish the interpretation or incompatibility of primary legislation is a much more far-reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or normal position in practice, namely that sections 3 and 4 would be and are resorted to in aid of or as a last resort by a person pursuing a claim or defence under sections 7 and 8 : see *Lancashire County Council v Taylor* [2005] EWCA Civ 284; [2005] 1 WLR 2668, para 28, reciting counsel's submission, and paras 37-44, concluding that, to exercise the court's discretion to grant a declaration to someone who had not been and could not be "*personally adversely affected*" would be to ignore section 7. …"

100. For present purposes I proceed on the basis that it is necessary for the Claimants to show, for any of their claims, that they are at least persons who could be adversely affected by the matters of which they complain. It is common ground in the present case that under Strasbourg case law, it is not necessary for standing that the applicant has actually suffered the consequences of the alleged breach, provided there is a risk of the applicant being directly affected by it in the future: *Dudgeon v UK* (1981) 4 EHRR 149. Where a claimant claims to be a potential (rather than a present actual) victim, he must provide reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur: mere suspicion or conjecture is insufficient (*Senator Lines v 15 Members States* (2004) 39 EHRR SE3, p.20).

101. The Defendant contends that Aviva's interest in this claim ended on the reinsurance of its back-book by Swiss Re in 2015; and that insofar as Aviva claims to have a

continuing interest by reason of the reinsurance not covering certain types of risk situated abroad, that is (i) irrelevant to the liability pertaining to Mr Bainbridge and (ii) not supported by any evidence as to how many policies are likely to involve claims subject to that exclusion.

102. In my view, however, Aviva does qualify as a 'victim' for the purposes of this claim. First, Aviva remains primarily liable to policyholders and, indirectly, to the State under the policies of insurance to which it is a party. It remains contingently exposed to any future refusal or inability of Swiss Re to meet its obligations under the reinsurance. Secondly, the reinsurance is not unlimited. Although certain details, including the quota share percentage and the overall financial "*Limit*" are redacted in the version currently before the court, it is evident that the reinsurance policy does not provide unlimited protection. It contains a series of specific exclusions within the definitions of *"Excluded Loss"* and *"Excluded Policy"*, including various overseas risks. There must at least be a risk that some relevant claims will accordingly fall outside the scope of the reinsurance, and the witness statement of Aviva's former reinsurance claims manager, Mr Bashford, includes a specific statement that not all of the EL policies for which Aviva is responsible are subject to reinsurance. Thirdly, it is the Defendant's own case in relation to Swiss Re, and in any event plainly likely, that the risk of liabilities arising pursuant to the 1997 Act will have been a factor in the determination of the premium paid by Aviva to Swiss Re for the reinsurance. In other words, those contingent liabilities will have increased the amount Aviva had to pay. Any one of these reasons would in my view be a sufficient basis on which to regard Aviva as a victim for HRA purposes.

103. The Defendant submits that Swiss Re cannot be a victim, because it reinsured Aviva's book in full knowledge of the liabilities imposed by the 1997 Act. The higher cost of claims resulting from the offending features of the 1997 Act will, the Defendant says, have been priced into the premium that Swiss Re charged. Accordingly, the Defendant says, Swiss Re's A1P1 rights arose in 2015 and have not been interfered with since. If the book ends up being less valuable, whether in part because more long-tail claims materialise and/or because a greater proportion of that liability relates to non-deductible benefits, then Swiss Re's complaint is simply that it has made a bad bargain.

104. The Defendant cites *Aston Cantlow v Wallbank* [2004] 1 AC 546, where the House of Lords held that certain individuals who were obliged to fulfil an obligation they had voluntarily taken on were not being deprived of their possessions for the purposes of A1P1. In that case, the respondents owned a farm, part of which was rectorial property; they were therefore liable to pay for all necessary repairs to the chancel of the local church under the Chancel Repairs Act 1932. The House of Lords rejected their argument that the Parish Council had acted unlawfully by requiring them to pay for the repairs, thereby interfering with their right to the peaceful enjoyment of their possessions under A1P1. Lord Hobhouse said:

> "90. …When Mr and Mrs Wallbank acquired the title to that land they assumed that responsibility to repair and the consequent liability in default if they should fail to discharge it. This was not a responsibility and liability which they shared with the public in general; it was something which they had personally assumed voluntarily by a voluntary act of

> acquisition which at the time they apparently thought was advantageous to them. From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature. Again, this conclusion is adverse to the Wallbanks' defence.
>
> …
>
> "91. … The word "possessions" …applies to all forms of property and is the equivalent of "assets". But what is clear is that it does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability. Nor do they have a Convention right to be relieved from the consequences of a bargain made, albeit some 200 years earlier, by their predecessors in title….The only reason why they are being sued is because they are the parties liable. This defence also fails. The submission that there should be a declaration of incompatibility likewise fails.
>
> 92. For the sake of completeness, it was clear that at all material times both they and their predecessors in title knew of the responsibility to repair or at least that it was asserted that they would be responsible if they acquired the title to the relevant land, an assertion which they have now admitted to be correct subject only to the Human Rights Act 1998. Further, they originally ran a case of waiver by the PCC which they have now accepted was rightly rejected. If they had had a legal defence it would have been recognised by the court and the action would have been dismissed. Their financial liability under the 1932 Act is not arbitrary. It arises from their failure to perform a civil private law obligation which they had voluntarily assumed."

105. The Defendant argues that the same logic applies in the present case. In *Aston Cantlow*, a liability that arose by statute would accrue upon the acquisition of property to which that statutory liability attached. In the present case, a liability that arises under statute accrues to Swiss Re as a result of its reinsurance of Aviva's book of business, to which that statutory liability is attached. Further, the reinsurance policy specifically covered liabilities arising as a consequence of legislation as well as common law and equitable principles. Having entered into a private commercial arrangement to acquire property subject to a statutorily imposed liability, Swiss Re cannot make any complaint under A1P1 at all.

106. I am not, however, persuaded that the present case is on all fours with *Aston Cantlow*. First, the House of Lords there considered that in enforcing liabilities for chancel

repair, the appellant church council was enforcing a civil debt and doing a private act rather than acting as a public authority. That cannot be said of the Defendant's position in the present case. Secondly, in purchasing the land Mr and Mrs Wallbank had expressly taken on the chancel liability, which was the very thing they alleged to contravene their A1P1 rights. Here, what Swiss Re has reinsured is the relevant liabilities of Aviva as they may from time to time arise. Swiss Re's complaint is not that it has taken on Aviva's liabilities, but that those liabilities should not be increased by reason of the 1997 Act insofar as that Act or its current mode of application contravenes A1P1.

107. In that respect, the comments of the House of Lords in *Wilson* are apt. There, the Secretary of State argued that a person who acquires property subject to limitations under national law which subsequently bite according to their tenor cannot complain that his rights under A1P1 have been infringed. The House of Lords said:

> "… This proposition is stated too widely and too loosely to be acceptable. Clearly, the expiry of a limited interest such as a licence in accordance with its terms does not engage article 1. That is not this case. Here the transaction between the parties provided for repayment of the loan and for the car to be held as security. What is in issue is the "lawfulness" of overriding legislation. The proposition advanced by the Secretary of State would mean that however arbitrary or discriminatory such legislation might be, if it was in existence when the transaction took place a court enforcing human rights values would be impotent. A Convention right guaranteeing a right of property would have nothing to say. That is not an attractive conclusion." (§ 41)

108. It is fair to say that the present case is not on all fours with *Wilson* either, since it cannot be said that the reinsurance contract between Aviva and Swiss Re provided for the reinsured liabilities *not* to include liabilities augmented by an unlawful application of the 1997 Act. However, the general point made in the last portion of the above quotation is apposite: 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. Its claimed status as victim arises from the reinsured liabilities exceeding, on an ongoing basis, those which (it is alleged) could lawfully be imposed on the relevant compensators and their insurers. It is true that the reinsurance premium is likely to have been augmented to reflect the risk that that situation would continue, and that may well be a factor to be taken into account when assessing what loss (if any) Swiss Re may have suffered or what would constitute just satisfaction for any breach. It does not follow, however, that the court can or should assume that the effect of the premium is to insulate Swiss Re from any possible adverse effect flowing from the alleged violation, so as to deprive it of 'victim' status altogether.

