Passage of the

Damages (Asbestos-related Conditions) (Scotland) Bill 2008

SPPB 129
Passage of the

Damages (Asbestos-related Conditions) (Scotland) Bill
2008

SP Bill 12 (Session 3), subsequently 2009 asp 4

SPPB 129
Contents

Foreword

Introduction of the Bill

Bill (As Introduced) (SP Bill 12) 1
Explanatory Notes (and other accompanying documents) (SP Bill 12-EN) 5
Policy Memorandum (SP Bill 12-PM) 15
Delegated Powers Memorandum (SP Bill 12-DPM) 25

Stage 1

Stage 1 Report, Justice Committee 27
Written evidence and supplementary written evidence to the Justice Committee 129

Correspondence:
Minister for Community Safety to Ministry of Justice, 24 June 2008 403
Ministry of Justice to Minister for Community Safety, 10 August 2008 405
Minister for Community Safety to Ministry of Justice, 27 August 2008 406
Ministry of Justice to Minister for Community Safety, 29 September 2008 408
Ministry of Defence to Justice Committee, 30 September 2008 409
Minister for Community Safety to Ministry of Justice, 9 October 2008 410
Minister for Community Safety to Justice Committee, 20 October 2008 412
Secretary of State for Business, Enterprise and Regulatory Reform to Justice Committee, 30 October 2008 414
Secretary of State for Business, Enterprise and Regulatory Reform to Finance Committee, 30 October 2008 415

Extract from the Minutes of the Parliament, 5 November 2008 416
Official Report, Meeting of the Parliament, 5 November 2008 418

Stage 2

Marshalled List of Amendments for Stage 2 (SP Bill 12-ML) 443
Groupings of Amendments for Stage 2 (SP Bill 12-G1) 444
Extract from the Minutes, Justice Committee, 2 December 2008 445
Official Report, Justice Committee, 2 December 2008 446

Before Stage 3

Correspondence from the Minister for Community Safety to the Justice Committee, 25 February 2009 452
Revised Financial Memorandum (SP Bill 12-FM) 500

Stage 3

Marshalled List of Amendments selected for Stage 3 (SP Bill 12-ML2) 510
Groupings of Amendments for Stage 3 (SP Bill 12-G2) 514
Extract from the Minutes of the Parliament, 11 March 2009 515
Official Report, Meeting of the Parliament, 11 March 2009 516
Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected.

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

Written submissions to the Justice Committee at Stage 1 were originally published on the web only. These submissions, along with supplementary written submissions and additional correspondence, are incorporated in this volume after that Report.

At Stage 2, no amendments were agreed to. An 'As Amended' version of the Bill was not, therefore, produced.

Although no amendments were agreed to at Stage 2, following further correspondence from the Minister for Community Safety, a Revised Financial Memorandum was produced for the Bill. The correspondence and the Revised Financial Memorandum are included in this volume before the material relating to Stage 3.
Damages (Asbestos-related Conditions) (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

1 Pleural plaques
   (1) Asbestos-related pleural plaques are a personal injury which is not negligible.
   (2) Accordingly, a person who has them may recover damages in respect of them from a person liable for causing them.
   (3) Any rule of law the effect of which is that asbestos-related pleural plaques are not a personal injury or are negligible ceases to apply to the extent it has that effect.
   (4) But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable for causing (or materially contributing to the development of) a personal injury.

2 Pleural thickening and asbestosis
   (1) For the avoidance of doubt, a condition mentioned in subsection (2) which has not caused, is not causing or is not likely to cause impairment of a person’s physical condition is a personal injury which is not negligible.
   (2) Those conditions are—
       (a) asbestos-related pleural thickening; and
       (b) asbestosis.
   (3) Accordingly, it is not necessary for a person seeking damages in respect of asbestos-related pleural thickening or asbestosis to prove that it has caused, is causing or is likely to cause impairment of the person’s physical condition.
   (4) But where a person seeking damages claims, in relation to the amount of damages sought, that the thickening or asbestosis has caused, is causing or is likely to cause such impairment, it remains for the person to prove those matters.
3 Limitation of actions

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

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

(i) asbestos-related pleural plaques; or

(ii) a condition mentioned in section 2(2) which has not caused, is not causing or is not likely to cause impairment of a person’s physical condition; and

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

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 Commencement and retrospective effect

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

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

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

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

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

5 Short title and Crown application

(1) This Act may be cited as the Damages (Asbestos-related Conditions) (Scotland) Act 2008.

(2) This Act binds the Crown.
Damages (Asbestos-related Conditions) (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

Introduced by: Kenny MacAskill
On: 23 June 2008
Bill type: Executive Bill
DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Damages (Asbestos-Related Conditions) (Scotland) Bill introduced in the Scottish Parliament on 23 June 2008:
   - Explanatory Notes;
   - a Financial Memorandum;
   - the Scottish Government’s Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 12–PM.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The House of Lords (HoL) decision in Johnston v NEI International Combustion Ltd published on 17 October 20071, ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action because they do not signify damage or injury that is sufficiently material to found a claim for damages in tort. The Judgment is not binding in Scotland, but is highly persuasive. The equivalent cause of action in Scotland is “delict”: in a delictual action a person may claim civil damages against another person responsible for a wrongful act that has caused loss or injury.

5. The purpose of the Bill is to ensure that the HoL Judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. As it is possible that the courts might look to Johnston as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Bill also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Scotland. The Bill does not affect the law on quantum (the amount that is paid in damages). Where a person sustains a physical injury which is compensatable the compensation they receive can include sums for e.g. anxiety and risk of the person’s condition deteriorating in the future.

Section 1 – Pleural plaques

6. This section addresses the central reasoning of the Judgment in Johnston by providing that asbestos-related pleural plaques are an actionable personal injury. Subsections (1) and (2) provide that pleural plaques are a non–negligible personal injury in respect of which damages may be recovered, i.e. that pleural plaques are material damage that is not de minimis for the purposes of claiming delictual damages. Subsection (3) disapplies any rule of law, such as the common law principles referred to in the Johnston judgment, to the extent that their application would result in pleural plaques being considered non-actionable. Subsection (4) ensures that section 1 does not otherwise affect the operation of statutory or common law rules for determining delictual liability.

1 http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm
Section 2 – Pleural thickening and asbestosis

7. This section makes provision against the possibility that the ruling in Johnston may be applied in relation to asymptomatic pleural thickening and asbestosis (because the courts may consider that the ratio (principles of law underlying and justifying the decision) in Johnston provides authority in these cases). Subsections (1) and (2) provide that where asbestos-related pleural thickening or asbestosis has not caused, is not causing or is not likely to cause a physical impairment it is a non-negligible personal injury i.e. the condition is material damage that is not de minimis for the purposes of claiming delictual damages. In subsection (1) the phrase “for the avoidance of doubt” is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are not actionable. Subsections (3) and (4) provide that a person suffering from pleural thickening or asbestosis need only prove symptoms, or the likelihood of symptoms developing, if they wish that matter to be reflected in the amount of damages awarded.

