



# The Scottish Parliament

## **Justice 1 Committee**

### **1st Report, 2007 (Session 2)**

### **Stage 1 Report on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill**

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### **Stage 1 Report on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill**

**Published by the Scottish Parliament on 12 January 2006**





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## Justice 1 Committee

### 1st Report, 2007 (Session 2)

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# The Scottish Parliament

## Justice 1 Committee

### Remit and membership

#### **Remit:**

To consider and report on matters relating to the administration of civil and criminal justice, the reform of the civil and criminal law and such other matters as fall within the responsibility of the Minister for Justice, and the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigations of deaths in Scotland.

#### **Membership:**

Pauline McNeill (Convener)  
Marlyn Glen  
Mr Bruce McFee  
Margaret Mitchell  
Mrs Mary Mulligan  
Mike Pringle  
Stewart Stevenson (Deputy Convener)

#### **Committee Clerking Team:**

Callum Thomson  
Douglas Wands  
Euan Donald  
Lewis McNaughton  
Allan Campbell





# The Scottish Parliament

## Justice 1 Committee

### 1st Report, 2007 (Session 2)

#### Stage 1 Report on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION AND BACKGROUND

1. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill was introduced to the Scottish Parliament on 27 September 2006. On 22 June 2006 the Minister for Parliamentary Business explained the Scottish Executive's intention in bringing forward the legislation—

“Members of all parties will have been moved by the plight of those who suffer from asbestos-related disease and their families, and concerned by obstacles that lie in the way of fair damages being awarded. Des McNulty has built on his long record of campaigning on the issue by moving quickly to propose legislation, but time is against him in this session. The Executive will therefore publish an asbestos damages bill to address the issue of relatives' claims so that a choice does not have to be made between claiming while a person is alive and waiting for them to die tragically, and so that families do not suffer disadvantage as a result.”<sup>1</sup>

#### *The current legislative framework*

2. Under the Damages (Scotland) Act 1976 (the 1976 Act) where a person dies as a result of personal injury their relatives may be entitled to claim damages for patrimonial loss and/or non-patrimonial loss (NPL). Patrimonial damages are awarded for loss of financial support, while non-patrimonial damages are awarded in respect of:

- distress because of the suffering of the injured person before death;
- grief and sorrow at the death of injured person; and
- loss of deceased's society and guidance.<sup>2</sup>

<sup>1</sup> Official Report 22 June 2006 c.26820

<sup>2</sup> Policy memorandum p.2

3. Changes to the 1976 Act, through the Damages (Scotland) Act 1993 (the 1993 Act), allowed the executor to claim the sufferer's solatium (pain and suffering; expectation of loss of life) to the date of death after his or her death. Previously the claim for solatium died with the sufferer. The 1993 Act also amended section 1(4) of the 1976 Act to replace the previous loss of society award with 3 heads of claim (past and future). The section 1(4) damages constitute an additional amount paid to the immediate family only if the sufferer does not settle their claim in full prior to death.<sup>3</sup>

4. Under section 1(2) of the Damages (Scotland) Act 1976 (the 1976 Act), the immediate family of an injured person is prevented from claiming damages on the death of that person if the deceased has already settled in full a claim prior to death for damages for his or her own loss.

*What is mesothelioma?*

5. Mesothelioma is a cancer of the mesothelial cells. Mesothelial cells cover the outer surface of most of our internal body organs, forming a lining that is sometimes called the mesothelium. Mesothelioma cancer can develop in the tissues covering the lungs and abdomen.<sup>4</sup>

6. Mesothelioma rarely develops in people who have never been exposed to asbestos. Mesothelioma does not usually develop until 20 to 40 years after exposure to asbestos. There is no cure for mesothelioma and once diagnosed, sufferers survive on average some 14 months.<sup>5</sup>

7. In the great majority of cases, the disease is associated with occupations where there was a greater likelihood of asbestos exposure, such as shipbuilding and construction. There are strong geographical concentrations around shipbuilding areas, centres of railway engineering, and asbestos plants.<sup>6</sup>

8. It is noted in the policy memorandum that incidences of the disease are on the increase. There were 1969 mesothelioma deaths in 2004. It is projected that mesothelioma deaths will reach a peak of 2400 in 2013 before they gradually reduce.<sup>7</sup>

*What is the dilemma faced by mesothelioma sufferers?*

9. In the policy memorandum, the Scottish Executive set out what it referred to as a dilemma faced by mesothelioma sufferers.

10. Currently, mesothelioma sufferers face the dilemma of either pursuing their own damages claim or not pursuing their claim before they die so that their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to.<sup>8</sup>

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<sup>3</sup> Ibid

<sup>4</sup> SPICe briefing note on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill p. 4

<sup>5</sup> Policy Memorandum p.1

<sup>6</sup> Policy Memorandum p.1

<sup>7</sup> Policy Memorandum p.1

<sup>8</sup> Ibid

11. The dilemma has intensified in recent years in part as a consequence of new court procedures implemented on the recommendation of Lord Coulsfield. A Court of Session working party chaired by Lord Coulsfield recommended an accelerated timetable for the settlement of all personal injury cases in the Court of Session. This new timetable was implemented by the Court of Session in April 2003. In practice this has meant cases being concluded within the shortened period of 12 to 13 months.<sup>9</sup>

12. Mesothelioma sufferers survive for an average of 14 months. Before the implementation of this accelerated timetable, mesothelioma sufferers were rarely faced with this dilemma as they did not live long enough to receive damages in their own lifetime. However, with cases being concluded within 12 to 13 months mesothelioma sufferers have a genuine possibility of receiving damages in their own lifetime and as such are faced with the dilemma as described in paragraph 9.

13. Another contributing factor to the dilemma has been the substantial increase in the amount of damages which are awarded to the immediate family for solatium to compensate for any grief and suffering and emotional distress which they suffer and loss of society and guidance under section 1(4) of the 1976 Act. In 1992, the amounts awarded to a widow ranged from £5,500 to £12,500 and to a child from £600 to £10,500. However, recent awards of section 1(4) damages have increased from £20,000 to £28,000 to a widow and £5000 to £10,000 for an adult child and £3,000 to £10,000 for an elderly parent losing an adult son.<sup>10</sup>

14. Therefore, a mesothelioma sufferer can not benefit in their own lifetime without ultimately disadvantaging their own family.

15. As a consequence of these two factors most sufferers (around 80%) are not pursuing their own claims in order not to disadvantage their families.<sup>11</sup>

*The campaign for a change in the legislation both within and outwith the Parliament*

16. The plight of mesothelioma sufferers has been an issue of considerable debate both within and outwith the Parliament.

17. As far back as 2000, Duncan McNeil initiated a Members' debate on mesothelioma, which primarily focussed on the delay in compensating sufferers.<sup>12</sup>

18. This same issue of delay in compensation claims was the subject of petition PE 336 by Frank Maguire, lodged on 29 January 2001 on behalf of Clydeside Action on Absbestos. The terms of the petition were as follows—

“for the Scottish Parliament’s Justice Committees to initiate a review of the powers and procedures of the Court of Session in handling cases involving victims of asbestos poisoning, to ensure that the real issues between the

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<sup>9</sup> Scottish Executive consultation on amendment to section 1 (2) of the Damages (Scotland) Act 1976, consultation paper

<sup>10</sup> Policy memorandum p.2

<sup>11</sup> Ibid

<sup>12</sup> SPICe briefing p. 12

parties involved are properly identified; that delay is minimised; and that interim payments and jury trials are made available to victims.”<sup>13</sup>

19. The petition was referred to the Justice 2 Committee. Pauline McNeill MSP and Bill Aitken MSP produced a reporters’ report focussing on the petitioner’s concerns relating to written pleadings and his proposal regarding the use of a fast track procedure. The report was adopted by the Justice 2 Committee on 18 December 2002.<sup>14</sup>

20. One of the main features of the report was that it recommended the implementing of the proposals of the Coulsfield Report to accelerate the time it takes to reach a point at which the parties can reach a settlement.<sup>15</sup>

21. In addition, the Justice 2 Committee’s report recommended the introduction of special procedures for the treatment of mesothelioma cases.<sup>16</sup>

22. In April 2003 the Court of Session implemented the proposals of the Coulsfield Report.<sup>17</sup>

23. As discussed before, the acceleration of the timetable for personal injury cases in the Court of Session highlighted the particular dilemma faced by mesothelioma sufferers.

24. Frank Maguire wrote to the Justice 1 Committee on 20 June 2005 advising the Committee of this dilemma and proposing that the Damages (Scotland) Act 1976 be amended, so as to ensure that when a mesothelioma sufferer is awarded damages their families claim is not extinguished.<sup>18</sup>

25. The Justice 1 Committee wrote to the Deputy Minister to advise them of this issue and inviting their response.<sup>19</sup> On January 20 2006 the Deputy Minister wrote back to the Committee in order to advise them that officials were working with Frank Maguire to consider the issue.<sup>20</sup>

26. The first legislative attempt to address this dilemma came in the form of a proposal for a Members’ Bill from Des McNulty MSP. The policy intention of the proposal as lodged on 16 May 2006 was as follows—

“to improve compensation for asbestos victims and relatives of persons deceased through personal injury attributable to asbestos-related diseases.”

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<sup>13</sup> SPICe briefing p. 13

<sup>14</sup> SPICe briefing p.13

<sup>15</sup> Ibid

<sup>16</sup> SPICe briefing p.14

<sup>17</sup> Official Report, Justice 1 Committee, 29 November 2006, Col 4097

<sup>18</sup> Correspondence from Frank Maguire to the Justice 1 Committee, 20 June 2005

<sup>19</sup> Correspondence from the Convener to Deputy Minister for Justice, 15 September 2005

<sup>20</sup> Correspondence from the Deputy Minister for Justice to the Convener, 20 January 2006

27. On 22 June 2006 the Scottish Executive announced its intention to bring forward legislation on this issue. The following day Des McNulty withdrew his proposal.<sup>21</sup>

### SCOTTISH EXECUTIVE CONSULTATION

28. As noted, in advance of the Executive's decision to legislate on this issue, Des McNulty MSP lodged a proposal for a Members' Bill to address the dilemma faced by mesothelioma sufferers. In order to develop this proposal Des McNulty had conducted his own preparatory work.<sup>22</sup> Because of the preparatory work conducted by Des McNulty the Scottish Executive was able to issue a consultation paper on 7 July, two weeks after they had announced their intention to bring forward legislation on this issue.<sup>23</sup>

29. The consultation paper asked respondents to answer three questions. The first asked respondents to indicate whether they agreed that existing legislation causes problems for mesothelioma sufferers and their families. The second asked whether respondents considered the best way to remove this dilemma would be to disapply section 1(2) of the Damages (Scotland) Act 1976. While the third asked whether application of the Bill should be confined to mesothelioma sufferers or whether provision should be made to enable Scottish Ministers to extend the Bill's application to other kinds of personal injury.<sup>24</sup>

30. The consultation closed on 18 August 2006. Of the 16 responses received, 15 made observations. Of those 15, all agreed that the existing law is problematic. 12 agreed that the problem should be remedied by disapplying section 1(2) of the 1976 Act, however, three suggested that a legislative change was unnecessary and the dilemma could be alleviated by greater use of interim awards. 10 respondents agreed that the Bill should be confined to cases of asbestos related mesothelioma. 7 agreed that Scottish Ministers should have the power to extend the new provision to other diseases or forms of personal injury, while 6 disagreed and 2 offered no direct comment.<sup>25</sup>

**31. The Committee commends the Scottish Executive on the speed with which it brought forward its consultation.**

### COMMITTEE CONSULTATION

32. The Committee issued a call for evidence on the Bill on 29 September 2006. It was noted in the call for evidence that those who had already responded to the Executive's consultation needed only to reply if they had anything further to add. The Committee received 9 responses to its call for evidence. In addition, the Committee held three oral evidence sessions. The oral and written evidence can be found at annexe B and C respectively. The oral evidence sessions were arranged as follows—

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<sup>21</sup> SPICe briefing p.15

<sup>22</sup> Policy Memorandum p.3

<sup>23</sup> Ibid

<sup>24</sup> Ibid

<sup>25</sup> SPICe briefing

Session 1: 46th Meeting, 2006 (Session 2), 29 November

- *Scottish Executive Bill Team*

Lorna Brownlee (Scottish Executive Justice Department)

Paul Cackette (Scottish Executive Justice Department)

Bob Cockburn (Scottish Court Service)

Alison Fraser (Scottish Executive Legal and Parliamentary Services)

Anne Hampson (Scottish Executive Justice Department)

Session 2: 48th Meeting, 2006 (Session 2), 6 December

- *Representatives of mesothelioma sufferers*

Ian Babbs (Asbestos Action Tayside)

Phyllis Craig (Clydeside Action on Asbestos)

Tommy Gorman (Clydebank Asbestos Group)

- *Solicitors representing mesothelioma sufferers*

Ronald Conway (Bonar and Co Solicitors)

Frank Maguire (Thompsons Solicitors)

- *Representatives of the insurance industry*

Ian Johnston (Forum of Scottish Claims Managers)

David Taylor (Forum of Insurance Lawyers)

Lisa Marie Williams (Association of British Insurers)

Session 3, 50th Meeting, 2006 (Session 2), 13 December

- *Deputy Minister for Justice and officials*

Johann Lamont (Deputy Minister for Justice)

Lorna Brownlee (Scottish Executive Justice Department)

Paul Cackette (Scottish Executive Justice Department)

Bob Cockburn (Scottish Court Service)

Alison Fraser (Scottish Executive Legal and Parliamentary Services)

*Structure of the remainder of the report*

33. The remainder of the report addresses the main issues which have arisen in the course of the Committee's stage 1 consideration before providing the Committee's overall conclusions on the general principles of the Bill. The main issues are as follows—

- Is there a dilemma for mesothelioma sufferers?
- Is legislation the best means by which to deal with this dilemma?
- Should the Bill be confined to mesothelioma?
- Should the Bill be retrospective?
- What will the practical effect of the Bill be on court procedure?

## MAIN ISSUES

### Is there a dilemma for mesothelioma sufferers?

34. A consequence of the implementation by the Court of Session of an accelerated timetable for the settlement of personal injury cases is that mesothelioma sufferers are now living long enough to settle claims in their own lifetime. If they choose to settle then they prevent their family from making a claim after they have died. Because of the substantial amounts of damages awarded to the immediate family for solatium, as compared with awards to the sufferer in life, then in settling in life they are also foregoing a higher settlement. This is the dilemma faced by mesothelioma sufferers.

35. Phyllis Craig, giving evidence on behalf of Clydeside Action on Asbestos, illustrated the nature of the dilemma by giving an example of a sufferer whom Clydeside Action on Asbestos had encountered—

“It is unfair that people who should receive their damages in life are being asked to make a decision about whether they should receive nothing and allow their relatives to benefit. They also receive no recognition that they have an asbestos-related condition. They have to look to their family's financial security. We dealt with a woman who was a nurse with nine children. Can you imagine the difference that it would make to their lives if she took her damages in life rather than that happening posthumously? The nine children would receive £90,000, plus £28,000 for the husband. There is a considerable difference between what a family receives when the person is still alive and what it receives posthumously.”<sup>26</sup>

36. The Deputy Minister explained that it was the recognition of this dilemma on the part of the Executive that led to the introduction of the legislation—

“The purpose of the bill was to address urgently and specifically a problem that the law of damages caused for mesothelioma sufferers, which is that most of them chose not to pursue their own claim in order that their families might benefit from the larger award that is made after death, as the committee heard in evidence.”<sup>27</sup>

37. The dilemma was also recognised by the insurance industry. In its response to the Committee's call for evidence, the Association of British Insurers (ABI) recognised the problems affecting mesothelioma sufferers and their families associated with the current legislative framework.<sup>28</sup>

**38. Presented with such unanimity on this issue, the Committee concludes that a very real dilemma does exist for mesothelioma sufferers. Furthermore, the Committee is persuaded that there is a need to act in order to respond to this dilemma and to seek to resolve it.**

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<sup>26</sup> Official Report, Justice 1 Committee, 6 December 2006; c 4112

<sup>27</sup> Official Report, Justice 1 Committee, 13 December 2006; c 4165

<sup>28</sup> Written submission by Association of British Insurers

**Is legislation the best means by which to deal with this dilemma?**

39. As described in greater detail previously, in order to remove the dilemma faced by mesothelioma sufferers, the Bill proposes to disapply section 1(2) of the Damages (Scotland) Act 1976. The Scottish Executive set out in the policy memorandum why they considered a legislative change to be the only remedy to this dilemma—

“The only real alternative approach is making no change to the law and leaving mesothelioma sufferers and their families in the predicament described earlier. The difficulties arising from this approach would be twofold. There is first of all the distress to sufferers and their families in having to reach a view about when and on what basis to enter claims. Secondly, there is the financial loss to families in terms of benefits foregone if victims do settle in life. Legislative change is the only means to achieve the desired outcome.”

40. However, in its response to the Committee’s call for evidence, the ABI contended that new legislation was not necessary. They advocated encouraging claimants to initiate their claim, make an application for interim damages, and then sist the claim until after their death. The ABI suggested this process would enable the claimant to receive a sum of money whilst still alive, while preserving the family’s right to claim damages after the sufferer’s death.<sup>29</sup>

41. In their responses to the Scottish Executive’s Consultation both the Forum of Insurance Lawyers (FOIL) and Forum of Scottish Claims Managers (FSCM) also intimated that the change in legislation was unnecessary and that use of interim payments could alleviate this problem.

42. In the course of the evidence session on 6 December there was a recognition on the part of the insurers that interim payments were rarely used in Scotland, in contrast with their greater use in England and Wales.

43. It was argued by Lisa Marie Williams of the ABI that interim payments in Scotland are in part being under used as consequence of a failure to make the defender aware of the case against them for as long as 12 months after a solicitor has known about the case. She advocated the use of a pre-action protocol, so as to ensure that defenders are made aware of cases at an earlier juncture and that as a consequence payments are made expediently.<sup>30</sup>

44. Pre-action protocols are designed to promote dispute resolution between parties on an equal footing, at a reasonable cost, speedily and in an easy and understandable way, with or without legal representation.

45. Such a disease pre-action protocol is in place in England and Wales. Ian Johnston of FSCM informed the Committee of progress made to establish a disease pre-action protocol in Scotland—

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<sup>29</sup> Written submission from the Association of British Insurers

<sup>30</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4143

“We agreed a personal injury pre-action protocol with effect from 1 January. By “we”, I mean the claims managers, because I can speak only on behalf of the people who are members of the FSCM. That said, I think that it is being used by companies beyond our membership.

During the discussions, it was felt by all sides that we should take small steps and not run before we could walk, so we did not include disease. However, at our most recent review meeting a couple of months ago, I posed the question whether we wanted to consider extending the personal injury protocol and whether we could create a disease protocol. There was a positive response to that from the Law Society of Scotland. Our members are working on a draft, which I hope we will submit to the Law Society early in the new year. There will be discussion and negotiation on it over a period, but I hope that it is the beginning of work that will create a disease pre-action protocol.”<sup>31</sup>

46. Scottish Executive officials explained why the Executive considered that advocating greater use of interim payments would be an inadequate response to this dilemma—

“Some respondents to the consultation expressed the view that the change in the law in the bill is not necessary because the problem could be addressed through the greater use of interim awards of damages and sisting of cases until after the death of the person with mesothelioma. We do not consider that that would be a reliable solution for mesothelioma sufferers. If interim awards were to become a useful way to provide some damages due to a mesothelioma sufferer it would require changes in behaviour on the part of pursuers and defenders. That must be the case, because there were only nine awards of interim damages in the year to 31 March 2006. If that approach provided an acceptable solution, people would be using it. Ministers did not feel able to forego this opportunity to address the problem through a change in the law because of the existence of a little-used procedural mechanism.”<sup>32</sup>

47. Phyllis Craig was similarly opposed to the greater use of interim payments—

“If someone is to be paid interim damages, the insurance company is acknowledging that they were exposed to asbestos and have the condition and that it will meet the claim by paying out, for example, £30,000 while the person is alive. Why should the person not receive their full damages in life? They are the one who is dying; they are entitled to the money. Why pay them a portion of the money? Given that insurance companies will pay them so much, why not pay them the full amount, rather than leave it until after their death? I invite the committee to put that point to the insurance companies.”<sup>33</sup>

48. In his evidence to the Committee Frank Maguire, a lawyer who represents mesothelioma sufferers, expressed his scepticism about alleviating this situation by means of greater use of interim damages. He argued that the level of interim

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<sup>31</sup> Ibid

<sup>32</sup> Official Report, Justice 1 Committee, 29 November 2006, c 4096

<sup>33</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4115

damages awarded is based on the most pessimistic view of what the final settlement will be.<sup>34</sup>

49. He also argued that the awarding of interim damages does not provide the claimant with a sufficient degree of certainty. He said that while interim damages might be awarded it cannot be guaranteed that the claimant will win their case and there may ultimately be a requirement on the relatives to pay back the interim damages awarded.

50. When the insurers gave evidence to the Committee on 6 December they adopted a different position from the one they presented in their written evidence. ABI, FOIL and FSCM all indicated that they supported the Bill as introduced. None of them disputed the necessity for legislation to resolve this dilemma.<sup>35</sup>

51. Lisa Marie Williams explained ABI's position to the Committee—

“...our position is that we never want unnecessary legislation when there are current legal processes. However, we have seen the bill and are content for it to proceed. We have no objection to the bill and we want it to pass into law as quickly as possible.”<sup>36</sup>

52. At the Committee's meeting on 13 December the Deputy Minister welcomed the support for the Bill emanating from the insurance industry. Reflecting on this she suggested there was no longer any support for an alternative to legislation.

**53. The Committee considers that the best way to alleviate the dilemma facing mesothelioma sufferers is to make a change to the existing legislation.**

**54. The Committee does not consider the use of interim payments to be a viable or appropriate alternative to legislation as a means to alleviate the dilemma faced by mesothelioma sufferers.**

**55. In general terms the Committee is concerned about delays in the settlement of personal injury cases. However, the Committee welcomes and encourages the insurance industry's work to achieve early settlement of claims and the progress being made in the development of a pre-action protocol.**

#### **Should the Bill be confined to mesothelioma?**

56. As part of the consultation process, the Scottish Executive asked respondents to indicate whether they agreed that the Bill should be confined to mesothelioma, but with the provision to enable Scottish Ministers to extend the Bill's provisions to other diseases. The SPICe briefing note on the Bill asserts that of the 16 respondents to the Executive's consultation, ten agreed that the Bill should be confined to mesothelioma. Seven respondents considered that Scottish Ministers should have the power to extend the Bill's provisions to apply to other

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<sup>34</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4130

<sup>35</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4146

<sup>36</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4146

diseases. Six did not believe that Scottish Ministers should be given such powers while two offered no comment.<sup>37</sup>

57. The Bill as introduced applies solely to mesothelioma sufferers and does not contain a power for Scottish Ministers to extend the Bill's provisions to apply to other diseases.

58. Scottish Executive officials explained that the purpose of the Bill was to combat the particular dilemma facing mesothelioma sufferers. In light of the unique nature of mesothelioma and in turn the uniqueness of the dilemma it causes, it was explained that the Scottish Executive determined that it was appropriate for the Bill's provisions to be confined to mesothelioma—

“In our consultation paper, we suggested that ministers might have the power to extend the new provision to apply to other diseases or conditions if necessary. There was a mixed response to that from consultees. If an order-making power were included, it would be restricted to diseases that share the characteristics of mesothelioma. We see no likelihood of such a power being needed in the foreseeable future, and ministers decided that the bill should not contain it.

A crucial reason why the bill is mesothelioma specific and why we do not see a need for an order-making power is that it is intended to remove a problem that the law causes for a particular group of people; it is not intended to encroach into the law itself any more than is necessary to address the identified problem. In other words, the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives' rights are extinguished if the deceased settles their claim in full prior to death.”<sup>38</sup>

59. While stating that the Bill had been introduced to remedy a problem unique to mesothelioma, there was also a recognition on the part of the Scottish Executive of the need for a holistic review of damages law. In order to undertake such a review, the policy memorandum notes that Ministers have asked the Scottish Law Commission to carry out a review of the Damages (Scotland) Act 1976 and the relevant elements of the Administration of Justice (Scotland) Act 1982.<sup>39</sup>

60. In evidence to the Committee, the Deputy Minister expanded on the nature of the review—

“The review will consider the position of other personal injury victims and their relatives. At common law, a relative could only claim damages if the deceased could still claim damages at the time of their death. That provision has been enshrined in Scottish statute since 1976. To do away with it would create a new duty of care between the liable person and the deceased person's immediate family. That would run counter to the dependent nature of the relatives' claim, which currently lies in the existence of an

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<sup>37</sup> SPICe briefing p.22

<sup>38</sup> Official Report, Justice 1 Committee, 29 November, c 4095

<sup>39</sup> Policy memorandum p.5

undischarged liability to an injured person that is based on a duty of care that the liable person owes to the injured person.

To make provision for an independent duty of care to the relatives of the deceased would extend the boundaries of delictual liability and, without a thorough appraisal of the rationale for it and an assessment of the impact and costs, it would be unwise and indefensible. Therefore, we have asked the Scottish Law Commission to report on the matter and reflect on the broader issues that have emerged from the focus on mesothelioma.”<sup>40</sup>

61. As noted above, seven respondents to the Scottish Executive’s consultation intimated their support for the Bill to provide for Scottish Ministers to have the power to extend its provisions to other diseases.