109. I also agree with the Claimants that the Defendant's reliance on *Maatschappij v Netherlands* (App. No 57602/09) is misplaced. The ECtHR held there that a claim under Article 6 of the Convention could not be assigned from one claimant to another. The purported assignment was of the claim itself, which the ECtHR held was not capable of rendering the purported assignee a 'victim' for the Article 34 purposes. By

contrast, in *Novikov v Russia* (App. No 35989/02), the injured party assigned title to the underlying asset in which it was alleged there had been an interference contrary to A1P1. The court held that that assignment *of title* had resulted in the acquisition by the assignee of a "possession" or a "claim" within the meaning of A1P1. In the instant case, the insurance policies are encumbered by clauses deemed by the impugned legislation to be present, and it is that substantive encumbrance which has (in part) been passed on from Aviva to Swiss Re.

110. *A fortiori*, if and in so far as the relevant question is whether Aviva and Swiss Re have sufficient interest in the matter to give them standing under ordinary principles, in my view each of them clearly does.

(K) WHETHER THE ACT INFRINGES THE CLAIMANTS' A1P1 RIGHTS

(1) Interference

111. The Defendant accepts that rights and obligations under a policy of liability insurance constitute 'possessions' for A1P1 purposes; and that a liability imposed by the State that reduced the value of an existing contract can amount to an interference with possessions.

112. Moreover, in my view the funds used to meet insurance liabilities can also properly be regarded as 'possessions'. As indicated in *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46*:*

> "I would also hold that the amount of money that they would be required to pay to satisfy their obligations under the insurance policies is a possession for the purposes of A1P1" (§ 28 *per* Lord Hope)
>
> "The concept of "possessions" has been interpreted by that court as including a wide range of economic interests and assets, but one paradigm example of a possession is a person's financial resources. That is implicitly reflected in the recognition, in the second paragraph of A1P1, that the preceding provisions do not impair the state's right to secure the payment of taxes or other contributions or penalties. In the case of an insurance company, the fund out of which it meets claims must therefore constitute a possession within the meaning of the article. Legislation which has the object and effect of establishing a new category of claims, and which in consequence diminishes the fund, can accordingly be regarded as an interference with that possession." (§ 114 *per* Lord Reed)

113. Nonetheless, it appears correct to treat the present case as involving interference with rather than deprivation of possessions, and the Claimants did not seek to argue the contrary. A loose analogy may be provided by the case law in which, as the Defendant notes, the ECtHR has held that systems of taxation or which impose positive obligations on persons constitute systems of control (rather than amounting to deprivation): see § 73 above.

114. The Claimants' essential complaint is about the obligation to pay for benefits that do not correspond to any damage caused by their insured, in the circumstances identified in § 11 above. They make the point that in each of those circumstances, the repayment of benefits to the State is not matched or not fully matched by a credit given by the employee. In contrast the State has received both employee and employer's National Insurance contributions for the State insurance scheme but, under the 1997 Act as interpreted by the Defendant, she receives in effect a form of free reinsurance. The impact of these features is compounded in respect of policies of liability insurance issued before 19 March 1997 by the requirement retrospectively imposed upon insurers or reinsurers who hold such policies, or who have acquired the liabilities under them, to cover these new liabilities.

(2) Legitimate aim

115. The aim of the 'scheme' is expressed as follows in the Defendant's Detailed Grounds of Resistance:

> "it is an instrument of social policy that ensures that the State can recover a contribution of costs that it has incurred from tortfeasors or their insurers and the EL industry generally. This meets the costs that are attributable to tortious wrongdoing and increases the amount of public resources generally and thereby furthers the community interest."

116. The Claimants accept that the objectives of recovering costs attributable to tortious wrongdoing, and increasing public resources generally, are legitimate aims. However, they argue that the scheme established in 1997, as it now applies in the light of the subsequent developments summarised in § 10 above, goes well beyond those objectives.

117. The Defendant seeks to meet this point by stating the scheme's objectives more widely. She suggests that the "*particular mischief*" which the 1997 legislation aimed to address included the reimbursement of the State for the costs of benefits attributable to injury caused by employers who are no longer traceable or whose insurers are no longer traceable.

118. I do not accept that submission. I have outlined in section (D) above the genesis of the 1997 legislation and the main problems which it sought to address. It was not in my view consciously directed, either to any significant degree or even at all, to the recovery from employers or their insurers in respect of injuries caused by others such as non-traceable employers/insurers. Rather, the legislators' focus was to deal with the problems arising from the small claims limit and the unfairness of deducting from general damages the cost of State benefits relating to other heads of claim. Nor would I accept that the 1997 Act was designed with a view to increasing public resources as an end in itself, without regard to the fault of the compensator/insurer from whom contributions were to be demanded.

119. Moreover, as I have already noted, the 1997 Act predated the statutory and common law developments listed in § 10 above which addressed the problems arising for injured persons in cases of untraceable employers/insurers. When those developments did in due course occur, they were decisions or measures driven by

social policy considerations aimed at the amelioration of the position of the victims of long-tail diseases, not at the position as between the State and traceable employers/insurers with regard to State benefits.

120. If obtaining reimbursement for the cost of State benefits attributable to the tortious actions of third parties had been part of the aims pursued by the 1997 legislation, it would arguably have been a legitimate aim, but much would have depended on the means used to achieve it. The Defendant submits that the sharing of risk across the insurance industry, by imposing liability attributable to wrongdoing by an insolvent or untraceable employer/insurer on any other insurer who is traceable, and who has a liability in respect of at least some of that tortious harm, is an ordinary and unobjectionable scheme. The Defendant cites as a comparator compulsory motor insurance and the funding of the Motor Insurers' Bureau (MIB), whereby gaps in coverage are met by spreading risk amongst other identified insurers. The Defendant adds that there is at least a reasonable chance that the 'missing' insurer in any given situation is Aviva itself (which has actively acquired large numbers of EL insurers and/or policies).

121. I do not consider the analogy to be apt. The MIB operates by spreading cost across the industry as a whole. The complaint about the scheme at issue in the present case is that it allocates 100% liability to reimburse State benefits, selectively, to those identifiable insurers whose policyholders were responsible for any part (however small) of the wrongdoing that caused the disease.

122. Similarly, the Diffuse Mesothelioma Payment Scheme (DMPS), established under the Mesothelioma Act 2014, does not provide an apt comparator. It provides for payments to victims whose former employers/their insurers cannot be traced, funded by a levy on current EL insurers based on matters such as market share. It does not impose an individual burden in the same way as the scheme in question in the present case. Both the MIB scheme and the DMPS are also distinguishable in that they are essentially directed at providing support for victims.

(3) Rational connection to aim

123. The Defendant submits that the 1997 Act and measures adopted under it are clearly rationally connected to its aim, particularly bearing in mind that one of the aims is to maximise recovery for the State. By contrast, the Defendant submits, the approach proposed by the Claimants would reduce insurers' contributions and cause a corresponding increase in the costs to be met by taxpayers, which is contrary to that aim.

124. The Claimants accept that, to the extent that the Defendant's aim may be to "*increase the amount of public resources available generally*", a policy which maximises the sums paid by insurers to the State would be rationally connected to that aim. Whether such an aim alone is capable of justifying the individual and excessive burden imposed upon the Claimants is another matter.

