

# **Justice Committee**

## **19th Report, 2008 (Session 3)**

### **Stage 1 Report on the Damages (Asbestos-related Conditions) (Scotland) Bill**

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# The Scottish Parliament

## **Justice Committee**

**19th Report, 2008 (Session 3)**

### **Stage 1 Report on the Damages (Asbestos-related Conditions) (Scotland) Bill**

**Published by the Scottish Parliament on 13 October 2008**





# The Scottish Parliament

## Justice Committee

### 19th Report, 2008 (Session 3)

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Steve Thomas, Technical Claims Manager, Zurich Assurance Ltd;

Dr Martin Hogg, University of Edinburgh;

Professor Anthony Seaton, University of Aberdeen;

Frank Maguire, Thompsoms Solicitors;

Phyllis Craig, Senior Welfare Rights Officer, and Harry McCluskey, Secretary, Clydeside Action on Asbestos.

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**Written evidence is published separately on the Committee’s web-page at:**  
<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/damages/index.htm>



# The Scottish Parliament

## Justice Committee

### Remit and membership

#### **Remit:**

To consider and report on (a) the administration of criminal and civil justice, community safety, and other matters falling within the responsibility of the Cabinet Secretary for Justice and (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

#### **Membership:**

Bill Aitken (Convener)  
Robert Brown  
Bill Butler (Deputy Convener)  
Angela Constance  
Cathie Craigie  
Nigel Don  
Paul Martin  
Stuart McMillan

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

Douglas Wands  
Anne Peat  
Euan Donald  
Christine Lambourne





# The Scottish Parliament

## Justice Committee

### 19th Report, 2008 (Session 3)

#### Stage 1 Report on the Damages (Asbestos-related Conditions) (Scotland) Bill

The Committee reports to the Parliament as follows—

#### INTRODUCTION

1. On 23 June 2008, the Damages (Asbestos-related Conditions) (Scotland) Bill was introduced to the Scottish Parliament. The Policy Memorandum explains that the Bill's intentions are—

“... to make sure that people negligently exposed to asbestos in Scotland who go on to develop an asymptomatic asbestos-related condition can pursue an action for damages. The means of achieving this is by ensuring that the HoL judgment in *Johnston v NEI International Combustion Ltd* does not have effect in Scotland as regards these conditions.”<sup>1</sup>

#### BACKGROUND

2. From the early 1980s until 2005-06 damages were awarded to claimants who had developed pleural plaques, an asymptomatic asbestos-related condition, in a number of court cases.

3. However, in 2004, insurers brought ten test cases in England and Wales. In his judgment in February 2005 Mr Justice Holland found in favour of the claimants but reduced the amount they were able to claim. In seven cases the insurers appealed to the Court of Appeal in England and Wales, which in 2006 reversed the decision of the High Court judge. The Court of Appeal's decision was subsequently appealed to the House of Lords.<sup>2</sup>

4. The House of Lords judgment in *Johnston v NEI International Combustion Ltd* published on 17 October 2007<sup>3</sup> ruled that asymptomatic pleural plaques do not

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<sup>1</sup> Damages (Asbestos-related Conditions) (Scotland) Bill. Policy Memorandum, paragraph 14.

<sup>2</sup> Policy Memorandum, paragraph 5.

<sup>3</sup> Judgments - *Johnston* (Original Appellant and Cross-respondent) v. *NEI International Combustion Limited* (Original Respondents and Cross-appellants) *Rothwell* (Original Appellant and Cross-respondent) v. *Chemical and Insulating Company Limited* and others (Original Respondents and Cross-appellants) Etc.

give rise to a cause of action under the law of damages. This judgment reversed over twenty years of precedent and practice as described above. Their Lordships ruled that since pleural plaques cause no symptoms and do not cause or lead to other asbestos-related diseases, or shorten life expectancy, their mere presence in the claimants' lungs is not a material injury capable of giving rise to a claim for damages in tort; that although the development of pleural plaques is proof that the claimants' lungs have been penetrated by asbestos fibres which could independently cause other fatal diseases, neither the risk of developing those other diseases nor anxiety about the possibility of that risk materialising could amount to damage for the purposes of creating a cause of action in tort.<sup>4</sup>

5. Although the House of Lords judgment in the Johnston case is not binding in Scotland, it is persuasive and has already been influential in a Court of Session case (*Helen Wright v Stoddard International plc*). Indeed, in this case, Lord Uist reserved his opinion on the question of damages for pleural plaques until the House of Lords decision had been issued and then issued a supplementary opinion of his own. In his judgment, Lord Uist used the House of Lords ruling to conclude that pleural plaques cause no harm at all.<sup>5</sup>

6. Following the House of Lords judgment there were calls for the Scottish Government to overrule the decision. Concerns were expressed in and beyond the Scottish Parliament and the Scottish Government received in the region of 250 personal testimonies about the devastating effect of a diagnosis of pleural plaques and the very real anxiety caused by living with a condition which indicates a significant exposure to asbestos.<sup>6</sup>

7. On 29 November 2007 the Scottish Government announced that it intended to introduce a Bill to overrule the House of Lords judgment in Scotland and that the provisions of the Bill would take effect from the date of that judgment. Kenny MacAskill, Cabinet Secretary for Justice in the Scottish Government, announced on 13 December 2007 that, subject to Parliamentary timetabling, he expected to introduce a Bill before the summer recess.<sup>7</sup>

#### *Structure of the report*

8. 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 report therefore focuses in turn on the medical opinion of pleural plaques, the legal implications of the Bill, the potential costs of the Bill and finally the Committee's views on the general principles of the Bill.

9. Before examining these issues, however, the Committee first considers the Scottish Government's consultation and then sets out its own consultation process.

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<sup>4</sup> Policy Memorandum, paragraph 6.

<sup>5</sup> Scottish Parliament Information Centre. (2008) Damages (Asbestos-related Conditions) (Scotland) Bill. SPICe Briefing 08/40.

Available at: <http://www.scottish.parliament.uk/s3/bills/12-Asbestos/index.htm> [Accessed 23 September 2008]

<sup>6</sup> Policy Memorandum, paragraph 8.

<sup>7</sup> Policy Memorandum, paragraph 12.

## SCOTTISH GOVERNMENT CONSULTATION

10. The Policy Memorandum to the Bill explains that prior to introducing the Bill the Scottish Government met with groups representing sufferers of asbestos-related conditions and the insurance industry to obtain their views. The response from the former was that the House of Lords judgment had had an adverse effect on pleural plaques sufferers, while the latter indicated that it supported the judgment of the House of Lords.<sup>8</sup>

11. Further to these meetings, the Scottish Government issued a partial Regulatory Impact Assessment (RIA) on 6 February 2008, in order to establish the potential impact of legislation on employers, Government Departments and insurers. 22 responses were received, 17 of which did not support the proposal to legislate.<sup>9</sup>

12. The Minister for Community Safety confirmed to the Committee the extent of the Scottish Government's consultation—

“Before deciding to legislate, we consulted key stakeholders. The Cabinet Secretary for Justice and officials met representatives of the insurance industry. After announcing our decision at the end of November, we continued to try to work with stakeholders through meetings and, notably, by consulting from 6 February to 4 April on a partial regulatory impact assessment.”<sup>10</sup>

13. The Committee received written evidence from the Law Society of Scotland, which criticised the extent of the consultation process—

“The process of consultation in relation to this Bill was insufficient. There was consultation on a partial Regulatory Impact Assessment (RIA) in February 2008 on the potential impact of legislation on industry, employers and Government Departments. That consultation was not about the decision to introduce legislation and only 22 responses were received. This is not the most appropriate process upon which to launch such a change in the law.”<sup>11</sup>

14. The Committee questioned the appropriateness of the manner in which the Scottish Government had consulted on this matter. The Minister for Community Safety sought to explain the reason why the Scottish Government had taken this approach—

“The reason for our approach is simple. We felt that, in the interests of all those people with pleural plaques whose cases are currently sisted and awaiting settlement and who expected that, as was the case over the past 20 years or more, they, like others, would receive a settlement, we should not unduly delay or prolong their anxiety about their claims, nor should we prevent the legal process from bringing about the result that is the primary purpose of the bill: to restore the status quo ante and put the law back to

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<sup>8</sup> Policy Memorandum, paragraph 20.

<sup>9</sup> Policy Memorandum, paragraph 20.

<sup>10</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Col 1088.

<sup>11</sup> Law Society of Scotland. Written submission to the Justice Committee.

what it was before. Over the past 20 years, those who had pleural plaques and everything that goes with them received compensation, and the insurers settled. Presumably, insurers took account of the costs of the settlements in their own premia-setting processes.

In a nutshell, we believed that, because of those factors, and in the interests of those who have sustained pleural plaques, we should act swiftly and not delay. It is perhaps fortunate that we have a Scottish Parliament, which is able to deal with such matters. From the tenor of the Ministry of Justice's consultation paper, had we waited for Westminster to act we would be waiting still, and for a long time to come."<sup>12</sup>

**15. The Committee acknowledges the good intentions of the Scottish Government in seeking to provide a swift legislative response to the House of Lords judgment in the Johnston case and that shortening the consultation process was one element of this swift response.**

**16. However, in the course of its consideration of the Bill a number of complex issues have been drawn to the attention of the Committee, which were not brought out in the Regulatory Impact Assessment.**

**17. Whilst the Committee acknowledges that there is no legal requirement on the Scottish Government to consult, the Committee is of the view that if a fuller consultation process had been followed then these issues may have been highlighted and the Scottish Government could have responded to them at that juncture. The Committee believes that this would have enhanced scrutiny of the Bill.**

#### JUSTICE COMMITTEE CONSULTATION

18. The Committee issued a call for evidence on the Bill on 30 June 2008, inviting responses by 25 August. The Committee received 31 responses. These can be found on the Committee's website at:  
<http://www.scottish.parliament.uk/s3/committees/justice/inquiries/damages/Damagessubmissions.htm>

19. In addition, the Committee held two oral evidence sessions. The oral evidence can be found at annexe D. The oral evidence sessions were arranged as follows—

#### Session 1: 19th Meeting, 2008 (Session 3), 2 September

- *Association of British Insurers*  
Nick Starling, Director of General Insurance and Health, Association of British Insurers;  
Dominic Clayden, Director of Technical Claims, Norwich Union Insurance Ltd; and  
Steve Thomas, Technical Claims Manager, Zurich Assurance Ltd.

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<sup>12</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1089.

- *Forum of Insurance Lawyers*  
Gilbert Anderson, Regional Representative for Scotland, and Dr Pamela Abernethy, Forum of Insurance Lawyers;
- *Academics*  
Dr Martin Hogg, University of Edinburgh; and  
Professor Anthony Seaton, University of Aberdeen.
- *Representatives of pleural plaques sufferers*  
Frank Maguire, Thompsons Solicitors;  
Phyllis Craig, Senior Welfare Rights Officer, and Harry McCluskey,  
Secretary, Clydeside Action on Asbestos.

Session 2: 20th Meeting, 2008 (Session 3), 9 September

- *Scottish Government*  
Fergus Ewing MSP, Minister for Community Safety, Paul Allen, Head of Damages and Succession Branch, Civil Law Division, Anne Hampson, Policy Manager, Damages and Succession Branch, Civil Law Division, and Catherine Scott, Solicitor, Solicitors Constitutional and Civil Law Division, Scottish Government.

#### MEDICAL OPINION OF PLEURAL PLAQUES

20. As has been previously explained, the primary purpose of the Bill is to ensure that people who were negligently exposed to asbestos and who go on to develop asymptomatic conditions can claim for damages. In particular, the Bill seeks to ensure that pleural plaques sufferers can pursue their claims regardless of the House of Lords judgment in the Johnston case.

21. Much of the Committee's consideration of the Bill focussed on the medical opinion of pleural plaques and the differing conclusions on pleural plaques drawn from these medical opinions.

22. This section of the report considers, firstly, the medical definition of pleural plaques, before going on to set out and assess the medical opinion presented to the Committee about the nature and severity of the condition.

#### **What are pleural plaques?**

23. The Policy Memorandum to the Bill describes pleural plaques in the following terms—

“Pleural plaques:

- are an indicator of exposure to asbestos in someone with an appropriate occupational history;
- are small areas of scarring on the pleura (the membrane surrounding the lungs);

- do not generally cause symptoms or disability;
- do not cause or develop into asbestos-related disease such as asbestosis or mesothelioma; and
- signify greatly increased lifetime risk for developing mesothelioma and a small but significantly increased risk of developing bronchial carcinoma as a result of exposure to asbestos.”<sup>13</sup>

24. Dr Rudd, a consultant physician, provided the Committee with a succinct definition of pleural plaques—

“Pleural plaques are a pathological change in the membrane which surrounds the lung, caused by inhalation of asbestos fibres.”<sup>14</sup>

25. Professor Seaton, a chest physician, also provided the Committee with his definition of pleural plaques—

“Pathologically, they are scars. They have a nice lining over them, they do not interfere with the function of the lung and so on, and they are not pre-malignant. They are a sign that someone has been exposed to asbestos.”<sup>15</sup>

### **Medical opinion of pleural plaques**

26. The Committee considered the various medical opinions of pleural plaques presented to them.

27. There were two particular strands of medical evidence that the Committee pursued with witnesses. Firstly, the Committee explored whether or not pleural plaques are deemed harmful or harmless and secondly whether there is any association between developing pleural plaques and subsequently developing mesothelioma or other serious asbestos-related conditions.

#### *Harmless or harmful*

28. As a basis for its consideration of the medical evidence, the Committee, first looked at the opinions expressed by two of the judges in the House of Lords judgment on the Johnston case, which were indicative of the opinions expressed in this case—

“It was not merely that the plaques caused no immediate symptoms (...) The important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life. They had no effect upon their health at all.” [Lord Hoffman]

“It is common ground that the plaques are not symptomatic: they do not cause the claimants pain nor do they disable them in any way.” [Lord Rodger of Earlsferry]

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<sup>13</sup> Policy Memorandum, paragraph 2.

<sup>14</sup> Dr Robin Rudd. Written submission to the Justice Committee.

<sup>15</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1057.

29. Professor Seaton provided both written and oral evidence to the Committee. In his written evidence he expressed his support for the House of Lords judgment in the Johnston case, before going on to characterise pleural plaques in the following terms—

“... pleural plaques are medically trivial, cause no impairment and, until it was proposed by lawyers that they should attract compensation, caused no medical problems.”<sup>16</sup>

30. Professor Seaton continued this line of argument in evidence to the Committee—

“Most people with pleural plaques have no symptoms at all and do not even know that they have them. They tend to discover that they have them when they have an X-ray for some other condition. However, those are only the pleural plaques that show up on X-rays. I am sure that many more people are going around with pleural plaques that do not show up on X-rays.

Medical opinion is quite clear. There is no dispute in the medical profession— at least among those of us who have studied the problem. Of themselves, pleural plaques do not cause symptoms. Almost inevitably, the knowledge that someone has pleural plaques leads to anxiety, which can be allayed if the person is given a clear explanation of the implications of having pleural plaques.”<sup>17</sup>

31. The Royal College of Physicians of Edinburgh expressed its view of pleural plaques—

“Pleural plaques are among the most common of all asbestos related conditions, and there is a real danger that misinterpretation of the risk to patients will perpetuate the unnecessary anxiety felt by patients. As others have stated, there are additional risks resulting from unnecessary investigations, particularly excessive radiation exposure during scanning of patients seeking to prove damage. Much of this will be initiated by lawyers rather than physicians.”<sup>18</sup>

32. Dr Rudd’s submission concurred with Professor Seaton’s submission that in most instances pleural plaques sufferers have no symptoms. He, however, highlighted the considerable anxiety resulting from diagnosis of pleural plaques—

“People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. It has been suggested that the anxiety is a result of lack of information about the true nature of plaques and that all that is needed to dispel the anxiety is a full explanation. It has also been suggested that the anxiety is caused or contributed to by the fact that damages are payable in respect of plaques. While these factors may come into play, they are not responsible for all or even most of the anxiety.

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<sup>16</sup> Professor Anthony Seaton. Written submission to the Justice Committee.

<sup>17</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Cols 1052-1053.

<sup>18</sup> Royal College of Physicians of Edinburgh. Written submission to the Justice Committee.

Explanation that the future risks arise from the asbestos exposure which caused the plaques and not from the plaques themselves is a fine distinction that means little to the person without scientific training. It is the discovery of the plaques that has led to the situation in which an explanation of the future risks is necessary. For those who have been heavily exposed to asbestos the truth about their future risks is not in fact reassuring. To be told your present condition is benign but there is a 10% risk that you will die prematurely of mesothelioma and that your risk of lung cancer may be 40% or more, as in the case of a heavily exposed smoker, is not likely to set your mind at rest.

Despite the best intentioned and comprehensive reassurance offered by doctors that plaques are harmless, often the person diagnosed with plaques knows of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. Patients have sometimes been told to look out for new symptoms and report them to their doctor. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life.”<sup>19</sup>

33. Dr Allan Henderson, a consultant physician with particular experience of asbestos related lung cancer, also submitted that in most cases there will be no symptoms for pleural plaques sufferers. However, like Dr Rudd, he highlighted the anxiety resulting from pleural plaques. He argued that the nature of this anxiety is such that damages should be awarded.<sup>20</sup>

34. Dr Colin Selby, a consultant in respiratory medicine, expressed similar sentiments—

“... once patients are aware of the presence of pleural plaques, even with detailed supportive explanation, they often suffer mental anxiety if not turmoil and distress: Though not physical, I believe it represents a real injury”<sup>21</sup>

35. The Committee also received medical evidence from Professor John Welsh, a professor in palliative care and Dr Stanley Wright, a consultant respiratory physician. Both were of the view that pleural plaques sufferers in most cases do not have symptoms, but contended that damages should be awarded for the increased anxiety associated with the diagnosis of pleural plaques.<sup>22</sup>

**36. The Committee notes that there was agreement amongst the medical experts that in most cases people with pleural plaques will not experience any symptoms.**

**37. The Committee also notes that there was agreement that diagnosis of pleural plaques is likely to induce anxiety. Experts were, however, divided in their opinion as to whether damages should be awarded to pleural plaques sufferers.**

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<sup>19</sup> Dr Robin Rudd. Written submission to the Justice Committee.

<sup>20</sup> Clydeside Action on Asbestos. Supplementary written submission to the Justice Committee.

<sup>21</sup> Clydeside Action on Asbestos. Supplementary written submission to the Justice Committee.

<sup>22</sup> Clydeside Action on Asbestos. Supplementary written submission to the Justice Committee.

*Risk of developing mesothelioma*

38. Evidence from clinicians made it clear that diagnosis of pleural plaques can instil considerable anxiety in those diagnosed with the condition in relation to the prospect of developing mesothelioma.

39. 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.

40. 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.

41. The Committee explored with witnesses the risk of developing mesothelioma for those with pleural plaques.

42. Professor Seaton was questioned by the Committee on this point—

“Well, pleural plaques are much more common than mesothelioma. Most people with pleural plaques do not develop mesothelioma. Perhaps as many as 1 in 20 or 1 in 10 might develop it. It is true that the epidemiology shows that radiologically-diagnosed pleural plaques—which I accept is not the same as pleural plaques—entail an increased risk of mesothelioma. However, if that is corrected in our analysis of individuals' exposure—we are talking about people who have been exposed to asbestos—that increase in risk disappears, because the risk is not due to the plaques.”<sup>23</sup>

43. The Committee also received correspondence from the Chief Medical Officer on this point—

“The opinion of a number of senior respiratory physicians is that, for similar levels of exposure to asbestos the risk of developing mesothelioma is probably the same whether or not pleural plaques have developed. It is a difficult area in which to be certain. There is no easy test that can be done to measure how much asbestos one individual has been exposed decades previously. It is also the case that the development of pleural plaques and the development of mesothelioma are essentially two completely different pathological processes so individuals may vary in their propensity to develop either condition. In general, however, it would be sensible to assume that, for similar levels of exposure, individuals have a broadly similar risk of developing mesothelioma regardless of whether or not they have developed pleural plaques.”<sup>24</sup>

44. The Chief Medical Officer also considered the issue of whether everyone with mesothelioma will have pleural plaques—

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<sup>23</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1057.

<sup>24</sup> Chief Medical Officer. Written submission to the Justice Committee.

“When mesothelioma is diagnosed in a chest x-ray, the appearance of the affected lung is greatly altered and it is not possible to see plaques on the affected side. It is not, therefore, possible to demonstrate radiologically plaques in every case of mesothelioma nor, given the greater importance of the mesothelioma, would there be any point in attempting to do so. It would be reasonable to assume that the vast majority of mesothelioma cases do have plaques but given my comments in the previous paragraph about plaque formation and mesothelioma development being different pathological processes, there remains the possibility of a patient developing mesothelioma but not having any plaques.”<sup>25</sup>

45. In his written submission to the Committee, Dr Rudd, stressed that it is the exposure to asbestos and not the presence of pleural plaques that increases the risk of developing mesothelioma —

“People with pleural plaques who have been heavily exposed to asbestos at work have a risk of mesothelioma more than one thousand times greater than the general population. The risk for those more lightly exposed is less but still significant.”<sup>26</sup>

46. In a contribution to the book “Occupational Disorders of the Lung”, Dr Rudd set out in more detail the nature of these risks—

“Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos-induced pleural disease, nor to pose any risk of malignant change leading to mesothelioma. Their presence may indicate, nevertheless, a cumulative level of asbestos exposure at which there is an increased risk of mesothelioma or other asbestos-related disorders. On average, in the absence of any other evidence about exposure it is reasonable to assume that subjects with plaques will have had higher exposure to asbestos than subjects without plaques. The frequency of development of other complications of asbestos exposure in persons with plaques is not a function of the presence of the plaques, but of the asbestos exposure that caused plaques. Since plaques may occur after a wide range of different exposures, the risks of other asbestos-related conditions may differ widely between different populations and individuals with plaques.”<sup>27</sup>

**47. The Committee found the evidence on this point clear and consistent. All of the experts explained that it is the exposure to asbestos rather than the presence of pleural plaques that causes mesothelioma.**

**48. However, the Committee also acknowledged that the presence of pleural plaques does indicate that the person in question has been exposed to asbestos and as such their risk of developing mesothelioma is now, in the words of Dr Rudd “more than one thousand times greater than the general population”.**

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<sup>25</sup> Chief Medical Officer. Written submission to the Justice Committee.

<sup>26</sup> Dr Robin Rudd. Written submission to the Justice Committee.

<sup>27</sup> Ministry of Justice (2008) *Pleural Plaques Consultation Paper*. Available at: <http://www.justice.gov.uk/publications/cp1408.htm> [accessed 19 September 2008]

## LEGAL EFFECT OF THE BILL

49. In this section, the Committee explores whether it is appropriate to compensate pleural plaques sufferers and whether this is consistent with the law of delict. The section also explores whether this legislative approach is the best way to resolve this situation; whether the Bill will achieve its desired effect; whether it is appropriate to limit the Bill to the conditions it concerns itself with; and whether the Bill will prevent those who have claimed for pleural plaques from making subsequent claims should they develop other more serious asbestos-related conditions.

### **Should pleural plaques sufferers be compensated?**

50. The policy behind the Bill is to make sure that people negligently exposed to asbestos in Scotland who go on to develop an asymptomatic asbestos-related condition can pursue an action for damages. The means of achieving this is by ensuring that the House of Lords judgment in *Johnston v NEI International Combustion Ltd* does not have effect in Scotland as regards these conditions.<sup>28</sup>

51. The key question the Committee therefore had to explore with witnesses was whether pleural plaques sufferers should continue to be able to claim compensation.

52. The Minister for Community Safety explained to the Committee the Scottish Government's position—

“The Scottish Government's view is that it should continue to be possible to obtain damages when pleural plaques or similar asbestos-related conditions develop as a result of negligence. Securing that right is the purpose of the Damages (Asbestos-related Conditions) (Scotland) Bill. We came to that view not because we disputed the medical evidence that had helped to inform the House of Lords judgment; we accept that, generally, pleural plaques are not, per se, a source of physical pain, nor do they inhibit function or reduce life expectancy in themselves. We accept that they do not, in and of themselves, lead on to conditions that have those results.

We believe, however, that it is important to take account of other facts. First, pleural plaques represent a physiological change in the body. They occur because the body has been attacked or injured. Secondly, pleural plaques are strongly associated with exposure to asbestos. Although they do not directly cause a greatly increased lifetime risk of mesothelioma or a small but significantly increased risk of bronchial carcinoma, they signify that, as a result of exposure to asbestos, the individual is at such higher risk compared with the general population.

Thirdly, people with pleural plaques have a specific physical manifestation of asbestos exposure, which can cause them understandable anxiety for the reasons that I have just set out. That is notably the case because many people with pleural plaques live in our old industrial heartlands and will know,

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<sup>28</sup> Policy Memorandum, paragraph 14.

often from family experience, about the potential lethality of asbestos. Although the pleural plaques will not be outwardly visible, those people and their loved ones might have seen X-rays and might frequently see the scars in their mind's eye."<sup>29</sup>

53. He continued—

“Reflecting on those factors and on the fact that a right to damages has been an established feature for the past 20 years, and taking account of discussions with our chief medical officer, the Scottish Government believes that pleural plaques are not a trivial injury and that people who develop them should still be able to claim damages where their condition has arisen because of an employer's negligence. That is the straightforward and specific purpose of our bill, and it is an appropriate and proportionate response to potential fall-out here from the House of Lords judgment.”<sup>30</sup>

54. The position of the Scottish Government, as stated by the Minister for Community Safety, was supported by the Law Society, by the Faculty of Advocates in its response to the RIA, members of the medical community and those groups representing sufferers of asbestos-related conditions.

55. Phyllis Craig of Clydeside Action on Asbestos explained to the Committee why she believed damages should be awarded—

“It is fine for someone without pleural plaques to say to someone with pleural plaques that the condition is medically trivial and not to worry, but we know about the worries and anxieties of people who come to Clydeside Action on Asbestos and the Clydebank Asbestos Group. It is insulting for the insurance industry to tell people not to worry. It is telling people, “What you need is an educational programme.” The people with pleural plaques who come to us know that pleural plaques do not develop into mesothelioma, but they are also well aware that the exposure to asbestos that caused the pleural plaques can also cause a terminal condition.”<sup>31</sup>

56. She explained that it gave sufferers the opportunity to “punish” those who had negligently exposed them to asbestos—

“Clients who have been diagnosed with pleural plaques because of others' negligence tell us that they want those people to be punished. The severity of their feelings is such that they would much rather that the matter was treated as a criminal offence. That option is not open to them, however; their only remedy was to pursue civil damages. Although that option was taken away, we hope that it will be restored to them. A compensation award gives people some sort of conclusion or resolution about their exposure to asbestos,

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<sup>29</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1087.

<sup>30</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Cols 1087-1088.

<sup>31</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1067.

although victims would much rather that the people who exposed them to asbestos were criminally prosecuted.”<sup>32</sup>

57. Frank Maguire also saw it as an opportunity for sufferers to get some form of redress against those who negligently exposed them to asbestos—

“From a lawyer's perspective, I can say that the reaction of my clients when they win a case is that they feel that they have got some measure of justice because someone has been held to account and has had to pay some compensation that is not negligible. Although they might have reservations, they go away with the feeling that a wrong has been partially righted in some way.”<sup>33</sup>

58. Unite explained why it believed pleural plaques sufferers should be compensated—

“Unite is unequivocal in our anger over the industry's abandonment of their responsibility for a serious disease. Pleural plaques are brought about by exposure to asbestos. It is the ‘calling card’ for the development of more serious and terminal asbestos-related illnesses. It is only right that negligent employers who exposed workers to asbestos should be liable for the anxiety, pain (mental and physical) and the detriment in the quality of life sufferers of pleural plaques experience that their condition could develop into the fatal cancer mesothelioma.”<sup>34</sup>

59. The Law Society of Scotland in its written submission contended that the Bill should be supported and the position prior to the House of Lords judgment in the Johnston case restored.<sup>35</sup>

60. The Union of Construction Allied Trades and Technicians' also supported the Bill. Part of their argument for supporting the rights of pleural plaques to claim damages was that successful pleural plaques claims are important to the success of subsequent claims for mesothelioma as the evidence has already been established and as such the subsequent claim should be easier to prove.<sup>36</sup>

61. In the course of its consideration of the Bill, the Committee also received a considerable body of evidence from those who believed that pleural plaques sufferers should not be compensated. These responses were primarily drawn from the insurance industry, but also from some members of the medical and legal professions.

62. Nick Starling, of the Association of British Insurers, explained to the Committee why he believed damages should not be awarded for pleural plaques—

“We have set out clearly that we are opposed to the bill because pleural plaques are benign and because the best way of dealing with people who

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<sup>32</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1079.

<sup>33</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1079.

<sup>34</sup> UNITE. Written submission to the Justice Committee

<sup>35</sup> Law Society of Scotland. Written submission to the Justice Committee.

<sup>36</sup> UCATT. Written submission to the Justice Committee.

have them is not to increase their anxiety but to reassure them that the plaques will not be a problem. The bill also changes fundamentally the law of damages—the law of delict and liability—by saying that exposure is enough to ensure compensation. Finally, it damages businesses' confidence in their ability to go to law and to have judgments upheld, rather than overturned.”<sup>37</sup>

63. Dominic Clayden of Norwich Union Insurance Ltd submitted that in awarding damages for pleural plaques, an award was being made to compensate for the risk of subsequently developing a condition.<sup>38</sup>

64. Nick Starling also argued that this legislation could precipitate claims for other conditions—

“We are concerned that people will come forward with other anxiety, exposure-related conditions that the courts will have to take account of. All the premiums are for payments that will be made in 20, 30 or 40 years. It is a huge issue for underwriters to have to calculate that sort of future liability on the basis of uncertainty about how many people with pleural plaques will come forward and how the courts will deal with analogous cases of exposure without harm.”<sup>39</sup>

65. In arguing against providing compensation for pleural plaques sufferers, Dr Abernethy, representing the Forum of Insurance Lawyers (FOIL), explained the position that Lord Uist had taken in his recent judgment—

“It is not that pleural plaques cause harm which is de minimis: it is that they cause no harm at all.”<sup>40</sup>

66. Gilbert Anderson explained why FOIL opposed the provisions of the Bill—

“For lawyers, the issue is about accepting that, despite unequivocal, overwhelming medical evidence that pleural plaques are harmless and are properly understood, misconceived anxiety causes people to be worried about something that may or may not happen in the future. The focus of the bill before us is clearly pleural plaques, asymptomatic asbestosis and pleural thickening, which will never cause impairment, as I read the bill. What about other people, however? For instance, someone might be negligently exposed to radiation—perhaps, ironically, through overscanning—and they might be worried about something that could happen in the future. The law is clear: if someone sustains harm, the court will give them damages, provided they have got over all the other hurdles.

Where would it end? It is wonderful that the Parliament is seeking to attract international litigation to resolve the situation under our system but, if we were to pass legislation that is wholly inconsistent with fundamental legal

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<sup>37</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1047.

<sup>38</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1028.

<sup>39</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1032.

<sup>40</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1037.

principles, it would do untold damage to the legal system of which we are extremely proud.”<sup>41</sup>

67. Dr Hogg questioned awarding damages for anxiety—

“The question is, should that knowledge, coupled with anxiety about the issue, give rise to a right to claim damages? There are many situations in which people become aware that they are at greater risk of an injury in the future, but in general we do not say that merely coming to know that they are at greater risk of injury gives someone a right to damages, for the simple reason that that would cause a huge amount of litigation to compensate people who may never go on to suffer an injury.”<sup>42</sup>

68. Dr Hogg also questioned the basis on which the legislation had been brought forward—

“As an academic who has an interest purely in seeing that the law is generally coherent and sensible, I am entitled to ask why the Parliament wants to do that, but nothing that I have been able to find out about the background to the bill has provided me with an answer. I suspect that it wants to do it because it does not want to appear unsympathetic to people who, quite reasonably, are anxious about their state of health and because not doing what it proposes to do would make it look cruel and unconcerned about such people, as lawyers are typically accused of being. You must look below the appearance of generosity that the Parliament wants to give and ask whether you are acting for sound reasons that make sense according to the law as a whole, within which you must operate and for which you must legislate. That is the issue that concerns me.”<sup>43</sup>

69. Andrew Smith QC wrote to the Committee expressing his concern. He expressed many of the concerns already highlighted, but in addition to these, he questioned the Bill’s incompatibility with the concept of certainty in law—

“The reason for these rules is that members of the public, and commercial organisations, should be able to know what their rights are at the time that they assume obligations and those rights. The matter arises very sharply in this very case. Insurers entered in to contracts of insurance. They did so on a footing that they would not be liable unless there was an injury as properly understood. When they challenged the decision of Mr. Justice Holland, they were successful and the judgments of the House of Lords vindicated their position. They knew where they stood.

But they are now faced with the Government effectively acting as a further court of appeal above the House of Lords. The contracts of insurance that they entered into are being rewritten by the Government.”<sup>44</sup>

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<sup>41</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Cols 1048-1049.

<sup>42</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Cols 1068-1069.

<sup>43</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1067.

<sup>44</sup> Andrew Smith QC. Written submission to the Justice Committee.