Section 3 – Limitation of actions

8. To ensure that claims do not become time-barred during the period between the date of the Judgment (17 October 2007) and the date the Bill comes into force, this section provides that this period does not count towards the three-year limitation period for raising an action of damages in respect of the three conditions covered in the Bill. Subsection (1)(a) addresses the kinds of claims to which this section applies, that is, claims involving the asbestos-related conditions covered by sections 1 and 2. This includes claims that have been raised in the courts before the Bill comes into force as well as future claims. Subsection (1)(b) provides that, where actions have been raised before the date the Bill comes into force, this section will apply only if they are ongoing at that date. The effect of this section is to address cases that may be at risk of being dismissed by the courts on time-bar grounds, e.g. a person who developed pleural plaques in December 2004 and whose case could be considered time-barred by December 2007 might have delayed raising their case thinking they had no right of action under the Johnston judgment. The person may then have lodged their case in January 2008 because of the Government’s announcement that it intended to bring this Bill forward. Without this provision, which would stop the time-bar clock running from October 2007 until the date the Bill comes into force, that person’s claim could be dismissed as having been raised beyond the three-year limitation period.

Section 4 – Commencement and retrospective effect

9. This section details the provisions for commencement and retrospection. Subsection (1) provides that the substantive provisions of the Bill will come into force on a date appointed by Scottish Ministers by commencement order. The remaining subsections explain the retrospective effect of the provisions of the Bill. Subsection (2) provides that sections 1 and 2 of the Bill are to be treated for all purposes as always having had effect. This is necessary in order to fully address the effect of the judgment in Johnston, because an authoritative statement of the law by the HoL is considered to state the law as it has always been. Subsection (3) qualifies the effect of subsection (2) by providing that sections 1 and 2 do not have effect in relation to claims settled, or legal proceedings determined, before the date the Bill comes into force. The effect of subsections (2) and (3) is that pursuers in cases which had not been settled, or determined by a court, before the Bill comes into force will be able to raise, or continue, an action for damages.
Section 5 – Short title and Crown application

10. This section gives the short title of the Bill and provides that the Bill binds the Crown.

FINANCIAL MEMORANDUM

INTRODUCTION

11. Pleural plaques’ incidence is thought to be rising largely as a result of asbestos exposure, most commonly associated with industries such as shipbuilding. However, they can only be detected on x-ray or CT (computed tomography) scan so are usually diagnosed incidentally during the course of medical investigations. There is no accurate record of how many cases are diagnosed each year in Scotland. It has been estimated that up to half of those occupationally exposed to asbestos will have pleural plaques thirty years after first exposure.\(^2\) Mesothelioma is the only asbestos related disease for which projections of the future burden are available. Given pleural plaques also have a long latency, and in the absence of other evidence, predictions of future mesothelioma deaths may provide the best guide to the potential scale of further rises in cases of pleural plaques. Annual mesothelioma deaths in Great Britain are expected to rise by up to 20% between now and a peak around 2015. Following this, indications are that the mortality rate will then decline. (Although these projections rest on a number of uncertain (and largely unverifiable) assumptions, the timing and scale of the maximum annual death toll is not highly sensitive to these uncertainties.)

Basis for calculating costs in this memorandum

12. The Scottish Government consulted on a Partial Regulatory Impact Assessment (PRIA) for the Bill from February to April 2008.\(^3\) Responses to this consultation (where confidentiality has not been requested) are available in the Scottish Government Library, K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD (Tel:0131 244 4565). A summary of responses is available at http://www.scotland.gov.uk/consultations. The final RIA is available at http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full. Information gained from responses to the consultation on the PRIA has been used in preparing this financial memorandum as well as the final RIA. The main components for calculating costs are numbers of cases and cost per case. The calculations result in maximum costs, in the sense that they proceed on the basis that all claims will be successful.

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\(^3\) http://www.scotland.gov.uk/consultations.
Numbers of cases

13. 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. In the PRIA we used a figure of 200 actions raised per year in relation to pleural plaques in Scotland. Insurers’ representatives take the view that this figure is too low in relation to estimates of future claims for a number of reasons:

- the figure of 200 in the PRIA was described as being cases raised in court. Cases are also settled without going to court. However, as indicated in footnote 4, the figure we used in the PRIA was actually based on new cases created, which is a combination of cases settled without being raised in court, and actions raised in court. We inadvertently referred to cases created as “actions raised” in the PRIA and apologise for any confusion caused. The ratio is roughly 75% raised in court to 25% settled without going to court;
- publicity about pleural plaques could lead to more people claiming;
- increasing numbers of older people getting scans for other reasons could lead to more claims;
- there could be increased use of speculative fee arrangements (no win, no fee) which could lead to more claims. Our understanding is, however, that most asbestos-related cases are already funded in this way;
- there could be increased activity by claims management companies which would increase scanning and numbers of claims. Our understanding is that claims management companies have not had much of a presence in Scotland to date.

14. Clearly there is a degree of uncertainty about future numbers of pleural plaques claims. However, in the absence of any firm figures to the contrary, we consider that a reasonable basis on which to proceed is: 200 cases a year as explained in footnote 4; plus cases against Government Departments (see paragraphs 19 and 28); plus cases against local authorities (see paragraph 23). In relation to asymptomatic pleural thickening and asymptomatic asbestosis, our best estimate of an average number of cases raised per year is 20. Within this we have made a notional allocation of 2 cases to local authorities and none to Government Departments (based on enquiries), with the rest (18) falling to business.

15. There is currently a build up of around 630 pleural plaques cases because of the House of Lords Judgment and earlier judgments in the English courts. Approximately 250 of these cases are currently sisted (suspended) by the courts and roughly 380 are backed up with solicitors. There are also 216 backed up cases against the Scottish Government, other Government Departments and local authorities (see paragraphs 19, 23 and 28). We understand that there may be a total backlog of around 60 cases involving asymptomatic pleural thickening and asymptomatic asbestosis. Within this we have made a notional allocation of 5 cases to local authorities and none to Government Departments (based on enquiries), with the rest (55) falling to business.