125. To the extent, however, that the Defendant's aim is to "*meet the costs that are attributable to tortious wrongdoing*", the Claimants submit that the features identified at § 11 above are *not* attributable to tortious wrongdoing, because they do not correspond with damage caused by the Claimants' insureds. Moreover, these features

mainly arose as a result of legislative and common law developments which post-date the 1997 Act and in order to achieve the different aim of redressing the balance between tortfeasors and victims. Accordingly, the Claimants deny that there is any rational connection between that legitimate aim (meeting costs attributable to tortious wrongdoing) and the impugned aspects of the measures.

126. It is necessary at this stage of the argument to address the features listed in § 11 above, to which the Claimants' take exception, individually. For ease of reference, and in short form, they are:

i) the requirement to repay 100% of the recoverable benefit even where the employee's own negligence also contributed to the damage sustained;

ii) the requirement to repay 100% of the recoverable benefit even where the employee's 'divisible' disease is, as in *Carder*, in part unconnected with the insured's tort;

iii) the requirement to repay 100% of the recoverable benefit in 'indivisible' disease cases even where the insured's tort exposed the victim to asbestos only for a limited period, such that at common law they would bear only a share of the liability;

iv) the requirement to repay certain benefits that do not correspond to a recognised head of loss, including benefits that do not correspond to heads of compensation that would be payable by way of damages following a successful negligence claim; and

v) the requirement to repay 100% of the recoverable benefit despite the element of compromise that is present in most settled claims, even where settlement occurs expressly without admission of liability.

127. As to the first feature (contributory negligence), I do on balance consider there to be a potential rational connection, albeit a tenuous one, between the challenged measures and the aim of recovering full compensation from tortfeasors for the loss they have caused. If and to the extent that contributory negligence can be shown, it would in principle be illogical to regard the compensator as having to that extent caused the disease. However, an argument to the contrary might be made on practical grounds. It is evident that during the formulation and passage of the 1997 Act itself, contributory negligence was regarded as a complex problem, and in the end a decision was taken to leave it out of account: a decision which appears to have been driven by concerns about practicability and/or fairness to injured persons (see §§ 24, 26, 37, 39 and 47 above). It is true that later proposed measures have taken a different approach: see §§ 16.iv) and 16.v) above relating to the Welsh and Scottish Bills. However, with some hesitation, I consider that a measure which omits on practical grounds to carve out benefits ultimately attributable to the victim's own contributory negligence could nonetheless still be regarded as rationally connected to an aim of recovering from tortfeasors costs attributable to their wrongdoing.

128. The second and third features (100% liability for benefits despite only partial responsibility) are not in my view rationally connected to such an aim. Recovery from wrongdoers of the costs occasioned by their wrongdoing would be rationally

connected with recovering State benefits in proportion to the extent of the wrongdoing in question, but not with recovering all State benefits without regard to the extent of the wrongdoing. The post 1997 developments which imposed 100% liability in favour of injured persons may well have had a rational connection (though that is not in issue in the present claim) with the social policy aims which they served of ensuring that those injured persons were not left uncompensated. However, those considerations are not in my view capable of amounting to a rational connection between the challenged measures here and the aims they purport to serve.

129. As a result, the second and third features could in my view be justified, if at all, only on the basis of being rationally connected to the objective of increasing State resources. The key question in that context is the one of fair balance considered below.

130. The fourth feature (benefits not corresponding to heads of loss) in my view falls in a different category. The fact that certain benefits do not correspond to heads of compensation that would be payable by way of damages following a successful negligence claim does not prevent them from having been caused in a practical sense by the insured's wrongdoing. As the Defendant points out, the Act's recoverability provisions reflect the fact that the benefits paid have arisen out of the infliction of that tortious harm even though the benefits themselves are not tortious heads of loss and recoverable as such. The costs that can fairly be attributable to the insured's tortious wrongdoing include welfare benefit costs that arise by reason of that wrongdoing, even if they are not themselves recoverable as heads of loss. There is a rational connection between the legitimate aim and a measure that seeks to avoid the taxpayer subsidising the tortfeasor for the wider costs to the State occasioned by the tortfeasor's own tortious action.

131. The Claimants make the further point that some State benefits are caught by the 1997 Act even though they may be payable in part for reasons entirely unrelated to the insured's tort. For example, IIDB is paid at levels depending on the degree of disability. A claimant may suffer from an asbestos-related but also some entirely separate condition. However, in my view the possibility that this could be the case in some instances does not of itself remove the rational connection between the objective and the challenged measures. The rules on IIDB are complex, and the summary provided in an appendix to the Claimants' skeleton argument indicates that they include various deeming provisions: to the effect, for example, that benefit can be received by a sufferer from pneumoconiosis (which includes asbestosis) by reason of only a 1% disability compared to the usual 14% threshold for payment; but that, for mesothelioma and lung cancer claims the level of disability is deemed to be 100%. The State has, in these respects, chosen to take a relatively generous approach to sufferers from these diseases. Nonetheless, taking a broad view, the benefits payable to them can still fairly be attributed to the torts which caused them to suffer from them.

132. Finally, as to the fifth feature of the scheme, the Claimants accept that it would not be practicable to devise a scheme which took account of the element of compromise in a settlement without admission of liability, but say the court's consideration of whether a fair balance is struck by the scheme as applied by the Defendant should take account of the fact that the scheme will capture such settlements. At the rational connection stage, I consider that a connection can be shown in these circumstances, the

connection being at least the purely practical one that in order for a State benefit recovery scheme to work, it may be necessary to overlook distinctions of this kind based on the extent to which liability was or was not admitted.

(4) No more than is necessary

133. The Defendant submits in her skeleton argument that:

> "101. Once it is accepted that it is a legitimate aim that the insurance industry should contribute to the welfare costs occasioned by the tortfeasor's insured conduct to the extent considered appropriate by Parliament, then it follows that the means used are not more than is reasonably necessary for that purpose. Any "less intrusive" means, would, in effect, be in furtherance of a different or lesser objective.
>
> 102. … Having accepted (C/Skel §42) that the aim of increasing the amount of public resources available generally is a further, legitimate aim, the Secretary of State could not achieve her two stated aims which together seek to ensure that the State can recover the costs it has incurred arising "in respect of" the tortious accident injury or disease, namely the cost of the welfare benefits that have had to be paid to the victims of those torts. If the State is to be alleviated of those costs, costs which arise from the tortious conduct of the insured, it is necessary to adopt the measures in question insofar as they require either the tortfeasor or their insurers to bear the burden of those consequential costs.
>
> 103. By contrast, the Insurers measures would, for the reasons set out in para 100 above, fail to give effect to those legitimate aims insofar as it would compel the Secretary of State to adopt a statutory measure that imposed no greater burden on the insurer than its insured would incur at common law."

134. The difficulty with this approach is that it glosses over the distinction between (i) costs fairly attributable to the conduct of the tortfeasor whose insurers are asked to recompense the State, and (ii) costs fairly attributable to the conduct of third parties. The expressions *"the welfare costs occasioned by the tortfeasor's insured conduct"* and *"costs which arise from the tortious conduct of the insured"* would naturally denote only (i), whereas the Defendant's actual case is that (ii) can also be recovered. The words *"to the extent considered appropriate by Parliament"* may be intended in part to reflect that point, in which case the Defendant's argument does indeed become circular, by restating the 'legitimate aim' in terms of the measure actually put in place.

135. In addition, the suggestion quoted in paragraph 102 above that the Claimants' approach would result in their having no greater burden than would exist at common law is fallacious. At common law neither the insured nor the insurer would have any liability to reimburse State benefits. The Claimants' approach in the present case would leave them with statutory liabilities to compensate the State for the cost of benefits attributing to their insureds' wrongdoing, including costs that cannot for

whatever reason be deducted from compensation payments. What the Claimants' approach seeks to avoid is additional statutory liabilities that are not fairly attributable to their insureds' wrongdoing.