70. **The Committee acknowledges the arguments put forward by those in favour of ensuring that pleural plaques sufferers can continue to claim damages for their condition and those who oppose this.**

71. **However, given that damages have been awarded to pleural plaques sufferers negligently exposed to asbestos for the last 20 years, the Committee believes that it is right and proper that pleural plaques sufferers should be able to continue to pursue compensation.**

72. **Whilst the Committee acknowledges that the reasoning of the House of Lords in *Johnston* was legally unimpeachable, the Committee takes the view that people with pleural plaques have a specific physical manifestation of asbestos exposure. The Committee is of the view that this signifies that their risk of developing mesothelioma is many times greater than that of the general population. Furthermore, the Committee considers that the resultant effect on the lifestyle and sense of wellbeing of those diagnosed with pleural plaques is substantial and adverse.**

73. **Mesothelioma and other asbestos-related diseases are widely recognised in Scotland, particularly in certain communities, as a common consequence of established asbestos exposure. The Committee is not persuaded by the suggestion that the anxiety felt by those diagnosed with pleural plaques can be allayed by appropriate medical explanations.**

*Is the Bill consistent with the law of delict?*

74. In considering the Bill, one of the key concerns expressed to the Committee was that the Bill was inconsistent with the law of delict.

75. The fundamental concept of the law of delict is breach of legal duty causing unjustifiable harm.<sup>45</sup>

76. Evidence from DLA Piper Insurance Services Ltd expressed concern about the Bill's compatibility with the law of delict—

“The judgment in *Johnston* settled (on the basis of new consensual medical evidence) that pleural plaques have no effect on health. To make compensation available for pleural plaques in light of that evidence, runs contrary to the Scottish law of negligence and could open the way to more widespread challenges to clear long standing legal principles on which individual citizens and bodies corporate have thus far been entitled to rely upon.”<sup>46</sup>

77. Nick Starling contended that awarding damages to pleural plaques sufferers would not be consistent with the law of delict—

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<sup>45</sup> Stewart, W. (1995) *The Scottish Contemporary Judicial Dictionary*. W Green and Sons.

<sup>46</sup> DLA Piper Insurance Services Ltd. Written submission to the Justice Committee.

“According to the fundamental law of delict and the law of liability, harm must be demonstrated for compensation to be paid. Pleural plaques do not demonstrate that harm.”<sup>47</sup>

78. He continued—

“... the prospect of developing a condition, or anxiety that is engendered by the prospect of developing a condition, has never been actionable in English or Scottish law. The bill would fundamentally change that and therefore raises a much wider issue than pleural plaques; it raises the whole issue of harm, liability and delict.”<sup>48</sup>

79. Dr Hogg explained his concerns about the impact on the law of delict—

“The bill takes one class of persons in the population and says that they have been injured, even though, according to the ordinary principles of what constitutes damage under Scots common law, they have not been injured, are not unwell and have not suffered any damage. To me, that does damage to the wider law of delict and, as an earlier speaker hinted, opens the way for other people to come forward and say, “I have been exposed to certain substances. I am not suffering any ill effects, but I am worried and want to claim damages.” It seems to me that there is no good reason why people in that position could not argue that if asbestos inhalers are entitled to compensation, they should be, too.”<sup>49</sup>

80. Dr Hogg indicated that there was a commonly held view that the law of delict in Scotland is good and that Parliament has very rarely sought to interfere.<sup>50</sup>

81. The Minister for Community Safety, however, intimated that the Scottish Government was progressing in a manner consistent with the law of delict—

“We are proceeding on the basis of the law of delict. Compensation will arise only after there has been a breach of a duty of care under the common law or various health and safety statutes by an employer who has wrongly allowed employees to be exposed to asbestos, resulting in pleural plaques or either of two other asbestos-related conditions. Proof must be provided.”<sup>51</sup>

82. Frank Maguire took a slightly different position—

“I do not see the great fundamentals of the law of delict being overturned or upset, but I do see that, on this occasion, the law of delict has reached a conclusion that is unjust and the Scottish Parliament can rectify it.”<sup>52</sup>

**83. The Committee notes the differing views of witnesses as to whether or not the Bill is consistent with the law of delict.**

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<sup>47</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1024.

<sup>48</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1026.

<sup>49</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Cols 1065-1066.

<sup>50</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1066.

<sup>51</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1093.

<sup>52</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1084.

84. **The Committee notes that pleural plaques, as an internal physiological change, could be considered an injury under Scots common law. The Committee also notes that the effect of the resultant anxiety on a pleural plaques sufferer could be deemed injurious to their wellbeing.**

85. **The Committee does accept that the Bill represents a departure from the established principles of delict in Scotland. However, the Committee does not accept that the Bill will overturn or undermine this law generally as the Bill is expressly restricted to asbestos related conditions.**

86. **The Committee recognises that pleural plaques have been regarded for 20 years as being compensatable within the envelope of the law, and believes that the Bill represents a proportionate response to the House of Lords judgment.**

**Could another approach be taken to compensating pleural plaques sufferers?**

87. In the course of the Committee's consideration of the Bill, it was proposed that an alternative non legislative approach could be taken to compensating pleural plaques sufferers.

88. Dr Hogg drew the Committee's attention to the approach being taken by the UK Government—

“...no-fault compensation scheme that the Westminster Parliament is proposing for England and Wales. Introducing a statutory compensation scheme would certainly take the pressure off individual employers and insurers. That would not address my fundamental concern, which is that people would be compensated from public funds for something that was not traditionally considered to be an injury, but it would at least move the burden of paying away from the private sector to the public sector. You might not wish to do that, however, because it could be considered as letting people off for their negligence. The point that I made in the concluding paragraph of my submission was that there are other things to think about.

The paper from the Ministry of Justice throws the debate a bit wider than the bill does, because it at least considers that there are alternatives to allowing a right in damages and delict for compensating people for pleural plaques. The Scottish Parliament perhaps seems to have closed off the alternatives too early, without considering what they might be. I have not considered what the alternatives might be in great detail; I am merely suggesting that there are other routes that you might consider.”<sup>53</sup>

*Compensation schemes*

89. The Committee notes that other compensation schemes for industrial injuries have previously been adopted in the United Kingdom.

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<sup>53</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1071.

90. In January 1998, the Department of Trade and Industry (now the Department for Business, Enterprise and Regulatory Reform) took responsibility for the accumulated personal injury liabilities of the British Coal Corporation. In the same year, the courts found the Corporation negligent in respect to lung disease caused by coal dust (Chronic Obstructive Pulmonary Disease or COPD) and hand injuries caused by using vibrating equipment (Vibration White Finger or VWF). Under the courts and in negotiation with claimant's solicitors the Department established two schemes to pay compensation.<sup>54</sup>

91. The Department received over three quarters of a million claims from former miners, their widows, or their estates for COPD (592,000) and VWF (170,000). By the time all the claims have been settled, the Department estimates that it will have paid some £4.1 billion in compensation.<sup>55</sup>

92. The Public Accounts Committee at Westminster scrutinised the schemes and found that some claimants had been awaiting a settlement for 10 years or more, that claims had been underestimated by 300% and that the administration of the scheme had been exceptionally costly.<sup>56</sup>

#### *Industrial Injuries Disablement Benefit*

93. The Committee also noted the Industrial Injuries Disablement Benefit (IIDB) Scheme which provides noncontributory, 'no-fault' benefits for disablement because of accidents or prescribed diseases which arise during the course of employed earners' employment. The benefit is paid in addition to other incapacity and disability benefits. It is tax-free and administered by the Department for Work and Pensions.

#### *Scottish Government response*

94. The Minister for Community Safety explained that no fault compensation schemes had been considered, but that the Scottish Government believed that there were difficulties with these schemes. He explained what these difficulties were—

“There are several reasons for our view. First, we are not convinced that such a scheme would be appropriate in Scotland, because the issue of fault is central to the legislation. Compensation arises because there has been fault on the part of employers. That is uppermost in the mind of claimants. They feel aggrieved that someone has caused them injury because of carelessness and breach of the law. Fault is very much part of asbestos cases, and it is deeply felt by all claimants and their former colleagues. Many of those who are afflicted by pleural plaques might feel that, apart from the

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<sup>54</sup> Public Accounts Committee 12th Report. (2008) *Coal Health Compensation Schemes*. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpublicacc/350/35002.htm> [Accessed 19 September 2008]

<sup>55</sup> Public Accounts Committee 12th Report. (2008) *Coal Health Compensation Schemes*. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpublicacc/350/35002.htm> [Accessed 19 September 2008]

<sup>56</sup> Public Accounts Committee 12th Report. (2008) *Coal Health Compensation Schemes*. Available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpublicacc/350/35002.htm> [Accessed 19 September 2008]

money, the compensation should involve some recognition of the negligence or fault that occurred.

We are aware of the difficulties that arise when an approach that involves setting up a separate fund is taken. Doing so would cause delays and there would perhaps be a more open-ended liability than in a fault-based system, which is what we are pursuing. Compensation funds have been set up, such as coal health compensation schemes for chronic obstructive pulmonary disease and for vibration white finger. We considered but rejected taking that approach in this case. We would probably have had to wait until the next session of Parliament had we gone down that route, even if we could find a huge pot of money for it.

Finally, the history of schemes such as the coal health schemes has been chequered in relation to some of the issues that formed the thrust of Cathie Craigie's first question."

**95. The Committee notes that a publicly funded compensation scheme was an alternative to the proposals in the current Bill. The Committee also notes the experience of the coal health compensation schemes and acknowledges the benefits and problems associated with such schemes.**

**96. The Committee has a clear preference for the legislative approach adopted by the Scottish Government.**

**97. The Committee acknowledges that it is of considerable importance to pleural plaques sufferers that liability is attached to the awarding of damages and, as such, alternative schemes would not provide the remedy being sought.**

#### **Will the Bill have its desired effect?**

98. The Committee considered whether the Bill will have its desired effect, protecting the ability of pleural plaques sufferers to claim for their condition.

99. The Minister for Community Safety indicated he believed that it would have its desired effect—

“...the bill simply restores the status quo ante, so the law will be as it was before the House of Lords judgment.”<sup>57</sup>

100. The Law Society of Scotland in its written submission contended that it would indeed lead to restoration of the status quo—

“The Bill is the Scottish Government's response to the decision and will reverse it. The Bill will restore claimants to the position they were in before the decision was delivered in October 2007 and enable them to negotiate settlements and to raise actions in the courts if they wish.”<sup>58</sup>

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<sup>57</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Col 1110.

<sup>58</sup> Law Society of Scotland. Written submission to the Justice Committee.

**101. The Committee is content that pleural plaques sufferers will continue to be able to pursue claims for damages.**

*Quantum*

102. The Committee was, however, concerned that the House of Lords judgment might still prove persuasive when judges are determining the quantum of damages to award to pleural plaques sufferers.

103. The Committee explored with the Minister for Community Safety whether he believed that judges might award nominal damages—

“I cannot speak for judges, but I have no reason to believe that awards will be out of line with those in the past, nor do I accept the characterisation that judges in the past accepted that pleural plaques cause pain. I am not aware of any evidence that that was the case, although that seems to be the assumption that underlies your question. It is for judges to study past cases. I would be surprised if there was evidence in the past that pleural plaques cause pain and suffering. I am not sure that I accept the premise of your question.”<sup>59</sup>

**104. The Committee is unclear whether there will be issues relating to how quantum of damages is established if the Bill as introduced is passed, and invites the Minister to clarify whether the position in this regard will be as it was before the House of Lords decision.**

**Is it appropriate to limit the Bill to the conditions it concerns?**

105. As introduced, the Bill concerns itself with pleural plaques, asbestos-related pleural thickening and asbestosis. In evidence, however, it was suggested to the Committee that if these conditions are to be legislated for, it would be appropriate to legislate for others too.

106. Professor Seaton stated that, in his opinion, as it is the exposure to asbestos and not the presence of pleural plaques themselves that causes mesothelioma, if damages are to be awarded to pleural plaques sufferers, it would be logical to also award damages to those who have been exposed to the same level of asbestos.

107. Dr Hogg suggested that if you believe that pleural plaques sufferers should be able to claim for damages then there are other groups that should be able to claim too—

“My understanding of the medical evidence is that inhalation of a number of substances—coal dust, silica dust, bauxite dust, beryllium, cotton dust and silica and iron mixtures, for example—could produce symptomatic conditions. Someone who had ingested such a substance but who was not showing any symptoms of illness might suffer from anxiety as a result of being told that ingestion of that substance meant that they were at greater risk of developing a symptomatic condition. If I were an MSP, I would find it hard to answer someone in that position who came to the Scottish Parliament and asked

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<sup>59</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1106.

why they were not entitled to compensation, were the bill to be passed and the principles of delict chipped away at.”<sup>60</sup>

108. The Minister for Community Safety, however, said the Scottish Government had no intention to extend the Bill—

“Some may argue that it should go further, but we have no plans at all to increase its scope. I understand that pleural plaques can constitute the appropriate proof, but proof must also exist that the pursuer was exposed to asbestos as a result of an employer's or another person's fault. The bill will allow compensation to be awarded only if such proof is offered. That has been the position for more than 20 years, during which it has been the status quo in Scots law.”<sup>61</sup>

109. The Minister for Community Safety explained that the Bill had been drafted in such a way as to ensure it only applied to the specific conditions it concerned—

“In our opinion, there is absolutely no way in which the bill, if it becomes law, could be used to widen the extent of claims to include claims that are based purely on anxiety. That cannot happen. As I said, the bill was drafted specifically to secure its objective and to go no further...”<sup>62</sup>

110. He continued—

“I am not aware of an analogous case or specific parallel. Exposure to asbestos has been an unwelcome part of Scotland's industrial history. Of course, there are occupational diseases, miners' diseases in particular, for which compensation of a different nature is available.

In any event, the bill has the specific and sole objective of restoring the right to claim compensation to people who sustained scarring—pleural plaques—as a result of exposure to asbestos following negligence by their employers.”<sup>63</sup>

**111. The Committee believes that the Bill is drafted in an appropriately tight way, so as to confine the Bill to the conditions with which it is concerned.**

**112. The Committee believes that there are compelling grounds to legislate for pleural plaques and the other asbestos related conditions contained within the Bill.**

**Will receiving damages for pleural plaques inhibit the claimant from seeking compensation for a more serious asbestos related condition?**

113. In considering the Bill, some concerns were raised about the potential for successful claimants in pleural plaques cases being prevented from making a second claim in the event of developing a more serious asbestos related condition.

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<sup>60</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1066.

<sup>61</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1093.

<sup>62</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1099.

<sup>63</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1099.

114. However, Gilbert Anderson asserted that receiving damages for pleural plaques would not impact on the ability of sufferers to make a second claim—

“Section 12 of the Administration of Justice Act 1982 allows a party who has suffered harm but who may go on to suffer greater harm to apply to the court for a provisional award of damages. On the assumption that there is harm in law, the court in its interlocutor will award a sum of money for the initial harm, but state that in the event that the party goes on to develop more serious harm, they will be able to return to the court to seek a higher award of damages. To that extent, the law is predictable, fair and consistent. That applies not only to cases that involve exposure to asbestos dust, but to all injuries.”<sup>64</sup>

115. Thompsons Solicitors in its written submission noted the concern about this point and sought to offer some clarity—

“In the context of damages for Personal Injury (which would include asbestos cases), the common law provided that when a claim for damages was made, it had to be in full and final settlement, irrespective of what risks might occur in the future. This was considered to be unjust and a right to return to the court was allowed in the event of any risk of serious deterioration occurring. This was the reason for the Section 12, the Administration of Justice Act 1982.”<sup>65</sup>

116. Giving evidence alongside the Minister for Community Safety, Catherine Scott, confirmed that the 1982 Act had been taken into account when considering the Bill and that the Government was satisfied that “the interaction with this Act is effective.”

**117. The Committee is satisfied that the Bill as drafted will not inhibit the ability of pleural plaques sufferers to claim damages for pleural plaques and subsequently for a more serious asbestos related condition, should they unfortunately develop one.**

## FINANCIAL IMPACT OF THE BILL

### Potential Costs

118. Much of the Committee’s deliberations around the Bill concerned the potential costs of the Bill.

119. The Minister for Community Safety set out the Scottish Government’s estimates of the costs of the Bill—

“The headline figures are that there is £17,125,000 to settle existing cases and, thereafter, there is broadly speaking, £5.5 million per annum, increasing to £6.5 million per annum at the peak—in around 2015—and then decreasing. We mention costs that will apply to the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform and costs

<sup>64</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1049.

<sup>65</sup> Thompsons Solicitors. Written submission to the Justice Committee.

on local authorities of £1 million to settle existing cases and £500,000 per annum increasing to £600,000 per annum. There will be smaller costs to the courts and the legal aid costs will be negligible. The cost to the Scottish Government will be £75,000.”<sup>66</sup>

120. The Financial Memorandum indicates that these calculations are based on the assumption of 200 cases a year settling at an average figure of £25,000.<sup>67</sup>

121. In its written submission, the ABI commented on the potential costs to Scotland—

“The Scottish Government has significantly underestimated the level of unjustified costs that the Bill will impose on defendant businesses, local authorities and insurers. It suggests that the annual cost to defendants will be between £5.5m and £6.5m; figures from the UK Government suggest that the annual cost in Scotland would be between £76m and £607m, and the total cost in Scotland would be between £1.1bn and £8.6bn.”<sup>68</sup>

122. According to figures provided by the ABI, the UK Government set the potential future costs for the UK for pleural plaques cases at between £3.67bn and £28.64bn.<sup>69</sup>

123. In oral evidence, Nick Starling suggested that there could be far higher numbers of people with pleural plaques than estimated by the Scottish Government. He suggested to the Committee that as many as 1 in 10 of the adult population could have pleural plaques through exposure to asbestos.<sup>70</sup>

124. With this figure in mind, and drawing on figures produced by the UK Government, he suggested that the annual cost to Scotland could be between £76 million and £607 million.<sup>71</sup>

125. Nick Starling stressed that it was very difficult to determine how many pleural plaques sufferers there are, but suggested that the legislation was likely to increase the numbers of people coming forward seeking damages for pleural plaques.<sup>72</sup>

126. In supplementary evidence to the Committee, the Association of British Insurers provided greater detail on the figures produced by the UK Government. From the figures presented by the UK Government, it would appear that there are likely to be 900 diagnosed cases of pleural plaques each year in the UK.

127. Dominic Clayden demonstrated how numbers of claims have increased recently and the associated uncertainty about how they will grow in years to come—

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<sup>66</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Col 1110.

<sup>67</sup> Damages (Asbestos-related Conditions) (Scotland) Bill. Financial Memorandum, paragraph 16.

<sup>68</sup> Association of British Insurers. Written submission to the Justice Committee.

<sup>69</sup> Association of British Insurers. Supplementary written submission to the Justice Committee.

<sup>70</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Cols 1028-1029.

<sup>71</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1031.

<sup>72</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1038.

“I can give you some numbers that the Institute of Actuaries collated across the insurance industry. In 1999, 500 pleural plaques claims were presented. That figure rose to 6,000 claims by 2005—a twelfold increase in five or six years. Part of our uncertainty comes from the fact that, in 1996, there was a general holding of breath to see what the Court of Appeal and, subsequently, the House of Lords would do with the cases. The vast majority of cases that we deal with are presented through solicitors, a significant number of whom are working on a no-win, no-fee basis, and it is our understanding that solicitors who are faced with uncertainty around the proposed legislation have simply put the brakes on until they understand what the situation will be.

Two numbers are certain—they were not impacted by the court case and the uncertainty that the case created in lawyers' minds—and those numbers showed a twelfold increase over five or six years.”<sup>73</sup>

128. He drew a parallel with the British Coal chronic obstructive pulmonary disease scheme—

“At the outset of the British Coal chronic obstructive pulmonary disease scheme, 150,000 claims were expected. By the time that the scheme closed, there were 592,000 claims—in other words, four times as many as had been expected. That happened despite the availability of data that were more statistically certain than those that we have in relation to pleural plaques.”<sup>74</sup>

129. Frank Maguire questioned the figures provided by the insurers—

“Anyone who wants to make a forecast or a projection should look to their existing data and should not speculate and make wild estimates. The best data that are available—there are none for England and Wales—are the data of Thompsons Solicitors, as we have dealt with most cases for a good number of years. Our database gives us quite a good basis for an estimate of how many cases we should expect to arise. In my estimate, the rate should continue to be around 200 pleural plaques cases a year. That has always been the rate. If the House of Lords decision had not gone the way that it did, I have no doubt that the rate would have continued in the coming years.”<sup>75</sup>

130. The Minister also queried the figures produced by the ABI—

“The figures presuppose that Scotland would have a 30 per cent share of pleural plaques cases, but evidence suggests that there would be a much lower figure of 10 per cent, if that. Those figures are based on a scenario in which the number of people who make claims will increase greatly: basically, the ABI has assumed that there will be a massive growth in the number of people making claims.”<sup>76</sup>

131. Giving the example of Norwich Union, Frank Maguire set out the costs likely to be incurred by an insurance company in relation to pleural plaques claims—

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<sup>73</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1039.

<sup>74</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1038.

<sup>75</sup> Scottish Parliament Justice Committee. *Official Report, 2 September 2008*, Col 1080.

<sup>76</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Col 1111.

“Norwich Union, for example, is sole insurer for seven cases and part insurer for 13, out of a total of 567 cases.

... The claims would be for about £5,000 for a provisional settlement and £10,000 for full and final settlement. We therefore quoted an average of £8,000. If you multiply that by eight, it is not an awful lot of money.”<sup>77</sup>

132. The Minister for Community Safety set out the basis for the Government’s figures—

“We have considered the number of cases that have been pursued and have identified that evidence as the yardstick for estimating the bill’s costs, which are, of course, really eliminated savings, because they are costs that applied before the House of Lords judgment. Before that judgment, insurance companies were paying those costs and charging premiums. The term “increased costs” that they use is a slight misnomer; they will simply not make savings that might otherwise have arisen.”<sup>78</sup>

133. The Minister explained to the Committee his understanding of the costs—

“The best figure that we could obtain on the amount of compensation that a pursuer might expect to get in Scotland is £8,000. That figure is based on information and 2003-04 settlement figures that we received from Thompsons and others, and is in paragraph 16 of the financial memorandum. That is the amount of money that the claimant would receive and our estimate is that the defender’s cost would be £6,000. Those are just general average figures and are not necessarily the figures for a particular case. As the financial memorandum says:

“This figure is an average derived from litigated and unlitigated claims”.<sup>79</sup>

134. In supplementary correspondence from the Minister for Community Safety, the Committee was supplied with the Scottish Court Service’s figures for the number of asbestos related personal injury cases raised in the Court of Session in the last five years—

- in 2007 there were 2487 personal injury actions, of which 279 were asbestos-related;
- in 2006 there were 2343 personal injury actions, of which 325 were asbestos-related;
- in 2005 there were 2174 personal injury actions, of which 287 were asbestos-related;
- in 2004 there were 2013 personal injury actions, of which 270 were asbestos-related;

<sup>77</sup> Scottish Parliament Justice Committee. *Official Report*, 2 September 2008, Col 1081.

<sup>78</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1095.

<sup>79</sup> Scottish Parliament Justice Committee. *Official Report*, 9 September 2008, Col 1105.

- in 2003 there were 1218 personal injury actions, of which 164 were asbestos-related

(NB the figures for 2003 are low because the new personal injury procedures did not start until April that year)<sup>80</sup>

**135. The Committee notes that there is a considerable divergence in the figures provided by the Scottish Government and Thompsons Solicitors and those provided by the insurance industry regarding the number of pleural plaques claims likely to arise in Scotland in any given year.**

**136. The Committee appreciates that it is a difficult task to predict accurately the potential costs for Scotland of legislating to protect the right to claim for damages for pleural plaques. However, the Committee is of the view that the Scottish Government may have underestimated the costs, while the insurance industry has probably significantly overestimated the costs.**

**137. The Committee invites the Scottish Government to give further consideration to the figures it presented in the Financial Memorandum, and provide the Parliament with a reassurance that these figures are indeed a fair indication of the likely costs of the Bill.**

#### **Statement of Funding Policy**

138. The Finance Committee, at its meeting on 24 June 2008, agreed to adopt level one scrutiny of the Bill. This meant not taking oral evidence, but instead seeking written evidence from the affected organisations.

139. As part of this process, the Finance Committee sought written evidence from the UK Government Departments affected by the Bill, the Ministry of Defence and the Department of Business, Enterprise and Regulatory Reform. In particular, they were invited to indicate whether they intended to invoke the Statement of Funding Policy.

140. The Statement of Funding Policy sets out long-standing conventions that have guided funding for Scotland, Wales and Northern Ireland since 1979 and includes full details of the population-based Barnett Formula. Under the Formula, Scotland, Wales and Northern Ireland receive a population-based proportion of changes in planned spending on comparable United Kingdom Government services in England. One of the key principles outlined in the Statement of Funding Policy provides that where decisions taken by any of the devolved administrations have financial implications for departments or agencies of the UK Government, the body whose decision leads to the additional cost will meet that cost.

141. If the Departments were to invoke the Statement of Funding Policy this would obviously impact on the Scottish Consolidated Fund. On the basis of the figures provided in the Financial Memorandum the total cost would be around £6 million.

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<sup>80</sup> Scottish Government. Supplementary written submission to the Justice Committee.

However, given the uncertainty surrounding the number of cases and level of payments it may be that the actual figure is in excess of this amount.

142. The Minister for Community Safety was asked what discussions he had had with the UK Government on this matter—

“The MOD has, historically, accepted liability in cases in which it has been liable. We expect that to continue and have heard nothing to the contrary from the UK Government Ministry of Justice or from any other UK Government ministry. Indeed, in a statement to Parliament last November, the First Minister made it clear that that principle is to be applied. We expect the MOD to pay for MOD cases in the future, as it has in the past. We also expect that principle to apply to the Department for Business, Enterprise and Regulatory Reform.”<sup>81</sup>

143. When asked again if he had met with UK counterparts to discuss the matter the Minister indicated that he had exchanged correspondence with Bridget Prentice, the Minister who has been dealing with the issue at a UK level—

“I have exchanged correspondence with Bridget Prentice and we have made it clear that we expect that what has happened in the past will continue. We raised the issue last November and there has been no contradiction by Bridget Prentice or anybody else. I assume that if Westminster were otherwise minded—that seems to be the issue behind Mr Martin's question—it would say so, but it has not. Nevertheless, I am in correspondence with Bridget Prentice and it would be helpful for Westminster to confirm that the MOD will continue to honour its commitments to Scotland in the future, as it has in the past, in accepting and settling cases in which there has been negligent exposure to asbestos of its former employees. I hope that that is something around which the committee can unite in agreement.”<sup>82</sup>

144. The Committee believes that it is a matter of considerable importance to the Parliament to know whether or not the UK Departments intend to invoke the Statement of Funding Policy. Should they decide to do so then the financial impact of the Bill on the Scottish Consolidated Fund could be significantly increased.

145. The Conveners of both the Finance Committee and the Justice Committee have written to the relevant UK Departments several times seeking assurances, but as of yet no response has been forthcoming.

**146. The Committee believes that the potential costs to the Scottish Consolidated Fund, should UK Departments invoke the Statement of Funding Policy, are such that the Parliament must be clear as to the position before passing the Bill.**

#### SUBORDINATE LEGISLATION COMMITTEE

147. The Subordinate Legislation Committee considered the Bill at its meeting on 2 September 2008.

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<sup>81</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Cols 1111-1112.

<sup>82</sup> Scottish Parliament Justice Committee. *Official Report, 9 September 2008*, Cols 1112-1113.

148. The Committee notes from the Subordinate Legislation Committee's report that the only delegated power within the Bill concerns the commencement provision.

149. The Committee further notes that the Subordinate Legislation Committee raised no concerns about this power.

#### POLICY MEMORANDUM

150. The Policy Memorandum sets out the Bill's policy objectives, what alternative approaches were considered, the consultation undertaken and an assessment of the effects of the Bill on equal opportunities, human rights, island communities, local government, sustainable development and other relevant matters.

151. The Committee commends the Scottish Government for the general level of detail contained in the Policy Memorandum which provided a helpful foundation for the Committee to develop an understanding of pleural plaques and the issue of whether those diagnosed with the condition should receive compensation.

#### EQUAL OPPORTUNITIES

152. In the Policy Memorandum, the Scottish Government 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.

#### CONCLUSIONS ON THE GENERAL PRINCIPLES OF THE BILL

**153. The Committee believes that it is appropriate that pleural plaques sufferers should be able to continue to pursue compensation.**

**154. The Committee also believes that the Parliament needs to have a better understanding of the likely financial implications of the Bill. To this end, the Committee recommends that the Scottish Government re-considers the adequacy of the Financial Memorandum. The Committee also recommends that the Scottish Government establishes whether the UK Government will invoke the Statement of Funding Policy, and the impact which this would have upon the Scottish Consolidated Fund. The Committee feels that it is essential to establish these specific matters prior to the Bill being approved by the Parliament as a whole at Stage 3.**

**155. The Committee is able to recommend support for the general principles of the Bill at Stage 1.**



# The Scottish Parliament

## **Subordinate Legislation Committee**

### **Damages (Asbestos-related Conditions) (Scotland) Bill**

The Committee reports to the lead committee as follows—

#### **Introduction**

1. At its meeting on 2 September 2008, the Subordinate Legislation Committee considered the delegated powers provisions in the Damages (Asbestos-related Conditions) Scotland Bill at Stage 1. The Committee submits this report to the Justice Committee as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill<sup>1</sup>

#### **Delegated Powers Provisions**

3. The Committee approves without comment the only delegated power in this Bill, which is a commencement provision at section 4(1).

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<sup>1</sup> [Delegated Powers Provisions](#)



The Scottish Parliament  
Pàrlamaid na h-Alba

**Finance Committee**  
**Convener: Andrew Welsh MSP**

Bill Aitken MSP  
Convener, Justice Committee  
Via email

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1 September 2008

Dear Bill

**Damages (Asbestos-Related Conditions) (Scotland) Bill –  
Financial Memorandum**

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda. At its meeting on 24 June 2008, the Committee agreed to adopt level one scrutiny in relation to the Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee has now received submissions from the Scottish Court Service, the Association of British Insurers, Zurich Financial Services, and AXA Insurance UK plc. All submissions are attached to this letter.

The Committee's remit is to scrutinise expenditure from the Scottish Consolidated Fund, but does not extend to examining the potential impact on the private sector. As the submissions from the insurance industry primarily address the underlying policy of the bill and the financial implications for businesses, it is my view they are more appropriately addressed to the lead committee on the Bill.

In addition, the Committee sought written evidence from those UK Government Departments which will be affected by the Bill (the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform) on whether they plan to invoke the Statement of Funding Policy. If the departments were to invoke the

Statement of Funding Policy, this would obviously have a significant impact on the Scottish Consolidated Fund. On the basis of figures provided in the Financial Memorandum, the total cost would be around £6 million. However, given the uncertainty surrounding the number of cases outlined in the submissions from the insurance industry, it may be that the actual figure will be in excess of this amount.

On that basis, if the submissions from DBERR and the MoD were to conclude that the Statement of Funding Policy will be invoked, the Committee would strongly recommend that the Justice Committee raise the issue with the Scottish Government.

The departments have committed to supply the Committee with submissions by 8 September 2008, although the clerks have contacted officials to request them sooner. They will be forwarded to the Justice Committee as soon as they are received.

If you have any questions about the Committee's consideration of the Financial Memorandum, please contact Allan Campbell, Assistant Clerk to the Committee, on 0131 348 5451, or email: [allan.campbell@scottish.parliament.uk](mailto:allan.campbell@scottish.parliament.uk)

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Welsh'.

Andrew Welsh MSP  
**Convener**

## SUBMISSIONS

### Finance Committee

#### Scrutiny of Financial Memorandum – the Damages (Asbestos-Related Conditions) (Scotland) Bill

#### Submissions received

#### SUBMISSION FROM THE ASSOCIATION OF BRITISH INSURERS

The ABI is the voice of the insurance and investment industry. Its members constitute over 90 per cent of the insurance market in the UK and 20 per cent across the EU. They control assets equivalent to a quarter of the UK's capital. They are the risk managers of the UK's economy and society. Through the ABI their voice is heard in Government and in public debate on insurance, savings, and investment matters. And through the ABI they come together to improve customers' experience of the industry, to raise standards of corporate governance in British business and to protect the public against crime. The ABI prides itself on thinking for tomorrow, providing solutions to policy challenges based on the industry's analysis and understanding of the risks we all face

#### EXECUTIVE SUMMARY

The Scottish Government has committed to introducing legislation to make symptomless pleural plaques and other symptomless asbestos-related conditions compensatable, and has introduced a draft Bill to that effect.

Pleural plaques are small fibrous discs on the surface of the lungs. They are symptomless in all but a handful of exceptional cases, and neither lead to, nor increase susceptibility to, any other conditions. They are benign and do not impair quality of life. Despite this clear prognosis, there continues to be much confusion and concern among people with the condition and the general public about what a diagnosis of pleural plaques really means for a person's health.

The ABI opposes the *Damages* Bill for three main reasons:

- **It is not the best way to help people with pleural plaques** – paying compensation sends the wrong message to people that the condition is more serious than it is, perpetuating confusion. Educating people about what the condition really means for a person's health will provide reassurance and reduce anxiety. Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who encourage people to have x-rays for pleural plaques with the aim of 'selling' the claim onto a solicitor for a fee. Unnecessary x-rays carry health risks.
- **It will fundamentally change the law of delict** – interference with the fundamental principles of law in this way and applying the changes

retrospectively may be used as a precedent to argue for compensation for other currently non-compensatable conditions, further increasing costs for defendants. The Bill will detrimentally affect the economic rights and interests of insurers, in breach on the European Convention on Human Rights.

- **It will undermine business confidence** – the Bill proposes a fundamental and retrospective change to the law of delict, undermining confidence in Scotland's stable legal environment, and making it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers, which will ultimately be passed back to taxpayers and policyholders.