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4 Figures provided by Thompsons Solicitors, who deal with approximately 90% of pleural plaques cases. The figure of 200 is an annual average of the figures for new cases created in the years 2004-2006, and extrapolated for Scotland.
Cost per case

16. Following consultation on the PRIA, the best information available to us is that settlement costs are in the region of £22,000 per case (made up of £8,000 compensation payment, £8,000 pursuer’s costs and £6,000 defender’s costs). This figure is an average derived from litigated and unlitigated claims, which we understand it would be difficult for insurers to disaggregate. The figure is based on final settlement costs, but some pursuers opt for provisional damages, which would be lower. This figure is based on the known 2003-04 settlement figures, from the period prior to the legal challenges which culminated in the HoL Judgment. It is therefore open to speculation as to whether this will be the average cost per case in Scotland by the time legislation is passed by the Scottish Parliament. We think that a reasonable working assumption for the purposes of this memorandum is an average cost per case of £25,000. (Separate figures have been provided by other Government Departments and are used in paragraph 28).

Wider implications

17. Some respondents to the consultation on the PRIA have expressed concerns that the legislation will have wider implications and will pave the way for claims for other conditions which are not compensatable at present, with consequential costs for defenders. However, the legislation, as drafted, will apply only to 3 asbestos-related conditions and will have no effect beyond these conditions. Legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.

18. We have been informed that, in response to the legislation, the cost of employers’ liability and public liability insurance premiums in Scotland is likely to increase (see also paragraph 29).

COSTS ON THE SCOTTISH ADMINISTRATION

Scottish Government

19. There are currently 3 ongoing cases for which the Scottish Government (SG) has responsibility as a defender. The cost of settling these cases is unknown but is likely to be around a maximum of £75,000 (see paragraph 16). Less than one case is raised against SG annually. The future cost for such cases is therefore expected to be negligible. However, there is a possibility of the UK Government invoking the Statement of Funding Policy between itself and the devolved administrations, which would mean that the Scottish Government would be asked to meet any additional costs incurred by UK Government Departments (see paragraph 28). The Statement says that, where decisions taken by any devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the United Kingdom Government or, alternatively, decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust such extra costs, the body whose decision leads to the additional cost will meet that cost. It is, however, by no means certain that the Statement would apply in relation to this legislation.
Scottish courts

20. It is not anticipated that the proposed legislation will significantly increase the costs to the Scottish courts. Most cases are raised in court, but settled extra-judicially (98% of all personal injury cases raised in court settle extra-judicially). The costs arising from cases settled extra-judicially (e.g. registration of cases) will be absorbed within existing resources and can be regarded as negligible. It is not possible to quantify accurately either current or future costs to the courts in dealing with cases settled judicially. While the cost of a sitting day to the court is known, this covers both appeal work (with 3 judges) and first instance work (with a single judge). Information held does not break down the appeal and first instance costs, therefore the cost cannot be equated or broken down to a particular type of case. Bearing this in mind, the average cost of a case (which will be heard over 4 days and based on Inner House costs) is likely to be in the region of £14,500. However, as noted above, only 2% of cases raised are actually settled in court. Therefore the cost to the court of settling these cases is likely to be in the region of £72,500 (220 cases x 2% = 5 cases x £14,500) Around 33% of the cost of any increased workload flowing from the legislation will be recouped from the parties, in the form of court fees in accordance with normal costing and recovery procedures in the Scottish courts. The Scottish Court Service consulted in February 2008 on an increase in court fees to increase the proportion of costs recovered from court users.

21. With reference to the backlog of cases (see paragraph 15), the extent to which court costs will be incurred will depend on how the sisted and other pending cases are taken forward and in particular how many are settled without further court action. However, on the basis of what is in the preceding paragraph the costs are likely to be in the region of £261,000 (906 cases x 2% = 18 cases x £14,500).

Legal aid

22. In cases where legal aid is granted and the case is subsequently successful, the legal aid costs and outlays will in the majority of cases be offset against the award of expenses made against the unsuccessful party and, if relevant, against the award of damages. However, except for medical negligence cases, almost all personal injury actions are now funded by speculative fee agreements and/or trade union assistance. Therefore, there is unlikely to be any increased cost to the Legal Aid Fund.

COSTS ON LOCAL AUTHORITIES

23. The proposed change has implications for local authorities in relation to employer liabilities. We do not have firm information about the overall costs incurred by local authorities in defending claims. Only 3 local authorities responded to the consultation on the PRIA. However, follow-up enquiries with authorities lead us to think that reasonable estimates would be an annual figure of 20 claims and a backlog of 40 claims, including cases involving asymptomatic pleural thickening and asymptomatic asbestosis. The cost of settling these claims is likely to be £500,000 per annum and £1,000,000 to settle the backlog (see paragraph 16). With reference to paragraph 11, based on a 20% increase in cases, the figure above of £500,000 can be

5 75% (see paragraph 13) x 218 cases plus 75% x 20 local authority cases plus 75% x 56 other Government department cases (with notional annual figure of 44 used for BERR, based on backlog, plus figure of 12 provided by MoD)
extrapolated to a peak of around £600,000. Local authorities may experience an effect on insurance premiums as the insurance industry has indicated that to legislate could make third party insurance (e.g. employer’s liability, and public liability) more expensive in Scotland, but this possible increase has not been quantified.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on business

24. Pleural plaques are particularly strongly associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries, including the former nationalised industries. However, there is evidence from occupational analyses of mesothelioma deaths that exposure may have occurred across a fairly wide range of jobs in the past both within and outwith these sectors. End users of asbestos products had substantial risks as well as those manufacturing the products themselves.

25. The Bill will have implications for employers and former employers in the relevant sectors and for their insurers. There would be savings to insurers and employers if the Scottish Government were to take no action. Whether employers and insurers incur additional costs over what they might otherwise have expected will depend on whether there is an increase in the number of claims and whether the cost of settling claims increases.

26. With reference to paragraphs 14, 15 and 16, the cost to defenders, other than local authorities and Government Departments, of the 630 pleural plaques claims and the 55 other symptomless asbestos-related claims outstanding would be around £17,125,000 (630+ 55 x £25,000). The annual cost would be around £5,450,000 (200+18 x £25,000) including pursuers’ and defenders’ expenses.

27. With reference to paragraph 11, based on a 20% increase in cases, the figure above of £5,450,000 can be extrapolated to a peak of around £6,540,000.

28. We understand that there are 37 backed up Scottish cases raised against the Ministry of Defence (MoD). The average reserve placed on each claim by MoD is £14,000 (including legal costs). Therefore settlement of these Scottish cases is likely to cost around £518,000. On the basis of the 37 cases being backed up over 3 years we can assume, with caution, that there are likely to be in the region of 12 pleural plaques cases raised against MoD per year with an annual cost of £168,000. Primarily for their interest in British Shipbuilders and to a lesser extent the former British Coal Corporation, the Department for Business, Enterprise & Regulatory Reform (BERR) has 136 open Scottish pleural plaques cases. The cost of settling these cases, including legal costs, is likely to be in the region of £1,200,000. Based on actuarial reviews undertaken on their coal and shipbuilders liabilities, BERR has informed us that its overall liability in Scotland (going forward to a peak in 6 to 8 years time and then falling away) is likely to be in the region of £5,300,000. There is no indication that pleural plaques cases have been raised against any other Government Department.