136. The Claimants accept that to the extent that the Defendant's aim is to "*increase the amount of public resources available generally*", as a matter of logic a less intrusive measure would achieve that aim less perfectly. I have, however, already made the point that the aim of the 1997 Act was not in fact to increase State recovery regardless of fault. I would also, despite the Claimants' concession, have some doubt about whether any such objective could not be achieved by a less intrusive measure. As noted earlier, the MIB model is to spread liabilities for missing drivers across the industry as a whole, and an industry-wide sharing scheme might be regarded as less intrusive than one which arbitrarily attributes 100% liability (vis-à-vis the State) to traceable insureds/insurers without regard to degree of fault. In the light of my conclusions below on 'fair balance', I do not though consider it necessary to reach a concluded view on this particular point.

137. Applying the 'no less intrusive means' test to the five features of the scheme to which the Claimants object:

i) (Feature 1: contributory negligence): I have concluded that potential practical difficulties about taking account of contributory negligence are capable of providing a rational connection between the challenged measures and a scheme which fails to provide for discounts based on contributory negligence. However, the 'no less intrusive means' test may operate more strictly. The evidence and submissions before me do not indicate that it would in fact be impracticable to take account of contributory negligence in the scheme, insofar as it applies as between compensators/insurers and the State (as opposed to its application vis-à-vis injured persons). The examples of the Welsh and Scottish Bills suggest that others have taken the view that such account could be taken, in somewhat similar contexts. Therefore, on the footing that the scheme aims to recover from insurers costs attributable to their insureds' tortious wrongdoing, I am not persuaded that a scheme taking account of contributory negligence would be incapable of achieving the scheme's objective. It follows that the recovery of sums without regard to contributory negligence can be justified, if at all, only on the basis of a wider aim of increasing public resources.

ii) (Features 2 and 3: 100% recovery regardless of independently caused injury or of third party fault): I have already concluded that these features are not rationally connected with an aim of recovery of costs fairly attributable to insureds' wrongdoing. Even if I am wrong in that view, I do not consider that no less intrusive means could be used to achieve that objective. On the contrary, it would be possible for the scheme to limit recovery in proportion to the insured's contribution to the injured person's overall exposure. These features could therefore be justified, if at all, only on the basis of a wider aim of increasing public resources.

iii) (Feature 4: benefits not corresponding to heads of loss): on the footing that the scheme legitimately aims to recover the costs of benefits arising out of the infliction of the insured's tort, even though the benefits themselves are not

tortious heads of loss and recoverable as such, I consider that no less intrusive means would be able to achieve that objective.

iv) (Feature 5: settlements without admission): the Claimants have accepted that it would not be practicable to operate a scheme drawing a distinction on this basis, it follows that no less intrusive means are available in this regard.

(5) Fair balance

138. The Defendant submits that the 1997 Act, as the Defendant currently applies it, strikes a fair balance. In summary, the Defendant contends as follows:

i) The Scheme was the subject of detailed consultation, including with the insurance industry, and the interests of the insurance industry were taken into account prior to and during the passage of the Bill giving rise to the 1997 Act.

ii) Were the obligation to reimburse the state for its payment of recoverable benefits to be treated, in effect, as a tax on insurers, it is clear that the fair balance test would only apply insofar as it requires procedural guarantees to establish that the particular insurer is liable to make the payments: the State is otherwise left to decide for itself the level of the liability, and the means of assessing and collecting the same. As the ECtHR stated in *Gasus-Dosier and Fordertechnik v Netherlands* (1995) 20 EHRR 403, it will "*respect the legislature's assessment in [enforcing tax liabilities] unless it is devoid of reasonable foundation*." That permissive approach has also been extended to retrospective taxation schemes: see *National and Provisional Building Society v UK* (1997) 25 EHRR 127 § 76. In the present case, the State could have decided simply to tax the insurance industry or increase general taxation; but instead created a bespoke scheme which correlates more accurately to actual EL insurance liabilities.

iii) Although applicable to policies written before section 22 came into force, it only applies to recoverable benefits arising after the Act came into force (including claimants whose extant claims had not been determined). Insurers therefore could seek to adjust their premia prospectively to mitigate any increased liability that might accrue. Swiss Re was able to fully assess the impact of section 22 when it came to consider Aviva's proposal to reinsure its book in 2015 in any event. The industry has adhered, without difficulty or complaint, to the scheme since its inception. The Claimants' evidence does not say that they have been unable to adjust premia or take other commercial decisions to adjust as a result of impact of common law and statutory changes since 1997 Act. Nor does the evidence expressly address or provide any evidence specifically as to the Claimants' profitability, whether in relation to EL policies alone, or when offered as part of wider packages. They have accordingly not shown any *"excessive and individual burden"* to exist.

iv) The estimated additional burden to the insurance industry referred to during the passage of the Bill has turned out to be correct.

v) The scheme does not shift all liabilities to the insurance industry. Rather, the balance was struck such that those liabilities are restricted to a period of 5

years. The State picks up the remainder. There are far more costs arising from tortious wrongdoing which are met by the general body of taxpayers in any event (including continuing costs to the NHS as a result of the expensive and long-term treatment which sufferers of long-tail illness undergo, but also less quantifiable costs, such as the costs of economic inactivity on the part of affected workers).

vi) Insofar as special justification is additionally required in the context of legislation that has retrospective effect, (a) such justification plainly exists on the facts and (b) that justification achieves a fair and proportionate balance between the various interests engaged. The House of Lords in *Axa* held that a statutory rule which (retrospectively) changed a common law rule to the detriment of insurers was proportionate, as, in part, insurers were well placed to "*take the rough with the smooth*" when determining risk. That change was comparable to the change in the present case to the insuring clause. The broad principle is that insurers operate in a sector where changes to risk, including through legislative (and retrospective) changes are themselves an identifiable and perennial risk.

vii) The retrospectivity in *Axa* involved the 'social injustice' of denying those with pleural plaques insurance cover (because it did not amount to actionable harm). Similarly, the contested aspects of the 1997 Act seek simultaneously to ensure that employees who are victims will not fail to be protected because of the disappearance of an employer or insurer, while at the same time requiring the tortfeasor (or its insurer) to bear responsibility for the social burden that would otherwise arise, in circumstances where the welfare benefits in question are paid "*in respect of*" the accident injury or disease caused by the tortfeasor. That is a classic example of a polycentric socio-economic policy designed, at one and the same time, to protect employees and to remedy the injustice of the state subsidising the tortfeasor's losses by requiring it to bear the cost of the welfare requirements that their conduct has necessitated.

viii) The 1997 Act is *"remedial social legislation"* like that involved in *Bäck v Finland* 40 EHRR 48, where retrospective legislation had granted relief to impecunious debtors allowing them to write down their debts very substantially on the basis of a greatly reduced payment schedule. The retrospective nature of this legislation meant "*that a special justification [was] required for such interference*" with existing contracts, but it was "*remedial social legislation*" and the ECtHR held that "*in particular in the field of debt adjustment … it must be open to the legislature to take measures affecting the further execution of previously concluded contracts in order to attain the aim of the policy adopted*" (§ 68).

ix) As many of the claims arise in relation to exposure that occurred decades ago, many of the Claimants' EL predecessors in title received premium for EL risks where claims in respect of those risks were never made before those policies became untraceable. The insurance industry has had the historic benefit of that premium; yet the Claimants are seeking to avoid the burden to which that lack of traceability has given rise.