62. Clydeside Action on Asbestos, in its response to the Executive’s consultation, intimated its support for the extension of the Bill to all types of diseases in terminal cases. However, in giving oral evidence to the Committee Phyllis Craig of Clydeside Action on Asbestos changed her position, expressing support for confining the Bill to mesothelioma—

“I believe that mesothelioma is a unique condition that is caused only by asbestos exposure. Given its uniqueness and the poor prognosis of the condition, we must concentrate on mesothelioma.”<sup>41</sup>

63. Both Ian Babbs, of Asbestos Action Tayside and Tommy Gorman of Clydebank Asbestos Group were similarly convinced of the appropriateness of confining the bill to mesothelioma. Tommy Gorman explained to the Committee why he deemed it appropriate—

“Other asbestos-related conditions and lung cancer, which were mentioned during the consultation, are for another day, but the Parliament must consider them with seriousness in the future. Any obfuscation of the bill would be a diversion from passing this important piece of legislation, but outstanding issues that affect sufferers of asbestos-related conditions in general need to be the Parliament’s business in the future.”<sup>42</sup>

64. The STUC in its written response to the Committee intimated its disappointment at the lack of provision to extend the Bill’s application. In so doing, however, there was a recognition on the part of the STUC that the dilemma faced by mesothelioma sufferers was in need of an urgent remedy and that other issues could be covered within the review being undertaken by the Scottish Law Commission. With this in mind the STUC intimated its support for the Bill.<sup>43</sup>

65. In contrast, the written response from the ABI welcomed the terms on which the Bill had been introduced. As noted previously, ABI had argued that legislation was not necessary, however, on the basis that legislation was an inevitability, it

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<sup>40</sup> Official Report, Justice 1 Committee, 13 December 2006, c 4168 - 4169

<sup>41</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4113

<sup>42</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4113

<sup>43</sup> Written submission by the STUC

welcomed the fact that the Bill had been confined to mesothelioma.<sup>44</sup> In her oral evidence to the Committee, Lisa Marie Williams expanded on why they supported the Bill on this basis of its confinement to mesothelioma—

“All that I would say on that point is that insurers like certainty. Lots of changes in laws that mean that insurers pay more or less money create uncertainty, which is never welcome in the industry. We support the bill because it is specific to mesothelioma and we recognise that, because of the characteristics of the disease, there is an issue with it.”<sup>45</sup>

66. Frank Maguire intimated that he too thought it was right the Bill was focussed on mesothelioma. A case had been made in responses to the Scottish Executive’s consultation for the incorporation within the Bill of asbestos related lung cancer, however, Frank Maguire explained to the Committee that he did not consider it to be analogous to mesothelioma—

“As has been pointed out, another variably fatal disease associated with asbestosis is lung cancer. Such cases involve either a combination of lung cancer and asbestosis or lung cancer alone. The problem is that they are not straightforward. Indeed, they can be subject to much dispute. I can understand why defenders would strenuously resist any lung cancer case that I took into court—unlike with mesothelioma, we cannot say that lung cancer is inevitably caused by asbestos. There are competing causes such as smoking and various other, probably unknown, factors. Defenders would simply blame those other causes or argue that we cannot prove that asbestos caused the condition.

Such cases would depend on the amount of exposure the person had had and the evidence of asbestos load in their lungs, which would require not just a biopsy but a post-mortem. In a practical sense, we cannot make any progress with lung cancer cases. Because defenders strenuously dispute and resist them, we cannot secure a hearing or even prepare cases in time before the people in question die. As a result, any suggestion that lung cancer be included in these provisions would have to be tentative.”<sup>46</sup>

67. Frank Maguire also rejected the case for applying the Bill to asbestosis. Similar to his arguments in terms of asbestos related lung cancer, he suggested that it was difficult to prove the link between exposure to asbestos and asbestosis. As with asbestos related lung cancer he intimated that conclusive proof of the link between asbestos and asbestosis in a particular sufferer may only be found in the course of a post-mortem.

**68. The Committee notes that there was unanimity amongst those who gave oral evidence to the Committee that it was appropriate to confine the Bill’s provisions to mesothelioma sufferers.**

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<sup>44</sup> Written submission by the Association of British Insurers

<sup>45</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4153

<sup>46</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4122

69. In light of the unique nature of mesothelioma and the dilemma it causes, the Committee considers that it would be inappropriate to extend the application of the Bill's provisions to other diseases and with this in mind believes it was correct to make no provision for Ministers to extend the application of the Bill by order.

70. At the same time, the Committee welcomes the Scottish Executive's decision to invite the Scottish Law Commission to review damages law more generally.

#### **Should the Bill be retrospective?**

71. The Bill, as introduced, would come into force on the seventh day after the date of Royal Assent. In the course of the Committee's consideration of stage 1 of the Bill, the Committee explored with witnesses the merits or otherwise of giving the Bill's provisions retrospective effect.

72. To apply the Bill retrospectively would mean that the Bill would cover cases settled before the date on which the Bill was enacted. As introduced, the Bill would only apply to cases settled on or after the seventh day after Royal Assent.<sup>47</sup>

73. Frank Maguire indicated to the Committee that applying the Bill retrospectively would be welcomed. He informed the Committee that he had 62 cases where mesothelioma sufferers were deferring their hearings until after the implementation of the Bill, so as to benefit from its provisions. He suggested that if the Bill were to apply retrospectively then he would be able to proceed with these cases.<sup>48</sup>

74. Support for applying the Bill's provisions retrospectively also came from those groups representing the interests of mesothelioma sufferers. Tommy Gorman of Clydebank Asbestos Group expressed support for the Bill's provisions applying as far back as possible—

"My view is that retrospection should apply as far back as possible. The bill has been introduced and has attracted such support from the public and from members because there is a clearly identified denial of human rights, legal rights and civil rights in relation to the narrow issue that the bill is intended to address."<sup>49</sup>

75. Following on from the session with the groups representing asbestos sufferers it was suggested to Frank Maguire that the Bill's provisions should apply from the point at which the Executive articulated its intention to legislate on this issue. He was not persuaded by this argument—

"...the insurers and defenders have not had notice that that was going to happen. If the Scottish Executive indicated now that, once royal assent is

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<sup>47</sup> Official Report, Justice 1 Committee, 29 November, c 4105

<sup>48</sup> Official Report, Justice 1 Committee, 6 December, c 4119

<sup>49</sup> Official Report, Justice 1 Committee, 6 December, c 4117

given, the act will be retrospective from now, that might make me feel a bit easier regarding any human rights challenge in future.”<sup>50</sup>

He continued—

“That would take away the unfairness, because the date would be prospective rather than retrospective. The Executive would state that the act will apply as from a date in the future, rather than from a date in the past by which lawyers had already acted and done everything.”<sup>51</sup>

76. Ian Johnston of the Forum of Scottish Claims Managers indicated that their members were already behaving as if the Bill were in force in their dealings with mesothelioma sufferers.<sup>52</sup>

77. Both David Taylor of FOIL and Lisa Marie Williams of ABI indicated that in general terms they had concerns about making legislation retrospective. In this instance, however, they were not unduly concerned. Lisa Marie Williams expanded on the position taken by the Association of British Insurers—

“Obviously, we do not like retrospectivity as a rule, taking into account questions of certainty and all sorts of human rights reasons. However, during the aftermath of the *Barker v Corus* case, we agreed with the DWP that all claims following the date of that judgment and prior to the passing of the Compensation Act 2006 would be treated under the terms of that act. I do not see that we would have a problem with it at all.”<sup>53</sup>

78. At the Committee meeting on 13 December the Deputy Minister advised the Committee that she had been ‘struck’<sup>54</sup> by the evidence given the previous week by representatives of mesothelioma sufferers. The Deputy Minister informed the Committee that in light of the calls for retrospection voiced by the representatives of mesothelioma sufferers and the acceptance of the proposal by insurers, the Executive would amend the Bill at stage 2.<sup>55</sup>

79. The Deputy Minister explained to the Committee that an amendment would be lodged at stage 2, so that the Bill’s provisions should apply to any case in which the sufferer recovers damages or obtains a full settlement on or after 20 December 2006.<sup>56</sup>

**80. The Committee has pursued the question of retrospectivity throughout its evidence taking.**

**81. The Committee strongly welcomes the Deputy Minister’s intention to amend the Bill at stage 2 so that the Bill’s provisions will apply to claims settled on or after 20 December 2006 and commends the Deputy Minister for**

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<sup>50</sup> Official Report, Justice 1 Committee, 6 December 2006, c 4127 - 4128

<sup>51</sup> Ibid

<sup>52</sup> Official Report, Justice 1 Committee, 6 December, c 4154

<sup>53</sup> Official Report, Justice 1 Committee, 6 December, c 4154 - 4155

<sup>54</sup> Official Report, Justice 1 Committee, 13 December, c 4163

<sup>55</sup> Official Report, Justice 1 Committee, 13 December, c 4163

<sup>56</sup> Official Report, Justice 1 Committee, 13 December, c 4164

**the speed with which this commitment was given. In light of the clarity and unanimity of the witnesses' responses the Committee considers that such an amendment is required.**

**82. The Committee considers that the certainty provided by the Deputy Minister's announcement will be beneficial to both mesothelioma sufferers seeking recompense in their own lifetime and to the insurance industry.**

**What will the practical effect of the Bill be on court procedure?**

83. At the Committee's meeting on 29 November, Scottish Executive officials explained to the Committee that it was their understanding that the proposed amendment to the Damages Act, as contained within the Bill, would most probably lead to two actions being lodged. Scottish Executive officials explained their understanding—

“...if the bill is passed, it could result in two court actions rather than one, depending on how the litigants conduct the litigation. One set of proceedings would be to resolve the dilemma, which the victim may wish to do before he or she dies. Then, because the solatium related to death would be finalised only on death, the relatives would raise a separate action. Therefore, one possible outcome is that there would be two sets of litigation, with all the consequences that that would have.”<sup>57</sup>

84. At the Committee's meeting on 6 December Frank Maguire suggested that the initiating of only one action could be feasible. He advised the Committee that there is precedent for this within the current legislative framework —

“There is no need for two actions; a case could be dealt with in one action. At the moment, if someone takes a case to court and dies during the course of it, the case is sisted and their relatives are brought into the same case. The same kind of mechanism could apply.”<sup>58</sup>

85. Ronald Conway questioned whether the initiating of a single action was feasible in this instance. He suggested that the claim lodged by the sufferer and the claim lodged by the immediate family of the sufferer are two separate kinds of claims and as such he doubted whether they could form a single action. He also suggested that the procedure drawn to the Committee's attention by Frank Maguire was not of relevance as it pertained to the awarding of provisional damages and this process does not apply to mesothelioma cases.<sup>59</sup>

86. However, the Deputy Minister accepted that two actions might not necessarily be required—

“The committee heard evidence that pursuers would prefer one action rather than two, as having two separate actions would increase costs. I think that it would be reasonable to presume that defenders would also prefer there to be one action rather than two because of costs. We have noted that point and

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<sup>57</sup> Official Report, Justice 1 Committee, 29 November, c 4101

<sup>58</sup> Official Report, Justice 1 Committee, 6 December, c 4137

<sup>59</sup> Ibid

are looking into the possibility of a single action in such cases. It is my intention to report back to the committee as soon as possible. It may be that, when the bill is passed, some defenders will settle the relatives' claims without their having to return to court at all."<sup>60</sup>

87. A supplementary letter from the Deputy Minister indicated that whether a single action could be initiated would be a matter for Rules of Court, which are made by the Court of Session.<sup>61</sup>

**88. The Committee considers that there may be benefit in the initiation of only one court action. The Committee appreciates that the extent of the savings may be limited, but in order to provide a simplified process for all parties, the Committee considers that there may be merit in the initiation of a single action.**

**89. The Committee recommends that the Scottish Executive liaise with the Court of Session, insurance industry and solicitors in order to establish, firstly whether the raising of a single action in mesothelioma cases would be feasible, and secondly, whether it would indeed be beneficial to all parties.**

## OTHER ISSUES

### Finance

90. The financial implications of the Bill are limited, but those that there are will fall upon defenders. These provisions will largely impact on the private sector, however, as employers, the Bill will also have implications for local authorities.

91. In the course of the Committee's evidence taking the financial impact of the Bill on defenders was explored. It was explained to the Committee that there would only be an extra financial burden in 15% of cases, as the majority of cases, 85%, are settled by the sufferer's family after death. With this in mind, the Scottish Executive Bill team informed the Committee that the Scottish Executive had estimated that costs for defenders would rise from £1.1 million to £1.5 million.

92. In its response to the Scottish Executive's consultation, the ABI had suggested that the Bill could have an adverse effect on insurance premiums. In evidence to the Committee, however, the ABI confirmed that they no longer had any such concerns as the Bill as introduced, confined as it is to mesothelioma, offered a degree of certainty which they indicated would not be there if Scottish Ministers had been able to extend the application of the Bill.

93. The Committee is therefore reassured that the financial impact of the Bill will be limited.

### Policy Memorandum

94. The Policy Memorandum sets out the Bill's policy objectives, what alternative approaches were considered, the consultation undertaken and an assessment of

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<sup>60</sup> Official Report, Justice 1 Committee, 13 December, c 4169

<sup>61</sup> Supplementary submission from the Deputy Minister for Justice, 9 January 2007

the effects of the Bill on equal opportunities, human rights, island communities, local government, sustainable development and other relevant matters.

95. The Committee commends the Executive for the general level of detail contained in the Policy Memorandum which provided a helpful foundation for the Committee to develop an understanding of the dilemma facing mesothelioma sufferers and the means by which to respond to the dilemma.

### **Equal Opportunities**

96. In the Policy Memorandum, the Executive sets out the impact of the Bill on equal opportunities. The Committee is content that such matters have been accounted for and that no major issues arise.

### GENERAL PRINCIPLES OF THE BILL

**97. The Committee considers that there is acceptance from all interested parties that, as it stands, damages law creates a terrible dilemma for mesothelioma sufferers and that action is needed to resolve the dilemma. The Committee notes that there is unanimity amongst interested parties that the Bill is the most appropriate means by which to resolve the dilemma. The Committee welcomes the positive impact the Bill will have on the lives of mesothelioma sufferers and the lives of their families.**

**98. The Committee notes that any concerns held by interested parties in relation to the Bill have been resolved in the course of stage 1. The Committee commends the Deputy Minister for the speed with which she responded to the concerns raised by witnesses and welcomes the commitment to apply the Bill's provisions to cases settled on or after 20 December 2006.**

**99. The Committee unanimously supports the Bill and recommends to the Parliament that the general principles of the Bill be agreed to.**

## **EXTRACTS FROM THE MINUTES OF JUSTICE 1 COMMITTEE**

### **34th Meeting, 2006 (Session 2), Wednesday 27 September 2006**

**Forthcoming Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill (in private):** The Committee considered and agreed its approach to Stage 1 of the forthcoming Bill.

### **46th Meeting, 2006 (Session 2), Wednesday 29 November 2006**

**Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill:** The Committee took evidence at Stage 1 of the Bill from—

Paul Cackette, Head of Civil Justice, Law Reform and International Division, Scottish Executive;

Lorna Brownlee, Bill Team Leader, Scottish Executive;

Anne Hampson, Bill Team Member, Scottish Executive;

Alison Fraser, Office of the Solicitor of the Scottish Executive; and

Bob Cockburn, Deputy Principal Clerk of Session, Scottish Court Service.

### **48th Meeting, 2006 (Session 2), Wednesday 6 December 2006**

**Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill:** The Committee took evidence at Stage 1 of the Bill from—

Phyllis Craig, Clydeside Action on Asbestos;

Tommy Gorman, Clydebank Asbestos Group; and

Ian Babbs, Asbestos Action Tayside

and then from

Frank Maguire, Thompsons Solicitors; and

Ronald Conway, Bonar and Co. Solicitors

and then from

Lisa Marie Williams, Association of British Insurers;

David Taylor, Forum of Insurance Lawyers; and

Ian Johnston, Forum of Scottish Claims Managers.

### **50th Meeting, 2006 (Session 2), Wednesday 13 December 2006**

**1. Decision on taking business in private:** The Committee agreed to take item 5 and all future consideration of that item in private.

**3. Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill:** The Committee took evidence at Stage 1 of the Bill from—

Johann Lamont MSP, Deputy Minister for Justice;

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Paul Cackette, Head of Civil Justice, Law Reform and International Division, Scottish Executive;

Lorna Brownlee, Bill Team Leader, Scottish Executive;

Bob Cockburn, Deputy Principal Clerk of Session, Scottish Court Service; and

Alison Fraser, Office of the Solicitor of the Scottish Executive.

**5. Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill (in private):** The Committee considered the possible contents of a draft Stage 1 Report.

**1st Meeting, 2007 (Session 2), Tuesday 9 January 2007**

**Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill (in private):** The Committee agreed its Stage 1 Report subject to specified changes being made.

## Scottish Parliament

### Justice 1 Committee

*Wednesday 29 November 2006*

[THE CONVENER *opened the meeting at 10:05*]

### Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill: Stage 1

**The Convener (Pauline McNeill):** Good morning and welcome to the 46<sup>th</sup> meeting in 2006 of the Justice 1 Committee. All members are present, so we have no apologies.

Item 1 is consideration at stage 1 of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, which is a new bill. I welcome the officials from the Scottish Executive bill team and Paul Cackette, who is head of the civil justice division of the Scottish Executive Justice Department. Paul will do the rest of the introductions.

**Paul Cackette (Scottish Executive Justice Department):** Good morning, and thank you for the opportunity to give evidence to the committee. I will ask Lorna Brownlee, who is the leader of the bill team, to make an introductory statement to set out the context of the bill. Lorna is assisted by Anne Hampson, who has also been working within the Justice Department on the bill. On my immediate right is Alison Fraser, who is a solicitor from the office of the solicitor to the Scottish Executive. Alison is the bill team's lawyer and gives legal advice on the bill. On her right is Bob Cockburn, who is the deputy principal clerk of session at the Court of Session. We asked him to be available to answer questions this morning because we are aware that some of the issues that arise from the bill relate to practices in the Court of Session and the way in which actions on mesothelioma are progressed. He can answer questions on court procedures.

**Lorna Brownlee (Scottish Executive Justice Department):** The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill is unusual in several respects. It is very short, and it was introduced to Parliament quickly, just 14 weeks after the Minister for Parliamentary Business announced that the Executive would introduce a bill on the matter. The bill will affect the small number of people who suffer from mesothelioma and their families.

The context for this unusual bill is that, under the Damages (Scotland) Act 1976, when a person dies as a result of personal injuries, their relatives

may be entitled to claim damages for their patrimonial and non-patrimonial loss. Patrimonial damages are awarded for loss of financial support, and non-patrimonial damages are awarded in respect of distress due to the suffering of the injured person before death, grief and sorrow at the death of the injured person and loss of the deceased's society and guidance.

Under section 1(4) of the 1976 act, only relatives who are members of the deceased's immediate family can claim damages for non-patrimonial loss. However, under section 1(2) of the 1976 act, relatives' claims are extinguished if the victim settles their own claim in full before death and the defender's liability has been discharged.

The Damages (Scotland) Act 1993 amended the 1976 act to allow the executor to claim for the sufferer's solatium to the date of death. Solatium is pain and suffering and the expectation of loss of life. Previously, the claim for solatium died with the sufferer. The 1993 act also amended section 1(4) of the 1976 act to replace the previous loss of society award for relatives with the three aspects of claims for non-patrimonial loss that I mentioned.

Broadly speaking, the payments that are made under the various aspects of a damages claim are similar, regardless of whether settlement is made before the sufferer's death or afterwards in relation to claims by the executor and relatives, apart from payments that are made to relatives under section 1(4) of the 1976 act for their non-patrimonial loss. The changes that I have described mean that section 1(4) damages constitute an additional amount—which can be substantial—that is paid to the immediate family only if the sufferer does not settle their claim in full prior to death.

A mesothelioma sufferer therefore faces a dilemma: either they pursue their own damages claim before they die, or they do not, so that their executor and relatives can claim awards that total more than the award of damages to which the sufferer was entitled. About 80 per cent of sufferers are not pursuing their own claims, in order not to disadvantage their families.

The straightforward and specific purpose of the bill is to remove that dilemma for mesothelioma sufferers. It will disapply section 1(2) of the 1976 act so as to allow the immediate family of a mesothelioma sufferer to claim damages for non-patrimonial loss, under section 1(4) of that act, after the sufferer dies, irrespective of whether the deceased has already recovered damages or obtained a settlement.

We carried out a consultation on our proposals. The majority of respondents agreed that the law creates a problem for mesothelioma sufferers and their families in relation to relatives' claims for non-patrimonial loss and that the way to deal with that

is by the proposed amendment to section 1(2) of the 1976 act. The majority of respondents agreed that the bill should be confined to mesothelioma.

In considering the mesothelioma-specific nature of the bill, it is necessary to be clear about what it is and is not designed to do. The purpose of the bill is to remove the dilemma that mesothelioma sufferers face in relation to whether to pursue a damages claim. They face that dilemma because of a unique combination of features relating to mesothelioma. It is almost invariably caused by exposure to asbestos; in the other cases—which probably involve about one in a million people—negligence does not arise. Under current medical science, there is no treatment that will cure anyone with the disease. The average life expectancy of someone who has the disease is 14 months.

For people diagnosed with mesothelioma, the issue of how to handle a compensation claim arises immediately. They know their likely life expectancy and that their disease was caused by exposure to asbestos, and—this is important—under the Fairchild exception they do not need to meet the normal test of causation in civil actions. The causal requirement is satisfied if an employer's wrongful conduct materially increased the risk of the person contracting mesothelioma.

The Executive believes that no other class of personal injury shares those characteristics and, typically, puts the sufferer in a dilemma in relation to relatives' compensation claims. Most mesothelioma sufferers are not pursuing their own claims, in order not to disadvantage their relatives. No one involved in making personal injury claims has told us that any other groups of claimants face that dilemma and are forgoing their own claims in favour of their relatives' claims. We have introduced the bill to address that specific problem.

In our consultation paper, we suggested that ministers might have the power to extend the new provision to apply to other diseases or conditions if necessary. There was a mixed response to that from consultees. If an order-making power were included, it would be restricted to diseases that share the characteristics of mesothelioma. We see no likelihood of such a power being needed in the foreseeable future, and ministers decided that the bill should not contain it.

A crucial reason why the bill is mesothelioma specific and why we do not see a need for an order-making power is that it is intended to remove a problem that the law causes for a particular group of people; it is not intended to encroach into the law itself any more than is necessary to address the identified problem. In other words, the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives'

rights are extinguished if the deceased settles their claim in full prior to death.

However, in considering the need to take this action, we have identified areas of the law of damages that should be reviewed. The evolution of the law relating to damages recoverable in respect of a death resulting from personal injury—and to damages recoverable by relatives of an injured person—has resulted in provisions that are complex and which, together with practice and procedures, can have unintended consequences.

Ministers have therefore asked the Scottish Law Commission to undertake a review of the 1976 act and the relevant elements of the Administration of Justice Act 1982, taking into account underlying practices and procedures. The review will consider the position of other personal injury victims and the continuing appropriateness of the exclusion of relatives' rights in section 1(2) of the 1976 act.

10:15

Some respondents to the consultation expressed the view that the change in the law in the bill is not necessary because the problem could be addressed through the greater use of interim awards of damages and sisting of cases until after the death of the person with mesothelioma. We do not consider that that would be a reliable solution for mesothelioma sufferers. If interim awards were to become a useful way to provide some damages due to a mesothelioma sufferer it would require changes in behaviour on the part of pursuers and defenders. That must be the case, because there were only nine awards of interim damages in the year to 31 March 2006. If that approach provided an acceptable solution, people would be using it. Ministers did not feel able to forgo this opportunity to address the problem through a change in the law because of the existence of a little-used procedural mechanism.

The Executive has introduced this short bill to address urgently and specifically a problem encountered by mesothelioma sufferers who are choosing not to pursue their own claims so that their family can benefit from larger awards. The bill is the only sure way to address the problem. We have introduced it in the knowledge that a wider look at this area of the law is necessary and is being carried out by the Scottish Law Commission. We think that that two-pronged approach is the correct way to proceed.

**The Convener:** That was a helpful and succinct summary.

**Marlyn Glen (North East Scotland) (Lab):** Lorna Brownlee's introduction was detailed and helpful. She has probably answered my question already. I want to know about the development of

the bill, including the implications of the Coulsfield report in the process. Would the witnesses like to add anything to what Lorna Brownlee has said already?

**Lorna Brownlee:** Part of the background to the bill is the campaigning that has taken place and the representations that have been made—no least to Parliament through Des McNulty MSP.

A feature of the dilemma is that it is now possible that sufferers' own claims are settled more quickly than they used to be as a result of the Coulsfield rules. That is one of a number of factors that come together and contribute to the dilemma. My colleagues may like to say more about Coulsfield.

**The Convener:** I would like to say something about that before we go any further. Claims are being settled more quickly as a result of the Coulsfield rules, but it was a report by the previous Justice 2 Committee, via Lord Cullen, that agreed a short procedure through Coulsfield. I do not know whether you were aware of that. The previous Justice 2 Committee specifically negotiated on the back of the Coulsfield reforms that mesothelioma sufferers only could apply to the court for a shortened procedure. My understanding is that one of the reasons why sufferers are coming through the queue more quickly is because the procedure is so much shorter.