29. As already noted, insurers anticipate that they will incur additional costs as a result of the legislation. They have indicated that higher costs for insurers would be passed on to Scottish
business customers in the form of higher insurance premiums. Only when the insurance industry has considered the legislation as introduced, and taken a view on the risks it presents, would any quantification of increased cost of insurance premiums be possible.

Costs on individuals

30. There will be no significant costs to individuals arising from this amendment. The effect of the legislation is that individuals who develop the asbestos related conditions in the Bill through negligent exposure to asbestos in Scotland will be able to raise a claim for damages. In Scotland, most asbestos related actions are funded by Speculative Fee Agreements and/or trade union assistance. The insurance industry has confirmed that premiums for first party insurance policies (e.g. life, critical illness, income protection) would not be affected by the legislation.

SUMMARY OF ADDITIONAL COSTS ARISING FROM THE BILL

<table>
<thead>
<tr>
<th>Costs on Scottish Administration</th>
<th>Costs on Local Authorities</th>
<th>Costs on Business and the State</th>
<th>Costs on other Bodies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government – £75,000 to settle existing cases</td>
<td>£1,000,000 to settle existing cases</td>
<td>Business (employers, former employers and their insurers) – £17,125,000 to settle existing cases</td>
<td>Individuals - None - see paragraph 30</td>
</tr>
<tr>
<td>Annual cost negligible - see paragraph 19</td>
<td>£500,000 per annum increasing to a peak of £600,000 per annum around 2015 and then decreasing – see paragraph 23</td>
<td>£5,450,000 per annum increasing to a peak of £6,540,000 per annum around 2015 and then decreasing – see paragraphs 26 and 27</td>
<td></td>
</tr>
<tr>
<td>Courts - £261,000 for existing cases £72,500 per annum – see paragraphs 20 and 21</td>
<td></td>
<td>MoD – £518,000 to settle existing cases £168,000 per annum see paragraph 28</td>
<td></td>
</tr>
<tr>
<td>Legal Aid - Negligible – see paragraph 22</td>
<td></td>
<td>DBERR – £1,200,000 to settle existing cases £5,300,000 overall liability see paragraph 28</td>
<td></td>
</tr>
</tbody>
</table>

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

31. On 23 June 2008, the Cabinet Secretary for Justice (Kenny MacAskill MSP) made the following statement:
“In my view, the provisions of the Damages (Asbestos-related Conditions) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

32. On 20 June 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

“In my view, the provisions of the Damages (Asbestos-related Conditions) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
DAMAGES (ASBESTOS-RELATED CONDITIONS)
(SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill introduced in the Scottish Parliament on 23 June 2008. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 12–EN.

POLICY OBJECTIVES OF THE BILL

Background

2. 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.

3. Pleural plaques incidence is thought to be rising largely as a result of asbestos exposure, most commonly associated with industries such as shipbuilding. However, they can be detected only on x-ray or CT (computed tomography) scan so are usually diagnosed incidentally during the course of medical investigations. There is no accurate record of how many cases are diagnosed each year in Scotland. It has been estimated that up to half of those occupationally exposed to asbestos will have pleural plaques thirty years after first exposure. Mesothelioma is the only asbestos related disease for which projections of the future burden are available. Given pleural plaques also have a long latency, and in the absence of other evidence, predictions of future mesothelioma deaths may provide the best guide to the potential scale of further rises in

cases of pleural plaques. Annual mesothelioma deaths in Great Britain are expected to rise by up to 20% between now and a peak around 2015. Following this, indications are that the mortality rate will then decline. (Although these projections rest on a number of uncertain (and largely unverifiable) assumptions, the timing and scale of the maximum annual death toll is not highly sensitive to these uncertainties.)

**Origins of Bill**

4. From the early 1980s until 2005-06 damages were awarded for pleural plaques in a number of court cases, on the basis that:
   - exposure to asbestos dust is a breach of the common law duty of care and of various statutory duties under health and safety at work legislation;
   - asymptomatic pleural plaques are an injury caused by that breach of duty;
   - persons with pleural plaques have an increased risk, in relation to the general population, of developing other more serious asbestos-related conditions, e.g. asbestosis, mesothelioma and cancer;
   - pursuers suffer anxiety as a result of the presence of the pleural plaques and the increased risks.

5. Damages have been awarded for pleural plaques in a number of reported Scottish cases. However, in 2004, insurers brought ten test cases before Mr Justice Holland in the England and Wales High Court. Mr Justice Holland gave judgment in February 2005 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.

6. The House of Lords (HoL) Judgment in *Johnston v NEI International Combustion Ltd* published on 17 October 2007 ruled that asymptomatic pleural plaques do not 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. In brief, 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.

7. The Judgment is not binding in Scotland, but is highly persuasive. Scots and English principles of negligence are very similar and English negligence cases are often cited and followed in the Scottish Courts. *Johnston* has already been cited in a Court of Session case.

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2 [http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm](http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071017/johns-1.htm)

3 “Tort” is the English legal term for the area of law known as “delict” in Scotland. Under the law of delict people who cause loss or injury to others may be held civilly liable to pay compensation.

4 Negligence is a particular type of tort or delict.
8. Following the HoL 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.

9. At the Member’s Business Debate on 7 November in the name of Stuart McMillan MSP on the House of Lords Ruling it was clear that Members considered that this was a wrong that had to be put right and that they would welcome and expect positive action from the Scottish Government.

10. Pleural plaques are part of the unintended and unwelcome consequences of our industrial heritage. The HoL Judgment has raised serious concerns for people with pleural plaques. Although plaques are not in themselves harmful they do give rise to anxiety because they signify an increased risk of developing very serious illness as a result of exposure to asbestos. In areas associated with Scotland’s industrial past, people with pleural plaques are living alongside friends who worked beside them and are witnessing the terrible suffering of those who have contracted serious asbestos-related conditions, including mesothelioma. This causes many of them terrible anxiety that they will suffer the same fate. The Scottish Government believes that people who have negligently been exposed to asbestos and who are subsequently diagnosed with pleural plaques should be able to raise an action for damages as has been the practice in Scotland for over twenty years.

11. The Scottish Government acknowledges that, if it were to take no action, people with pleural plaques would be able to raise an action for damages if they develop a more serious asbestos related condition. However, such damages would not compensate them for having pleural plaques or for the anxiety suffered following a diagnosis of pleural plaques.

12. On 29 November 2007 the Scottish Government announced that it intended to introduce a Bill to overrule the HoL 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.