x) The relevant observations in the *Welsh Bill* case are not binding and distinguishable because (a) they were *obiter*, (b) it concerned a decision of a non-sovereign parliament, so the restrictions on the court's role explained in *Wilson* did not apply (c) the present case concerns pre-HRA legislation, (d) the question in the *Welsh Bill* case was the legality of a scheme in current circumstances, whereas the present case concerns an Act passed 23 years ago (since when no further interference has occurred), (e) in the present case, both the State and insurers have been operating for 23 years on the basis of the regime and will have made decisions reflecting it, (f) there was, in the present case, a social policy consensus for the package of measures put in place

139. I consider these points in turn below.

140. [i] The 1997 legislation was indeed the subject of detailed consultation, including with the insurance industry, and the interests of the insurance industry were taken into account prior to and during the passage of the Bill giving rise to the 1997 Act. However, the effect of the legislation now, following the fundamental changes in the law outlined in § 10 above, could not have been in Parliament's contemplation. The available materials indicate that the objectives Parliament sought to pursue via the 1997 Act were specific, and were not directed at the problems which have subsequently emerged and to which the present claim relates. There is no indication that Parliament's objective in passing the 1997 Act was to address the problem of untraceable employers/insurers. Parliament was not therefore required to undertake the balancing exercise which the present claim raises. Further, as Lord Hobhouse stated in *Wilson*:

> "The question of justification and proportionality has to be answered by reference to the time the events took place to which the statutory provision is being applied. The person claiming to be a victim has to show how he has been affected by the provision he complains about. Those who are seeking to justify the use of the statutory provision have to do so as at the time of that use. If they cannot justify it at that time, their use of it is a breach of the victim's "Convention rights". That is how the European Court would decide the question and it is also how the municipal court is required to look at it. In most cases the difference will probably be academic and it no doubt was so regarded in the present case. But as circumstances change so the justification or the absence of it may change. Merely to examine the situation at the time the Act in question was passed and treat that as decisive is wrong in principle. The same point can be seen equally clearly in relation to a question of compatibility arising under section 4. As I have explained earlier, the decision under section 4 has to be made as at the time of the decision; just as the current state of the legislation at that time is what has to be the subject matter of the decision so also the circumstances and social needs existing at that time are what is relevant, not those existing at some earlier or different time. To look for justification only in the Parliamentary debates

> at the time the statute was originally passed invites error." (§ 144)

141. Thus, as the Defendant points out, in considering whether legislation is compatible with the Convention, the parties and the court are not restricted to considering justifications advanced at the time it was passed. Ex post facto justification may legitimately be taken into account, for example, in deciding whether legislation strikes a fair balance. In addition, given the passage of time since 1997, the court has to bear in mind that not all relevant materials will now be available. For example, Committee stage minutes have not been retained.

142. Even bearing those factors in mind, I do not consider that the first to third features identified in § 11 above strike a fair balance, still less that special justification has been shown bearing in mind their retrospective effect. They have the effect of imposing substantial liabilities to the State pursuant to historic insurance policies, upon insurers who could not have priced any such risks into the premiums obtained at the time, in respect of State benefits bearing no proportionate relationship to the wrongdoing by the relevant insureds. The social policy objectives which, exceptionally, have led the courts and Parliament to take a novel and particularly generous approach to causation vis-à-vis the victims of asbestos-related diseases do not reasonably justify imposing on the insurers additional liabilities to the State.

143. It is true that there was some consideration during the 1997 Act's passage of the particular problem of contributory negligence, and that in the end no provisions were included in that regard. However, such evidence as exists tends to suggest that that approach was taken for essentially practical reasons. It is not for the court to criticise Parliament's approach in any way, and I do not do so. It is, however, legitimate to point out that, insofar as the Defendant might suggest that the 1997 outcome as regards contributory negligence reflected some form of social consensus or policy, the available evidence does not support that view. In any event, the court has the duty to form its own view as to the balance struck now, in the light of the HRA, which was not in force at the relevant time, and bearing in mind the retrospective effect of the legislation. For the same reasons as indicated in § 142 above, I conclude that justification has not been shown for the scheme, as it now operates, to ignore contributory negligence when determining the amounts payable by insurers to the State.

144. [ii] It may be the case (though it is unnecessary to seek to decide the point) that Parliament could, consistently with A1P1, introduce a tax on the insurance industry as a whole to cover the State benefit costs to which the present claim relates. However, the 1997 Act is not of course such a scheme, and the possibility that such a scheme would be lawful does not shed any real light on the legality of the actual legislation as it now operates.

145. Moreover, I do not consider that any of the features of the scheme to which the Claimants object could be justified as providing for a fair balance simply on the basis that they increase the level of recovery for the public purse. Measures of general taxation of the public, or of businesses in general, may satisfy the fair balance test without undue difficulty on the grounds that they serve the legitimate aim of raising public finance. Taxation of industry sectors may also satisfy the fair balance test on a similar basis and/or on the basis that they relate to costs arising from that sector in

particular (as in the MIB and DMPS examples). By contrast, measures, such as those involved in the present case, which target particular entities are unlikely to satisfy the test simply on public fundraising grounds: a fair balance is unlikely to be struck by such targeted measures unless the individual burden imposed can be regarded as fair in the light of particular circumstances appertaining to the targeted entities, such as costs fairly attributable to their activities.

146. [iii] There is no cogent basis on which it can be assumed that insurers could seek to adjust their premia prospectively to mitigate any increased liability that might accrue as a result of the features of the scheme of which the Claimants complain. To do so would involve seeking to increase premia on current insureds by reference to liabilities arising on business underwritten in the past for other insureds. Insurers operate in a competitive market, and for affected insurers to seek to increase premia in that way would self-evidently tend to put them at a competitive disadvantage compared to others. The witness statement of Aviva's Technical Liability Manager, Mr Donovan, states that:

> "Many current EL insurers have only come into the market over recent years and have no legacy, or long tail, claims. If those insurers with long tail claims were to increase their EL premiums they would be at a competitive disadvantage when put against insurers who did not. There would be no advantage offered to the potential policyholder to go with those higher premiums. All other things being equal the customer would be likely to choose the cover with the lowest premium."

147. Mr Donovan also states that EL insurance has very rarely been profitable in its own right, and that in most recent years since 2005 the insurance industry has made a consistent loss from compulsory EL insurance. Insurers have typically 'packaged' EL cover with other classes of non compulsory insurance in order to sustain commercial activity. Some EL insurers were not able to carry on in business at all over recent decades and became insolvent. These included Iron Trades Mutual, Builders Accident Insurance and Independent Insurance. All of these insurers carried significant asbestos liabilities; and Iron Trades in particular had been an important EL insurer with particular exposure to heavy industrial concerns. It stopped writing business in the late 1990s, continued paying claims (under the name Chester Street Insurance Holdings) for a time, but subsequently went into insolvent administration in or around 2001. Its liabilities are now being paid largely by the Financial Services Compensation Scheme, funded by a levy on current financial entities (including Aviva).

148. In these circumstances, I do not consider that the court can confidently assume, as the Defendant submits, that industry has adhered without difficulty to the scheme since its inception. Although failures such as those mentioned above cannot specifically be linked to the liabilities to the State exacted pursuant to the 1997 Act, those liabilities clearly formed part of the burden of asbestos-related liabilities upon those firms, as well as being a burden on extant firms with long-tail asbestos exposure.

149. [iv] I am not persuaded by the argument that the estimated additional burden to the insurance industry referred to during the passage of the Bill has turned out to be correct. As noted earlier, it was estimated during its passage that it would cost the

insurance industry between £51 million and £71 million a year. The witness statement of Mr Towers, a Senior Policy Manager working for the Defendant and with responsibility for policy regarding the 1997 Act, states that in the period 2014/5 to 2018/19, benefit recoveries from EL claims averaged £68.75 million a year, and benefit recoveries across all liabilities averaged £125 million a year. However, by far the larger part of the 1997 estimates represented the estimated effect of removing the small claims limit, which was considered likely to increase the level of settlements (see § 42 above). That estimated cost is likely to have included increased payments to injured persons, not merely to the State. I do not therefore consider that a comparison between the 1997 estimates and Mr Towers' figures for EL claims from 2014 to 2019 would be a like to like comparison. A somewhat more apt comparison would be with the much smaller estimates from 1996 relating to asbestos-related settlements (see §§ 42.i) and 43 above).

