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11/AVW/GVM/Misc

For the attention of Shane McAteer
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Date
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Dear Mr McAteer

**KENNEDYS'S RESPONSE NIA DAMAGES
(ASBESTOS-RELATED CONDITIONS) BILL NIA BILL 10/10
KENNEDYS LAW: EVIDENCE SESSION 19 JANUARY 2011**

Thank you for your letter raising further queries. Our responses are outlined below:

Question

1. In its response to the Committee's call for evidence Kennedy's Law has stated its belief that the Bill is in contravention of the Human Rights Act. The Committee has heard similar concerns from others and is taking steps to become further informed on this issue. During Monday's debate the Minister stated that:

"I am happy to say that, in light of all the information that is available to me, in my view, the Bill is legally competent."

- Can you advise the Committee what evidence you have used to reach your conclusions about the possible contravention of the Human Rights Act?

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Answer

1. In relation to the possible contravention of the Human Rights Act the following points occur:
 - a. Dealing with the issue of retrospective application; and
 - b. The right to a fair Trial.

Retrospective Application

We submit that to apply legislation retrospectively is at odds with the Convention principles of striking a fair balance and being reasonably proportionate. It effectively removes any argument on causation from the remit of the courts and therefore, cannot be considered to be striking a fair balance between the rights of claimants and those of defendants.

The Committee just has to look at the news to see that at present the Financial Services Authority (FSA) is being challenged in the High Court in London at present over compensation for the mis-selling of payment protection insurance (PPI) it appears on the basis that the new FSA Rules were to be applied retrospectively.

The right to a fair Trial under Article 6

On behalf of the actual Defendants, the right to a fair Trial is diminished by the passage of time and the unavailability of witnesses and the recollection of witnesses evidence. Also by removing causation from the courts remit the Act effectively becomes judge and jury, facilitating claimants, (who have no symptoms), recourse to compensation without the need to deal with the common law positions of remoteness of damage and foreseeability.

Question

2. The Kennedy's Law response also poses the question:

"Is it envisioned that the Assembly will enact further legislation to deal with other asymptomatic diseases arising from work related activities?"

- What other asymptomatic diseases arising from work related activities might the Assembly be called upon to legislate for?

Answer

2. As outlined, for example, pre the Smoking Ban, workers may have been exposed to second hand smoke. They may asymptomatic at present but there still may be changes within their lungs that could, on this occasion, give rise to a more serious complaint at a later date such as emphysema and/or lung cancer or other pulmonary related diseases.

Secondly, individuals who may have worked with fine detailed soldering work, for example, in relation to the building of circuit boards may find in later life that they have developed arthritic conditions which may or may not been caused by or contributed to by their working environment a number of years ago.

On our research to date has not shown any asymptomatic conditions being compensated.

Question

3. The response from Kennedy's Law contends that the Bill seeks to define personal injury and this is something that is not within the remit of elected officials to decide.
 - Where does responsibility for the definition of personal injury lie?
 - How can legislation designed to provide that certain asbestos-related conditions are actionable personal injuries, without defining what those injuries might be?

Answer

3. A Judge on the basis of the factual matrix and application of expert witness evidence from medical practitioners will reach a decision on the basis of all the facts as to whether a personal injury has been sustained. It is therefore a joint legal and medical decision. In Rothwell v Chemical & Insulating Co Ltd, it was held that whilst pleural plaques was indicative of the extent to which an individual had been exposed to asbestos, it could not fairly be described as a disease or an impairment of physical condition for the purposes of an action for damages. Lord Hoffmann affirmed the trial judge's finding that the plaques affected neither life expectancy nor lung function

and caused no pain or discomfort and thus, in Lord Glennie's characterisation of Rothwell, "could not suffice, by themselves, to make negligent exposure to asbestos actionable".

We do not believe that legislation can be designed to provide that certain asbestos related conditions are actionable personal injuries, without defining what those injuries may be.

Question

4. In its response to the consultation on the draft legislation it is reported by DFP that Kennedys Law stated that *"It makes no sense, morally or economically, to take money from what is a finite 'pot' which is required to meet the future needs of 'real' victims of asbestos related diseases, so as to provide a 'windfall' to a person with no measurable physical or psychological injury."*

- Can you advise the Committee how you have determined who qualifies as a 'real' victim of asbestos related diseases?

Answer

4. A "real" victim of asbestosis related disease is someone who has actually sustained an injury which is symptomatic, has caused pain and suffering, has interfered with their life and amenity, has caused them to require treatment, prevented them from working, enjoying day to day activities and has had a real effect upon their quality of life.

I hope that these comments may be useful to you.

Kind regards.

Yours sincerely

Amanda Wylie
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For Kennedys