Michaelmas Term
[2011] UKSC 46
On appeal from: [2011] CSIH 31

JUDGMENT

AXA General Insurance Limited and others (Appellants) *v* The Lord Advocate and others (Respondents) (Scotland)

before

Lord Hope, Deputy President
Lord Brown
Lord Mance
Lord Kerr
Lord Clarke
Lord Dyson
Lord Reed

JUDGMENT GIVEN ON

12 October 2011

Heard on 13, 14 and 15 June 2011

Appellant
Richard Keen QC
Jane Munro
(Instructed by Brodies LLP)

1st Respondent
Alan Dewar QC
James Mure QC
(Instructed by Scottish Government Legal Directorate Litigation Division)

2nd Respondent
Ruth Crawford QC
John MacGregor
(Instructed by Office of the Solicitor to the Advocate General for Scotland

3rd-10th Respondents
Aidan O'Neill QC
Chris Pirie
(Instructed by Thompsons Solicitors Glasgow Scotland)

Intervener (First Minister of Wales)

Theodore Huckle QC
Clive Lewis QC
(Instructed by Welsh Assembly Government Legal Services Department, Cardiff)

Intervener (Attorney General for Northern Ireland)
John F Larkin QC
Donal Sayers BL
(Instructed by Solicitors for the Attorney General for Northern Ireland)

Intervener (Friends of the Earth Scotland Ltd)

Simon Collins

(Instructed by Patrick Campbell & Co Solicitors)

Intervener (Department of Finance and Personnel (Northern Ireland))
Paul Maguire QC
Paul McLaughlin BL
(Instructed by Departmental Solicitor's Office)

LORD HOPE

1. The appellants are insurance companies, whose business includes the writing of employers' liability insurance policies. They undertake to indemnify the employer in respect of any liability incurred by it for harm or injury arising out of the employer's negligence. They have brought these proceedings to challenge the lawfulness of an Act of the Scottish Parliament which was passed on 11 March 2009, received the Royal Assent on 17 April 2009 and came into force on 17 June 2009. It is the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") which provides that asymptomatic pleural plaques, pleural thickening and asbestosis shall constitute, and shall be treated as always having constituted, actionable harm for the purposes of an action of damages for personal injury.

2. It is no secret that the purpose of the 2009 Act was to reverse the decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281 ("*Rothwell"*). In that case it was held that, as pleural plaques caused no symptoms, did not increase susceptibility to other asbestos-related diseases or shorten life expectancy, their mere presence in the claimants' lungs did not constitute an injury which was capable of giving rise to a claim for damages. It was anticipated that, while that decision was not binding on the Scottish courts, it would almost certainly be followed in Scotland as there is no material difference between the law of England and Wales and Scots law on this branch of the law. In *Wright v Stoddard International plc (No 2)* [2007] CSOH 173, 2008 Rep LR 37 Lord Uist applied the decision in *Rothwell*, although on the facts he would not have awarded damages anyway: see para 161. The appellants claim that reversing that decision will expose them to claims under their indemnity insurance policies amounting to millions of pounds annually and perhaps several billions of pounds in total. They seek declarator that the 2009 Act is unlawful and its reduction.

3. The first and second respondents are, respectively, the Lord Advocate representing the Scottish Ministers and the Advocate General for Scotland representing the United Kingdom government. The third to tenth respondents are individuals who have been diagnosed with pleural plaques caused by negligent exposure to asbestos. They have each raised, or intend to raise, actions of damages seeking reparation for the loss, injury and damage which they claim to have sustained as a result of their employers' negligence. The defenders to their actions include, or will include, private undertakings, nationalised industries and public bodies at the level of both local and central government. These respondents claim that they will be financially disadvantaged if the appellants' attack on the 2009 Act were to be successful, as they would be deprived of the benefit of the declaration in the Act that pleural plaques constitute harm which, for the purposes of an action

of damages, is actionable. On 8 May 2009 they were allowed by the Lord Ordinary (Lord Uist) to enter the process as individuals who were directly affected by the issues raised under and in terms of rule 58.8(2) of the Rules of the Court of Session 1994.

4. On 8 January 2010, after a debate that took place over periods totalling 22 days, the Lord Ordinary (Lord Emslie) held that the appellants had locus standi to bring these proceedings, that the wording of Rule of Court 58.8(2) was wide enough to cover the position of the third to tenth respondents but that the appellants had failed in their various challenges to the 2009 Act and their petition must be dismissed: [2010] CSOH 2, 2010 SLT 179. The appellants reclaimed. On 12 April 2011, after a hearing which lasted 8 days, the First Division (the Lord President (Hamilton), Lord Eassie and Lord Hardie) allowed the reclaiming motion to the extent of repelling the answers for the third to tenth respondents on the ground that they did not have a title and interest to be convened as respondents under rule 58.8(2), but quoad ultra refused the reclaiming motion: [2011] CSIH 31, 2011 SLT 439. The appellants have now appealed to this court and the Lord Advocate and the third to tenth respondents have cross-appealed. The Attorney General for Northern Ireland, the Northern Ireland Department of Finance and Personnel and Friends of the Earth Scotland were given permission to intervene in writing. The First Minister of Wales was given permission to intervene both in writing and orally and the Counsel General for Wales (Mr Theodore Huckle QC) made submissions on his behalf.

Background

5. As the Lord Ordinary explained (2010 SLT 179, paras 2-4), pleural plaques are physical changes in the pleura. They can be detected radiologically as areas of fibrous tissue by x-rays and CT scans. They are caused by occupational exposure to asbestos and, in common with other asbestos-related conditions, they tend to develop after a long latency period of 20 years or more. In most cases they have no discernible effect on an individual's day to day physical health or well-being. They are asymptomatic, causing no pain or discomfort. They produce no disability or impairment of function, nor are they externally disfiguring. But it was common ground in *Rothwell* that they do indicate that the quantity of asbestos fibres in the lung is significant: see Lord Rodger of Earlsferry, para 78. While they do not in themselves threaten or lead to other asbestos induced conditions, their presence may indicate a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. In that respect they are said to function as a marker for that increased risk. Individuals who have been diagnosed with pleural plaques are liable to become alarmed and anxious for the future. In some cases this may bring to mind the suffering and perhaps death of friends and colleagues from asbestos-related diseases. Their enjoyment and quality of life may be severely reduced by the associated anxiety.

6. It would, as Lord Rodger of Earlsferry said in *Rothwell*, para 90, make no sense, if the plaques themselves are not a condition for which the law will intervene to give damages because it is not serious enough to require its intervention, for the law to give damages for anxiety associated with plaques. Furthermore, the anxiety is not about any risk to health caused by the plaques themselves. Rather, it is because these individuals are worried that they may develop asbestosis or mesothelioma as a result of the accumulation of fibres in their lungs. To give them a claim for damages for this would be to give them a claim for something that the plaques themselves did not cause. So the mere risk that they may develop asbestosis or mesothelioma in the future will not give them a claim for damages. For them to recover damages for the associated anxiety, the asbestos-related pleural plaques themselves must be actionable.

7. Claims for damages in negligence for pleural plaques began to emerge in the 1980s. In three cases, all of which were decided at first instance in England, the judges found in the claimants' favour: *Church v Ministry of Defence* (1984) 134 NLJ 623, Peter Pain J; *Sykes v Ministry of Defence* The Times, 23 March 1984, Otton J; and *Patterson v Ministry of Defence* [1987] CLY 1194, Simon Brown J. The claimants in these cases had all been exposed to asbestos while working in naval dockyards. In some cases it was indicated that pleural plaques did not give rise to a cause of action: *Morrison v Central Electricity Generating Board*, 15 March 1984; *Shuttleton v Duncan Stewart & Co Ltd* 1996 SLT 517. But damages were awarded in *Gibson v McAndrew Wormald & Co Ltd* 1998 SLT 562 and *Nicol v Scottish Power plc* 1998 SLT 822. And the general practice of employers or their liability insurers during this period was to concede that pleural plaques were an actionable injury and to settle claims without admission of liability. The appellants say that this was because both the number and value of such claims were low.

8. Insurance by employers against their liability for personal injury to their employees has been compulsory since 1 January 1972, when the Employers' Liability (Compulsory Insurance) Act 1969 came into force. In terms of section 1(1) every employer must insure, and maintain insurance, against liability for "bodily injury or disease" sustained by its employees and arising out of and in the course of their employment in the employer's business. But section 3 of that Act exempts a number of public employers from the requirement to carry such insurance. These include any body corporate established by or under any enactment for the carrying on of any industry or part of an industry, any undertaking under national ownership or control and a council in Scotland constituted under section 2 of the Local Government etc (Scotland) Act 1994.

9. Employers will, of course, have to meet any claims if the insurer has gone out of business or refuses to indemnify. But in many cases resulting from exposure to asbestos the employer had gone out of business by the time the harmful outcome had manifested itself. For practical purposes much of the cost of meeting claims

for pleural plaques will fall on insurers. Regulation 2 of the Employers' Liability (Compulsory Insurance) General Regulations 1971 (SI 1971/1117) prohibits any condition in a policy of insurance issued or renewed in accordance with the requirements of the 1969 Act which provides that no liability shall arise under the policy, or that any such liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy.

10. From about the mid-1990s the number and value of claims for pleural plaques began to increase sharply. Furthermore, by this time an increase in proportional mortality from lung cancer as milder cases of asbestosis survived long enough to develop a malignancy had led to a greater interest in the benign pleural diseases, including pleural thickening and pleural plaques: *Parkes*, *Occupational Lung Disorders* (1994), Browne's Introduction to his chapter on benign asbestos pleural disease. The consensus of medical opinion was that pleural plaques were indeed benign. So United Kingdom government departments which had succeeded to the liabilities of former nationalised industries, and later various parties including the leading insurers, decided to challenge the practice of settling these claims. Ten test cases were selected for trial before Holland J. He found that pleural plaques were actionable: [2005] EWHC 88 (QB). In seven of these cases the insurers appealed to the Court of Appeal, which reversed the decision of the trial judge: [2006] EWCA Civ 27, [2006] ICR 1458. Four of the claimants appealed to the House of Lords in *Rothwell*, but on 17 October 2007 their appeals were dismissed. It was held that the mere presence of pleural plaques in the lungs was not actionable.

11. That decision was controversial and, as was to be expected, it was not well received by those with pleural plaques who had made, or were considering making, claims for damages. This was especially so in those parts of the United Kingdom such as Clydebank where industries that exposed their employees to asbestos were or had been located and where asbestos-related conditions were most frequently found. There were demands for the law to be restored to what it had previously been thought to be. On 25 October 2007 the First Minister advised the Scottish Parliament that the Scottish Government was considering its position. On 1 November 2007 the Cabinet Secretary for Justice met representatives of the insurance industry to discuss the matter. The issue was debated in the Scottish Parliament on 7 November 2007. On the same day the Parliament was informed that the Cabinet Secretary for Justice had met representatives of Clydeside Action on Asbestos together with Frank Maguire of Thompsons Solicitors (who was acting for a number of persons seeking damages), and that the Scottish Government's intention was to consider a bill which had been drafted by Mr Maguire's firm with a view to reversing *Rothwell* in Scotland. The Scottish Government's intention to legislate to allow those with pleural plaques to continue

to be able to raise an action for damages was confirmed by the Cabinet Secretary on 28 November 2007.

The legislation

12. The Bill which became the 2009 Act was prepared by Scottish parliamentary counsel. It was introduced into the Scottish Parliament on 23 June 2008. A call was issued by the Justice Committee for the submission of written evidence by 25 August 2008. Oral evidence was taken by the Committee on the general principles of the Bill on 2 and 9 September 2008. The Stage 1 Report was published on 13 October 2008. It was recommended that the Parliament agree to the general principles, which it did unanimously on 5 November 2008. Following consideration of proposed amendments to the Bill as passed at Stage 1, it passed the Justice Committee in unamended form at Stage 2 on 2 December 2008. It was approved by the Scottish Parliament, subject to certain minor amendments, at Stage 3 on 11 March 2009, by a majority of 98 to 16. The Bill received the Royal Assent on 17 April 2009.

13. The long title to the 2009 Act states that its purpose is to provide that certain asbestos-related conditions are actionable personal injuries. The Act itself is in these terms:

> "*1. Pleural plaques*
>
> (1) Asbestos-related pleural plaques are a personal injury which is not negligible.
>
> (2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.
>
> (3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.
>
> (4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.
>
> *2. Pleural thickening and asbestosis*

(1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused and is not causing impairment of a person's physical condition is a personal injury which is not negligible.

(2) Those conditions are –

(a) asbestos-related pleural thickening; and

(b) asbestosis.

(3) Accordingly, such a condition constitutes actionable harm for the purposes of an action of damages for personal injuries.

(4) Any rule of law the effect of which is that such a condition does not constitute actionable harm ceases to apply to the extent it has that effect.

(5) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

3. Limitation of actions

(1) This section applies to an action of damages for personal injuries –

(a) in which the damages claimed consist of or include damages in respect of –

(i) asbestos-related pleural plaques; or

(ii) a condition to which section 2 applies, and

(b) which, in the case of an action commenced before the date this section comes into force, has not been determined by that date.

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4. Commencement and retrospective effect

(1) This Act (other than this subsection and section 5) comes into force on such day as the Scottish Ministers may, by order made by statutory instrument, appoint.

(2) Sections 1 and 2 are to be treated for all purposes as having always had effect.

(3) But those sections have no effect in relation to –

(a) a claim which is settled before the date on which subsection (2) comes into force (whether or not legal proceedings in relation to the claim have been commenced); or

(b) legal proceedings which are determined before that date.

5. Short title and Crown application

(1) This Act may be cited as the Damages (Asbestos-related Conditions) (Scotland) Act 2009.

(2) This Act binds the Crown."

14. On 29 October 2007 the UK Government indicated in the course of a debate in the House of Commons that, having given careful consideration to the judgment in *Rothwell*, it had decided that it would not be appropriate to legislate on the issue: Hansard (HC Debates) 29 October 2007, col 798w. It confirmed that this was its position in a written answer on 10 December 2007: (HC Debates) 10 December, col 176w. On 9 July 2008 the Ministry of Justice issued a consultation paper entitled *Pleural Plaques* (CP 14/08), in which the options for increasing support, help and information to people with pleural plaques, for changing the law

and for providing financial support were set out, the last two being by means of a no-fault payment scheme. The consultation period closed on 1 October 2008. On 5 February 2010 the Damages (Asbestos-related Conditions) Bill, which was designed to create parity of treatment between England and Wales and Scotland, received its second reading in the House of Lords: Hansard (HL Debates) 5 February 2010, cols 454 - 463. But it did not have the support of the government and on 25 February 2010 the Ministry of Justice announced that, following the consultation, the law in England and Wales would not be amended but that it had been decided to introduce an extra-statutory scheme by which payments of £5,000 would be made to persons who had begun but not resolved a pleural plaques compensation claim at the time of the decision in *Rothwell*: Hansard (HL Debates) 25 February 2010, cols 140-144w. The Pleural Plaques Former Claimants Payment Scheme was launched on 2 August 2010. It provides that applications under it must be received by 1 August 2011.

15. On 21 March 2011 the Northern Ireland Assembly passed a measure for Northern Ireland which in all material respects is in identical terms to the 2009 Act, the short title of which is the Damages (Asbestos-related Conditions) Act: Northern Ireland Assembly Official Report 21 March, p 488. Prior to its receiving the Royal Assent the Attorney General for Northern Ireland referred the question whether the Bill was within the legislative competence of the Assembly to this court under section 11 of the Northern Ireland Act 1998. He submitted that its provisions offended article 6 of the European Convention on Human Rights and/or article 1 of Protocol 1 to the Convention and/or article 14 read together with those articles. He withdrew the reference before the hearing of this appeal could take place. The Act received the Royal Assent on 21 June 2011 when sections 4(1) and 5 came into force. The remainder of the Act will come into force on such date as the Department of Finance and Personnel shall appoint.

16. No proposals were drawn to the court's attention for similar legislation to be passed by the Welsh Assembly. But, as the Counsel General explained, the First Minister of Wales has an interest in this appeal in so far as it is directed to questions about the legislative competence at common law of the Scottish Parliament.

The issues

17. The appellants challenge the validity of the 2009 Act on two bases:

(1) that it is incompatible with their rights under article 1 of Protocol 1 to the Convention ("A1 P1") and that it is in consequence outside the legislative

competence of the Scottish Parliament by virtue of section 29(2)(d) of the Scotland Act 1998;

(2) that it is open to judicial review on common law grounds as an unreasonable, irrational and arbitrary exercise of the legislative authority conferred by the Scotland Act 1998 on the Scottish Parliament.