150. [v] The 5-year rule operates to limit insurers' liabilities under the scheme, and it is true that the State bears numerous ongoing burdens arising from long-tail diseases. However, as the Claimants point out, in mesothelioma cases, sadly, life expectancy is well short of five years anyway. Further, the evidence does not support the view that the five-year limit represented some form of balance struck between the taxpayer and the insurer. Rather, it seems to have been a pre-existing feature introduced to reflect the view that as more than 80% of claims were resolved within two and a half years, it was unfair to victims to permit deductions in relation to forward projections of benefit entitlement (see Minutes of Evidence taken before the House of Commons Social Security Committee, Wednesday 1 February 1995, p.24, paragraph 36 of the Memorandum submitted by the Department of Social Security).

151. [vi] I am not persuaded that, so far as concerns the first three features identified in § 11 above, special justification has been shown for the retrospective effect of the legislation. First of all, the pre-legislative materials quoted earlier indicate that Parliament's primary objective in making the Act apply retrospectively was to cater for cases 'in the pipeline', rather than anything more broad-reaching. Secondly, the effect of the scheme, as it now operates, is to load onto insurers, whose insureds under historic policies caused varying proportions of exposure to asbestos, 100% of the cost of the prescribed State benefits payable to the victims. These costs mainly arise under policies underwritten at a time when no potential liability existed to compensate for State benefits at all. Such risks could not therefore have been priced into the premia received.

152. It is not in my view an answer to that to assert that insurers must expect to 'take the rough with the smooth', or that insurers operate in an area where changes to risk are themselves an identifiable and perennial risk. As Lord Mance stated in Axa:

> "Retrospectivity. The key to this issue is not in my view that insurance is a contract against risks. There are always limits to the contingencies upon which insurers speculate, provided by the terms and conditions of the policy. Further, insurers are normally entitled to expect that the liabilities, which their insured employers incur "arising out of and in the course of [their] employment" and which they insured under the specimen copy policy to which I have referred, will be liabilities capable of existing in law at the time of the

> occurrence during the relevant employment from which such liabilities arise" (§ 91)

153. [vii] The retrospectivity in *Axa* involved an Act of the Scottish Parliament which reversed the statement of the common law in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281 that asymptomatic pleural plaques resulting from asbestos exposure did not in themselves amount to actionable damage. The Supreme Court noted that the typical policy wording indemnified the insured against "*bodily injury*". Thus, if the position in law were that pleural plaques were to be regarded as *"bodily injury"* as the 2009 Act deemed them to be, then the liability was covered by the terms of the insurance policy agreed between the parties. There was, unlike in the present case, no need for any statutory extension to the contractual obligation.

154. Lord Hope's observation about taking the rough with the smooth (§ 39) was made in the context of his point that *"phrases such as "bodily injury or disease" are capable of expanding the meaning that they were originally thought to have as medical knowledge develops and circumstances change. Diseases that were previously unknown or rarely seen may become familiar and give rise to claims that had not at the outset been anticipated"*, as illustrated by the effect of asbestos (§ 38), and that:

> "The effects of asbestos provide ample evidence of this phenomenon, as people began to live long enough after exposure to it to contract mesothelioma and other harmful asbestos-related diseases. The nature, number and value of claims were therefore always liable to develop in ways that were unpredictable. The premium income that was expected to meet the claims that were foreseen at the outset may have no relationship, in the long term, to the burden that in fact materialises. How best to provide for that eventuality is an art which takes the rough with the smooth and depends on the exercise of judgment and experience." (§ 39)

155. It is, however, unrealistic in my view to suggest that insurers writing policies in earlier decades could reasonably have been expected, by the exercise of judgment and experience, to cater for the possibilities that (a) the State would impose a new requirement to compensate it for the cost of benefits over and above those which could be deducted from compensation payments, (b) Parliament and the common law would over time hold employers 100% liable for damage to which they had made only a limited contribution and (c) that in turn would lead to a liability to pay the State sums equal to 100% of numerous State benefits paid to the injured persons. Such liabilities to the State could on no view have been regarded as conceivably falling within the insuring clauses at the time the policies were written. Indeed, as Lords Hodge and Sumption pointed out in *International Energy Group,* the courts in *Fairchild, Barker* and *Durham "departed from established legal principle and extended the law of causation"* (§ 98) and in *Fairchild* (a judgment described by Lord Hoffman writing extra-judicially as *"revolutionary"*) created *"a special exception to [the general principle of causation] which could not be justified by reference to any general principle and depended on a distinction which had no rational factual or legal justification"* (§ 128).

156. Lord Hope also noted in *Axa* that pleural plaques had been regarded as actionable for over 20 years (§ 30), and went on to say:

> "… The anxiety that is generated by a diagnosis of having developed pleural plaques is well documented and it had been the practice for over 20 years for such claims to be met, albeit without admission of liability. The numbers of those involved, and the fact that many of them live in communities alongside people who are known to have developed very serious asbestos-related illnesses, contributed to a situation which no responsible government could ignore. It seems to me that the Scottish Parliament were entitled to regard their predicament as a social injustice, and that its judgment that asbestos-related pleural plaques should be actionable cannot be dismissed as unreasonable." (§ 33)

157. The first to third aspects of the 1997 Act identified in § 11 above do not address any equivalent social injustice. They are aspects which benefit the State while conferring no additional benefit on injured claimants.

158. I consider the position to be different in relation to the fourth aspect (benefits not corresponding to heads of loss). I have concluded earlier that there is a rational connection between the legitimate aim and a measure that seeks to avoid the taxpayer subsidising the tortfeasor for the wider costs to the State occasioned by the tortfeasor's own tortious action. On the footing that the first three aspects are removed, so that insurers pay the State amount commensurate only with the extent of their insureds' contribution to the disease, a fair balance is struck in my view by requiring those payments to include costs relating to the benefits as a whole payable to the injured person and not merely those which correspond to heads of loss recoverable for negligence.

159. [viii] I would accept that insofar as the 1997 Act set out to address the problems of the small claims limit and deductions from general damages, both of which disadvantaged injured persons, it could be regarded as being *"remedial social legislation"*. However, insofar as it operates now to require payments by insurers to the State of sums that do not correspond to their insureds' contribution to the damage (i.e. the first three features identified in § 11 above), it cannot be regarded as social remedial legislation, nor as being comparable to the legislation at issue in *Bäck v Finland*. There are no such pressing social concerns in the present case as might constitute special justification for retrospective legislation. On that basis, the remarks of Males LJ in *Equitas Insurance Limited v Municipal Mutual Insurance Limited* [2019] EWCA Civ 718, which the Claimants highlight, are pertinent:

> "There is no doubt that the Fairchild decision together with the Compensation Act 2006 and the cases which have applied these principles have created significant anomalies in the law. That jurisprudence, intended as it was to ensure a remedy for victims of negligent exposure to asbestos, has extended into liability insurance and (now) reinsurance in ways which seem unlikely to have been intended or predicted." (§ 90)

> "…once the courts can be confident that the objective of ensuring victim protection has been achieved, it is desirable that the anomalies should be corrected and that the law should return to the fundamental principles of the common law. Put shortly, once unorthodoxy has served its purpose, we should revert to orthodoxy…". (§ 91)

160. [ix] I do not consider the point that the insurance industry in general had the benefit of premiums paid to now untraceable insurers provides special justification for the State to impose all the costs of benefits onto those insurers who remain extant, being identifiable and not (unlike a number of other EL insurers) having become insolvent. Nor does the speculative possibility that some extant insurers could themselves be the 'untraceable' insurers in the context of EL claims in my view provide such special justification.