We believe that the Scottish Government has significantly underestimated the potential cost of the legislation. On the basis of figures from the UK Government, the annual cost of making plaques compensatable in Scotland is likely to be between £76m and £607m, the total cost to Scotland would be between £1.1bn and £8.6bn<sup>1</sup>. To put this into context, annual net employers' liability premium in Scotland is approximately £131m<sup>2</sup>.

The financial costs would fall on defendants, including insurers, local authorities and the Government itself, and would be passed onto policyholders and taxpayers in the form of higher premiums and council tax.

We urge the Finance Committee to highlight to Parliament the issues associated with this Bill.

**1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

The Association of British Insurers did respond to the consultation on the partial Regulatory Impact Assessment; additionally, seven of our members submitted separate responses. All eight responses raised concerns about the adequacy of the financial assumptions made.

**2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

**4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

**6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

<sup>1</sup> Ministry of Justice, *Pleural Plaques*, July 2008

<sup>2</sup> ABI estimate based on ABI statistics and National Statistics

No, we do not believe our comments on the financial assumptions, or the financial implications for the ABI's members, have been accurately reflected in the Financial Memorandum.

While our comments have been noted, they have not been given sufficient attention. The Scottish Government has calculated the likely cost of the Bill on the basis of unknowns; we are extremely concerned about the potential for significant underestimation.

- **We do not know how many people have, or will develop, pleural plaques**

The Financial Memorandum fails to consider the financial impact of any changes in the proportion of the population developing pleural plaques, or their propensity to claim.

There are a number of studies which suggest that pleural plaques is more prevalent among the population than the Scottish Government acknowledges:

- A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques<sup>3</sup>
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”<sup>4</sup>
- Professor Tony Newman Taylor, previously chair of the Industrial Injuries Advisory Council, states that about one-third to one-half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure<sup>5</sup>.

- **We do not know the future number of pleural plaques claims**

The Financial Memorandum recognises that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. It considers the average annual number of cases settled in Scotland in 2004-2006 as “a reasonable basis on which to proceed because of the lack of any “firm figures to the contrary”. Accordingly, the financial implications of the legislation are based on 200 claims being received per year.

While we cannot give a precise number of future claims, in our responses to the partial RIA we pointed to data that could be used to inform what the range might be. This has not been considered in the Memorandum. Figures from the Institute of Actuaries<sup>6</sup> show that, across the UK, approximately 500 pleural plaques claims were made against insurers in 1999, by 2005 this had risen steeply to 6,000, only to fall again to 2,250 in 2006 following the Court of Appeal judgment when there was uncertainty as to whether pleural plaques would be compensatable. Scotland has around 30% of the UK's asbestos liabilities; accordingly, based on the data from the Institute of Actuaries, we estimate that had the Court of Appeal judgment upheld first

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<sup>3</sup> Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", *Chest* 2004:125, 1103-1117

<sup>4</sup> Chapman, SJ et al, "Benign Asbestos Pleural Disease", *Curr Opin Pulm Med* 2003:9(4), 266-271

<sup>5</sup> 3 Dec 2007 House of Commons debate, Michael Clapham (Lab): reading an email from Professor Tony Newman Taylor: "You may be interested to know that about a third to one half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure. After twenty years, 5 to 15 per cent. will have uncalcified pleural plaques".

<sup>6</sup> Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)

ruling that plaques were compensatable, the annual number of claims in Scotland would be closer to 1,800 than the 200 the Financial Memorandum suggests.

Further, history shows us that it is very difficult to accurately predict how many claims are likely to arise following changes to legislation: at the outset of the British Coal Chronic Obstructive Pulmonary Disease scheme, 150,000 claims were expected; by the time the scheme closed, 592,000 claims had been registered. This massive underestimation was despite data with an apparently greater degree of statistical certainty than exists for plaques.

In addition, the Financial Memorandum also fails to adequately deal with the potential for forum shopping (where non-Scottish claimants seek to bring a claim in Scotland). This creates further uncertainty about the potential number of claims.

The UK Government has subsequently published a consultation document on pleural plaques which includes a more thorough assessment of the potential costs of compensating for the condition; on the basis of its assessment, the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and £8.6bn. We urge the Financial Committee to consider these figures rather than those contained in the Memorandum when examining expenditure from the Scottish Consolidated Fund.

- **We are concerned about the potential for other currently uncompensatable conditions becoming compensatable**

Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable, exposing defendants to potentially significant costs.

Another concern raised in our response to the partial RIA consultation was that the proposed legislation fundamentally changes the law of delict, which could pave the way for any number of claims being made for the risk of an illness occurring, or for worry that something might happen. If legal developments of this nature occurred, the level of litigation would significantly increase along with the possibility of weak or spurious claims, with damaging effects for businesses and the economy. While the Memorandum notes our concern, it suggests that it is not relevant to this discussion. We disagree: any financial assessment of the legislation must consider the cost of its wider implications.

**3. Did you have sufficient time to contribute to the consultation exercise?**

Yes.

**5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

The Bill will impose significant financial costs on the insurance industry. Higher costs for insurers may be passed onto policyholders in the form of higher employers' liability and public liability premiums. The UK government suggest that the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and £8.6bn<sup>7</sup>. To put this context, the current annual net employers' liability premium in Scotland is £131m<sup>8</sup>. Potentially, some insurers may choose to exit the Scottish liability insurance market altogether.

**7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

Not applicable.

**8. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

For an action for damages for personal injuries there must be (a) a negligent act or breach of statutory duty by the defender which (b) causes an injury to the pursuer's body, as a result of which (c) the pursuer suffers material damage. Any damage must be more than *de minimis* which is to say that it is required to reach a threshold of seriousness if it is to justify the intervention of the law; a risk of future damage is not, by itself, compensatable; and mere anxiety about a risk of future damage is not, by itself, compensatable.

Under the current law, symptomless pleural plaques are not therefore compensatable. Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable.

We cannot know what type of new claims might arise under these circumstances, or how many; it is therefore impossible to quantify the potential costs; however, we can say that they are likely to be substantial.

Pleural plaques can only be detected by x-ray or CT scan examination. The Financial Memorandum does not include the cost to NHS Scotland for a significant rise in demand for such examinations, including costs for medical staff time, training, or operation of examination equipment.

## **CONCLUSION**

The *Damages* Bill fails to address the real issues for people with pleural plaques and is based upon a belief that paying money in some way deals with this condition. In summary, it:

<sup>7</sup> Ministry of Justice, *Pleural Plaques*, July 2008

<sup>8</sup> ABI estimate, based on ABI statistics and National Statistics

- is not the best way to help people with pleural plaques
- will fundamentally change the law of delict
- will undermine business confidence.

## SUBMISSION FROM AXA INSURANCE UK PLC

### About AXA Insurance

AXA Insurance UK plc is a major general insurer in the UK market. It is the general insurance business arm of AXA UK PLC and occupies a leading position as one of the top 4 commercial business insurers in the United Kingdom.

AXA is a major provider of employers liability insurance in the UK market with in excess of 80,000 policyholders for this type of business in 2008.

### Executive Summary

The Scottish Government has committed to introduce legislation to make symptomless pleural plaques and other asymptomatic asbestos-related conditions compensable, and has introduced a Bill to that effect, the *Damages (Asbestos-related Conditions) (Scotland) Bill* hereinafter referred to as the Damages Bill.

AXA opposes the Damages Bill for 3 key reasons:

1. It represents a fundamental and unwarranted alteration of the law of delict.
2. Alteration in the law of delict in this way will undermine business confidence in the Scottish environment
3. Legislation to provide compensation is not the best way to help those who are diagnosed with pleural plaques.

AXA will be submitting evidence to the Justice Committee in accordance with the Committee's current call for evidence.

We have reviewed the content of the Financial Memorandum published in association with the draft Damages Bill. We believe that the Scottish Government has significantly underestimated the potential cost of the legislation and that many of the financial assumptions upon which the Bill is based are flawed.

This paper sets out our key concerns and we urge the Finance Committee to highlight to the Scottish Parliament the issues associated with this Bill.

### Our Submission to the Finance Committee

- |   |
|---|
| <p><b>1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?</b></p> |
|---|

AXA Insurance did respond to the consultation on the partial Regulatory Impact Assessment. We raised concerns about the adequacy of the financial assumptions made.

**2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

**4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

**6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

No, we do not believe our comments on the financial assumptions or the financial implications for AXA have been accurately reflected in the Financial Memorandum.

The Scottish Government have calculated the likely cost of the Damages Bill on the basis of unknown trends and we are very concerned that the overall cost of the proposed legislation has been significantly underestimated as a result.

The Association of British Insurers (ABI) has provided the Scottish Government, and the Finance Committee of the Scottish Parliament, with evidence of the doubts that arise in relation to the future numbers of those diagnosed with pleural plaques. We agree with their views and believe that the number of cases predicted by the Scottish Government is understated.

The Scottish Government has recognised in the Financial Memorandum that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. We agree with this comment. Whilst we cannot give precise data on the number of future claims we agree with the ABI comments on the data that could be used to determine what the range of possible claim volumes could be. We note that this data has not been considered in the Financial Memorandum.

We agree fully with the evidence submitted by the ABI in relation to the possible number of future claims and urge the Financial Committee to consider these figures rather than those contained within the Financial Memorandum.

We remain gravely concerned about the fundamental changes to the law of delict that will arise should the Damages Bill be enacted. The Memorandum prepared by the Scottish Government indicates that whilst our concerns have been noted they are not regarded as being relevant to the discussion. We disagree. Any consideration of the financial impact of the Damages Bill must consider the cost of its wider implications.

**3. Did you have sufficient time to contribute to the consultation exercise?**

Yes.

**5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

The Bill will impose significant financial costs on AXA Insurance UK PLC, which it will be able to meet. However, the inevitable higher costs may be passed onto policyholders in the form of higher employers' liability and public liability premiums.

**7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

Not applicable

**8. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

The Damages Bill is drafted to fundamentally alter the facts related to pleural plaques. Medical evidence is clear that pleural plaques are almost always asymptomatic and definitely do not lead to any other medical condition. The Bill legislates to reverse these facts, in total contradiction to all medical evidence.

We believe that the Scottish Government's determination to reverse clear medico-legal facts in this way will ultimately result in a precedent being set to do the same for other asymptomatic conditions. Once legislation is passed to enable one group of persons to secure compensation on the basis of anxiety about future harm alone it will be very difficult for the Scottish Government to resist demands from other groups.

We cannot quantify the possible costs associated with such a widening of the operation of the law of delict in Scotland but we can say they are likely to be substantial.

### **Conclusion**

The Damages (Asbestos-Related Conditions) (Scotland) Bill is wrong and the financial assessment that has been prepared in support of its enactment is flawed.

We urge the Finance Committee to draw these matters to the attention of the Scottish Parliament.

**AXA Insurance UK plc  
18<sup>th</sup> August 2008.**

## SUBMISSION FROM ZURICH FINANCIAL SERVICES GROUP

Zurich Financial Services Group (Zurich) is an insurance-based financial services provider with a global network of subsidiaries and offices in North America and Europe as well as in Asia Pacific, Latin America and other markets. Founded in 1872, the Group is headquartered in Zurich, Switzerland. It employs approximately 60,000 people serving customers in more than 170 countries, with around 7,900 employees based in the UK.

We provide insurance and risk management solutions and services for individuals, small and mid sized businesses, large corporations and major multi-national companies. We distribute third-party financial services products.

Zurich welcomes the opportunity to share its research, extensive knowledge and views with the Finance Committee to assist the scrutiny stage of the Bill. As one of the two lead insurers that actioned the test litigation on pleural plaques, Zurich has invested four years of research, resource, legal expertise and liaison with medical experts towards the litigation which accumulated in the House of Lords ruling in October 2007. Zurich has therefore a close interest in this proposal and will examine the legality of the proposed legislation.

### **GENERAL COMMENTS**

Zurich is opposed to the decision by the Scottish Executive to introduce legislation to make pleural plaques compensatable and believes it should be revisited. The House of Lords concluded, in October 2007, that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages.

In his summary Lord Hoffman stated that pleural plaques do not cause or develop into asbestos-related disease, are symptomless and do not progress into other asbestos related conditions. This decision was based on agreed medical evidence applied to fundamental principles of the law of negligence.

Zurich is of the view that legislating to make compensation payable for anxiety rather than a recognised medical illness will set a dangerous example and would open the floodgates to people with exposure only claims. As a consequence this would have an impact on employers, insurers, local authorities and the Government. The implication of the proposed legislation means higher costs being passed onto customers by the way of higher insurance premiums, resulting in Scottish businesses being at a disadvantage to their English and Welsh competitors.

The RIA document states that the proposed legislation is to be retrospective in its application and effect. This creates a question regarding legal framework in Scotland and whether it can be regarded as one founded on stable and equitable principles that can be relied upon. Zurich would look carefully at the legality of the proposed legislation.

## **EXECUTIVE SUMMARY**

The Scottish Government has committed to introducing legislation to make symptomless pleural plaques and other symptomless asbestos-related conditions compensatable, and has introduced a draft Bill to that effect.

Pleural plaques are small fibrous discs on the surface of the lungs. They are symptomless in all but a handful of exceptional cases, and neither lead to, nor increase susceptibility to, any other conditions. They are benign and do not impair quality of life. Despite this clear prognosis, there continues to be much confusion and concern among people with the condition and the general public about what a diagnosis of pleural plaques really means for a person's health.

Zurich opposes the Damages Bill for three main reasons:

- It is not the best way to help people with pleural plaques – paying compensation sends the wrong message to people that the condition is more serious than it is, perpetuating confusion. Educating people about what the condition really means for a person's health will provide reassurance and reduce anxiety. Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who encourage people to have x-rays for pleural plaques with the aim of 'selling' the claim onto a solicitor for a fee. Unnecessary x-rays carry health risks.
- It will fundamentally change the law of delict – interference with the fundamental principles of law in this way and applying the changes retrospectively may be used as a precedent to argue for compensation for other currently non-compensatable conditions, further increasing costs for defendants. The Bill will detrimentally affect the economic rights and interests of insurers, in breach on the European Convention on Human Rights.
- It will undermine business confidence – the Bill proposes a fundamental and retrospective change to the law of delict, undermining confidence in Scotland's stable legal environment, and making it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers, which will ultimately be passed back to taxpayers and policyholders.

We believe that the Scottish Government has significantly underestimated the potential cost of the legislation. On the basis of figures from the UK Government, the annual cost of making plaques compensatable in Scotland is likely to be between £76m and £607m, the total cost to Scotland would be between £1.1bn and £8.6bn<sup>9</sup>. To put this into context, annual net employers' liability premium in Scotland is approximately £131m<sup>10</sup>.

The financial costs would fall on defendants, including insurers, local authorities and the Government itself, and would be passed onto policyholders and taxpayers in the form of higher premiums and council tax.

We urge the Finance Committee to highlight to Parliament the issues associated with this Bill.

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<sup>9</sup> Ministry of Justice, Pleural Plaques, July 2008

<sup>10</sup> ABI estimate based on ABI statistics and National Statistics

## **EVIDENCE**

### **1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

Zurich did respond to the consultation on the partial Regulatory Impact Assessment; our response raised concerns about the adequacy of the financial assumptions made.

### **2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

### **4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

### **6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

No, we do not believe our comments on the financial assumptions have been accurately reflected in the Financial Memorandum. While our comments have been noted, they have not been given sufficient attention. The Scottish Government has calculated the likely cost of the Bill on the basis of unknowns; we are extremely concerned about the potential for significant underestimation.

### **We do not know how many people have, or will develop, pleural plaques**

The Financial Memorandum fails to consider the financial impact of any changes in the proportion of the population developing pleural plaques, or their propensity to claim.

There are a number of studies which suggest that pleural plaques are more prevalent among the population than the Scottish Government acknowledges:

- A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques<sup>11</sup>
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”<sup>12</sup>
- Professor Tony Newman Taylor, previously chair of the Industrial Injuries Advisory Council, states that about one-third to one-half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure”<sup>13</sup>.

<sup>11</sup> Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", Chest 2004:125, 1103-1117

<sup>12</sup> Chapman, SJ et al, "Benign Asbestos Pleural Disease", Curr Opin Pulm Med 2003:9(4), 266-271

<sup>13</sup> 3 Dec 2007 House of Commons debate, Michael Clapham (Lab): reading an email from Professor Tony Newman Taylor: "You may be interested to know that about a third to one half of those occupationally exposed to asbestos will have calcified pleural plaques thirty years after first exposure. After twenty years, 5 to 15 per cent. will have uncalcified pleural plaques".

### **We do not know the future number of pleural plaques claims**

The Financial Memorandum recognises that “there is no reliable way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim”. It considers the average annual number of cases settled in Scotland in 2004-2006 as “a reasonable basis on which to proceed because of the lack of any “firm figures to the contrary”. Accordingly, the financial implications of the legislation are based on 200 claims being received per year.

While we cannot give a precise number of future claims, in our responses to the partial RIA we pointed to data that could be used to inform what the range might be. This has not been considered in the Memorandum. Figures from the Institute of Actuaries<sup>14</sup> show that, across the UK, approximately 500 pleural plaques claims were made against insurers in 1999, by 2005 this had risen steeply to 6,000, only to fall again to 2,250 in 2006 following the Court of Appeal judgment when there was uncertainty as to whether pleural plaques would be compensatable. Scotland has around 30% of the UK’s asbestos liabilities; accordingly, based on the data from the Institute of Actuaries, we estimate that had the Court of Appeal judgment upheld first ruling that plaques were compensatable, the annual number of claims in Scotland would be closer to 1,800 than the 200 the Financial Memorandum suggests.

Further, history shows us that it is very difficult to accurately predict how many claims are likely to arise following changes to legislation: at the outset of the British Coal Chronic Obstructive Pulmonary Disease scheme, 150,000 claims were expected; by the time the scheme closed, 592,000 claims had been registered. This massive underestimation was despite data with an apparently greater degree of statistical certainty than exists for plaques.

In addition, the Financial Memorandum also fails to adequately deal with the potential for forum shopping (where non-Scottish claimants seek to bring a claim in Scotland). This creates further uncertainty about the potential number of claims.

The UK Government has subsequently published a consultation document on pleural plaques which includes a more thorough assessment of the potential costs of compensating for the condition; on the basis of its assessment, the potential cost of compensating pleural plaques in Scotland is likely to be between £1.1bn and £8.6bn. We urge the Financial Committee to consider these figures rather than those contained in the Memorandum when examining expenditure from the Scottish Consolidated Fund.

### **We are concerned about the potential for other currently uncompensatable conditions becoming compensatable**

Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable, exposing defendants to potentially significant costs.

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<sup>14</sup> Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)

Another concern raised in our response to the partial RIA consultation was that the proposed legislation fundamentally changes the law of delict, which could pave the way for any number of claims being made for the risk of an illness occurring, or for worry that something might happen. If legal developments of this nature occurred, the level of litigation would significantly increase along with the possibility of weak or spurious claims, with damaging effects for businesses and the economy. While the Memorandum notes our concern, it suggests that it is not relevant to this discussion. We disagree: any financial assessment of the legislation must consider the cost of its wider implications.

**3. Did you have sufficient time to contribute to the consultation exercise?**

Yes.

**5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

The Bill will impose significant financial costs on the insurance industry. Higher costs for insurers may be passed onto policyholders in the form of higher employers' liability and public liability premiums.

There may be an assumption that the cost of this action will simply be borne by Insurers. This is not the case. Zurich has many customers now and in the past who have elected to take deductibles on their EL / PL policies. This means that they bear the first part of any claim up to an agreed sum from their own funds. We believe that both corporate customers and Local Authorities could be exposed to additional expenditure if the Scottish Parliament pursues this course of action.

**7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

Not applicable.

**8. Do you believe that there may be future costs associated with the Bill, for example, through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

For an action for damages for personal injuries there must be (a) a negligent act or breach of statutory duty by the defender which (b) causes an injury to the pursuer's body, as a result of which (c) the pursuer suffers material damage. Any damage must be more than *de minimis* which is to say that it is required to reach a threshold of seriousness if it is to justify the intervention of the law; a risk of future damage is not, by itself, compensatable; and mere anxiety about a risk of future damage is not, by itself, compensatable.

Under the current law, symptomless pleural plaques are not therefore compensatable. Legislating to make plaques compensatable fundamentally changes the law of delict. Changing the law in this way for asbestos-related conditions is likely to be used as a precedent to argue for compensation in other situations which are not currently compensatable.

We cannot know what type of new claims might arise under these circumstances, or how many; it is therefore impossible to quantify the potential costs; however, we can say that they are likely to be substantial.

Pleural plaques can only be detected by x-ray or CT scan examination. The Financial Memorandum does not include the cost to NHS Scotland for a significant rise in demand for such examinations, including costs for medical staff time, training, or operation of examination equipment.

### **CONCLUSION**

The Damages (Asbestos – related Conditions) (Scotland) Bill fails to address the real issues for people with pleural plaques and is based upon a belief that paying money in some way deals with this condition. In summary, it:

- is not the best way to help people with pleural plaques
- will fundamentally change the law of delict
- will undermine business confidence.

Zurich has legal advice that in passing the Bill in its current form (or indeed any similar form to the same retrospective effect), the Scottish Government would be acting outwith its legislative competence, contrary to the provisions of the Scotland Act. Zurich would like to make it clear that, given the advice received, it intends to challenge the legislation through the courts if it is passed by the Scottish Parliament.

We hope this information assists your consideration of the Bill.

**Bill Paton**  
**UKGI Chief Claims Officer**

### SUBMISSION FROM THE SCOTTISH COURT SERVICE

### **QUESTIONNAIRE**

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Damages (Asbestos-Related Conditions) (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee's scrutiny.

### **Consultation**

- 1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?**

The Scottish Court Service was consulted during the drafting of the Bill and in relation to the content of the Financial Memorandum.

- 2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?**

Yes.

**3. Did you have sufficient time to contribute to the consultation exercise?**

Yes.

**Costs**

**4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.**

The Scottish Court service contributed to the terms of paragraphs 20 and 21 of the Financial Memorandum.

**5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

Yes, the Scottish Court Service is content that the Courts can meet the costs associated with the provisions in the Bill. Claims arising from pleural plaques have in recent years been a normal part of the business dealt with by the Court of Session. Many of those claims are currently live in the Court, as is mentioned in the Memorandum, and would have been dealt with in normal course if the House of Lords had not passed the judgment which they did.

**6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

The Scottish Court Service cannot comment on this.

**Wider Issues**

**7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?**

Not applicable.

**8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?**

Some guidance will require to be provided to Court staff on the effect of the legislation, if passed, but any costs associated with that will be minimal.

**JUSTICE COMMITTEE**  
**EXTRACT FROM MINUTES**  
**17th Meeting, 2008 (Session 3)**  
**Tuesday 24 June 2008**

**Work programme (in private):** The Committee considered its work programme and agreed its approach to its scrutiny of the Scottish Government's draft budget 2009-10. In addition, the Committee agreed its Stage 1 approach to the Damages (Asbestos-related Conditions) (Scotland) Bill and the Sexual Offences (Scotland) Bill. The Committee also agreed its preferred candidates for appointment as advisers in connection with its scrutiny of the draft budget and the Sexual Offences (Scotland) Bill.

**JUSTICE COMMITTEE**  
**EXTRACT FROM MINUTES**  
**19th Meeting, 2008 (Session 3)**  
**Tuesday 2 September 2008**

**Damages (Asbestos-Related Conditions) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—  
Gilbert Anderson, Regional Representative for Scotland, and Dr Pamela Abernethy, Forum of Insurance Lawyers;  
Nick Starling, Director of General Insurance and Health, Association of British Insurers;  
Dominic Clayden, Director of Technical Claims, Norwich Union Insurance Ltd;  
Steve Thomas, Technical Claims Manager, Zurich Assurance Ltd;  
Dr Martin Hogg, University of Edinburgh;  
Professor Anthony Seaton, University of Aberdeen;  
Frank Maguire, Thompsons Solicitors;  
Phyllis Craig, Senior Welfare Rights Officer, and Harry McCluskey, Secretary, Clydeside Action on Asbestos.

**JUSTICE COMMITTEE**  
**EXTRACT FROM MINUTES**  
**20th Meeting, 2008 (Session 3)**  
**Tuesday 9 September 2008**

**Declaration of interests:** Robert Brown MSP declared that he was a member of the Law Society of Scotland and that formerly, as a partner of the law firm Ross Harper and Murphy, he had represented both pursuers and defenders in cases of medical negligence and reparation, although only the pursuer on asbestos cases.

**Decision on taking business in private:** The Committee agreed that its consideration of draft reports on the Damages (Asbestos-Related Conditions) (Scotland) Bill at future meetings should be taken in private.

**Damages (Asbestos-Related Conditions) (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—  
Fergus Ewing MSP, Minister for Community Safety, Paul Allen, Head of Damages and Succession Branch, Civil Law Division, Anne Hampson, Policy Manager, Damages and Succession Branch, Civil Law Division, and Catherine Scott, Solicitor, Solicitors Constitutional and Civil Law Division, Scottish Government.

**JUSTICE COMMITTEE  
EXTRACT FROM MINUTES  
21st Meeting, 2008 (Session 3)  
Tuesday 16 September 2008**

**Damages (Asbestos-Related Conditions) (Scotland) Bill (in private):** The Committee considered the main themes arising from the evidence sessions, in order to inform the drafting of its report.

**JUSTICE COMMITTEE  
EXTRACT FROM MINUTES  
22nd Meeting, 2008 (Session 3)  
Tuesday 30 September 2008**

**Damages (Asbestos-Related Conditions) (Scotland) Bill (in private):** The Committee agreed to defer consideration of a draft Stage 1 report to its next meeting.

**JUSTICE COMMITTEE  
EXTRACT FROM MINUTES  
23rd Meeting, 2008 (Session 3)  
Tuesday 7 October 2008**

**Decision on taking business in private:** The Committee agreed to take item 4 in private. The Committee also agreed to consider its draft report on the Scottish Government's Draft Budget 2009-10 in private at future meetings.

**Damages (Asbestos-Related Conditions) (Scotland) Bill (in private):** The Committee agreed not to accept supplementary written evidence.

**Damages (Asbestos-Related Conditions) (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report and agreed to continue consideration at its next meeting.

**JUSTICE COMMITTEE  
EXTRACT FROM MINUTES  
24th Meeting, 2008 (Session 3)  
Thursday 9 October 2008**

**Damages (Asbestos-Related Conditions) (Scotland) Bill (in private):** The Committee agreed its Stage 1 report.

## **Damages (Asbestos-Related Conditions) (Scotland) Bill: Stage 1**

10:21

**The Convener:** For our first evidence session on the Damages (Asbestos-Related Conditions) (Scotland) Bill, we have three panels of witnesses. I welcome the first panel and thank its members for their forbearance while we dealt with our administrative business. The witnesses are: Gilbert Anderson, regional representative for Scotland, and Dr Pamela Abernethy, of the Forum of Insurance Lawyers; Nick Starling, director of general insurance and health at the Association of British Insurers; Dominic Clayden, director of technical claims at Norwich Union Insurance Ltd; and Steve Thomas, technical claims manager at Zurich Assurance Ltd. Dr Abernethy, gentlemen, I welcome you and thank you for giving up your time to give us evidence.

We have received from the witnesses a lengthy, detailed and helpful submission, so we will move straight to questioning.

**Bill Butler (Glasgow Anniesland) (Lab):** Good morning, Dr Abernethy and gentlemen. It has been argued by supporters of the bill that those with pleural plaques have suffered harm, the scarring of the membrane surrounding the lung is a physical injury and damages should therefore be available. Will you each explain to the committee why you think that the harm is not sufficient to merit an award of damages?

**Nick Starling (Association of British Insurers):** Thank you for your invitation to give evidence on this beautiful September day. We rely entirely on the unanimous decision by the House of Lords on the basis of completely agreed medical evidence that pleural plaques are benign; there are no symptoms associated with them other than in the most exceptional cases; and they do not develop into more serious conditions—they are inert biologically. The only issue is that they give cause for anxiety in some people. According to the fundamental law of delict and the law of liability, harm must be demonstrated for compensation to be paid. Pleural plaques do not demonstrate that harm. That is based on agreed medical evidence.

**Bill Butler:** That is clear, Mr Starling. Does anybody else want to have a go?

**Pamela Abernethy (Forum of Insurance Lawyers):** From my medical understanding and having read with interest the medical evidence in the Johnston case, I believe that the consensus—although it has not been finally established—is

clear that pleural plaques are simply the body's physiological response to the presence of foreign fibres. As a consequence of such fibres in the body, there is a release of chemical mediators, which then create fibrous tissue that walls off the foreign fibres. As a consequence of that, the body's defence system operates to effectively prevent plaques from causing harm.

Therefore, my submission would be that plaques are a good thing and do not cause harm. Harm is pathological in the body; it does damage and usually has symptoms. The plaques are markers of exposure to asbestos. We know that some people have plaques as a consequence of exposure to asbestos, but some studies suggest that up to 50 per cent of those equally exposed to asbestos do not have plaques. My view is therefore that plaques do not cause harm.

**Bill Butler:** Did I hear you correctly? Are you saying that plaques are a good thing?

**Pamela Abernethy:** That is exactly what Lord Scott of Foscote said in the House of Lords. While listening to senior counsel submissions on the matter, he asked whether they meant that plaques are a good thing. I do not think that I can actually give you an answer to that—

**Bill Butler:** But that is what you have just said.

**Pamela Abernethy:** My understanding of the medical evidence is that plaques are the body's way of trying to wall off the bad fibres.

**Bill Butler:** Mr Starling said that plaques do not develop into serious conditions—

**Pamela Abernethy:** No.

**Bill Butler:** That is what Mr Starling said. What is your view as a medical person? Would they never develop?

**Pamela Abernethy:** My position is that plaques are a marker that an individual has been exposed to asbestos. However, people who have been exposed to asbestos but do not have plaques can equally have a slightly higher than normal risk of developing mesothelioma or asbestosis.

In fact, that is the difficulty that I see with the bill: those who have been equally exposed, perhaps in the same factory setting, but do not have the plaques have a slightly higher risk of mesothelioma or asbestosis, just as an individual with plaques does. Although those with plaques have a higher risk compared with the normal population, that is my difficulty with the bill.

**Bill Butler:** Does anybody else want to have a go?

**Gilbert Anderson (Forum of Insurance Lawyers):** Let me record my thanks on behalf of

the Forum of Insurance Lawyers for the opportunity to give oral evidence on the bill.

A fundamental point that should be borne in mind is that it is the exposure that creates the risk of further disease rather than the plaques per se. That is my understanding, as a lawyer, from reading the overwhelming medical evidence on the matter. As Mr Butler rightly says, this is a question of medical evidence and, ultimately, the overwhelming, agreed medical evidence—it does not appear to be in dispute—is that plaques per se are harmless.

**Bill Butler:** You mention exposure, Mr Anderson. How would you respond to supporters of the bill who say that pleural plaques sufferers have been wrongfully exposed to asbestos and are therefore entitled to seek compensation from those who acted negligently?

**Gilbert Anderson:** I am keen to re-emphasise that the bill does not appear to be about culpability. It is concerned only with whether harm has occurred.

A number of things have to happen for an action for damages for personal injury to succeed under the law of Scotland. First, a duty of care has to be in existence, and the pursuer has to show that the duty of care was owed to him. He has to show that there has been a breach of that duty, and he then has to demonstrate that, as a consequence of the breach, he has suffered the harm that is complained of. From my reading of the bill, I understand that it is only the harm that we are concerned about today.

With the greatest of respect to the committee—I fully understand that the bill is well intentioned—I believe that we should be focusing on the fundamental issue of whether the various conditions that are detailed in the bill are harmful or harmless. The overwhelming medical evidence appears to be unequivocal that they are harmless. To my mind, culpability, breach of duty and negligence are not relevant considerations in assessing the fundamental purpose of the bill.

**Nick Starling:** This takes us back to my opening remark about the law of delict, or liability as it is in England, which is fundamentally based on actual harm rather than exposure. We can all think of circumstances in which people have been exposed to harm—to harmful chemicals, for example—but have not developed a condition. The fundamental issue is that, as soon as someone develops a condition, whether that is asbestosis or increased risk of a heart attack from exposure to prescription drugs, there is a case for compensation.

However, the prospect of developing a condition, or anxiety that is engendered by the prospect of developing a condition, has never

been actionable in English or Scottish law. The bill would fundamentally change that and therefore raises a much wider issue than pleural plaques; it raises the whole issue of harm, liability and delict.

10:30

**Bill Butler:** In response to the first couple of questions, we have heard—tell me if I am wrong—that pleural plaques are a good thing and are harmless. Is that correct? Does anyone on the panel disagree with that opinion? Mr Clayden and Mr Thomas have not spoken yet.

**Pamela Abernethy:** One would not say that pleural plaques are a good thing. Pleural plaques are a marker of exposure to asbestos, so one is not saying—

**Bill Butler:** Forgive me, Dr Abernethy, but you said that plaques are a good thing—or you quoted without demur someone who said that.