There was a third basis, argued before the Lord Ordinary, that the 2009 Act was an interference by means of legislation with a current dispute and was thus incompatible with the appellants' rights under article 6. But this argument was rejected by the Lord Ordinary (2010 SLT 179, paras 161-179) and it was not renewed in the Inner House or before this court.

18. The Lord Advocate in his cross-appeal submits that there is no relevant interference with the existing possessions of the appellants, and that in consequence they should not be found to have victim status for the purposes of article 34 of the Convention. If this argument is sound the appellants will not be in a position to maintain their challenge to the 2009 Act on the ground that it is outwith the legislative competence of the Scottish Parliament because it is incompatible with their rights under A1 P1, as section 100(1) of the Scotland Act 1998 provides that the Act does not enable a person to rely on any of the Convention rights in any proceedings unless he would be a victim for the purposes of article 34 if proceedings in respect of the act in question were brought in the European Court of Human Rights.

19. The third to tenth respondents in their cross-appeal submit that, as they are members of a class affected by the 2009 Act and have a legitimate interest to protect, they are persons "directly affected" by the issues raised within the meaning of rule 58.8(2) and that the Lord Ordinary was right to hold that they should be made parties to the proceedings.

Legislative competence

20. Section 29(1) of the Scotland Act 1998 provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. Section 29(2)(d) of the Act provides that a provision is outside that competence so far as it is incompatible with any of the Convention rights. Those rights include the right protected by A1 P1, which 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."

21. According to the jurisprudence of the Strasbourg court, A1 P1 is in substance a guarantee of the right to property. It comprises three distinct rules: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v United Kingdom* (1997) 25 EHRR 127, para 78; *Bäck v Finland* (2004) 40 EHRR 1184, para 52; *Draon v France* (2005) 42 EHRR 807, para 69. The first is expressed in the first sentence of the first paragraph, and it is of a general nature. It lays down the general principle of the peaceful enjoyment of property. The second is expressed in the second sentence of the same paragraph. It deals with deprivation of property, which it subjects to the conditions to which that sentence refers. "Law" in that sentence is to be understood in the autonomous sense that it has throughout the Convention. To be "law" for this purpose, the provision must be accessible, clearly expressed and not arbitrary. The third is set out in the second paragraph. It recognises that the Contracting States are entitled, among other things, to control the use of property in the general interest and to secure the payment of taxes or other contributions or penalties.

22. These rules are not distinct, in the sense of being unconnected: *Bäck v Finland* (2004) 40 EHRR 1184, para 52. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle set out in the first rule. So I do not think that we need to concern ourselves as to whether the question that has been raised in this case is directed to the rule about deprivation which is set out in the second sentence of the first paragraph rather than the general principle referred to in the first sentence. Whichever it is, the interference must comply with the principle of lawfulness, and it must pursue a legitimate aim by means that are reasonably proportionate to the aim sought to be realised.

23. The questions that must be addressed are, therefore, (1) whether the appellants have been able to show that the effect of the 2009 Act is that they would be "victims" for the purposes of article 34 of the Convention, (2) if so, whether the interference with their "possessions" that its provisions represent pursues a legitimate aim and (3) if so, whether the means that have been chosen by the Scottish Parliament are reasonably proportionate to the aim sought to be realised.

(a) do the appellants have victim status?

24. Mr Dewar QC for the Lord Advocate submitted that, in order to answer the question whether the appellants have victim status, it was necessary to understand the true nature of the possessions at stake and the nature and extent of any interference with these possessions. In *Kopecký v Slovakia* (2004) 41 EHRR 944, para 35(c) the court said of the practice of the Convention institutions under A1 P1:

> "An applicant can allege a violation of article 1 of Protocol 1 only in so far as the impugned decisions related to his 'possessions' within the meaning of this provision. 'Possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of article 1 of Protocol 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition."

Basing himself on this guidance, he submitted that the test was not satisfied. He accepted that the expectation was that, where an insured interest was involved, the insurer would respond and provide the employer with the indemnity. But the effect of the Act was indirect. The contractual relationship between the employer and the insurer was quite separate from that between the employer and his employee. A person could not claim to be a victim unless he was directly affected. In this case the Act did not take anything away from the employers or their insurers in that sense. As the Lord Ordinary said (2010 SLT 179, para 195), it was not the Act which would cause the claimants' claims to succeed but proof of all the legal and factual requisites for an award. So its consequences are simply too remote from the legislation to qualify.

25. The judges of the First Division did not accept this argument, as it seemed to them to be clear that the appellants were within a class who might be directly affected by the 2009 Act: 2011 SLT 439, para 35. This approach to the rule that, in order to claim to be a victim of a violation, a person must be directly affected by the impugned measure, is supported by the Strasbourg court's analysis in *Burden v United Kingdom* (2008) 47 EHRR 857, para 34 where, having referred to the rule in the previous paragraph, it said:

> "It is, however, open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct or risk being prosecuted or if he is a member of a class of people who risk being directly affected by the legislation."

The court referred by way of example to *Marckx v Belgium* (1979) 2 EHRR 330, where the applicants were found to be directly affected by, and thus victims of, legislation which would limit the child's right to inherit property from her mother upon her mother's eventual death. On the other hand in *Willis v United Kingdom* (2002) 35 EHRR 547 the risk of the applicant being refused a widow's pension on grounds of sex at a future date was found to be hypothetical since it was not certain that she would otherwise fulfil the statutory conditions for the payment of the benefit on the relevant date.

26. The difference between a risk of being directly affected and a risk which is purely hypothetical is not easy to identify. But in *Burden* the applicants were held to be directly affected by the legislation because they had established that, given their age, the wills they had made and the value of the property they owned, there was a real risk that in the not too distant future one of them would be required to pay substantial inheritance tax on the property inherited from the sister: para 35. So the fact that the interference is not present or immediate but may not occur until some time in the future does not exclude the person from being a victim for the purposes of article 34. A person's financial resources, as in the case of the accumulated wealth of the Burden sisters or the property that Miss Marckx had it in mind to leave to her illegitimate daughter, are capable of being possessions within the meaning of A1 P1. Here the complaint is of the imposition of a liability to indemnify which had been removed by *Rothwell*. But, as the court said in *Burden*, para 59, the amount of money that must be paid is a "possession" for the purposes of the article.

27. The question, then, is whether the consequences for the applicants of the 2009 Act are too remote or tenuous for them to be directly affected by it. The answer to it must depend on what the Act was designed to achieve. As its long title makes plain, its purpose was to reverse the decision that the House of Lords took in *Rothwell* by making asbestos-related conditions, including pleural plaques, actionable. No doubt, where the employers still exist, it is against the employers that their claims for damages will be directed. But there is a risk that in practice the effect of the Employers' Liability (Compulsory Insurance) Act 1969 is that the liability will fall upon the insurers. Their liability cannot be dismissed as remote or hypothetical. The claims that have already been brought, as well as those that will be brought before they are extinguished by the limitation period, are by people in whose lungs pleural plaques have actually been detected. There is ample material in the record of the proceedings before the Scottish Parliament to show that it was

the insurance industry that was expected, and intended, to bear the burden of meeting their claims.

28. For these reasons I would hold, in agreement with the Inner House, that the appellants are entitled to bring these proceedings as the effect of the 2009 Act is that they would be victims for the purposes of article 34 of the Convention if proceedings in respect of that Act were to be brought in the European Court of Human Rights. 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 A1 P1. If it is to be held to be compatible with the appellants' Convention right, the 2009 Act must be shown to be pursuing a legitimate aim and to be reasonably proportionate to the aim sought to be realised.

(b) legitimate aim

29. In *James v United Kingdom* (1986) 8 EHRR 123, para 47 the Strasbourg court said that eliminating what are judged to be social injustices is an example of the functions of a modern legislature. There is ample evidence that the Scottish Ministers considered that the consequences of the decision in *Rothwell* were unduly harsh for people with pleural plaques and that this was a social problem that the Scottish Parliament ought to address, and that this was how the matter was perceived in the Scottish Parliament. On 13 December 2007 the Cabinet Secretary for Justice made a statement to the Parliament reporting on the decision to introduce a bill to reverse *Rothwell*, in the course of which he said:

> "The effects of asbestos are a terrible legacy of Scotland's industrial past, and we should not turn our backs on those who have contributed to our nation's wealth. We have, therefore, acted quickly to reassure people who have been diagnosed with pleural plaques through being negligently exposed to asbestos that they will continue to be able to raise an action for damages."

30. The rationale for government intervention was set out in para 10 of a Partial Regulatory Impact Assessment on the proposed bill which was published by the Scottish Government on 6 February 2008, in which it was stated:

> "Pleural plaques have been regarded as actionable for over twenty years. They are part of the unintended and unwelcome consequences of our industrial heritage. The HoL Judgment has raised serious concerns for people with pleural plaques. Although plaques are not in themselves harmful they do give rise to anxiety because they

> signify an increased risk of developing very serious illness as a result of exposure to asbestos. In areas associated with Scotland's industrial past, people with pleural plaques are living alongside friends who worked beside them and are witnessing the terrible suffering of those who have contracted serious asbestos-related conditions, including mesothelioma. This causes them terrible anxiety that they will suffer the same fate. The Scottish Government believes that people who have negligently been exposed to asbestos who are subsequently diagnosed with pleural plaques should continue to be able to raise an action for damages as has been the practice in Scotland for over twenty years."

It is clear from this explanation that the matter was seen as a social injustice which justified intervention by the legislature. As was later to be pointed out in para 11 of the Explanatory Notes that accompanied the Bill when it was introduced on 23 June 2008, there was no accurate record of how many cases were being diagnosed each year in Scotland. But the incidence of pleural plaques was thought to be rising, and it was estimated that up to half of those occupationally exposed to asbestos would have pleural plaques thirty years after first exposure. The numbers of those likely to be involved, and the circumstances in which they had contracted this condition, were such that the issue was seen to be a legitimate one for legislation in the public interest.

31. The approach that the Strasbourg court takes to this matter was explained in *James v United Kingdom*, para 46, in which the court said:

> "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.
>
> Furthermore, the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature

> in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation."

This formula has been repeated in many cases since that date: see, for example, *Broniowski v Poland* (2004) 40 EHRR 495, para 149; *Maurice v France* (2005) 42 EHRR 885, para 84. In *Draon v France* (2005) 42 EHRR 807, para 76 the court said that the notion of "public interest" is necessarily extensive as it will commonly involve consideration of political, economic and social issues. The court will, it said, respect the legislature's judgment as to what is in the public interest unless that judgment is manifestly without reasonable foundation.

32. As I pointed out in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381, the doctrine by which a margin of appreciation is accorded to the national authorities is an essential part of the supervisory jurisdiction which is exercised over state conduct by the international court. It is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts too the Convention should be seen as an expression of fundamental principles which will involve questions of balance between competing interests and issues of proportionality. I suggested that in some circumstances, such as where the issues involve questions of social or economic policy, the area in which these choices may arise is an area of discretionary judgment. It is not so much an attitude of deference, more a matter of respecting, on democratic grounds, the considered opinion of the elected body by which these choices are made.

33. Can it be said that the judgment of the Scottish Parliament that this was a matter of public interest on which it should legislate to remove what was regarded as a social injustice was without reasonable foundation or manifestly unreasonable? I do not think so. There is no doubt that the negligence of employers whose activities were concentrated in socially disadvantaged areas such as Clydebank had exposed their workforce to asbestos and all the risks associated with it for many years. 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.

(c) proportionality

34. In *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 69 the Strasbourg court declared that, for the purposes of the rule contained in the first sentence of the first paragraph of A1 P1:

> "… the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of article 1."

In *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301, para 63, recalling this passage, the Commission said that that fair balance must be regarded as upset if the person concerned had to bear an individual and excessive burden. In *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v United Kingdom* (1997) 25 EHRR 127, para 80 the court, again recalling what had been said in *Sporrong*, said that there must be a reasonable relationship of proportionality between the means employed and the aims pursued. In *Draon v France* (2005) 42 EHRR 807, para 79 the court added these comments:

> "Compensation terms under the relevant domestic legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under article 1 of Protocol 1 only in exceptional circumstances."

35. One of the features of the 2009 Act is that it declares that sections 1 and 2 are to be treated "for all purposes as having always had effect": section 4(2). Although the reach of this provision is limited by sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973, the effect of the Act is that claims which under the law as declared by the House of Lords in *Rothwell* were always bound to fail because a diagnosis that a person had pleural plaques did not give rise to a cause of action as the anxiety to which it gave rise was not actionable were now to be capable of resulting in an award of damages. Its effect can be said to be retrospective in that the insurance policies which will be called upon to meet this liability were written when the law must, on the declaratory theory, be taken to

have been as stated in *Rothwell*. Claims which on the law as it must be taken to have been at that time would have been bound to have been rejected are declared by the Act to be actionable. The issue of retroactive effect was considered in *Bäck v Finland* (2004) 40 EHRR 1184, para 68 where the court said:

> "Turning to the retroactive effect of the 1993 Act, the Court notes that neither the Convention nor its Protocols preclude the legislature from interfering with existing contracts. The Court considers that a special justification is required for such interference, but accepts that in the context of the 1993 Act there were special grounds of sufficient importance to warrant it. The Court observes that in remedial social legislation and in particular in the field of debt adjustment, which is the subject of the present case, 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."

36. The question is whether the insurance industry which the appellants represent is being called upon to bear a disproportionate and excessive burden. This is not, of course, something that arose incidentally, as an unforeseen or unlooked for consequence of declaring in the legislation that pleural plaques are to be treated for all purposes as being always actionable. On the contrary, there were extensive discussions with the insurance industry while the effects of the Bill were being assessed. The implications for insurers were described in paras 17, 18 and 29 of the Explanatory Notes that accompanied the Bill when it was introduced, and an updated reassessment of the financial implications was communicated to the Convener of the Justice Committee by the Minister for Community Safety's letter dated 25 February 2009. Moreover it is an inescapable consequence of the measure taken to deal with the demands of the general interest of the community that the burden which was to fall on the insurers could not be alleviated or compensated.

37. There are however two special features of this case which seem to me to show that the balance that was struck cannot be said to be disproportionate. The first is that the claims which the Act makes possible will only succeed if it is shown that the exposure to asbestos was caused by the employer's negligence. Indeed, the Act is conspicuously careful in its draftsmanship. Its effect is restricted to new claims and to claims that have been commenced but not yet determined. It preserves all the other defences that may be open on the law or the facts, other than the single question whether the pleural plaques themselves are actionable. It achieves what it has to achieve. But it does no more than that.

38. The second special feature is that the business in which insurers are engaged and in pursuance of which they wrote the policies that will give rise to the

obligation to indemnify is a commercial venture which is inextricably associated with risk. Because they were long term policies there was inevitably a risk that circumstances, unseen at the date when they were written, might occur which would increase the burden of liability. 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. 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.

39. 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. So the fact that the effect of the Act will be to increase the burden on the insurers, even to the extent that was anticipated, does not seem to me to carry much weight.

40. It might have been different if the law on the actionablity of pleural plaques had been settled by judicial decision when the policies were written. The effect of the Act would have been to reverse the settled law after the date when the insurers committed themselves by their contract to indemnify. As it is, the question whether they amounted to bodily injury or a disease remained open then and for many years afterwards. The law itself might indeed have developed differently, as Lord Rodger observed in *Rothwell*, para 84 when he said that in theory it might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis or mesothelioma. The interference with the insurers' possessions can therefore be seen to be within the area of risk with which they engaged when they undertook to indemnify the consequences of the employer's negligence.

41. For these reasons I would hold that the interference with the appellants' possessions by the 2009 Act pursued a legitimate aim and that the means chosen by the Scottish Parliament are reasonably proportionate to the aim sought to be realised. It follows that the 2009 Act was not outside the legislative competence of the Parliament.

The common law grounds

42. The appellants' case at common law is that the 2009 Act was the result of an unreasonable, irrational and arbitrary exercise of the legislative authority conferred by the Scotland Act 1998 on the Scottish Parliament. Although the Dean of Faculty did not abandon that argument in this court, he accepted that if his argument that the Act was incompatible with A1 P1 were to be rejected on the grounds that there was a legitimate aim and that its provisions were reasonably proportionate to the aim sought to be realised he could not succeed on this ground at common law. On one view, very little more need be said about it. But the question as to whether Acts of the Scottish Parliament and measures passed under devolved powers by the legislatures in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance. It goes to the root of the relationship between the democratically elected legislatures and the judiciary. At issue is the part which the rule of law itself has to play in setting the boundaries of this relationship. I think therefore that the argument which this part of the appellants' case raises cannot be dismissed so easily.