161. [x] I agree that the relevant observations in the *Welsh Bill* case are not strictly binding because they were *obiter*, though since the points were fully argued the observations are entitled to the highest degree of respect. The fact that the case concerned a decision of a non-sovereign parliament removed any inhibition on the court's consideration of the legislative process. However, those restrictions which do apply in the present case are not such as to prevent the court from performing its duty to assess compliance with the HRA. The House of Lords in *Wilson* made clear that the court may not question proceedings in Parliament, which would contravene Article 9 of the Bill of Rights 1689, and that it is no part of the court's function to determine whether sufficient reasons were given by Parliament for passing an enactment: the quality, cogency or sufficiency of reasons given by the promoter of legislation is a matter for Parliament and not the court to determine (see, in particular, §§ 61-67 and §§ 110-118 per Lords Nicholls and Hope respectively). However, the court is permitted, provided it avoids any criticism of Parliament or its proceedings, to consider evidence that may cast light on what Parliament's aim was when it passed the provision in question, as part of the provision of considering whether legislation is compatible with Convention rights (§ 118). I have aimed, in my foregoing reasoning, to abide by that distinction.

162. The fact that the present case concerns pre-HRA legislation does not remove the need to consider whether and to what extent its operation now complies with Convention rights, and I have already rejected the Defendant's contention that there has been no post-1997 interference with such rights. The possibility that both sides in the present case may have taken decisions on the basis that the legislation was lawful may in due course be relevant when considering what would constitute just satisfaction for breach of Convention rights. However, I do not consider it to bear directly on the question of 'fair balance', taking in account also the points I make in §§ 146-148 above.

163. In disagreement with the Defendant, I do consider the Supreme Court's observations in the *Welsh Bill* case to be apposite in the present case. The Claimants highlight *inter alia* §§ 63-66 of the judgment, where Lord Mance said:

> "63. The Counsel General [for the Welsh Government] submits that *AXA* [2012] 1 AC 868 was a stronger case for treating the legislation as incompatible than the present, yet the Supreme Court did not do so. I do not accept the Counsel

General's analysis. The Scottish statute in issue in *AXA* affected all outstanding and future claims, and the present Bill on its face also affects all future compensation payments made in respect of outstanding and future claims. But the two differ in other important respects:

a. The Scottish statute was passed to rectify a perceived injustice directly affecting those suffering from asbestos-related diseases, and was in this very real sense social remedial legislation. Despite the Counsel General's contrary submission, the same cannot in my opinion be said of the Bill. It has no effect on sufferers from asbestos-related diseases. Its purpose is to transfer the financial burden of costs of their hospitalisation from the Welsh Ministers to compensators and their insurers.

b. The Scottish statute was passed to restore the legal position as it had been understood at first instance for some decades, and it might well have been accepted as being at the highest instance. The present Bill aims to change a well-understood position which has existed since the NHS was created, by introducing a new right of recourse which has never previously existed, though it is one which Parliament could at or at any time since the creation of the NHS have decided to introduce without any legal problem in relation to future events giving rise to liability claims against compensators (and so to liability insurance claims by compensators against their liability insurers).

c. The Scottish statute built on established legal principles, requiring liability to exist before compensators could be compelled to meet claims for pleural plaques and for insurance cover to exist before such compensators could recover from their liability insurers. This was one of the two points stressed by Lord Hope in *AXA*, as I have mentioned in the preceding paragraph. The Bill bypasses such principles, making the liability of compensators dependent simply on the payment of compensation, even if made without admission of liability and making the liability of insurers arise independently of the terms of the insurance policies issued, by reference to the fact of payment of such compensation, provided such policies would to some extent cover any liability which such compensators would, if it were established, have had.

64. The first of these points requires further treatment. The Counsel General submits that, although the Bill has no effect on sufferers from asbestos-related diseases, it is a measure passed as a matter of economic and social policy, in relation to which the Welsh Assembly should be recognised as having a wide area of appreciation and discretionary judgment: see *Huitson* [2012] QB 489, at para 85 per Mummery LJ. He also cites in support the House's decision in *Wilson* [2004] 1 AC

> 816. Both these were cases where the relevant legislation had retrospective aspects. But in both there were directly applicable and compelling social interests militating in favour of retrospectivity. *Wilson* concerned consumer protection legislation regarding the enforceability of loan agreements which failed correctly to state the amount of credit. *Huitson* concerned legislation protecting a grave challenge to the public exchequer, posed by wholly artificial tax arrangements taking advantage of double taxation treaties to avoid the payment of United Kingdom tax by United Kingdom residents. The arrangements were anyway doubtfully legal and such residents had no legitimate expectation that they could avoid such tax.
>
> 65. Although the Bill would either save the Welsh Ministers money or add to their resources, it is not shown that it would achieve a directly applicable or compelling social or economic interest comparable with those involved in these previous cases. Section 15 of the Bill contains the specific enjoinder that the Ministers should have regard to the "desirability" of equivalent sums being made available for "research into, treatment of or other services relating to asbestos-related diseases", but it is not shown that any such sums so expended would add to existing sums already being spent in these areas, or resolve any exceptional social or economic problem. It is common knowledge that the funding of the National Health Service is under increasing strain throughout the United Kingdom, and it may be so even more in Wales than elsewhere, but that is a different level of general problem to any shown on the authorities to be relevant in the present context.
>
> 66. The Counsel General maintains that special justification exists for the retrospectivity involved in the Bill because, without it, the Bill cannot achieve its legitimate policy aim. That is a circular submission, which, if accepted, would eliminate the important balancing stage of the proportionality exercise identified by Lord Reed in *Bank Mellat* (para 43 above) by Lord Hope in AXA (para 49 above) and by the Strasbourg Court in its case law (paras 44-48 above). …"

164. In the present case, the 1997 Act does not build on established legal principles. It extends the liabilities of compensators and their insurers to liabilities for State benefits that did not previously exist and fell outside the terms of the policies they underwrote. Subsequently, there have been highly significant and unpredictable developments in the common law and statute which were expressly intended to benefit the victims of torts, and did not involve an assessment of their effects on the balance between employers/insurers and the State under the 1997 Act. The Supreme Court found the Welsh measures to be unlawful even though they made allowance for contributory negligence, and even though the medical costs in question could in principle have been recoverable from employers/insurers had the injured person obtained private medical treatment. In those respects the present case is *a fortiori* the *Welsh Bill* case.

The present case is like the *Welsh Bill* case in that there are in my view no compelling social interests militating in favour of retrospective imposition of the liabilities referred to in §§ 11.i)-11.iii) above.

165. For all these reasons, I conclude that each of the features of the operation of the 1997 Act referred to in §§ 11.i)-11.iii) above is incompatible with the Claimants' A1P1 rights.

(L) FAILURE TO MAKE REGULATIONS UNDER SECTION 22(4)

166. Section 22(4) provides that *"Regulations may in prescribed cases limit the amount of the liability imposed on the insurer by subsection (1)".* The Claimants say this indicates that Parliament has itself been prepared thus to delegate authority in this area to the Executive, and so that at one level the claim is as much about the failure of the Defendant to make secondary legislation as it is about the provisions as originally enacted by Parliament.