**Pamela Abernethy:** No—

**Gilbert Anderson:** No one would say that pleural plaques are a good thing. That is common sense. However, their presence perhaps demonstrates that the body's defence mechanism is operating effectively. Those are neutral words—

**Bill Butler:** Why is the defence mechanism operating? Is it because it senses that harm has been done?

**Gilbert Anderson:** I am not a doctor, but my understanding is that pleural plaques are a reaction to invading fibres—

**Bill Butler:** Asbestos?

**Gilbert Anderson:** Indeed. I understand that pleural plaques try to wall off the fibres, as I think that my friend Dr Abernethy said. I speak as a lay person; I am a lawyer, not a doctor—

**Bill Butler:** Snap.

**Gilbert Anderson:** The question is therefore properly for the medical profession. However, on the basis of common sense I do not think that anyone would accept that pleural plaques are a good thing, although their presence perhaps demonstrates that the body's defence mechanisms are functioning.

**Bill Butler:** Because the body is under attack.

**Gilbert Anderson:** Indeed.

**Bill Butler:** Indeed. Thank you.

**The Convener:** In fairness, I point out that the comment about pleural plaques being a good thing came from a judgment by Lord Justice Scott.

**Pamela Abernethy:** Mr Butler, I did not say that pleural plaques are a good thing. I hope that you appreciate that I was quoting—

**Bill Butler:** I appreciate that, but you quoted the learned judge without demur.

**Dominic Clayden (Norwich Union Insurance Ltd):** We need to separate the issues. I return to Mr Butler's earlier question. Neither I, nor—I think—any other person who gives evidence to the committee would seek to defend an employer who negligently exposed someone to asbestos. However, the bill does not seek to provide compensation for exposure to asbestos per se.

Exposure to asbestos cannot be described as a good thing; it is terrible for people to be in circumstances in which exposure to asbestos subsequently causes a debilitating or fatal condition. Our company and the industry look to compensate such people. However, the aspect of the bill about which I think that we have a difference of opinion is that we do not think that compensation should be payable for the risk, of which a pleural plaque is a marker, of subsequently developing a condition.

**The Convener:** Cathie Craigie will ask about the history of the matter.

**Cathie Craigie (Cumbernauld and Kilsyth (Lab):** I want to clarify a point that has emerged from the discussion. Does our expert panel of lawyers and insurers accept that the appearance of pleural plaques indicates that a person has had significant exposure to asbestos and that throughout the person's life there will be a risk of their developing mesothelioma?

**Nick Starling:** The presence of plaques indicates exposure to asbestos and is quite widespread. By some estimates, as many as one in 10 of the adult population has plaques, because we are all exposed to asbestos, either through the workplace or through general environmental exposure. When someone has been exposed to asbestos there is a risk that they will develop conditions, but the risk is relatively small.

**Cathie Craigie:** Is it agreed that that is a risk?

**Nick Starling:** If someone has been exposed to asbestos, whether they have pleural plaques or not, there is an increased risk that they will develop further asbestos diseases.

**Gilbert Anderson:** I emphasise that that risk exists for people who have been exposed but who do not have plaques. The fundamental point that I tried to get across earlier is that it is not the plaques that create the risk, but the exposure. Someone who has been heavily exposed might not have plaques, while someone who has been lightly exposed might have plaques. One of the anomalies in the bill, in its present form, is that one of those people would be entitled to compensation and the other would not. That is not consistent, transparent or even handed, and such

inconsistency is not good for the Scottish legal system.

**Cathie Craigie:** I am sure that we will consider that point further as we go through the bill.

Prior to the House of Lords judgment in the case of *Johnston v NEI International Combustion Ltd*, insurers had not challenged the right of pleural plaques sufferers to claim damages. Can you explain why insurers had previously made those payments?

**Nick Starling:** Before passing the question to the experts, I will just say that, in almost all those cases, the premiums were collected in the 1940s, 1950s and 1960s, which was a long time before any compensation was payable for pleural plaques. The history goes back a long way.

**Steve Thomas (Zurich Assurance Ltd):** The question why we paid those claims for many years and then stopped doing so comes up frequently. As an insurer, we follow the decisions of the courts. We paid past claims in accordance with courts' decisions that that was the right and proper thing to do. In the 1980s, the Ministry of Defence pursued cases in an attempt to work out whether pleural plaques should be compensatable. There was some ambiguity in the medical evidence at that time, but the judiciary ruled that it was right and proper that compensation should be paid.

As time went on, however, medical evidence developed. In 2002 and early 2003, the medical opinion that we were receiving had crystallised and coalesced to a point at which medical experts were able to tell us that pleural plaques were benign and did not mutate into serious conditions such as asbestosis or mesothelioma and that, in all but the rarest cases, they were asymptomatic. Based on that medical evidence, the matter was taken back to the courts, which made the ruling that they did.

**Dominic Clayden:** In the 1980s, the MOD cases suggested that compensation should be paid. It must be recognised that litigation is an expensive process and that more cases were coming to the insurance industry, which was also expensive. One of the reasons for making the challenge in the courts was the significant cost of paying compensation for pleural plaques, which we do not believe is right.

It is not entirely clear when the peak number of deaths or claims to the insurance industry relating to asbestos exposure will occur. The best estimates suggest that it will be around 2015, but experts differ. I would be open about the fact that one of the reasons for seeking a change in the position was that the trickle of cases was going to become larger. That made it important to take the issue to the courts to seek clarity.

**Cathie Craigie:** Some people might say that the change has been made because, in the 1980s, compensation was being paid out not by the insurance industry but by the Ministry of Defence using Government money.

The fact is that there are medical opinions on both sides of the argument. How open has the insurance industry been in seeking opinions from both sides? Am I right in thinking that the impetus for this change was financial rather than based on medical evidence?

**Nick Starling:** I will make some opening remarks and then ask Mr Clayden to comment.

The Government and insurers have always paid compensation for asbestos-related conditions side by side, depending on whether the people involved worked in the state or private sector. That situation has not changed.

On a more general point, in the House of Lords case, the medical evidence that pleural plaques are benign was unanimous and agreed completely by both sides.

**Dominic Clayden:** I can only build on those comments. The fact is that we operate in an adversarial court system, and one of the features of the court case is that there was no significant difference in opinion between doctors for either party. That was not the issue in the court proceedings. As a result, it is not a question of insurers picking and choosing the doctors whom they listen to. In our view, there is significant agreement in the medical profession about the benign nature of plaques.

**Cathie Craigie:** But the impetus for the change in the insurance industry's opinion was that there would be more—and more expensive—cases, which would mean significant costs.

**Dominic Clayden:** What you suggest was certainly a feature.

**Steve Thomas:** It is worth clarifying that the *Rothwell* and *Johnston* litigation was initiated by a Government department: the Department of Trade and Industry. The insurance industry became involved in the litigation after that, because we felt that we needed to have a voice in what would clearly be an important case.

**Paul Martin (Glasgow Springburn) (Lab):** You have indicated that if the bill is passed and enacted, the resulting higher costs to the insurance industry will be passed on to customers in the form of higher premiums. Are you able to quantify those higher costs and higher premiums?

**Nick Starling:** On the overall issue of cost, we feel that, by being based on the number of assisted cases, the regulatory impact assessment has hugely underestimated the potential cost of

the legislation. As I said earlier, it has been estimated that as many as one in 10 of the adult population has plaques; if the bill were to become law, it would be saying in effect that those people are entitled to compensation. On top of that, we would certainly expect people to encourage others to come forward and make claims. There are, for example, phenomena such as scan vans, and if we type the phrase “pleural plaques” into any internet search engine, we will find at least one website touting for this kind of custom. As a result, we feel that an immediate effect of the legislation would be a very large number of people making claims.

I point out that these potentially extremely high figures are not ours; they are based on a Westminster Government consultation document, which estimated that the annual cost to Scotland could be between £76 million and £607 million. The potentially huge cost of the legislation is far more than the Scottish Government has estimated.

I will hand your specific question about premiums to my colleagues.

10:45

**Dominic Clayden:** Part of our concern over the proposed legislation is that, as insurers, we issue a policy today on an assumption of what we believe the law to be and the broad legal position in which claims will be assessed in the future. To answer Paul Martin’s question, there are two aspects to the cost impact. The first is that, if enacted, the bill will create further uncertainty in the mind of an insurance underwriter, who is likely to ask, “If I write business in Scotland, will there be a change in legislation that will increase my costs in an unexpected way?” The second aspect is the question of how the costs of pleural plaques claims are to be paid.

**Paul Martin:** Could the panel clarify their answer to what I believe is a clear question? You have made it clear that there will be an increase in premiums if the Parliament passes the bill. However, I am looking for you to quantify what that increase will be. Surely it is not a guesstimate and you are clear about what you expect the increase to be. What kind of figure can we expect?

**Dominic Clayden:** We have not reached a final position with underwriters, which is something that we will have to do by looking at the legislation. Given the wide bracket of potential claims numbers, we will also have to look at how those develop. An additional point is that—with the caveat that I am not an underwriter but a claims person—I would not expect an underwriter to assume that all employers or premium-paying customers would be treated equally, because

there would be the question of the nature of the employment.

**Paul Martin:** But could you just confirm that you said in your paper that there will be an increase in premiums?

**Dominic Clayden:** Yes.

**Paul Martin:** Surely you do not say that without making a calculation that clarifies how you arrive at a particular figure. Somebody must answer the question by saying, for example, “We have assessed the bill and calculated that there will be an increase in premiums.” For the record, have you just guessed that there will be an increase in premiums? You stated clearly in your paper that there will be an increase in premiums.

**Dominic Clayden:** Absolutely. That is the expectation.

**Paul Martin:** An expectation.

**Dominic Clayden:** But that will be taken in the round because how an insurance premium is calculated is ultimately subject to an assessment of the claims costs and competitive market forces.

**Paul Martin:** So it is possible that there will not be an increase in premiums.

**Dominic Clayden:** There may not be, but if the bill is enacted, it will create an upward pressure on premiums in Scotland.

**Paul Martin:** Just for the record, that could be said about any claim that is made. Any environment in which the insurance industry finds itself can have an effect on premiums. That could be said about any legislation that we pass that relates to the insurance industry.

**Dominic Clayden:** An issue that is significantly different in this situation is the prospect of significant retrospective change to the law. We have not faced such an impact on the insurance industry in Scotland previously. The House of Lords ruling is not binding in Scotland—that is a separate issue—but if it was followed in the Scottish courts, then changing the law retrospectively would be a worrying development for us.

**Nick Starling:** Paul Martin asked whether something could be stated for the record, and perhaps I can help with that. Scottish businesses currently pay a total of £131 million a year in employers’ liability premiums. I said earlier that, should the bill become law, the possible cost would be between £76 million and £607 million annually. That is an early indicator of how premiums could change.

Our other concern about the bill is that it will fundamentally change the law of delict. We are concerned that people will come forward with

other anxiety, exposure-related conditions that the courts will have to take account of. All the premiums are for payments that will be made in 20, 30 or 40 years. It is a huge issue for underwriters to have to calculate that sort of future liability on the basis of uncertainty about how many people with pleural plaques will come forward and how the courts will deal with analogous cases of exposure without harm. All our member companies face that huge problem, which is why it is difficult to say exactly what will happen to premiums, other than that, if you do the maths on the basis of the pleural plaques figures, they will go up.

**The Convener:** I seek some clarification. I know that the figures were not produced by you, but they are a bit vague. We are talking about a bottom-line figure of £76 million and a top-line figure of more than £600 million. The disparity is fairly dramatic. I am not a student of actuarial science, but the bottom-line figure of an additional exposure of £76 million would mean that the total for employers' liability premiums of £131 million would have to be increased by roughly 50 per cent. If the figure was £600 million, the impact would be much more dramatic. I know that those are Government figures, but how were they obtained? We need that information, because an increase in the premium of £76 million is one thing, but an increase of £600 million is something else entirely.

**Nick Starling:** The figures were based on actuarial data. By definition, the extent of the increase is extremely difficult to assess. It is a known unknown that a large number of the population have pleural plaques. They do not know that they have them because they have no symptoms—the pleural plaques do not impair their health. According to some estimates, as many as one in 10 of the adult population will have pleural plaques. It is estimated that for every one mesothelioma case, there are about 25 to 30 cases of pleural plaques. By definition, we are talking about a range, because there are numerous uncertainties involved in calculating the figures.

**Nigel Don (North East Scotland) (SNP):** Forgive me, gentlemen, but I want to press you on the issue. Some of us have run the odd business in the past and we are used to numbers. The convener has pointed out that the bottom-line number represents an increase of 50 per cent in employers' liability premiums. I note that none of you has been prepared to say that. If the £600 million figure is correct, that is four times the current annual premium income. Why are you not prepared to say that the bill will result in premiums having to be increased by a factor of about four? That is what the maths says. Whether the factor in question is three, five, 10 or two, we are talking

about a big number. Why are you not prepared to say that? Why are you just suggesting that the numbers might or might not be affected, when that is entirely inconsistent with the maths that we have just done for you?

**Dominic Clayden:** When one breaks the numbers down, one finds that not all the costs that are associated with pleural plaques will be met by the insurance sector—any compensation will result in a significant cost to the state. The figures that have been quoted are global figures for costs in Scotland as a whole. A significant uncertainty that the insurance industry faces is that we do not know how much of those costs will fall to be picked up by the MOD or other formerly nationalised industries. Ultimately, if the bill is enacted, it will create a significant upward pressure, the cost of which will have to be borne in part by the insurance industry.

At the same time, there is a competitive market. A concern that we have is that the bill might create an uneven playing field, in that any new entrants to the market would not face that cost and might take a different view on premiums from existing insurers, who might have to bear the cost of cases that arise as a result of the bill. I appreciate your desire for certainty, but we genuinely cannot provide it.

**Nigel Don:** Forgive me—I am not looking for certainty. I acknowledge that uncertainty is the business that you deal with and I do not have a problem with that. However, as an engineer, I recognise an order of magnitude when I see it, and there is a huge difference between an increase of 10 per cent and an increase by a factor of six.

Although you do not know what proportion of the increase will be borne by your industry rather than by Government departments such as the MOD, I respectfully suggest that you could have a pretty good guess. I hesitate to guess what that number might be, but it is a fraction—it might be 10 per cent or it might be 50 per cent. The number changes, depending on one's guess, but the order of magnitude does not. I still struggle to understand why you mention that it is a competitive market—which is undoubtedly the case—when we are dealing with such big numbers. Why, given the numbers you have given us, which are to such an order of magnitude above the current income from premiums, are you suddenly adding the caveat, "Well, it's a competitive market and it might not make any difference"?

**Dominic Clayden:** I will explore an example with you. My company exists in a competitive market and although I sit alongside Mr Thomas from Zurich Assurance this morning, when we walk out the door I hope that he does not win

business and that we do. In that competitive market we will take a view of what our claims cost will be. It is partially based on the future and inevitably involves looking at whether we could recoup some of our losses in past years. That would be different if new entrants came into the market. I cannot legislate for that; it is hugely difficult. If we were in a situation where we were looking to recoup all those past costs absolutely, it is clear that scaling would occur.

**Nigel Don:** I want to pursue your comment about changing the law retrospectively. I accept the point in principle, but surely that does not apply in this case. I think that all we are being asked to do is to restore the law to how it was believed to be before the House of Lords ruling, albeit that the ruling said that the law was wrong previously. Surely if the bill is passed, we would only be restoring it to the condition in which you thought you were underwriting business prior to the House of Lords judgment. We are not proposing to change the law under your feet.

**Dominic Clayden:** I understand that the House of Lords declares the law as it has always been—that is the legal principle. The issue with which I am particularly concerned is whether the Lords will clarify that the law is different in Scotland and we will simply face reversal legislation. Insurance has a basket of approaches. It is not all swings; swings and roundabouts are built into it.

**Nigel Don:** If the bill had been passed in 1930 and was the law of the land, you would have been underwriting business in exactly the same position as you were prior to the House of Lords judgment.

**Dominic Clayden:** At a global level, I do not think that any underwriters from that time anticipated the level of asbestos claims that developed. I will be absolutely open and clear: the premiums that were collected on a ring-fenced basis for such risks in no way reflect the billions of pounds that the insurance industry has paid out.

**Nigel Don:** I understand and respect that entirely. You said that insurance has swings and roundabouts and no doubt you have collected more premiums in other areas or you would all be out of business—that is the nature of what you do. However, I reiterate the point that if the proposals in the bill had always been the law because they had been passed into statute, you would have been in exactly the same environment.

**Nick Starling:** Perhaps we need to turn to the lawyers on my left, but I understand that liability or delict has always been determined by the courts in this country, not by statute. Therefore, the courts have decided at various points that on some issues there is liability or that more needs to be paid. The insurance industry has always accepted that. It has accepted where it has had to pay more;

in the case that we are discussing, it has to pay less. However, I am not a legal expert.

**The Convener:** Let us hear from Mr Anderson.

**Gilbert Anderson:** I will try to be helpful. Essentially, the common law of the land is a matter for the courts. As Dominic Clayden suggested, when the court decides a point of law—in this case the House of Lords in the recent Johnston case—the impact is that the common law is deemed always to have been thus. Does that answer the point?

**Nigel Don:** Yes, it answers the point, but I understand the law as you described it, as I did before you did so. That does not alter the fact that you are underwriters and that you underwrite in what you perceive to be the legal situation. The lower courts made the law previously and at that point, you were underwriting business. We do not propose to change the legal framework in which you do that.

I do not think that you are proposing to ask for the money back that was paid out on the previous cases, or that those who received compensation before the House of Lords judgment are proposing to pay it back on the ground that they should never have received it. I accept and understand the legal theory, but it is not the case, particularly with insurance.

11:00

**Gilbert Anderson:** Absolutely. There can be all sorts of reasons why cases settle; sometimes there can be many wrong reasons as well as right ones. However, until the appeal courts make a determination—I do not know the reason why but the Ministry of Defence chose not to appeal—everyone has the right to have the decision of a lower court tested, up to the ultimate court of appeal. Once that has been done, the common law says that the decision of the highest court is a statement of what the law has always been. That is one of the interesting issues here. It is about the difference between the judicial and legislative functions.

**Pamela Abernethy:** Indeed. As you might know, there are 200 cases sisted in the Court of Session. We had been looking for test cases to test the law in Scotland's higher courts even when the Rothwell case was at the Court of Appeal stage—as members will know, a House of Lords decision is not binding in Scotland, although it is highly persuasive. Since the House of Lords judgment, there has been one case where Lord Uist has followed the House of Lords decision, so it looks as if the Scottish courts will do that. As Lord Hope said in the House of Lords decision, the case is all about fundamental principles of law, which are the same in English law as they are in

Scots law. Gilbert Anderson has already explained those to you: as a result of the breach of duty, there must be harm. The House of Lords said that there was no harm. Lord Uist said:

“It is not that pleural plaques cause harm which is de minimis: it is that they cause no harm at all.”

That is the view that a Scottish judge reached. Had cases in this jurisdiction not continued to be resisted, we would have taken them through the various stages if the lawyers for the claimants were not prepared to accept the House of Lords judgment. A challenge was going to be made in Scotland to the outer house decisions, of which there were very few before the cases we are discussing.

**The Convener:** Has Lord Uist’s judgment been taken to the division?

**Pamela Abernethy:** No, it has not.

**Gil Paterson (West of Scotland) (SNP):** I have a question on numbers. Do you have a definitive statement to make on where you gained the evidence that one person in 10 has pleural plaques?

**Nick Starling:** If you will excuse me, I will look at my notes. Annex B of our submission refers to the prevalence of plaques and gives the various possibilities of exposure. We say that

“there will be 20-50 people developing plaques”

for every person who develops mesothelioma, and that

“Professor Mark Britton, a consultant physician and Chairman of the British Lung Foundation, reported that a pathologist had estimated that 10% of the cadavers he saw had pleural plaques.”

There is some evidence that more than half of males aged over 70 living near Glasgow have pleural plaques. That evidence is cited in annex B of the Association of British Insurers’ submission.

**Gil Paterson:** And yet, the Health and Safety Executive states:

“THOR/SWORD/OPRA (a group of clinicians around the U.K who report figures for respiratory disease to the HSE) show there were an estimated 1258 cases of benign (non-cancerous) pleural disease reported in 2006.”

That does not add up, does it?

**Nick Starling:** As I said earlier, the incidence of pleural plaques is a known unknown. No one knows how many cases there are out there. I am quoting sources such as the chairman of the British Lung Foundation, who I think is a reliable source. I do not know about the HSE figures. By definition, the HSE deals with disease rather than asymptomatic conditions although I do not know whether that explains the difference in the figures. We have always made it clear that there is huge uncertainty around the issue because no one

knows precisely the degree of exposure. People in this room will have pleural plaques without being aware of it because they do not carry any symptoms.

**The Convener:** The total number of cases is, of course, a vital consideration. The information that we have is, to an extent, contradictory. We have had a fair exchange on the matter, but Bill Butler would like to make a final point.

**Gil Paterson:** Before that, could I just finish my point?

**The Convener:** Briefly, please.

**Gil Paterson:** I am interested in the numbers. However, I get the impression that our witnesses are creating an aura of uncertainty. As Nigel Don said, they have suggested that there is likely to be a substantial uplift in claims. However, there was no massive rush to make claims before the House of Lords judgment.

**Nick Starling:** I am not creating uncertainty; the uncertainty is a result of the very nature of pleural plaques. There is a range of professional opinion—we cite some of that opinion in our annex—and we acknowledge that, at this stage, no one can say how many people have got pleural plaques. Further, no one can say what the effect of the legislation will be. As I said, the legislation will in effect make compensation an entitlement, and there will undoubtedly be a lot of people who will have an interest in bringing people forward to claim compensation. I mentioned a website that is already doing so and, in the past, people have gone around with scan vans, which scan people to see whether they can detect pleural plaques so that they can then seek compensation.

I am not creating uncertainty; I am saying that uncertainty exists, which is why there is such a wide range of potential costs in relation to this issue.

**Gil Paterson:** My basic point is simple. Before the House of Lords judgment, there were a certain number of claimants. You are suggesting that if the Scottish Parliament reverses that judgment in Scotland, there will be a significant increase in that number. The reason for that is unclear to me.

You raised the issue of scan vans, which are unheard of in Scotland, as far as I know. I do not think that any have been used in Scotland. From my perspective, you seem to be introducing a lot of uncertainty to the argument. I will draw my own conclusions about that, but I would like you to say why reversing the judgment of the House of Lords would make the situation dramatically different from the situation that pertained before last October.

**Nick Starling:** I think that that is highly likely to happen. At the outset of the British Coal chronic

obstructive pulmonary disease scheme, 150,000 claims were expected. By the time that the scheme closed, there were 592,000 claims—in other words, four times as many as had been expected. That happened despite the availability of data that were more statistically certain than those that we have in relation to pleural plaques.

We know that scan vans exists, and we know that people will want to get clients to make claims, as that is how those people make money. We expect that those vans would be used. I have already mentioned a website that is explicitly engaged in such work at the moment. Dominic Clayden can give you more detail on that.

**Dominic Clayden:** I can give you some numbers that the Institute of Actuaries collated across the insurance industry. In 1999, 500 pleural plaques claims were presented. That figure rose to 6,000 claims by 2005—a twelvefold increase in five or six years. Part of our uncertainty comes from the fact that, in 1996, there was a general holding of breath to see what the Court of Appeal and, subsequently, the House of Lords would do with the cases. The vast majority of cases that we deal with are presented through solicitors, a significant number of whom are working on a no-win, no-fee basis, and it is our understanding that solicitors who are faced with uncertainty around the proposed legislation have simply put the brakes on until they understand what the situation will be.

Two numbers are certain—they were not impacted by the court case and the uncertainty that the case created in lawyers' minds—and those numbers showed a twelvefold increase over five or six years.

**The Convener:** Three members are indicating that they would like to ask questions, but I will invite Bill Butler to speak first. What he says might answer some of the questions.

**Bill Butler:** Mr Starling, in response to an earlier question from the convener, you said that your figures were based on actuarial detail. Is that actuarial detail the figures of 500 and 6,000 in the Institute of Actuaries report that Mr Clayden has just mentioned?

**Nick Starling:** I was quoting actuarial detail that the UK Westminster Government used in its evidence. I think that Dominic Clayden was talking about actual claims.

**Bill Butler:** Would it be possible to provide the committee with written evidence of the source of the figures? That would help us to understand clearly.

**Nick Starling:** Yes, of course. We included some information in our submission, and we can

make available the Westminster Ministry of Justice's consultation document.

**Bill Butler:** It would be helpful if that information could be forwarded to the committee.

**The Convener:** Yes, it would. As you rightly say, Mr Starling, there is information in your submission. However, the submission does not explain how the figures were calculated, and I think that committee members are concerned about that. If you could provide us with a somewhat more expansive answer, it would be helpful.

**Nick Starling:** I emphasise that these are not our data; they are data that the Government used in its publication in, I think, June of this year.

**Bill Butler:** You referred to those data in your answer to the convener, so it would be very helpful if you could convey the data to the committee.

**Stuart McMillan (West of Scotland) (SNP):** Scan vans have been mentioned. How many scan vans are operating in Scotland, and how many have been operating over each of the past five or 10 years? Do you have information on scan vans, claims farmers and the like?

**Nick Starling:** We do not have data on that, but we know that scan vans exist and we know that people are there to make money out of claims. Our point is that, once you create an entitlement to compensation—which is what the bill will do—people will urge others to come forward and make claims. They will do that in various ways—through websites; through the kind of advertisements that we are all familiar with; and, at the extreme end, through scan vans. We know that scan vans exist and we would expect them to arrive—I do not know how you could stop them from arriving. Our concern is about what will happen in future rather than about what is happening now.

**Stuart McMillan:** Do scan vans exist in Scotland at the moment?

**Nick Starling:** I do not know. However, they have no reason to do so because pleural plaques are not compensatable at the moment. The moment pleural plaques are compensatable, you would expect people to try to discover them.

**The Convener:** Have scan vans existed in Scotland for other issues such as asbestosis, pulmonary carcinoma or mesothelioma?

**Nick Starling:** My understanding is that scan vans were looking only for asymptomatic conditions. You do not need a scan van to say that you have asbestosis or mesothelioma. However, we are talking about something that is likely to occur if the law changes.

**Stuart McMillan:** However, it is not definite that scan vans will appear in future.

**Nick Starling:** The racing assumption is that it will be in various people's interest to make others come forward to make claims.

**Bill Butler:** You are making an assumption based on no evidence whatsoever.

**Nick Starling:** If you type "pleural plaques" into Google, you will already find one website that encourages people to come forward because they will now be able to make claims.

**Bill Butler:** With respect, we are talking about scan vans and you are claiming that there is a history of them in Scotland. On what evidence do you base that claim?

**Nick Starling:** I am saying that there is a history of scan vans in the United Kingdom; I have no specific evidence about Scotland.

**Bill Butler:** Well, Scotland is part of the United Kingdom. You are basing your claim on no evidence whatsoever. Is that correct, Mr Starling?

**Nick Starling:** I do not have it in front of me, but there has certainly been evidence of scan vans operating in the past.

**Bill Butler:** In Scotland?

**Nick Starling:** By definition, they operate somewhat quietly. As I say, I have no specific evidence with me, but I am talking about what has happened generally in the UK and what we expect will almost certainly happen if the legislation is enacted.

**Bill Butler:** I hear clearly what you are saying.

11:15

**Paul Martin:** You have suggested that it is in solicitors' interests to find evidence of pleural plaques through, for example, the use of scan vans. Are you suggesting that individual companies might try to profit through such practices?

**Nick Starling:** There is certainly clear evidence that legal firms can make money from the referral of cases.

**Paul Martin:** So such activity would be in the interests of solicitors. I suggest, however, that it is in the interests of insurance companies to ensure that scan vans are not available, given that they enable such cases to be brought forward. Is it not to your advantage that such claims are not made?

**Nick Starling:** The insurance industry has no powers to control the use of scan vans.

**Gilbert Anderson:** On behalf of the legal profession in Scotland, I point out that the

landscape for handling personal injury cases in this country is very different to that south of the border. For example, in England, there are conditional fee agreements, which are not permitted under the law of Scotland or by the Scottish legal profession. As a result, we are not necessarily comparing apples with apples. The point is pertinent, because the committee needs to understand that the handling of cases is very different in Scotland and that success fees and other features of conditional fee agreements do not apply here.

**Stuart McMillan:** It has been stated that the insurance industry is committed to paying fast, fair and efficient compensation to claimants and that the industry is working on initiatives to streamline claims for people with asbestos-related diseases. Has the industry fought mesothelioma claims in court?

**Nick Starling:** Mesothelioma is entirely separate from the issue of pleural plaques that we are discussing.

**Stuart McMillan:** I accept that.

**Nick Starling:** Mesothelioma is a malignant condition—

**The Convener:** I think that Mr McMillan is simply pursuing the principle.

**Dominic Clayden:** In previous cases, clarity has been sought from the court with regard to insurers' legal liability. It is right and proper that, as commercial organisations, insurers should be able to ask the court about the legal position on such cases and whether they are legally required to pay compensation. The insurance industry is not a social fund; it provides a contractual indemnity to our policy holders. As such, the insurance industry has in some cases tested whether the insurance policy should operate.

**Stuart McMillan:** So the insurance industry has fought claims in the past.

**Dominic Clayden:** It has fought claims in order to understand its legal liability under the insurance policy.

**Stuart McMillan:** Did the industry support the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill in the previous parliamentary session?

**Dominic Clayden:** Yes.

**The Convener:** Do you want to respond, Mr Thomas?

**Steve Thomas:** I am trying to recall whether—  
[*Interruption.*] Yes, we did support it.

**Nick Starling:** I believe that we gave evidence to the Justice 1 Committee at the time.

**Stuart McMillan:** Are insurance companies currently defending any cases involving asbestos-related diseases either in Scotland or in England and Wales?

**Pamela Abernethy:** As a lawyer acting on behalf of insurers, I think that it might be helpful to point out that some cases can involve more than one defender and that sometimes those defenders do not have insurance cover. That can create difficulties in settling cases, particularly with regard to the question of their contribution. Moreover, someone might claim to have asbestosis when our medical evidence suggests that they have a different condition called cryptogenic fibrosing alveolitis. On the whole, however, we settle most cases as quickly as possible if there is a liability.

**Gilbert Anderson:** There is a terrible danger of overgeneralising. I said earlier that there is a series of hurdles to be overcome for a pursuer to succeed in a personal injury claim, and I repeat that the bill is concerned with the last hurdle.

It is difficult to generalise. There could be many reasons for the issue—such as how a case is pled and evidence about whether a particular defender employed the pursuer—and I do not think that it is helpful to overgeneralise. I say that with the greatest of respect. Any party in litigation is entitled to defend a particular case given the overall prevailing circumstances, and cases can often have very different details.

I can comment on behalf of the insurance world and from my experience of acting for both insurers and pursuers—we are not all one side or the other. Indeed, lawyers are there to be even handed, and our ultimate duty is to the court and to justice being done. Generally speaking, if the various hurdles are overcome and information is forthcoming that demonstrates medical causation, breach of duty and other factors, it is in the insurance industry's interest to settle the case as quickly as possible. As the old adage goes, unlike good wine, cases do not improve with age.

**Stuart McMillan:** Let me get to my point. We have received correspondence in which the insurance industry comes across as doing its best and wanting to get things moving quickly to help people. However, we have received other evidence that the real situation is the exact opposite and that the insurance industry seems to be fighting tooth and nail against individuals who go to court to claim damages for asbestos-related conditions. That is the point that I am getting at.

**Steve Thomas:** I can perhaps help. You may be alluding to what is known as trigger litigation, which is currently running in England and Wales. That is a piece of litigation that relates to asbestos compensation in which a handful of what we refer to as run-off companies—insurers that are no

longer trading or writing business and legacy companies that are endeavouring to look after a fund of money—have brought litigation about policy wording and its interpretation. The live market, including companies such as Zurich and Norwich Union, is opposing that litigation. In effect, we are acting as the defendants and trying to maintain the status quo so that the run-off companies are not successful in their endeavours. That may have been what people have written to you about.

**Stuart McMillan:** That is certainly part of it. However, although the idea from written evidence is that the insurance companies appear to be the friend of anyone claiming damages for an asbestos-related condition, other evidence suggests otherwise—whether or not that relates to the trigger litigation. That is my point.

**Nick Starling:** My point would be that insurance companies want to pay when they are liable. The issue around the legislation is how to determine liability in cases when the exposure often goes back 20, 30 or 40 years, people have a discontinuous employment history, companies have gone out of business and so on. It has always been a difficult issue, but insurance companies want to meet their obligations and pay when they are liable. That is what they are determined to do.

That brings us back to the fact that we are talking about serious conditions such as mesothelioma, asbestosis and cancer rather than the asymptomatic condition that is pleural plaques.

**Angela Constance:** It has been suggested to me that the insurance industry's opposition to the bill is a bottom-up attack on people's ability to make successful claims on the basis that they have been exposed to asbestos or have an asbestos-related condition. I will give a practical example to explain why I make that suggestion. My understanding is that, if people make a successful claim for compensation on the basis that they have pleural plaques, in the event that they develop a more serious condition at a later date they can return to court for the compensation that will be due to them for the more serious condition. If they have already made a successful claim for pleural plaques, it will have been established that they have been harmfully exposed to asbestos and have an injury, so it will be much easier for them to have that future claim settled. Obviously, when people are seriously ill, time is of the essence. However, if people cannot claim for having pleural plaques, in the event that they develop a more serious illness they will need to go through a lengthy legal process that is open to challenge by insurers and defenders. In that sense, it has been suggested that this is a bottom-

up attack, with implications for the more serious cases.

**Dominic Clayden:** Let me be absolutely clear that this is not a bottom-up attack with the aim of somehow denying those who have a legitimate claim for mesothelioma or for any of the other serious asbestos-related conditions for which people receive compensation. Let me lay that one completely to rest.