43. The issue can be broken down into its component parts in this way. First, there is the question whether measures passed by the devolved legislatures are amenable to judicial review, other than in the respects expressly provided for by the devolution statutes, at all. If not, that will be the end of the argument. But if they are open to judicial review on common law grounds at all, there is the question as to what these grounds are. At the one extreme are the grounds that the appellants' second plea in law encapsulates: that the legislation is unreasonable, irrational or arbitrary. At the other is the proposition that judicial intervention is admissible only in the exceptional circumstances that Lord Steyn had in mind in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 102; see also my own speech at paras 104-107 and Baroness Hale of Richmond's observations at para 159. To answer these questions in their proper context it is necessary to set out the background in a little more detail. Although I am conscious of the implications of what the court decides in this case for the other devolved legislatures, I shall concentrate on the position of the Scottish Parliament. As was common ground before us, I consider that, while there are some differences of detail between the Scotland Act 1998 and the corresponding legislation for Wales and Northern Ireland, these differences do not matter for present purposes. The essential nature of the legislatures that the legislation has created in each case is the same.

44. The starting point for an examination of the first question is the following proposition in *West v Secretary of State for Scotland* 1992 SC 385, 412-413:

> "The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument."

45. Devolution is an exercise of its law-making power by the United Kingdom Parliament at Westminster. It is a process of delegation by which, among other things, a power to legislate in areas that have not been reserved to the United Kingdom Parliament may be exercised by the devolved legislatures. The Scotland Act 1998 sets out the effect of the arrangement as it affects Scotland with admirable clarity. Section 1(1) of the Act declares: "There shall be a Scottish Parliament." Its democratic legitimacy is enshrined in the provisions of section 1(2) and section 1(3), which provide for the election of those who are to serve as its members as constituency members and by a system of proportional representation chosen from the regional lists. Section 28(1) provides that the Parliament may make laws, to be known as Acts of the Scottish Parliament, and section 28(2) provides for them to receive the Royal Assent. Section 28(5) provides that the validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment. Although section 28(7) provides that that section shall not affect the power of the United Kingdom to make laws for Scotland, in practice the Scottish Parliament enjoys the same law making powers for Scotland as the Westminster Parliament except as provided expressly for in section 29 which, in certain closely defined respects, limits its legislative competence. Section 29 does not, however, bear to be a complete or comprehensive statement of limitations on the powers of the Parliament. The Act as a whole has not adopted that approach: see *Somerville v Scottish Ministers (HM Advocate General for Scotland intervening)* [2007] UKHL 44, 2008 SC (HL) 45, [2007] 1 WLR 2734, para 28.

46. The carefully chosen language in which these provisions are expressed is not as important as the general message that the words convey. The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in *Jackson*, para 9, is the bedrock of the British constitution. Sovereignty remains with the United Kingdom Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes. Section 29(1) declares that an Act of the Scottish Parliament is not law so far as any

provision of the Act is outside the legislative competence of the Parliament. Then there is the role which has been conferred upon this court by the statute, if called upon to do so, to judge whether or not Acts of the Parliament are within its legislative competence: see section 33(1) and paragraphs 32 and 33 of Schedule 6, as amended by section 40 and paragraphs 96 and 106 of Schedule 9 to the Constitutional Reform Act 2005. The question whether an Act of the Scottish Parliament is within the competence of the Scottish Parliament is also a devolution issue within the meaning of paragraph 1(a) of Schedule 6 to the Scotland Act in respect of which proceedings such as this may be brought in the Scottish courts.

47. Against this background, as there is no provision in the Scotland Act which excludes this possibility, I think that it must follow that in principle Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law. The much more important question is what the grounds are, if any, on which they may be subjected to review.

48. There is very little guidance as to how this question should be answered in the authorities. I do not think that we get much help from cases such as *R v Secretary of the State for the Environment, Ex P Nottinghamshire County Council* [1986] AC 240, *R v Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 and *Edinburgh District Council v Secretary of State for Scotland* 1985 SC 261. They were concerned with the exercise of delegated powers by ministers and, as the judges of the First Division said, 2011 SLT 439, para 83, none of them is directly in point in this case. All I would take from them is that, even in these cases, a high threshold has been set. I also think that the situation that was considered in *R (Asif Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [2002] QB 129 which was concerned with a draft order which was laid by the Secretary of State and approved by both Houses of Parliament is so different from that which arises here that it can safely be left on one side. The fact is that, as a challenge to primary legislation at common law was simply impossible while the only legislature was the sovereign Parliament of the United Kingdom at Westminster, we are in this case in uncharted territory. The issue has to be addressed as one of principle.

49. The dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy. It draws its strength from the electorate. While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a legislature of this kind are best placed to judge what is in the country's best interests as a whole. A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate.

This suggests that the judges should intervene, if at all, only in the most exceptional circumstances. As Lord Bingham of Cornhill said in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] AC 719, para 45, the democratic process is liable to be subverted if, on a question of political or moral judgment, opponents of an Act achieve through the courts what they could not achieve through Parliament.

50. The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion. For Lord Bingham, writing extrajudicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not open to them to change it: *The Rule of Law*, p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, *Who are the masters Now?* (6 April 2011), said at para 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in *Jackson*, para 71, the warning that Lord Hailsham of St Marylebone gave in *The Dilemma of Democracy* (1978), p 126 about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in para 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish.

51. We do not need, in this case, to resolve the question how these conflicting views about the relationship between the rule of law and the sovereignty of the United Kingdom Parliament may be reconciled. The fact that we are dealing here with a legislature that is not sovereign relieves us of that responsibility. It also makes our task that much easier. In our case the rule of law does not have to compete with the principle of sovereignty. As I said in *Jackson*, para 107, the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. I would take that to be, for the purposes of this case, the guiding principle. Can it be said, then, that Lord Steyn's endorsement of Lord Hailsham's warning about the dominance over Parliament of a government elected with a large majority has no bearing because such a thing could never happen in the devolved legislatures? I am not prepared to make that assumption. We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it

might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.

52. As for the appellants' common law case, I would hold, in agreement with the judges in the Inner House (2011 SLT 439, para 88), that Acts of the Scottish Parliament are not subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness. This is not needed, as there is already a statutory limit on the Parliament's legislative competence if a provision is incompatible with any of the Convention rights: section 29(2)(d) of the Scotland Act 1998. But it would also be quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature unless authorised to do so, as in the case of the Convention rights, by the constitutional framework laid down by the United Kingdom Parliament.

Are the 3rd to 10th respondents "directly affected"?

53. Rule 58.8(2) of the Rules of the Court of Session 1994, as amended by SSI 2000/317, provides:

> "Any person not specified in the first order made under rule 58.7 as a person on whom service requires to be made, and who is directly affected by any issue raised, may apply by motion for leave to enter the process; and if the motion is granted, the provisions of this Chapter shall apply to that person as they apply to a person specified in the first order."

An annotation to this rule in Greens Annotated Rules of the Court of Session printed in the Parliament House Book, vol 2, C 478/4 states:

> "The motion to enter the process should state the title and interest of the person."

Although the phrase "title and interest" does not appear in rule 58.8(2), it is used in the form of petition for judicial review which is set out in Form 58.6. That form, which is to be read together with Rule of Court 58.6(1), requires paragraph 1 of the petition to state the "designation, title and interest" of the petitioner.

54. The Lord Ordinary said that in his view the court's discretion under rule 58.8(2) is generous rather than restrictive, and that he could see no reason why the

third to tenth respondents' participation in these proceedings should be restricted: 2010 SLT 179, para 87. The judges of the First Division accepted that the phrase "any person … who is directly affected by any issue raised" in rule 58.8(2) comprehended a wide range of persons if it was considered in isolation. But they said that its construction was constrained by the substantive law on title and interest: 2011 SLT 439, para 54. In their view the amendment to rule 58.8(2) by SSI 2000/317, and the introduction of rule 58.8A which made provision for public interest interventions, achieved a reasonable balance to respect the interests of all concerned. So, before the third to tenth respondents could rely upon rule 58.8(2) to enter the process as parties, they had to demonstrate such a title and interest as would entitle them to do so: para 55. As for the question whether any beneficiary, or potential beneficiary, of a general legislative measure had title to intervene as a responding party to counter any challenge to its validity, they said they had not been referred to any authority to support a positive answer to that proposition, and that there were important indications to the contrary. They referred to *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7, where the title of the pursuers to challenge the use of the ferries for excursions up the Tay was recognised as they were ratepayers but there was no suggestion that all other ratepayers could be convened as additional defenders to argue that the use of ferries for excursions was beneficial to their interests: para 56.

55. In *D & J Nicol v Dundee Harbour Trustees* at pp 12-13 Lord Dunedin declared:

> "By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase 'title to sue' has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think that it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies."

Although he refrained from making any general pronouncement as to when there is title and when there is not (see p 17), he gave some examples. At p 13 he said that the simplest case of all is where a person is the owner of something, which enabled him to have the right to sue in the vindication or defence of his property. Next in simplicity came contract, where the relation of contract gave the one party the right to insist on the fulfilment of the contract by the other. It was argued in the Court of Session in *Dundee Harbour Trustees* that the pursuers had a title and interest to challenge the use of the ferries for excursions as rival traders. But that contention was abandoned in the House of Lords by the pursuers' counsel. Lord Dunedin said

at p 12 that he thought that he was right to do so: see also the Lord Chancellor (Haldane) at p 11. When a complainer can only say that he is a rival trader and nothing more, he qualifies an interest but not a title.

56. The Rule of Court 260B of the Rules of Court of Session 1965 which introduced the procedure for judicial review which is now to be found in Chapter 58 of the 1994 Rules was a procedural amendment only, which did not and could not alter the substantive law: *West v Secretary of State for Scotland* 1992 SC 385, 404. So neither the nature nor the scope of the supervisory jurisdiction was altered by the introduction of the new rule. But this does not mean that one cannot look at its nature and scope to decide what the substantive law is, and to see what it tells us about the test that should be applied to determine whether a person may bring proceedings of this kind and whether he may be permitted to enter the process as someone who is directly affected by the issues that are raised.

57. The Court said in *West* that the competency of an application for judicial review does not depend upon any distinction between public law and private law, and that it was not confined to those cases which have been accepted as amenable to judicial review in England: p 413. That proposition was based on the review of the authorities that was undertaken in that case, and it remains true today. But it would be wrong to take from it the idea that these proceedings have nothing to do with public law. One of the benefits of the supervisory jurisdiction of decision-taking in Scotland is that it is so wide ranging. It is not confined to those cases which have been accepted as amenable to judicial review in England. It extends from the field of private law on the one hand, as shown by cases such as *Forbes v Underwood* (1886) 13 R 465 in which the court exercised its jurisdiction to compel the performance of his duties by an arbiter under a private contract and *McDonald v Burns* 1940 SC 376 and *St Johnstone Football Club Ltd v Scottish Football Association Ltd* 1965 SLT 34 which could not be described as cases in the field of public law, to cases that undoubtedly lie within that field on the other.

58. In cases that lie within the private law sphere it will no doubt be appropriate to ask whether the petitioner has a title and interest to bring the proceedings in the sense indicated by Lord Dunedin. The fact that a person upon whom a decision-making function has been conferred by a private contract is amenable to the supervisory jurisdiction is not something that is likely to affect anyone other than the parties to the contract. In that situation the application of the private law test as to whether a title and interest to bring and defend the proceedings has been demonstrated will be perfectly appropriate. But it is hard to see the justification for applying that test which, as Lord Dunedin's discussion in *D & J Nicol v Dundee Harbour Trustees* shows, is rooted in private law to proceedings which lie within the field of public law. It was emphasised in *West* that the categories of what may amount to an excess or abuse of jurisdiction are not closed, and that they are capable of being adapted in accordance with the development of administrative

law: p 413. Their adaptation and development in the public interest risks being inhibited by a strict adherence to the private law requirement that title and interest must be shown before proceedings for judicial review may be brought or before a party who wishes to respond may enter the process.

59. The imbalance that exists between the way public interest issues may be dealt with in England and how they are still dealt with in Scotland can be seen from the very different view that was taken on either side of the Border of the standing of women's groups who objected to the visit to the United Kingdom of Mike Tyson, a convicted rapist, so that he could earn money here by appearing in the boxing ring. Their attempts to bring proceedings for judicial review failed in both jurisdictions, but for quite different reasons. In *R v Secretary of State for the Home Department, Ex p Bindel* [2001] Imm AR 1 Sullivan J held that Justice for Women did not have arguable grounds for interfering with the Secretary of State's decision to grant Tyson a temporary visa to enter the country, not that they did not have a sufficient interest to bring the proceedings. But in *Rape Crisis Centre v Secretary of State for the Home Department* 2000 SC 527 Lord Clarke applied Lord Dunedin's dictum in *D & J Nicol v Dundee Harbour Trustees* 1915 SC (HL) 7, asking himself whether there was "some legal relation" which gave the petitioners some right which the person against whom they brought the proceedings either infringed or denied. He held that the petitioners lacked the title to sue that was needed under Scots law to enable them to obtain a remedy, as the scope and function of the legislation under which the Secretary of State exercised his jurisdiction did not provide a legal nexus between him and the petitioners. He said that they were in no different position from any other member of the public in that respect. But he recognised at p 534 that, although Lord Dunedin's dictum had stood the test of time, it was uttered in times well before the huge development of administrative law and judicial review that had taken place in recent decades.

60. The judges of the First Division, who were of course considering the position of the third to tenth respondents and not that of the petitioners, said that they were not referred to, and were not aware of, any authority to support the proposition that any beneficiary or potential beneficiary of a general legislative measure had a title to intervene as a responding party to counter an attack on its validity: 2011 SLT 439, para 56. They referred to the decision in *D & J Nicol v Dundee Harbour Trustees* as an important indication to the contrary, and to the practical difficulty of identifying all those who might be benefited by an impugned measure. In their view only the decision-taker could appropriately expound the reasons for its decision, and nothing could be added to those reasons by benefited third parties. In para 57 they said that to hold that these respondents were "directly affected" as beneficiaries of the 2009 Act would be to give an interpretation to the rule that went beyond matters of procedure and moved into the field of the substantive law of entitlement to defend.

61. The wording of the rule, if taken by itself, is plainly wide enough to cover the situation in which these respondents find themselves. The positions of the appellants on the one hand and of the third to tenth respondents on the other as to the 2009 Act are, after all, really two sides of the same coin. As the Lord Ordinary was surely right to point out, if these respondents as actual or potential pleural plaque claimants are not directly affected by its fate, it would be hard to regard the appellants as directly affected in that context either: 2010 SLT 179, para 87. I agree, of course, that the real issue that has to be addressed, if the third to tenth respondents are to succeed, is the substantive law to which the rule must be taken to give effect. But the other points that the First Division made in para 56 of their opinion do not seem to me to answer the unfairness created by that paradox. Any practical difficulty in identifying all those who might be benefited by an impugned measure is answered by the point that the petitioner does not have to do this. It is up to those who consider themselves to be in that position to make themselves known to the court. The suggestion that only the decision-taker could appropriately expound the reasons for its decision, and that nothing could be added to those reasons by benefited third parties, seems to run counter to the basic rule of natural justice that the other party to the argument has a right to be heard.

62. As for the substantive law, I think that the time has come to recognise that the private law rule that title and interest has to be shown has no place in applications to the court's supervisory jurisdiction that lie in the field of public law. The word "standing" provides a more appropriate indication of the approach that should be adopted. I agree with Lord Reed (see para 170, below) that it cannot be based on the concept of rights, but must be based on the concept of interests. It is worth noting that, as Friends of the Earth Scotland pointed out in their written intervention, in the 19th century Scots law was quite liberal in its approach to the question of standing in relation to what were said to be public wrongs. In *Torrie v Duke of Athol* (1849) 12 D 328 three individuals sought declarator that a route through Glen Tilt was a public road and were permitted to do so although they were not seeking to vindicate any private right. In *Macfie v Blair and Scottish Rights of Way and Recreation Society Ltd* (1884) 11 R 1094 the court sustained the Society's right to be sisted as a defender to the action in which it had no private right or interest but to seek to vindicate a public right whose promotion was one of its aims. As Lord Clyde pointed out in *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179, 184 these and several other similar cases can be regarded as examples of an actio popularis. But that does not seem to me to take anything away from the point that a person may have a sufficient interest to invoke the court's supervisory jurisdiction in the field of public law even although he cannot demonstrate that he has a title, based on some legal relation, to do so.

63. Like Lord Dunedin in *D & J Nicol v Dundee Harbour Trustees*, I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words "directly affected" which appear in rule 58.8(2) capture

the essence of what is to be looked for. One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in *R v Inland Revenue Commissioners, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 646, and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word "directly" provides the necessary qualification to the word "affected" to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

64. As I consider that it is plain that the third to tenth respondents are directly affected by the appellants' challenge to the 2009 Act, I would allow their cross-appeal.