167. The Claimants highlight two respects in which this facet of their claim might have particular relevance:

i) HRA section 6 enables the Claimants to complain about the failure to make regulations where the 1997 Act empowers the Defendant to do so in circumstances where, if contrary to the Claimants' primary submission the proper interpretation of the 1997 Act does not remove all of the matters objected to in these proceedings, the making of such regulations would achieve that result.

ii) This part of the Claimants' complaint could not on any view contravene Article 9 of the Bill of Rights. Only the Secretary of State has the power to make regulations and to lay them before Parliament: it is not legislation which it is open to any member of Parliament to bring forward. The decision of the Secretary of State as to whether to make such regulations is an executive action and not a "*proceeding in Parliament*" for the purposes of Article 9.

168. The Defendant makes three points specifically in relation to this part of the Claimants' case.

169. First, the Defendant contends that the Claimants' argument is inconsistent with HRA section 6(6):

> ""An act" includes a failure to act but does not include a failure to—
>
> (a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

170. Section 30(1) of the 1997 Act provides that any power under it to make regulations or an order is exercisable by statutory instrument, and sections 30(2) and (2A) (as amended) provide:

> "(2) A statutory instrument containing regulations or an order under this Act (other than regulations under section 11(2A) or 24 or an order under section 34) shall be subject to annulment in pursuance of a resolution of either House of Parliament.
>
> (2A) A statutory instrument containing regulations under section 11(2A) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."

Subsection 30(2) thus subjects regulations under *inter alia* section 22(4) to what may termed a 'negative procedure', which may be contrasted with those variants of the affirmative and negative resolution procedures under which proposed secondary legislation is laid before Parliament only in draft, pending either approval or the absence of objection by Parliament.

171. Section 5(1) of the Statutory Instruments Act 1946 provides:

> "Where by this Act or any Act passed after the commencement of this Act, it is provided that any statutory instrument shall be subject to annulment in pursuance of resolution of either House of Parliament, the instrument shall be laid before Parliament after being made and the provisions of the last foregoing section shall apply thereto accordingly, and if either House within the period of forty days beginning with the day on which a copy thereof is laid before it, resolves that an Address be presented to His Majesty praying that the instrument be annulled, no further proceedings shall be taken thereunder after the date of the resolution, and His Majesty may by Order in Council revoke the instrument, so, however, that any such resolution and revocation shall be without prejudice to the validity of anything previously done under the instrument or to the making of a new statutory instrument"

172. In *R(T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49 Lord Reed considered whether a failure to amend an Order made in 1975, following the entry into force of the HRA, would fall within HRA section 6(6). He noted that the term "*legislation*", as used in section 6(6)(a), must include subordinate legislation, given the express reference in section 6(6)(b) to primary legislation. Lord Reed said:

> "149. I am inclined to think that it was. The power to make orders under the 1974 Act is exercisable in accordance with section 10(2), which requires that a draft of the proposed order must be laid before Parliament and approved by an affirmative resolution. The draft order would appear to me to be properly described as a "proposal for legislation". That approach leads to the somewhat unattractive conclusion that whether a failure to make subordinate legislation falls within the scope of section 6 of the Human Rights Act depends upon the particular way in which the legislation must be made: an order made by the

> Secretary of State subject to annulment by a resolution of either House, for example, would not on any view involve the laying before Parliament of a "proposal for legislation". On the other hand, it is consistent with the respect for Parliamentary sovereignty found throughout the Human Rights Act that the decision of a member of either House whether to lay a legislative proposal before Parliament, whether in the form of a Bill or a draft order, should not be the subject of judicial remedies. As I shall explain, however, I find it unnecessary to reach a concluded view upon the point, which was not the subject of submissions." (my emphasis)

173. The words I have underlined would seem to suggest that Lord Reed considered that a decision whether to make regulations that would (as in the present case) be laid before Parliament *after* having been made would fall outside section 6(6). The ensuing words might, though, be read as expressing a doubt as to whether that result properly accords with Parliamentary sovereignty; and it is not difficult to see that the operation of this provision might appear to give rise to seemingly arbitrary distinctions.

174. This potentially important topic was the subject of relatively brief submissions before me. However, it seems to me that the dividing line actually drawn in HRA section 6(6) is between secondary legislation that when introduced is a mere "*proposal for legislation*", and secondary legislation that already has the quality of actual legislation when introduced, whether or not it is subject to the possibility of annulment. On that view, there is no question of this being a claim which (as the Defendant puts it) *"seek[s] to compel Parliament to legislate"*. If section 6(6) had been intended to exclude from the operation of the Act any failure to make secondary legislation other than those categories of secondary legislation as do not require potential Parliamentary scrutiny at all, then it seems likely that that could and would have been more simply and clearly set out. Accordingly I would conclude that a failure to make regulations under section 22(4) of the 1997 Act is not excluded by HRA section 6(6) from the operation of the HRA.

175. Secondly, the Defendant highlights the words in the Judicial Review Claim Form *"[f]ailure to make Regulations under section 22(4) of the said Act so as to ensure such compatibility in relation to insurance policies issued before its commencement"*. The Defendant points out that section 22(5) provides that "*[t]his section applies to policies of insurance issued before (as well as those issued after) its coming into force*". Thus to make regulations whose effect would be to undo the imposition of liability under section 22(1) in relation to policies written before the Act came into force would be inconsistent with section 22(5), which expressly provides for retrospection.

176. I do not accept that argument. The Claimants' claim is not that the 1997 Act should be disapplied insofar as it applies retrospectively. Rather, it is that specific features of the scheme (being those itemised in § 11 above) are, bearing in mind *inter alia* the retrospective nature of the legislation, incompatible with A1P1.

177. Thirdly, the Defendant submits that section 22(4) was, as the Minster's speech introducing the Bill indicates, introduced for a very limited purpose:

> "Subsection (4) is designed to deal with the situation where an upper limit on the insurer's liability to pay compensation in the event of injury has been agreed and reached. It enables the Secretary of State to restrict the amount of benefit the insurer has to repay in such circumstances. Because the upper limits which apply in personal injury policies are usually very high, such situations are likely to arise extremely rarely. However, where such a limit is reached, and the insurer is not liable to pay the whole of any compensation due, it would not be appropriate for him to be held responsible for the repayment of the whole of the benefits recoverable. However, we still intend to seek full repayment of benefits from the compensator in all other circumstances. It will be necessary to devise workable rules for restricting liability to repay benefits in such a scenario in consultation with interested parties. The inclusion of this regulation-making power gives us the flexibility to carry out that consultation before the new scheme comes into effect."

178. However, section 22(4) as enacted is unambiguous in its terms, and I do not consider that its scope can properly be cut down by reference to the particular reasons put forward for its introduction.

179. Accordingly, I would if necessary conclude that the Claimants' claim can be cast as one based on failure to make regulations under section 22(4). The arguments as to the substance of the claim are, as it appears to me, essentially the same as those I have considered in the preceding sections of this judgment.

(M) REMEDIES

180. Given the complexity of the matter, I consider it appropriate to accede to the proposal of both sides that they be the subject of further submissions in the light of my conclusions on the substance of the matter.

181. I have also given some consideration to the question of whether I should seek to determine from what date or dates the aspects of the scheme that I have found not to comply with A1P1 became non-compliant. However, I am conscious that this topic was not the subject of focussed argument before me. My inclination would be to consider that feature (i) referred to in § 11 above was non-compliant from the date the HRA came into force, but that features (ii) and (iii) became non-compliant only when the Act began to operate in the circumstances that existed following (respectively) the decision in *Carder* and the passage of the Compensation Act 2006. However, considerations of limitation may make certain distinctions academic, and in any event I consider that the parties should have the opportunity to address these issues by way of further argument, either before me in the context of remedies, or in any ensuing proceedings directed at the Claimants' financial loss claims.

(N) CONCLUSION

182. For these reasons I conclude that the claim succeeds in part. The three aspects of the scheme set in place by the 1997 Act which I summarise in §§ 11.i)-11.iii) above are incompatible with the Claimants' rights under A1P1.

183. I am grateful to both parties' counsel for their clear and helpful written and oral submissions.