Leaving aside the impact of retrospective legislation and so on, it would be a hugely expensive process to create a marker for future claims that—depending on how one believes the numbers would fall—would involve 30 claims being processed at significant cost for every case in which the unfortunate person went on to suffer the significant condition. If that is the issue that we are seeking to address, other remedies are potentially available.

I would separate the two issues. The insurance industry has made real progress on speeding up the process for mesothelioma claims, which is the primary, significant asbestos-related claim for which time is of the essence. We are quicker on that and we are working with lawyers who represent sufferers so that we can speed up that process. I think that we need to maintain a disconnect there. What is proposed would be a disproportionate remedy.

**Angela Constance:** I am aware from correspondence that, by comparison with those who previously made a successful claim for pleural plaques and then developed the more serious condition, those who have not made a claim for pleural plaques must start from scratch in establishing their right to a claim.

**Dominic Clayden:** I see the point that you are making, but I can only reiterate that it seems a disproportionate remedy, given the significant associated costs, to require that compensation be paid at that point so that we can deal with the scenario in which the person unfortunately develops mesothelioma subsequently. If that is the issue, one could explore different ways of achieving that aspect by speeding up the process. Significant dialogue is going on about how the process can be speeded up. I know that we have discussed the range of the costs but, whether those are at the top or bottom of the range that has been quoted, significant costs will be involved in achieving that.

**Des McNulty (Clydebank and Milngavie) (Lab):** I have two questions, the first of which is directed at Dr Abernethy. She said earlier that there was not much evidence that those who had pleural plaques would necessarily go on to develop the more serious asbestos-related diseases of mesothelioma and asbestosis. I want

to put to her the opposite point. Given that she suggested that those who do not have pleural plaques can contract those serious diseases, what is the weight of evidence as to whether people who do not have pleural plaques but have been exposed to asbestos negligently are more likely to get asbestos-related diseases? How far would you push that argument?

11:30

**Pamela Abernethy:** Thank you for giving me the opportunity to expand on the issue, because I may not have expressed myself as well as I should have in answer to Mr Butler. My position on the matter is quite simple. Obviously, pleural plaques are an indicator of exposure to asbestos. However, I understand that the fundamental point for doctors is the length and degree of exposure to asbestos. It may be more appropriate and helpful for you to address your question to the medical experts who will give evidence to the committee later—I am a doctor, but I am not an expert in the area, although I have read a lot about it. I do not think that there are statistics that indicate how many people who have or do not have plaques develop mesothelioma. I understand that many plaques are discovered at post mortem in people in whom there has been no disease. However, having plaques is not a good thing, because it is an indicator of exposure to asbestos. I cannot indicate to you in detail how many people who do not have plaques develop mesothelioma. The literature that I have read suggests that the incidence of mesothelioma in those who have had plaques is between 2 and 5 per cent.

**Des McNulty:** My understanding was that a relatively high proportion of people who had mesothelioma had previously suffered from pleural plaques, so the two conditions are associated.

**Pamela Abernethy:** I am not saying that they are not.

**The Convener:** We will pursue the issue with those whom I will describe as contemporary medics.

**Des McNulty:** My other question is directed to the insurance industry. You have made great play of the fact that quite a high proportion of the population—as many as one in 10, according to my colleague Mr Paterson's question—may have pleural plaques. Surely the issue for you is whether a company that you insure is at fault for exposing a person to asbestos negligently. The issue is not the number of people in the population who have pleural plaques, but the number of people who have them as a direct consequence of negligent exposure to asbestos, which may be of an entirely different order of magnitude. Surely that reflects past experience—the extent to which

negligence is identified is the most important factor in determining the number of successful cases. The problem for people who are considering pursuing cases is whether they can establish negligence by a past employer.

**Nick Starling:** Our opposition to the bill is not driven fundamentally by the numbers, although those are a consideration. We have set out clearly that we are opposed to the bill because pleural plaques are benign and because the best way of dealing with people who have them is not to increase their anxiety but to reassure them that the plaques will not be a problem. The bill also changes fundamentally the law of damages—the law of delict and liability—by saying that exposure is enough to ensure compensation. Finally, it damages businesses' confidence in their ability to go to law and to have judgments upheld, rather than overturned. The numbers are important, and we have drawn attention to them because they have been seriously underestimated, but I have given our fundamental reasons for opposing the bill.

**The Convener:** The final question, from Margaret Smith, is directed to Mr Anderson.

**Margaret Smith (Edinburgh West) (LD):** My question relates to the bill's implications for the law of damages, which have been mentioned at several points. What are your thoughts on issues relating to precedent? We have discussed the fact that there is a lack of hard data on the impacts that the bill would have even in relation to the narrow issue of pleural plaques. If you are concerned about the implications of the bill setting a precedent for other conditions, your concerns about premiums are presumably almost stratospheric.

**Gilbert Anderson:** I could not give you an actuarial answer as to which stratosphere we might be in.

I should mention FOIL's concerns—which Mr McMillan touched on—about the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, although I will return to your question in a moment, Mrs Smith. Our concerns regarding that bill were about focusing on one group to the detriment of others. For instance, why should the family of someone in a permanent vegetative state not benefit from legislation in the same way as the family of a mesothelioma victim? Furthermore, we believe that the procedures that were already in place were adequate to enable interim payments to be made.

I return to Mrs Smith's question about where the bill might lead. For lawyers, the issue is about accepting that, despite unequivocal, overwhelming medical evidence that pleural plaques are harmless and are properly understood,

misconceived anxiety causes people to be worried about something that may or may not happen in the future. The focus of the bill before us is clearly pleural plaques, asymptomatic asbestosis and pleural thickening, which will never cause impairment, as I read the bill. What about other people, however? For instance, someone might be negligently exposed to radiation—perhaps, ironically, through overscanning—and they might be worried about something that could happen in the future. The law is clear: if someone sustains harm, the court will give them damages, provided they have got over all the other hurdles.

Where would it end? It is wonderful that the Parliament is seeking to attract international litigation to resolve the situation under our system but, if we were to pass legislation that is wholly inconsistent with fundamental legal principles, it would do untold damage to the legal system of which we are extremely proud.

**Margaret Smith:** You are concerned about—

**Gilbert Anderson:** The principle.

**Margaret Smith:** You are concerned about the principle of the matter and the focus on anxiety. Some people might say that anxiety can have detrimental effects on people's mental health, and that it is not without harm in itself.

**Gilbert Anderson:** Well—

**Pamela Abernethy:** If the anxiety leads to damage to mental health, that does translate into harm. Then, people may recover damages.

**Margaret Smith:** Let me pick up on a smaller issue, which relates to what Angela Constance was discussing. You raise the matter of the time bar in your submission. You say that the bill might have the undesirable consequence of allowing time to run out for the claimant, starting from the point when they were informed of the presence of plaques. You are suggesting that if they do not come forward within three years, that could impact on their ability to make claims at a later stage—presumably not just for pleural plaques but for the more serious manifestations of exposure to asbestos. Is that a fair reading of what you were trying to say in your submission?

**Gilbert Anderson:** Yes: a great deal of uncertainty and confusion would be caused as to when the sand starts to come out of the egg timer, as it were. This is relevant to the point that Ms Constance raised. People would be concerned about whether or not they should settle fully and finally, thereby possibly depriving themselves of further damages in the event that they develop actual compensatable disease later. That was one of the difficult issues in the decision by Lord Prosser in the case of Shuttleton. Is the pleural plaques claim time barred or is the whole claim

time barred? For me, the application of good solid principle to a number of circumstances is the best way for our common law to evolve. Frankly, to make specific changes for this or that disease or condition or for other situations causes chaos and does not lead to consistency and predictability, which legal advisers need if they are to give meaningful advice with any certainty. At the end of the day, lawyers are paid not to raise cases in court, but to give good advice and ultimately, one hopes, to keep clients out of court.

**Margaret Smith:** I want to pick up on the point about whether the time bar would apply to the pleural plaques or to the final manifestation of the disease. In answer to Angela Constance, Mr Clayden said that she should separate out those two things, which are the beginning and the end of the process. You might advise someone that they should attempt to separate the two. Clearly, if that person went on to develop asbestosis, the harm could be shown to be considerable and the compensation could be considerable. From what Mr Clayden said, the two things should be seen as separate.

**Gilbert Anderson:** I have two points on that. If someone came to me in relation to a claim about asbestos-related disease that was based purely on plaques and anxiety, the first thing that I would tell them would be that they had suffered no harm and that they therefore did not have a claim. My friend Frank Maguire would do the same.

On a wider point, I return to the importance of principle. Section 12 of the Administration of Justice Act 1982 allows a party who has suffered harm but who may go on to suffer greater harm to apply to the court for a provisional award of damages. On the assumption that there is harm in law, the court in its interlocutor will award a sum of money for the initial harm, but state that in the event that the party goes on to develop more serious harm, they will be able to return to the court to seek a higher award of damages. To that extent, the law is predictable, fair and consistent. That applies not only to cases that involve exposure to asbestos dust, but to all injuries.

**The Convener:** We still have slight concerns about costs. I will come back briefly to Nigel Don.

**Nigel Don:** The witnesses will have seen the financial memorandum, paragraph 16 of which suggests that, on average, about a third of any compensation goes to the claimant and about two thirds disappears in fees. That is all order-of-magnitude stuff. I acknowledge that not all the fees go to lawyers—I have nothing against lawyers—because medical evidence and other things that cost money are required. Are those numbers defensible, in that not much more can be done to improve them from the claimant's point of view? If they are not defensible and could be

improved—which I am sure all members would prefer—do you have any suggestions as to how that could happen?

11:45

**Gilbert Anderson:** That is an interesting point, which Lord Gill and his team are considering closely. The issue is very much about proportionality, and it is part of Lord Gill's remit in conducting the civil courts review. The law must draw a line somewhere. We must have procedures that do not make the cost of pursuing rights disproportionately high, given the value of the case. We may live in a society in which we know the price of everything and the value of not a lot but, sometimes, we cannot put a value on justice.

That said, my respectful submission is that any civilised society has to employ a bit of expedience and practicality. The point is hugely important, given that we are talking about the potential for there to be massive numbers of cases. I use the word "massive" because I am not familiar with the precise statistics and their accuracy—it is important that we try to bottom them out.

Vast numbers of claims might be generated, but it is my position that, on any view, harm is not caused at all, therefore there is never any liability. Even if harm was caused, the value would be very low, and the disproportionate costs of litigation would be unthinkable—I do not want to be overdramatic; perhaps I should call them very high—and would not be reflective of an effective legal system.

**Nigel Don:** Let us assume that the bill is passed. Would there be scope for the insurance industry to recognise fairly early on in the process some level of claim which, no doubt, would have to be sorted out in court? Where it was likely that there was liability, would the industry be prepared to pay out on the ground that that would be a better bet than taking a case to court?

**Gilbert Anderson:** I can answer the question only in general terms. You know FOIL's position on the bill. In my experience—I am sure that it is the same for Pamela Abernethy—the insurance world does not want litigation; it wants the evidence to be produced as quickly as possible. In essence, the industry wants a more inquisitorial approach to be taken to investigations. If liability is to be found, the industry wants it to be found as quickly as possible and to settle. Litigation should be a last resort.

**Pamela Abernethy:** The insurance industry encouraged us, as lawyers, to draft a pre-action disease protocol. I did that in Scotland. The protocol was revised and was circulated to the Law Society of Scotland—

**The Convener:** We have evidence in that respect, Dr Abernethy.

**Pamela Abernethy:** The protocol is now up and running. I think that claimants' firms were also involved. The aim was for any individual who suffers from a disease to access justice more easily. I understand that negotiations are under way on a mesothelioma pre-action protocol. In other words, the intention is to avoid going to court, which, I hope, should reduce legal costs. People might say, "Surely that acts against lawyers' interests," but our ultimate duty is to the courts and our clients. We want to ensure that we help them and that we help claimants. We are not here to not help claimants to get justice. We are here to help.

We wrote the protocol with the aim of reducing costs by avoiding the need to go to court. Once a case enters the court process, costs escalate. Significant costs are involved even in lodging a writ or in lodging defences and so on.

**Dominic Clayden:** I may have misunderstood the presumption in your question, Mr Don. I think that it was that insurers somehow enjoy the prospect of increased costs. However, we take every step to reduce costs. Ultimately, we believe that lawyers are in business as much as the next person and that they seek to make a profit. The profession is not altruistic. I say that as a lawyer: I can criticise my fellow professionals or be realistic about them. We seek to reduce costs. It is in our interest to do so.

The insurance industry's broader frustration relates to the level of legal costs, both in Scotland and in England and Wales, which are disproportionately high. I would be happy to have a lengthy conversation about the level of legal costs and how costs are fixed.

**The Convener:** We can leave that for another day.

**Nigel Don:** I want to make absolutely clear my greatest respect for lawyers. I understand to some degree what they do. I have no problem with lawyers charging, making a profit and all that kind of stuff. That is not the issue. My point is that the numbers that we are looking at are very high. It appears that a disproportionate proportion of what should be compensation disappears. One therefore has to ask about the process.

**The Convener:** This evidence-taking session has been lengthy and important. One matter is outstanding, which Mr Starling has undertaken to remedy. I refer to the figures that Mr Butler requested on the UK Government's research into the number of cases and likely costs.

I thank the panel for attending. As I said, the session was important and extremely useful to the

committee. I will allow a brief suspension for the changeover of witnesses.

11:50

*Meeting suspended.*

11:52

*On resuming—*

**The Convener:** We turn to the next panel of witnesses. I welcome Dr Martin Hogg from the University of Edinburgh and Professor Anthony Seaton from the University of Aberdeen. By way of introduction, Dr Hogg is senior lecturer at the University of Edinburgh's school of law. His main areas of research lie in all aspects of the law of obligations. He is currently researching liability for the causation of asbestos-related mesothelioma and liability for pleural plaques.

Professor Seaton is emeritus professor of environmental and occupational medicine at the University of Aberdeen and honorary senior consultant to the Institute of Occupational Medicine at the University of Edinburgh. His main areas of research are the epidemiology of asthma and occupational diseases, and particularly the explanation of epidemiological findings in mechanistic terms. Professor Seaton, if your discipline is as difficult to perform as it is to pronounce, you must have a fairly exciting life.

Gentlemen, as you provided full written submissions, for which I thank you, we will again proceed immediately to questions.

**Bill Butler:** Good afternoon, gentlemen—well, it is almost afternoon. Professor Seaton, in your experience, what impact do pleural plaques have on those with the condition?

**Professor Anthony Seaton (University of Aberdeen):** First, I would like to clarify some of the misunderstandings that I have heard this morning, which made me wonder what people have in mind when they say "pleural plaques". Most people with pleural plaques have no symptoms at all and do not even know that they have them. They tend to discover that they have them when they have an X-ray for some other condition. However, those are only the pleural plaques that show up on X-rays. I am sure that many more people are going around with pleural plaques that do not show up on X-rays.

Medical opinion is quite clear. There is no dispute in the medical profession—at least among those of us who have studied the problem. Of themselves, pleural plaques do not cause symptoms. Almost inevitably, the knowledge that someone has pleural plaques leads to anxiety, which can be allayed if the person is given a clear

explanation of the implications of having pleural plaques.

Incidentally, I am a chest physician—that is an easier way of describing me.

**The Convener:** Much easier.

**Professor Seaton:** I have been a chest physician since 1970. I am now a retired chest physician. In my early years of practice—I wrote my first book on occupational lung diseases when I was a chest physician in Cardiff in 1975—it was quite simple to deal with patients in whom one found pleural plaques coincidentally. One treated the condition that they had come to see one with, which was usually a condition such as bronchitis or asthma that was unrelated to the plaques, and told them that they also had scars on the inside of their chest wall that were not attached to the lung, were not affecting the lung in any way and were not causing them any symptoms.

At that time—in the 1970s—there was a certain amount of uncertainty about whether pleural plaques might in some way lead to the development of more serious diseases. That uncertainty related to epidemiological studies that showed that someone who had pleural plaques was at greater risk of getting mesothelioma than was someone who did not have pleural plaques. We now know that it is not the fact that someone has pleural plaques but their exposure to asbestos that is responsible for the later development of mesothelioma. Someone can certainly be at risk of mesothelioma without having any radiologically visible pleural plaques. Every one of us is at risk of mesothelioma. For someone who, like me, has worked with asbestos, that risk is a little bit higher than it is for someone who has never worked with asbestos, for whom it is about one in a million. For members of some trades—people who are of my age or a little younger and who have worked in construction or in the shipyards—that risk goes up to as high as one in 10, which is a substantial risk. It is exposure to asbestos rather than the presence or absence of pleural plaques that entails the risk of mesothelioma.

That was rather a long answer to an apparently simple question. In fact, the question is not simple. You probably think that someone either has pleural plaques or they do not, but that is not the case. Someone may have pleural plaques that are not visible radiologically or pleural plaques that are visible radiologically. Therein lies the answer to the question that has been asked repeatedly this morning: how many people out there have pleural plaques? In my second submission, I gave an estimate based on a very simple calculation, of how many people in Scotland might be expected to have pleural plaques. My best estimate is that about 55,000 males have pleural plaques. That figure is not likely to increase, because the

asbestos exposures that occur today are not likely to cause significant problems. There will be a few extra cases, but not a significant number.

That is the figure that one might expect were everyone who has pleural plaques to be found. Whether everyone is found depends on the intensity with which people look for pleural plaques. If someone had a commercial interest in finding people with pleural plaques, they might look for them—for example, by advertising. They might ask everyone who had worked as a joiner, a carpenter or a shipwright to go and have an X-ray. The X-ray of someone who had been exposed to asbestos could be negative, so it might seem that they did not have pleural plaques, but pleural plaques might be found with a computed tomography scan. Such people would therefore have a reasonable incentive to have such a scan, which involves 20 times as much radiation as a chest X-ray, the result of which would be a measurable and significant increase in the risk of cancer.

12:00

The other consequence of seeking people with pleural plaques is that doing so would, paradoxically, increase anxiety in the population, because people, naturally, become more anxious once they have been told that they have pleural plaques. That anxiety is not allayed unless someone clearly explains to them the implications of pleural plaques. It is not allayed by litigation or seeking compensation—in fact, it can get worse.

I submitted evidence to the committee because of my clinical experience of dealing with people with pleural plaques. Things used to be straightforward, but when the issue became a legal issue—a compensation issue—things became difficult, as we had to give patients a mixed message. I had to say to patients that their having pleural plaques did not mean that they would get mesothelioma and that pleural plaques did not do them any harm. They had to be told that they had a risk of mesothelioma—they could be told roughly what that risk was and its likely consequences—but the law stated that they had a disease for which they could get compensation. In medicine, it is very difficult to give a reassuring message if someone says that the patient can get compensation because something is a disease.

**Bill Butler:** You have given a detailed answer to a question that is, on the face of it, simple, but which is really, as you have said, far more complex than that.

I have two further questions. In your written evidence, you state:

“pleural plaques are harmless indicators of past asbestos exposure”

that are

“medically trivial, cause no impairment and, until it was proposed by lawyers that they should attract compensation, caused no medical problems.”

For the record, do you stick by what you have said? I assume that you do.

**Professor Seaton:** Yes, with the proviso that, as I have said, anxiety will be a natural consequence for someone who is told that there is something the matter with their X-ray. In such circumstances, it is the chest physician’s job to explain the implications of the radiological findings. One’s objective would be—indeed, my objective still is—to reassure the person and tell them about the real risks that they run and why they run them. That can be done reasonably simply.

I cannot emphasise too much that the risk is related to asbestos exposure. I am sure that there are plenty of people nowadays without plaques who have been exposed to asbestos and are anxious as a result of that exposure.

**Bill Butler:** Finally, is the view that you have expressed to the committee the unanimous opinion of the medical fraternity?

**Professor Seaton:** That is like asking whether all lawyers are agreed on everything.

**Bill Butler:** The question is pretty simple.

**Professor Seaton:** Like all questions, it is not as simple as it seems. There is, of course, no such thing as the unanimous view of the medical profession on any subject, because the medical profession is composed of people with all sorts of different views. However, if you ask me whether it is the unanimous view of people who have studied the issue and who are expert in occupational lung disease, I say that it is.

**Bill Butler:** So you are giving a simple answer to a complex question because you define it according to those who have experience in the particular field. However, I am asking you whether people who have comparable experience in your particular field of expertise all agree with what you have said this morning. That is a fairly simple question.

**Professor Seaton:** Well, it assumes that I know everyone and their views, which I do not.

**Bill Butler:** Yes, but by and large—

**Professor Seaton:** It is not a simple question. It is easy to frame what appear to be simple questions. I know of nobody who has studied the issues who would disagree with what I have said. I know most of the major players in the field in Britain, the United States and Europe and I would

say that we are unanimous. However, you could, of course, go to a radiologist or general practitioner who has not studied the field and does not know the literature who might take a different view.

**Bill Butler:** Okay, that is a fairly clear response regarding your view, and I am grateful for that.

**Professor Seaton:** I do not think that most people in my field would disagree with it.

**Bill Butler:** In your view. Okay, thank you.

**The Convener:** In his opening statement and in answer to question one, Professor Seaton answered some of the questions that we had in mind, but we will proceed with Nigel Don in any event.

**Nigel Don:** Thank you, convener. I really would like to hear a definitive answer to one question, Professor Seaton. It is whether someone who has contracted mesothelioma or asbestosis will have shown symptoms of pleural plaques or whether a sizeable chunk of those who go on to develop the real medical conditions do not at any stage develop plaques.

**Professor Seaton:** You said symptoms of pleural plaques, but there are no symptoms.

**Nigel Don:** Yes, I am sorry. I meant plaques.

**Professor Seaton:** The answer to your question is no, because most of them will not have had a chest X-ray, therefore plaques will not have been seen. Most people with mesothelioma—I have seen very many of those unfortunate patients in life and at post mortem—do have pleural plaques. They are not always visible on their X-rays, but they are usually visible at post mortem.

When I was in Wales, I heard Mark Britton quote the figure that 10 per cent of the adult male population have pleural plaques. He was quoting someone else, but the figure is based on no scientific study at all. However, I heard exactly the same story from a very good lung pathologist when I was in Cardiff, who said that 10 per cent of people in Cardiff who came as coroners’ post mortems—that is, sudden deaths in the street—had pleural plaques. They are very common in the adult industrial population in Britain. Most people with mesothelioma and asbestosis have pleural plaques, although they may not always be visible on their chest X-ray.

**Nigel Don:** Forgive me, but this part of the logic is crucial, and I really want to nail it. If I could say that every patient who contracted mesothelioma or asbestosis had pleural plaques—a figure of 95 per cent would be fine for the basis of the argument—I would be able to conclude that the development of pleural plaques indicated a different statistical regime. That would apply even if, under the

original regime, in which you had never measured or gone looking for plaques, the figure had been less. In other words, if everybody who developed mesothelioma or asbestosis had, on the way, developed plaques, the intermediate stage where you found plaques would change the statistical likelihood of the patient in front of you developing mesothelioma or asbestosis.

**Professor Seaton:** Well, pleural plaques are much more common than mesothelioma. Most people with pleural plaques do not develop mesothelioma. Perhaps as many as 1 in 20 or 1 in 10 might develop it. It is true that the epidemiology shows that radiologically-diagnosed pleural plaques—which I accept is not the same as pleural plaques—entail an increased risk of mesothelioma. However, if that is corrected in our analysis of individuals' exposure—we are talking about people who have been exposed to asbestos—that increase in risk disappears, because the risk is not due to the plaques.

Plaques are harmless—there is no doubt about that. Pathologically, they are scars. They have a nice lining over them, they do not interfere with the function of the lung and so on, and they are not pre-malignant. They are a sign that someone has been exposed to asbestos, but it is the intensity of the exposure to asbestos that is the cause of mesothelioma. That is the difference.

**Nigel Don:** I am entirely with you. I am using plaques purely as a marker or an indicator. I am not suggesting that they are in any sense malignant or pre-malignant. They are merely an indicator that the patient is in that fraction of the population that is, because it has been checked, at greater risk of developing mesothelioma than the population of which they were a part before the test was done.

**Professor Seaton:** They are in the population that is at greater risk of mesothelioma. That population is the population of individuals in that birth cohort who have been exposed to asbestos.

**Nigel Don:** Yes.

**Professor Seaton:** The people with plaques are at no greater risk than are the people without apparent plaques within that population. If we adjust for age and exposure to asbestos, plaques do not mean that someone is at greater risk. That is the important point. If we compensate someone for having pleural plaques, it is logical to compensate all those people who do not have pleural plaques but who had the same exposure to asbestos. The trouble is that plaques do not indicate the intensity of exposure. That is a critical fact.

**Nigel Don:** I am with you there, but can I go back to the other end of the argument? If

everybody who is found to have mesothelioma has plaques—

**Professor Seaton:** Well, pretty well everyone does.

**Nigel Don:** All right—pretty well everyone. I mean, near enough that we can have the argument and the discussion—

**Professor Seaton:** But they are not always radiologically apparent, which is what the bill is about, as I understand it.

**Nigel Don:** Perhaps not, because the definition in the bill has nothing to do with how plaques are measured. It is just concerned with whether plaques exist, so it does not matter whether there has been an X-ray or CT scan.

**Professor Seaton:** That opens a can of worms.

**Nigel Don:** It might open a can of worms but, nonetheless, if we are changing the law—sorry, we are getting into evidence in law, and we should never do that, because by and large it is a mistake.

My concern is to try to establish whether the development and discovery of pleural plaques puts a person in a different fraction of the population. Purely and simply because of the observation that a person has pleural plaques, we are entitled to draw the conclusion that they have been exposed to sufficient asbestos that they are more likely to develop mesothelioma, because the people who develop mesothelioma develop pleural plaques on the way.

**Professor Seaton:** Well, yes. I think I said that, if someone has pleural plaques, they are at greater risk of having mesothelioma than are people in the population at large, including you and me. Well, not me, because I have been exposed to asbestos. You probably have as well, as an engineer. However, a person is not at greater risk than are other people who have done the same job, if you like. It is the job and the exposure that are critical, not the plaques.

12:15

**Nigel Don:** I entirely accept that the person is not at greater risk than those who did the same job but happen to be different physiologically such that they are fortunate enough not to respond to asbestos in the same way. I am with you there, but if those who have contracted mesothelioma have plaques, I think—I must be careful here—that those who know they have plaques are entitled to take the view that they are now known to be at greater risk of developing mesothelioma than the population in which they were before the test was done.

**Professor Seaton:** That is absolutely correct and it lies behind the point about anxiety that I was trying to explain previously. As I understand it, the issue is about compensation for anxiety about the possibility of developing serious and fatal diseases. When a good chest physician is confronted with a patient with pleural plaques, he will try in so far as is possible to give the facts. The facts are not wholly reassuring, but they are sufficiently reassuring to stop the patient becoming obsessed with mesothelioma and just waiting for it to arrive. In other words, the risks are lower than many other well-known risks, such as those from smoking.

My reason for putting down my views in writing for the committee is related to the medical difficulties that would be consequent on the law saying one thing to the individual and me trying to say another, but you are quite right to say that the person with pleural plaques has reason to worry. That worry could be allayed if the person came to a chest physician such as me who, having found out the person's exposure to asbestos, could explain what that risk was in relation to, say, the risk of dying from cancer.

Your risk and mine of dying from cancer—our common shared risk—is one in three. If someone has a risk of one in 20 of dying of mesothelioma—which is not uncommon in people with pleural plaques—that adjusts somewhat the likelihood of what sort of cancer they will die of. It does not influence their life expectancy. That depends on more common causes of death, such as other sorts of cancer, heart disease and so on.

That is how I try to explain the matter to patients. I do not try to pull the wool over people's eyes; I try to give them the facts and it is then up to them. If a person is a naturally nervous sort, the issue might become a cause of prolonged anxiety; if they are the usual phlegmatic Scot, they will go and have a beer and not worry about it very much. There are all sorts of gradations in-between.

**Nigel Don:** If possible, I would like to put some numbers—and certainly some algebra—on this. As members of the general population, we have a one in a million chance of dying of mesothelioma. Is that right?

**Professor Seaton:** Yes, the chances are one in a million when unrelated to asbestos exposure. Mesothelioma is an uncommon disease.

**Nigel Don:** Forgive me, but let us now forget the general population. If we know that we have been exposed to asbestos—as you and I probably have—the risk is different but it is still pretty low.

**Professor Seaton:** Yes.

**Nigel Don:** If someone who has been exposed to asbestos asks you what are their chances of

developing mesothelioma, your answer is one in something.

**Professor Seaton:** Yes.

**Nigel Don:** If, however, a comprehensive X-ray scan or whatever reveals the existence of pleural plaques, that person's chances of developing mesothelioma are stably higher because they are in a smaller population of people who are likely to develop the disease. I think, if I may say so, that that is the nub of what we are about. At that point, someone who knows that they have plaques is entitled to be anxious—albeit not much—that they are at greater risk of developing a disease that they will have contracted from asbestos.

**Professor Seaton:** They will not be at greater risk than their workmates who do not have plaques—which is an important point—but it is true that they are at increased risk of developing mesothelioma.

You can forget about asbestosis, which is very uncommon nowadays, but mesothelioma is a critical and common disease. There are about 2,000 cases a year in the United Kingdom.

**Nigel Don:** So the diagnosis of plaques is, in your view, a justification for some level of anxiety. The statistics have changed, simply because we know more.

**Professor Seaton:** I said right at the beginning that it is absolutely sure that someone who is told that they have pleural plaques will initially be anxious as a consequence. The job of the doctor is to tell the patient about likelihoods. Afterwards, the patient will usually feel reassured that their condition is unlikely to develop into a more serious disease. What you say is quite right; I do not think that there is any great difference of opinion between us on this point.

I have tried to practise preventive medicine all my career; I have tried to find ways of preventing these diseases. You mention anxiety. The seeking out of people with pleural plaques is, of course, causing anxiety, as is the information that is widely available to people with asbestos exposure. In some cases the anxiety is justified, but in most cases it is needless. Who knows in the individual case? Knowing that you have worked in the asbestos industry is a cause of anxiety, and that is quite understandable. Having pleural plaques is an additional cause of anxiety—but unjustifiably so, because having the plaques should not add to the anxiety already caused by knowing that you have worked in the asbestos industry.

**The Convener:** Gil Paterson, has your point been answered?

**Gil Paterson:** Not yet. For clarity, I wonder whether Professor Seaton will say whether pleural plaques are caused only by exposure to asbestos.

**Professor Seaton:** To all intents and purposes, yes. Many other things cause fibrosis of the pleura, but asbestos-related pleural plaques are very characteristic pathologically.

I hope that I am here to give committee members information. Diagnosing pleural plaques is not straightforward. If you take a chest X-ray and have it read by four radiologists, two will see pleural plaques and two will not. There is inter-observer variability. Indeed, there is also intra-observer variability: if I look at a batch of 400 X-rays on several occasions—something that I have done regularly for epidemiological studies—I will sometimes miss the plaques and I will sometimes find them, on the same film.

Diagnosis is not straightforward. Furthermore, shadows that look like pleural plaques might not be pleural plaques. Further investigation might show that they are fat tabs under the ribs or that they are what we call companion shadows. There is scope for misdiagnosis—which raises the problem of the requirement for further investigation. In medicine, further investigation is fraught with all sorts of problems. It can lead to the finding of coincidental things that then lead to further investigation, harm, and increased exposure to radiation.

Like all questions, that one was not completely simple.

**The Convener:** That is becoming apparent.

**Gil Paterson:** I am still at it with my questions.

**The Convener:** Can you continue at it briefly?

**Professor Seaton:** I am sorry about my answers, but I am not going to pretend that the issues are straightforward when they are not.

**Gil Paterson:** I would like to clarify this. If someone has pleural plaques, they came from exposure to asbestos. Or is that too simple?

**Professor Seaton:** I am prepared to concede that there is a characteristic sort of pleural plaque that can be quite easily diagnosed radiologically and that is certainly due to asbestos.

**Gil Paterson:** Are there any other diseases—you may have a different description—that are similar to pleural plaques? Is there anything else, that is similar, that you can view, that may develop into something else? Is there something similar to pleural plaques, or is it only pleural plaques that have a signature that signifies that the person has been exposed to asbestos? Is there anything else that has a signature that can be somewhat confused with pleural plaques?

**Professor Seaton:** The question as I understand it is whether, when we see what we think are pleural plaques on someone's X-rays, we can say that the person has been exposed to

asbestos. The answer to that is yes. There is another question, which is whether there is anything else that looks like pleural plaques and can be mistaken for them. The answer to that question is also yes—particularly fat pads under the ribs.

I am not sure whether there was a third question hidden in there.

**Gil Paterson:** My main question is whether there is some other stamp that shows that something is there but will remain dormant although there is a good chance that something else will happen in a certain number of people.

**Professor Seaton:** In relation to asbestosis?

**Gil Paterson:** No, anything. In other words, is there anything peculiar to pleural plaques? Is it a unique condition? You say that pleural plaques are harmless, but an above average proportion of the people who are identified as having them are likely to have an asbestos-related disease. Is there anything else like that that is not related to asbestos?

**Professor Seaton:** Yes. If someone drinks too much whisky, it is easy to determine their risk of developing cirrhosis by doing blood tests on them. There are many medical indicators of future disease. Pleural plaques are different in that they are an indication of exposure to the toxic agent.

It is off the top of my head, but I will pursue the whisky analogy—in fact, let us say wine and not make it too Scottish. Someone who drinks too much claret might have a red nose, which would be an indication of drinking too much alcohol, which would also scar that person's liver, but the red nose would not be the cause of the scarred liver—the alcohol consumption would. Similarly, plaques are an indication of exposure to asbestos, and it is exposure to asbestos that causes the serious diseases. Does that help?