Conclusion

65. For these reasons and for the further reasons given by Lord Reed, I would dismiss the appeal and to that extent would affirm the interlocutor of the Inner House dated 12 April 2011. I would however, as I have just said, allow the cross-appeal by the third to tenth respondents. I would set aside that part of the interlocutor of the Inner House in which the petitioners' ninth plea in law was sustained and the answers for the third to tenth respondents were repelled. In respect of those pleas in law I would restore the interlocutor of the Lord Ordinary dated 8 January 2010.

LORD BROWN

66. Many will have been disappointed by the unanimous decision of the House of Lords in *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281, fewer surprised. Pleural plaques that neither cause symptoms nor increase susceptibility to other asbestos-related conditions, were held not to constitute actionable damage for the purposes of a personal injury claim. Of course the existence of pleural plaques demonstrates that a person's lungs have been penetrated by asbestos fibres capable of causing various fatal diseases and naturally many who suffer them will be greatly worried on that account. It is established law, however, that neither the risk of injury nor the apprehension of its happening are actionable. In so far as a trilogy of first instance decisions in the mid-1980s had suggested the contrary - one of them my own judgment in *Patterson v Ministry of Defence* [1987] CLY 1194, rejecting the contention that "symptom-free physiological change" such as pleural plaques can alone constitute an actionable injury, but accepting that, taken together with the risk of future disease and anxiety, they do so (the so-called

theory of aggregation) – they were wrong, as too was Smith LJ's dissenting judgment in the Court of Appeal in *Rothwell* [2006] ICR 1458, itself substantially based on the aggregation theory.

67. In short, the answer to the question: "is [a claimant with asymptomatic pleural plaques] appreciably worse off on account of having plaques?" (the critical question identified by Lord Hoffmann in *Rothwell* at para 19), is "no". On all the medical evidence, he is no worse off than anyone else (a former workmate, say) who has experienced similar exposure to asbestos dust and logically, indeed, he has no greater reason (than such a former workmate) to worry about his future.

68. Doubtless with these considerations in mind, the Westminster Government, following various attempts by private members to reverse the decision in *Rothwell* by legislation, introduced an extra-statutory scheme, confined to those diagnosed with pleural plaques who had raised a claim for damages prior to 17 October 2007 (the date of the House of Lords decision in *Rothwell*), under which such claimants would receive a one-off payment of £5,000 from government funds (upon application made prior to 1 August 2011).

69. The Scottish Parliament, however, and subsequently the Northern Ireland Assembly also, responded very differently to the decision in *Rothwell*, namely by legislating to reverse it. Under this legislation, pleural plaques, notwithstanding that they are asymptomatic, are to be treated as having always constituted actionable harm so that all who suffer them, provided only they can establish the other elements of a cause of action, can claim against their erstwhile employers, claims for the most part to be met by the employers' liability insurers. The 2008 Regulatory Impact Assessment prepared prior to the Damages (Asbestos-related Conditions) (Scotland) Act 2009 ("the 2009 Act") suggested (at para 29) average settlement costs of £22,000 per case (based on 2003-4 figures), comprised of £8,000 compensation payment, £8,000 pursuer's costs and £6,000 defender's costs.

70. The main differences, therefore, between the English (and Welsh) extra-statutory scheme and the 2009 Act are: first, that the former is a no-fault scheme, secondly, that the former is confined to claims made before the 2007 decision in *Rothwell,* and, thirdly, that the cost of the former (substantially less per case than the latter) is borne by government rather than designed to fall on the employers' liability insurers.

71. Put more broadly, the English scheme is intended at comparatively modest public expense to assuage the disappointment of those immediately affected by *Rothwell;* the Scottish legislation by contrast is calculated to create a new category

of actionable bodily injury at enormous cost to insurers, estimated overall perhaps in billions of pounds. It is, after all, difficult to suppose that the great majority of those Scottish workers who were exposed to asbestos in the course of their working lives will not now, albeit symptom-free, consult solicitors and doctors so as to discover whether or not they have pleural plaques (or pleural thickening) with a view to claiming substantial damages – damages essentially to compensate them for their anxiety as to the future (an anxiety in some cases actually precipitated, however illogically, by the very process of discovering these intrinsically harmless physiological changes). And sometimes, indeed, the worry experienced by those found to have these changes will then be accentuated still further by learning that they give rise to a substantial damages award which in itself suggests an "obviously serious problem" – see Holland J's judgment at first instance in respect of Mr Quinn, one of the claimants in the *Rothwell* litigation: [2005] EWHC 88 (QB), [2005] PIQR P478, at para 22.

72. This is the essential context in which the present proceedings were brought: a claim by a number of insurance companies affected by the 2009 Act to challenge its lawfulness principally on the ground that it is incompatible with their property rights under article 1 of Protocol 1 ("A1P1") to the Convention (albeit also on the common law ground of irrationality).

73. With regard to the claim under A1P1, it seems to me clear almost beyond argument that the appellants have victim status. True, their liability to claimants under the 2009 Act will only arise once all the elements of the relevant damages claims against the insured employers have been established and, true too, the appellants have expressly reserved their position as to whether liability under their various policies of insurance will actually then be engaged. But nobody doubts that a very large number of claims *will* be established against employers and the clear underlying intention of the 2009 Act was that the cost of these claims should indeed fall on the insurers. The latter point could hardly be more clearly illustrated than by a letter dated 28 November 2008 written by a government official in the course of the Bill's preparation to Mr Maguire of Thompsons (the union solicitors promoting the Bill and assisting in its drafting):

> ". . . [W]e are concerned that there is a risk that, if we specify on the face of the Bill that its provisions are for the purposes of the law of delict, defenders may seek to argue that there is no read-across to other areas of the law, eg the interpretation of contracts. This could place a significant barrier in the way of many potential claimants, if it were argued that it leaves pursuers with a delictual claim against an employer that is not covered by the employer's insurance policy. It is a pity that a meeting to discuss such issues could not take place before amendments were lodged on 25 November, especially as the process of disclosing our concerns to the Committee may also result

> in those concerns being drawn to the attention of those who may wish to utilise them in opposing claims for compensation, contrary to our intention and yours. Of course, we will endeavour to avoid that consequence so far as possible, but it is not entirely in our hands."

There is nothing further on this issue which I wish to add to Lord Hope's judgment on the point at paras 24-28 and Lord Reed's at paras 109-112 with which I wholly agree.

74. It follows that the critical questions arising on the A1P1 claim are, first, whether the 2009 Act pursues a legitimate aim and, secondly, whether the undoubted burden which it imposes on the appellants is reasonably proportionate to that aim.

75. At the heart of the appellants' attack on the legitimacy and proportionality of this legislation lies the complaint that it is nakedly retrospective in its application.

76. Put aside section 3 of the 2009 Act which is designed simply to ensure that no claim should be statute barred simply by virtue of the lapse of time between the decision in *Rothwell* and the coming into force of the Act twenty months later, ie whilst understandably in the light of *Rothwell* claimants would not be pursuing claims. Assuming that the Act is otherwise unobjectionable, no one could reasonably take exception to that provision – "a limitation holiday" as Mr Aidan O'Neill QC called it. Rather the focus of the appellants' argument is upon section 4(2) of the 2009 Act which, of course, stipulates that sections 1 and 2 of the Act – which dictate that pleural plaques and other asymptomatic asbestos-related conditions constitute actionable harm – "are to be treated for all purposes as having always had effect". In other words, not merely is *Rothwell* being reversed in the sense that Parliament is providing that, in future, pleural plaques are to be regarded as constituting actionable harm. Instead Parliament is in effect providing that the legal position is to be as if the House of Lords in *Rothwell* had reached the opposite conclusion on the question before it – a decision which then, of course, under the declaratory theory, would itself have had full retrospective effect.

77. Had the House of Lords in *Rothwell* decided that asymptomatic pleural plaques of themselves constitute a non-negligible personal injury and thus actionable damage – decided in other words that in this particular context the common law should develop in this admittedly novel way – the appellants would doubtless have deplored the decision but they could certainly not have questioned its legitimacy. No doubt they would have resented the fact that, as a consequence of the decision, they would unexpectedly have had to pay out on claims resulting

from the employee's exposure to asbestos upwards of 20 years (quite likely up to 40 years) previously. But they could no more have advanced an A1P1 challenge to this development of the law than they could have challenged the House of Lords decision some four years earlier in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 to adopt a less stringent than the usual "but for" test for establishing the necessary causal connection between an employer's negligence and a claimant's condition in, most notably, mesothelioma cases. Employers (and their liability insurers) necessarily take the risk of the common law developing in ways which may adversely affect them with regard to personal injury claims.

78. Why then, it may be asked, if the courts can adapt and develop (ie change) the law (albeit within well-recognised constraining limits) to accord with what the judges consider to be the contemporary demands of justice, cannot Parliament with similar impunity change the law by legislation? After all, again in the broadly analogous context of mesothelioma claims, Parliament chose by section 3 of the Compensation Act 2006 (again, flatly contrary to the interests of the employer's liability insurers and again, by section 16(3) of the Act, to be "treated as having always had effect") to reverse the decision of the House of Lords in *Barker v Corus UK Ltd* [2006] 2 AC 572 (where the House had further developed the *Fairchild* principle but had limited the extent of any given defendant's liability under that principle) on the issue of quantum. It is not suggested that on that account insurers could successfully have had section 3 of the 2006 Act declared incompatible on A1P1 grounds.

79. For my part I have not found this an altogether easy question to answer. It is not, I think, a sufficient answer merely to point to the declaratory theory of the common law – the theory that judgments state what the law has always been, thereby on occasion correcting ex hypothesi erroneous earlier court decisions. Is the answer perhaps that judges are sworn to administer the law and the public must and do accept the law as the judges declare it to be but that legislation, where, as here, it retroactively interferes with what the judges have declared to be people's property rights and is then challenged, has to be justified as legitimate and proportionate? If, as I believe, that essentially *is* the difference between these two ways in which people's property rights may be adversely affected, it must surely be relevant, indeed highly relevant, to consider just how substantial a departure from the established legal position is being effected by the impugned legislation.

80. With these considerations in mind, I turn then to the particular circumstances of the present case. How substantial a departure from the established common law position, one asks, is being effected by the 2009 Act? In one sense, of course, a very great departure indeed: *Rothwell* is being reversed. And it is being reversed in respect of pending claims ("backed-up" claims as they were described in the Lord Ordinary's judgment at para 173) no less than future

claims. I had, indeed, at one time wondered whether this undoubted, and deliberate, impact of the legislation upon pending claims might not of itself have vitiated the legislation by virtue of article 6 of the Convention, if not by reference to A1P1 itself – see particularly the *Zielinski v France* (1999) 31 EHRR 532 line of Strasbourg authorities and Anna Jasiak's article, "Changing the rules mid-game. Legislative interference in specific pending cases: separation of powers and fair trial", Vienna Journal on International Constitutional Law, vol 4, Issue 1/2010. The Lord Ordinary, however, rejected the appellants' complaint under article 6 (see paras 146-179 of his judgment) and the appellants have never thereafter sought to return to it - understandably, I think, because a challenge of this nature must in reality stand or fall upon the effect of the legislation generally. It would be absurd to strike down legislation like this (and, indeed, like section 3 of the Compensation Act 2006) merely because pending actions are included within its scope. Accordingly, instead of the respondents having to establish "compelling grounds of the general interest" (*Zielinski* at para 57), as is ordinarily required to justify legislation designed to influence the judicial determination of pre-existing disputes (legislation which thus prima facie frustrates the administration of justice), they need demonstrate no more than that their claim to be acting in the public or general interest is not "manifestly without reasonable justification" (*James v United Kingdom* (1986) 8 EHRR 123, para 46, cited by Lord Hope at para 31). This is, I need hardly add, a substantially easier test to satisfy.

81. As just stated, given that the 2009 Act is reversing *Rothwell* in respect of past claims no less than future ones – all, indeed, save already determined claims – its departure from the position established by *Rothwell* is in one sense extreme. But its departure from the common law position as this was understood to be *before* the decision of the House of Lords in *Rothwell* is altogether less so. Certainly, as I suggested at the outset, the majority of those concerned with asbestos-related claims are likely to have made a correct prediction of the eventual outcome of the litigation; the insurers would not have been expecting an adverse finding of liability. But no one could sensibly have described it as a foregone conclusion and, as I also noted earlier, a number of judgments (including that of Smith LJ in the Court of Appeal in *Rothwell* itself) favoured a different result. Indeed, even in the House of Lords in *Rothwell*, Lord Rodger of Earlsferry said at para 84:

> "The asbestos fibres cannot be removed from the claimants' lungs. In theory, the law might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis or mesothelioma. But the courts have not taken that line."

The clear inference is that the courts might have taken that line and would have been entitled to do so. Parliament, therefore, cannot be regarded as having completely overturned a body of established law unambiguously supporting the

appellants' position so as to destroy what they could properly characterise as a legitimate expectation of being permanently immune from such claims.

82. It is not as if Parliament had declared, rather than that asymptomatic physical changes constitute actionable bodily harm, that any substantial proven exposure to asbestos fibres to an extent likely to result in their harmful ingestion should be thus actionable. Although the Dean of Faculty for the appellants suggested that realistically this is the effect of the 2009 Act – pleural plaques themselves being intrinsically harmless and their real significance being their manifestation of substantial exposure to potentially lethal fibres – the existence of demonstrable physical changes seems to me ultimately all important. Beguilingly though the appellants sought to characterise this legislation as no more than a labelling exercise, its description of asymptomatic pleural plaques as bodily injury being transparently designed to engage the employer's liability insurance, the argument is in fact unsustainable. It cannot be doubted that pleural plaques result from the ingestion of asbestos fibres and essentially what the legislation does is categorise these undoubted physical changes as actionable bodily injury. It is this categorisation which falls to be contrasted with the common law position as earlier understood and, as I have already suggested, the contrast is really not that extreme.

83. It is essentially for these reasons, rather than because the appellants as insurers are in a business inevitably associated with risks and unpredictable events, that, in common with the other members of this Court, I am prepared, given the wide margin of appreciation properly accorded to a democratically elected body determining the public interest by reference, as here, to political, economic and social considerations, to regard this legislation (ill-judged though many might regard it to be) as legitimate and proportionate and so immune from challenge under A1P1. Had the test been that of "compelling grounds of public interest" I should not have regarded it as satisfied. I am not, however, prepared to condemn this legislation as "manifestly without reasonable justification."

84. With regard to the basis upon which legislation by the Scottish Parliament may be subject to common law review and the various other issues which arise for consideration on this appeal and cross-appeal, there is nothing that I wish to add to the comprehensive judgments already given by Lord Hope and Lord Reed. I too would make the orders which they propose.

LORD MANCE

85. There is very little to add to the comprehensive judgments given by Lord Hope and Lord Reed. I am in essential agreement with all their reasoning and conclusions, and make only a few observations on certain of the points arising.

86. *Victim status:* I agree that the appellants have status to rely on the Convention rights within the meaning of section 7(7) of the Human Rights Act 1998, read with article 34 of the Convention. The relevant Convention provision is article 1 of Protocol 1 ("A1P1"). As Lord Hope (paras 21-22) and Lord Reed (paras 107-108) observe, it appears unlikely here to matter whether the present case engages the second sentence as well as the general principle contained in the first sentence of A1P1. I am like them satisfied that it engages the first sentence, and I would myself also think that it engages the second.

87. Whether insurers' position would in law be actually affected by the 2009 Act depends of course upon the future incidence of claims involving their insureds as well as the interpretation and application of the insurance policies issued to such insureds. But it is sufficient for victim status under article 34 that there is a real risk that a person's Convention rights will be directly affected in the not too distant future: see e g *Burden v United Kingdom* (2008) 47 EHRR 857, para 35; *Clayton and Tomlinson, The Law of Human Rights*, 2nd ed (2009), paras 22.29-22.49.

88. Here there is clearly such a risk. A, if not the, main target of the legislation was employers' insurers, who (with their reinsurers) have borne the brunt of asbestos-related claims over the last thirty or so years. That is clear enough from the proceedings before the Scottish Parliament, as Lord Hope observes in para 27. It is illustrated by the letter dated 5 December 2008 written by the Head of Damages and Succession of the Scottish Executive's Civil Law Division to Mr Maguire of Thompsons, solicitors promoting the Bill which became the 2009 Act, expressing concern about the risk that any reference in the Bill to the law of delict could prevent "a read-across to other areas of law, e.g. the interpretation of insurance contracts".