**Bob Cockburn (Scottish Court Service):** There are two separate issues. The Coulsfield rules were developed several years ago—Lord Coulsfield received his remit in 1997. The rules are about tackling delays in relation to personal injury claims more generally, and not just mesothelioma cases. Therefore, the reforms of the procedures are actually quite separate from this legislation.

**The Convener:** Perhaps you are not aware of this, but there are three issues. There is the legislation; there is the Coulsfield report, which started in 1997, although I do not know when it concluded—

**Bob Cockburn:** In 2003.

**The Convener:** Mary Mulligan and Margaret Ewing were involved at one point as reporters. Stewart Stevenson was also involved. Because the previous Justice 2 Committee was so busy at the time, it was agreed that Bill Aitken and I would do the negotiations with Lord Cullen. You will know that, at that time, there was a preliminary court that was run by Lord Mackay, with a specific agreement that mesothelioma sufferers could apply for a shortened process via the Coulsfield reforms. That is how that process came about.

**Bob Cockburn:** That remains the case. It is still possible to seek acceleration of the procedure under the Coulsfield rules.

**Stewart Stevenson (Banff and Buchan) (SNP):** I seek clarification on an issue that Lorna Brownlee mentioned in her opening remarks. I heard her say that only one in a million cases of mesothelioma is not asbestos derived. According to the briefing that we have from the Scottish Parliament information centre, the Health and Safety Executive states that there is a known exposure to asbestos in 80 per cent of cases. I accept that that may be a different issue. The British Lung Foundation states that more than 90 per cent of cases of mesothelioma derive from asbestos exposure. One in a million is a rather different figure. Is the difference simply because the 80 per cent and 90 per cent figures are about cases in which we know of the exposure, so the point is not that there is no exposure in the other 20 per cent or 10 per cent of cases? Is it the medical view that only one case of mesothelioma in a million involves no exposure to asbestos? The figures from the British Lung Foundation and the Health and Safety Executive may not be in opposition to your figure.

**Lorna Brownlee:** Those figures relate to the totality of mesothelioma cases. The one in a million figure is one that I noticed on rereading the Fairchild judgment—their lordships used the figure in relation to cases that arise from a cause other than asbestos. I think that the figure means one in a million in the total population.

**Stewart Stevenson:** Oh. So, for clarification, the prevalence of mesothelioma in its various forms is one per million population.

**Lorna Brownlee:** No—the prevalence of mesothelioma in the population from a cause other than asbestos is one in a million.

**Mr Bruce McFee (West of Scotland) (SNP):** So, in Scotland, we could expect there to be five cases of mesothelioma that are not related to asbestos.

**Lorna Brownlee:** That would be the logical conclusion.

**Stewart Stevenson:** At the peak rate of 2,500 cases, the five cases that we would expect—using the one in a million figure—that are not related to exposure to asbestos would be a small percentage. I am struggling to do the arithmetic.

**Mike Pringle (Edinburgh South) (LD):** It is 2.5 per cent.

**Stewart Stevenson:** No; it is much less than that—it is one in 500, or 0.2 per cent.

**Lorna Brownlee:** One important point about cases that are not a result of asbestos is that they

do not arise from negligent conduct on anybody's part.

**Stewart Stevenson:** I was not going there. I was simply pursuing the medical issue. To be absolutely clear on the record, mesothelioma is almost never—but not never—derived from a cause other than exposure to asbestos.

**Lorna Brownlee:** Correct.

**Stewart Stevenson:** That is all that I wanted to know.

**Margaret Mitchell (Central Scotland) (Con):** It would be helpful to the committee if you gave an outline of any discussions or progress on resolving the issues between the Administrations at Westminster and Holyrood.

**Lorna Brownlee:** The bill deals with an area of devolved law, but we have of course had discussions with colleagues in England, as they are interested in developments in the law in Scotland. There are no outstanding issues of policy between the Administrations in that respect.

**Margaret Mitchell:** The question really stems from the debate in the Parliament on 29 June on a legislative consent motion on the Compensation Bill. Are you saying that nothing in United Kingdom legislation will be affected by the bill and that there is nothing further on which we must consult Westminster?

**Lorna Brownlee:** That legislative consent motion related to the separate issue of joint and several liability. The Parliament decided unanimously that the legislative consent motion was the right way in which to proceed on that. There is no issue outstanding with Whitehall in relation to the matter with which the bill deals.

**Margaret Mitchell:** So there are no on-going discussions with Westminster about any way in which the bill would impact on reserved powers.

**Lorna Brownlee:** There are on-going discussions in Whitehall on ministers' general wish to improve the processing of claims from mesothelioma sufferers. For example, the Department for Work and Pensions has work in hand in relation to better handling of claims for benefits. A number of steps are being taken to improve matters for mesothelioma sufferers, but there are no issues outstanding between the Administrations.

**Margaret Mitchell:** Tom McCabe said:

"Action is proceeding in a joined-up way on a wide front, across the responsibilities of the Scottish and Westminster Administrations."—[*Official Report*, 3 June 2004; c 8998.]

**Lorna Brownlee:** That comment was made during an earlier debate. The background to that

statement may have been health matters—possible treatments and so on.

**Mr McFee:** I understand that the intention of the Compensation Act 2006, which was considered at Westminster, was to allow an individual who was claiming compensation to claim from one employer, rather than to have to have joint liability admitted. My father was in the shipyards, and it was extremely common for people to work for a number of different companies, depending on the stage that had been reached in building a ship. In those days a person could leave work on a Friday and start work with someone else on a Monday. They could be exposed to asbestos, as my father was, on a number of occasions. Under the 2006 act, people can proceed against just one employer and need not get all the employers to pool their liability. That is very important for mesothelioma sufferers, because it is difficult to get companies that no longer exist to admit liability.

**Paul Cackette:** There is a particular issue with mesothelioma as opposed to other asbestos-related illnesses, because it is accepted that mesothelioma is a one-exposure disease. A person may be suffering from the disease because of one event, although they may have worked in a number of places over a number of years. Because it is not medically possible to establish exactly when a person contracted the illness, it was extremely difficult—under traditional delict and damages law, impossible—for a pursuer who had a number of employers to prove liability against any of them. That gave rise to the Fairchild exception, which meant that there was no need to prove specifically that one person had caused the harm, when a range of employers were potentially responsible. However, the case of *Barker v Corus*, which followed that, raised the issue of joint and several liability. As a consequence, the UK Government, supported by a legislative consent motion in the Scottish Parliament, effected the reverse of that decision, to allow the pursuer to proceed and to obtain damages on a joint and several basis.

**Mr McFee:** So that is the link between the two pieces of legislation.

**Paul Cackette:** Joint and several liability is the link. The legislative consent motion that was agreed to in June was about that. The bill relates to the same disease but addresses a different problem.

**Mr McFee:** Indeed, but the issue of joint and several liability was a major hurdle for us to get over before reaching this point.

**Paul Cackette:** Indeed.

**Stewart Stevenson:** I want to focus on the response to the Executive consultation from the Association of British Insurers, which suggests

that the alternative process of sisting could be used. In her opening remarks, Lorna Brownlee indicated that there have been only nine examples of that.

Can you tell us about the costs and difficulties involved in a person raising an action and their relatives raising a separate action after their death, compared with those involved in a person raising an action, getting interim damages and sisting the action, which is then continued until after their death—or do we not know about that yet?

10:30

**Paul Cackette:** On costs, if the bill is passed, it could result in two court actions rather than one, depending on how the litigants conduct the litigation. One set of proceedings would be to resolve the dilemma, which the victim may wish to do before he or she dies. Then, because the solatium related to death would be finalised only on death, the relatives would raise a separate action. Therefore, one possible outcome is that there would be two sets of litigation, with all the consequences that that would have.

It depends to a certain extent on how the pursuers, the defenders and their insurers react to the change in legislation. In order to minimise the risk of double litigation they might move in future to greater use of interim damages, but it is hard for us to say. I know that you will take evidence next week from those who deal with such cases in practice. They may be better placed to advise you on the situation. As Lorna Brownlee said, our experience is that interim damages are rarely used in the cases that are proceeded with in the person's lifetime. For whatever reason, interim damages are not considered an acceptable way to resolve the dilemma.

**Stewart Stevenson:** In any event, is it correct to say that the bill in no way removes any currently available approach, such as raising an action while the person is alive, sisting it and then continuing the action after their death? The bill merely creates an additional option for which there is, in my humble opinion, a strong case.

**Paul Cackette:** Yes. Rules are in place that allow such an approach to be taken and nothing in the bill would stop that option being pursued if that is what the parties chose to do.

**Mr McFee:** Stewart Stevenson is probably driving at the so-called solution put forward by the insurance industry, which was that, rather than find themselves in the dilemma that people who are suffering from mesothelioma are currently in, someone could begin a case and sist it. Stewart Stevenson's question was about the cost to the court system if people pursued that route rather than the option that is before us in the bill.

**Stewart Stevenson:** I was asking about the costs to all parties.

**Paul Cackette:** If the process was agreed by the parties, a payment of interim damages was made and the court was willing to agree to the sist, I think that there would not be additional legal costs—certainly, the cost would not be as much as it would be if a separate action proceeded.

An issue that arises with sisting—I am not aware whether it has been tested with the courts yet—is that in recent years the courts have generally tended to be more reluctant to agree sists without good cause being shown, in order to ensure that cases are managed properly. Timetabling to get resolution as quickly as possible, in accordance with chapter 43 of the Court of Session rules, has tended to mean that courts are even more reluctant to agree sists. That is the context and the situation that is developing in cases of this nature. A sist is a possible option, but it is for courts to decide; a court may or may not grant a sist, whatever the parties ask for.

**Mr McFee:** Is it your view that sisting might be a cumbersome way of addressing the problem?

**Paul Cackette:** I am not sure that I would go so far as to say that it is cumbersome. It is a way of proceeding. I do not know whether Bob Cockburn has any views on the way in which sisting is used in the context of the Coulsfield rules. I am not sure that I would say that it is cumbersome, but judges, who are sensibly driven by the rules to keep programmes on schedule, have not tended to encourage sisting.

**Bob Cockburn:** It is a difficult question for us to answer, because essentially it is for the court to decide whether to grant a sist. It is certainly an option, but a lengthy sist is inconsistent in some ways with the ethos of the Coulsfield reforms, which is all about setting the end point right at the start of litigation and working towards that end point. If a sist was granted and took the proceedings beyond the end point that the court had set for the case, that might become a problem for the court. It is a matter for judicial discretion.

**Mr McFee:** It would at best introduce a degree of uncertainty into the process, in that you could not second-guess what the decision of the court would be in any particular case.

**Bob Cockburn:** Yes. That is fair.

**Paul Cackette:** That is the risk that arises.

**Mr McFee:** The Forum of Insurance Lawyers, in its response to the Scottish Executive's consultation, argued that the consultation was predicated on an incorrect premise. The forum said that the victim does not, by accepting any damages, prevent his family from claiming for non-patrimonial loss. How do you respond to that?

**Paul Cackette:** There are a number of aspects to that. To a certain extent, our response is the answer that Lorna Brownlee gave earlier. The proof of the pudding is in the eating: interim damages are not used to any significant extent at present and, if they were a good way forward, we might expect them to be used a little bit more.

In theory at least, interim damages are potentially difficult for the court to address because, to make an award of interim damages, it would have to accept that a payment ought to be made even though the case was not yet proven. The case would not have got to a proof and, as anyone who is involved in litigation is aware, even the most watertight case is not guaranteed to succeed, so the court would have quite a difficult task.

The other dimension is that, if defenders were willing to agree to make interim damages payments, there would be no need for the court to consider the case. The parties could agree interim damages between them, the payment could be made without troubling the judge and then the matter could be resolved later. If a judge ends up being asked to make an interim award, it is because the defender objects to it; if the defender did not object, the parties would just agree damages between them.

The difficulty for the court with awarding interim damages lies not only in having to make an interim award where liability is not admitted, but in having to do it in the face of the defender saying that they do not agree with an award.

**Mr McFee:** That is interesting.

**Mrs Mary Mulligan (Linlithgow) (Lab):** In her opening statement, Lorna Brownlee referred to the Executive's decision not to include a power to extend the bill's provisions to any other conditions. I ask her to say a little more about the basis for that decision.

**Lorna Brownlee:** Ministers wished there to be no doubt about the situations that might give rise to the use of such a power. Such situations would be similar to the situation in which people with mesothelioma find themselves. We took the view that if any condition was going to emerge that arose from negligence, and on which the medical consensus as to cause and outcome would be as it is with mesothelioma, we would already know about it, because such things take a long time to develop.

On reflection and in the light of consultation, we felt that it would be difficult to make a case to the Parliament for such a power and to set out for you clear criteria for its use if we did not have a clear view of the need for it. We also felt that there was a risk that, if we allowed for the bill's coverage to be extended, concerns about that power might

divert attention from the bill's purpose. Without a clear need for such a power, we did not consider it sensible to provide a diversion from the bill's main purpose, which was to address a specific, identified problem.

**Mrs Mulligan:** I notice from the consultation that seven parties agreed that you should have the power. Did any of them mention anything that they thought could be encompassed within it at some point in the future?

**Lorna Brownlee:** Yes. Some parties mentioned asbestos-related lung cancer as a possible addition, which we considered because it was raised with us. However, as you might know, asbestos-related lung cancer is clinically indistinguishable from other lung cancers and probably about 3 per cent of lung cancers are attributable to asbestos inhalation. That puts asbestos-related lung cancer sufferers in a very different position from mesothelioma sufferers in relation to damages claims.

Also, although asbestos-related lung cancer was mentioned as something that might be added, we were not told that people who suffer from it are forgoing making their own claims. The purpose of the bill is to address the dilemma that mesothelioma sufferers face.

We agree that lung cancer is a distressing and horrible condition that is caused in some cases by asbestos inhalation, but in the context of the bill we do not think that it is in the same category as mesothelioma.

**Mrs Mulligan:** Do people with asbestos-related lung cancer go through the same procedure to claim damages?

**Lorna Brownlee:** I refer to the point that Paul Cackette made earlier. Next week's witnesses might be more able to answer your question. When we examined the cases that were settled in court over a period of 35 years, we found that lung cancer was mentioned in 58 cases. However, in all but two cases it was mentioned as a possible increased risk for people who had been exposed to asbestos. There were only two cases in which the person had actually contracted asbestos-related lung cancer.

**Mrs Mulligan:** You said that, if conditions to which the bill could be extended were going to emerge, you would know about them because of the time that they take to develop. However, we all know that things can change. If a condition developed that fell into the same category as mesothelioma, would further legislation be required, or is there another way of dealing with that?

**Lorna Brownlee:** At the moment, the bill is specifically on mesothelioma.

**Mrs Mulligan:** So if there was another condition, you would need to introduce another bill.

**Lorna Brownlee:** That is correct.

**Mike Pringle:** The bill will not apply to people who have already settled, but it will apply to cases that are currently going through the courts. If somebody's case starts to go through the courts today and they settle before the bill becomes law, will they have the right to claim retrospectively? Why did you decide that retrospective claims should not be allowed? In future, people will have the right to make claims, but a lot of people have already settled. They might think that the bill is unfair to them.

**Paul Cackette:** The answer to your first question is no. If someone settles before the bill becomes law, they will not be able to enjoy the benefit of the changes. There is a difference between cases that have been settled and cases that might be settled between now and the legislation coming into force. In the case of the latter, we expect that parties will not want to settle because they will know that the bill is going through the Parliament. If they are properly advised, people who are caught in that dilemma should be able to protect their position.

On your second question, there is a balance to be struck between the way in which such changes are progressed, worthwhile though we believe them to be, and the impact on general damages law. A matter that concerns us in general is the fact that the current damages legislation proceeds on an important principle of certainty. When damages claims are settled, they are settled. The concept of opening up a settled damages claim at some point in future gives rise to a range of risks for pursuers as well as defenders. The principle is important, and I emphasise that it cuts both ways. The matter does not arise in the bill, but if it had been drafted differently, it could have allowed settled claims to be reopened. We think that that is a dangerous line to go down.

That is part of the reason why the bill is prospective in its application. There is always a presumption in favour of not enacting retrospective legislation unless good cause is shown. We can certainly see the argument for cause in this case, but the difficulty is that allowing legislation to be applied retrospectively would cut across the principle and benefits of certainty in relation to actions that were settled on the basis of the law as it stood at the time.

10:45

**Mike Pringle:** Okay.

**Mr McFee:** I want to be absolutely clear about this. There is a degree of retrospection in the bill,

but it is absolutely minuscule. If somebody settles before the act comes into force, they will not have the protection that it affords. Therefore, people who might be considering settling at the moment would be well advised not to reach final settlement before the bill comes into force.

**Paul Cackette:** Yes.

**Alison Fraser (Scottish Executive Legal and Parliamentary Services):** I am sure that the witnesses for next week's meeting will be able to tell you what they are doing about that, given that they will be dealing with on-going claims.

**Mr McFee:** I understand. I just wanted the message to be absolutely clear that the degree of retrospection is not terribly large, which means that somebody who settles next week will not be afforded the protection of the bill. I want to ensure that people in that position know that that is the position.

**The Convener:** I think that you said that many pursuers are delaying settlement in any case, because they know that that will benefit their families. I suppose that they will continue to do that, so that they can get the benefit of the bill.

**Paul Cackette:** They are delaying settlement for slightly different reasons. There will not be an impact on the 80 per cent who have resolved the dilemma in their own minds by delaying their cases anyway. The issue that has been raised comes into play only for those who decide that they want to proceed with their own claims.

**The Convener:** It is fair to say that, given the Coulsfield reforms to speed up the system, on the back of the work of the previous Justice 2 Committee, there are more living pursuers in the system than there would have been previously. Under the pre-Coulsfield system many pursuers were not alive by the time their claims came to court, which is why we needed to speed up the system. Is it fair to say that because we have speeded up the system, more pursuers now have the difficult decision to make whether to pursue their own claim?

**Paul Cackette:** That is a fair point. Over the years, the courts have generally become more generous in the level of payments that they award in relation to relatives' solatium. The consequence of that is that, in purely financial terms, the dilemma for pursuers is greater, because by waiting they acquire more compensation. All those factors have to be considered together, but your basic hypothesis is correct.

**Stewart Stevenson:** I draw to your attention what the Parliament did under advice from Government advisers in relation to the Agricultural Holdings (Scotland) Act 2003. I refer to the backdating of the crossover from limited

partnerships to short limited duration tenancies. In essence, it was concluded that it was proper to backdate to the point at which the policy intention was published. In a parallel way, do you think that it would be appropriate to backdate provisions in the bill to the date of its introduction, which is 27 September 2006?

**The Convener:** In addition, I am aware that the provisions of the Leasehold Casualties (Scotland) Act 2003 came into force on the day that the bill was published, although I do not know what mechanism was used—perhaps there was a particular reason for that. That act is one of those gems, which I would be amazed if anyone other than Adam Ingram and I remembered.

**Paul Cackette:** I can speak only about the Agricultural Holdings (Scotland) Bill, which I worked on in a previous existence. I am aware of the backdating provisions that Stewart Stevenson mentioned, which were included because of the particular circumstances. As I recall, there were concerns that, in the period between the time of the Executive making people aware of its proposals and the time of royal assent, all sorts of behaviours would be undertaken that would circumvent—

**Stewart Stevenson:** Would the word “shenanigans” be appropriate?

**Paul Cackette:** It would not be for me to use such a word.

**Stewart Stevenson:** I think that Ross Finnie has used language that was not even as moderate as that.

**Paul Cackette:** Yes. It was a valid point and a reasonable observation.

As I say, I cannot speak about the Leasehold Casualties (Scotland) Bill, but with the Agricultural Holdings (Scotland) Bill there was a concern that the provisions of the bill could be circumvented by the activities of landlords after they became aware of what was coming down the tracks. They could have entered into leasehold arrangements in order to avoid the consequences of the bill once it was enacted.

Mr McFee made points about this earlier, but I am not sure that the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill will give similar opportunities to people who wish to avoid the consequences of the bill. Perhaps those who are involved in dealing with the litigation would be better placed to advise the committee.

The Agricultural Holdings (Scotland) Bill was very difficult to draft. When you consider retrospective legislation, you have to put yourself in the shoes of people eight or 10 months before. It was extraordinarily difficult to ensure that we did not make a mistake and change historical fact.

**Stewart Stevenson:** A principle of the Agricultural Holdings (Scotland) Act 2003 was that it was not inequitable to make the date on which the act came into force the date on which the intentions behind it were published.

**Paul Cackette:** Indeed—and I certainly accept that the principle is not unprecedented.

**Mr McFee:** We should perhaps ask others about this. It may be that no one comes into that category.

**Paul Cackette:** A final point that I would like to make is about certainty. It would be possible to allow for the reopening of cases that were settled between the date of introduction and the date of royal assent. We should not forget that there are serious policy reasons why breaking the principle of certainty of settlement in damages cases is a bad idea.

**Mr McFee:** That would, of course, be the reason that we would want to allow retrospective provision—not to introduce uncertainty, but to make the provision available to people in the category, if there are any.

**The Convener:** Under the bill, if a pursuer has settled a claim, the family can, on the death of the pursuer, go back to court a second time and make claims under other heads. The family cannot do that at the moment—unless, of course, the person delays their claim. Will the bill result in increased settlements from the defender?

**Anne Hampson (Scottish Executive Justice Department):** We estimated that it would cost about £1.1 million, rising to £1.5 million, for the defenders to pay. We have to remember that 85 per cent of cases at the minute are being settled by relatives after the death of the pursuer, so it is only in the other 15 per cent of cases that increased costs will arise.

**The Convener:** So that £1.1 million to £1.5 million is for the 15 per cent of cases that are not being settled in that way.

**Anne Hampson:** That is correct.

**The Convener:** The panel said earlier that the evidence was that the trends of settlement in relation to solatium were increasing.

**Paul Cackette:** That is my understanding. To a certain extent, my evidence is anecdotal—it comes from speaking to personal injury lawyers—but the rates have been increasing over the years.

**The Convener:** Is it also correct to say that the trend is also changing with regard to solatium settlements to sons and daughters?

**Paul Cackette:** As I understand it, the trend for claims both by widows and by sons and daughters has changed consistently.

**The Convener:** Will demand for the bill's provisions eventually fade out? I realise that the SPICe briefing sets out some statistics on the matter, but I would like to get your response to the question on the record.

**Lorna Brownlee:** Are you asking whether demand will fade away after the number of mesothelioma deaths reaches a peak?

**The Convener:** Yes.

**Lorna Brownlee:** That is the logical conclusion, but it will take quite a long time to reach that point.

**The Convener:** What are your predicted timescales for that?

**Lorna Brownlee:** I am sure that the HSE would want me to stress that any projections should be treated with caution, but according to current projections the peak will be reached somewhere between 2011 and 2015, after which deaths will gradually decline.

**The Convener:** Obviously we will hear from other witnesses on this bill, but do you have any feeling for the strength of opposition to this amendment to the 1976 act?

**Lorna Brownlee:** You will have seen the responses that we have received and, obviously, the submissions that you have received to your own call for evidence. The main points that have been raised with us, including the possible use of interim damages and the possibility of extending the provisions, have already been discussed this morning. One can certainly gauge from the responses the strength of feeling on this matter. It might be fair to say that, having seen what we have done in light of their responses, one or two of the respondents to your call for evidence have tempered their original comments. In any case, you have also seen SPICe's summary of the responses.

**The Convener:** If we stick to the timetable, I see no reason why we cannot reach stages 2 and 3 before February or March. How long does it take for legislation to receive royal assent? A couple of months?

**Paul Cackette:** Under the Scotland Act 1998, four weeks must elapse after stage 3 before royal assent can be given. In general, if all goes well, royal assent is given four, five or six weeks after stage 3.

**The Convener:** And the provisions would come into force the very next day.

**Paul Cackette:** They would come into force seven days later.

**The Convener:** Do members have any other questions? I do not believe it; it is only 11 o'clock

and we seem to have run out of questions. Stewart Stevenson predicted as much.

**Margaret Mitchell:** The Forum of Scottish Claims Managers has expressed concern about double accounting with regard to claims for wages and solatium and has suggested that, as the existing law is problematic, section 1(2) of the 1976 act be disapplied. Have those concerns been met?

**Lorna Brownlee:** There is no element of double accounting, because we are not disapplying section 1(3) of the 1976 act, which relates to patrimonial damages to relatives. Double accounting would happen if that were disapplied, as the victim's settlement takes account of the support payment that they will have received.

**Margaret Mitchell:** That is helpful.

**The Convener:** Your clear and succinct evidence has helped our scrutiny of the bill. I thank you for appearing before the committee. We will raise various issues with our other witnesses at next week's meeting.

I remind members that our next meeting is on Tuesday 5 December, at which the committee will further consider its draft report on its inquiry into the Scottish Criminal Record Office.

*Meeting closed at 10:59.*

**48th Meeting, 2006 (Session 2), 6 December 2006, Written Evidence**

SUBMISSION FROM HARRY MCCLUSKEY, CLYDESIDE ACTION ON ASBESTOS

As you maybe aware Clydeside Action on Asbestos have been actively campaigning on the current injustices within our Scottish system of civil justice. It was as a result of the Lord Presidents direction following petition PE336 (which primarily dealt with a fast track system to ensure that those with mesothelioma should receive their damages in life) that the issue of potential damages for a surviving spouse and/or dependents was highlighted. To create this fast track system in order that those with mesothelioma who were claiming compensation received their damages in life was only just. However this system only highlighted the anomaly that put additional pressure on those with mesothelioma, as they now had to make a choice as to whether or not they should accept their damages in life knowing that this would be a much lesser value than having a posthumous settlement as no future payment would be made in respect of their spouse/families following their death. Clydeside Action on Asbestos believe that to place additional pressure on terminally ill people is totally unacceptable. We further believe that there has been a breach of natural justice in that there should be no financial difference between an in "life payment" and posthumous settlement where a person has, or has died, from mesothelioma.