**Gil Paterson:** Yes. Thanks very much.

**The Convener:** We have one final question from Paul Martin.

**Paul Martin:** I have two questions, actually.

Professor Seaton, you suggest that anxiety has been amplified by the involvement of solicitors in what you believe should be the domain of the medical profession. Do you accept that, in the information age in which we live, if I visit a consultant I can seek a wide range of information without visiting a solicitor? That may not have been the case 30 years ago, but now I can do a Google search for "pleural plaques" and find a wide range of information about the condition; I would not need a solicitor to provide me with it.

**Professor Seaton:** Sorry, but—

**Paul Martin:** You have made considerable play of the anxiety that is created by the implications of the present legal framework. My point is that people can become anxious as a result of information from different sources—it does not have to be provided by solicitors.

12:30

**Professor Seaton:** Oh goodness, no—all sorts of things can make people anxious, but lawyers are pretty good at it. Surely everyone recognises that the process of litigation is a huge cause of anxiety. Someone can make themselves anxious by looking on the web—that is commonplace nowadays.

**Paul Martin:** But your submission suggests that causing that anxiety is monopolised by the litigation industry. My point is that, following a visit to the consultant, people can be anxious for many reasons. Twenty or 30 years ago, a visit to the consultant would probably have been people's only source of information on their condition. We cannot get away from the fact that the public are much better informed about conditions and have opportunities to follow through on that, without the need to visit a solicitor. Do you accept that anxiety can be created in different ways following a consultation?

**Professor Seaton:** I do not think that I implied that lawyers are the only cause of anxiety. I accept that doctors cause a great deal of anxiety if they give people uninformed advice. All I am saying is that it makes it difficult for chest physicians to give the impartial and objective advice that they should give if there is a conflict between what they say and what the law says.

**Paul Martin:** I appreciate that, but your submission states that the medical process has been “handed over to lawyers”. I am trying to make an objective point. The point that I am trying to extract from you is that the process of creating anxiety is not necessarily handed over to lawyers, because anxiety can be created in different ways.

**Professor Seaton:** I have spoken on the issues for 30 years, although I make it clear that I am no expert on the legal matters. When the law appeared to be changing and patients of mine were entering into the litigation process, I was informed by a lawyer that I would be regarded as medically negligent if I did not tell patients that they should or had the right to consult a lawyer. That was unequivocal advice that I was given by a law firm in Glasgow at the time. I remember it clearly because I made the point to that lawyer—who I think is here—that that made it difficult for me to give patients sensible and helpful advice. I had to put the issue into perspective and tell them that their chances of getting serious diseases were

slight, although they had a somewhat increased risk, but then add, “By the way, you must go and see a lawyer.”

I do not know whether the advice that I was given was right or wrong, but that was the advice that I was given at the time. In my teaching from then on—I have taught many of the chest physicians in Britain—I have taught that patients with pleural plaques should be told of their right to go and see a lawyer. That has been my teaching for more than 20 years now.

**Paul Martin:** You will have heard in the previous evidence the references to scan vans and to the possibility of their being introduced in Scotland. Do you have any knowledge of scan vans operating in Scotland or in other parts of the UK?

**Professor Seaton:** That depends on what you mean by scan vans.

**Paul Martin:** We heard that businesses in different parts of the country are using scan vans to identify pleural plaques.

**Professor Seaton:** I think that what you mean are mobile X-ray units.

**Paul Martin:** That is right.

**Professor Seaton:** I certainly believe that there are such things as mobile CT units in Scotland, because I have come across people who have had X-rays taken by them. They provide expensive X-ray facilities to hospitals that do not have them. In general, however, there is less of a need for them in Scotland because the NHS is better provided with such facilities and getting a CT scan in the local hospital is usually quite straightforward. I am pretty sure that such units exist, but I am not saying that they are used to trawl for patients or to get business for lawyers.

**The Convener:** So you are saying that you are pretty sure that there are vans of this type, but that they might be part of the NHS.

**Professor Seaton:** I think that there are. I know of hospitals in which people have talked about the mobile unit coming around. However, as for the question of who owns it—

**The Convener:** Are you talking about mobile units in remote areas?

**Professor Seaton:** Yes. However, I do not think that that is relevant to this issue.

**The Convener:** No. I can see why you have given that answer to the question, but I do not think that the scan vans that you are talking about are the same as the scan vans that we have in mind, which are organised by personal injury lawyers.

**Professor Seaton:** I have not come across such things. That said, of course, there is a commercial interest in maximising the number of people who come forward with pleural plaques, although that can be done through press advertisements and so on. Indeed, I expect that that would happen.

I carried out the very successful research on the association of dust exposure with chronic lung disease that led to coal miners in Britain receiving compensation. For all sorts of complicated reasons not unrelated to very poor planning, ill-thought-out regulation and the ill-thought-out consequences of that regulation, it resulted in gross oversubscription and huge amounts of public money not necessarily going to waste but going into the pockets of doctors and lawyers. I think that, with this legislation, there is a risk not only to the insurance companies—which have already made their case—but of public money going to waste. After all, many claims nowadays are against the public sector.

**The Convener:** Thank you for that evidence, Professor Seaton. We have no more questions for you at this stage, but I ask that you remain at the table in case we need any more advice.

We now have a few questions for Dr Hogg, who has provided a very full and extremely useful submission. Dr Hogg, if we are prepared to construe pleural plaques as a physical injury, why should those who were wrongfully exposed to asbestos not be in a position to obtain a recovery and compensation?

**Dr Martin Hogg (University of Edinburgh):** Of course a personal injury—if that is what you want to call it—should come under the law of damages, but as earlier witnesses have made clear, this bill is not just about pleural plaques; it begins to tinker with the fundamental requirements of an action of delict in Scotland, which for me is the more troubling aspect. Every legal system has to work out the fundamental requirements for bringing a claim in delict. As you have heard, those requirements are that a person must be owed a duty of care that has been breached by the defender; that they must suffer recognised damage; and that there must be a causal connection between the breach of duty and the damage.

The bill takes one class of persons in the population and says that they have been injured, even though, according to the ordinary principles of what constitutes damage under Scots common law, they have not been injured, are not unwell and have not suffered any damage. To me, that does damage to the wider law of delict and, as an earlier speaker hinted, opens the way for other people to come forward and say, “I have been exposed to certain substances. I am not suffering

any ill effects, but I am worried and want to claim damages.” It seems to me that there is no good reason why people in that position could not argue that if asbestos inhalers are entitled to compensation, they should be, too.

My understanding of the medical evidence is that inhalation of a number of substances—coal dust, silica dust, bauxite dust, beryllium, cotton dust and silica and iron mixtures, for example—could produce symptomatic conditions. Someone who had ingested such a substance but who was not showing any symptoms of illness might suffer from anxiety as a result of being told that ingestion of that substance meant that they were at greater risk of developing a symptomatic condition. If I were an MSP, I would find it hard to answer someone in that position who came to the Scottish Parliament and asked why they were not entitled to compensation, were the bill to be passed and the principles of delict chipped away at.

**The Convener:** To some extent, you might have anticipated the question that Stuart McMillan intended to ask.

**Stuart McMillan:** In your submission, you say:

“The Bill represents, in my opinion, a worrying trend of modern government to interfere in decisions of the courts made according to orthodox principles”.

Do you agree that it is the role of MSPs and of Parliament to make laws to rectify what politicians might deem to be unjust situations or decisions?

**Dr Hogg:** If the common law is patently wrong and erroneous, Parliament can intervene, provided that it does so on a principled and sound basis, but Parliament has tended to interfere in our law of delict and our law of obligations very infrequently over the past several hundred years, because the general view of Scots lawyers is that we have an extremely good law of delict that has been worked out over a long period of time and which has come to conclusions that most people, certainly on the issue of damage, acknowledge are sensible.

In my submission I mentioned that, in general, one of three types of a mark of damage is required before one can say that damage has occurred. Those three marks of damage exist for very good reasons—their purpose is to prevent a flood of claims by people who might simply have been exposed to a risk of injury but who have not actually been injured. For example, if I drove down the road carelessly, without looking where I was going because I was fiddling with my CD player, looked up at the last minute, saw a pedestrian whom I was about to strike and injure, and put the brakes on, with the result that they were not injured, I would have broken my duty of care to that pedestrian, but I would not have caused them any damage. I would certainly have exposed them to a risk of injury and made them extremely

anxious about the idea of being struck, but I do not think that we would want to say that they should be entitled to damages, because according to the orthodox principles of the law there would be no indication that they had suffered any damage.

There is nothing wrong with the Scottish Parliament examining the issue of damage in general. If MSPs thought that the traditional common-law marks of damage were not sufficient to allow people whom they thought had a rightful claim to compensation to be compensated, that would be a perfectly reasonable enterprise for the Parliament to engage in, but only if it considered the issue in the round and thought about when exposure to risk should give a right to compensation. It is an incomplete and rather unsatisfactory way of proceeding to simply pluck from the general population one category of people who have inhaled one type of substance and to say that those people, who according to orthodox principles are well, will now be called unwell.

**Stuart McMillan:** I am sure that the Cabinet Secretary for Justice will take on board your comments about damage in general when he reads the *Official Report* of today's meeting, but the bill focuses on a specific area. Do you agree that MSPs and the Parliament can make decisions in this area, if they see fit to do so?

12:45

**Dr Hogg:** Yes, but after I read the bill it was not clear to me why you want to tell a category of people who, according to the rules of delict that we have had for hundreds of years and according to medical criteria, are not injured that they are injured and to give them the right to compensation. As an academic who has an interest purely in seeing that the law is generally coherent and sensible, I am entitled to ask why the Parliament wants to do that, but nothing that I have been able to find out about the background to the bill has provided me with an answer. I suspect that it wants to do it because it does not want to appear unsympathetic to people who, quite reasonably, are anxious about their state of health and because not doing what it proposes to do would make it look cruel and unconcerned about such people, as lawyers are typically accused of being. You must look below the appearance of generosity that the Parliament wants to give and ask whether you are acting for sound reasons that make sense according to the law as a whole, within which you must operate and for which you must legislate. That is the issue that concerns me.

**Stuart McMillan:** I am sure that all MSPs want to ensure that justice is done for everyone in Scotland.

**Dr Hogg:** I do not doubt that; I am questioning whether in this case justice will be done. The common law on damage that we had for a long time has ensured that justice is done. It has allowed reasonable claims to come to the courts, but it has said to people who have not been and may never be injured that they should wait to see whether they have been injured. If they have, they are entitled to compensation according to all the rules that we operate. If we jump the gun, we will open up a can of worms around compensating people merely because they have been exposed to risk. No legal system of which I know has gone down that road.

In my submission, I mention that in the US, which has much more history of dealing with asbestos claims, the three states with most experience in that area have done the exact opposite of what the Scottish Parliament is proposing to do. They have said that they want not to channel funds to those whom they call the worried well but to ensure that people have genuinely recognised asbestos-related injuries before they bring claims. If we ignore that great experience from comparable jurisdictions, we will make Scots law look rather foolish and will give the impression that we are rushing into doing something without considering properly the issue and the experience of other jurisdictions that have much more history of dealing with asbestos claims.

**The Convener:** Dr Hogg, you have anticipated Nigel Don's question. Would the member like to raise any further issues?

**Nigel Don:** Dr Hogg, you will have heard my exchange with Professor Seaton. Will you comment on the logic—I hope that it can be described as logic—with which I finished? We seem to agree that, whatever the cohort in which someone started, once they have been diagnosed with pleural plaques they are part of a group of people who appear statistically to be at higher risk of developing mesothelioma. At that point, there is the trigger of a perceivable injury—the anxiety that results from their knowing that they are at greater risk than they were before they had that evidence.

**Dr Hogg:** You are correct to say that such people are aware that they are in a category of persons who are at higher risk of developing mesothelioma. The question is, should that knowledge, coupled with anxiety about the issue, give rise to a right to claim damages? There are many situations in which people become aware that they are at greater risk of an injury in the future, but in general we do not say that merely coming to know that they are at greater risk of injury gives someone a right to damages, for the simple reason that that would cause a huge

amount of litigation to compensate people who may never go on to suffer an injury.

**Nigel Don:** That is my legal question, which I think is a new one. You are right to say that we have not done this before. The issue that we are looking at may be the corollary of the extra salary that we pay to people who do dangerous things.

If someone wants to do a seriously dangerous job—I am not sure what such jobs might be, although working offshore is certainly one—their income will to some extent be greater as an economic consequence of the risk that they choose to take.

**Dr Hogg:** Yes, but that is a matter of contracting—

**Nigel Don:** I see that Professor Seaton is shaking his head. I know that the agricultural industry, for example, is dangerous and yet agricultural wages are low. Other things being equal, however, there would be—

**Professor Seaton:** With respect, that is a terrible misconception. The Scottish Trades Union Congress got rid of the concept of danger money years ago—thank goodness.

**Nigel Don:** The STUC might have got rid of it, but in reality we routinely pay people more for doing dangerous things than for doing undangerous things.

**Dr Hogg:** It is right to point out that anxiety can be compensated, but traditionally the law in Scotland, England and other jurisdictions has allowed that anxiety is only compensated if it can be connected to a recognised, present personal injury. If someone has a physical injury that is beyond doubt and they are worried that it might lead to the risk of another injury in the future, that can be compensated as part of what in law is called solatium—compensation for pain and suffering.

As a check on the flood of claims that could arise, however, the courts have always said that that anxiety must be attached to a demonstrable, present personal injury. At the moment, pleural plaques are not considered to be a personal injury for the reasons that I have stated, and I would not want them to be. That is how anxiety fits into the picture. We do not help people who are anxious and not yet unwell if we fuel their anxiety by saying, “We think you should be given compensation for your condition.”

One of the committee members asked whether it is just lawyers who create the anxiety. It is not, but a piece of parliamentary legislation could add to that anxiety if it tells people who are well that they are in fact unwell, as section 1 of the bill does.

**Nigel Don:** We acknowledge that we are

developing and changing the law in a direction that you perhaps feel is bad and which is certainly not the direction in which we have gone historically. Is there not a case for developing in that direction, in that people are, perhaps, entitled to be anxious if they find themselves in a category of people who appear to be at a greater risk as a result of what someone did to them—or as a result of what someone did not do to protect them?

**Dr Hogg:** That would be a legitimate development if it was done in a consistent, joined-up way, by examining the whole issue of risk exposure in law. Risk exposure is a notoriously tricky subject: the House of Lords has examined it in a number of cases in recent years, with regard to what kind of risk should or should not give rise to compensation.

Simply plucking one group out of the population and saying that their exposure should give rise to compensation is not carrying out law reform in a sensible fashion. I suspect that if the silica lobby or the bauxite lobby had lobbied a bit harder, they might find that they, rather than just the asbestos lobby, were included in the legislation that is before us today.

The job of members of the Scottish Parliament is to take an overall view of the law, rather than simply to listen to one particular group and say, “Well, we feel sorry for you so we will compensate you.” As MSPs, you are the guardians of the whole of the law, and if you want to carry out that very rare act of involving yourself in the law of obligations—a largely untouched area of law—you must have clear and sensible reasons for doing so, which should relate to the fundamental idea of when someone is injured.

That is what I want to lead you back to: every legal system struggles with the idea of when, for the purposes of a delict claim, someone is injured. From what I have heard about the parliamentary deliberations on the matter, I have not yet gained a sense that you as MSPs have thought really hard about why you want to change the marks of injury to include simply exposure to risk, and where it might lead if you were to make that change.

**Paul Martin:** You suggest in your written submission that a more appropriate regulatory framework could be designed to hold those who negligently expose people to asbestos to account. Can you give us an idea of how you envisage such a scheme working, and the compensation that victims could expect?

**Dr Hogg:** I am not even sure that compensation would necessarily be involved. There are two ways to approach the matter. One is to firm up the rules about people being exposed to noxious substances. That approach could be developed—

although it is not an issue that I have thought about in depth; I merely suggest it as an alternative, by way of trying to prevent the exposure from happening in the first place. That would, of course, have costs to industry and occupiers of buildings.

Another approach might be to examine the no-fault compensation scheme that the Westminster Parliament is proposing for England and Wales. Introducing a statutory compensation scheme would certainly take the pressure off individual employers and insurers. That would not address my fundamental concern, which is that people would be compensated from public funds for something that was not traditionally considered to be an injury, but it would at least move the burden of paying away from the private sector to the public sector. You might not wish to do that, however, because it could be considered as letting people off for their negligence. The point that I made in the concluding paragraph of my submission was that there are other things to think about.

The paper from the Ministry of Justice throws the debate a bit wider than the bill does, because it at least considers that there are alternatives to allowing a right in damages and delict for compensating people for pleural plaques. The Scottish Parliament perhaps seems to have closed off the alternatives too early, without considering what they might be. I have not considered what the alternatives might be in great detail; I am merely suggesting that there are other routes that you might consider.

**Paul Martin:** I take you back to the issues around potential litigation in other areas and other industries. Do you accept that exposure to asbestos is a specific area and that, as the Cabinet Secretary for Justice has said, the issue needs to be taken forward, to recognise the wrongs of the past?

**Dr Hogg:** It represents the biggest incidence of exposure to a noxious substance that can lead to symptomatic conditions—although I am prepared to be corrected by my medical colleague. However, it is not just a numbers game. If there are other categories of condition that might begin as asymptomatic conditions but which could go on to become symptomatic conditions, it seems rather unfair to people in those other categories not to consider their symptoms.

In Florida, it has been decided to legislate not simply on asbestos, but on silica. The legislators there have considered the issue in a broader context.

**Paul Martin:** Do you accept that this is an issue for Parliament?

**Dr Hogg:** Of course it is.

**Paul Martin:** I appreciate your commentary on the matter and your academic contribution, but it is for parliamentarians to consider the issue. In considering how to proceed with the bill, they should not be affected by the fact that somebody else might wish to highlight their own case. Why should that affect us?

**Dr Hogg:** I was suggesting that sensible law reform would consider the issue of exposure to noxious substances, which creates risk in the round. Doing things a little bit at a time is not, in my opinion, a coherent way of reforming the law. If you were just to consider asbestos, that would mask the underlying problem, and it would mean tinkering with the rules governing when there may be actionable damage. To consider one thing at a time plasters over the underlying problem. It would mean tinkering with well-established rules about when someone has suffered a personal injury. I suggest that picking out one condition, for no apparent reason as far as I can see—apart from its producing the greatest number of cases—does not give a good impression on the international stage.

**Paul Martin:** Why do you say that the rules are well-established?

**Dr Hogg:** Over hundreds of years, people have brought litigation before the courts in which they say, “I have been injured.” Over a great period of time, the courts have developed the idea of when somebody should be considered to be injured. The sands of time have helped to identify the marks of harm that the legal system recognises. To change one of those long-established marks of harm without seeming to know why is a slightly dangerous thing. The common law of delict and of obligations in general works very well, because it has involved a great sifting of the rules over a long period of time, at the end of which good sense and justice seem to have prevailed. Suddenly, however, we seem to be changing tack, and I am not quite sure why.

13:00

**The Convener:** Stuart McMillan has one brief further point for Professor Seaton.

**Stuart McMillan:** Towards the end of paragraph 6 of your submission, you say:

“They indicate that some asbestos has passed through the lungs and reached the lung lining and has then been inactivated by a scar reaction. They do thus represent an injury in the sense that a scar on the skin represents a previous cut or burn.”

I will describe the first point that came to my mind when I read that, on which I would like clarification. I will take the issue away from pleural plaques and asbestos-related conditions to another walk of life. If somebody is injured or burned when using

equipment or raw materials at work because their workplace has not complied fully with health and safety legislation, and if that injury or burn is not life threatening, should they be allowed to claim for damages?

**Professor Seaton:** You know that I am not a lawyer; the issue is for lawyers to comment on. I understand that compensation for an injury requires a calculation to translate the severity of that injury into monetary terms. It does not compensate people for anything, any more than paying people money for anxiety makes them less anxious—it certainly does not achieve that.

In law, an injury might be regarded as a serious injury if it caused pain and suffering, which would be compensated, or it might be regarded as a trivial injury. If someone scratched their finger at work, they probably would not sue for damages, although I am sure that they would be entitled to. The law might take the view that that was a trivial matter on which to go to court.

My point is that something has happened in the body when a person gets a pleural plaque—a lawyer who gave evidence earlier explained what might be happening. However, a pleural plaque causes no pain or suffering and implies no further illness in the future. In those circumstances, I would have thought that a judge might decide that the condition was not worthy of any financial reward.

**Stuart McMillan:** Your submission says that an injury has occurred. It says:

“They do thus represent an injury”.

**Professor Seaton:** If you are going to change the whole law on the basis of a strict interpretation of injury as something that can be a scratch, the answer is yes—I am being honest. It is some sort of injury; it is the healing process of an injury.

**The Convener:** This is actually a legal point, so I ask Dr Hogg to speak briefly.

**Dr Hogg:** The question of scarring is interesting. We tend to associate a scar with a visible injury. As my submission says, the physical appearance that we present to the world is important. That is why external alterations to our bodies, such as a scar, can constitute injury, even if we do not suffer pain—although that would generally occur with a scar—and even if no physical impairment is caused.

The problem with pleural plaques is that the word “scar” is used to describe them, but not in the way that a lawyer would think of a scar—as a visible injury. I understand that it means a fibrous tissue change around the asbestos fibre, which is really an internal cellular change. However, the word “scar” triggers in many people’s minds the idea that pleural plaques are therefore injurious. If

we return to the legal marks of an injury, we discover that pleural plaques are not injurious, because they do not cause physical impairment, pain or suffering or a visible change in the person’s appearance. That is why pleural plaques are not an injury, whereas an external scar is and would be compensatable, as long as it were more than a tiny scratch, which would be a *de minimis* injury in law.

**Stuart McMillan:** We are not focusing on a small scratch that somebody gets at work, which could happen in any workplace. You made a point about whether there is external, visible scarring, but a pleural plaque is still a scar, albeit an internal one.

**Dr Hogg:** Using the word “scar” is one way to describe a pleural plaque, but it leads people to think that there must be an injury. In a pleural plaque, the cells cluster around a fibre of asbestos and, in an attempt to destroy it, they die and create a fibrous deposit. If we explain it in that way and take out the word “scar”, it is less obvious, even to the layperson, that the pleural plaque should be called an injury. When we use the word “scar”, it conjures up ideas of injury.

My point is that it is important to remember that, where a scar is an injury, it is visible. Where there is simply an internal cellular change that we could call a scar if we wanted to use that word but in relation to which no ill-effects are produced, calling it a scar can lead people to the wrong conclusion that it is injurious.

**The Convener:** Thank you, gentlemen. That was extremely helpful.

13:06

*Meeting suspended.*

13:07

*On resuming—*

**The Convener:** I welcome our final panel of witnesses. I apologise for the fact that you have been kept waiting for so long, but you will appreciate that the matter is important and we require to be as thorough as possible.

The final witnesses are Frank Maguire, solicitor advocate at Thompsons Solicitors; Phyllis Craig, senior welfare rights officer at Clydeside Action on Asbestos; and Harry McCluskey, secretary of Clydeside Action on Asbestos. Mr Maguire, we are grateful for the long, detailed submission that you gave us, which is helpful and which means that we can move straight to questions.

**Bill Butler:** Good afternoon, colleagues. In written evidence to the committee, to which I have

already referred, Professor Anthony Seaton refers to pleural plaques as

“harmless indicators of past asbestos exposure”

that are

“medically trivial, cause no impairment and, until it was proposed by lawyers that they should attract compensation, caused no medical problems.”

How do you respond to that statement?

**Frank Maguire (Thompsons Solicitors):** It seems to be a variation on the scan van idea—the idea that cases are somehow being provoked by other people such as lawyers or claims farmers. It is suggested that those people are out there trying to find people who might have been exposed to asbestos, getting them X-rayed or CT scanned to find out whether they have pleural plaques, and taking forward claims. That just does not happen, as far as our cases—and those of other lawyers whom I know—are concerned.

What happens is that the person is of an age at which they have medical problems, such as breathing problems or whatever, and they go to their GP or to the hospital for investigation. The finding of pleural plaques might or might not be incidental. The person might have a breathing problem to which pleural plaques would be relevant, or they might have a different scan because they have a heart problem. The doctor tells them about the findings on the X-ray or the CT scan, including the findings other than pleural plaques if there are any, and then—rightly—tells them what those findings might mean. The findings could signify that the person has been exposed to asbestos to such an extent that they have an increased risk of getting one of the more serious conditions. That is what the doctors do.

When a person gets such information, they ask themselves what they can do. One thing that they can do is find out what rights they have. After such a meeting, they might go to Clydeside Action on Asbestos, which gives them advice on their rights. Those rights reflect how they react. People are not only anxious—they come away from the meeting angry because someone has exposed them to asbestos to such an extent that their life may be threatened. When the person goes to see a lawyer, they ask whether they have any rights and the lawyer says that they do. They have the right to call the company or employer to justice and find them liable for breach of statute duty or common law duty. They have a right to compensation for the anxiety that has been caused because of what the company or employer has done, and that gives them a resolution or the beginnings of a resolution. They recognise that someone can be called to account, which may somehow assuage their anger. There is recognition that they have been harmed and that they will get something for their

anxiety, which is all that the law can do for them. We also tell people that they have a right to return to court. If they establish those two things, they can return to the court for a claim to be made if they get mesothelioma, diffuse bilateral pleural thickening, asbestosis or lung cancer. That is another concern that they have. They worry about what will happen to them and their families if they get one of those conditions.

Justice gives the person a recognition that they have been harmed and that someone is being brought to account for that; it gives them something for the anxiety that has been caused; and it gives them resolution in respect of what may happen in the future. I hope that when a person has been to see a lawyer or Clydeside Action on Asbestos, they go away reassured or comforted having been told what may happen.

Lawyers are not medical people. The information that we receive and give to clients is from medical experts. We say that the medical expert has said what the risks are—we say the same thing that Professor Seaton says. We make up nothing. People get further reassurance from us. They are told what the position is by their medical adviser and by us. However, some people do not worry much, matters prey at the back of some people’s minds, and some people are very worried no matter what one does.

13:15

**Phyllis Craig (Clydeside Action on Asbestos):** Professor Seaton is perfectly entitled to hold the opinion that he holds, but I do not think that it represents what the majority of medical professionals think. For the record, I have papers on plaques that I would like to hand in today. I have asked for the opinions of chest consultants, palliative care consultants and oncologists who have looked after people with plaques and other conditions.

It is fine for someone without pleural plaques to say to someone with pleural plaques that the condition is medically trivial and not to worry, but we know about the worries and anxieties of people who come to Clydeside Action on Asbestos and the Clydebank Asbestos Group. It is insulting for the insurance industry to tell people not to worry. It is telling people, “What you need is an educational programme.” The people with pleural plaques who come to us know that pleural plaques do not develop into mesothelioma, but they are also well aware that the exposure to asbestos that caused the pleural plaques can also cause a terminal condition.

Let us turn to the kind of educational programme that people could be offered. One of our clients with pleural plaques has a husband and brother

who also have pleural plaques. Her other brother was also diagnosed with the same condition. Sadly, he died earlier this year of mesothelioma. Many of our clients talk of family members, others in their community and former work colleagues who have pleural plaques. Often, they tell us that they have watched loved ones and friends develop mesothelioma as a result of exposure to asbestos. If that is what they have witnessed, how can educational programmes help by saying, "Don't you worry. These plaques will never hurt you."

Perhaps the insurance industry wants doctors not to tell people that they have pleural plaques. As we say in our submission:

"In an article, initially reported in the Insurance Times 31/1/08, it was revealed that U.K Justice Minister Bridgette Prentice had accused the insurance industry of asking doctors not to tell their patients they had pleural plaques."

Is that an example of an educational programme?

The committee heard earlier from Professor Seaton, whom I respect, but with whose opinion I disagree. Medical opinion often changes. Indeed, not so long ago, a case of lung cancer but no other radiological evidence of an asbestos-related disease would have merited no compensation. Legislation changed that. We have to take on board the fact that the people about whom we are talking have been negligently exposed to asbestos and that a physical change in their lungs causes them severe anxiety. The situation is compounded by the fact that they have seen family members who were also exposed to asbestos develop conditions that led to their death.

**Harry McCluskey (Clydeside Action on Asbestos):** I have worked for many years as a volunteer, including with Clydeside Action on Asbestos. To my knowledge, over the past 25 years or more, a diagnosis of pleural plaques has always resulted in compensation being paid. However, the insurers are now telling us that, in medical terms, pleural plaques are harmless and that they do no damage to the lungs. It has taken the industry quite a long time to come up with the report, given that it has paid out over all the years.

As others said today, pleural plaques are a scarring on the lungs. For something to be scarred, it has first to be cut. If someone cuts into something, a certain amount of damage is bound to result. Pleural plaques can and do cause breathing problems. As others have said, the most serious aspect of the condition is its devastating nature. I put a different light on it: I call it a disease on the mind. That is exactly how I and other victims see it.

When a victim is first diagnosed with pleural plaques, he is told that that is what he has got. That might not mean too much to him, but it is a different ball game when he is told that the cause

was inhaling dangerous asbestos fibres. Earlier, we heard about the worry and anxiety that that brings into someone's life. That is exactly how it is: worry, stress and fear, not only for the victim, but for their family, too.

Over the past few years, we in Clydeside Action on Asbestos have had quite a number of cases in which victims have come to us after being diagnosed with pleural plaques and have later gone on to develop mesothelioma or lung cancer and have died. We have many cases of that. To me, there should be no argument today. Pleural plaques should be fully compensated, as should pleural thickening and asbestosis.

All five types of asbestos-related disease that I know of are incurable. Three of them can be progressive and the other two are terminal. If a victim develops one of the three progressive types of asbestos-related disease, he can still go on to develop one of the other terminal diseases and die. The victim does not have much going for him.

Let me give one more true fact. I had four very close friends—ex-workmates—who, like me, contracted an asbestos-related disease. They worked with me in Clydeside Action on Asbestos to help other victims. Sadly, three of them went on to die of mesothelioma and the other died of lung cancer through asbestos. I heard the good professor talking about a million-to-one shot, but that is pure rubbish as far as I am concerned. It might be pointed out that I am still here, but my four friends are away. I do not have an answer to that, but I can say that, as I said earlier, this is a disease on the mind. It is there 24/7. Tomorrow, it could be my turn. That is the way that I have got to look at it.

**Bill Butler:** Thank you, Mr McCluskey.

Convener, Ms Craig mentioned medical evidence that is contrary to that which we heard from the good professor. Could that evidence be submitted to the committee for our consideration? I know that we will take oral evidence next week from those who take a contrary medical view to that of the professor.

**The Convener:** It would be useful if that could be provided, Ms Craig.

**Phyllis Craig:** Yes.

**The Convener:** Thank you.

We have got a lot out of those answers. We will proceed with the next set of questions, which is from Paul Martin.

**Paul Martin:** What difference does a compensation award make to someone who has been diagnosed with an asbestos-related disease such as pleural plaques?

**Phyllis Craig:** First, although compensation is their only remedy, it is not the one that they want. Clients who have been diagnosed with pleural plaques because of others' negligence tell us that they want those people to be punished. The severity of their feelings is such that they would much rather that the matter was treated as a criminal offence. That option is not open to them, however; their only remedy was to pursue civil damages. Although that option was taken away, we hope that it will be restored to them. A compensation award gives people some sort of conclusion or resolution about their exposure to asbestos, although victims would much rather that the people who exposed them to asbestos were criminally prosecuted.

If you are asking what the amount of money means to people, you could ask what such money means to anyone who has mesothelioma, or what it means to anyone who was physically abused. It does not mean anything, but it is the only remedy that people have.

**Harry McCluskey:** As a victim who was diagnosed with an asbestos-related disease—I worked as a logger—I had to take early retirement. I previously earned a good wage, but now I cannot work. I live on the mere money that I can get from the social, which is not very much. I would certainly be worthy of any compensation that I got. It is much needed. I could then help my family out.

**Frank Maguire:** From a lawyer's perspective, I can say that the reaction of my clients when they win a case is that they feel that they have got some measure of justice because someone has been held to account and has had to pay some compensation that is not negligible. Although they might have reservations, they go away with the feeling that a wrong has been partially righted in some way.

**Paul Martin:** Professor Seaton talked about the anxiety that is caused as a result of the legal profession's pursuit of a claim. Do you think that that is the case in respect of your firm or any other firm?

**Frank Maguire:** As you know, we deal with around 90 per cent of the cases and the remaining 10 per cent are dealt with by trade union lawyers and other extremely responsible lawyers. The situation in Scotland is not like that in England and Wales, which might be questionable in some respects. I do not know any lawyers who go out to farm claims. We always receive the cases from a group or a trade union or via the medical profession.

**Des McNulty:** I would like to draw on your long experience of dealing with these matters. This morning, we heard, from the representatives of Norwich Union and Zurich Assurance in particular,

some dramatic estimates about the number of potential claims and the implications for employer premiums as a result of the proposed change in the legislation. Based on your understanding of the number of claims coming through the system and the exposure of those and other companies, can you shed any different light on what we were told?

**Frank Maguire:** Anyone who wants to make a forecast or a projection should look to their existing data and should not speculate and make wild estimates. The best data that are available—there are none for England and Wales—are the data of Thompsons Solicitors, as we have dealt with most cases for a good number of years. Our database gives us quite a good basis for an estimate of how many cases we should expect to arise. In my estimate, the rate should continue to be around 200 pleural plaques cases a year. That has always been the rate. If the House of Lords decision had not gone the way that it did, I have no doubt that the rate would have continued in the coming years.