13. The UK Government indicated on 29 October 2007 that it had decided that it would not be appropriate to legislate. On 12 March 2008, the Prime Minister indicated that a consultation document on pleural plaques would be published and that the Government was determined to take some action.

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6 [http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-01.htm](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-01.htm)


8 [http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071029/text/71029w0045.htm#07103034000624](http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071029/text/71029w0045.htm#07103034000624)

9 [http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080312/debtext/80312-0002.htm#08031240000103](http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080312/debtext/80312-0002.htm#08031240000103)
Specific objectives

14. 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 HoL Judgment in *Johnston v NEI International Combustion Ltd* does not have effect in Scotland as regards these conditions.

15. The HoL Judgment was concerned with asymptomatic pleural plaques. Ensuring that this condition is actionable in Scotland is the primary intention of the legislation. However, it is possible that the courts might look to *Johnston* as authority in relation to claims in respect of other asymptomatic asbestos-related conditions. At the end of 2006 there was an English county court case which ruled that someone who had been negligently exposed to asbestos and had developed asymptomatic pleural thickening and asbestosis (as well as pleural plaques) did not have an actionable case. In the period since the Judgment was issued in *Johnston*, indications have been given to the Court by defenders in cases in the Court of Session of an intention to pursue cases in which the cause of action is minimal symptomless asbestosis as likely test cases.

16. Asbestosis is a non-malignant scarring of the lung tissue which impairs the elasticity of the lungs, restricting their expansion and hampering their ability to exchange gases. This leads to inadequate oxygen intake to the blood. Pleural thickening is a non-malignant disease in which the lining of the pleura becomes scarred. If it is extensive then it can restrict expansion of the lungs and lead to breathlessness. Asbestosis and pleural thickening can both be detected while asymptomatic. In contrast with pleural plaques, they are usually (but not always) progressive and symptoms/impairment will occur. A person with a diagnosis of asymptomatic asbestosis or pleural thickening has, as with pleural plaques, an indicator of significant exposure to asbestos and the worry of possible very serious disease such as mesothelioma plus the worry that their condition will itself progress and cause impairment (unless they can be told categorically that their condition is non-progressive).

17. Scottish Ministers consider that there is a risk, if the Bill dealt only with making pleural plaques actionable, that this could lead to an inconsistent and unfair result. A person with plaques, which are symptomless and almost always non-progressive, could raise an action for damages but a person with pleural thickening or asbestosis, which was currently symptomless but which was likely to progress, could not. It would be unfair if a person with thickening or asbestosis had to wait for symptoms to develop before claiming when a person with plaques could do so straight away. The Bill therefore provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by negligent exposure to asbestos, continue to give rise to a claim for damages in Scotland.

18. In summary, the Bill:

- provides that asbestos-related pleural plaques amount to a material personal injury capable of founding a claim in damages;
- clarifies that asymptomatic asbestos-related pleural thickening and asymptomatic asbestosis continue to be actionable;

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10 *Terwyn Owen v Esso Exploration & Production UK Ltd*, 16 November 2006: [http://www.corries.co.uk/cgi-bin/template.pl?npd&ID=96](http://www.corries.co.uk/cgi-bin/template.pl?npd&ID=96). The claimant has decided not to take this case to appeal: [http://www.corries.co.uk/cgi-bin/template.pl?npd&ID=157](http://www.corries.co.uk/cgi-bin/template.pl?npd&ID=157) [link no longer active]
This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008

- has retrospective effect.

APPLICABILITY OF PROVISIONS

19. The provisions have retrospective effect and apply to cases which have not been settled, or determined by a court, before the date the Bill comes into force.

CONSULTATION

20. Prior to the decision to bring forward legislation, meetings were held with asbestos groups and their representatives and representatives of the insurance industry. The groups expressed their dismay about the HoL Judgment and its adverse effect on people with pleural plaques. The insurance industry representatives put forward the view that the Judgment should be allowed to stand and that pleural plaques should not give rise to a claim for damages. A consultation on a partial Regulatory Impact Assessment (RIA) was issued on 6 February 2008 to assess the potential implications of the legislation for the insurance industry, employers and Government Departments. A summary of the consultation responses has been published on the Scottish Government Consultation website. The final RIA is available on the Scottish Government Business and Industry website.

21. Although the consultation was not in relation to the decision to introduce legislation, the majority of respondents did offer comments on this. Of the 22 responses received, 17 did not welcome the proposal to legislate, with the biggest group within this being insurers. To put these figures into context, it should be borne in mind that, as there was no consultation on the general policy, parties supportive of the Bill would not necessarily have responded to the consultation on the partial RIA. Scottish Ministers have noted the concerns of those opposed to the legislation but they remain convinced of the need to take forward a Bill to ensure that the HoL Judgment does not have effect in Scotland.

22. The responses to the partial RIA were helpful in firming up numbers of pleural plaques claims and average settlement costs, based on the historical position. The information provided has been taken into account in the final RIA and the Financial Memorandum. The responses also raised questions about whether the numbers and costs of pleural plaques claims might be higher than the historical position would suggest; and whether the legislation would have wider implications which would lead to higher costs for Scottish business. These aspects are discussed in the final RIA and the Financial Memorandum. The table in Annex A to this Memorandum sets out what might be described as policy issues raised in the responses, and gives our comments.

ALTERNATIVE APPROACHES

23. The only real alternative approach is making no change to the law. This would mean that the HoL Judgment, regarded as highly persuasive by Scottish courts, would almost certainly be followed in Scotland, so that claims in respect of asymptomatic pleural plaques, and possibly

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also in respect of asymptomatic forms of pleural thickening and asbestosis, would be dismissed by the courts.

24. This would result in a loss of compensation payments to people with pleural plaques, and a possible loss of compensation for those with pleural thickening and asbestosis who are not yet experiencing symptoms. This would be a permanent loss, both for those who do not go on to develop a more serious condition and those who do (because any payment in respect of e.g. a diagnosis of mesothelioma would not include damages in respect of pleural plaques and the anxiety suffered by a person from the time of diagnosis of pleural plaques).

25. Some respondents to the consultation on the partial RIA suggested that education not compensation would be the best way of providing peace of mind to people with pleural plaques. The Scottish Government agrees that people should have clear information about their medical conditions, but takes the view that education is no substitute for appropriate compensation. Pleural plaques are irreversible scarring on the lining of the lungs which the Scottish Government considers should be treated as a material personal injury for which damages may be awarded. The anxiety felt by people with pleural plaques comes from the known risks associated with asbestos.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

26. An Equality Impact Assessment (EQIA) has been carried out and can be viewed on the Scottish Government EQIA System website. The Bill’s provisions are inclusive; no impact on equal opportunities is envisaged.