89. Whether and how far there may be such a read-across is not a matter before the Supreme Court. The only copy of an actual insurance policy before the Supreme Court is a Combined Legal Liability Insurance Policy issued by AXA Insurance UK plc to John Laing and Son Ltd of Page Street, London NW7 2ER through C E Heath & Co (London) Ltd for three years commencing 1 January 1977, covering the insured "against all sums which the insured becomes legally liable to pay as damages in respect of bodily injury (including death or disease) sustained by an Employee arising out of and in the course of his employment or

engagement by the Insured in the Business and caused within the Geographical Limits during the Period of Insurance". The Geographical Limits were worldwide. The respondents accepted that this policy is and others are likely to be subject to English, rather than Scottish, law. A Scottish Act will not on the face of it change the legal effect of an English insurance contract, even in Scotland. However, depending upon the particular policy language, the scope of the concept of bodily injury under a worldwide policy may respond to different conceptions of bodily injury in different parts of the world. Here, the question would be whether it would respond to a development or change, such as that introduced retrospectively by the 2009 Act, in the conception of bodily injury. I say no more about the answer, which may be elicited in another context or suit. Suffice it to say that insurers such as AXA have ample reason for direct concern about their forthcoming exposure.

90. The unreality of the objection to AXA's victim status is underlined by a consideration of the alternative. That is that the (only) persons with victim status are employers. It is perhaps curious that no employer has joined or been joined in these proceedings. But in likelihood that underlines the reality, that the persons with real potential exposure are insurers. However, if the view were to be taken that insurers have no victim status, then employers clearly must have. The 2009 Act could not be *less* vulnerable to challenge by them than it would be by insurers if insurers have victim status.

91. *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. Hence, the present challenge to the 2009 Act is based on the fact that it retrospectively converts into harm actionable in law physical changes which (it has been held in *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281) were not otherwise such, in the hope or expectation that the relevant policies will have to respond to that development.

92. The decision in *Rothwell* came decades after the relevant employment and insurance periods. But it represents a decision as to what the common law is and in legal theory always was. This is no mere incantation. In the absence of any authoritative case law, responsible insurers can and will take a view as to the extent of their exposure, and conduct themselves accordingly. They may, as here, be prepared to pay or accept limited claims for a limited period, without testing the legal position at an appellate level. But there may come a time when, again as here, they test the position at the highest level. It is an aspect of the rule of law that it is

normally courts who determine what legal liabilities have from time to time been incurred as a result of past conduct, and that legislators leave that to courts.

93. There are however circumstances in which legislation with retrospective effect in respect of past conduct may be justified. One example in the same area as the present is found in section 651(5), added to the Companies Act 1985 by the Companies Act 1989 to allow the restoration to the register of a company for up to 20 years. The intended and actual effect was to reverse retrospectively insurers' victory in *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, where the House of Lords had held that it was impossible for Mrs Bradley to invoke the protection of the Third Party Rights against Insurers Act 1930 after her insured employer had not only become insolvent, but also been dissolved. This victory conferred an uncovenanted windfall on liability insurers in precisely the circumstances in which they ought to have been in the front-line of exposure. I recounted the story in *Insolvency at Sea* [1995] LMCLQ 34, 37. The government was persuaded that retrospective legislation was justified. Lord Templeman, who had dissented in the appellate committee, spoke twice to aid the legislative passage of the relevant clause in the Lords. A tribute should also be paid to the late Mr Robert Kiln of Kiln Underwriting Syndicate at Lloyd's, well-known liability underwriters, who had written to the government acknowledging the uncovenanted nature of the windfall. Mrs Bradley was herself, I understand, able to pursue her claim.

94. Another potential example, unchallenged, is provided by section 3 of the Compensation Act 2006, reversing the decision of the House of Lords in *Barker v Corus UK Ltd* [2006] 2 AC 572 and so making all those exposing to asbestos persons subsequently contracting mesothelioma liable jointly and severally for the whole of the damage: see *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 WLR 523. Section 16 provided that:

> "(3) Section 3 shall be treated as having always had effect.
>
> (4) But the section shall have no effect in relation to—
>
> (a) a claim which is settled before 3 May 2006 (whether or not legal proceedings in relation to the claim have been instituted), or
>
> (b) legal proceedings which are determined before that date."

There were also specific provisions enabling the variation of settlements or determinations made on or after 3 May 2006 and before the date (25 July 2006) on which the Act was passed.

95. The key to the present appeal is that, when the relevant policies were issued and the relevant employment occurred, there was no certainty whatever how the law might treat claims for pleural plaques if and when they ever emerged. The wave of asbestos-related claims which hit the USA in the 1970s and the United Kingdom in the 1980s was itself very largely unforeseen by everyone, and claims for pleural plaques and questions about their impact on liability policies decades after expiry were far over the horizon. It remained uncertain how the common law would treat such a phenomenon as pleural plaques, if and when this emerged as a source of potential claims, until the decision in *Rothwell* itself. It was entirely possible to regard pleural plaques, when they emerged as a potential basis of claim, as an injury (see e g per Lord Hope, para 39 in *Rothwell* and cf per Lord Hoffmann, paras 8-9 discussing the symptomless, but none the less serious lung damage which was the subject of *Cartledge v E Jopling & Sons Ltd* [1963] AC 758). It was possible to regard the bodily change that pleural plaques involve as constituting sufficient damage to give rise to a claim for personal injury, either by itself or when taken in conjunction with the anxiety resulting from knowledge of such plaques. A number of first instance courts had taken such a view, as did Holland J, as well as Smith LJ in the Court of Appeal, in *Rothwell* itself. Insurers cannot have been in any way certain of the position, and there is no suggestion that any insurer relied in any meaningful sense upon the common law position proving to be that which was ultimately established in *Rothwell*.

96. It is in these circumstances that the Scottish Parliament decided to enact the 2009 Act to replace the common law, as ultimately established by *Rothwell*, with a different, statutorily imposed result at which the common law might by itself always have arrived. No doubt it was for financial reasons that the Scottish Parliament decided on this approach, rather than on an approach which would have imposed the resulting cost on Scottish taxpayers generally. One can have reservations about a policy framed (as the Cabinet Secretary for Justice said on 13 December 2007) to avoid "turning our backs on those who have contributed to the nation's wealth", when those whose backs were intended to bear the resulting burden were not the nation at large to whose wealth the contribution had been made, but employers and insurers who had, on a proper understanding of the common law and the relevant policies, never contracted to bear such cost. Had the common law as established by *Rothwell* been clear when the relevant policies were written and the relevant employment occurred, or had it been possible for employers and/or insurers to show that they had in the meantime relied to a meaningful extent upon the law being held to be as it was ultimately held in *Rothwell*, the position would have looked very different. But under the circumstances as they are, I think that the Scottish Parliament's statutory intervention by the 2009 Act must on balance be regarded as legitimate, as within the scope of the judgment which it was entitled to make as to what was appropriate and as proportionate. I therefore agree that the appeal should be dismissed so far as it concerns compatibility of the 2009 Act with the Convention.

97. *Common law review:* All that I would add to what is said by Lord Hope and Lord Reed is that I question whether irrationality as a ground of review at common law is confined as closely to purpose as Lord Reed appears to regard it at the conclusion of his para 143. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock said of irrationality in the *Wednesbury* sense, that it "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". There can be decisions - to take a familiar extreme example, a blatantly discriminatory decision directed at red-headed people - where, irrespective of any limitation on the purposes for which the decision-maker might act, a court would regard what has been done as irrational, because of the way in which the decision operated. If a devolved Parliament or Assembly were ever to enact such a measure, I would have thought it capable of challenge, if not under the Human Rights Convention, then as offending against fundamental rights or the rule of law, at the very core of which are principles of equality of treatment.

LORD REED

98. I gratefully adopt Lord Hope's account of the background to this appeal. Three important issues are raised. The first is whether the Damages (Asbestos-related Conditions) (Scotland) Act 2009 is incompatible with the Convention rights of insurers who are affected by it, as guaranteed by article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("A1P1"). If so, it follows that the Act is outside the legislative competence of the Scottish Parliament, by virtue of section 29(2)(d) of the Scotland Act 1998, and is not law. The significance of this issue is not confined to Scotland, since similar provisions are contained in the Damages (Asbestos-related Conditions) Act (Northern Ireland) 2011. Accordingly, in addition to the submissions made on behalf of the appellants, the Lord Advocate representing the Scottish Ministers, and the third to tenth respondents, there were also written interventions on this issue by the Attorney General for Northern Ireland and the Northern Ireland Department of Finance and Personnel.

99. The second issue is of wider significance. It is whether the 2009 Act is susceptible to review by the courts under the common law as an irrational exercise of legislative authority. Since such an issue could in principle arise in relation to any legislation enacted by any of the devolved legislatures, its constitutional importance is apparent. Submissions were made on this issue not only on behalf of the appellants, the Lord Advocate, the Advocate General for Scotland representing the United Kingdom Government, and the third to tenth respondents, but also by the Counsel General for Wales on behalf of the First Minister of Wales.

100. The third issue is one of importance in Scottish public law. It concerns the circumstances in which, in judicial review proceedings in Scotland, a person may be granted leave to take part in the proceedings as a person "directly affected by any issue raised". This issue arises in relation to the third to tenth respondents, who are individuals who have been diagnosed with pleural plaques, and whose cross-appeal on this matter was supported by the Lord Advocate. There was also a written intervention on this issue by Friends of the Earth Scotland.

The effect of the 2009 Act

101. In order to decide whether the 2009 Act constitutes an interference with the appellants' possessions for the purposes of A1P1, it is necessary first to consider what the Act does. Section 1 provides:

> "(1) Asbestos-related pleural plaques are a personal injury which is not negligible.
>
> (2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.
>
> (3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.
>
> (4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries."

The effect of section 1 is to reverse, in relation to Scotland, the decision of the House of Lords in *Rothwell* v *Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] AC 281 that asymptomatic pleural plaques do not constitute actionable harm. Although that was a decision in an English appeal, it was based on legal principles which are common to Scots and English law, and there can be no doubt that a Scottish case proceeding on the same factual findings would be decided, at common law, in the same way. That position is altered by subsections (1) to (3), but only in respect of pleural plaques and not in respect of any other non-harmful physiological changes. Subsection (4) preserves all other aspects of the law governing liability in damages for personal injuries.

102. Section 2 is concerned with asymptomatic asbestos-related pleural thickening and asbestosis. These conditions resemble asymptomatic pleural plaques in that they do not cause impairment of a person's physical condition, but signify that the person has ingested asbestos fibres and is therefore at risk of serious disease. As a result, although they are not harmful in themselves, their diagnosis is likely to result in considerable anxiety. Section 2 is in identical terms to section 1, mutatis mutandis, and removes the common law barrier to the actionability of such conditions while preserving all other aspects of the law governing liability.

103. Section 3 is concerned with the law of limitation, and requires the period between the date when judgment was given in *Rothwell* and the date when the section came into force to be left out of account in the computation of time. That section has to be read together with section 4(2), which provides that sections 1 and 2 are to be treated for all purposes as having always had effect. Thus, whereas sections 1 and 2, if they stood alone, would create a cause of action as from the date when they came into force, the effect of section 4(2) is to deem them always to have had effect. That has the consequence that causes of action may be deemed to have arisen before the date when sections 1 and 2 came into force, and may be time-barred; but section 3 excludes from the computation of time the period between *Rothwell* and the date of entry into force of sections 1 and 2, during which the conditions in question were not actionable according to the law then in force. Section 4(2), by requiring sections 1 and 2 to be treated "for all purposes" as having always had effect, is also liable to affect the interpretation of contracts, including contracts of insurance, entered into before sections 1 and 2 came into force. Finally, it is relevant to note section 4(3), which excludes from the effect of sections 1 and 2 any claim which was settled before section 4(2) came into force, and any legal proceedings which were determined before that date. Claims which have been determined are therefore not affected by the Act.

104. Since the Act renders pleural plaques (and the analogous conditions mentioned in section 2) actionable, it has the effect of rendering persons liable in damages in respect of pleural plaques sustained as a result of their fault. The pleural plaques may have been sustained before or after the Act came into force. The fault, on the other hand, will have occurred long before the pleural plaques were sustained, the lapse of time between exposure to asbestos and the development and diagnosis of pleural plaques being measured in decades. Since the use of asbestos in industry has been virtually eliminated in this country, almost all claims brought as a result of the Act will relate to fault which occurred long before the Act came into force.

105. In practice, the persons who are rendered liable in damages as a result of the Act are in most cases employers in industries, such as shipbuilding, in which asbestos was formerly used. Most such employers were at all material times

insured against liability for bodily injury or disease sustained by their employees, such insurance being compulsory, for employers other than certain public bodies, in terms of the Employers' Liability (Compulsory Insurance) Act 1969. The 2009 Act may thus have the effect of rendering insurers liable to indemnify employers under policies of employers' liability insurance, depending in any individual case upon the interpretation of the policy. Furthermore, where such an employer has become insolvent or has been wound up, its rights against the insurer in respect of the liability vest in the person to whom the liability was incurred, by virtue of the Third Parties (Rights against Insurers) Act 1930. Subsequent to the enactment of the 2009 Act, the Third Parties (Rights against Insurers) Act 2010 has in addition made provision for such a person to bring proceedings directly against the insurer, without having first established the liability of the insured.

106. As a result of this statutory framework, and the "step-in" clauses normally included in the relevant policies of insurance, it is in reality insurers rather than the insured employers who generally respond to claims, negotiate settlements, conduct or compromise legal proceedings, and assume liability for the payment of any sums which may be found or agreed to be due. In addition, it is not uncommon, in industries such as shipbuilding, for the former employers of persons exposed to asbestos to be in liquidation, or to have been struck off the Register of Companies. For all these reasons, many if not most legal proceedings on behalf of former employees are in reality directed against the insurers. The *Rothwell* case was itself litigated by insurers; and the 2009 Act is designed to deprive them of the fruits of their victory.

Article 1 of the First Protocol

107. A1P1 in substance guarantees the right of property. In its judgment in the case of *Sporrong and Lönnroth* v *Sweden* (1982) 5 EHRR 35, para 61, the European Court of Human Rights analysed A1P1 as comprising three distinct rules. The first is a rule of a general nature, set out in the first sentence of the first paragraph, which enunciates the principle of the peaceful enjoyment of property ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions"). The second is the rule contained in the second sentence of the first paragraph, which covers deprivation of possessions and subjects it to certain conditions ("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 third rule, stated in the second paragraph, is an explicit recognition that states are entitled, amongst other things, to control the use of property in accordance with the general interest. The Strasbourg court also observed in its *Sporrong and Lönnroth* judgment that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable. Those observations were repeated by the court in its judgment in the case of *James* v *United Kingdom* (1986) 8 EHRR 123, para 37, where it added

that the three rules are not distinct in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property, and should therefore be construed in the light of the general principle enunciated in the first rule. These statements have been reiterated many times in the subsequent case law of the court.

108. Assessment of whether there has been a violation of A1P1 thus involves consideration of whether a "possession" exists, whether there has been an interference with the possession, and, if so, the nature of the interference: whether, in particular, it constitutes a deprivation of the possession falling within the second rule, or a control on use falling within the third rule, or falls within the more general principle enunciated in the first rule. Given that the second and third rules are only particular instances of interference with the right guaranteed by the first rule, however, the importance of classification should not be exaggerated. Although, where an interference is categorised as falling under the second or third rule, the Strasbourg court will usually consider the question of justification under reference to the language of those specific provisions of A1P1, the test is in substance the same, however the interference has been classified. If an interference has been established, it is then necessary to consider whether it constitutes a violation. It must be shown that the interference complies with the principle of lawfulness and pursues a legitimate aim by means that are reasonably proportionate to the aim sought to be achieved. This final question focuses upon the question whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (*Sporrong and Lönnroth*, para 69). In that regard, the Strasbourg court accepts that a margin of appreciation must be left to the national authorities.

The status of "victim"

109. The text of the guarantee makes clear that it can be relied upon by either a natural or a legal person, but in either case an application can be made to the Strasbourg court only by a person "claiming to be the victim of a violation": article 34 of the Convention. That requirement is reflected at a domestic level in section 7(7) of the Human Rights Act 1998, and also in section 100(1) of the Scotland Act, which provides that the Act does not enable a person (other than a law officer) to rely on any of the Convention rights in any proceedings unless he would be a victim for the purposes of article 34. In reliance upon that provision, counsel for the Lord Advocate, and counsel for the third to tenth respondents, submitted that the appellants could not rely upon A1P1 in these proceedings, since they were not affected directly and personally by the 2009 Act so as to qualify as victims of an interference with their possessions.

110. This argument had two related aspects. The first was that since any effect which the Act might have upon the appellants was consequential upon the effect which it had upon their insured, it followed that the true victim, if any, was the insured rather than the insurer. The second aspect of the argument was that the effect, if any, of the 2009 Act upon the appellants depended in any event upon its application in individual cases. Unless and until a liability arising under the Act was established against an insured wrongdoer, and that liability was thereafter held to fall within the ambit of a policy of insurance written by an individual appellant, it could not be said that any of the appellants was affected by the Act.