Our database does not support the wild figures that you heard earlier, which are accompanied by the assumption that scan vans and so on would be used, but we have never worked like that in Scotland. My estimates are based on empirical data. We get 200 claims a year, and I can see no great reason why that would not continue.

On the exposure of the various parties, our database allows us to see who the defender is and who the insurer is for individual cases. We can also tell whether the insurer is the sole responsible party or whether there is more than one responsible party. We do not have that information for about 25 per cent of the cases, as we are still investigating them. It might be that no defender can be found or that there is a solvent defender with no insurance. In about 77 per cent of the cases, however, we can identify the relevant information.

On our database, there are 567 cases, of which Norwich Union has 3.52 per cent. Of that number, it is the sole defender in 1.23 per cent and part of a multidefender situation in 2.29 per cent. Obviously, the 1.23 per cent of cases for which it is the sole defender represents a greater cost to the company than the 2.29 per cent in relation to which there is shared liability.

Royal and Sun Alliance has 4.46 per cent of our cases. Of that number, it is the sole defender in 1.06 per cent and a joint defender in 4.4 per cent.

Zurich Assurance has 7.48 per cent of our cases. Of that number, it is the sole defender in 2.82 per cent and a joint defender in 4.76 per cent.

Those are the figures on the exposure of the commercial enterprises, based on empirical data. I

regard their exposure to the impact of pleural plaques cases in Scotland as minimal.

13:30

**Des McNulty:** Just to put a number on it, let us assume that an insurer was responsible for 10 per cent of the claims in Scotland. What would that amount to in pounds?

**Frank Maguire:** Norwich Union, for example, is sole insurer for seven cases and part insurer for 13, out of a total of 567 cases.

**Des McNulty:** How much would the claims be for?

**Frank Maguire:** The claims would be for about £5,000 for a provisional settlement and £10,000 for full and final settlement. We therefore quoted an average of £8,000. If you multiply that by eight, it is not an awful lot of money.

**The Convener:** Mr Maguire dealt with scan vans in his response to earlier questions, so we will move straight—

**Phyllis Craig:** Sorry, could I make a point about scan vans?

**The Convener:** Very briefly.

**Phyllis Craig:** The insurance industry's submissions referred to scan vans, but we have come across scan vans only from clients who have enlightened us that they were subject to X-rays carried out by their employers after their asbestos exposure. That was done to ascertain that they did not have pleural plaques although, because of the latency period, pleural plaques would not have shown up anyway. However, if pleural plaques are not dangerous, why would an employer expose people to radiation when there was no need to do so?

**The Convener:** You have posed the question. Thank you for that intervention.

**Frank Maguire:** Convener, as I gave out a lot of statistics and numbers, would it be helpful to give you a schedule that provides a profile of the cases? I have not calculated percentages, but I can give them to you by e-mail if you like, although they are available from the evidence anyway.

**The Convener:** It would save our having to calculate them if you did that.

**Margaret Smith:** Does your set of figures include what you regard as the state's potential liability as well as that of insurance companies?

**Frank Maguire:** Yes, the state liability figures are included.

**Margaret Smith:** That is fine. We can put that into evidence. I just wanted to check that we had both sides of the equation.

**Frank Maguire:** The figure for the British Shipbuilders Corporation is 16.74 per cent, but the biggest one is for the Iron Trades Insurance Group, which is basically a run-off company of Norwich Union and is not a commercial enterprise; it has a finite estate, which someone administers, but it does not get any premiums or do any business.

**Margaret Smith:** We heard earlier, and have just heard again to some extent, about the potential impact on premiums and on insurance companies and about the commercial nature of insurance companies. My salary and allowances are in the public domain and members around this table are well used to what we get paid being subject to public scrutiny. How do you respond to the criticism that the legal profession, rather than those who suffer from pleural plaques and the anxiety that they might bring, will be the primary beneficiaries of the bill?

**The Convener:** Before you answer, Mr Maguire, I note that we have received a late submission from the Law Society of Scotland that details the fees. However, do you wish to augment that information?

**Frank Maguire:** Yes, I was going to mention that as well. Obviously, we must watch out for claims farmers and percentage claims companies that take away a swatch of someone's damages. In my firm and in other trade union firms, we separate the compensation award from the court costs. The auditor of court assesses the court costs and decides whether they are reasonable or necessary, so they are objectively referenced. Those costs include outlays for medical records, court dues, health and safety experts and medical experts. In addition, the lawyer has taken on the risk of the case being lost, which may mean exposure to tens of thousands of pounds in costs.

In so far as Thompsons and the trade unions are concerned, the member gets the compensation and the lawyer gets the court costs. There is no question of the client's claim being eaten into by a lawyer taking a 25 or 30 per cent cut, which can often happen with damages. The client gets the damages and we get the judicial costs, which are objectively justified. We are able to do that because we have built up expertise. I have a whole department dealing with nothing but asbestos cases. We have economies of scale and data. We do not reinvent the wheel every time; we know who all the defenders and witnesses are, and we are therefore able to do what we do competitively and efficiently.

The defenders are now recognising that if they do not admit liability, if they go hard on the time bar or if they argue among themselves, the costs of the case will increase. There is nothing that I can do about that. If they do not recognise it, I

have to get the evidence and information, and do the representation in court to get that.

Dr Abernethy mentioned the industrial diseases pre-action protocol, which we have been involved in, along with the Law Society and defenders firms. In my paper and in that of the Law Society, the committee can see that there is now a way in which we can get liability admitted early, the diagnosis agreed early and the compensation paid out quickly. The fees for that kind of case would be about £1,900.

**Angela Constance:** In your capacity as a lawyer, do you think that the bill has wider implications for the law of damages? It was suggested earlier that the bill is a fundamental assault on the founding principles of the law, which have been built up over a period.

**Frank Maguire:** There is a jurisprudential difference here. Dr Hogg is very much in the judicial supremacy area, which says, "Let judges get on with it. Do not interfere with them, whatever conclusions they come up with," whereas the real situation is that judges develop, interpret and apply the law. Of course, the Scottish Parliament can also legislate on issues that it perceives to be unjust or considers should be remedied. What is happening here is that the judges, through their orthodoxy, have reached a particular conclusion that is unjust. That is when an issue comes to the Scottish Parliament, for it to consider whether the result from the Scottish courts is unjust. That has happened time and again. This is not the only time that the Scottish Parliament has considered what the judges have done or have not done—this is not just civil law and criminal law—and has said, "We do not agree with that." Previously, before the Scottish Parliament, those injustices would have continued. Now that we have the Scottish Parliament, they are addressed and rectified quite speedily.

With regard to the Compensation Act 2006, the legislative consent motion passed by the Scottish Parliament represented a change to the conclusion of the House of Lords. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was another change that was introduced by the Scottish Parliament. Allowing grandchildren to claim, under the Family Law (Scotland) Act 2006, was another area in which the Scottish Parliament wanted a different conclusion from the one that the judges felt able to reach. The Civil Partnership Act 2004 allowed same-sex partners to claim. Even the reservation to go back to court is a creature of statute. The judges did not develop that; Westminster developed it in 1982.

There is this idea that we cannot go into the law and change it. Under the Protection from Harassment Act 1997, someone is entitled to civil damages for anxiety alone. That was felt

necessary by the legislators, and therefore it is another area where we come in. The idea that there will be wide repercussions from these cases is wrong. This is not new. We have had compensation for pleural plaques cases for the past 20 or 30 years. All we are doing is saying, "Please clarify that we are still entitled to these damages." As the committee has heard in evidence, calcified pleural plaques are caused only by asbestos. There are no problems about other causes. These cases have been compensated until now and we want them to continue to be compensated. I do not see the great fundamentals of the law of delict being overturned or upset, but I do see that, on this occasion, the law of delict has reached a conclusion that is unjust and the Scottish Parliament can rectify it.

**The Convener:** I thank Mr Maguire, Ms Craig and Mr McCluskey for giving evidence. It has been exceptionally useful and the committee is obliged to you.

**Harry McCluskey:** I want to mention one thing. It is not only Clydeside Action on Asbestos. My friends at the back are from the Clydebank Asbestos Group, which has been actively supporting the bill from day one.

**The Convener:** I am sure that that is the case, Mr McCluskey. Thank you.

13:41

*Meeting continued in private until 13:42.*

## **Damages (Asbestos-related Conditions) (Scotland) Bill: Stage 1**

10:22

**The Convener:** Agenda item 3 is the Damages (Asbestos-related Conditions) (Scotland) Bill. I have two points before we proceed. First, I see from correspondence that the committee has received from Thompsons Solicitors that one of the companies that has a liability is AGF Insurance, which I worked with many years ago for a few years. I have not been in receipt of any money from the company for a considerable period, although, technically, it has contributed to my meagre pension fund. I wish to put that declaration on record. As members know, when the Parliament has dealt with asbestos-related matters previously, that connection has not inhibited me from voting in a direction that was not totally in the interests of insurance companies. I would not hesitate to do so again if the need arises.

My second point is that we have made strenuous efforts to take oral evidence on the medical condition pleural plaques from those who indicated in correspondence that the condition is an injury and one which should be compensatable. The people from whom we sought that evidence are hospital consultants. Like all hospital consultants, they are busy and so were unable to join us today. However, we have written evidence from them. The strength of that evidence is not diluted by the fact that they cannot appear personally.

Today's principal business is an evidence-taking session with the Minister for Community Safety, Fergus Ewing. I thank him for coming and bringing with him his officials, who are Anne Hampson, Paul Allen and Catherine Scott. I ask the minister to make an initial address, after which we will ask questions.

**The Minister for Community Safety (Fergus Ewing):** Good morning, colleagues, and thank you, convener. I declare that I am a qualified solicitor and a member of the Law Society of Scotland. I have a certificate to practise, although I am no longer in practice.

For more than 20 years, people with asbestos-related but generally symptomless conditions such as pleural plaques—which are scars on the membrane surrounding the lungs—have been eligible for damages under the law of delict, provided that negligence could be established. That came to be accepted as an established right. Last October, however, in the case of Johnston v NEI International Combustion Ltd, the House of

Lords ruled that pleural plaques are not sufficiently harmful to be eligible for damages. Although that ruling was not binding in Scotland, it was, in the legal sense, highly persuasive, and the expectation was that, here in Scotland, the right to damages for pleural plaques would go.

The Scottish Government's view is that it should continue to be possible to obtain damages when pleural plaques or similar asbestos-related conditions develop as a result of negligence. Securing that right is the purpose of the Damages (Asbestos-related Conditions) (Scotland) Bill. We came to that view not because we disputed the medical evidence that had helped to inform the House of Lords judgment; we accept that, generally, pleural plaques are not, per se, a source of physical pain, nor do they inhibit function or reduce life expectancy in themselves. We accept that they do not, in and of themselves, lead on to conditions that have those results.

We believe, however, that it is important to take account of other facts. First, pleural plaques represent a physiological change in the body. They occur because the body has been attacked or injured. Secondly, pleural plaques are strongly associated with exposure to asbestos. Although they do not directly cause a greatly increased lifetime risk of mesothelioma or a small but significantly increased risk of bronchial carcinoma, they signify that, as a result of exposure to asbestos, the individual is at such higher risk compared with the general population.

Thirdly, people with pleural plaques have a specific physical manifestation of asbestos exposure, which can cause them understandable anxiety for the reasons that I have just set out. That is notably the case because many people with pleural plaques live in our old industrial heartlands and will know, often from family experience, about the potential lethality of asbestos. Although the pleural plaques will not be outwardly visible, those people and their loved ones might have seen X-rays and might frequently see the scars in their mind's eye.

At Westminster, Dr Robin Rudd, an authority in the field, was quoted as saying:

"For many the anxiety is ever present. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life."—[*Official Report, House of Commons*, 4 June 2008; Vol 476, c 252WH.]

Reflecting on those factors and on the fact that a right to damages has been an established feature for the past 20 years, and taking account of discussions with our chief medical officer, the Scottish Government believes that pleural plaques are not a trivial injury and that people who develop them should still be able to claim damages where

their condition has arisen because of an employer's negligence. That is the straightforward and specific purpose of our bill, and it is an appropriate and proportionate response to potential fall-out here from the House of Lords judgment.

Before deciding to legislate, we consulted key stakeholders. The Cabinet Secretary for Justice and officials met representatives of the insurance industry. After announcing our decision at the end of November, we continued to try to work with stakeholders through meetings and, notably, by consulting from 6 February to 4 April on a partial regulatory impact assessment.

10:30

Hard-and-fast evidence was elusive. Unfortunately, insurers were unwilling or unable to provide hard data or estimates, despite our requests. Against that background, it is surprising that the insurance industry has more recently felt able to provide estimates—and they are very high estimates—of the costs that will arise from the bill. We do not find the figures credible, for three main reasons. First, the insurers assert that the costs for Scotland would be 30 per cent of the costs that the United Kingdom Government projects for England and Wales. That figure seems very high. Secondly, the UK Government's projection assumes that the volume of claims will potentially be more than 60,000 per annum. That is well above past experience. In the Johnston judgment, Lord Rodger said:

"For about twenty years pleural plaques have been regarded as actionable ... this has not resulted in an unmanageable flood of claims".

Thirdly, the UK Government's projection assumes quite a high award level of up to £13,400 per claim, which is more than 50 per cent higher than we believe recent awards have been. We believe that our estimates, which are based on historical data, give a more realistic assessment. We are confirmed in that belief by a statement made by Deloitte, which estimates that the House of Lords decision could save insurers across the UK up to £1.4 billion over the years, which is one twentieth of the UK Government's equivalent prediction.

I do not want to get too far into commenting on the evidence of others at this point; I am sure that the committee will wish to put questions to me about that. For now, I conclude by recapping the Scottish Government's basic position. We lodged our short bill because, having listened to stakeholders, including parliamentarians, we were persuaded that people who have been negligently exposed to asbestos and who contract an asbestos-related condition, albeit symptomless, should still be able to pursue a damages claim in

Scotland. I believe that the bill will meet that policy objective without making any undue incursion into the general law of delict. More fundamentally, I am confident that the bill will ensure that the law of Scotland reflects our country's values and our expectations of how our fellow citizens should be treated. That is what the bill, and, indeed, the Parliament, are all about.

**The Convener:** Before we proceed with questions, I wish to follow up something that you said. You spoke about the consultation approach that the Scottish Government adopted for the bill. You will appreciate that the particular route that you took on this occasion is somewhat different from the procedures that are laid down and which normally apply. Would you like to comment on that?

**Fergus Ewing:** Certainly. As you say, the Government proceeded with a great deal of swiftness. We have of course consulted insurers and stakeholders. There was a consultation from February to April on the partial regulatory impact assessment, following the announcement last November by the cabinet secretary that we would be legislating.

The reason for our approach is simple. We felt that, in the interests of all those people with pleural plaques whose cases are currently stilled and awaiting settlement and who expected that, as was the case over the past 20 years or more, they, like others, would receive a settlement, we should not unduly delay or prolong their anxiety about their claims, nor should we prevent the legal process from bringing about the result that is the primary purpose of the bill: to restore the status quo ante and put the law back to what it was before. Over the past 20 years, those who had pleural plaques and everything that goes with them received compensation, and the insurers settled. Presumably, insurers took account of the costs of the settlements in their own premia-setting processes.

In a nutshell, we believed that, because of those factors, and in the interests of those who have sustained pleural plaques, we should act swiftly and not delay. It is perhaps fortunate that we have a Scottish Parliament, which is able to deal with such matters. From the tenor of the Ministry of Justice's consultation paper, had we waited for Westminster to act we would be waiting still, and for a long time to come.

**The Convener:** I have no doubt that your alacrity is well intentioned, but, bearing in mind that the matter is turning out to be more complex than most of us had envisaged, it might well have been in the interests of everyone if you had gone through the normal consultation process. I hope that the Scottish Government will remember such considerations in the future.

We will now turn to questions. For reasons of cohesion, the questions will be asked under three headings: medical issues; legal issues; and pecuniary issues.

**Robert Brown:** Everyone in the committee has considerable sympathy with the issue and with some of the reasons for your policy, minister. However, you are faced with the problem that the view that was expressed by the House of Lords—including two Scottish judges who were in attendance at the time—was unanimous.

On the medical evidence, do you accept the reasoning as being a valid statement of the general principles of Scots law in this area, leaving aside the exception that you are seeking to make?

**Fergus Ewing:** We do not dispute the medical evidence that was taken. We accept that pleural plaques are not, in themselves, harmful and that they are symptomless, other than in exceptional cases. We accept that they do not cause or turn into more serious conditions.

It is fair to say that the Scottish Government's primary objective is to restore the law to what it was before. We think that that is correct on policy grounds. In my opening statement, I described the basis for that.

I think that it was Robin Rudd—whose evidence you will be familiar with if you have read the House of Lords judgment—who said that those who have been exposed to asbestos are 1,000 times more likely to sustain mesothelioma than the general population is.

Of course, pleural plaques are not the cause of mesothelioma; it is the exposure to asbestos that increases the risk of sustaining mesothelioma. Mesothelioma is a disease that kills and, as far as I am aware, there is no cure for it. It kills fairly quickly, as well—a length of two years has been mentioned in some of the medical advice that I have seen. I do not offer any medical advice today, but we all recognise—and, perhaps, know from constituency interests and general knowledge—that mesothelioma is a fatal disease. If one is diagnosed as having pleural plaques, one will almost certainly be aware of the increased likelihood of suffering a disease that is fatal. If that happened to me or to someone in my family, I would be anxious. Similarly, if it happened to someone in the House of Lords, they would be anxious.

We took that into account as one of the factors that I mentioned in my opening statement. We did so following a debate in Parliament during which I believe we received the support of most parties, including yours.

**Robert Brown:** Obviously, the central point in relation to the House of Lords judgment that you

are seeking to overturn is the medical finding that pleural plaques are, by themselves, symptomless and, in most cases, harmless. The ruling, therefore, fits with the general principle of the law. Does the Scottish Government have any evidence to the contrary, or does it accept that medical position? Do you have any evidence concerning not only a comparison between those with pleural plaques and the general population but a comparison between those who have been identified as having pleural plaques and the rest of the population who have been exposed to asbestos? In other words, evidentially, does it take you much further to know that people have been exposed to pleural plaques?

**Fergus Ewing:** I think that Robert Brown is asking on what basis the Government intends to overturn the medical findings of the House of Lords. However, that is not what we are doing. As I said, by and large, we do not dispute the view of the medical evidence that has been taken by the House of Lords or most of the evidence that was given by the insurance industry at last week's meeting of this committee. We are not overturning medical evidence—that is not something that Governments do. We are placing a different interpretation on the evidence. We feel that pleural plaques are not, in themselves, trivial, and that while they do not generally cause pain or have symptoms, one must consider the rest of the facts, namely, the increased propensity and susceptibility to dying due to contracting mesothelioma or bronchial carcinoma.

The second question raises the technical issue of the relative incidence of susceptibility between those with pleural plaques and those without pleural plaques who might also have been exposed to asbestos. As that is a highly technical area—although it is one in which we are not particularly challenging the evidence that was presented to the House of Lords—I would like the officials to have a stab at answering the question.

**Paul Allen (Scottish Government Constitution, Law and Courts Directorate):** The consensus of the medical opinion that we have seen is that people who are exposed to asbestos are at the same risk of mesothelioma, whether they have pleural plaques or not. The fact that someone has pleural plaques does not mean that they are more at risk of mesothelioma than one of their colleagues who worked the same hours in the same factory as they did. The difference that we see is that pleural plaques are an injury. I think that it was Lord Hope who said, in the Johnston judgment:

“Pleural plaques are a form of injury.”

The question that we are considering is whether they are a trivial injury.

**Robert Brown:** You indicated that you think that there is no difference in the level of risk of developing mesothelioma between those who have suffered pleural plaques and those who have not. Do you have any evidence to offer the committee to back that up?

**Paul Allen:** I could check with our chief medical officer, who I believe has the relevant research, and write to you with it. My reading of what he has told us is that the balance is pretty much the same across the categories of people who do or do not have pleural plaques if they have had the same level of exposure to asbestos.

**The Convener:** We would be grateful if we could have that in writing at some stage.

**Nigel Don (North East Scotland) (SNP):** The evidence that I have heard from several places, including in this committee, is that, almost invariably, those who contract mesothelioma have pleural plaques. If that is the case, I can draw you a diagram that demonstrates quite conclusively that those who discover that they have plaques are at greater risk. They were not at greater risk when they were working, but it is quite clear that, at the point when they know that they have pleural plaques, they move into a section of the population that, at the end of the day, proves to have a higher incidence of mesothelioma. That is the case simply because no one who gets mesothelioma does not have plaques.

**Paul Allen:** I think that, if I get the chief medical officer to write to you, he will confirm that people who have mesothelioma are invariably found to have had pleural plaques. That is pretty much certain.

**Robert Brown:** On the minister's earlier reply on the causal connection between pleural plaques and mesothelioma, it is vital that we understand what is being said. My understanding of the evidence that has been heard so far is that there is no causal connection between pleural plaques and the later development of mesothelioma, apart from the fact that pleural plaques are evidence of exposure to asbestos in the first place. Would the minister like to revisit the wording that he used earlier, for the sake of clarity?

**Fergus Ewing:** I think that I was quite clear earlier. An increased risk of mesothelioma is caused not by the pleural plaques that scar the membrane around the lung—normally the parietal pleura, I believe—but by the exposure to asbestos that led to the plaques. The plaques are proof that someone has been exposed to asbestos. It is, therefore, the exposure to asbestos, evidenced by the plaques, that proves that someone has a greatly increased risk than the general population of contracting mesothelioma and a slightly less

greatly increased risk of contracting bronchial carcinoma.

10:45

**Angela Constance (Livingston) (SNP):** Given that the key issue is, as you have said, negligent exposure to asbestos, surely people without pleural plaques who have been negligently exposed to asbestos have a right to be compensated.

**Fergus Ewing:** That is certainly a line of argument. Pleural plaques offer proof that a person has been exposed to asbestos because there will be scarring. Plaques are internal scarring as opposed to external scarring on a person's body. You are right to say that other people in the population have been exposed to asbestos, but it is important to emphasise that the bill's purpose and scope are limited. We are proceeding on the basis of the law of delict. Compensation will arise only after there has been a breach of a duty of care under the common law or various health and safety statutes by an employer who has wrongly allowed employees to be exposed to asbestos, resulting in pleural plaques or either of two other asbestos-related conditions. Proof must be provided.

As I said, the bill's scope is restricted. Some may argue that it should go further, but we have no plans at all to increase its scope. I understand that pleural plaques can constitute the appropriate proof, but proof must also exist that the pursuer was exposed to asbestos as a result of an employer's or another person's fault. The bill will allow compensation to be awarded only if such proof is offered. That has been the position for more than 20 years, during which it has been the status quo in Scots law.

**Angela Constance:** I understand what you are saying about pleural plaques being proof or evidence of exposure to asbestos and about the bill's restricted nature, but are there other routes to pursue under the law for individuals without pleural plaques who have been negligently exposed to asbestos and can establish evidence of their past exposure to it—for example, if they can prove that there has been a health and safety breach?

**Fergus Ewing:** Persons who have been diagnosed with pleural plaques have a definite physical manifestation of their exposure to asbestos that will become a focus for their anxiety—indeed, the condition has been described as a ticking timebomb. Awarding damages for anxiety and risk alone has never been part of our law of delict. I understand the argument that you advance, but we do not propose to take it up in considering this bill, or any other bill. I stress for readers of the *Official Report* of this meeting that

the bill is tightly framed. It is designed purely to restore the right of action to those who enjoyed that right before; it is not designed to extend that right in any way. It is important that I state that clearly for the record.

**Angela Constance:** I understand perfectly the point that you make, but I am simply trying to establish whether other avenues already exist for people without pleural plaques who have been negligently exposed to asbestos and can provide evidence of that. Is there an avenue that they can pursue in Scots law other than the avenue proposed in the bill?

**Fergus Ewing:** That question is for a lawyer in practice to advise on rather than me—I am not in practice. I am not aware of any legal redress that such a person would possess under Scots law, but there may be learned friends out there who disagree with me. The advice that I have received is that there is no such legal redress in the law of Scotland. That is where we stand. I am pleased that I have had the opportunity to state that clearly for the record on the Government's behalf.

**The Convener:** I tend to agree with the minister, but we will get information on that matter for the member. We have spent a long time on the first issue, as it is important, but I think that everybody is now clear. We shall move on.

None of us is in the business of making life worse for people. However, it was suggested last week that, by legislating, the Government could worsen the condition of people with pleural plaques through increasing their anxiety. Do you agree with or refute that argument?

**Fergus Ewing:** I do not really understand it, as the bill will restore the right to receive compensation to those who can prove that their pleural plaques arose as a result of negligence by their employers. As a result of the bill, people in such a situation will be entitled to receive compensation and will therefore be in the position that similar people were in until the House of Lords judgment. It might be better if I understood the argument, but I dismiss it anyway.

It is not only the money that is of comfort to people who pursue such claims—the finding of fault and the acceptance of responsibility are also of comfort. Giving back to people the rights that they have enjoyed for the past two decades and that they expected to continue to have will be likely to allay rather than cause anxiety.

**Stuart McMillan (West of Scotland) (SNP):** The insurance industry has suggested that as many as one in 10 of the adult population has pleural plaques. Professor Seaton's best estimate is that around 55,000 males in Scotland have pleural plaques. What is your assessment of the

prevalence of the condition in Scotland? What is the basis for your calculation?

**Fergus Ewing:** I read the *Official Report* of last week's meeting carefully and, if my memory serves me correctly, it was Professor Mark Britton who referred to the estimate that one in 10 people may have pleural plaques, but that was not his opinion; he quoted that statistic after hearing it from somebody else. If that is the case, there has been a form of medical hearsay. Later in that meeting, Professor Seaton was helpful in expressly saying that there was no scientific basis for the one in 10 figure. I think that the figure is therefore anecdotal evidence that may or may not have emerged from what a pathologist said to somebody at some time in the past. No scientific data on the matter exist.

On Professor Seaton's prediction, the bill's rationale, as set out in the policy and financial memoranda, which members will have read, clearly recognises that there are factors that are difficult to pin down when we make projections. Any estimate is an estimate, and we are making a forecast. We have sought to use the historical, empirical evidence that exists. We have considered the number of people who have pursued claims and have based our estimates of the bill's likely costs on the evidence of what has actually occurred. We recognise that, for various reasons, not everyone who has been entitled to make a claim has done so. It is accepted in the medical evidence that pleural plaques have a long latency period—it can be 20 or 30 years before they manifest themselves, presumably as the fibrous tissue seeks to cover the asbestos particles in the membrane or pleura surrounding the lung. Therefore, there are several variables.

Professor Seaton, the UK Government and the Association of British Insurers have all offered opinions—somewhat doom-laden predictions—but we have preferred to proceed on the basis of what has actually happened. I think that we will consider that evidence further, and I am certainly prepared to discuss it at length, but that has been our rationale. Rather than pick one expert who says that the number of people with pleural plaques is X thousand and another who says that it is Y thousand, we have considered what has actually happened. We have considered the number of cases that have been pursued and have identified that evidence as the yardstick for estimating the bill's costs, which are, of course, really eliminated savings, because they are costs that applied before the House of Lords judgment. Before that judgment, insurance companies were paying those costs and charging premiums. The term "increased costs" that they use is a slight misnomer; they will simply not make savings that might otherwise have arisen.

**The Convener:** Leaving aside the one in 10 figure, although we recognise the rationale behind the calculation of costs, which we will come to later, the 55,000 figure did, in fact, have evidence to back it. Has no empirical study been carried out on the likely number of cases?

**Fergus Ewing:** I am aware that there are differing views on this matter. I certainly saw Professor Seaton's statement regarding the figure of 55,000. I think that I am right in saying that he said that the figure was based on a fairly simple calculation. I have not studied that, nor have I had the opportunity since last week to obtain any detailed medical opinion on his view, which I would really have to do. In the interim, I do not know whether my officials can offer anything else in relation to Professor Seaton's estimate.

**Paul Allen:** The chief medical officer for Scotland has confirmed that the position is as it is outlined in the UK Government's consultation paper: that there is no hard-and-fast evidence about the level of pleural plaques. There are best guesses on the basis of studies rather than a clear-cut picture. Nick Starling said in evidence last week that the insurers' estimate was that the level was up to one in 10, which obviously suggests that that is the maximum. We have no figures, and I am not aware of any clear figures on the level of pleural plaques in the population. What we are clear about is that the key feature for the purposes of the bill is the number of people who have been diagnosed with pleural plaques who wish to pursue their claim and can prove negligence.

**Fergus Ewing:** Perhaps I can just add that it was useful last week that Gil Paterson referred to the Health and Safety Executive evidence that, in 2006, an estimated 1,258 cases of benign non-cancerous pleural disease were reported in the whole UK. That evidence derives from reports to the THOR/SWORD/OPRA surveillance schemes in 2006. I appreciate that that information may be for a slightly different purpose than the one that is before us today, but I mention it because the HSE figures seem to give broad support for our modest prediction as opposed to the alarmist predictions at the other end.

The HSE has dealt with this matter because it is its job to do so in relation to claims under the industrial injuries disablement benefit scheme. The HSE statistics support our broad approach that Scotland has 10 per cent of the instances of asbestos-related diseases in the UK and not 30 per cent. That figure is very much in line with the HSE statistics, which are some of the few hard-and-fast, factual statistics that we have as opposed to projections and hypotheses, which I know we must consider as best we can. However, I submit that the HSE data are generally

supportive of the rationale that the Scottish Government has employed.

**Stuart McMillan:** Thank you, minister. I do not know whether you have seen the document that committee members received over the past few days from the Association of British Insurers entitled "The 2007 GIRO Conference UK Asbestos Working Party II". The information in one of the document's pages puts a question mark for me over the evidence that the insurance industry provided to the committee about what may happen in the future if the bill is passed. The document states that the projection is that the trend of decreasing numbers of pleural plaques claims will continue in 2007. It is a stark reduction, going from just under 6,000 in 2003 down to about 1,200 or 1,300 in 2007. That information seems to conflict with other information that the insurance industry has provided.

**The Convener:** I think that the minister is operating under a bit of a disadvantage. I take it that you do not have the document, minister.

**Fergus Ewing:** I am sorry, but I do not, so I think that it would be wrong for me to offer a comment on it. I can comment on evidence that has been given to the committee because I read the witnesses' evidence from last week's meeting in the *Official Report*.

11:00

**The Convener:** In fairness to you, minister, I think that you should restrict your remarks to that evidence.

**Fergus Ewing:** We certainly heard the evidence from the insurance industry at last week's meeting. We have sought to engage with the insurance industry. The Cabinet Secretary for Finance and Sustainable Growth met industry representatives on 1 November 2007. Since then, officials have met other industry representatives, and Mr Swinney and I met representatives of Scottish Widows. We want to continue the dialogue with the insurance industry. That is the practical thing to do. I say that deliberately here today because that remains our position and I expect to continue to engage directly with the insurance industry. It performs a necessary role in society and is an important part of the economy—it has a job to do.

I was heartened to note, however, that Paul Martin secured the admission from Dominic Clayden at last week's meeting that, in fact, there may be no increases in premiums because of the bill. Indeed, the position seemed to be that the ABI was taking its position to avizandum, as it were, and intended to consider the bill after its passage was concluded. I am not sure that anything necessarily prevents the ABI from considering the bill as it is now. However, one prediction was that

there would be no increase in the insurance premiums, which would be good news.

On the other hand, of course, there have been somewhat dramatic reports of extremely high costs. The ABI has come up with those figures, but we do not recognise the basis for them. Some of them seem to be no more than a form of economic embellishment or financial embroidery. We prefer our rationale of looking at the facts as they have been in Scotland, supported by the HSE and by the statistics that we have been able to glean from the Scottish Court Service on the number of asbestosis-related cases raised in Scottish courts. We are therefore looking at the facts. We also engage in conjecture, but we think that some of the figures quoted have been close to alarmist, so we do not acknowledge that they are likely to be valid or accurate.

**The Convener:** Thank you. We turn now to Angela Constance.

**Angela Constance:** I think that the question that I intended to ask has been well explored.

**The Convener:** You are happy with the answers that you got.

**Angela Constance:** Yes.

**The Convener:** That means that we can move on to the legal issues questioning, which will be opened by Nigel Don.

**Nigel Don:** Good morning, minister. I want to try to rationalise for the sake of our legal brothers what we think the basis of the bill is. I fully understand your contention that the Government is simply trying to restore the law to the way that it was previously. That is admirable. However, there is an argument that the House of Lords demonstrated that the law previously was wrong and that previous awards of damages were made on the basis that pleural plaques were an injury, although actually they are not. Therefore, there seem to be two ways of rationalising what we propose to do. One is to allow a claim for the anxiety, which we must all understand is real. The alternative would seem to be to allow a claim for the internal scarring on the ground that it is a physiological change. Do you accept that pleural plaques do not fall within the existing recognised principles defining physical injury in Scots law?

**Fergus Ewing:** No. We take a different view of the legal significance of pleural plaques. We do not dispute the medical evidence, but we reach a different conclusion from that drawn by the noble lords. We do not accept that one can disaggregate the scarring from the anxiety. A pursuer in a case is taken as a person in the round and more than just a part of the case is considered. What is considered is the effect that the pleural plaques

have had on his or her life, the person's age and circumstances and all the facts of the case.

**Nigel Don:** If the bill is passed, are you confident that the courts will not use it to extend the law of delict to cover exposure to other materials that, with the benefit of hindsight, are known to be dangerous?