Clydeside Action on Asbestos firmly believe that the proposed bill will rectify this appalling and unjust legal position and once the amendment is made will provide a more just system to the almost 700 people with mesothelioma who would otherwise have to make a choice of either accepting damages in life, perhaps to make life more comfortable, or give up their right to compensation to ensure future financial stability for their family members.

It is therefore the opinion of Clydeside Action on Asbestos and all of its members that the Damages (Scotland) Act 1976 should proceed to be amended at the earliest opportunity in favour of all those with mesothelioma.

One example of a client who had been affected by this anomaly is as follows:

Mr X was diagnosed with mesothelioma in 2005. He is aged 63 and is married with 4 children who all live at home. Having some financial difficulties he is somewhat forced to ask that his claim for damages be fast tracked in order he pay off his debt and make the remainder of his life more comfortable. Taking into consideration all factors (pain and suffering; loss of earnings and services) Mr X settles for £130,000. The value of his case had it been settled posthumously would have been approximately £198,000. (the original £130,000 with an additional £28,000 for his widow and £10,000 for each dependent). Mr X sadly died earlier this year.

Harry McCluskey  
Secretary

SUBMISSION FROM TOMMY GORMAN, WEST DUNBARTONSHIRE  
COUNCIL/CLYDEBANK ASBESTOS GROUP

Thank you for your letter dated 29 September 2006 concerning the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

The fact that a Mesothelioma sufferer has already secured a settlement from a negligent employer while alive should have no bearing on the individual rights of surviving appropriate bereaved relatives to pursue claims.

I support the purpose of the Executive's Bill which is to amend the damages (Scotland) Act 1976 in order to allow appropriate close family members of mesothelioma patients to claim for non-patrimonial loss including distress, grief and loss of association where the patient has suffered personal injury due to asbestos exposure leading to mesothelioma and dies as a

consequence of this injury. Appropriate bereaved relatives will have the legal right to make claims whether, or not, the deceased relative has already recovered damages.

The amendment to the Damages (Scotland) Act 1976 encompassed within the Bill addresses basic issues of human rights and natural justice which require to be rectified urgently. It will allow many Mesothelioma sufferers to die with dignity and peace of mind in the knowledge that adequate financial provision is in place for loved ones after death. This removes from families a dilemma which imposes upon them the need to make an impossible decision; whether the sufferer, in life, claims their due compensation which may deliver an improved quality of life through the provision of small comforts which could be purchased; or do they sacrifice their right to compensation in order to allow immediate family members to make claims after they are dead. This proposed change makes a most valuable contribution by assisting this group of terminally ill people to make end of life decisions in the absence of undue stress and anxiety.

There are growing numbers of individuals affected by asbestos-related disease (including Mesothelioma), whose lives have been destroyed by exposure to this carcinogen. It is disheartening to meet the bereaved relatives of the victims of this horrendous industrial cancer and hear how they are disadvantaged by the law as it currently applies in their cases under the Damages (Scotland) Act 1976.

As it is understood by voluntary organisations, trade unions and all who campaigned for this change the Bill is intended to ensure that, if the injured person recovers damages for mesothelioma, and then dies, this does not prevent his or her immediate family from recovering damages for the grief, suffering and other emotional damage which they have suffered. Mesothelioma victims are people who have suffered through no fault of their own. They contracted this fatal form of cancer through exposure to asbestos, a hazard which was acknowledged by factory inspectors in the late 19<sup>th</sup> century.

I would like to take this opportunity to acknowledge the cross-party consensus that has been displayed recently in the Scottish Parliament on court proceedings, compensation issues and other matters concerning the victims of asbestos-related disease and also the informed nature of the contributions made by the MSPs who have participated in these debates. Many individuals and families affected by Mesothelioma regard this as a Bill for the people; introduced by a Parliament working for some of its most vulnerable citizens. It is their fundamental belief this legislation should progress through the stages of parliamentary scrutiny in the most economic timescale.

Tommy Gorman

Welfare Rights Representation Unit, West Dunbartonshire Council/Clydebank Asbestos Group

#### SUBMISSION FROM THE ASSOCIATION OF BRITISH INSURERS

This is the Association of British Insurers' response to the Scottish Executive's consultation on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

The Association of British Insurers is the trade association for insurance companies operating in the UK. It represents over 400 members who, between them, account for over 94% of the general insurance business of UK insurance companies.

Our members have a substantial part to play in compensating Mesothelioma victims and we welcome the opportunity to play a constructive role in this consultation process. We are already working closely with the Department for Work and Pensions to improve the claims process for Mesothelioma victims in England and Wales, and we would like to take this opportunity to indicate that we are keen to work more closely with the Scottish Executive in a similar way.

However, we do not believe that the proposed legislation is necessary. We recognise that the current law, which prevents the immediate family of Mesothelioma sufferers from claiming

damages for their non-patrimonial loss if that family member has settled his claim within his lifetime, can cause problems for claimants and their relatives. This can be resolved, however, by encouraging claimants to initiate their claim, make an application for interim damages, and then sist the claim until after their death. This process would enable the claimant to receive a sum of money whilst still alive, and for their family to claim their damages after death.

If it is accepted, nevertheless, that a change in the law is necessary we are pleased to note that the amendment to the Damages Act has been restricted to Mesothelioma claims only. We support this decision, as Mesothelioma is a unique disease. The medical characteristics of the disease and, because of these, the way in which Mesothelioma litigation is dealt with, are particular only to Mesothelioma itself. We would therefore, be opposed to any extension of this new law to any other disease.

Nick Starling,  
Director, General Insurance Department

## Scottish Parliament

### Justice 1 Committee

*Wednesday 6 December 2006*

[THE CONVENER *opened the meeting at 09:49*]

### Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill: Stage 1

**The Convener (Pauline McNeill):** Good morning and welcome to the 48<sup>th</sup> meeting in 2006 of the Justice 1 Committee. I have received no apologies. I have switched off my phone; I ask members as usual to check that they have switched off theirs. I introduce from the Scottish Parliament information centre Murray Earle, who has been assisting us with the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

I welcome our first panel of witnesses: Phyllis Craig is from Clydeside Action on Asbestos; Tommy Gorman is from Clydebank Asbestos Group; and Ian Babbs is from Asbestos Action Tayside. Although you have made many representations to the previous Justice 2 Committee in session 1, this is still an important occasion. We have a number of questions for you; Bruce McFee will begin.

**Mr Bruce McFee (West of Scotland) (SNP):** Good morning. As the witnesses know, the bill seeks to address campaigners' concerns about section 1(2) of the Damages (Scotland) Act 1976. As representatives of campaigning groups, do the witnesses think that the bill as introduced is successful in doing so?

**Phyllis Craig (Clydeside Action on Asbestos):** If the bill is passed, I think that it will be successful in meeting our aims. Clydeside Action on Asbestos represents many people who have mesothelioma. It is very unfair that if sufferers claim for damages in life, they forfeit their family's right to receive damages for loss and grief following their death. We must remember that that person is going to die.

**Mr McFee:** Do other panel members wish to put anything on record about the need for this action?

**Ian Babbs (Asbestos Action Tayside):** I back everything that Phyllis Craig said. The mesothelioma patient has the problem of facing the fact that he or she is dying and then has to make a decision about when to claim damages, when they are totally involved in their survival. It is a question of whether they are emotionally ready. That decision should not have to be made; it

should be straightforward. Like Phyllis Craig, I feel that the bill should be passed to allow that.

**Tommy Gorman (Clydebank Asbestos Group):** The strength of the bill is that it is short and gets to the point immediately. There are no frills; it addresses the issue that it is meant to address. The people whom we are here to represent really appreciate that.

**Mr McFee:** So you agree that it does what it says on the tin.

**Tommy Gorman:** Very much so.

**Phyllis Craig:** Very much so.

**The Convener:** It is well recognised that your organisations have lobbied the Parliament on many issues related to your campaign to get justice for sufferers of asbestos-related conditions. You will be aware that, in the previous session of Parliament, Bill Aitken and I were directly involved in negotiations to try to shorten the procedure for sufferers whose cases came to court so late that many of them had passed away by the time that their cases were heard.

As a result of the Coulsfield reforms and the previous Justice 2 Committee's agreement with the then Lord President that asbestos sufferers could apply for a shortened procedure, it became much more likely that more sufferers would still be alive during the procedure. Have those reforms brought about the different problem with which we are dealing today?

**Phyllis Craig:** Petition PE336 highlighted the anomaly with which we are dealing today. It is unfair that people who should receive their damages in life are being asked to make a decision about whether they should receive nothing and allow their relatives to benefit. They also receive no recognition that they have an asbestos-related condition. They have to look to their family's financial security. We dealt with a woman who was a nurse with nine children. Can you imagine the difference that it would make to their lives if she took her damages in life rather than that happening posthumously? The nine children would receive £90,000, plus £28,000 for the husband. There is a considerable difference between what a family receives when the person is still alive and what it receives posthumously. Petition PE336 highlighted that anomaly, and we are here to try to have that rectified.

**Mrs Mary Mulligan (Linlithgow) (Lab):** Good morning. You will be aware that the bill applies only to mesothelioma sufferers—Tommy Gorman referred to the bill's simplicity. In the initial consultation, ministers suggested that they might take powers to extend the provision later, but they have not done that in the bill. Do you have comments on that?

**Phyllis Craig:** I believe that mesothelioma is a unique condition that is caused only by asbestos exposure. Given its uniqueness and the poor prognosis of the condition, we must concentrate on mesothelioma.

**Mrs Mulligan:** That is clear. Are the other witnesses of like mind?

**Ian Babbs:** Yes—I agree with Phyllis Craig. Only yesterday, I spoke to some lawyers about the situation. Their opinion was that because we know both the cause of mesothelioma and that death will occur after a short time, the condition is unique in comparison with other cases. There is no doubt about the situation and the result; we need action.

**Tommy Gorman:** I will follow up the convener's point about the previous Justice 2 Committee's work and the amount of time that is available to people. It is important to deal with mesothelioma in the bill. We must settle the situation in the most economic timescale, because of the short time between diagnosis and death. The evidence from civil servants was that 14 months was said to be the average time between diagnosis and death. In many cases, that would be extremely optimistic—people survive for only two, three, four or five months. For some cases, it is crucial that the bill is passed as quickly as possible. That is the reason for concentrating on mesothelioma.

Other asbestos-related conditions and lung cancer, which were mentioned during the consultation, are for another day, but the Parliament must consider them with seriousness in the future. Any obfuscation of the bill would be a diversion from passing this important piece of legislation, but outstanding issues that affect sufferers of asbestos-related conditions in general need to be the Parliament's business in the future.

**Phyllis Craig:** Defenders in lung cancer cases can drag out those cases, because many factors can cause lung cancer. Usually, the matter is left until a post mortem, so people do not receive their damages in life. In contrast, it is known right away that exposure to asbestos causes mesothelioma and it cannot be readily argued that that is not the cause.

**Mrs Mulligan:** Your position is clear. Other members will ask about timing and other issues.

**Ian Babbs:** Members may not be aware that Asbestos Action Tayside has operated only for about 12 months. I do not have the experience that the representatives of Clydeside Action on Asbestos and Clydebank Asbestos Group have. However, from my experience over the past 12 months, the period of 14 months that is stated in the consultation paper is very optimistic. We have had three deaths—one at 12 weeks, one at 14 weeks and one at 15 weeks after diagnosis. Those people had almost been fit. One chap had been on

holiday in Cyprus and had returned home because he felt unwell. Fourteen weeks later, he was dead. Fourteen months is very optimistic.

10:00

**Margaret Mitchell (Central Scotland) (Con):** You have answered the question fairly fully about not extending the bill to cover asbestos-related lung cancer, but could I tease out a little bit more information from you? You said that there could be problems—for example, it might not be so easy to state that a person's lung cancer was caused by exposure to asbestos—but that mesothelioma is a different proposition. Can you explain to the committee—just so that we have it on the record—why that is the case?

**Phyllis Craig:** It is readily accepted and agreed by medical professionals that mesothelioma is caused by asbestos exposure. When someone has a lung cancer, it is arguable that other contributory factors may have caused it. The defender can drag out a case and wait until the person passes away, because only once a post mortem is done and the tissue is analysed can we identify whether it was an asbestos-related lung cancer. We are trying to ensure that people receive their damages quickly while they are alive. They should have recognition of their condition and should be paid their damages. The prognosis of people with mesothelioma is so poor that the damages have to be paid quickly; the family can then follow that up and get damages for their loss. Lung cancer cases are almost always settled posthumously.

**Margaret Mitchell:** In mesothelioma cases, it is clear from the symptoms that the illness is caused by exposure to asbestos. That is the causal link and it is a given.

**Phyllis Craig:** That is right. Medical professionals have written many papers on the subject. I am sure that if you wrote to any consultant chest physician, thoracic surgeon or oncologist, they would agree that mesothelioma is caused by asbestos exposure. The fact that they agree with that is the reason why the defenders accept it.

**Margaret Mitchell:** That is helpful, because it stresses the uniqueness of your case.

**Marlyn Glen (North East Scotland) (Lab):** We all accept that you are very keen on the bill as it stands going through, but I ask you to comment on the other point of view. The response from some representatives of the insurance industry was that the bill is unnecessary. They suggest that, under the current procedures, it is feasible for a claimant to initiate a claim, make an application for interim damages and then suspend the claim until after their death, thereby allowing both the claimant and

the family to benefit. How do you respond to that argument?

**Phyllis Craig:** If someone is to be paid interim damages, the insurance company is acknowledging that they were exposed to asbestos and have the condition and that it will meet the claim by paying out, for example, £30,000 while the person is alive. Why should the person not receive their full damages in life? They are the one who is dying; they are entitled to the money. Why pay them a portion of the money? Given that insurance companies will pay them so much, why not pay them the full amount, rather than leave it until after their death? I invite the committee to put that point to the insurance companies.

**Marlyn Glen:** We certainly will.

**Ian Babbs:** Another point is the emotion that is involved, which the insurance companies appear to be asking the families to go through twice. The court case takes place and, as Phyllis Craig said, the person gets part of the compensation. However, then the insurance companies ask the families to go through it all again. That is inhuman.

**Tommy Gorman:** Marlyn Glen referred to the submission from the insurance industry, in which there is a contradiction within the final two paragraphs. It refers to sisting, but in the final paragraph the industry agrees with the bill. Anything that takes us away from the crux of the bill is a diversion and defeats the purposes of the bill. The reason for the bill is to be as economic as we can with time. Anything that takes us away from that defeats the spirit of the bill.

**The Convener:** In the witnesses' view, would it make any difference financially if interim damages were awarded? I am trying to understand what might motivate insurance companies to argue that position.

**Phyllis Craig:** Insurance companies have no other argument, so they are putting forward a delaying tactic. They are saying that they will pay interim damages so the bill is unnecessary and does not have to be passed. In fact, they are saying that they recognise that when someone has mesothelioma, they will pay damages, but only in their own time. If the insurance companies are going to pay interim damages, why do they not pay the full amount?

**The Convener:** I heard you say that to Marlyn Glen; I am trying to tease out why the insurance companies would argue that. In your view, is there any financial advantage to them in paying interim damages and then full damages?

**Phyllis Craig:** In my view, it is just a delaying tactic because they do not want the bill to be passed.

**The Convener:** Are you aware of any financial advantage to the insurance companies?

**Phyllis Craig:** I am not aware of that, but if you ask the legal representatives, they may tell you that there is.

**The Convener:** We will ask them, but we wanted to get your view as well.

**Mr McFee:** I want to ask about that; I will put my question to the insurance industry representatives too. Do the witnesses think that the insurance industry's opposition to the bill might be based on their fear of the floodgate principle? Do they think that, once compensation is open to one group, it will be open to others?

**Phyllis Craig:** I am sure that they will have that in mind. They will be wondering whether, if they agree to the provisions on mesothelioma, people will then press for further amendments to encompass lung cancer and other conditions—and I think that they should be scared.

**Tommy Gorman:** The question is outwith the parameters of this discussion. Under the bill, if a sufferer does not have mesothelioma, the family will not be able to claim non-patrimonial damages. The defenders have the right to defend themselves in court, and they do so with great enthusiasm.

**Mr McFee:** Indeed. As has been said, the bill is tightly drafted.

**Stewart Stevenson (Banff and Buchan) (SNP):** Tommy Gorman put it well when he said that the bill is straight and to the point.

I want to explore the possible implications of changing the date on which the bill will come into force. At the moment, that date will be seven days after it receives royal assent, which will happen about five weeks after the Parliament passes it—as I am sure that it shall. There is an argument that it should come into effect on the date on which it was published, which was in the middle of September. Would that make any difference? Are people waiting for the bill? It is clear what the bill is going to do, so backdating it would probably not have much effect in the real world. Are you aware of members of your organisations who have held back their legal claims until the bill is passed?

**Phyllis Craig:** We have many terminally ill clients who have been put in a position of having to choose whether to wait or not.

**Stewart Stevenson:** Just to clarify my view, I suspect that, if we backdated the bill to September, we would achieve a five-week improvement rather than really going back to September as people have been waiting anyway, if you see what I mean. Backdating the bill may be

a slightly false offer, although precedents suggest that we could do that.

**Tommy Gorman:** That is perhaps a question for the legal experts who will give evidence after us. Complex legal matters linked to retrospection were discussed on 29 November with the civil servants, who raised issues about previous legislation and the question of retrospection. The committee needs to pursue the matter carefully with the legal experts. There may be benefits, but it may raise questions to do with people's civil rights. The bill may be seen as necessary within Scottish society, but someone may lose out because their case was lodged earlier. They may not have been in a position to take proper legal advice on whether to hold back with their case or take it forward. There is an issue with retrospection, but a lay person is not qualified to get into the detail of that. It is important that the legal experts who will give evidence after us are pursued on the point.

**Stewart Stevenson:** We will do that. Do you have a view on the issue, or are you content that we should talk to Mr Maguire and Mr Conway about the implications of the issue?

**Tommy Gorman:** My view is that retrospection should apply as far back as possible. The bill has been introduced and has attracted such support from the public and from members because there is a clearly identified denial of human rights, legal rights and civil rights in relation to the narrow issue that the bill is intended to address. Retrospection should apply to an even longer period than the one you suggested.

**Stewart Stevenson:** Only if that clearly does not disadvantage the people whom we are trying to help. That is the issue that will drive us.

**The Convener:** The witnesses will see from the *Official Report* that we explored the matter with Scottish Executive officials. From that discussion, we are aware that significant hurdles would have to be overcome. However, we remain open on the matter and will question others on it. We just wanted to get the witnesses' view.

Although the bill has not been timetabled right through to stage 3, we calculate that it will come into force at the beginning of April. You will understand that the date is not definite, because the full timetable has not been set. In the absence of provisions to bring the bill into force earlier, is there virtue in our having informal discussions with Lord Mackay or other judges who have dealt with these cases and whom I have found to be helpful in the past about using flexibility in the system where that has been possible?

**Phyllis Craig:** It is always helpful to seek the advice of people such as Lord Mackay. That does no harm. If they can come up with further

suggestions that may assist the passage of the bill, it is an excellent idea.

**Mr McFee:** Tommy Gorman said that he is in favour of retrospection, and I understand entirely why he takes that position. Potentially, there are two ways of making the bill retrospective. One is simply to take it back a number of years. The other, for which there is precedent in the previous session of the Parliament, is to take it back to the date on which the bill was introduced, although there are difficulties associated with that. I know that the vast majority of people do not pursue their claims during their lives, in order to protect the position of their families. However, in some circumstances people have immediate financial needs that they must address. Do you have an indication of how many people have lodged claims since the bill was published?

**Phyllis Craig:** We do not have accurate figures, but very few of the clients whom we see want their case to go ahead and their claim for damages to be settled. They are all trying to ensure that their families are financially secure.

**Mr McFee:** So the number is very small.

**Ian Babbs:** I will try to put some figures on the problem. In Tayside we have had 15 cases of mesothelioma. Four of the people affected have died, and of the remaining 11 only one has decided to pursue damages rather than wait, for the sake of the family, until they have died. It is 14 to one.

**Mr McFee:** Was the claim to which you refer lodged recently?

**Ian Babbs:** It was lodged in the past 12 months.

**Phyllis Craig:** We represent the majority of mesothelioma sufferers. In the majority of cases, the sufferer realises that their wife or husband and children would lose out substantially on the claim, so—as people would normally do—they decide that they will not die in vain but will ensure that their family members are financially secure. That is the decision to which most people come.

10:15

**Mr McFee:** Yes, I understand that.

**The Convener:** I want to be clear about what happens when a sufferer decides not to settle to ensure that their family will get the full damages. What do they have to do in court terms?

**Phyllis Craig:** The witnesses from the legal firms will have to answer that question, because the case is already with the solicitor at that point and the solicitor will take the necessary steps to keep it open.

**The Convener:** That concludes our questioning. I thank all three witnesses for their clear and concise evidence. The committee is very grateful to them.

I welcome our second panel of witnesses: Frank Maguire from Thompsons Solicitors and Ronald Conway from Bonar and Co Solicitors. As I am sure they can imagine, we have quite a number of questions for them.

**Mr McFee:** The bill seeks to address campaigners' concerns by disapplying section 1(2) of the Damages (Scotland) Act 1976. Does it do that successfully? Are there any unintended consequences?

**Frank Maguire (Thompsons Solicitors):** Our view is that the bill does that successfully. There is a specific problem with mesothelioma, which the bill caters for. The point is to understand what the problem is and then determine whether the bill addresses it. I can go into more specific details about exactly what it is, if you like.

**Mr McFee:** Please do.

**Frank Maguire:** The first point is to do with statistics. There has been some mention of how many people are affected. Thompsons Solicitors has 500 mesothelioma cases. Of those, 74 sufferers are currently alive and 62 of those 74 sufferers have not gone to litigation. The main reason for that is that they want to hold back. However, the number is more than that because the 500 cases include people who took the decision not to proceed and have died. In those circumstances, the case proceeds for the relatives.

That gives you an idea of the scope of the problem. It is a continuing problem. The majority of people are not proceeding with their cases, but some are. I will give you a specific example of a case with which I dealt last week to show you how the problem works out in the dynamics of litigation and what the choices are.

Last week, I went to see a man in Clydebank who is suffering from mesothelioma. He has a wife, two sons, two daughters and eight grandchildren. His case is litigated, so it is in court and is going through the court procedures. There is good evidence in his case and I told him that I think that he will be successful in it. Under the Coulsfield procedures, a timetable has been set for his case whereby the hearing of it will take place in September 2007. The procedures also allow me to apply to the court for an earlier date than September 2007. The main force for that was the petition that got the procedure in place, which the Justice 2 Committee considered in the previous session.

If I accelerate his case, I should be able to get a hearing in January or February of 2007—in other words, in a month's or, at most, two months' time. I would be able to obtain all his damages—I emphasise the word "his"—at that hearing. He wants to have the case resolved so that he can have certainty in his life while he is dying. As well as finality, he wants justice—he wants someone to be brought to account for his condition. He also wants to settle his affairs before he dies and to improve life for himself and his spouse, who has suffered a stroke and is in care, which he has to pay for. He is living on his own and he needs the money badly.

That is what I can do for him, which is all very well, but there is a problem, which I had to explain to him. If he goes ahead with his case in January or February under the accelerated diet and I obtain his damages for him, in doing so I will cancel out the entitlement of his wife, his two sons, his two daughters and his grandchildren to important damages. They are separate persons who have separate claims because each of them will suffer grief and distress as a result of his death. Somehow I had to explain to him that by going for his damages, he would cancel out their entitlement to damages. However, if he dies before his case is resolved, the rights of his spouse, his children and his grandchildren to damages will not be cancelled out, but will come into play.

He faces a choice: he can have his case accelerated and have it heard in January or February, which will mean getting his damages but cancelling out his relatives' entitlement to damages, or he can wait and have the hearing in September 2007 so that his family members' damages, as well as most of his, can be realised. He could wait, but he knows that he will probably not make it to September 2007. Lawyers and specialist groups are confronted with that problem every week in every mesothelioma case they deal with.

I have explained the situation to countless people. I emphasise the dilemma in which they find themselves. I have a picture in my mind of what always happens. I am sitting in the house of a man with mesothelioma and he is on the settee with his wife and children beside him. When I tell him what will happen, he says, "Look, I'll just die. It's really important that my wife and my children get their damages as well as mine." Then the future widow and the children say, "No, it's your case. You go ahead and get your damages." That is the terrible dilemma that has to be resolved in all such cases. The fact that a decision has to be made about what to do leads to the creation of a dynamic in the family whereby the opposing altruism of each party gives rise to tension.

I was able to say to the man in Clydebank that there might be a solution because a bill is going through the Scottish Parliament that might enable me to get him his damages. We can talk about retrospection and how quickly they would come in, but he might survive until April or May, by which time I might be able to get him his damages. At the same time, I could get a date set for a hearing so that when he died, I would be able to come back to the court to obtain the damages for the relatives. He said that that would be great because it would mean that he would not be in a dilemma about going ahead with his case and getting his damages, because the ability of his future widow and children to get their damages would not be affected. That is what the bill will do for that person and for all people who are suffering from mesothelioma, who all face the same dilemma.