111. I find the argument unpersuasive. It is necessary to bear in mind in the first place that the Convention is concerned with the reality of a situation rather than its formal appearance, so as to ensure that it guarantees rights that are practical and effective. The interpretation of the concept of a "victim" is correspondingly broad: as the Strasbourg court has observed, an excessively formalistic interpretation of that concept would make protection of the rights guaranteed by the Convention ineffectual and illusory (*Lizarraga v Spain* (2004) 45 EHRR 1039, para 38). It is also well established that a person can claim to be a victim of a violation of the Convention in the absence of an individual measure of implementation: as the Strasbourg court stated in *Burden v United Kingdom* (2008) 47 EHRR 857, para 34, it is open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is a member of a class of people who risk being directly affected by it. Individuals have been held to be victims by virtue of legal situations which, for example, permitted corporal punishment in schools (*Campbell and Cosans v United Kingdom* (1980) 3 EHRR 531, para 116), conferred on children born out of wedlock inheritance rights inferior to those enjoyed by children born in wedlock (*Marckx v Belgium* (1979) 2 EHRR 330, para 27), restricted the provision of information concerning abortion clinics (*Open Door Counselling and Dublin Well Woman v Ireland* (1992) 15 EHRR 244, para 44), or prevented sisters who lived together from enjoying the same exemption from inheritance tax as married or same-sex couples (*Burden v United Kingdom*), even in the absence of the practical application to those individuals of the laws in question. On the other hand, where a person is not at risk of a violation of a Convention right unless and until a particular decision is taken, for example as to deportation, the person cannot claim to be a victim unless and until such a decision is in fact made (*Vijayanathan and Pusparajah v France* (Application Nos 17550/90 and 17825/91) (unreported) 27 August 1992, para 46).

112. In the present case, it is clear that the 2009 Act will, as a matter of practical reality, affect insurers as a class, as it is intended to do. Where employers were insured at the material time and the insurance policies now have to be interpreted as covering the conditions in question, the economic consequences of the Act will fall solely upon the insurers, and will not be secondary to economic consequences felt by their insured. For that reason, the suggested analogy with the relationship

between a company and its shareholders (under reference to such cases as *Agrotexim v Greece* (1995) 21 EHRR 250), or that between a mutual insurance company and its policyholders (under reference to the admissibility decision of the European Commission on Human Rights in *Wasa Liv Ömsesidigt v Sweden* (Application No 13013/87) (unreported) 14 December 1988), does not hold good. In addition, if the insurers cannot challenge the Act in the present proceedings, it is uncertain whether there are any other proceedings in which their rights under A1P1 can be protected. It is difficult to see how the A1P1 rights of an insurer could be asserted in proceedings brought under the Act against the insured, since the court would not be concerned in such proceedings with the effect upon a third party of an award of damages against the insured. There may be a question whether the validity of the Act could be determined in any subsequent proceedings for indemnification brought against the insurer, where the issue would be the interpretation of the insurance policy. In these circumstances, it would in my opinion be mistaken to deny the appellants the status of victims on the basis that they are not directly affected by the Act: so restrictive an interpretation of article 34 would run counter to the object of the Convention in general and article 34 in particular.

Interference with possessions

113. As I have explained, the 2009 Act has the effect of imposing a liability in damages upon employers and others who wrongfully exposed individuals to asbestos, causing them to sustain one of the conditions mentioned in the Act. Where the employer or other wrongdoer was insured, the Act consequently imposes a corresponding liability in indemnification upon the insurer, provided such liability is consistent with the interpretation of the contract of insurance which is applicable in any particular case. Subject to that proviso, therefore, the practical effect of the Act upon insurers is to alter the effect of insurance contracts by bringing within their scope conditions which were not previously covered. The liabilities of the insurers under the relevant contracts are thereby increased. The premiums payable under the relevant contracts cannot now be increased to reflect these liabilities, as the periods of cover expired long ago. The question which arises is whether this situation constitutes an interference with possessions within the meaning of A1P1, and, if so, how the interference should be categorised by reference to the three rules identified by the Strasbourg court.

114. 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.

115. It may be more difficult to categorise this interference in terms of the three rules identified by the Strasbourg court. It is not entirely clear from the Strasbourg jurisprudence whether the exposure of an insurance company to additional contractual liabilities, and consequent costs, should be characterised as a deprivation of possessions or a control on their use, to be examined solely under the second or third rule. As I have explained, however, those rules are only particular instances of interference with the right to peaceful enjoyment of property guaranteed by the general rule set out in the first sentence of A1P1. The question which then arises is whether the interference with the appellants' property rights is compatible with that general rule. I note that a similar approach was adopted by the Strasbourg court in the case of *Bäck v Finland* (2004) 40 EHRR 1184, para 58, which also concerned legislation that affected pre-existing contractual arrangements, with financial consequences for the applicant.

The lawfulness of the interference

116. The Strasbourg court has often said that the first and most important requirement of A1P1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful (see, for example, *Iatridis v Greece* (1999) 30 EHRR 97, para 58). In this context, as elsewhere in the Convention, the concept of "law" does not merely require the existence of some domestic law, but requires it to be compatible with the rule of law (see eg *James v United Kingdom*, para 67). In reliance upon that principle, it was argued on behalf of the appellants that the 2009 Act was incompatible with the rule of law by reason of its retroactive effects, which were destructive of legal certainty.

117. Counsel for the Lord Advocate stoutly denied that the Act was retroactive in its effects, but this appears to me to be an untenable position. By rendering actionable conditions which have a latency period of twenty years or so, the Act has for the first time made employers (and possibly others) liable in damages for conduct in the past which has caused such conditions. Furthermore, by doing so, and a fortiori by deeming such conditions always to have constituted actionable damage, the Act is designed to render insurers liable to indemnify their insured in respect of liabilities for damage of a kind which, on a correct understanding of the law as it then stood (as subsequently established in *Rothwell*), was not actionable at the time when the relevant policies were written or during the period of cover. These are retroactive effects: the legal consequences of what was done in the past will be governed not by the law in force at that time but by an Act passed many years later.

118. The concept of the rule of law is of fundamental importance to the Council of Europe, as appears from its Statute, in particular the Preamble and Article 3. It is endorsed in the Preamble to the Convention, and the Strasbourg court has described it as being inherent in all the articles of the Convention (*Malama* v *Greece*, (Application No 43622/98) (unreported) 1 March 2001, para 43). The concept has been variously interpreted: most notably, in this country, by Lord Bingham (*The Rule of Law*, 2010). It has also recently been considered by the European Commission for Democracy through Law, better known as the Venice Commission, which is the Council of Europe's advisory body on constitutional matters. Its *Report on the Rule of Law*, adopted in March 2011, employed Lord Bingham's definition of the rule of law:

> "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (para 36).

The Commission identified legal certainty as an aspect of the rule of law, and noted that legal certainty requires that the law be accessible and foreseeable in its effects. It also observed:

> "Legal certainty requires that legal rules are *clear and precise*, and aim at ensuring that situations and legal relationships remain foreseeable. *Retroactivity* also goes against the principle of legal certainty, at least in criminal law (article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests" (para 46).

119. The Strasbourg court has itself interpreted conformity to the rule of law as requiring, amongst other things, that the relevant domestic law must be adequately accessible and sufficiently precise to be foreseeable in its effects (*Lithgow v United Kingdom* (1986) 8 EHRR 329, para 110), and that it should not operate in an arbitrary manner (*Hentrich v France* (1994) 18 EHRR 440, para 42). The criteria of accessibility and foreseeability are not absolute; nor is the prohibition of arbitrariness incompatible with the existence of discretion. The court has often said that the effect of these requirements in a given situation depends upon the particular circumstances (see eg *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49).

120. In the criminal sphere, the Convention allows only a limited scope for retroactive legislation: the principles encapsulated in the maxim nullum crimen

sine lege, nulla poena sine lege are reflected in article 7. The position is different in the civil sphere. Changes in the law, even if resulting from prospective legislation or judicial decisions, will frequently and properly affect legal relationships which were established before the changes occurred. Changes in family law, for example, are not applicable only to families which subsequently come into existence, but affect existing families, even although the changes may not have been foreseeable at the time when individuals married or had children. Similarly, a person who buys a house, or a company that employs staff, cannot expect the law governing the rights and responsibilities of homeowners or employers to remain unchanged throughout the period of ownership or employment. The same point could be made in respect of other types of right and obligation of a civil character. As Lon Fuller observed in *The Morality of Law* (revised ed 1969), p 60:

> "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."

121. A distinction might, however, be drawn between laws which alter prospectively the rights and obligations arising from pre-existing legal relationships, and laws which alter such rights and obligations retrospectively. To the extent that laws of the latter kind may undermine legal certainty more severely, they may be more difficult to justify, but there can be no doubt that justification for such laws sometimes exists. It may exist, in particular, when the legislation has a remedial purpose. As Fuller remarked, at p 53:

> "It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces."

As I shall explain, this point has also been noted by the Strasbourg court. In particular, because judicial decisions normally operate retrospectively in accordance with the declaratory theory of adjudication, such decisions may upset existing expectations or arrangements, as Lord Nicholls of Birkenhead observed in *In re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, paras 6 to 8:

> "… from time to time court decisions on points of law represent a change in what until then the law in question was generally thought to be. This happens most obviously when a court departs from, or an appellate court overrules, a previous decision on the same point of law … A court ruling which changes the law from what it was

> previously thought to be operates retrospectively as well as prospectively … People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can therefore have disruptive and seemingly unfair consequences."

In such circumstances, retrospective legislation which restores the position to what it was previously understood to be may not be incompatible with legal certainty or the rule of law.

122. The Strasbourg court has recognised that the fact that legislation in the civil sphere has retroactive effects does not necessarily mean that it is incompatible with the rule of law or the Convention. In relation to A1P1, in particular, the court has considered retroactive effects in its assessment of proportionality rather than when considering the lawfulness of the interference, and has found such effects to be objectionable only in particular circumstances where they imposed an "individual and excessive burden" upon the applicant. In the case of *Mellacher v Austria* (1989) 12 EHRR 391, for example, which concerned the introduction of rent controls that were applicable to existing leases, the court stated (para 51), in its consideration of proportionality, that in remedial social legislation, and in particular in the field of rent control, 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. In the case of *Zielinski v France* (1999) 31 EHRR 532, which concerned a retrospective change in employment law and was brought under article 6(1), the court stated (para 57) that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute. In the case of *Bäck v Finland*, which concerned legislation enabling courts to authorise arrangements under which a debtor's pre-existing obligations to his creditors were modified, the court stated (para 68) that neither the Convention nor its Protocols preclude the legislature from interfering with existing contracts.

123. In the present case, section 4(3) of the 2009 Act expressly excludes from the effect of sections 1 and 2 any claim which was settled before section 4(2) came into force, and any legal proceedings which were determined before that date. The effect of the Act is therefore restricted to new claims, and outstanding claims which had not been disposed of. No point is taken by the appellants in relation to the effect of the Act upon any pending proceedings. In those circumstances, and having regard to the Strasbourg authorities which I have mentioned, the fact that the Act may alter the continuing effects of insurance contracts entered into in the past does not appear to me necessarily to offend against the rule of law as reflected

in A1P1. Whether it renders the Act incompatible with A1P1 therefore turns upon an assessment of proportionality. I shall return to it in that context.

The aim of the interference

124. An interference with possessions requires to be justified as being necessary in the public or general interest. In that regard, the Strasbourg court allows national authorities a wide margin of appreciation in implementing social and economic policies, and will respect their judgment as to what is in the public or general interest unless that judgment is manifestly without reasonable justification (*James v United Kingdom,* para 46). At the domestic level, courts require to be similarly circumspect, since social and economic policies are properly a responsibility of the legislature, and policy-making of this nature is amenable to judicial scrutiny only to a limited degree.

125. In the present case, the facts and policies underlying the Scottish Parliament's assessment that the provisions of the 2009 Act were necessary in the general interest are reasonably clear. Pleural plaques, and the other conditions mentioned in the Act, are pathological changes in the body. As Lord Hope observed in the *Rothwell* case, para 38, they may be described as a disease or an injury. Although they are not in themselves harmful to health, their presence signifies that the person has ingested asbestos fibres and is at appreciable risk of developing a serious disease and suffering a premature death. In consequence, the diagnosis of those conditions can cause a great deal of worry. The conditions are usually a consequence of fault on the part of employers, asbestos having long been known to be harmful to health. Asbestos-related conditions are relatively prevalent in parts of Scotland where industries using asbestos were concentrated. For a period of about 20 years prior to *Rothwell*, compensation was paid by insurers to persons who had sustained pleural plaques as a result of the fault of their employers. Against that background, the Scottish Parliament considered it appropriate, as a matter of social policy, to legislate to reverse the *Rothwell* decision, so as to ensure that compensation continued to be paid to persons in that position. It cannot be said by a court that the Parliament's judgment that that was in the public interest was manifestly unreasonable.

The proportionality of the interference

126. In order for an interference with possessions to be compatible with A1P1, it must not only be lawful and in the general interest, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This involves an assessment of whether a fair balance has been struck between the demands of the general interest of the community and

the requirements of the protection of the individual's fundamental rights: the individual should not be required to bear an individual and excessive burden (*James v United Kingdom*, para 50). In making that assessment at the international level, the Strasbourg court has allowed national authorities a wide margin of appreciation (see eg *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1093, para 75*).*

127. In the present case, emphasis was placed by counsel for the appellants upon the retroactive effects of the 2009 Act. Insurers would have to meet claims in respect of conditions which were not actionable at the time when the policies were written and were not in contemplation when the premiums were set. Reference was made to Strasbourg cases concerned with legislation which extinguished pre-existing claims which were the subject of pending proceedings, including *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301 and *Draon v France* (2005) 42 EHRR 807. The imposition of a liability with retroactive effect was, it was suggested, the mirror image of such cases. If the Scottish Parliament considered that there was a compelling reason for the payment of compensation, such compensation could be paid out of public funds, as under the Pleural Plaques Former Claimants Payment Scheme introduced in England and Wales, rather than the burden being placed on insurers. It was pointed out that the insurers had not themselves been at fault, and it was argued that the fault of their insured did not in itself make it proportionate to require the insurers to indemnify them.

128. The assessment of proportionality requires careful consideration of the particular facts. Considering the specific circumstances of this case, one aspect of importance is that, at the time when insurers entered into contracts of the type which are affected by this legislation, it could not have been predicted with confidence whether asymptomatic pleural plaques and other analogous conditions would be treated by the law as actionable or not. It would be artificial to maintain that insurers provided insurance in the 1970s or 1980s on the basis of the law as it was subsequently established in *Rothwell*. Even at the time of the *Rothwell* case, its outcome could not have been predicted with certainty: the argument which was ultimately rejected by the House of Lords was sufficiently attractive to have persuaded a number of judges in the lower courts.

129. A second relevant aspect is that pleural plaques were regarded as actionable for about 20 years prior to the decision in *Rothwell*. Courts awarded damages for them, and employers and their insurers settled many claims. Insurers treated such claims as one of the risks which they had underwritten. The 2009 Act does not require them to do any more than that. In that sense, it can be regarded as preserving the status quo which existed before a correct understanding of the legal position was established as a result of the *Rothwell* litigation.

130. It is of course true that the Scottish Parliament could have opted to compensate individuals affected by pleural plaques out of public funds rather than seeking to place a burden upon insurers. The scheme operating in England and Wales, however, compensates only persons who had begun but not resolved a pleural plaques claim at the time of the *Rothwell* decision, and the compensation available is restricted to a payment of £5,000. Those limitations reflect an assessment that compensation should be paid out of public funds, and of how a fair balance should then be struck between the interests of those individuals who were affected by the *Rothwell* decision and the other demands on the public purse. The fact that that assessment was made in England and Wales does not entail that the same assessment ought to have been made in Scotland; nor does the fact that a publicly-funded scheme would avoid any burden being placed on insurers entail that a scheme which imposes such a burden is disproportionate. As the Strasbourg court observed in *James v United Kingdom*, para 51, in relation to a similar argument:

> "This amounts to reading a test of strict necessity into the article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way."

131. The concept of the margin of appreciation reflects a recognition on the part of the Strasbourg court that in certain circumstances, and to a certain extent, national authorities are better placed than an international court to determine the outcome of the process of balancing individual and community interests. At the domestic level, the courts also recognise that, in certain circumstances, and to a certain extent, other public authorities are better placed to determine how those interests should be balanced. Although the courts must decide whether, in their judgment, the requirement of proportionality is satisfied, there is at the same time nothing in the Convention, or in the domestic legislation giving effect to Convention rights, which requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion. As Lord Bingham of Cornhill observed in *Brown* v *Stott* 2001 SC (PC) 43, 58-59, [2003] 1 AC 681, 703:

> "Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies."

The intensity of review involved in deciding whether the test of proportionality is met will depend on the particular circumstances. As Lord Hope explained in *R* v *Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 at p 381, the relevant circumstances include whether, as in the present case, the issue lies within the field of social or economic policy.