**Fergus Ewing:** I am pleased that you asked the question, because I am grateful for the opportunity to answer it. In our opinion, there is absolutely no way in which the bill, if it becomes law, could be used to widen the extent of claims to include claims that are based purely on anxiety. That cannot happen. As I said, the bill was drafted specifically to secure its objective and to go no further, which is important—I am grateful to Mr Don for allowing us to confirm that the bill has been framed with that very much in mind.

**Nigel Don:** How would the Parliament and the Government respond to groups that might make a similar case, albeit that they might involve smaller numbers?

**Fergus Ewing:** I am not aware of an analogous case or specific parallel. Exposure to asbestos has been an unwelcome part of Scotland's industrial history. Of course, there are occupational diseases, miners' diseases in particular, for which compensation of a different nature is available.

In any event, the bill has the specific and sole objective of restoring the right to claim compensation to people who sustained scarring—pleural plaques—as a result of exposure to asbestos following negligence by their employers.

**The Convener:** To some extent you have again anticipated what Angela Constance was about to ask.

**Angela Constance:** The minister might be aware that when Dr Hogg gave evidence to the committee he asked why exposure to asbestos should be treated differently from exposure to other types of risk. He asked why people who have been wrongly exposed to asbestos should be treated differently from people who have been negligently exposed to substances such as

“coal dust, silica dust, bauxite dust, beryllium, cotton dust and silica and iron mixtures”.—[*Official Report, Justice Committee*, 2 September 2008; c 1066.]

Those are all rather noxious substances, exposure to which is not in the best interests of people's health, as Dr Hogg made clear quite poignantly.

**Fergus Ewing:** I picked up a different aspect of Dr Hogg's evidence, which was about the Parliament's role in legislating. However, in the case of diseases that involve a significant element of pain and suffering, there is a clear entitlement to solatium. That applies to a great many conditions

that are associated with coal dust. Therefore, such cases are already dealt with in the corpus of the law of Scotland.

We plan to do nothing further than legislate in the context of the bill.

**Paul Martin (Glasgow Springburn) (Lab):** I want to ask about the principle of the Parliament's ability to legislate independently of concern about what follows and the impact that the legislation might have. Surely the principle is that the Parliament should be allowed to pass legislation without being concerned about what follows. There might be arguments about that in the context of the bill, but why should we be concerned about claims that might be made as a result of the Parliament setting the principle? I just pose the question to the minister; I have no particular view on the matter.

**Fergus Ewing:** I am not sure that I entirely understood the question. If a cause arises in future on which the Parliament thinks that there should be legislation, I have no doubt that Mr Martin and other members will raise the issue and we will consider it. However, we are here today to do a specific job, which we will do.

If Mr Martin is asking whether the Government is trying to fetter the Parliament in any way, the answer is that of course it is not. I am here to speak for the Government, not for the Parliament. When we legislate, we must be mindful of the consequences, especially the costs, which is why we have gone to considerable trouble to set out a rationale for the estimate of costs to business of £5.5 million to £6.5 million per year, which is set out in the financial memorandum.

If Mr Martin wanted to introduce a member's bill to extend the right to claim compensation to other circumstances, it is plain that he would be entitled to do so and that we would debate the matter as and when it arose.

**Paul Martin:** I am sorry about how I posed the question; perhaps I can simplify it. Should parliamentarians who are considering the bill be concerned that the bill might have the knock-on effect of establishing a principle whereby other claims could be made? Why should we be concerned about what might arise if the bill is passed? If we were concerned about the knock-on effects of bills, we might not progress with a number of bills.

**Fergus Ewing:** I think that the technical answer to your question is that any act of Parliament will be interpreted by the court on its terms—and only on its terms. If something is not in the act, it will not happen. Again, I am not quite sure what you are asking—I am sorry if I am failing to comprehend.

**Paul Martin:** My question might have been answered. I was asking whether, if the Parliament interrogates a bill before passing it, we should be concerned about the knock-on effects and other legislation that might arise.

**Fergus Ewing:** I think that I understand what you are driving at. When we pass a piece of legislation, it is incumbent on the Government to be as clear as possible about its impact. In this case, we are concerned to restore the right to claim compensation to people who had that right, but we are also anxious to ensure that there are no further consequences. We have decided to right a specific wrong.

Of course, members and people who are outside the Parliament might argue that there should be other reforms. That will always be the case. However, such reforms will not arise from the bill and nor can the bill ever be interpreted as founding a claim in another area. It is important to make clear to insurers and business in general that we are legislating because we think that it is right to do so and that we are not planning to extend the approach to other areas. I am grateful for the chance to emphasise that to the people who will no doubt be interested in reading the *Official Report*.

**Robert Brown:** The minister has clearly explained the motivation for the bill and the basis on which the bill is progressing, with which I am inclined to agree. However, there is an underlying issue. What is the principle of the legislation? Is it a matter of extending, in a general sense, the definition of what constitutes injury in the common-law principles of the law of Scotland, or is it—as I think that the minister is telling us—a matter of saying, “Okay, whatever the general principle might be, for this particular establishable and supportable reason, we are making an exception to it for people who suffer from pleural plaques”? On what principle is the Government proceeding?

11:15

**Fergus Ewing:** Mr Brown has cleverly posed two alternatives, neither of which I entirely agree with. I was about to answer, “The latter,” before I realised that Mr Brown was suggesting that we were proceeding to contradict the whole basis of the law of Scotland in relation to delict, which has developed over centuries.

We are simply restoring a right to claim for a specific group of people who have been wrongfully exposed to asbestos. That is it. We believe that those people have suffered an injury. We take a different view from that of the House of Lords on the significance of that. We are not granting a right to compensation on the basis that there has been no injury. There has been an injury. We differ on

the conclusions that we draw about its seriousness. We do not believe that the injury is trivial and we have received about 250 testimonies to that effect from people who are involved. However, the bill respects the principles of Scots law in connection with delict.

**Stuart McMillan:** The ABI argued in written evidence that the bill contravenes the right of insurers to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to which article 6 of the European convention on human rights refers. Are you satisfied that, in departing from the House of Lords judgment, the bill complies fully with the ECHR?

**Fergus Ewing:** Compliance with the ECHR is of course one test that must be considered for every bill. We say in the policy memorandum that we are satisfied that the bill complies with the ECHR and no player has contradicted that view, but I am aware that the ABI has raised that as a potential issue.

Perhaps the ABI refers to the retrospective element. We want to ensure that cases that are sisted—cases that are on ice or in abeyance—will be able to be pursued. I understand that the ECHR does not outlaw all retrospection but permits an element of it. The retrospection in the bill is for a clear and manifest purpose. It will not introduce an entirely new piece of legislation but restore the law to what it was when those claimants consulted their lawyers and pursued their claims.

We have considered the argument, which we do not think has merit. I do not know whether Paul Allen or Anne Hampson wants to add anything on the ECHR, since the committee has raised the issue.

**Paul Allen:** The UK Government’s consultation paper says clearly that the matter is for the Scottish Parliament, which suggests that it accepts that the bill falls within our devolved competence and implies that it thinks that the bill is within the ECHR. I do not know whether Catherine Scott has anything to say from a legal point of view, but my understanding has always been that the bill is ECHR compliant.

**Catherine Scott (Scottish Government Legal Directorate):** The Government considered article 6 of the ECHR as part of its preparations for introducing the bill. The Government is satisfied that the bill is not incompatible with the convention.

**Robert Brown:** I will ask about a technical development. Given the principle that a person may bring only one claim in respect of a negligent act—that is subject to rules about provisional damages—could the bill create a situation in which

someone who received compensation for pleural plaques might have difficulty in or be debarred from subsequently raising an action for a more serious ailment such as mesothelioma?

**Fergus Ewing:** I was about to offer a legal opinion, but I paused, because I am not entirely certain that it would be correct.

**The Convener:** I am sure that it will come with the appropriate health warning.

**Fergus Ewing:** In the old days, one would take several months before doing this kind of thing.

I understand that no difficulty exists, because of the Administration of Justice Act 1982—I will perhaps ask Catherine Scott to give me marks out of 10 in a moment. I understand that a claim for mesothelioma can be raised if that condition later develops. The Westminster Parliament introduced a provision on that in the early 1980s, to which Frank Maguire referred last week when he gave an example of a statutory measure that was necessary and of why one cannot always rely on m'learned friends in the House of Lords to do what people in society believe is necessary for fairness. I ask Catherine Scott to say whether that statement is correct, broadly speaking.

**Catherine Scott:** The Administration of Justice Act 1982 was considered while we drafted the bill. We are satisfied that the interaction with that act is effective.

**Fergus Ewing:** Angela Constance made the point last week that if someone raises an action for pleural plaques, that establishes exposure to asbestos. Many people who go on to contract mesothelioma die before their claims are settled, which causes great anguish and anxiety. I am not casting aspersions about who is responsible for any individual case. However, one argument is that when pleural plaques and negligence have been established, it is easier to sustain a successful claim for a life-threatening disease, if someone is in that unfortunate position. Angela Constance was right to raise that in her questioning.

**The Convener:** The issue has been canvassed.

Does anyone have other questions under the heading of legal issues?

**Nigel Don:** When should we discuss forum shopping? Many folk have worked both north and south of the border. Would no more than a week in a Scottish shipyard be enough to allow someone who habitually worked in England to bring a claim in Scotland? What is the legal and financial significance of that?

**The Convener:** The point is interesting.

**Fergus Ewing:** We have anticipated and considered the matter, which might be relevant if

the Ministry of Justice in England and Wales decides not to introduce a counterpart measure. That would mean that the law in Scotland gave people a right to claim compensation if they could establish exposure and negligence, whereas that would not be the case in England and Wales. The advice to us is that people furth of the border could not succeed unless they established a substantial Scottish connection. The normal principles of jurisdiction apply, so forum shopping would not be easy.

The issue is relevant. I do not know whether Catherine Scott or Paul Allen has anything to add.

**Catherine Scott:** I support the minister. The normal rules of jurisdiction and applicable law would apply. Those rules are well established and are designed to address issues such as forum shopping. They would sort the matter out.

**Nigel Don:** I do not know what "substantial" means in this context. Will you quote a case or a number that shows us what it means?

**Fergus Ewing:** A separate corpus of law deals with establishing jurisdiction. That law has developed to ensure that Scotland deals with Scottish cases and not with cases from Panama, Uruguay or England, for example. I have no details of that law with me but, in preparation for today's meeting, I was advised that a substantial Scottish connection is needed. If someone had worked not in Scotland but in a shipyard in England, it is common sense that establishing liability would be difficult.

Nigel Don is right to raise the matter. The Scottish Government wants no dubiety about the issue, and we do not believe that it exists. Of course, that is another point on which we are happy to engage with all the interested parties, such as the ABI and the Law Society of Scotland, which supports the bill, as does the Faculty of Advocates. We are concerned to have an open approach and we will discuss the issue if it is serious. Were it a serious issue, I would be concerned. Westminster can decide what is done down south, but we do not want to be a proxy for paying claims down south. No one would propose or welcome that.

Having set out the general line of argument, I should say that we dismiss forum shopping, because we do not believe that it is a factor. However, I have stated the position for the record, so that if others take a contrary view, they can contact us and let us know their arguments. I have no doubt that the point could be considered if the bill proceeded to stage 2, when amendments could be lodged to restrict further the possibility of forum shopping. I am glad that Nigel Don raised that general issue, because it is germane. I welcome the committee's interest.

**The Convener:** That takes us neatly to financial matters.

**Cathie Craigie (Cumbernauld and Kilsyth) (Lab):** Good morning, minister. I was grateful to hear you say in your opening remarks that you are not a practising solicitor, so we will not expect any bills for the questions that we are about to put.

You have discussed some of the financial aspects of the bill and commented on evidence that the committee heard last week. Given that asbestos-related conditions are asymptomatic and the value of any claims is likely to be relatively low, will the costs of litigating in relation to such conditions be disproportionately high?

**Fergus Ewing:** I am hunting through my papers for the financial memorandum, which sets out the figures involved. The best figure that we could obtain on the amount of compensation that a pursuer might expect to get in Scotland is £8,000. That figure is based on information and 2003-04 settlement figures that we received from Thompsons and others, and is in paragraph 16 of the financial memorandum. That is the amount of money that the claimant would receive and our estimate is that the defender's cost would be £6,000. Those are just general average figures and are not necessarily the figures for a particular case. As the financial memorandum says:

"This figure is an average derived from litigated and unlitigated claims".

Many people might conclude that it would be unfair for the injured party to receive £8,000 and for lawyers to receive £14,000. That second figure includes not only lawyers' fees but the cost of reports and medical evidence, which are not cheap, as Robert Brown will know from his experience. The figures also include other costs, such as VAT.

I am not here to castigate the legal profession but, as a lawyer, I will say that the level of costs is a concern. I have seen a press release from the ABI on that and I have seen other material from lawyers that challenges the level of costs. I hope that Lord Gill's review will examine that seriously, particularly whether the Court of Session is the appropriate forum for cases that have relatively small monetary value and are in a well-trodden area of law where no legal issues of note emerge. I am pleased that the Law Society has developed protocols that are designed to address the very problem that Cathie Craigie rightly raises. On the face of it, the lawyer receives quite a good deal in comparison with the injured party.

Fees might be substantially less in cases that do not go to court. When a case goes to the Court of Session, a huge amount of work and quite a lot of lawyers are involved. Perhaps that is why the figures appear to be relatively high.

I have invited the ABI by correspondence to consider the matter. I have not yet received a reply, but I am happy to engage with it if it so wishes.

**Cathie Craigie:** I am happy that discussions about that matter are on-going. I hope that we will be able to learn from and understand better the issue and perhaps improve procedures when the Gill review reports.

How are judges expected to calculate the amount of damages to be awarded?

11:30

**Fergus Ewing:** You might not be surprised to hear me say that that is a matter for judges and not for Government ministers. That is because of the separation of powers. It is not for Government ministers to opine on such matters; it is for judges to do so. We sought the best available evidence on the levels of award that have been made over the past 20-odd years, which brought us to the figures in the financial memorandum.

We have no reason to take the view that claims will be settled for a lesser value than before. I am reminded that our judges generally look to previously reported cases as a yardstick or indication of what they should award in cases of a similar nature. That is part of the process of assessing quantum in any case. However, the bill deals with liability; it does not deal with quantum.

**Nigel Don:** As I understand it, the bill will continue legal liability, but on a different basis. It seems to be accepted now that pleural plaques are not the major injury on which the original damages were awarded. Is it therefore possible that, although the bill says that the damage is not *de minimis*, judges might decide nonetheless to award nominal damages rather than the current figures, which are rather higher than nominal?

**Fergus Ewing:** I cannot speak for judges, but I have no reason to believe that awards will be out of line with those in the past, nor do I accept the characterisation that judges in the past accepted that pleural plaques cause pain. I am not aware of any evidence that that was the case, although that seems to be the assumption that underlies your question. It is for judges to study past cases. I would be surprised if there was evidence in the past that pleural plaques cause pain and suffering. I am not sure that I accept the premise of your question.

**Cathie Craigie:** Just so that I am clear in my mind, the figures in the financial memorandum and your comments this morning are based on cases from the past that you have examined. Is it correct that nothing in the bill should change the case

history on which judges have been able to rely for guidance in settling cases?

**Fergus Ewing:** That is absolutely correct. It will be for judges, not Government ministers, to assess quantum, as it always has been. The information that we obtained is the best information that we could obtain. It presupposes around 200 cases of pleural plaques in Scotland a year—I think that 218 is the actual figure, once we add in figures from various Government departments and so on.

I was anxious that we did not get evidence from the insurance industry when we asked for it, although there has been a lot of publicity of late about other figures that we have seen. I was anxious to determine whether there was any method of corroborating the information that we obtained from Thompsons, which repeated in its evidence to the committee last week that it handles 90 per cent of claims. Although I did not doubt that evidence, I was anxious to get some general corroboration that that was the incidence of claims. We got a broad indication from the Scottish Court Service that that is about the right level of asbestos-related cases raised in the Court of Session. There were 287 cases in 2005, 325 in 2006 and 279 in 2007. I was anxious to ensure that we had the best possible evidence for the committee, because I take financial memoranda extremely seriously.

If insurers want to share more information with us, we will examine it. I appreciate that there are issues of commercial confidentiality, which they raised to explain why they did not come forward with more statistics at last week's evidence session.

**Cathie Craigie:** One of my colleagues might go into that in more detail.

I am sure that the minister is aware that the UK Government is consulting on a paper that considers the issues in relation to changing the law of negligence and invites views on whether that would be appropriate. It also asks for views on the merits of establishing a no-fault payment scheme for individuals who have been diagnosed with pleural plaques. Has the Scottish Government explored the option of introducing such a scheme as an alternative to changing the law?

**Fergus Ewing:** Yes. We looked at a no-fault compensation scheme. Cathie Craigie is right: the Ministry of Justice's consultation paper refers to a no-fault scheme on a great many occasions—34—and considers the possibility of creating a freestanding no-fault compensation scheme. We believe that there are serious difficulties with that, which I think the Ministry of Justice in England recognises.

There are several reasons for our view. First, we are not convinced that such a scheme would be appropriate in Scotland, because the issue of fault is central to the legislation. Compensation arises because there has been fault on the part of employers. That is uppermost in the mind of claimants. They feel aggrieved that someone has caused them injury because of carelessness and breach of the law. Fault is very much part of asbestos cases, and it is deeply felt by all claimants and their former colleagues. Many of those who are afflicted by pleural plaques might feel that, apart from the money, the compensation should involve some recognition of the negligence or fault that occurred.

We are aware of the difficulties that arise when an approach that involves setting up a separate fund is taken. Doing so would cause delays and there would perhaps be a more open-ended liability than in a fault-based system, which is what we are pursuing. Compensation funds have been set up, such as coal health compensation schemes for chronic obstructive pulmonary disease and for vibration white finger. We considered but rejected taking that approach in this case. We would probably have had to wait until the next session of Parliament had we gone down that route, even if we could find a huge pot of money for it.

Finally, the history of schemes such as the coal health schemes has been chequered in relation to some of the issues that formed the thrust of Cathie Craigie's first question.

**The Convener:** Before we go to Robert Brown, I make the point that you are correct in what you say about the operation of those schemes. One issue is that the number of cases was grossly underestimated.

**Fergus Ewing:** I noticed that that was the case in relation to one of the schemes—I think that the number of cases was twice what it had been previously. Since we propose to restore the pursuit of claims on the basis of proving fault—proving not only that pleural plaques exist but that they exist because of wrongful exposure to asbestos—we argue that our rationale of looking at the facts is the correct approach.

Even if we do not have the support of all members of the House of Lords, I am reassured by the fact that Lord Rodger said that the floodgates have not opened. The law has been as it has been for the past couple of decades and more, and the floodgates have not opened—there has not been an explosion. There has been the possibility of website touting and scan vans and the wider dissemination of information about pleural plaques—a website contains 11 pages of details of legal firms that operate in the field. However, despite all that, despite the increased

knowledge, despite the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 being passed in the previous session of Parliament and despite this bill, the floodgates have not opened. There are those who say that there will be 25,000 or 30,000 claims, despite the fact that in the Court of Session there are only about 300 personal injury claims a year. The evidence is not with them; it is with us.

**Robert Brown:** Before we leave the question of quantification, I want to be clear that the bill will do what it says on the packet. It does not expressly reverse the House of Lords judgment, which, among other things, said that pleural plaques were symptomless and did not cause any harm, and that anxiety was not compensatable. Given that the earlier judgments on which damages were based—which I confess I have not read—were made by lower court judges in England, is there any scope for the bill to be interpreted in a way that differs from the Scottish Government's interpretation, taking account of the House of Lords judgment, which has not been overruled?

**Fergus Ewing:** I think that Robert Brown, like most lawyers, knows the answer to his question before he has finished framing it.

**Robert Brown:** I do not, which is why I am asking it.

**Fergus Ewing:** I would have thought that you might know. The answer is that acts of Parliament, such as acts of the Scottish Parliament in devolved areas, are binding on the lowest person in the land and on the House of Lords. As Robert Brown knows, House of Lords decisions on civil matters have a particular status in Scots law. They are not binding; they are not part of our law—

**The Convener:** Persuasive is the word.

**Fergus Ewing:** Indeed. They are persuasive. That is, persuasive not in the way that we use the term but in a way that has legal significance, which means that it is expected that a House of Lords judgment will be followed. I believe that there is one case in which the House of Lords judgment was followed—I think that it was in the outer house, but I could be wrong. We expect it to be followed, but it is not necessary for legislative purposes that we name the case in the act of Parliament. The case arose from England rather than from Scotland. As a matter of technical practice, the law applies because it is an act of Parliament. It will become binding because it is an act of the Scottish Parliament in a devolved area. That is the technical answer.

**Robert Brown:** With respect, minister, that is not quite my point. My point is that the bill indicates that if someone has pleural plaques it is compensatable—it is not negligible; it is not de minimis—but beyond that it does not give any

indication of the basis on which judges are to quantify that. Given the views that were expressed in the House of Lords—which on quantification are not expressly overturned—is the bill watertight? Can it deliver damages at something like the level previously indicated? Should we have any concerns about that?

**Fergus Ewing:** As I have said several times, the bill simply restores the status quo ante, so the law will be as it was before the House of Lords judgment. The question is: in the light of the House of Lords judgment, could a lower amount be awarded? I have already said that that is a matter for judges and that the bill deals with liability rather than with quantum. The bill does not deal with quantum issues but, as I outlined in my response to Angela Constance's question, we can see no rationale that would lead to a different approach being taken from the one taken in the past in assessing quantum, which was to examine previous cases and follow them as a broad yardstick and aid in computing the compensation amount.

**Paul Martin:** What is your current assessment of the financial implications of the bill to both business and the state?

11:45

**Fergus Ewing:** The financial consequences are set out in the financial memorandum, which is one of the documents that had to be submitted with the bill. As Paul Martin knows, a summary of the costs is set out in the memorandum, on page 9, and the figures therein have been consulted on. The headline figures are that there is £17,125,000 to settle existing cases and, thereafter, there is broadly speaking, £5.5 million per annum, increasing to £6.5 million per annum at the peak—in around 2015—and then decreasing. We mention costs that will apply to the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform and costs on local authorities of £1 million to settle existing cases and £500,000 per annum increasing to £600,000 per annum. There will be smaller costs to the courts and the legal aid costs will be negligible. The cost to the Scottish Government will be £75,000.

Those are our best estimates and the memorandum explains how we arrived at each figure. At my behest, that explanation is provided in some detail because of the seriousness that we attach to the task. I have already explained our fundamental rationale in arriving at the figures, which is that we considered what has actually happened in the past—not what might happen according to somebody else's hypothesis.

**Paul Martin:** We have heard evidence that the regulatory impact assessment hugely underestimates the bill's potential cost and that the annual cost to Scotland of legislating in the manner that is proposed in the bill would be between £76 million and £607 million. What are your views on that evidence?

**Fergus Ewing:** I have seen those annual figures, which were quoted by the ABI. Obviously, we do not accept those figures and we do not recognise them as being the best estimate because of several factors, some of which I have already described. The figures presuppose that Scotland would have a 30 per cent share of pleural plaques cases, but evidence suggests that there would be a much lower figure of 10 per cent, if that. Those figures are based on a scenario in which the number of people who make claims will increase greatly: basically, the ABI has assumed that there will be a massive growth in the number of people making claims.

We have heard evidence that the incidence of asbestos exposure in the population may be higher than is known to be the case and that the number of people with pleural plaques may be greater than the number who have submitted claims. That is absolutely taken as read. However, we have worked on the basis of the number of people who have made claims and the number of people who have been diagnosed as having pleural plaques and who can prove that they were exposed to asbestos in the workplace as a result of a breach of a duty of care under common law or the various health and safety statutes over the years. In essence, we believe that our approach is correct. Although we understand the approach that others take, we disagree strongly with the resultant figures.

**Paul Martin:** We have been given a figure of an annual cost of between £76 million and £607 million. Will you put on record what you expect the annual figure to be? I appreciate that you have given us some figures, but what is your estimate of the total?

**Fergus Ewing:** Looking to the future, we expect the cost on business and the state to be of the order of £5.5 million per annum, increasing to a peak of £6.5 million around 2015.

**Paul Martin:** What discussions have taken place with United Kingdom Government ministers about their intention to invoke the statement of funding policy?

**Fergus Ewing:** The MOD has, historically, accepted liability in cases in which it has been liable. We expect that to continue and have heard nothing to the contrary from the UK Government Ministry of Justice or from any other UK Government ministry. Indeed, in a statement to

Parliament last November, the First Minister made it clear that that principle is to be applied. We expect the MOD to pay for MOD cases in the future, as it has in the past. We also expect that principle to apply to the Department for Business, Enterprise and Regulatory Reform.

**Paul Martin:** Have you or the Cabinet Secretary for Justice met UK ministers to discuss the issue?

**Fergus Ewing:** I have exchanged correspondence with Bridget Prentice, the minister who has, I understand, been dealing with the issue in relation to a consultation paper in England. I have written to her and would be happy to meet her to discuss with her any aspects of the matter. I do not know whether there is a particular purpose that Mr Martin thinks would be served by such a meeting, but I would be happy to meet her to discuss issues of mutual concern.

**Paul Martin:** I asked the question because helpful evidence may be provided in such an exchange of correspondence, which would add to the debate. I understand, from the information with which we have been provided, that the statement of funding policy will be an integral part of any settlement. It will be important that there are exchanges of correspondence and that constructive dialogue takes place in respect of the statement of funding policy.

**Fergus Ewing:** I have no objection in principle to pursuing that course of action, although I do not think that anything in the correspondence that I have received would particularly constitute evidence. I would welcome an assurance—which we have not yet received—from Bridget Prentice that the MOD—and other UK departments that are responsible for negligence in relation to asbestos conditions—will continue to accept their responsibility. I assume that Mr Martin is not suggesting that their doing otherwise would be correct.

**Paul Martin:** I am asking a straightforward question. Has there been a constructive dialogue on securing the success of the bill—if it is enacted—by ensuring that UK Government ministers comply with the statement of funding policy, and that the MOD or any other organisation that is responsible accepts liability? I am not suggesting anything contrary to what you say: I am just asking whether there has been a constructive dialogue between your department and UK Government ministers.

**Fergus Ewing:** I have exchanged correspondence with Bridget Prentice and we have made it clear that we expect that what has happened in the past will continue. We raised the issue last November and there has been no contradiction by Bridget Prentice or anybody else. I assume that if Westminster were otherwise

minded—that seems to be the issue behind Mr Martin’s question—it would say so, but it has not. Nevertheless, I am in correspondence with Bridget Prentice and it would be helpful for Westminster to confirm that the MOD will continue to honour its commitments to Scotland in the future, as it has in the past, in accepting and settling cases in which there has been negligent exposure to asbestos of its former employees. I hope that that is something around which the committee can unite in agreement.

**The Convener:** It is appropriate to confirm to Fergus Ewing that I wrote last week on behalf of the committee to Bridget Prentice, the UK minister, and the Secretary of State for Defence regarding these important issues, which need to be resolved. We have not yet received a reply.

The minister will have got the message from committee members that there are concerns about the accuracy of the financial memorandum. I have listened to what you have said and there is one point on which I take issue with you. If we accept the UK figures and that the argument that 30 per cent of liability will come from Scotland is wrong, we have also to accept that 10 per cent seems to be an unduly optimistic figure. We need to bear in mind the profile of the Scottish engineering industry over many years, including the nationalisation of the shipyards in the mid 1970s and the situation at Rosyth. Also, the history of asbestos cladding in Glasgow means that many employees in the council’s former building and works department were engaged in stripping out asbestos. With all that in mind, the figure of 10 per cent seems to be unrealistic.

**Fergus Ewing:** My first instinct was very much along those lines in examining the issue with officials as part of the early preparation of this work. However, when one looks at the available evidence, it seems to me that the 30 per cent figure cannot be sustained by any data. First, perhaps I can quote the data that persuaded me that the qualitative arguments to which the convener has alluded, and which may at first sight lead to the conclusion that there would be a greater proportion of asbestos-related disease in Scotland than in England, actually does not appear to be the case. The Health and Safety Executive data on asbestos-related mesothelioma deaths show approximately 10 per cent of the Great Britain total being in Scotland. I have detailed data on this, but I am just giving you the headlines.

Secondly,

“data on asbestos-related claims assessed under the State Industrial Injuries Disablement Benefit Scheme”

show that

“the last five years has Scotland accounting for 10.4% of

mesothelioma claims, 12.2% of lung cancer with asbestosis claims and 5.3% of pleural thickening claims.”

In an area in which hard data are not always easy to find, the HSE data have persuaded me that the Government has some ballast to support our rationale that 10 per cent and not 30 per cent is a fair figure.

**The Convener:** It seems to me that it is more than just a passing coincidence that the 10 per cent figure is also the pro rata figure for the population. As you said, every instinct tells you that the figure is seriously open to question.

**Fergus Ewing:** That is not what the HSE data indicate. The convener would have to take up the issue with the HSE.

I am not a student of industrial history in England, but I know that a great many shipbuilding workers would also have been exposed to asbestos in yards there. The data that we have are the data upon which we have proceeded. There is no basis in the evidence that we have seen for assuming a 30 per cent rather than a 10 per cent allocation.

In your opening remarks, convener, you said that committee members have expressed dissatisfaction or concern on elements of the Government figures in the financial memorandum. I may not be remembering all the questions that have been put, but I am not aware that members have expressed concern or doubt about specific items in the financial memorandum. If that is the case, however, I am happy to do my best to answer the questions. You may have concerns, convener, but I cannot recollect others raising issues that have cast doubt on any of the major figures that we cite in the financial memorandum. I say that for the record and to be clear on the matter. Given the relative scarcity of evidence, I think that we have done a relatively good job. That said, if any member thinks that the Government has erred in any way, I am open to hearing their reasoned evidence-based doubts.

**Nigel Don:** You commented on the number of cases about which the Scottish Court Service has alerted you. I do not doubt the statistics—my question is simply whether a significant number of cases may go under the radar, so to speak. I do not know how the industry works in this regard. Is it likely that a significant number of cases that the insurance companies and local authorities deal with are handled without the rest of the world noticing them? Could the numbers be significantly wrong because a significant amount of stuff does not appear in the numbers?

12:00

**Fergus Ewing:** As is the case with so many of the questions, you are asking whether something

is possible. It is possible that I will win the lottery tomorrow, although it is unlikely, given that I do not buy tickets. To be serious, it has not been easy for us to obtain much of the data that we would like. I alluded to the fact that the insurers have not provided us with data. I understand why they have not done so, although they have more recently felt free to share data on the costs that they say might arise from the bill; we disagree with them on that issue. They have not shared data relating to the cases that they have handled.

We have data from the Scottish Court Service, the HSE, the CMO and the lawyers who operate in the area, principally Thompsons Solicitors, who say that they have dealt with 90 per cent of cases and have given us information on the number of cases that they handled between 2004 and 2006. We have taken an average figure of 200 from that information and have added 18, to take account of cases in the public sector that we would not expect Thompsons Solicitors to handle. During the consultation on the partial regulatory impact assessment that took place between February and April this year, we received only three responses from local authorities, which was a bit disappointing. However, my officials made further inquiries to ascertain whether we were on the right track.

It has not been an easy task for us to get data, but we are confident that the data that we have are the best that are available to us. If, in subsequent conversations, the insurers were to tell us that they have handled 1,000 cases in Scotland and provide us with their records, I would, of course, consider that information and engage with them. However, the figures that we have produced were consulted on in spring this year. I understand that neither they nor the quantum of the figures have been contradicted. No one has told us that the average figure for compensation is not £8,000 but £4,000 or £16,000, or that the number of cases per year is not 200 but 2,000 or 500. If they want to do so, my door is open. We have approached the issue in a logical way. Through their industry, my officials have procured the best evidence that is available to us: we have proceeded on the basis of that evidence.

**The Convener:** I have a final question that is probably in breach of the rule book of politicians, because I genuinely do not know the answer to it. The shipyards that were nationalised in the late 1970s were privatised some years into the Thatcher Government—probably about 10 years later. Would there have been an employers' liability insurance policy, or would there have been a self-insurance scheme, as a result of which the state would be liable for any claims occurring during that time?

**Fergus Ewing:** We will double-check that. From looking at various other issues over the years, I understand that it is the habit of public bodies in Britain to self-insure for the period for which they have liability and, thereafter, for private companies to be required to obtain employers' liability insurance. We will come back to the committee on that point.

**The Convener:** That is fine.

**Stuart McMillan:** Last week, the committee was told that pleural plaques could be "a good thing". Do you think that pleural plaques are "a good thing"?

**Fergus Ewing:** I certainly do not. To be fair to last week's witnesses—I think that Dr Abernethy was the first to raise the issue—it was plain that they were not making that argument seriously. Paul Martin was right to pursue the point with tenacity last week. If insurers were asked about the matter, they would say that pleural plaques are not "a good thing", but an injury that causes extreme anxiety. It was unfortunate that the phrase arose, but it was dealt with well by members of the committee last week.

**The Convener:** As members have no further questions, I thank the minister and his officials for their attendance. I note the minister's point about on-going dialogue. Can I take it that you will share with us anything pertinent or relevant that arises?

**Fergus Ewing:** I will do so in so far as that does not contravene any rule of correspondence. We want to be as open as possible in relation to these matters. I will be interested to see what reply the committee obtains from Bridget Prentice.

12:05

*Meeting continued in private until 12:46.*

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