Human rights

27. The Scottish Government believes that the proposed changes comply with the European Convention on Human Rights.

Island communities

28. The proposals will have no specific effect for island communities.

Local government

29. The proposals have implications for local authorities mainly in relation to employer liabilities. They will be exposed to claims in relation to pleural plaques as a result of the legislation and will have to make payments where there is a successful claim. Local authorities

13 http://www.scotland.gov.uk/Topics/People/Equality/18507/EQIADetails/Q/Id/161
may also experience an effect on insurance premiums as the insurance industry has indicated that to legislate could make third party insurance (e.g. employer’s liability, public liability) more expensive in Scotland.

**Sustainable development**

30. The proposed changes will not have any effect on sustainable development issues.
This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008

ANNEX A

<table>
<thead>
<tr>
<th>Points raised by respondents to the consultation on the partial RIA</th>
<th>Scottish Government comments</th>
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</thead>
<tbody>
<tr>
<td>The Scottish Government has ignored medical evidence that plaques are harmless.</td>
<td>We are fully aware of the medical evidence. In the partial RIA we made clear that plaques do not generally cause symptoms or disability and do not cause or develop into diseases such as asbestosis or mesothelioma. Nevertheless, plaques are irreversible scarring to the lining of the lungs and what they signify (i.e. significant exposure to asbestos) causes great anxiety to those diagnosed and their families.</td>
</tr>
<tr>
<td>Claims were settled historically when medical evidence was unclear. The House of Lords’ Judgment was based on medical evidence which was not available before: had it been, people with pleural plaques would not have been compensated. The Scottish Government is wrong to say that the Judgment overturns 20 years of precedent and practice.</td>
<td>We don’t accept the point that pleural plaques were only compensatable before because they were thought to cause ill-health, and that Johnston proceeds on new medical evidence that they have no effect on health. In the three historic English cases referred to in Johnston, the medical evidence appears to have been that the pleural plaques caused no symptoms: similarly in the Scottish case: Nicol v Scottish Power plc (OH) 3 July 1997, Lord Nimmo Smith (1998 SLT 822). Damages have been awarded for pleural plaques in a number of reported Scottish cases. Several judgments of lower courts in England and Wales ruled that pleural plaques were compensatable, and this position was accepted by the industry in Scotland for over 20 years. (See also paragraph 4.)</td>
</tr>
<tr>
<td>Legislation would constitute fundamental change to law of negligence.</td>
<td>The Bill has been drafted in such a way as to make the minimum incursion into the law. It provides that plaques amount to a material personal injury capable of founding a claim in damages. Anxiety will be considered as a matter of quantum, not as an aspect of establishing liability.</td>
</tr>
</tbody>
</table>
This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008

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<td>Legislation would set a dangerous precedent and will open floodgates to claims for other conditions.</td>
<td>The Bill is concerned only with 3 asbestos-related conditions and will have no effect beyond those conditions. Legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.</td>
</tr>
<tr>
<td>Proposed retrospection brings into question the fundamental principles around whether Scotland has a stable and reliable framework which business can rely on. Question legality of proposed legislation.</td>
<td>We acknowledge that retrospective law is not something to be undertaken lightly. In the context of overruling a HoL Judgment we consider that making the Bill retrospective is necessary to fully overrule the effect of that Judgment and in order to maintain the coherence of the law. The intention that the legislation would be effective from the date of Judgment was made clear at the outset. It will not affect cases already settled before the Bill commences.</td>
</tr>
<tr>
<td>Legislation would be unfair to those without plaques who have been exposed to asbestos and have the same risks.</td>
<td>Persons diagnosed with pleural plaques have a definite physical manifestation of their exposure which becomes a focus for their anxiety about that exposure and the risk of developing serious illness. We do not consider the proposed legislation to be discriminatory because persons without pleural plaques do not have any physical change upon which they can found a claim, and this justifies different treatment.</td>
</tr>
<tr>
<td>The risk of developing mesothelioma as a result of exposure is very low (1%-5%). The Scottish Government would therefore be legislating for the “worried well”.</td>
<td>Many people who could be described as the “worried well” have fears which do not derive from others’ negligent behaviour. It is inappropriate to describe people with pleural plaques as the worried well. They have a physical, permanent change in their lungs which indicates that they have a significantly higher risk than the general population of developing serious asbestos-related disease.</td>
</tr>
</tbody>
</table>
Points raised by respondents to the consultation on the partial RIA | Scottish Government comments
---|---
Legislation in Scotland only would encourage “forum shopping” by those seeking to raise a pleural plaques claim. | Following legislation in the Scottish Parliament, people with pleural plaques will have a right of action in Scotland. If no such right of action exists in the rest of the UK, it follows that pursuers will choose to raise any cross-border cases, where the Scottish courts have jurisdiction in relation to some elements, in the Scottish courts. As now, any defender found liable would be liable to the extent that they had contributed to the negligent exposure to asbestos. Whilst we accept that forum-shopping may be attempted, we are satisfied that established rules of jurisdiction and applicable law will ensure that only cases with a substantial Scottish connection will be tried in Scottish courts under Scots law.

Very few countries award compensation for symptomless asbestos-related conditions. | The Scottish Government’s interest and duty is in doing what is best for the people of Scotland.
DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Damages (Asbestos-related Conditions) (Scotland) Bill. It describes the commencement provisions in the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

BACKGROUND TO THE BILL

2. The House of Lords (HoL) decision in Johnston v NEI International Combustion Ltd, published on 17 October 2007, ruled that asymptomatic pleural plaques (an asbestos-related condition) do not give rise to a cause of action under the law of damages. The Judgment is not binding in Scotland, but is highly persuasive.

3. The purpose of the Bill is to ensure that the HoL Judgment does not have effect in Scotland and that people with pleural plaques caused by negligent exposure to asbestos can raise an action for damages. As it is possible that the courts might look to Johnston as authority in relation to claims in respect of other asymptomatic asbestos-related conditions, the Bill also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by negligent exposure to asbestos, continue to give rise to a claim for damages in Scotland.