**Mr McFee:** You have given us the moral case for the bill, but will you give us the financial case? Will you do your best to explain in cold, hard cash terms what it will mean for families?

**Frank Maguire:** Yes. We carried out a study of the live and fatal mesothelioma cases that the firm has settled. There will of course be a variance, given that not everyone has children and that some people are single, but in general damages increased by 20 or 30 per cent when the case involved the relatives. In other words, the damages in a fatal case were 20 to 30 per cent more than those in a live case.

The courts have recognised that, in the past, the damages awarded to relatives were on the low side and have increased them. In today's terms, all widows will generally receive £30,000; an adult child will receive £10,000; and the parent of an adult child who has died will receive about £10,000. It has been argued that, in cases that involve a younger relative—say, a teenager—the award should be increased from £10,000 to £15,000 or £20,000.

The case that I mentioned involves two sons and two daughters, which would result immediately in £40,000. If we add in the damages that the widow would receive, the figure rises to £70,000. No cases yet have involved grandchildren, because, until the Family Law (Scotland) Act 2006 was passed, they were unable to claim, but, depending on the relationship, they might well receive damages that are comparable with those received by children. Therefore, in the case in question, the man would be giving up more than £70,000—perhaps almost as much as £100,000—if he proceeded with his own case.

**Mrs Mulligan:** Earlier, I asked the families' representatives about the fact that the bill focuses solely on mesothelioma. Is that the right way

forward for the Executive or should it keep in reserve a power to add in other illnesses?

**Frank Maguire:** As has been pointed out, another variably fatal disease associated with asbestosis is lung cancer. Such cases involve either a combination of lung cancer and asbestosis or lung cancer alone. The problem is that they are not straightforward. Indeed, they can be subject to much dispute. I can understand why defenders would strenuously resist any lung cancer case that I took into court—unlike with mesothelioma, we cannot say that lung cancer is inevitably caused by asbestos. There are competing causes such as smoking and various other, probably unknown, factors. Defenders would simply blame those other causes or argue that we cannot prove that asbestos caused the condition.

Such cases would depend on the amount of exposure the person had had and the evidence of asbestos load in their lungs, which would require not just a biopsy but a post-mortem. In a practical sense, we cannot make any progress with lung cancer cases. Because defenders strenuously dispute and resist them, we cannot secure a hearing or even prepare cases in time before the people in question die. As a result, any suggestion that lung cancer be included in these provisions would have to be tentative.

Asbestosis, either on its own or in combination with lung cancer, is also fatal, but in such cases we also have to deal with competing diagnoses. As asbestosis is really pulmonary fibrosis, the causes of which are fairly neutral, we have to prove that the condition was caused by heavy exposure to asbestos, and is therefore asbestosis. Nothing on the computed tomography scan will show that the condition is asbestosis; it will simply show up as pulmonary fibrosis. Other evidence must be sought to prove that it is asbestosis. Again, the case might depend on contentious evidence and on post-mortem evidence on asbestos load in the lungs, the number of fibres that are found in the examination and so on.

For those reasons, the bill would not work at a practical level for lung cancer asbestos cases because they are way behind in terms of establishing liability and precedent. Therefore, my view is that although it might be fair enough to include such a provision in the bill, it should not disturb the mesothelioma cases. Mesothelioma is very different in that it is accepted that it is caused by asbestos, it can be diagnosed during the person's life and it involves a finite period within which the person dies.

10:30

Regarding other conditions, I am not aware and have no experience of conditions that are analogous to mesothelioma. We could speculate that there might be other cases similar to mesothelioma that involve a limited life expectancy, but I am not sure where or what those cases are or whether such cases have been established. Therefore, rather than think speculatively about those theoretical cases, we should deal with the real cases of mesothelioma. One day, we might deal with those other cases, whatever they might be.

**Mrs Mulligan:** That is clear, thank you.

**Margaret Mitchell:** Good morning. It would be helpful if some outline could be given of the uniqueness of mesothelioma and its causation, in particular with reference to the Fairchild case and the Barker v Corus case. I think that the trail from those cases has led to mesothelioma being treated as unique and identifiable. That seems to be the basis of the bill. It would be very helpful if we could be taken through that.

**Frank Maguire:** I am grateful for that question, as that factor distinguishes mesothelioma from lung cancer and asbestosis.

Mesothelioma is what lawyers call an indivisible disease. In other words, in respect of what occurs inside the lungs, one cannot point to any particular exposure as being more or less the cause of the disease. Mesothelioma is not dose related and is not time related apart from the fact that it has a latency period of perhaps 20 years. Within the period of causation, one cannot tell which defender caused the mesothelioma by exposing people to asbestos. In that sense, mesothelioma is indivisible.

We might distinguish that from asbestosis, which is divisible. The consultant physicians tell us that if a person had five years of exposure with one employer and five years of exposure of the same type with another employer, each employer can be said broadly to have caused 50 per cent of the damage in the lungs. As the causation can be broken up in that way, asbestosis is said to be divisible, whereas mesothelioma is indivisible.

Following the Barker v Corus case and the Compensation Act 2006, even if we cannot show which employer—all the employers might have materially increased the risk—caused the condition or show medically at which point it was caused, a special case is made for mesothelioma and special circumstances surround it. Causation of mesothelioma is regarded in a different way from that of asbestosis. If an employer materially increased the risk of mesothelioma, the employer is taken to have caused it fully. That applies to all the defenders. Therefore, in the example that I

gave, causation would not be split 50:50; whoever materially increased the risk would be liable for 100 per cent.

**Margaret Mitchell:** It is helpful to get that on record.

**The Convener:** You explained quite neatly what you are now able to do under the shortened procedure that was introduced under the Coulsfield reforms following the joint work that was undertaken by yourselves, Clydeside Action on Asbestos and the previous Justice 2 Committee. I want to explore what legal issues might be involved if we included in the bill some element of retrospection so that it came into force from the date when the bill was introduced. Stewart Stevenson put a similar question to the previous panel of witnesses. The committee is clear that there would be several hurdles to overcome, but we feel that we should explore the possibilities. In your view, should we try to bring the provisions of the bill into force earlier?

**Frank Maguire:** If the bill were retrospective to some extent, I could immediately take forward the 62 cases that I have waiting and try to get an early date for a hearing. We are talking about 62 cases. I would be able to get a hearing in January or February for the case that I mentioned earlier. Those are the numbers that we are talking about.

On the principle of retrospection, it is interesting to note that the Damages (Scotland) Act 1993 included an element of backdating. It involved a somewhat similar problem in that the award for the pain and suffering of a person who was dying was given only if the person survived the case. In other words, if the person died, the award for pain and suffering—which was a very substantial figure—died with them. So, the mischief that the act had to address was that of ensuring that the figure for pain and suffering survived the person's death and could be claimed by their executor. The Damages (Scotland) Act 1993 came into force on 18 April 1993, but its provisions were applied to deaths that occurred on or after 16 July 1992. It faced a problem that was similar to that which the bill faces, and it used the history of backdating to capture as many cases as possible.

We have since had the Human Rights Act 1998, which amended the 1993 act. One question that has to be addressed is whether retrospection contravenes the 1998 act and the European convention on human rights. The relevant article in the convention may be article 7, which in effect prohibits retrospection for criminal cases. However, in civil cases, retrospection is allowed where it is proportionate—where there is good cause. The court can weigh up the respective disadvantage and prejudice of both insurer and defender in a case.

Since the introduction of the bill, the certainty we want to have in such cases may well be catered for. The insurance industry, solicitors and our clients know about the bill. Given that it is a Scottish Executive bill, they also know that it is likely to be passed—subject to amendment. That may give scope for the provisions to apply to cases after a specified date, but I would have difficulty if they were applied retrospectively over a one or two year period. If that happened, proportionality might well begin to weigh against the asbestosis victim. An insurer could not have known that the legislation was on the cards. They would have settled cases—for whatever reason, including the need to compromise liability or simply because they wanted the case to be settled. The insurer has a contract with the person, which could be deemed to be disturbed.

**The Convener:** That is helpful. Is that also your view, Mr Conway?

**Ronald Conway (Bonar and Co Solicitors):** I preface my remarks by saying that I have a general interest in industrial disease and have no connection with any of the campaigning groups. I fully support the bill.

I do not have the same level of practical experience as Mr Maguire. If the Parliament was tempted to take extreme retrospective steps, it would effectively open up a hornet's nest of potential challenges to the bill. The entire history of constitutional law and human rights law is against the principle of retrospection. Over the past few years, a number of well-funded challenges have been made to industrial-disease-type claims.

I understand why retrospection is on the agenda, but it would be unwise to take extreme steps in that regard. The answer to the problem lies in the practical moves that are being made at the moment to preserve the victim's position.

**The Convener:** I want to explore the possibilities in respect of pending claims. Mr Maguire, you said that of the 500 mesothelioma cases that Thompsons Solicitors is representing, 62 will not go to litigation. I assume that the people involved in those cases are holding off in order to advantage their families.

**Frank Maguire:** There may be an element of that. Some of the cases have just come to us. People may not yet have made a decision. In the majority of cases, the people involved have made the decision not to go to litigation.

**The Convener:** I want to explore the possibilities in respect of recent cases—those that are waiting in the pipeline. Is that situation easier to deal with?

**Frank Maguire:** That is why I said we should look at things prospectively, from now onwards. Everyone now knows what is going on. Indeed, Lord Hardie allowed a case that was fixed for January to be postponed, pending the bill coming into force. The courts may be sympathetic to postponing cases that are fixed for January and February, but that does not get around the fact that those cases could have gone ahead if section 1(2) of the Damages (Scotland) Act 1976 did not apply.

There needs to be a trigger date—it cannot be the death because we are talking about what happens now—such as when an action has been commenced. Commencement shows that an action is serious and that there is enough evidence to show that the person has mesothelioma. If the bill applies to actions commenced after a certain date, everyone knows what the law will be. It would have been difficult to do that before now because decisions have already been made for insurers and pursuers under the current law.

**The Convener:** We are looking for what might, or might not, be a precedent. We have to consider the circumstances surrounding the acts—we know of at least two—that came into force on the date they were published as bills or, in other words, when it was made public that the Executive intended to legislate in such a way. I do not think that we will be exploring any dates before the date when the bill was published.

Given the difficulties that you have outlined, have you thought about the Parliament asking the Lord President's office whether it would be possible to red-circle cases that are submitted on or after the date on which the bill was introduced, pending the outcome of the bill process—as has happened before? Might that be a better way forward?

**Frank Maguire:** The indications are that that might be happening because of Lord Hardie's decision. In effect, he has agreed that a case can be postponed pending the bill coming into force. That would save current cases, in the sense that they will not be forced to go ahead because they have managed to survive—

**The Convener:** Are we talking only about the cases that Lord Hardie is dealing with? Presumably other judges would be dealing with—

**Frank Maguire:** That is the only case in which an application has been made. I agree that an approach could be made to the Lord President to tell him about the issue—Lord Hardie's decision could be referred to—and the Lord President could be asked to give a general note to the judges that the matter might arise. There are indications that

that is happening, but we need to be quite certain that it will happen in all cases.

**The Convener:** Do you want to add anything, Mr Conway?

**Ronald Conway:** That would be an ideal way to approach matters. When he spoke earlier, Mr Stevenson made the point that practical steps are being taken. This would be an extremely effective practical step and it would not open the legislation up to the potential challenges that we discussed earlier.

**Stewart Stevenson:** Perhaps I can close this issue off. The bill was signed on 27 September. Backdating to then would conform to precedents. Only cases that were raised on or after 27 September and completed before the beginning of April would be affected. Are there likely to be any such cases?

**Frank Maguire:** I could litigate the 62 cases next week, then try to get a hearing in February or March.

**Stewart Stevenson:** In the example that you gave earlier, you have that opportunity with a particular case. Did that case start on or after 27 September?

**Frank Maguire:** I cannot give you the exact date, but it was on or around that time because we have a hearing in September 2007.

**Stewart Stevenson:** So real cases could be affected if the bill came into force on 27 September?

**Frank Maguire:** Yes.

**Stewart Stevenson:** It is therefore worth the committee's while pursuing that issue?

**Frank Maguire:** It is. It is also worth noting that the Compensation Act 2006 had a retrospective element.

**Stewart Stevenson:** Yes. The bill to which I referred last week when the officials were before the committee was the Agricultural Holdings (Scotland) Bill. Cases were not backdated to the date that bill was signed, but to the date the minister made a specific policy announcement that was relevant to the item that was being backdated. In other words, backdating was to when all parties were certain about the Government's intention. They did not necessarily have a clear view of what Parliament would do, which is a different issue. As a precedent, it is probably quite a good one.

10:45

**Frank Maguire:** I take the convener's point, though, that the insurers and defenders have not had notice that that was going to happen. If the Scottish Executive indicated now that, once royal

assent is given, the act will be retrospective from now, that might make me feel a bit easier regarding any human rights challenge in future.

**Stewart Stevenson:** Ah. So, you are saying that it would be legally helpful if the Executive were to state a willingness to backdate to whatever date it is willing to backdate to. That would give a degree of legal certainty, whereas another approach might give less legal certainty.

**Frank Maguire:** Yes. That would take away the unfairness, because the date would be prospective rather than retrospective. The Executive would state that the act will apply as from a date in the future, rather than from a date in the past by which lawyers had already acted and done everything.

**The Convener:** For the sake of the discussion let us presume that royal assent could be achieved by 5 April 2007. If the Executive was prepared to say that the act would be retrospective from 1 January 2007, then you would be talking about a 1 January to 5 April window. Claims that you wanted to settle in that period would benefit, because the new provision, disapplying section 1(2) of the 1976 act, would apply.

From what you said, there are unlikely to be that many cases. I presume that Thompsons has more cases than any other solicitor.

**Frank Maguire:** We have 90 per cent of cases.

**Stewart Stevenson:** Nonetheless, going back to Mr Babbs's experience in Tayside, cases could arise on which, if they were able to be settled within that window, justice would be served. Mr Babbs's experience of survival is such that those people might be diagnosed next week and dead by April.

**Frank Maguire:** I have 62 cases that would go into that window, one of which is the man I told you about who said, "I'll wait until September 2007." I would go ahead with his case and try to get a hearing in February.

**The Convener:** But you would not get 62 cases in that window. Would the court be able to deal with that?

**Frank Maguire:** The court has already indicated through the Coulsfield procedures that I can accelerate a diet. It does not say that because there are too many cases it might not do that. It considers each case on its own and will accelerate the diet if I ask for that. There would be an impact on the court, but—

**The Convener:** We can only accelerate cases in terms of available courts.

**Frank Maguire:** The court accelerates cases anyway but, in any event, a lot of those cases

would settle. Very few cases proceed to a hearing. I would be settling most of them.

**The Convener:** So you would not need a court.

**Frank Maguire:** The court hearing would be the driver for the parties to sit down and settle the case. When I settled that case, however, I would know that I was not wiping out damages for the relatives. At the moment, I would be.

**The Convener:** Of the 62 cases that you would settle if the act applied between 1 January and 5 April, those that were successful would carry an increased liability for the insurers, unless they were deliberately delayed until after 5 April, or whatever the date is.

**Frank Maguire:** If one of the 62 pursuers died, the insurers would have to meet the damages anyway.

**Stewart Stevenson:** Would it be fair—

**The Convener:** Hold on. I want to be clear about this. If the Executive were to agree to make the act retrospective, what would be the disadvantage to insurance companies? Would there be any?

**Frank Maguire:** They could not argue retrospection because the Executive would be telling them about a prospective date. In any event, we are postponing most of these cases.

**The Convener:** In your view, the effect would be negligible.

**Frank Maguire:** Yes.

**The Convener:** We will put that to the insurers.

**Mr McFee:** Making the act retrospective would bring forward by three or four months the day on which insurance companies would pay out. If a case were not pursued now, the insurance company would ultimately have to pay out the same amount of money. In real terms there is little disadvantage to insurance companies.

**Frank Maguire:** In some cases they might have to pay out anyway.

**Mr McFee:** Indeed. The process might be accelerated in some cases.

I want to pursue an issue that the convener raised. What percentage of cases are settled out of court? I infer from what you said that that is true of the vast majority of cases. What we require is for a precedent to be set, as often other things flow from that.

**Frank Maguire:** The insurers can speak for themselves, but what will happen is that an insurer will evaluate a claim on the basis of what the damages for the insured person are and what the damages for the prospective widow and children

will be. I agree that most cases settle; the percentage of cases that settle is in the high 90s. Very few cases do not settle.

**Mr McFee:** So you think that more than 95 per cent of cases settle.

**Frank Maguire:** That is correct.

**Mr McFee:** So the effect on the court is minimal.

**Frank Maguire:** Yes.

**Stewart Stevenson:** I move on to the related matter of the insurers' evidence to the committee on the alternative procedure, which they say is already available, of sisting a case in conjunction with an application for interim damages. Are you aware of any examples of that happening? If not, why are there none?

**Frank Maguire:** I am not aware of any cases in which that has happened. The reason is that in cases of this sort there is very little occasion for interim damages. I agree with the Executive that there are only eight or nine instances of that, out of hundreds of cases.

There are problems with interim damages. First, interim damages cover only a proportion of damages. Court of Session rules 43.11 and 43.12 state that someone is entitled to a proportion of the damages. Judges have interpreted that as meaning a proportion of the most pessimistic valuation that one could have in a case, because it is not a matter of proof. Why should a person get only interim damages when we are talking about their getting full damages? We are talking not about the relatives' claim but about the pursuer getting full damages. Why should that not happen?

I endorse Phyllis Craig's point that the other test when pursuing a claim for interim damages is that it must be almost certain that the pursuer will win. If that is the case, why should the full damages not be paid? There is another point about interim damages that has not yet been made—that those damages might have to be paid back. We would end up telling pursuers that they may get interim damages, but we cannot guarantee that they will win their case. That leaves them with the thought in the back of their mind that they do not have finality and that the interim damages may have to be paid back. Rule 43.12 states that the court may order

"repayment by the pursuer of any sum by which the interim payment exceeds the amount which that defender is liable to pay the pursuer".

There is uncertainty about interim payments. People are left asking themselves what will happen after they die and whether their widow will be left with a bill. That is a psychological point.

Practically speaking, the test that the courts apply in respect of interim damages is so high that such damages will not be awarded. Invariably defenders do not admit liability and negative exposure, which is generally necessary for an interim damages motion to be successful.

**Ronald Conway:** Historically, interim damages have been used in situations such as road traffic accidents, where the defender has a criminal conviction. When the pursuer goes to court, they say that there is no conceivable defence and are awarded interim damages on a half-a-loaf basis. Also analogous is a health and safety conviction when someone goes to court on a damages claim saying that there is no conceivable defence and the claim will definitely succeed or when the defenders admit liability. There is no historical basis for interim damages being conceded by insurers in asbestos-related litigation.

In an example such as mesothelioma, the medical condition is clear and can be checked by both sides. In the standard conditions of, for example, a lagger who has worked breaking up insulation, there are often averments to that and no denial. From the outside, there would seem to be no conceivable defence, but there always seems to be a reason why insurers do not put their hands up at an early stage. We must judge from past behaviour that, to date, the insurance industry has not embraced interim damages.

Speaking from a slightly more objective perspective, I would welcome insurers embracing the concept of interim damages, because half a loaf is better than no loaf. A lot of the victims are effectively dying in a no-loaf situation. I would be interested to hear from the insurers that there has been a sea change in favour of the concept of interim damages and that, in the run-of-the-mill cases with which Scotland is distressingly familiar, we will see admissions of liability and interim damages awarded to persons while they are still alive.

**Stewart Stevenson:** I note that the insurers' comments in their written submission are confined to suggesting that claimants change their behaviour. I see no suggestion that they intend to change theirs.

**Frank Maguire:** One case that the committee could consider is *McCann v Miller Insulation and Engineering Ltd*, which will demonstrate the difficulties encountered by someone who has an asbestos-related condition in trying to get interim damages and the courts' view of it. They lacked various admissions in the pleadings, so the court rejected the application. Interestingly, the judge said that it was irrelevant that most cases settle. He said:

"The fact that it is within judicial knowledge, or at least within my own judicial knowledge that cases of this nature invariably settle without proof, does not assist the pursuer in this particular case, because one cannot in the present circumstances argue from the general to the particular. There may be many and varied reasons why such actions do settle."

That is what happened when a pursuer made an application for interim damages—it was rejected. That gives you the principles on which courts will address the issue.

**Stewart Stevenson:** To summarise, I suspect that your key point is that, should money be paid, it may not safely be spent, so it is of little value to someone.

**Frank Maguire:** There is an additional difficulty in that, once someone receives an interim payment, the CRU benefit recruitment comes in. Any benefit that someone has received will be taken off the interim payment, so what may seem like a reasonable interim payment of £25,000 or £30,000 will be reduced automatically by the amount of benefit that someone has received.

**Stewart Stevenson:** Just to be clear, would that apply to final payments? Do final payments interact with benefits as well?

**Frank Maguire:** It applies to final payments as well. When there is an interim payment, the CRU benefit recruitment cuts in, and there is a final accounting at the end of the case.

**Stewart Stevenson:** Therefore, an early receipt of a small amount of funds that may not be safely spent has a certainty of reducing the immediate income of the person affected.

**Frank Maguire:** It may do, but the amount that they receive may be reduced by the CRU benefit recruitment anyway.

**Stewart Stevenson:** That is a serious point.

**Mr McFee:** That is useful. Excuse my ignorance of the law, but if someone received interim damages and walked out of the court only to be knocked down and killed by the proverbial number 11 bus, would that have any bearing on the final figure available?

11:00

**Frank Maguire:** The case would be continued by the executor. The problem in that case is that death would have been caused not by the asbestos-related condition but by the bus. Therefore, the damages that the executor is likely to get may be reduced or wiped out by the interim payment, which they have to set off against it.

**Mr McFee:** Would it affect the interim payment?

**Frank Maguire:** No, it should not do so, because they have already got the interim payment, but it may ultimately be repayable.

**Mr McFee:** The interim payment may be repayable.

**Frank Maguire:** Yes, because the interim payment that the person received may exceed the damages.

**Mr McFee:** So there is an element of uncertainty with that method.

**Frank Maguire:** Yes, because of the element of repayment.

**Stewart Stevenson:** Forgive me, Mr Maguire, but I have just realised that I am ignorant and do not know what CRU stands for.

**Frank Maguire:** Sorry. That is my fault. The compensation recovery unit operates under the Social Security (Recovery of Benefits) Act 1997, which established a system whereby, when a person gets damages, the Government gets the benefits back that have been paid out as a consequence of the disease.

**Stewart Stevenson:** From?

**Frank Maguire:** The insurer.

**Stewart Stevenson:** So it is not the claimant who pays the money back.

**Frank Maguire:** No, but provisions in the 1997 act enable the insurer to set off certain benefits against certain heads of damage within the person's claim.

**Stewart Stevenson:** So the claimant in effect pays.

**Frank Maguire:** That is correct. There may be a set off, depending on how the damages are calculated.

**Stewart Stevenson:** Thank you. I offer my apologies for not asking about that earlier.

**Frank Maguire:** My apologies.

**The Convener:** We are all enlightened.

**Marlyn Glen:** I have a couple of questions. The situation is much more complicated than we realised.

You said that a proportion of the damages might be paid in an interim payment. What kind of proportion are you talking about? Secondly, if the insurers were pursuing overpayment, would they pursue the deceased person's estate?

**Ronald Conway:** The proportion depends on the judge, but typically a judge will give about 50 per cent of the lowest estimate of the claim. Some judges are slightly more generous than that, but that is the kind of figure that we are talking about.

Sorry, what was the second question?

**Marlyn Glen:** If the interim payment turned out to be an overpayment, would the insurers pursue the money after the claimant died?

**Ronald Conway:** Yes, if the executor assisted to the action. They would become liable for any overpayment.

**Marlyn Glen:** So the relatives would have to pay the money back.

**Ronald Conway:** Yes. As a matter of professional practice, the solicitor would have to say, "I have this application for interim damages but, by the way, although you may get the payment your survivors might have to pay some of it back." That could be the case in the kind of situation that Mr McFee envisages.

**Frank Maguire:** Such a situation would arise not only when the person is killed by a bus. Someone may die of a heart attack. The defenders would strongly argue that the heart attack would have occurred anyway and was not caused by asbestos. The person may receive an interim payment, but they may have a heart condition and may not survive because of that, so damages will not be so high.

**Mr McFee:** The situation that I outlined was merely an example.

**Frank Maguire:** I understand that, but the scenario is not speculative; it is real.

**Marlyn Glen:** The Forum of Insurance Lawyers, in its response to the Scottish Executive's consultation, argued that the consultation was predicated on the incorrect premise that by accepting any damages the victim prevents his family from pursuing a claim for solatium. How do you respond to those arguments?

**Ronald Conway:** The forum would have to explain what it is talking about.

I say by way of background that it is plain when I consider the issue—I have looked at it closely for the first time since the matter has arisen—that there is a legal anomaly. I, in discharging my claim, should not automatically discharge Mr Maguire's claim. That is an offence to jurisprudence, so to speak.

I apologise for speaking in these terms, but most fatal accidents are instantaneous so the scenario that we are discussing tends not to arise. It has arisen in the current context because of the work done by campaigning groups, petition PE336 and, dare I say it, the actions of this Parliament in pushing through the Coulsfield rules.