132. As I have explained, it is at the stage of considering proportionality that the Strasbourg court has generally taken account of the retroactive effects of legislative changes. In *Bäck* v *Finland*, for example, the court stated (para 68) that neither the Convention nor its Protocols preclude the legislature from interfering with existing contracts; that a special justification was required for such interference; and that, in the circumstances of that case, there were special grounds of sufficient importance to warrant it. The court attached importance, in that regard, to the nature of the legislation in question, observing that in remedial social legislation 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. The court also attached significance to the fact that the applicant had, at the time of entering into the contract in question, accepted a risk of financial loss (para 62). Other Strasbourg cases, such as *The National & Provincial Building Society, The Leeds Permanent Building Society and The Yorkshire Building Society v United Kingdom* (1997) 25 EHRR 127 and *OGIS-Institut Stanislas, OGEC St Pie X et Blanche de Castille v France*, (Application Nos 42219/98 and 54563/00) (unreported) May 2004, afford illustrations of situations where retrospective legislation designed to remedy a problem perceived as resulting from a judicial decision was held to be justified.

133. The present case also is concerned with remedial social legislation, the 2009 Act being designed to remedy the social problem perceived as resulting from the *Rothwell* decision: a problem which, if it were to be fully resolved by reversing that decision, so that insurers would continue to accept claims in respect of pleural plaques and related conditions as they had done for the previous twenty years, necessitated a remedy which altered the effect of existing contracts of insurance with retrospective effect. In addition, as I have explained, that decision could not realistically be regarded as representing the basis upon which the contracts in question were entered into.

134. In the light of those specific circumstances, I have reached the conclusion that, notwithstanding its retroactive effects, the 2009 Act cannot be regarded as having failed to strike a reasonable balance between the rights of insurers under A1P1 and the general interest in ensuring that persons suffering from pleural plaques and related conditions should continue to receive compensation. It follows that the challenge to the validity of the Act on the basis of A1P1 must be rejected.

Review on common law grounds – introduction

135. The appellants maintain in their pleadings that, in passing the 2009 Act, the Scottish Parliament acted in a manner which was unreasonable, irrational and arbitrary, and that the Act should therefore be quashed by the court. The Lord Ordinary accepted that Acts of the Scottish Parliament were subject to judicial review on the ground of irrationality, but considered that the scope for review could be no wider, and might be narrower, than that permitted in respect of United Kingdom subordinate instruments carrying direct Parliamentary approval, as explained by Lord Bridge of Harwich in *R* v *Secretary of State for the Environment, Ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at p 597: that is to say, an Act of the Scottish Parliament was not open to challenge on the ground of irrationality short of the extremes of bad faith, improper motive or manifest absurdity. He added that even if he had taken a contrary view, he would not in any event have closed the door on the possibility that the courts might require to intervene in defence of the rule of law and the fundamental rights and liberties of the subject. The judges of the First Division considered that review for irrationality was not apt in the context of the 2009 Act because the aspects of the Act whose rationality was challenged were essentially political questions which a court would not enter upon. The court appears therefore to have considered that whether an Act of the Scottish Parliament could be judicially reviewed on the ground of irrationality would depend upon an assessment of the justiciability of the issue raised in the particular case. They added that the court might well hold itself entitled to intervene in the event of a deliberate misuse of power, or if the Scottish Parliament were to take a measure of the kind contemplated by Lord Steyn in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 102.

Discussion

136. The power of the Scottish Parliament to make laws derives from section 28(1) of the Scotland Act, which provides:

> "(1) Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament."

Section 29, so far as material, and as amended by the Treaty of Lisbon (Changes in Terminology) Order 2011, provides:

> "(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.
>
> (2) A provision is outside that competence so far as any of the following paragraphs apply—
>
> (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
>
> (b) it relates to reserved matters,
>
> (c) it is in breach of the restrictions in Schedule 4,
>
> (d) it is incompatible with any of the Convention rights or with EU law,
>
> (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland."

The language of section 29 does not imply that the matters listed there are necessarily exhaustive of the grounds on which Acts of the Scottish Parliament may be challenged.

137. In *Whaley* v *Lord Watson* 2000 SC 340 Lord President Rodger, in rejecting the approach adopted by the Lord Ordinary in that case to the relationship between the courts and the Scottish Parliament, made the following observations at pp 348-349:

> "The Lord Ordinary gives insufficient weight to the fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work

> within the scope of those powers. If it does not do so, then in an appropriate case the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle, therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law.
>
> …
>
> Some of the arguments of counsel for the first respondent appeared to suggest that it was somehow inconsistent with the very idea of a parliament that it should be subject in this way to the law of the land and to the jurisdiction of the courts which uphold the law. I do not share that view. On the contrary, if anything, it is the Westminster Parliament which is unusual in being respected as sovereign by the courts. And, now, of course, certain inroads have been made into even that sovereignty by the European Communities Act 1972. By contrast, in many democracies throughout the Commonwealth, for example, even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments."

138. As the Lord President's remarks make clear, the Scottish Parliament is not a sovereign parliament in the sense that Westminster can be described as sovereign: its powers were conferred by an Act of Parliament, and those powers, being defined, are limited. It is the function of the courts to interpret and apply those limits, and the Scottish Parliament is therefore subject to the jurisdiction of the courts.

139. Questions as to the limits of the powers of the Scottish Parliament, and as to the lawfulness of its Acts, may come before different courts in different ways. They may, for example, be raised in the course of an appeal to the High Court of Justiciary, as in *Martin v HM Advocate* [2010] UKSC 10, 2010 SC (UKSC) 40, where a challenge was made to an Act of the Scottish Parliament in an appeal from the Sheriff Court. They may be raised in the lower courts and referred to the Court of Session or the High Court of Justiciary under the provisions of Schedule 6 to the Scotland Act, as for example in *A v Scottish Ministers* [2001] UKPC D 5, 2002 SC (PC) 63, where the question arose in the course of civil proceedings in the Sheriff Court. They may be raised by way of an application to the Court of Session for judicial review, as for example in *Whaley v Lord Advocate* [2007] UKHL 53, 2008 SC (HL) 107 and in the present case. There can be no doubt that questions as to whether the Scottish Parliament has acted within its powers fall within the scope of

the Court of Session's supervisory jurisdiction, as defined in *West v Secretary of State for Scotland* 1992 SC 385 at pp 412-413:

> "1. The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.
>
> 2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires."

140. It cannot however be assumed that the grounds upon which the lawfulness of an Act of the Scottish Parliament may be reviewed include all, or any, of the grounds upon which the Court of Session may exercise its supervisory jurisdiction in other contexts. In *West v Secretary of State for Scotland*, Lord President Hope referred at p 397 to:

> "… the distinction which must be made between the question of competency as to whether a decision is open to review by the Court of Session in the exercise of its supervisory jurisdiction, and the substantive grounds on which it may do so. The extent of the supervisory jurisdiction is capable of a relatively precise definition, in which the essential principles can be expressed. But the substantive grounds on which that jurisdiction may be exercised will of course vary from case to case. And they may be adapted to conform to the standards of decision-taking as they are evolved from time to time by the common law."

As that dictum makes clear, the grounds of review must be related to the nature of the power whose exercise is under review.

141. The approach adopted by the parties and the interveners in their submissions in the present case, like that of the Lord Ordinary and the Inner House, focused primarily upon the question whether Acts of the Scottish Parliament should be classified as primary legislation, in which case it would follow (so ran the argument) that they were immune from challenge save in exceptional circumstances of the kind discussed in *Jackson*, or as falling into some intermediate category of their own, possessing certain characteristics of primary

legislation but also certain characteristics of secondary legislation, in which case it would follow (so ran the argument) that they were subject to review on similar grounds to those applicable to secondary legislation. This approach appears to me to involve a number of difficulties. In the first place, classification of legislation as primary or secondary is not determinative of its susceptibility to judicial review. Orders in Council made under the Royal Prerogative, for example, are a form of primary legislation, but are subject to review (*Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453). Secondly, it has never been necessary to consider whether the immunity of Acts of the Westminster Parliament from judicial review is attributable only to the sovereignty of Parliament, or whether they would be immune from such review in any event for other reasons. The question has arisen in the past in relation to overseas legislatures established by Parliament during the nineteenth century, but the context was not comparable to the devolution of legislative power within the United Kingdom, and the cases preceded modern developments in judicial review. Classification is, at best, an indirect way of approaching what seems to me to be the underlying question, which is the extent to which judicial review, having regard to its nature and purpose, can apply to the law-making functions of a devolved legislature. I prefer to approach that question directly.

142. Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits. The extent of the courts' responsibility in relation to a particular exercise of power by a public authority necessarily depends upon the particular circumstances, including the nature of the public authority in question, the type of power being exercised, the process by which it is exercised, and the extent to which the powers of the authority have limits or purposes which the courts can identify and adjudicate upon.

143. If, for example, a public authority's powers are so widely drawn that it is in principle free to decide for itself what considerations are relevant to its decision-making, the courts cannot then review its decisions as having been based on irrelevant considerations or as having failed to have regard to relevant considerations, except to the limited extent to which any constraints on its freedom might be implied, for example in order to protect fundamental rights or the rule of law. Equally, if a public authority's powers are such that it is free to decide for itself for what purposes they should be exercised, the courts cannot then review its decisions on the basis that the powers were used arbitrarily or for an improper purpose, except again to the limited extent to which any constraints might be implied. Furthermore, in relation to a public authority with such wide powers, the

scope for applying irrationality as a ground of review is correspondingly limited, since that ground is predicated upon the courts' ability to determine whether a given decision lies within the range of decisions which are open to a rational decision-maker, proceeding upon a proper understanding of the purposes for which the power in question may be exercised and the circumstances which are relevant to its exercise. To the extent that the decision-maker can itself determine those purposes and circumstances, the range of decisions which are reasonably open to it is correspondingly widened, subject again to such fundamental constraints as may be implied.

144. In addition to being able to identify the limits and purposes of the powers in question, the courts must also be able to adjudicate upon them. If the question which arises is not justiciable – that is to say, is not suitable for the courts to decide, having regard to their constitutional function – then it cannot be made the subject of judicial review.

145. Considering the Scottish Parliament in the light of these general observations, it is necessary to examine the extent to which its powers have limits or purposes which the courts can identify and adjudicate upon. As in the case of any other statutory body, the court determines the scope of the powers of the Scottish Parliament by applying the principles of statutory interpretation to the relevant provisions, taking into account the nature and purpose of the statute under consideration. The purpose of the Scotland Act, as stated in its long title, was the establishment of a Scottish Parliament and Administration and other changes in the government of Scotland. It established a democratically elected legislature having the power to make laws, to be known as Acts of the Scottish Parliament. Such laws require to be made following procedures designed to ensure democratic scrutiny, some aspects of which are prescribed by the Act. They also require Royal Assent. They can amend or repeal Acts of the United Kingdom Parliament so far as applying to Scotland.

146. As a result of the Scotland Act, there are thus two institutions with the power to make laws for Scotland: the Scottish Parliament and, as is recognised in section 28(7), the Parliament of the United Kingdom. The Scottish Parliament is subordinate to the United Kingdom Parliament: its powers can be modified, extended or revoked by an Act of the United Kingdom Parliament. Since its powers are limited, it is also subject to the jurisdiction of the courts. Within the limits set by section 29(2), however, its power to legislate is as ample as it could possibly be: there is no indication in the Scotland Act of any specific purposes which are to guide it in its law-making or of any specific matters to which it is to have regard. Even if it might be said, at the highest level of generality, that the Scottish Parliament's powers had been conferred upon it for the purpose of the good government of Scotland, that would not limit its powers (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)*, paras 50-51 per

Lord Hoffmann, paras 107-109 per Lord Rodger of Earlsferry, paras 128-130 per Lord Carswell). The Act leaves it to the Scottish Parliament itself, as a democratically elected legislature, to determine its own policy goals. It has to decide for itself the purposes for which its legislative powers should be used, and the political and other considerations which are relevant to its exercise of those powers.

147. In these circumstances, it appears to me that it must have been Parliament's intention, when it established the Scottish Parliament, that that institution should have plenary powers within the limits upon its legislative competence which were created by section 29(2). Since its powers are plenary, they do not require to be exercised for any specific purpose or with regard to any specific considerations. It follows that grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes, and which are designed to prevent such bodies from exceeding their powers or using them for an improper purpose or being influenced by irrelevant considerations, generally have no purchase in such circumstances, and cannot be applied. As a general rule, and subject to the qualification which I shall mention shortly, its decisions as to how to exercise its law-making powers require no justification in law other than the will of the Parliament. It is in principle accountable for the exercise of its powers, within the limits set by section 29(2), to the electorate rather than the courts.

148. Considerations of justiciability lead to the same conclusion. In the present case, for example, counsel for the appellants argued before the First Division that the decision to pass the 2009 Act was irrational because it placed responsibility on private parties to pay compensation to individuals with a benign and asymptomatic condition. The court responded, at para 88:

> "But decisions of that kind – the conferring of benefits on those who are perceived to be deserving and the manner of funding of such benefits – are essentially political questions which, absent any infringement of a Convention right, a court cannot and should not enter upon."

Similarly in *R* v *Secretary of State for the Environment, Ex p Nottinghamshire County Council* [1986] AC 240, Lord Scarman commented at p 247 that matters of political judgment were not for the judges. Law-making by a democratically elected legislature is the paradigm of a political activity, and the reasonableness of the resultant decisions is inevitably a matter of political judgment. In my opinion it would not be constitutionally appropriate for the courts to review such decisions on the ground of irrationality. Such review would fail to recognise that courts and legislatures each have their own particular role to play in our constitution, and that each must be careful to respect the sphere of action of the other.

149. There remains the question whether the court possesses the power to intervene, in exceptional circumstances, on grounds other than those specified in section 29(2): as, for example, if it were shown that legislation offended against fundamental rights or the rule of law. In their submissions, counsel for the Lord Advocate accepted that devolved legislation was subject to review on such grounds, which they categorised as constitutional review, in distinction from administrative review.

150. Fundamental rights and the rule of law are protected by section 29(2) of the Act, in so far as it preserves Convention rights. But, as Lord Steyn pointed out in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, para 27:

> "… the Convention is not an exhaustive statement of fundamental rights under our system of law. Lord Hoffmann's dictum (in *Ex p Simms*) applies to fundamental rights beyond the four corners of the Convention."

The question is therefore not of purely academic significance.

151. As I have said, the court determines the powers of the Scottish Parliament by applying the principles of statutory interpretation, taking into account the nature and purpose of the statute under consideration. One familiar principle of statutory interpretation is the principle of legality explained by Lord Hoffmann in *R* v *Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 at p 131, in the dictum to which Lord Steyn referred in the case of *Anufrijeva*:

> "Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

152. The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but

also that it cannot confer on another body, by general or ambiguous words, the power to do so. As Lord Browne-Wilkinson stated in *R* v *Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 at p 575:

> "A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect … the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament."

Lord Steyn said in the same case, at p 591:

> "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law."

153. The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *R v HM Advocate* [2002] UKPC D 3, 2003 SC (PC) 21, para 16, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390, para 11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted "bearing in mind the values which the constitutional provisions are intended to embody". That is equally true of the Scotland Act. Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law.

154. There is however no suggestion in the present case that the Scottish Parliament has acted in such a manner. That being so, and review for irrationality being excluded, it follows that the challenge to the validity of the 2009 Act on common law grounds must be rejected.

The standing of the third to tenth respondents

155. The third to tenth respondents are individuals who have been diagnosed with pleural plaques caused by negligent exposure to asbestos and have actions for

damages pending or in immediate contemplation. Their cause of action is based upon the provisions of the 2009 Act.

156. When the appellants' application for judicial review of the 2009 Act was presented, it came before the court in the usual way for a first order specifying the persons upon whom it required to be served. That order required service to be made upon the Scottish Ministers and the Advocate General for Scotland, but did not identify any other persons who might have an interest. The third to tenth respondents then sought leave to enter the process in accordance with Rule of Court 58.8(2), which provides that any person not specified in the first order as a person on whom service requires to be made, and who is "directly affected by any issue raised", may apply by motion for leave to enter the process. Following a contested hearing, leave was granted by Lord Uist. Answers to the petition for judicial review were then lodged on behalf of the third to tenth respondents. The appellants in turn amended their petition so as to add a plea that, the third to tenth respondents having no title or interest in the application, their answers should be repelled. An argument in support of that plea was advanced before the Lord Ordinary, who concluded that it had no merit. The plea was however upheld by the First Division. Their conclusion, that persons who would be deprived of a cause of action if the petition succeeded were not directly affected by any issue raised, is paradoxical. It might also be thought to be unfair: the appellants are entitled to challenge the legality of the 2009 Act because it may have the effect of requiring them to pay compensation to persons on whom it confers a cause of action, but those persons, who are liable to be deprived of their cause of action, are not permitted to be heard in response. It is necessary to examine how the court arrived at this perplexing result.