DELEGATED POWERS

Section 4(1) Commencement and retrospective effect

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

4. Section 4(1) gives the Scottish Ministers power to commence the substantive provisions of the Bill by Order. No commencement date is specified in the Bill. It is however anticipated that the provisions will come into force two months after the Bill receives Royal Assent. As is normal with commencement orders, no form of parliamentary procedure is required. During the
period between Royal Assent and commencement, the Scottish Government will ensure that stakeholders are informed of the date on which the provisions will come into force.
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
Justice Committee

19th Report, 2008 (Session 3)

CONTENTS

REMIT AND MEMBERSHIP

REPORT
INTRODUCTION............................................................................................................. 1
BACKGROUND .................................................................................................................. 1
SCOTTISH GOVERNMENT CONSULTATION................................................................. 3
JUSTICE COMMITTEE CONSULTATION....................................................................... 4
MEDICAL OPINION OF PLEURAL PLAQUES ............................................................... 5
What are pleural plaques? ............................................................................................. 5
Medical opinion of pleural plaques ............................................................................. 6
LEGAL EFFECT OF THE BILL ..................................................................................... 11
Should pleural plaques sufferers be compensated?............................................... 11
Could another approach be taken to compensating pleural plaques sufferers?18
Will the Bill have its desired effect?.......................................................................... 20
Is it appropriate to limit the Bill to the conditions it concerns? ............................. 21
Will receiving damages for pleural plaques inhibit the claimant from seeking
compensation for a more serious asbestos related condition?................................. 22
FINANCIAL IMPACT OF THE BILL.............................................................................. 23
Potential Costs ............................................................................................................. 23
Statement of Funding Policy....................................................................................... 27
SUBORDINATE LEGISLATION COMMITTEE.............................................................. 28
POLICY MEMORANDUM ............................................................................................. 29
EQUAL OPPORTUNITIES.............................................................................................. 29
CONCLUSIONS OF THE GENERAL PRINCIPLES OF THE BILL ...............29

ANNEXE A: REPORT FROM THE SUBORDINATE LEGISLATION COMMITTEE
.................................................................................................................30

ANNEXE B: CORRESPONDENCE FROM THE FINANCE COMMITTEE ......31

ANNEXE C: EXTRACTS FROM THE MINUTES

17th Meeting, 2008 (Session 3), Tuesday 24 June 2008 .........................48
19th Meeting, 2008 (Session 3), Tuesday 2 September 2008 ....................48
20th Meeting, 2008 (Session 3), Tuesday 9 September 2008 .................48
21st Meeting, 2008 (Session 3), Tuesday 16 September 2008 .................49
22nd Meeting, 2008 (Session 3), Tuesday 30 September 2008 ...............49
23rd Meeting, 2008 (Session 3), Tuesday 7 October 2008 .....................49
24th Meeting, 2008 (Session 3), Thursday 9 October 2008 ...................49

ANNEXE D: ORAL EVIDENCE

19th Meeting, 2008 (Session 3), Tuesday 2 September 2008

Oral evidence ..................................................................................................50

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.

20th Meeting, 2008 (Session 3), Tuesday 9 September 2008

Oral evidence ..................................................................................................81

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.
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 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.”

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.

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

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1 Damages (Asbestos-related Conditions) (Scotland) Bill. Policy Memorandum, paragraph 14.
2 Policy Memorandum, paragraph 5.
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.\(^4\)

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.\(^5\)

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.\(^6\)

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.\(^7\)

**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.

\(^4\) Policy Memorandum, paragraph 6.


\(^6\) Policy Memorandum, paragraph 8.

\(^7\) Policy Memorandum, paragraph 12.
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.8

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.9

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.”10

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.”11

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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8 Policy Memorandum, paragraph 20.
9 Policy Memorandum, paragraph 20.
11 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.”

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/Damagesubmissions.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.

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."^{13}

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."^{14}

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."^{15}

Medical opinion of pleural plaques

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

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

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]

^{13} Policy Memorandum, paragraph 2.
^{14} Dr Robin Rudd. Written submission to the Justice Committee.
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.”

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.”

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.”

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.

16 Professor Anthony Seaton. Written submission to the Justice Committee.
18 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.\textsuperscript{19}

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.\textsuperscript{20}

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

\textquoteright\textasciitilde\ldots 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\textquoteright\textsuperscript{21}

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.\textsuperscript{22}

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.

\textsuperscript{19} Dr Robin Rudd. Written submission to the Justice Committee.
\textsuperscript{20} Clydeside Action on Asbestos. Supplementary written submission to the Justice Committee.
\textsuperscript{21} Clydeside Action on Asbestos. Supplementary written submission to the Justice Committee.
\textsuperscript{22} 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.”

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.”

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

24 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.”

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.”

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.”

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 that the general population”.

25 Chief Medical Officer. Written submission to the Justice Committee.
26 Dr Robin Rudd. Written submission to the Justice Committee.
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.

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,

28 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.”

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.”

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.”

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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although victims would much rather that the people who exposed them to asbestos were criminally prosecuted.”

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.”

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.”

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.

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.

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

34 UNITE. Written submission to the Justice Committee.
35 Law Society of Scotland. Written submission to the Justice Committee.
36 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.”

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.

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

“...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.”

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.”

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

principles, it would do untold damage to the legal system of which we are extremely proud.”

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.”

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.”

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 into 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.”

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44 Andrew Smith QC. Written submission to the Justice Committee.
70. The Committee acknowledges the arguments put forward by those in favor 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.45

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.”46

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

46 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."47

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."48

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."49

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.50

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."51

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."52

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

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.”

Compensation schemes

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

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.\[54\]

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.\[55\]

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.\[56\]

**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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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.”

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.”

58 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.”


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

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

“So 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.”

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…”

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.”

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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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.”

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.”

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

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65 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.\textsuperscript{66}

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.\textsuperscript{67}

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.”\textsuperscript{68}

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.\textsuperscript{69}

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.\textsuperscript{70}

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.\textsuperscript{71}

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.\textsuperscript{72}

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—

\textsuperscript{67} Damages (Asbestos-related Conditions) (Scotland) Bill. Financial Memorandum, paragraph 16.
\textsuperscript{68} Association of British Insurers. Written submission to the Justice Committee.
\textsuperscript{69} Association of British Insurers. Supplementary written submission to the Justice Committee.
"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."

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."

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."

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."

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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“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.”77

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.”78

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"."79

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;

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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)\(^{80}\)

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.

\(^{80}\) 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.”81

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.”82

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.

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 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.

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).

1 Delegated Powers Provisions
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

Yours sincerely

Andrew Welsh MSP
Convener
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. To put this into context, annual net employers’ liability premium in Scotland is approximately £131m.

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?

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2 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\(^3\)
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”\(^4\)
- 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\(^5\).

- **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\(^6\) 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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\(^3\) Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", Chest 2004:125, 1103-1117


\(^5\) 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”.

\(^6\) 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. To put this context, the current annual net employers’ liability premium in Scotland is £131m. 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:

7 Ministry of Justice, Pleural Plaques, July 2008
8 ABI estimate, based on ABI statistics and National Statistics
Justice Committee, 19th Report, 2008 (Session 3) – Annexe B

- 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 Committees 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

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?
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 Governments 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
18th 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. To put this into context, annual net employers’ liability premium in Scotland is approximately £131m.

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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9 Ministry of Justice, Pleural Plaques, July 2008
10 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 plaques11
- A study by SJ Chapman concludes pleural plaques “are found in as many as 50% of asbestos-exposed workers”12
- 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 exposure13.