The Coulsfield rules were on the stocks from 1997. They apply right across the board in all personal injury actions. In my view, and in the view

of many others, the law of Scotland has been improved enormously as a result of the asbestos petition and its knock-on effects—which cover everything, not just asbestos-related diseases.

Because of the speeded-up timetable, we now realise that victims have a dreadful clock ticking. Mesothelioma is unique; it is unlike even asbestosis. Mesothelioma is inevitably fatal. The window of time left to people can vary, but it will be 14 or 16 months at the longest. A situation can arise in which an unfortunate sufferer is contemplating his own death while his family are watching him in extremis. That is what section 1(4) of the 1976 act—on the damages relating to the immediate family—is about. It is about the distress and anxiety of people who are contemplating someone with a terminal disease; it is about their grief and sorrow when the person dies; and it is about the loss of society and guidance when the person dies. The speeded-up procedure has now brought all that into sharp relief.

The idea that somehow the victim can discharge the rights of the family—which are different in kind philosophically—is juridical nonsense. I will be waiting to hear why the Forum of Insurance Lawyers says that the bill is predicated on some kind of philosophical misconception, because I do not understand why it says that.

**Frank Maguire:** If we accept that the Forum of Insurance Lawyers has a point, we are led to say that section 1(2) of the 1976 act is dubious and does not mean what it says. The bill will clear up the dubiety so that we all know what the section means—including the insurers, who seem to have doubts.

**The Convener:** Like other witnesses, you have made it pretty clear that mesothelioma is unique. Although you say that other cases have different characteristics, the Damages (Scotland) Act 1976 applies to everything, so families who could have benefited, had their claims been allowed to be settled in whole, will not be able to do that if a claim has been settled in life.

**Ronald Conway:** In my experience, mesothelioma cases are unique and people are having to face up to problems today. The bill appears to me to be a fairly elegant quick fix. I understand that the whole question of damages for fatalities is being referred to the Scottish Law Commission.

From listening to this morning's evidence, it is easy to understand that there may well be situations in which the same clock is ticking for the victim and the family. One would not like people to be the victims of injustice and the problem can be addressed today. I respectfully suggest that the more theoretical problems can await the outcome of the Scottish Law Commission's investigation.

**Frank Maguire:** If there were a body of other cases that were like mesothelioma, I would have no difficulty with other proposals, but I cannot find another body of cases that have all the aspects of mesothelioma. We know what the problem is for mesothelioma cases, so we should not be held up by trying to think of other cases that might fall into the category.

We have a problem that we can fix by means of a nice small act. The Scottish Law Commission, which has been remitted to consider fatal cases, can then consider in depth whatever else may be wrong or right with the law as regards damages in fatal cases in Scotland. However, on mesothelioma, we have an urgent problem that is fairly obvious and can be addressed by the bill.

**The Convener:** Sure—but you will understand that, as the committee that is meant to test the bill, we need to play devil's advocate to ensure that we leave no stone unturned. I am sure that you do not misconstrue that as the committee not supporting the bill's provisions.

As you both mentioned the accelerated process under the Coulsfield reforms, I put it on record that Parliament received tremendous assistance from the Lord President's office through Lord Cullen, Lord Mackay and Lord Gill. I hope that they might do that again if we choose to pursue some of the issues that we mentioned earlier.

I am aware that the awards for damages for families have probably increased in the past few years. Is it fair to say that those settlements have been increasing in recent times?

**Frank Maguire:** Yes. Jury awards are the main driver for that. We still, if they can be obtained, have civil juries in Scotland for some cases. In some road traffic jury cases, the jury has, in considering awards for damages for families, come up with figures that were well out of sync with awards that were made by judges. We took asbestos cases before judges and asked why, if a road traffic case results in such a level of damages, an asbestos case cannot have similar or greater damages. The appeal court accepted that there was a general perception that the level of award for relatives was too low, so it examined and raised those awards. For example, in the case of a parent losing a child—such cases exist in asbestos cases—awards were of about £3,000. I took such a case to court and argued the points and the judge raised the award for that parent to £10,000. The same was done before the appeal court for widows' awards, which went from £20,000 to £30,000, and for the award for an adult child losing a parent, which went from about £5,000 to £10,000. The awards that judges make are beginning to approximate what juries would award. The upward move is driven mainly by juries.

**The Convener:** We have come to the end of our questioning.

**Frank Maguire:** I will make another point. The Executive was talking about there being two actions. Do you want us to comment on that? Perhaps it is important.

**The Convener:** Okay.

**Frank Maguire:** There is no need for two actions; a case could be dealt with in one action. At the moment, if someone takes a case to court and dies during the course of it, the case is sisted and their relatives are brought into the same case. The same kind of mechanism could apply.

**The Convener:** Are you saying that the bill requires two separate actions?

**Frank Maguire:** No, I am saying that it does not. Everything can be dealt with under one action for the person who is dying. At the moment—never mind under the bill—if the pursuer died, we would bring the relatives into the same action. The procedure could be the same.

**Stewart Stevenson:** Just to be clear, Mr Maguire—we are catching up with you—are you saying that it is potentially not the end of the case if final settlement is made?

**Frank Maguire:** Yes. There would be a joint minute or the judge would say that the case was settled as far as the sufferer is concerned, but would leave it open for the relatives to come back to the court in the same case.

**Stewart Stevenson:** What is the process for leaving a case open? Is that where sisting comes in?

**Frank Maguire:** Yes. There would be a sisting procedure pending the sufferer's death.

**Stewart Stevenson:** Are there instances of that happening just now or are you talking about something new?

11:15

**Frank Maguire:** No. At the moment, if I take a case for someone who is dying of mesothelioma and their case is not resolved before they die, the executor and the relatives are brought into the same case.

**Stewart Stevenson:** I understand that. I am asking about a case in which the final settlement for the mesothelioma sufferer is effected during the sufferer's life. I am asking—it might be Mr Conway who answers—whether it is possible to sist after the final settlement, which is after proof and everything else.

**Frank Maguire:** There are provisional damages, whereby the pursuer can get the damages now

and the court makes a reservation for them to come back in the future if there is a risk of serious deterioration. The court has what we could call a provisional mechanism in injury cases, which could be adapted to mesothelioma.

**Stewart Stevenson:** I want to be absolutely clear about this. If that procedure exists now, why is it not being used now in relation to mesothelioma?

**Frank Maguire:** The procedure is only for provisional damages and cannot be used just now. I am only giving you an analogous situation that could be adapted for mesothelioma cases.

**The Convener:** I think that you have opened a can of worms.

**Stewart Stevenson:** You have. Will you explain why the procedure cannot be used just now, as it is clearly being used in other damages actions?

**The Convener:** Before you do that, I have a question. When I questioned the Executive officials so that we could be clear about how the system would work, I am sure that they said that there would, in effect, be two parts to the process.

**Frank Maguire:** Yes.

**The Convener:** I understood from that that there would be two court actions: there would be the claimant's settlement and then, on their death, the family would come along. The Executive officials confirmed that that is how it would be done, but you are saying that it would not.

**Frank Maguire:** I am talking about a procedural mechanism for the court to ask whether under the bill another action from the relatives would be necessary or whether it could allow them to come back under the same case.

**Mr McFee:** I hear what you say and I think that I am with you on how the procedure might operate. Am I correct in saying that you suggest that no change to the law would be required to do that?

**Frank Maguire:** No.

**Mr McFee:** We were led to believe that two actions would be required—one by the claimant when he or she is alive and another posthumously—but you say that there is a device at the moment whereby that might not be necessary.

**Frank Maguire:** No—there is no device at the moment that would allow that to be done. All I was doing was drawing an analogy whereby, if I have—

**Mr McFee:** Can I interrupt? There is a device that is used in analogous situations and could apply if the bill is passed. Is that correct?

**Frank Maguire:** Once the bill is passed, the court will have to determine how it will deal with relatives' cases.

**Mr McFee:** Fine. If the court determines that, I can understand what you are getting at, but I want to go to the next point. What happens if the case is settled out of court?

**Frank Maguire:** We would go to the court and tell it what type of settlement we had reached. The court would then apply its rules, which would be new rules to cater for the situation in which the relatives will come into the case. There is no provision at the moment for a fatal case to have a provisional settlement. Provisional damages are provided for under a completely different statute regarding a completely different injury for someone who is alive but whose condition has a risk of deteriorating in the future.

**Stewart Stevenson:** To be absolutely clear, there are three types of potential settlements in personal injury cases: interim damages, which we have discussed; provisional damages, which are used for cases in which the damage is identified as not being likely to kill the pursuer and which give them an opportunity to come back when the situation changes—

**Frank Maguire:** Someone—

**Stewart Stevenson:** Sorry—bear with me for a second. I want to be absolutely clear that the provisional payment cannot be subsequently reduced, but can only be increased. That is an important point and I need to ask about it.

**Ronald Conway:** I want to move away from asbestos-related issues and to talk about provisional damages. Provisional damages are awarded when a person has a condition that may deteriorate into another much more serious condition. That clearly does not apply to mesothelioma, which is at the more serious end of the scale.

**Stewart Stevenson:** Give me an example.

**Ronald Conway:** Let us say that someone has a minor respiratory disease that might develop into full-blown asthma. That person will be given a provisional award, on the basis that he has a minor disease, and will be given the chance to come back to the court, normally within a set period—six or 10 years—to say that his condition has got much worse and he now wants damages for full-blown asthma. We have gone down a kind of blind alley.

**Mike Pringle (Edinburgh South) (LD):** I agree.

**The Convener:** If the issue needs to be sorted out, it is for Parliament to do that. We are trying to understand a process in which we have never been involved. The bill team has told us that there

are two actions to be settled and two separate processes. If your evidence is that it is unhelpful for there to be two stages and that you would like there to be one, we need to explore how we can achieve that.

**Frank Maguire:** It is a matter for the court—court rules will deal with how the rights of relatives are addressed. The court can specify that there should be two actions or that relatives should be included in the initial action.

**The Convener:** Could the court decide to deal with the two claims separately, if it chose?

**Frank Maguire:** Yes.

**Ronald Conway:** I think that there is a possibility of there being two actions.

**The Convener:** There are two separate claims.

**Ronald Conway:** The philosophical basis of the bill is that there are two separate kinds of claim.

**The Convener:** I am glad that you have raised the issue with us, because it clearly needs further explanation. If there is dubiety, we should try to resolve the issue now, so that everyone is clear about the nature of such actions and how the courts would deal with them. Mr Maguire has suggested that it is a matter for court rules, but we want to know how it would be dealt with.

**Ronald Conway:** The insurers already have all the information that they need. One would expect them to be proactive, to say that a separate action was not necessary and to present their proposals for dealing with the immediate family's claim. I urge the committee not to start chasing wild geese.

**The Convener:** I am glad that you raised the issue, as it needs to be explored further. Thank you for your evidence, which has been helpful and concise. I imagine that members would like to have a five-minute comfort break, so I suspend the meeting for five minutes.

11:23

*Meeting suspended.*

11:35

*On resuming—*

**The Convener:** I welcome our final panel of witnesses. I thank all of them for coming to give evidence to the Justice 1 Committee this morning. The panel is: Lisa Marie Williams, from the Association of British Insurers; David Taylor, from the Forum of Insurance Lawyers; and Ian Johnston, from the Forum of Scottish Claims Managers. We will go straight to questions from the committee.

**Mr McFee:** Good morning. The ABI submission suggests that, within the current legal framework, it is possible for claimants

“to initiate their claim, make an application for interim damages, and then sist the claim until after their death.”

The ABI further claims that the bill is unnecessary. Will you elaborate on that and say why, if the mechanism is such a good one, it is not widely used?

**Lisa Marie Williams (Association of British Insurers):** Absolutely, but first I want to thank the committee for inviting the ABI to give evidence.

In our submission, we outlined the process that is currently often used in such cases in England and Wales. When we started to look into mesothelioma claims, we were surprised to learn that the process is not often used in Scotland. On speaking to our members in Scotland, we heard that they are not often asked to use it.

In England and Wales, as soon as liability is admitted, an interim payment is made either through the fast-track court in London, which is run by Master Whitaker, or through agreement. The payment is usually about £40,000. The claim can then be stayed or, in Scotland, sisted. I do not know why the process is not used in Scotland. As I said, our members in Scotland have told us that it is not asked for.

**Mr McFee:** Can you think of any other reason why it is not asked for?

**Lisa Marie Williams:** I honestly cannot think of any. The ABI’s position is that, where legal processes are in place, we do not ever want to see the introduction of yet more legislation that aims to do the same thing, but is rushed, hurried or unnecessary. Quite often, legislation can have unintended consequences. We are concerned that that will happen in this case. However, the ABI is entirely happy with the way in which the bill is currently drafted.

**Mr McFee:** So the bill will not have any unintended consequences?

**Lisa Marie Williams:** As with every piece of legislation that affects our members, we took legal advice on the bill. A number of technical legal points were raised, which David Taylor may be better able to explain. When the consultation was launched, we thought that there were problems with the bill. However, as I said, the ABI is entirely happy with the bill as it is currently drafted.

**Mr McFee:** Okay. Maybe we will come to the other point in a wee moment.

I am not sure whether you heard the evidence from the previous panel—

**Lisa Marie Williams:** I listened to it outside.

**Mr McFee:** Perhaps you can therefore answer a question on the evidence that the CRU is making some form of claw back when an interim payment has been made. Is that a potential downside?

**Lisa Marie Williams:** I did not really understand the point. David Taylor and Ian Johnston may be better able to deal with the question. As I do not deal with claims, I do not understand the point that was made about the CRU clawing back payments.

**Ian Johnston (Forum of Scottish Claims Managers):** As the legislation stands, if you make an interim payment you have to account to the CRU.

**Mr McFee:** So that could be a drawback for claims—

**Ian Johnston:** I can see cases where it could be an issue.

**David Taylor (Forum of Insurance Lawyers):** I cannot really see that being a difficulty because the interim damages that are being paid would not be affected by the CRU position. There would be a liability over and above the damages. I cannot see any CRU benefits eating into those damages.

**Ian Johnston:** The other thing that you can do, if the CRU has to be paid, is to agree the sum that the claimant will receive clear in their hand. That is a practical solution that is done sometimes.

**Mr McFee:** Presumably “the sum that the claimant will receive clear in their hand” means that there is a deduction at some stage.

**Ian Johnston:** If the CRU has to be paid—for the sake of argument, let us say £10,000—you would discuss with the claimant’s solicitor the amount that would be paid to the claimant in addition to that.

**Mr McFee:** You say that interim payments are widely used in England and Wales. I do not know whether there are any differences in the procedures there that make the process better. You say that interim payments are not given because they are not asked for. Before the bill was published, how widely did your members make it known that interim payments were a possibility and that they were prepared to co-operate with such a possibility?

**Lisa Marie Williams:** Since *Barker v Corus*, mesothelioma has come on to the political agenda. The problem in Scotland may be a pre-action protocol one. We are working closely with the Department for Work and Pensions, the Department for Constitutional Affairs, the Trades Union Congress and the Association of Personal Injury Lawyers on a mesothelioma-specific pre-action protocol that will provide much more detail on all the stages of the process.

We did some research earlier this year, following *Barker v Corus*, into mesothelioma claims that come against our members. Probably most worrying for us was finding out about the timetable of the disease. The ABI and its members recognise that people need to have compensation very quickly. Our research, from a sample of cases, showed that it took an average of 12 months from the solicitor knowing about the case to the defendant knowing. From the defendant knowing to the claim being settled took on average a further 12 months.

The purpose of the pre-action protocol is to say that the defendant should be notified much more quickly of a claim, in a short intimation letter. The letter would include very basic details but would enable the defendant to open their file and do some preliminary investigation so that they can make an interim payment to the claimant within a very short space of time. We see that as essential. Our members in Scotland would like to hear about claims much more quickly so that interim damages, if that is what the claimant wants, can be paid much more quickly.

**Mr McFee:** When did work start on the pre-action protocol in Scotland?

**Ian Johnston:** It is probably best if I answer that. We agreed a personal injury pre-action protocol with effect from 1 January. By "we", I mean the claims managers, because I can speak only on behalf of the people who are members of the FSCM. That said, I think that it is being used by companies beyond our membership.

During the discussions, it was felt by all sides that we should take small steps and not run before we could walk, so we did not include disease. However, at our most recent review meeting a couple of months ago, I posed the question whether we wanted to consider extending the personal injury protocol and whether we could create a disease protocol. There was a positive response to that from the Law Society of Scotland. Our members are working on a draft, which I hope we will submit to the Law Society early in the new year. There will be discussion and negotiation on it over a period, but I hope that it is the beginning of work that will create a disease pre-action protocol.

**Mr McFee:** So it is not really in place.

**Ian Johnston:** The disease protocol is not in place; what is in place is a personal injury—exclusive of disease—protocol.

**Mr McFee:** I have no reason to doubt your word that you are working on it, but to us mere mortals it may look somewhat reactive. However, we are probably encouraged if you say that you intend to smooth the course.

**Ian Johnston:** Our position is one of wanting to improve the claims process and earlier and more open sharing of information. That is what the personal injury protocol has been about. I can safely say that that is our commitment.

**Stewart Stevenson:** From what Lisa Marie Williams said, I got the flavour that the English system of interim payments is different from the system here. I want to explore what she said about that. I think she said that interim payments are made after an admission of liability.

**Lisa Marie Williams:** That is correct.

11:45

**Stewart Stevenson:** In court terms, is that after the proof?

**Lisa Marie Williams:** In many cases in England and Wales, once the defendant has done their investigation into the case, which is usually on an issue of proceedings, the case will be litigated but will probably not go to court. Proceedings will have been started and the defendant will have done their investigation and admitted liability, but that will not be at the stage of a court hearing.

**Stewart Stevenson:** The interim payment is made at the point when uncertainty as to liability has been removed?

**Lisa Marie Williams:** Yes.

**Stewart Stevenson:** There is therefore no cause thereafter for a requirement to repay the interim payment. The difficulty that we have heard about from previous witnesses is that, in the Scottish procedure, an interim payment is made prior to the proof and, therefore, the financial liability that may bear upon the defender can change. The claimant is exposed to the difficulty that, after the proof, the payment that is due may be less than the interim payment and the difference may have to be repaid. Although we use the same term in Scotland and England, the interim payment occurs at entirely different points in the process. I seek your views on the suggestion that the reason why we have one approach in England and an entirely different approach in Scotland is that the bases of the interim payments are different.

**Lisa Marie Williams:** As I said, the payment in England and Wales is usually about £40,000.

**Stewart Stevenson:** I am not talking about the amount; the issues are the sequence and the certainty for the claimant.

**Lisa Marie Williams:** I am not sure that I understand your point. The certainty aspect is that, when the defendant has admitted liability—

**Mr McFee:** I am sorry to interrupt, but that is exactly the point. You are saying that, in England, the payment is made after liability is established, whereas our understanding is that in Scotland it is made prior to liability being established.

**Stewart Stevenson:** That is where I was going, Bruce.

**Mr McFee:** I beg your pardon.

**Lisa Marie Williams:** I can see why that might be an issue for claimants.

**Stewart Stevenson:** The advice that we have had from previous panels is that if a claimant sists after the interim payment, that is before the proof and an admission of liability so, although the claimant has the interim payment in their bank account, they may have to pay it back, depending on what happens thereafter. Therefore, claimants cannot rely on such payments; they cannot spend the money because they may have to give it back.

**Lisa Marie Williams:** I am sorry; it took me a while to get your point. I do not know of any of our members that would make an interim payment without investigating the claim. I would not have thought that an insurer would make an interim payment as soon as a claim came in and without any investigation as to whether it was liable.

**Stewart Stevenson:** Why would an insurer make an interim payment when there has been an admission of liability in the proof? Why not make a final payment, given that there is no legal process to go through?

**Lisa Marie Williams:** Because, unfortunately, the issues of quantum often take a long time. After an interim payment, there can be a lot of to-ing and fro-ing between the defendant and the claimant, for example, as to the amount of special damages, which often takes a lot of negotiation. There are two basic payments: general damages and special damages. General damages are for pain, suffering and loss of amenity; special damages are for matters such as loss of earnings or pensions. Unfortunately, discussions on the amount of special damages can take a long time. While that was going on, the claimant would not receive any money if they had not received an interim payment.

**Ian Johnston:** I do not think that the situation in England and Wales is as different from that in Scotland as we are beginning to suggest.

**Stewart Stevenson:** I am exploring the differences, not stating them.

**Ian Johnston:** I may be corrected by others, but I think that the situations are similar in that, in both instances, payment is made when the liability admission is forthcoming, but pending quantum being agreed.

**The Convener:** That is the key question. We have heard evidence that, historically, insurance companies have not had a record of admitting liability, but have defended cases to the bitter end. Why should we accept your proposition that interim damages are an alternative to the bill?

**Ian Johnston:** That is not our position; our position is that the bill should be passed.

**The Convener:** So you are not arguing the case for interim damages.

**Ian Johnston:** I am not arguing that the issue should be dealt with by interim damages.

**The Convener:** Is anybody arguing that?

**Lisa Marie Williams:** As I explained at the beginning, we do not want unnecessary legislation when there are current legal processes—

**The Convener:** To be clear, the Association of British Insurers is arguing that the use of interim damages is preferable to the bill.

**Lisa Marie Williams:** If I could just finish, our position is that we never want unnecessary legislation when there are current legal processes. However, we have seen the bill and are content for it to proceed. We have no objection to the bill and we want it to pass into law as quickly as possible.

**The Convener:** Right. So why are we debating an unnecessary alternative?

**Lisa Marie Williams:** I was just answering the questions.

**The Convener:** So we do not need to cover that issue. Good.

**Mr McFee:** The issue is in the submissions.

**Ian Johnston:** We make an observation on the matter in our submission but, earlier in it, we say that we have no objection to the bill.

**David Taylor:** The discussion highlights that an existing remedy—interim damages—is not being used to the extent that it should be. Whatever the situation has been in the past, in the future, and irrespective of what happens with the bill, that existing remedy can be used to achieve damages for a person who suffers from this terrible disease. In FOIL's opinion, the key to opening the door to interim damages is the early provision of information. Over the years, that has been as much the problem as anything else. It is now certainly the case that, if information is provided, there is no reason why insurers will not agree to make an interim payment.

**Lisa Marie Williams:** That is absolutely the situation, which is why we are working on a pre-action protocol, to ensure that defendants get the information that they need early on, so that a

payment can be made while the claimant is still alive.

**The Convener:** I think that we have covered that issue.

**Mr McFee:** I raised the issue entirely because of the comments in the ABI submission. To put the matter straightforwardly, your position is that, as long as the bill remains limited to mesothelioma, on the ground of the uniqueness of the condition, you will not oppose it. Over and above that, as Mr Johnston said, you are considering internal processes with the aim of speeding up interim payments, should that route be pursued.

**Lisa Marie Williams:** Absolutely.

**Marlyn Glen:** I invite Mr Taylor to elaborate on his contention that the Executive's consultation was predicated on the incorrect premise that, by accepting any damages, the victim prevents his or her family from pursuing a claim for solatium.

**David Taylor:** That is related to our view that a person can apply for interim damages. Under the law, a person who suffers from the disease can raise an action, apply for an interim payment and then sist the action. That is why we made that point in our submission. It goes back to the point I made earlier: whatever the reason interim damages are not being used, the remedy is available and can be used.

**Marlyn Glen:** So you suggest that the victim should not get full damages?

**David Taylor:** No, I do not suggest that. I am saying that there is existing machinery in the law to enable somebody to obtain an interim payment of the damages to which he is entitled. The action can then be stopped temporarily, or sisted, while the person succumbs to the disease and then the relatives can step in and continue with any claims that they have for damages.

**Marlyn Glen:** There does not seem to be any advantage for the family or the claimant in that. You heard the evidence from our first panel.

**David Taylor:** If interim damages were used as a remedy, payment could be made to the person much more swiftly than would be the case if they waited for a full court hearing to come round. That is the obvious advantage. However, it would depend on insurers and their representatives receiving information on the key elements that make up this kind of claim, which are employment, exposure to asbestos, and medical evidence.

**Marlyn Glen:** The previous witnesses suggested that interim payments were being used as a delaying tactic and as a means of ensuring that the claimant did not get the full amount. Obviously, people want payments up front.

**David Taylor:** It is not a delaying tactic; it is quite the reverse. If an interim payment of damages is made, the money is received—

**Marlyn Glen:** But the claimant gets a smaller amount.

**Lisa Marie Williams:** Not overall. The interim damages payment is a proportion of what someone gets in total. They get a proportion up front of the total damages—whatever the court awards or what is decided on between the parties. The rest of the compensation that is due to the claimant is paid once the issues of quantum have been settled. It is an advantage to claimants to have an interim payment; they get it much more quickly than is otherwise the case.

**Mr McFee:** Mr Taylor, if I may, I will take you back a bit. We heard evidence that the process for making interim payments has been somewhat more elongated than it could have been. I assume that that is the reason for the introduction of the new protocol. I entirely take your point that if victims go down the interim payment route, their families are not disadvantaged, but that if they finalise their claim—which is the situation in which people find themselves at the moment—the relatives' claim is extinguished.

**David Taylor:** If the claim is finalised and settled, I agree that that is the case. Under section 1(2) of the 1976 act, the claim would be extinguished.

**Mr McFee:** The only situation in which that would not happen is when someone chooses to go down the interim route. Our experience to date of people choosing to go down that route is that the procedure can be somewhat prolonged.