The approach of the Inner House

157. The court acknowledged that the phrase "any person … who is directly affected by any issue raised" comprehends a wide range of persons if read in isolation, but considered that its construction in the context of the rule of court was constrained by the substantive law on title and interest. A rule of court could not alter the substantive law, and therefore could not confer a title to sue or to defend on a person who did not otherwise have such a title. Under reference to a dictum of Lord Dunedin in the case of *D & J Nicol* v *Dundee Harbour Trustees* 1915 SC (HL) 7, the court concluded that the third to tenth respondents had no title or interest to defend.

158. The court also referred to the cases of *Zurich General Accident and Liability Insurance Co Ltd v Livingston* 1938 SC 582 and *Norwich Union Life Insurance Society v Tanap Investments UK Ltd* 2000 SC 515. In the *Zurich General Accident* case, the pursuers were an insurance company who brought

proceedings against their insured for declarator that they were entitled to avoid her policy of motor insurance. Persons who had been injured as a result of an accident which had occurred while the defender's car was being driven by a third party applied to be sisted as additional defenders, on the basis that the avoidance of the policy would deprive them of their statutory right to recover from the insurers any award of damages which they might obtain against the driver. They were held to be entitled to defend the proceedings, Lord Moncrieff commenting at p 590 that it seemed "quite unanswerable that a person, whose statutory right may be taken away by a process of law, should, before his statutory right is taken away, be entitled to be heard as a proper defender against the conflicting claim". In the *Norwich Union* case, the pursuers were creditors who held a security over property. Following the debtor's insolvency and the sale of the property, they brought proceedings against the debtor in which they sought the rectification of agreements under which they had advanced money to the debtor, so as to bring them within the scope of their security. Another creditor, who held a postponed security over the same property, sought to defend the proceedings on the basis that the rectification of the agreements would affect its own ranking. The court held that the postponed creditor was entitled to defend the proceedings if the rectification sought would adversely affect it. In the present case, the First Division distinguished these two cases as being cases where the person seeking to enter the process had an undisputed right which would be affected by the proceedings, whereas in the present case the validity of the legislation establishing the right was itself in issue.

Discussion

159. In considering the approach adopted by the Inner House, it is appropriate to begin by reminding oneself of the nature of an application to the supervisory jurisdiction of the court (in the context of public law: the following discussion is not concerned with applications made in relation to private bodies), and of how it differs from an ordinary action. Putting the matter broadly, in an ordinary action in private law the pursuer is seeking to vindicate his rights against the defender. The right on which the action is founded constitutes his title to sue. In proceedings of this kind, if a person who has not been convened as a defender wishes to be made an additional defender, that must be on the basis that his property or other rights are liable to be affected by the outcome. In that sense, he must have a title to defend the proceedings. That point is illustrated by the cases of *Zurich General Accident* and *Norwich Union* which were cited by the First Division. An application to the supervisory jurisdiction, on the other hand, is not brought to vindicate a right vested in the applicant, but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law.

160. The nature and implications of the distinction between these two types of procedure has become increasingly clear in modern times, as a result of three related developments. The first of these was the establishment of judicial review as a distinct form of procedure. Until 1985, the same forms of procedure were used in Scotland for applications to the supervisory jurisdiction as in other proceedings. In practice, since the remedies commonly sought were the reduction of the decision challenged, or a declarator of the legal position, and those remedies could only be obtained in an ordinary action commenced by summons, that form of procedure was commonly used. Reform was initiated by Lord Fraser of Tullybelton, who said in *Brown* v *Hamilton District Council* 1983 SC (HL) 1 at p 49 that it was for consideration whether there might not be advantages in developing special procedure in Scotland for dealing with questions in the public law area, comparable to the English prerogative orders; an observation which he repeated in *Stevenson* v *Midlothian District Council* 1983 SC (HL) 50 at p 59. Shortly afterwards the Working Party on Procedure for Judicial Review of Administrative Action was set up under the chairmanship of Lord Dunpark. Its report recommended the establishment of a form of procedure for judicial review, initiated by petition. That recommendation was implemented in 1985, when a new rule 260B was inserted into the Rules of Court 1965. Slightly amended, the provisions of that rule are now contained in Chapter 58 of the Rules of Court 1994.

161. The choice of a procedure initiated by petition rather than summons reflects the nature of an application to the supervisory jurisdiction. The object of a summons is to enforce the pursuer's legal right against a defender who resists it, or to protect a legal right which the defender is infringing. Reflecting its nature, a summons is addressed to the defender and is served as of right. If defences are not lodged within the time allowed, decree is normally granted as a matter of course. A petition, on the other hand, is an ex parte application addressed to the court, requesting it to exercise the jurisdiction invoked by the petitioner. It can only be served on other persons if the court grants a warrant to do so. In general, the petitioner is expected to seek a warrant for service on all persons who may have an interest in the matter, and a first order is then granted authorising such service, and allowing those persons, and any other persons having an interest, to lodge answers. In the case of judicial review procedure, in particular, rule 58.6 provides a form of petition, set out in form 58.6, which requires the petitioner to state the identity of the respondent (who will be the public authority responsible for the act, decision or omission to be reviewed), and the identity of any persons having an interest, who are to be named in the schedule for service. Even if the petition is unopposed, it will not be granted unless the court is satisfied that it is appropriate for it to exercise the relevant power in the manner requested.

162. The fact that the application is made by petition is thus not a mere procedural technicality but reflects an aspect of applications to the supervisory jurisdiction which is of great practical significance: an applicant for judicial

review, unlike the pursuer in an ordinary action, does not need to assert any right to a remedy. One corollary is that the court can review a decision which does not affect the legal rights of the applicant in any way. Another is that the court can apply grounds of review which require the decision to comply with standards which create no legal rights in the applicant.

163. The second important development was the decision in the case of *West,* which provided clarification of the nature of the supervisory jurisdiction, the need for which had become apparent following the introduction of rule 260B. The opinion delivered by Lord President Hope made clear, in particular, the essential difference between the nature and purpose of the court's supervisory jurisdiction, on the one hand, and its jurisdiction to adjudicate on disputed questions of right, on the other.

164. The third development was a substantial growth in the number of applications to the supervisory jurisdiction following the introduction of the procedure for judicial review. This has resulted in the development of public law as an area of practice and academic study. In consequence, an area of the law which had previously been relatively neglected has become the subject of intensive consideration, and legal doctrine has been examined, criticised and refined.

165. Long before these developments, the question of standing was considered in a variety of contexts which would now be regarded as falling within the area of public law, although they were not understood in that way at the time. One context in which litigation arose in the nineteenth and early twentieth centuries concerned ultra vires actings by public corporations. The case of *D & J Nicol* v *Dundee Harbour Trustees* was one such case. It was decided by applying the ultra vires doctrine which had previously been developed in company law, and standing was confined to persons who were considered to be in an analogous position to shareholders. Remarks made in that case by Lord Dunedin have had an enduring influence. He said, at pp 12-13:

> "By the law of Scotland a litigant, and in particular a pursuer, must always qualify title and interest. Though the phrase 'title to sue' has been a heading under which cases have been collected from at least the time of Morison's Dictionary and Brown's Synopsis, I am not aware that anyone of authority has risked a definition of what constitutes title to sue. I am not disposed to do so, but I think it may fairly be said that for a person to have such title he must be a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies."

Lord Dunedin gave, as examples of the type of legal relation he had in mind, ownership, contract, trust and other fiduciary relationships. The relationship between the harbour trustees and their ratepayers, who included the pursuers, was regarded as falling into the last of these categories. Whether the harbour trustees complied with their statutory duties was thus treated as an essentially private matter between them and their ratepayers, with which third parties had no concern unless their property or other rights were affected.

166. Lord Dunedin expressly disavowed the intention to formulate a definition, but his observations are valuable as a guide to title and interest to bring an ordinary action in private law. For the reasons I have explained, they are inapposite in the context of applications to the supervisory jurisdiction. That is reflected in the fact that there are other cases of that period concerned with the acts of public authorities, such as *Rossi v Magistrates of Edinburgh* (1904) 7F (HL) 85, which cannot readily be fitted into the two-fold analysis which Lord Dunedin described. The inaptness of that analysis as an approach to standing in the context of judicial review has however become clearer in more recent times. Two cases illustrate the point. The first is *Wilson* v *Independent Broadcasting Authority* 1979 SC 351, in which members of the public were held to be entitled to bring proceedings to prevent the Authority from putting out political broadcasts in breach of their statutory duty to ensure that the programmes broadcast by them maintained a proper balance. Lord Ross said at pp 356-357 that he could see no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that body to the public, provided the individual could qualify an interest. The second case is *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179, in which the organisation better known as Age Concern Scotland challenged guidance issued by the chief adjudication officer regarding social security payments for severe weather conditions. Lord Clyde followed the case of *Wilson* and concluded that any member of the public, or an association such as the petitioners, was entitled to bring proceedings to enforce the proper administration of social security legislation, subject to demonstrating a sufficient interest. The case is also noteworthy for Lord Clyde's use of the expression "locus standi". Lord Clyde adopted the same approach, and the same terminology, in the subsequent case of *Air 2000 Ltd* v *Secretary of State for Transport (No 2)* 1990 SLT 335. The expression "locus standi", and its English equivalent, standing, were also used by Lord Clyde extra-judicially in the relevant chapter of *Clyde and Edwards, Judicial Review* (2000), where the authors questioned at para 10.03 the appropriateness or helpfulness of a two-fold analysis, in terms of title and interest, in the context of judicial review.

167. In the present case, the First Division cited the cases of *Wilson* v *Independent Broadcasting Authority* and *Scottish Old People's Welfare Council, Petitioners* when considering the standing of the appellants at common law to bring the present proceedings. They concluded that there was no reason why a

member of the public adversely affected by legislation passed by the Scottish Parliament could not challenge it, provided he or she had an interest to do so. At the same time, the court also cited Lord Dunedin's dictum in the *Nicol* case, and endeavoured to reconcile their decision with previous cases in which, on the basis of that dictum, a more restrictive approach to standing had been adopted.

168. As the Inner House's discussion of the authorities demonstrates, the results of applying a test of title and interest in the context of public law have been unpredictable: in some cases, such as the *Wilson* case, it has been applied liberally, but in other cases it has been applied more restrictively. As Professor A W Bradley commented in 1987, "the resulting state of the law places an unnecessary pitfall in the way of voluntary organisations and other bodies that have a serious reason for seeking judicial scrutiny of the legality of government policies" ("Applications for Judicial Review – the Scottish Model" [1987] *Public Law* 313, 319). In consequence, as was noted in the *Report of the Scottish Civil Courts Review* (2009), vol 2, p 27, public law issues arising in Scotland are sometimes litigated in the English courts, where the rules on standing are clearer and have been less restrictively applied.

169. These practical difficulties reflect the problem which, as I have explained, arises as a matter of principle if the court's approach to standing in judicial review is based upon the approach followed in ordinary actions under private law. The approach to standing which was stated by Lord Dunedin in the *Nicol* case is appropriate to proceedings where the function of the courts is to protect legal rights: in that context, only those who maintain that their legal rights require protection have a good reason to use the procedures established in order for the courts to perform that function. The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. As Lord Hope, delivering the judgment of the court, said in *Eba v Advocate General for Scotland (Public Law Project intervening) (Note)* [2011] UKSC 29, 2011 SLT 768, [2011] 3 WLR 149, para 8:

> "… the rule of law … is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it: *West* v *Secretary of State for Scotland* 1992 SC 385, 395. This favours an unrestricted access to the process of judicial review where no other remedy is available."

There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which

it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction. The exercise of that jurisdiction necessarily requires a different approach to standing.

170. For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say "might", because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

171. The supervisory jurisdiction has developed almost entirely through judicial decisions. One of the responsibilities of the courts is to ensure its continuing development, on an incremental basis, so as to meet the needs of the time. In my opinion, the time has come when it should be recognised by the courts that Lord Dunedin's dictum pre-dates the modern development of public law, that it is rooted in private law concepts which are not relevant in the context of applications to the supervisory jurisdiction, and that its continuing influence in that context has had a damaging effect on the development of public law in Scotland. This unsatisfactory situation should not be allowed to persist. The time has also come when the courts should cease to use the inappropriate terminology of title and interest in relation to such applications, and should refer instead to standing, based upon a sufficient interest.

172. Considering specifically the question of standing to take part in judicial review proceedings other than as the applicant or the respondent, it follows from the nature of such proceedings, as I have explained, that standing should depend upon demonstrating a sufficient interest in the issues raised by the application. That approach was reflected in the terms of rule 260B, when the procedure for judicial review was introduced in 1985. As under the present Rule 58.6, the applicant was required to identify persons having an interest and to seek a first order for service upon those persons. Any such person was then entitled to lodge answers to the petition. Paragraph (14), which was the predecessor of the current rule 58.8(2), provided that any person not specified in the first order as a person upon whom service required to be made might enrol a motion for leave to enter the process.

173. Since paragraph (14) referred to "any person", its scope was not explicitly restricted by reference to any criterion of standing, but it was interpreted as being intended to enable persons with an interest in the issues raised by the application to take part in the proceedings. In *Sutherland District Council v Secretary of State for Scotland* (unreported) 23 December 1987, Lord Clyde said:

> "Paragraph (14) envisages that interested parties may be permitted to enter the process more freely than in the case of an ordinary action and so enable the parties and the court to have the benefit in appropriate cases of the submissions of other interested parties."

The contrast drawn by Lord Clyde between standing to participate in judicial review proceedings and standing in an ordinary action is consistent with the approach which I have explained in the present case. Paragraph (14) was considered again in *Casey* v *Edinburgh Airport Ltd* (unreported) 23 February 1989, a decision of Lord Morison. The case concerned a challenge to decisions taken by the airport authority, under a bye-law, to refuse permits to the applicant taxi operators. During the hearing, the applicants sought to challenge the validity of the bye-law itself. Lord Morison refused to consider such a challenge in the absence of intimation to the taxi operators who had been granted permits under the contested bye-law. He said:

> "No intimation of the petition has been made to these persons, since in its present form it does not affect their interest … It seems to me to be clear that the argument sought to be presented by the petitioners cannot be determined in the absence of intimation to other taxi operators who have an interest to uphold the validity of the permission granted to them."

I note that in the present case the judges of the First Division stated, at para 56 of their opinion, that it had never been suggested, in cases in which the validity of a bye-law was challenged, that those who might benefit from it should be called for their interest, and that that was an important indication that a beneficiary of a general legislative measure had no title to counter a challenge to its validity. The court had not been referred to the case of *Casey*.

174. As I have explained, the provisions of rule 260B were repeated in Chapter 58 of the current Rules of Court when they were introduced in 1994. The terms of paragraph (14), in particular, were repeated in rule 58.8(2). That rule was amended by the Act of Sederunt (Rules of the Court of Session Amendment No 5) (Public Interest Intervention in Judicial Review) 2000 (SSI 2000/317), which came into force on 2 October 2000, at the same time as the Human Rights Act. Its purpose, as appears from its title, was to provide for public interest intervention in judicial review cases. With that aim in mind, a new rule 58.8A was introduced, which enabled an application for leave to intervene to be made on the basis that an issue in the proceedings raised a matter of public interest which the applicant wished to address. The introduction of that procedure made it necessary to amend rule 58.8(2) so as to clarify whether, in any particular case, the appropriate procedure for a person to adopt was an application for leave to enter the process, under rule 58.8(2), or an application to intervene, under rule 58.8A. Accordingly, rule 58.8(2) was amended so that "any person" became "any person … who is directly affected by any issue raised", and rule 58.8A was restricted to "a person to whom rule 58.8(2) does not apply". The Act of Sederunt was not intended to make it more difficult for interested parties to take part in judicial review proceedings: on the contrary, the intention was to liberalise access by introducing an additional procedure for public interest intervention. In those circumstances, the insertion into rule 58.8(2) of the stipulation that the person must be directly affected by any issue raised should be understood as reflecting the pre-existing requirement that the person must have a sufficient interest.

175. Against that background, it appears to me that rule 58.8(2), in requiring that a person wishing to enter the process must be directly affected by any issue raised, did not purport to innovate upon the substantive law, but reflected it. In the circumstances of the present case, that requirement was satisfied by the third to tenth respondents.

Conclusion

176. For these reasons and those given by Lord Hope, with which I respectfully agree, I would dismiss the appeal, allow the cross-appeal by the third to tenth respondents, and make the order which Lord Hope proposes.

LORD KERR, LORD CLARKE AND LORD DYSON

177. For the reasons given by Lord Hope and Lord Reed, with which we agree, we too would dismiss the appeal and allow the cross-appeal.