**David Taylor:** It has not been used to the extent that it could—and perhaps should—have been.

**Margaret Mitchell:** Do you envisage an interim payment ever exceeding the quantum payment? In those circumstances, there may be a claw back.

**Lisa Marie Williams:** Our members have never told us anything like that. It would be extraordinarily unlikely to happen. In England and Wales, the usual level of interim payment is between £30,000 and £40,000 and the average claim is about £120,000.

**Ian Johnston:** I bow to Mr Conway and Mr Maguire in terms of their ability to give us practical examples, but in the 30 years that I have been doing this work I have never heard of an insurance company clawing back an interim payment, or part of such a payment.

**Margaret Mitchell:** I suppose that that is reassuring. In these situations, the affected person is keen to have peace of mind. They need to know that there is no loophole. The element of

uncertainty about a claw back—however unlikely it is to arise—militates against people going down such a route or thinking that it is the total solution.

**Lisa Marie Williams:** Perhaps. I do not understand the mindset, however. The defendant will have admitted liability. In making an interim payment, they are furthering the claim; it is almost a staged part of the process of making the final settlement. The interim payment is one more step in the chain.

**The Convener:** You heard some of the evidence from the previous panel. You will therefore know that Scotland now has a fairly fast-track procedure for mesothelioma claims. Some cases are now coming to court quickly. You also heard that other cases are being delayed because of disadvantage. Can the interim payment system compete with the fast-track system that is now in place in Scotland?

**David Taylor:** Interim damages can be sought within a period of 14 days from the date on which defences are lodged. I think that that is the timescale.

**The Convener:** I will have to press you on the matter. I can see your argument that there may be advantage in getting a payment—albeit a smaller one—within 14 days, but what approach will the insurance industry take to give people the confidence to use the system? When they accept liability, insurance companies will have to get to the table a lot more quickly than happens at the moment.

12:00

**Lisa Marie Williams:** That is exactly why we are working with APIL, the DWP and the DCA on the pre-action protocol. Everyone must know what information to provide to the defendant at the outset of the intimation of a claim, so that the defendant can start to investigate and collapse the process. As I said earlier, it is often a year from when the solicitor knows about the claim to when the defendant knows about the claim. That is a year in which the claimant is not getting any damages. We are saying that the process needs to be much shorter so that, as soon as the defendant knows about the claim, they can start their investigation. That brings us closer to the claimant getting an interim damages payment, if they want that.

**The Convener:** Could that be described as a new commitment from the insurance industry that it will come to the table more quickly if, as you say, people can take advantage of the interim payment system?

**Lisa Marie Williams:** People already take advantage of the interim payment system in

England and Wales. We are working closely with the DWP because it is an area that the insurance industry takes very seriously.

**The Convener:** I need you to answer the question. Can we deal with the position in Scotland? I understand your argument about an interim payment being another option for pursuers, if they want a quicker payment. You say that they can apply within 14 days. Given what we observe about the track record of the industry, that will only stand up if you are giving a commitment that you will come to the table more quickly; otherwise, it is not really an option at all.

**Ian Johnston:** We are not arguing the point in the first place. We have accepted that the bill should be enacted. As for the future, we have started a discussion with the Law Society to create a disease pre-action protocol in Scotland, albeit that that discussion is in its infancy.

**The Convener:** What is David Taylor's position on that?

**David Taylor:** I cannot speak for the insurance industry. As I have stated before, it is my view that if information about these key elements is provided, it is not in the insurers' interest to delay claims.

**The Convener:** They have done so in the past.

**David Taylor:** Perhaps there has been a change of attitude.

**The Convener:** That is what I am asking. You are saying that there has been a change in attitude. We may pass the bill, but I do not see why that option should not be available if a payment could be brought about more quickly. That would require a change in the industry's attitude. Are you confirming that there has been such a change?

**Ian Johnston:** Our members have no desire to delay claims.

**Lisa Marie Williams:** Our members are in exactly the same position. None of our members has any interest in delaying claims.

**Mike Pringle:** This is a question for David Taylor or Ian Johnston. We have heard that, in England and Wales, there has been a procedure whereby interim payments have been made. Many claimants in England and Wales get an interim payment and then get the full amount later, although I understand that it takes a long time. It can be inferred clearly from what you have said that that procedure has not been used in Scotland. Why has it not been used in Scotland?

**Ian Johnston:** In our experience, it is rarely asked for and we struggle to get the information that we require to allow us to investigate the case and reach a decision. I do not think that it serves

any purpose for us to start throwing mud at each other. I do not want that. We have difficulties in getting information.

**Mike Pringle:** I just wonder why, if the procedure has been used in England and Wales for some time, it has not been used in Scotland. I am interested to hear why that is.

**David Taylor:** It is to do with the provision of information. If the information is not provided to enable an insurer's solicitor to investigate matters properly, the solicitor cannot form a view and give advice on making an interim payment.

**Mike Pringle:** That has implications—correct me if I am wrong—for companies such as Legal and General, which operate throughout the United Kingdom. In England and Wales, for some reason, claimants seem to provide the information much more quickly to Legal and General and all the other insurance companies, and the insurance companies in England and Wales are making interim payments. However, for some reason, Scottish claimants are not providing the information as quickly. Does any of us honestly believe that that is the case?

**Ian Johnston:** For most insurers, the claims will be dealt with in the same office. It is not the case that there is one philosophy in the Scottish office and another philosophy in the English office. Many insurers have just one office that deals with all disease claims, which will have a single philosophy, whatever it is. Therefore, if there is a different attitude to interim damages in England and Wales, I suggest that that is because information is received sooner.

**Mike Pringle:** In that case, I ask Lisa Marie Williams why information should come from claimants in England and Wales more quickly than it comes from claimants in Scotland.

**Lisa Marie Williams:** It might be just to do with an attitude or way of working. Defendants make interim payments only when such payments are requested, but the experience is that interim payments are not requested in Scotland, whereas they are requested in England and Wales. In England and Wales, we also have problems in getting the information as quickly as we would like to get it, which is why we are working on the pre-action protocol, which will set down timeframes and lists of information that should be forthcoming, to enable the process to be much quicker.

**Mike Pringle:** I welcome that approach, but the idea that claimants in England and Wales are providing information more quickly is bizarre. We are told that the claims are dealt with in the same office—how bizarre is all that?

**Mr McFee:** Did Lisa Marie Williams say that, after a claim is made with a lawyer, it could take a year for the claim to reach the defendant?

**Lisa Marie Williams:** Yes.

**Mr McFee:** The committee is considering only the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill. Can you understand why a process that takes a year is no use to a person whose lifespan is measured in months?

**Lisa Marie Williams:** I absolutely can, which is why we say that, as soon as a solicitor knows about a case, they should write to the defendant and provide the basic information, so that the claim can be started much more quickly. A year is too long a time for a claim to rest with a solicitor while information is gathered.

**Mr McFee:** Yes, but that is what currently happens.

**Lisa Marie Williams:** The research referred to claims that were settled in 2005.

**The Convener:** Reasons are beginning to surface. It is fair to say that when the Parliament last considered the issue there were questions about the delays around asking someone—I think it was the national insurance organisation—for a list of employers. It is coming back to me now. We had to write to the relevant UK department, to ask it to speed up the supply of information, because the lack of information that both sides needed to tell them who employed whom was delaying the process.

**Lisa Marie Williams:** That is absolutely right. The DWP has worked with HM Revenue and Customs to provide a new timetable, which I think is 10 days.

**The Convener:** Okay. We are wandering off the point a bit.

**Mrs Mulligan:** My question is for David Taylor, but I am happy to hear other witnesses' views. Mr Taylor, in your submission to the Scottish Executive's consultation, you said that damages law in its entirety should be referred to the Scottish Law Commission for review. Why is that?

**David Taylor:** The policy memorandum touches on the fact that it can be dangerous to amend legislation in relation to a specific disease, but the bill will do that, by disapplying section 1(2) of the 1976 act in relation to mesothelioma. The whole area is complicated and when we were considering it, we thought that change should not be made without detailed consideration by the Scottish Law Commission. As the committee will realise from the evidence that it heard today, the issue is complicated and needs careful consideration, particularly if there are to be moves

to disapply section 1(2) in relation to other diseases.

**Mrs Mulligan:** Are you more relaxed about the situation now that you know that it is meant to deal specifically with cases of mesothelioma?

**David Taylor:** We can see that mesothelioma is a terminal disease with peculiarities attached to it, in terms of this situation. In one view, in principle, there is no reason why you would not disapply section 1(2) in relation to other diseases. However, like others who have given evidence to you today, I cannot think of any other disease that comes into the category that mesothelioma is in.

**Mrs Mulligan:** So you accept that we are talking about a small number of people who are in such circumstances, that the issue of time is crucial and that we are trying to do something that is quite straightforward. Are you still of the view that damages needs to be reviewed?

**David Taylor:** I think that that was raised as part of the on-going consultation process. My understanding is that the issue of section 1(2) is to be reviewed by the Scottish Law Commission. I might have misunderstood that, but that was my understanding.

**Mrs Mulligan:** And do you welcome that?

**David Taylor:** Yes.

**Margaret Mitchell:** In response to the Scottish Executive's consultation, the Association of British Insurers referred to the financial consequences on insurance premiums. Now that you know the specifics of the bill, could you comment on that aspect?

**Lisa Marie Williams:** All that I would say on that point is that insurers like certainty. Lots of changes in laws that mean that insurers pay more or less money create uncertainty, which is never welcome in the industry. We support the bill because it is specific to mesothelioma and we recognise that, because of the characteristics of the disease, there is an issue with it.

**Margaret Mitchell:** Are you saying that if the Executive had extended the provisions to cover other conditions, there would have been the element of uncertainty that you mention but, as you know that the specific provision in the bill applies only to mesothelioma sufferers, there will not be that uncertainty and premiums will not be affected?

**Lisa Marie Williams:** It is for each individual member to make decisions on their own premiums. However, the situation is more certain than it would be if the Scottish ministers could extend the provision without any further consultation. We definitely welcome that.

**Margaret Mitchell:** Is it fair to say that your concern is not an on-going one and that the situation has been clarified by what has been said about the uniqueness of the case and the fact that the provision will be restricted to these sufferers only?

**Lisa Marie Williams:** Yes.

**Stewart Stevenson:** I have a fairly specific question for Ian Johnston. In your submission to the Scottish Executive's consultation, you highlighted the possibility of double counting in relation to loss of wages and loss of family support. What basis did you have for saying that and do you now have that concern?

**Ian Johnston:** Since I have seen the bill, I no longer have that concern.

**The Convener:** Do you have a view about the impact of the Coulsfield report on mesothelioma sufferers? Has the accelerated approach that we now have in Scotland made any difference to the insurance industry?

**Lisa Marie Williams:** Not that I am aware of. We welcome the quick settlement of those claims.

**Stewart Stevenson:** In previous sessions, there was some discussion about the date on which the bill should come into operation. As drafted, it would be seven days after royal assent is given, which might be around the beginning of April. Would there be any effect if the day were brought forward to approximately now, on the basis of a minister in the Scottish Executive saying that that was their intention? If, for the sake of argument, a Scottish minister were to say on Friday this week that their intention was for the bill to become operative on 8 December 2006, what implications might that have for you?

12:15

**Ian Johnston:** It would be helpful at this point if I were to read a communication that I issued to the Justice Department on 3 August. I emphasise that it was only on behalf of our members. I wrote:

"On behalf of our members I am also pleased to be able to confirm that we will, pending the new legislation, behave in accordance with the proposed changes when faced with a claim by a living claimant."

**Stewart Stevenson:** So, de facto, if not de jure, you are behaving as if the bill is in force.

**Ian Johnston:** Yes.

**Stewart Stevenson:** Thank you for that. What about the other witnesses?

**Lisa Marie Williams:** Obviously, we do not like retrospectivity as a rule, taking into account questions of certainty and all sorts of human rights reasons. However, during the aftermath of the

Barker v Corus case, we agreed with the DWP that all claims following the date of that judgment and prior to the passing of the Compensation Act 2006 would be treated under the terms of that act. I do not see that we would have a problem with it at all.

**David Taylor:** In general terms, we would have concerns about making any legislation retrospective, for reasons that have already been expressed. Certainty is potentially usurped if legislation is made retrospective. However, I do not have any particular comments to make on the—

**Stewart Stevenson:** But, in the specific terms in which I put the question, if it were to be stated that the bill, once enacted, would be put in operation from Friday this week, albeit that we will not pass the bill for some months, that would provide certainty. That is certainly not opening the door to claims going back several years. Would you have any concerns about that situation? I have heard from your two colleagues that, in essence, they would not have concerns about that.

**David Taylor:** I would not have any concerns over and above the concerns that have already been expressed. I appreciate that it is a very short window of time that we are talking about.

**The Convener:** I reassure you that the committee is mindful of the issues that you have raised about the dangers of retrospection. According to the evidence that we have heard, a number of cases are already being held in abeyance. That cannot be so in every case, and we cannot direct the course of events, but the narrow issue for us to consider is whether a retrospective provision would make any difference. Our thinking will be influenced by what you have to say about whether there might be any prejudice caused to your industry. You might have heard me say earlier that another way of exploring this matter, as we have done in the past, is to discuss the management of cases with the Court of Session and to find out whether the court might be able to assist. I think that fewer than 100 cases are waiting for the bill to pass.

**Lisa Marie Williams:** It is my understanding that the situation is similar to the time following the Barker judgment but before the passing of the Compensation Act 2006. If the cases that are currently waiting for judgment are not allowed the same rights as those that are brought after enactment, it is unfair on the former cases. Following the Barker case, most claims were stayed until the Compensation Act 2006 came into effect. That allowed those people who had had a judgment in the intervening time to get the same level of compensation.

**The Convener:** That is useful to know.

The matter that Mr Maguire raised with us in his closing remarks perhaps confused the committee—I wish to clear up some of that confusion. Do you have a view about the matter of court procedure? When we had the Executive officials before us, we asked them to clarify what would now be involved under the bill. They told us that there would be two parts to the process. First, there would be the claimant themselves settling in respect of their claim. Then, the family would come along later. Do you have a view on whether that is one action or two actions? Does it make any difference to you?

**David Taylor:** We cannot see how it could be anything other than two actions. If the sufferer's claim is settled, that claim would be at an end; a further set of court proceedings would then be required in order to litigate the claims of the relatives.

Mr Maguire touched on provisional damages. He made it clear in his oral evidence that the rule on provisional damages could not, as it stands, apply to this situation. However, via the Sheriff Court Rules Council or the Court of Session Rules Council, it might be possible to amend the rule on provisional damages to deal with this specific situation. That issue is not covered in any detail in the consultation papers; it would have to be considered carefully.

**The Convener:** The issue has only just arisen.

**David Taylor:** It is a procedural issue to do with the way in which claims can best be processed. Amending the rule seems to be a possibility. Indeed, a member of FOIL touched on that in a consultation paper that she prepared.

**Margaret Mitchell:** If the claimant died, would you not treat the whole thing as one case with the executor acting on behalf of the relatives? The information would all be there and there would be no reason to have two cases. The only reason I can see for perhaps having two cases would be if the circumstances of the relatives who were to be the beneficiaries had changed substantially in the interim. However, if the information was as it had always been, would it not be beneficial to treat the whole thing as one case?

**David Taylor:** Indeed it might be. Apart from anything else, doing so would probably cut the costs for all parties. As I say, my understanding is that, under the existing law, two separate actions would be required. If I understood Mr Maguire's final position on the matter, that is what he thought as well.

**The Convener:** We will obviously explore the issue further. It has been helpful to hear your views.

We have no further questions, so it only remains for me to thank you for your evidence this morning. Your approach to the committee has been extremely welcome and I thank you for going into detail to help us to understand all the issues surrounding the bill.

## Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill: Stage 1

10:00

**The Convener:** I welcome Johann Lamont, the Deputy Minister for Justice, and her team. Paul Cackette is the head of the civil justice division; Lorna Brownlee is the bill team leader; Bob Cockburn is the deputy principal clerk of session of the Scottish Courts Service; and Alison Fraser is from the Scottish Executive. I welcome you all to this final evidence session before we produce our stage 1 report on the bill. We have some questions, as you might expect; however, I understand that the minister wants to make a statement before we begin.

**The Deputy Minister for Justice (Johann Lamont):** Thank you, convener. I am grateful for the opportunity to speak about the bill and to discuss the issues that have been flagged up in evidence so far. I have come to the bill late, having only recently assumed new responsibilities.

I was struck by the power of the evidence that was given last week on the issues, which go far beyond financial consideration and damages. I was especially struck by the evidence from Frank Maguire, who spoke about an individual who wants to have his case resolved so that he can have certainty in his life while he is dying. As well as finality, he wants justice. He wants someone to be brought to account for his condition. I thought that that was a powerful comment on the fact that this is about not just the financial needs and interests of the families, but about people wanting justice and recognition of what has caused their suffering. We recognise the importance of the bill for individuals and their families who are, as we speak, suffering the consequences of past decisions.

I would like to say something about retrospection. You will be aware that, as drafted, the bill will apply to cases in which a sufferer recovers damages or obtains a full settlement on or after the date on which the bill comes into force, which will be seven days after it receives royal assent. In cases in which the liability of the responsible person has been discharged prior to that date, that discharge will continue to bar any claim by the immediate family. I am aware that the committee has explored the issue with both pursuers and defenders and that no objections were made to limited retrospection to a date that would be announced by Scottish ministers. We have considered the issue carefully and agree that we should remedy the distressing dilemma that is

currently faced by mesothelioma sufferers as soon as is reasonably practicable.

We have, therefore, decided that the bill's provisions should apply to any case in which the sufferer recovers damages or obtains a full settlement on or after 20 December 2006. We will lodge an amendment to the bill at stage 2 to that effect. That will mean that the dilemma that is faced by mesothelioma sufferers will be remedied from next Wednesday and that they will be able to proceed with their own claims in the knowledge that their families will not be disadvantaged. Sufferers will be able to settle their claims or seek accelerated proof dates, and some of them will be able to get and benefit from their own full damages payments before they die. Also, sufferers who have put off starting proceedings so as not to disadvantage their families will now be able to enter proceedings.

I am grateful to the committee for raising the issue and refining it in the evidence session last week. The consensus among the witnesses around the possibility of setting an earlier date has enabled us to respond swiftly and positively.

**The Convener:** Thank you, minister. I am sure that I speak on behalf of the whole committee in welcoming the statement that you have just made. You will be aware that we were keen to explore the issue, and we are delighted with your response—as, I am sure, are Clydeside Action on Asbestos and all the other witnesses among whom there was consensus on the issue. They will be delighted with the Executive's approach in making the provisions of the bill apply retrospectively from 20 December 2006. The circumstances of these cases clearly require such a precedent to be set, although I appreciate that you will be keen for that precedent not to be followed in every other bill.

**Stewart Stevenson:** I echo the convener's remarks. The minister shows great wisdom in responding to the fact that all the witnesses, on both sides of the argument, appeared to support a change to the bill. I have one minor question, although I do not believe that the issue affects anybody. Why has the date from which the bill's provisions will apply been set as next week rather than today?

**Johann Lamont:** You will recognise that retrospection is a delicate matter—something that the convener has highlighted. We thought that it was important to give people notice of the change, so we allowed a week for notice to go out. Once people know about the change, they will have some certainty. We explored every option, including setting the date as today, but that was the advice that we received and it was on that basis that I made the announcement today.

**Stewart Stevenson:** So, in essence, by giving notice, the Executive is protecting itself from a particular kind of legal challenge, the effect of which would be to damage the effect of the bill. None of us wants that to happen.

**Johann Lamont:** The same wisdom that you reflected on earlier was involved in reaching a decision on the date.

**Stewart Stevenson:** That is fine. Thank you.

**Marlyn Glen (North East Scotland) (Lab):** What is the basis on which the Scottish Executive determined to legislate on the issue at this juncture?

**Johann Lamont:** The purpose of the bill was to address urgently and specifically a problem that the law of damages caused for mesothelioma sufferers, which is that most of them chose not to pursue their own claim in order that their families might benefit from the larger award that is made after death, as the committee heard in evidence. The conclusion of the consultation was that no comparable condition is on the horizon; a conclusion that was confirmed in oral evidence to the committee.

At present, under section 1(2) of the Damages (Scotland) Act 1976, claims that are made by the immediate family of someone who dies as a result of a personal injury are extinguished if the injured person settles their claim before they die. As the committee is aware, the bill seeks to disapply section 1(2) of the 1976 act in order to allow the immediate family of a mesothelioma sufferer to claim damages for non-patrimonial loss under section 1(4) of the act after the sufferer dies, irrespective of whether the deceased recovered damages or obtained a settlement. At the committee's last meeting, all the witnesses said in evidence that they supported the bill and agreed that it addresses the problem.

**The Convener:** Minister, you will be aware of the context for our consideration of the bill: the issues that were raised in a petition to the Parliament on how the court system affects mesothelioma sufferers; the Coulsfield report; and the work that the former Justice 2 Committee did in the previous session of the Parliament.

I remind you that the Coulsfield report reduced the timescale in which civil cases are heard. On the back of that, the former Justice 2 Committee agreed with the Lord President that an even shorter timescale could be made available to mesothelioma sufferers. Cases that would have taken up to three years to come to court have been taken in as short a time as six months. Do you agree that the bill was an inevitable consequence of shortening the process as a result of Coulsfield?

**Johann Lamont:** I am very aware of the role of the former Justice 2 Committee and the work that it did on Coulsfield. I am also very aware of the tireless work of campaign groups in bringing the issue to the attention of the Parliament, including through petitioning the Public Petitions Committee, and of the positive responses to that effort. I am aware of the work of MSPs in general in pursuing this issue, and in particular that of the Justice 2 Committee and Des McNulty MSP.

The convener asked whether the bill was inevitable. That is not necessarily the word that I would use. It is logical that if the time that it takes to make a claim is reduced, more people will be alive to have to make the dreadful decision that sufferers have to make at the moment. That emphasised to me the inevitability of death that people have to confront. In evidence last week, some groups said that some mesothelioma sufferers' lifespan can be a great deal shorter than the 18 months that is often given for the period from diagnosis to death. It is clear that shortening the period that it takes for a claim to be pursued has meant that more people have been caught up. The question of inevitability is a separate matter. The introduction of the bill reflects the capacity of committees, the Parliament and others to listen to the issues that were raised and pursued in such strong terms, particularly by the campaigning groups that speak on behalf of these families.

**Mr McFee:** I echo the remarks about your announcement on retrospection. That will help some of those who had decided not to pursue their claims to re-think their decision and make a claim that will lead to an earlier settlement. At least there will be some form of limited justice in the situation.

The insurance industry, particularly in its initial submissions, claimed that the bill was unnecessary. They suggested that it was possible within the current legal framework for a claimant to make a claim and an application for interim damages, and then to suspend the claim until after their death, thereby preserving the rights of their relatives. How do you respond to that argument?

**Johann Lamont:** In general, it seems from the evidence that people have accepted the necessity for the bill and, in so doing, have recognised that the interim damages approach will not satisfy the challenge that has been raised. Before we introduced the bill, we considered the view that it might be unnecessary because of the possibility of interim damages being paid and the sisting of cases until the victim dies. As the committee will be aware, there were only nine awards of interim damages for personal injury cases last year. We took the view that that would not be a reliable solution to the problem faced by mesothelioma sufferers. If it were, the dilemma would not exist.

In our view, legislative change is the only way to provide an early and certain solution to the problem. I believe that our view was borne out by the evidence that was given by witnesses last week. Despite close questioning by the committee, there was no consensus about the lack of use of the existing mechanism, and it was not clear that it would be used any more in the future. It will be able to be used alongside the change in the law that we are proposing, if that is what the parties agree.

I note that, last week, all the witnesses from the insurance sector supported the bill, and that there is no longer a suggestion that it is not necessary because of the possibility of interim damages being awarded.

**Mr McFee:** Indeed. I think that the majority of members will vote to pass the bill, but will you join me in urging the insurance industry to continue in its efforts to speed up the settlement of claims in these and other cases, so that people are not unnecessarily kept hanging on for months, or years in some instances?

**Johann Lamont:** We are very keen, particularly given the challenges of time and the circumstances of people with such conditions, for things to be done as speedily as possible, but as robustly as possible. We do not want there to be unnecessary or wilful delay. All those involved have now accepted the need for the bill, which indicates a willingness to take the proposed approach to the challenges that the families concerned are facing.

**Mike Pringle (Edinburgh South) (LD):** Could you explain the process by which the Executive determined not to include in the bill a ministerial power of amendment to extend its provisions to other types of disease or personal injury? Some people have suggested that it should include such a power.

**Johann Lamont:** I will ask those who were more responsible for the decisions around drafting the bill about that in a moment. We reflected on the comments that were made in response to the consultation about the importance of introducing legislation to address a particular problem that had been identified with a particular solution that would give certainty to those concerned. I do not know whether anyone wishes to comment more specifically about the decision not to take such a power.

**Lorna Brownlee (Scottish Executive Justice Department):** We examined the responses to the consultation carefully in relation to that point. As we have said before, there was a mixed response. People had reservations for a number of different reasons. Some people thought that uncertainty would arise. That is possibly the kind of

uncertainty that you heard about from Lisa Marie Williams last week. There was also concern that there could be a diversion away from the primary purpose. In the absence of any other relevant condition, the priority was to focus on mesothelioma.

**Mrs Mary Mulligan (Linlithgow) (Lab):** I welcome your remarks this morning, minister. Having listened to the evidence last week, which indicated that there are already claimants who are waiting to find out the result of the scrutiny of the bill, I think that it is to the credit of the Scottish Parliament and the Scottish Executive that you have been able to respond as quickly as you have. People should appreciate that this is the sort of thing on which the Scottish Parliament makes a difference.

My question follows on from that of Mike Pringle and relates to other claims. Could you say a little more about any progress that has been made in reforming the law of damages and the work of the Scottish Law Commission in that regard? That was referred to by one of the witnesses last week.

10:15

**Johann Lamont:** As has been said, in introducing the bill so quickly, it was ministers' clear objective to help mesothelioma sufferers and their families. However, the need to take that action pointed up the fact that there are areas of the law of damages that should be reviewed. The evolution of the law relating to damages recoverable in respect of deaths resulting from personal injury and recoverable by relatives of an injured person has resulted in complex provisions that, together with practice and procedures, can have unintended consequences. Therefore, we have asked the Scottish Law Commission to undertake a review of the 1976 act and the relevant elements of the Administration of Justice Act 1982, taking into account underlying practices and procedures.

The review will consider the position of other personal injury victims and their relatives. At common law, a relative could only claim damages if the deceased could still claim damages at the time of their death. That provision has been enshrined in Scottish statute since 1976. To do away with it would create a new duty of care between the liable person and the deceased person's immediate family. That would run counter to the dependent nature of the relatives' claim, which currently lies in the existence of an undischarged liability to an injured person that is based on a duty of care that the liable person owes to the injured person.

To make provision for an independent duty of care to the relatives of the deceased would extend

the boundaries of delictual liability and, without a thorough appraisal of the rationale for it and an assessment of the impact and costs, it would be unwise and indefensible. Therefore, we have asked the Scottish Law Commission to report on the matter and reflect on the broader issues that have emerged from the focus on mesothelioma.

**Mrs Mulligan:** Have you placed any timescale on that consideration?

**Johann Lamont:** The Scottish Law Commission will report in 2008 and we—or, I should say, the next Administration—will then respond to its report.

**Mrs Mulligan:** Are you quite comfortable with dealing with the issues that are connected to mesothelioma separately from what will be a fairly wide-ranging review?

**Johann Lamont:** Absolutely. We recognise that there is a particular problem. A particular solution for the sufferers has been identified and supported, but it flags up the fact that there are other issues. I do not have a view on the range of those issues or the solutions to them, but the Scottish Law Commission will afford the Executive the opportunity for further consideration of those matters in due time.

**Margaret Mitchell:** When the Scottish Executive officials gave evidence, they seemed to envisage that the bill would trigger two actions—one for a sufferer's damages claim and one for their relatives' claim. However, Frank Maguire, who represents sufferers and who gave evidence last week, seemed to think that, in certain circumstances, only one action would be necessary. Will you comment on that?

**Johann Lamont:** I will make a couple of comments and then the officials will expand on them. We are aware that the issue was explored last week in committee. In the financial memorandum, we said that two actions may be raised instead of one in future because, if the victim is able to settle before death, the relatives will raise their own action. At present, if the victim does not settle, there is a single claim by the executor and relatives.

The committee heard evidence that pursuers would prefer one action rather than two, as having two separate actions would increase costs. I think that it would be reasonable to presume that defenders would also prefer there to be one action rather than two because of costs. We have noted that point and are looking into the possibility of a single action in such cases. It is my intention to report back to the committee as soon as possible. It may be that, when the bill is passed, some defenders will settle the relatives' claims without their having to return to court at all.

**Paul Cackette (Scottish Executive Justice Department):** It may be beneficial if I add a few words to that, as I think that it was my evidence from two weeks ago that referred initially to the idea that two actions could be needed. The thinking behind that was that the way in which the bill resolves the dilemma that victims face, thereby allowing them to raise proceedings while they are still alive, gives rise to a slight mismatch between the victim's claim, which would be raised in their lifetime, and the relatives' claim, which would arise after and only because of the victim's death. It seemed to me that those were two mutually exclusive concepts and that it was difficult to understand how the initial action could include a claim by the relatives for damages that could not arise until a later date.

That is what led me to think that there might be a need for two actions, but that was a purist's analysis of the claim. I listened closely to what Mr Maguire said last week and I defer to those who have practical experience of dealing with litigation in the courts. If practitioners believe that a way can be found to ensure that cases can proceed with one action, we would welcome that. As I said, I defer to their assessment of how things work in practice. I have explained the underlying thinking that made me conclude that there might be a need for two actions, but if the matter can be resolved, we would welcome that.

**Margaret Mitchell:** So it will depend on the circumstances. If the sufferer managed to make their claim before death, that would be the first action and the second action would be triggered on their death when the relatives claimed. However, if a period of time passed while they were in pursuit of the claim or they did not quite manage it, the claim could be dealt with in one action by the executor, who would act on the information that they held about the beneficiaries. Even then, however, a little discretion would need to be left to the court because the information might have changed substantially—for example, the beneficiaries might have changed because someone had died in the interim, but that information might not have been relayed. Could that be dealt with quite quickly or would it be left to the court's discretion?

**Paul Cackette:** In practice, that is what happens when a victim dies before the case is settled. My understanding is that the executor takes forward the victim's case and the relatives' claim would arise at that point. In practice, the claims are rolled together into the continuation of a single case.

The scenario that we had in mind is one in which the victim was able to settle before they died. I perceive that, in such cases, a gap could arise. One of the various mechanisms that could be used is the *sist*. That could well be a means by

which the relatives' claim could be rolled together into the one action at a later point.

**Margaret Mitchell:** That is helpful.

Minister, has consideration been given to the financial consequences for insurance premiums? Like other members of the committee, I welcome your confirmation this morning that the bill's provisions will kick in on 20 December. Obviously, time is of the essence. However, will you comment on the effect on insurance premiums?

**Johann Lamont:** In oral evidence last week, the insurance representatives did not raise any concerns about costs. I do not know whether there has been a discussion about an impact on premiums.

**Margaret Mitchell:** I think that the concern was more about the issue of certainty, which you resolved today when you stated that the provisions will kick in on 20 December. You have given quite a bit of notice, which is entirely reasonable. Given the evidence that we heard last week, I think that the insurance companies will be satisfied with that.

**Johann Lamont:** That is my expectation, given what was said last week. Through the bill and my statement this morning, we seek to provide the certainty that everybody wants.

**Mr McFee:** Do you agree that some of the concerns that the insurance industry expressed earlier about costs should be more than offset by modern working practices, which mean that we will not have huge numbers of mesothelioma cases in future? Many cases arose from practices in the shipbuilding industry.

**Johann Lamont:** As I said at the beginning, the issue is not just about money. It is about justice and the recognition and acknowledgement of fault. I do not pretend to know a great deal about it, but poor working practices led to significant consequences for people. I am confident that industry is now aware of those consequences and I trust that those who are involved in it recognise the significance of health and safety, not because of potential financial consequences later on but simply in the interests of a good society. People should not have to live with the intolerable consequences of poor working practices earlier in their lives.

**The Convener:** I return to the question of the two separate actions, which we need to try to resolve, although we may understand how it will be resolved in practice. As you said, we heard from Frank Maguire, whose view is that the matter is for the courts to sort, perhaps by court rules or an act of sederunt. I am not happy to leave the situation like that. If that is how the issue is to be resolved, we should agree on that and leave it to the courts.

Several considerations need to be examined. Am I correct to say that the cases go to the Court of Session?

**Paul Cackette:** Yes. In practice, all the cases are taken at the Court of Session.

**The Convener:** So solicitors such as Thompsons Solicitors instruct a civil advocate to represent their interests at the Court of Session.

**Paul Cackette:** Yes.

**The Convener:** When a victim settles a case that is to go to the Court of Session, the question is whether the case is settled before it reaches court. I am thinking of cases that go to court. Solicitors would instruct a solicitor advocate or advocate to represent the victim. They would book a court for that and a fee would be charged for that. Later, the relatives could come along and make a claim, for which a solicitor advocate or advocate would be instructed and a court would be booked, unless the case was settled out of court, although even if that happened, administration work would still have to be done. Is it possible to achieve that in a single action or would the agreement of all the solicitors and the Faculty of Advocates be needed to achieve that?

**Paul Cackette:** I do not know whether Bob Cockburn wants to say anything about the court processes. In effect, for the reasons that led me to think that two actions could be needed, resolution of the dispute would need to take place in two phases, because the causes of action arise at slightly different times. Whether that would necessarily give rise to significant extra costs might depend on the practice that develops.

In that context, one point that comes to mind is that if an insurer admitted the core liability to the victim and agreed to settle the first claim, I would certainly be surprised if, in practice, the insurer insisted on a full-blown proof of the relatives' claim. We have heard evidence that there is reasonable certainty and clarity as to how much compensation relatives would obtain and it must be relatively easy to prove who the victim's relatives are.

It is right to say that one action would have at least two phases. If the second phase required a continuation and sharing of information, I would have thought that court rules could allow that, to save preparation of a new process that had to narrate the same information all over again to construct the relatives' claim. It is difficult to estimate how much money that would save, but some saving would result from it.

The Lord President, rather than the Executive, makes the rules of court. I suspect that he may consider whether—perhaps ironically—anything in the Coulsfield rules, which push towards quick

settlement and a rigid timetable, would inhibit the ability to continue or postpone a case until the victim dies, to allow the relatives' claim to proceed under the same process. I do not know whether Bob Cockburn has further thoughts on how things work in practice.

**Bob Cockburn (Scottish Court Service):** I doubt whether I can usefully add much to what Paul Cackette said. Your assessment is correct, convener. The second claim will involve some process. It will need to be set out and responded to in writing—that assumes that it needs to go to court at all. Some process will follow that. The two claims will be similar.

If savings are to be incurred, they will probably relate to the fact that the court will have access to the initial claims papers and some of the evidence that was made available for the first claim will be available for the second claim. However, as Paul Cackette said, it is difficult to quantify the saving financially.

**The Convener:** We need to consider this further. We might go back to some of the witnesses for a bit more detail. It might well be that if the court rules allowed the action to be sisted so that those involved in the second action could at least get access to the original papers, then the rest of it might be down to the arrangement that a solicitor has with their representative in the Court of Session.

**Paul Cackette:** The key thing is to ensure that nothing in the court rules will be able to stop that. It is that way round rather than the other way round.

**The Convener:** That is helpful.

**Johann Lamont:** As I have said, we intend to report back to the committee on our considerations and we will do that as soon as we can.

**The Convener:** That is helpful.

As there are no further questions, I thank the minister for her evidence. We are delighted with all that she has said. I also thank the bill team and the witnesses who have appeared this morning.

Having achieved a world record time in taking evidence from the minister this morning and dealing with the bill so speedily, we now have time to deal with other important matters.

**50th Meeting, 2006 (Session 2), 13 December 2006, Supplementary  
Written Evidence**

SUPPLEMENTARY SUBMISSION FROM JOHANN LAMONT MSP, DEPUTY MINISTER  
FOR JUSTICE

I am writing to follow up a point which the Committee raised with me when I gave oral evidence on the Bill on 13 December, namely will it be necessary following commencement of the Bill's provisions for there to be two court actions - one for the sufferer's damages claim and one for their relatives' claim - or might it be possible to have only one action.

To some extent, this point may be academic as relatives' claims may well be settled either before the death of the sufferer or after without the need to take the matter to court. However, in the event that a claim by relatives does need to be raised in court, I have been advised that whether this could be linked in a single action to the sufferer's own claim would be a matter for Rules of Court (which are made by the Court of Session following such consultation as is necessary with the Court of Session Rules Council or the Sheriff Court Rules Council) and that primary legislation would not be required. The Court would need to be convinced of the need for special procedures to deal with these cases before any changes to the Rules would be made.

Johann Lamont  
Deputy Minister for Justice

## **ANNEXE C – OTHER WRITTEN EVIDENCE**

### **SUBMISSION FROM STEWART CAMPBELL, HEALTH AND SAFETY EXECUTIVE**

I have consulted with colleagues in HSE, who have given me some further explanation of the Compensation Act, and its application in Scotland. I have also looked at your "Rights of relatives..." Bill, and although HSE has no statutory interest in this area, it is clearly, in the light of our broad experience with asbestos, anomaly that should be addressed.

Your Committee may be interested in the most recent Mesothelioma statistics for Scotland, which were published last Thursday. You can access them through this introductory section to the Scotland statistics:

<http://www.hse.gov.uk/statistics/regions/scotland.htm>

I gather that you would also be interested in some input from HSE to the oral evidence session on 6 December. As you can tell from the brevity of the above reply, HSE has no formal interest in the subject matter of the current Bill, but if the Committee were interested in hearing evidence about the legislative approach to the control of asbestos, the guidance in place, and the statistical background, then we would be happy to assist. I have a commitment on 6 December, although depending on timing I might manage to do both. In any case, I might not be the best person in HSE, and one of our inspectors with a specialist interest in asbestos might be better able to help. Let me know what you are likely to want, and we will see what we can do.

Stewart Campbell  
Director, Scotland

### **SUBMISSION FROM SAMUEL CONDRIY, THE LAW SOCIETY OF SCOTLAND**

The Law Society of Scotland welcomes the opportunity to comment on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill.

The Civil Procedure Committee has considered the Bill and has noted the specific policy objectives which address the dilemma faced by mesothelioma sufferers who can either pursue their own damages claim or choose not to claim so their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to.

The Society recognises that the existing law, which prevents the immediate family of mesothelioma sufferers from claiming damages for their non-patrimonial loss on the death of the sufferer (if that person has already recovered damages or settled their claim during their lifetime) does cause problems.

The Society wishes to record its broad agreement with the principles and provisions of the Bill and welcomes this proposed legislation as a positive step towards providing a suitable legal frame work within which mesothelioma sufferers and their relatives may be entitled to receive damages in order to compensate them for the loss and suffering caused by this appalling disease.

Samuel Condry  
Law Reform Assistant

### **SUBMISSION FROM FRANK GRAY, UNION OF CONSTRUCTION, ALLIED TRADES AND TECHNICIANS**

UCATT believes our members unfortunate enough to suffer from terminal industrial diseases should receive full compensation to take into account the suffering and hardship incurred by injuries inflicted as a result of the negligent actions of employers. This must include

compensation for family members to reflect their pain and suffering throughout their loved one's illness and after their death.

UCATT is of the view that the current situation whereby those who have suffered the loss of a loved one are prevented from claiming their rightful compensation unless the victim gives up their right to compensation in their lifetime is totally unjust.

Unless this is addressed the majority of our members who are victims of these illnesses will continue to forego their compensation in order to make financial provision for their surviving family following their deaths. We do not believe that our members diagnosed with mesothelioma and facing the prospect of a horrific and painful death should be placed in this position. They should have access to their own compensation in their lifetime, allowing them a better quality of life in their final months, in the knowledge that their family will have the right to their own financial recompense after their death.

UCATT believes that all immediate family members who have to witness the pain and suffering of mesothelioma victims from diagnosis to the final stages of their life have the right to be compensated. Payments of such sums should not be reliant on decisions of their loved ones. We need to move to a position where every family member who has suffered asbestos exposure through the negligent actions of former employers of the deceased receives their rightful compensation at an appropriate time more respectful of their loved ones suffering.

Disapplying Section 2(1) of the Damages Act will resolve an unjust situation and ensure that all those affected by this horrendous industrial disease, that always results in the death of a victim, receive recompense for their loss. We have little sympathy for defenders or their insurers regarding the financial impact of these proposals.

Insurers offered insurance at a premium rate, against a known risk as to the dangers of asbestos exposure, yet try to avoid compensating those that suffer most, victims and their families. The financial impact of these changes would be minimal as most victims are already foregoing compensation in order to provide for their families after their death.

UCATT intends to ensure that those individuals suffering from mesothelioma and their families are not disadvantaged by an inconsistency in law. This view is based on the relatively short life expectancy of a victim on diagnosis, following an unusually long latency period.

However, we would welcome any provision within the proposed amendments that would allow Scottish Ministers to move to include any future claims for compensation for occupational disease or injury that similarly disadvantages victims and their families.

Frank  
UCATT Researcher

Gray

#### SUBMISSION FROM SARAH O'NEILL, SCOTTISH CONSUMER COUNCIL

Thank you for inviting the Scottish Consumer Council to submit its views on the above Bill and the likely impacts of the proposed measures. While we have no specific knowledge or experience of the problems caused to mesothelioma sufferers, we consider that there are issues of access to justice arising here for those who are affected.

I attach for the committee's information a copy of our response to the recent Scottish Executive consultation on this issue, which sets our views on the issues that the Bill is intended to address. We have no further comments to add at this stage.

I hope that the committee finds this helpful. Please do not hesitate to contact me should you wish to discuss any aspect of this matter further.

Sarah O'Neill  
Legal Officer

### Scottish Consumer Council response to Scottish Executive Consultation

The Scottish Consumer Council welcomes the opportunity to respond to this consultation paper. While we have no specific knowledge or experience of the problems caused to mesothelioma sufferers, we consider that the paper raises issues of access to justice for the affected individuals.

We would therefore answer the questions posed by the consultation paper as follows:

1. Do you agree that the existing law, which prevents the immediate family of mesothelioma sufferers from claiming damages for their non-patrimonial loss on the death of the sufferer if that person has already recovered damages or settled their claim during his or her lifetime, causes problems?

It seems clear from the consultation paper that the existing law, which is now 30 years old, is no longer appropriate to deal with this particular situation. We agree that it should therefore be amended to ensure that sufferers can claim compensation for their loss while they are still alive, in the knowledge that their family will no longer be precluded from making their own claim for the loss they have suffered.

As the recent final report of the Civil Justice Advisory Group chaired by Lord Coulsfield,<sup>62</sup> published by the Scottish Consumer Council noted, there are concerns among stakeholders about delay in the Court of Session generally. However, while we still await the forthcoming research report on the new rules introduced in the Court of Session for personal injury cases, we understand that this is likely to demonstrate that the reforms have been a success, leading to faster resolution of personal injury cases.

The reforms must therefore be in the interests of personal injury pursuers, reducing the stress and anxiety of the court process, and resulting in faster payment of any damages awarded than under the previous system. Unfortunately, however, it is clear that, taken in conjunction with the relevant section of the Damages (Scotland) Act, this has had the unfortunate side effect of forcing mesothelioma sufferers to choose between pursuing damages for themselves, or leaving it to their relatives to pursue the case following their death. As the consultation paper points out, at present 80% choose the latter option, denying themselves the damages which may have made their last weeks or months easier. This cannot have been the original intention behind the legislation, and we therefore agree that it should be amended to address this situation.

2. Do you agree that these problems should be remedied by disapplying section 1(2) of the 1976 Act so as to enable the immediate family of mesothelioma sufferers to claim damages for non-patrimonial loss, even although the deceased had already recovered damages or obtained a settlement in his or her lifetime?

Yes. As the consultation paper points out, there is no link between the injured person's own claims for *solatium*, and that of their immediate family.

3. Do you agree that the Bill should be confined to cases where the sufferer has contracted asbestos related mesothelioma with Scottish Ministers having the power to extend the new provision to apply to other diseases or other kinds of personal injury if experience shows this to be necessary?

We agree that this would be the best solution at this stage. We are not aware that this particular issue arises in any other situation at present. This may, however, change in the future, and we agree that it makes sense to provide for a power of extension to other categories of case, should this become necessary.

I hope that these comments are helpful.

Yours sincerely

Sarah O'Neill

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<sup>62</sup> *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group*, published by the Scottish Consumer Council, November 2005.

SUBMISSION FROM ANNA RITCHIE, SCOTTISH TRADES UNION CONGRESS

**Introduction**

The STUC is Scotland's Trade Union Centre. Its purpose is to coordinate, develop and articulate the views and policies of the Trade Union Movement in Scotland reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 630,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Prompting safer and healthier workplaces is central to the STUC's mission as is fighting for justice for those who have suffered injury or disease as a result of negligent employers.

The STUC very much welcomes the introduction of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill by the Scottish Parliament and welcomes the opportunity to make this written submission to the Justice 1 Committee.

**Background**

The STUC is strongly of the view that the current situation, whereby those who have suffered the loss of a loved one are prevented from claiming their rightful compensation unless the victim gives up their right to compensation in their lifetime, is totally unjust.

We recognise that this situation has arisen following the introduction of new Court of Session procedures that now allow the realistic prospect for compensation cases lodged on diagnosis of mesothelioma to be settled in the victim's lifetime. Prior to these new procedures, there was little prospect of this and all damages due to the victim were paid to the estate with immediate family members claiming damages for non-patrimonial loss following the death of their loved one.

The Damages Scotland Act 1976 prohibits relatives claiming non-patrimonial loss if the victim receives their compensation while alive and this has been an unfortunate side effect of the welcome changes in the Court of Session procedures.

The STUC does not believe that this was the intention of Scottish Executive Ministers when introducing these new procedures and we support the proposals to disapply Section 1(2) of the Damages (Scotland) Act 1976. Therefore, allowing the victims to claim compensation in life and their families to claim for non-patrimonial loss following a victim's death.

*Origins of the Bill*

The STUC has supported Asbestos Groups in seeking these changes and have made previous representations to Scottish Executive Ministers on this issue. We supported the proposals for the Private Member's Bill by Des McNulty MSP and the commitment by the Scottish Executive to legislate on this matter in the current Parliament.

*Specific Objectives*

Mesothelioma is a particularly horrendous condition and is unique in that it has a long latency period, is always fatal and has a very short life expectancy following diagnosis. The STUC is not aware of any cases that have been caused by anything other than exposure to asbestos.

We believe that, despite there being justification for including other potentially fatal industrial diseases, the prime objective is to ensure that all who suffer loss as a result of mesothelioma are properly compensated and that the changes are implemented as a matter of urgency.

We therefore, accept the views of the Scottish Executive that this Bill should only cover claims resulting from mesothelioma although we would have preferred to see Ministers having the power to amend the scope of the Bill if necessary.

However, we welcome the commitment from the Scottish Executive to carry out a wider review of the Damages (Scotland) 1976 Act and the continuing relevance of section 1(2).

Given the need to process this legislation quickly, our view is that the Scottish Executive Ministers are correct to apply this to mesothelioma compensation and look to the wider review to address other conditions. The STUC will obviously commit to participating in any consultation or legislative process arising from this review.

#### *Alternative Approaches*

The STUC believes that Scottish Executive Ministers are correct to address this issue through specific legislation and not to rely on changes in the behaviours referred to provide a more enlightened and widespread use of interim payment.

We note the comments contained within the consultation response from the Association of British Insurers that gives an erroneous and misrepresented view on the use of interim payments in England and Wales.

Following discussions with the TUC on the use of interim payments, we have sought the views of the Greater Manchester Asbestos Victims Support Group. Its Chair has extensive experience of supporting victims and their families and knowledge of the use of interim payments and I have included the following pertinent comments from his response:

“I would say that it is misleading to suggest, as I think the ABI does, that interim payments are commonly sought, and then a stay allowed, to specifically allow fatal payments to be made. Where this is done, it is an unpalatable device, not a desirable one, to achieve a better outcome for the family.

It would be much better to allow a sufferer to settle a claim in life and give the opportunity to the family to pursue fatal damages on the death of the sufferer, and not have the victim confront their imminent death in the context of legal devices to maximise compensation.”

The Greater Manchester Asbestos Support Group feels that the arrangements for mesothelioma compensation in England and Wales are not a satisfactory solution and welcome the moves by the Scottish Parliament to address the issue through specific legislation.

The STUC shares the Scottish Executive’s view that the new procedure for personal injury actions, including mesothelioma cases has been successful, albeit this view is only based on anecdotal evidence at present. We look forward to the publication of the evaluation being carried out into the operation of the new procedures and their effectiveness.

#### **Financial Impact**

As highlighted in both the policy memorandum and the financial memorandum, as few as 15% of mesothelioma cases are currently settled in life despite the introduction of the new procedures. This low percentage reflects the invidious and agonising decisions that terminally ill victims have to make in relation to providing financial security for their family following their death or ensuring they can be able to provide a better quality of life for themselves in their final months.

Given that 85% of claims are currently being settled by the deceased victim’s estate and payment for non-patrimonial loss to victims’ families, we do not believe that providing full compensation to all victims and families under the new arrangements would result in significant burdens on insurers or the state.

Any increased costs on the insurance industry in relation to litigation and compensation will be reflected in increases in employers’ liability insurance premiums. The STUC believes that such increases could be off set by a reduction in premiums to employers who take the

occupational health and safety of their workers seriously, including those organisations who may have potential asbestos liabilities.

The projected cost of increased compensation on an annual basis of £1.5 million pounds at the current estimated peak of asbestos-related disease anywhere between 2001 and 2015 is, we believe, insignificant in comparison to the profits made by insurers. Furthermore, it is of greater insignificance and relevance when we consider the pain, suffering and loss of society that these victims suffer following negligent exposure to asbestos some thirty or fifty years earlier.

We have little sympathy for defenders or their insurers regarding the financial impact of these proposals. Insurers offered insurance at a premium, against a known risk as to the dangers of asbestos exposure stretching back over one hundred years, yet they continually try to avoid compensating those that suffer most, victims and their families.

### **Conclusion**

The STUC welcomes the efforts of the Scottish Executive Ministers to address this issue and its recognition that effective change can only be assured through the introduction of specific legislation and not by relying on changing the behaviours of defenders and pursuers.

Only through enactment of this legislation will victims and their families have security in the last days of this appalling illness and be able to focus on their remaining time together rather than agonising over when to take their compensation.

Anna Ritchie  
STUC



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