13 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 Actuaries14 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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14 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.
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.

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.

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, 19th Report, 2008 (Session 3) – Annexe C

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.
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 guessestimate 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? 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”?
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 sisted, 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 concern is about what will happen in future rather than about what is happening now. 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 know that people are there to make money out of claims. 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.

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: 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: 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 harmedly 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 asbestos 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. 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.

Gilbert Anderson: I can answer the question quickly as possible and to settle. Litigation should be found, the industry wants it to be found as quickly as possible. In essence, the industry wants a more inquisitorial approach to be taken to investigations. If liability 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 pay out on the ground that that would be a better bet than taking a case to court?

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 over dramatic; perhaps I should call them very high—and would not be reflective of an effective legal system.

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. 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 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 statably 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 interobserver variability. Indeed, there is also intraobserver 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 asbestosis-related disease. Is there anything else like that that is not related to asbestosis?

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 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 lawyer in Glasgow at the time. I remember it clearly because I made the point to that lawyer—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 orthodox principles of the law there would be no indication that they had suffered any damage.

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.
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, can constitute injury, even if we do not suffer pain. 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 lagger—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.
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.
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 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 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

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, evidently, 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 corroborating 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?

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 ongoing 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.
Written evidence received by the Justice Committee
on the Damages (Asbestos-related Conditions) (Scotland) Bill

Professor Anthony Seaton CBE
Professor David G. Owen
Royal College of Physicians of Edinburgh
Dr Martin A Hogg
William J. Stewart
Des McNulty MSP
Nautilus UK
Association of British Insurers
CBI Scotland
Geoff Clarke, Advocate
Andrew Smith QC
Norwich Union
Association of Personal Injury Lawyers
DLA Piper Insurance Services Group
Royal and Sun Alliance Insurance plc
AXA Insurance UK plc
Zurich Financial Services Group
Clydeside Action on Asbestos
British Occupational Hygiene Society
Institute of Occupational Medicine
Councillor Kenny MacLaren
Neil Mackenzie
Union of Construction Allied Trades and Technicians
Unite
Thompsons Solicitors
Forum of Insurance Lawyers
Law Society of Scotland
Scottish Trades Union Congress
Meg Henderson
George Tomlinson
Dr Robin Rudd

Supplementary written evidence

Clydeside Action on Asbestos
Thompsons Solicitors
Association of British Insurers
Scottish Government and Chief Medical Officer
Clydeside Action on Asbestos
1. The House of Lords has accepted medical evidence that pleural plaques are harmless indicators of past asbestos exposure and not a cause of ill health. They have discussed in extenso the legal issues surrounding compensation for such a condition and have decided that there is no case in law for actions against employers for the condition. I have been asked for my opinion on this issue. My views are those of a physician and researcher who has made a prolonged study of the issues and has looked after many patients with asbestos related conditions.

2. I agree with the decision of the House of Lords, which is based on generally accepted medical knowledge. Much of the argument revolved around the anxiety felt by individuals as a consequence of receiving information that they had plaques. For the reasons given below, I am of the opinion that this anxiety relates to inability of doctors to reassure patients about the benign nature of the condition in light of legal implications that it is a serious disease. The risks relate to asbestos exposure, not to pleural plaques, and such risks can now be quantified and put into perspective in order to inform and usually reassure the individuals concerned.

3. Asbestos causes a number of different conditions of the lung and its lining (the pleura), some serious and fatal, others less serious, and some trivial but sometimes alarming. The most serious such conditions, mesothelioma and lung cancer are widely known by the public to be fatal, while asbestosis is potentially disabling and fatal. The others, notably pleural plaques, pleural effusion and pleural fibrosis, though not fatal, are often confused in the public (and sometimes medical) mind as “asbestosis”. The least serious is the development of pleural plaques. This is however far and away the most common of all the asbestos-related conditions and thus has acquired important financial connotations to companies, lawyers and doctors as well as to workers, out of all proportion to its medical importance.

4. Mesothelioma is universally fatal, uniquely attributable to asbestos exposure and relatively common, occurring in some 2000 people per annum in UK. The risk of development is related to the dose of asbestos received (the product of exposure concentration and duration). Asbestosis is now rarely fatal, since its development requires a very high exposure and such exposures are historic in the West. It does however still appear in a slowly progressive or arrested form in some individuals with heavy past exposures and certainly can be disabling. Lung cancer is primarily related to cigarette smoking but asbestos exposure is a well-recognised risk factor that acts synergistically with smoking. These serious conditions are rightly
compensable under civil law and the degree of disablement is assessable in the normal manner.

5. The pleural conditions other than mesothelioma differ in a number of ways. Pleural effusion is usually temporarily disabling and may resolve into pleural fibrosis. It is worrying for the patient, since the alternative diagnosis the doctor considers is always mesothelioma and several investigations and ultimately the passage of time without worsening are necessary to exclude this fatal possibility. There is no dispute about compensation for this. Diffuse pleural fibrosis likewise may be confused with mesothelioma, requires investigation and causes anxiety. In addition, if it is sufficiently extensive it may cause pulmonary impairment and disablement which may be measured easily by lung function testing. Again, compensation is not in dispute. In contrast, pleural plaques are medically trivial, cause no impairment and, until it was proposed by lawyers that they should attract compensation, caused no medical problems. They have now become big business for law firms and an easy source of income for expert witnesses. Their unnecessary investigation by CT scanning has resulted in considerable radiation exposure of well people, sometimes at the instigation of lawyers rather than doctors.

6. I first became interested in industrial and asbestos diseases and their prevention as a junior doctor in Liverpool in the 1960s. In the United States, from 1969 to 1971 I concentrated mostly on coalminers’ diseases but in Cardiff, as a young chest consultant, I saw many patients with both coal- and asbestos-caused disease. My interest and knowledge of these and other conditions was such that I published my first book on the subject with my American colleague, Prof WKC Morgan, “Occupational Lung Diseases” in 1975. At that time and well into the 1980s the benign nature of pleural plaques was known to the medical profession. In pathological terms they are collagenous scars, usually on the under-surface of the ribs or on the diaphragm, on what is called the parietal pleura. They neither involve the lungs themselves nor impair its function. They are not pre-malignant. They were however known to be an indication of previous asbestos exposure and thus a confirmation of the story recounted by the subject. 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. By their limited extent and their position away from the lung, they cannot impair its function.

7. During my earlier professional career it was possible to deal with patients in whom pleural plaques had been discovered, almost always as an incidental finding consequential upon having a chest radiograph, by explaining that they simply meant that, as the person usually knew, he had been exposed to asbestos and that they did not imply the likelihood of any serious disease. As time passed, it became possible for chest physicians with suitable knowledge to explain any risk of other asbestos-disease related to the exposures and to make a rough estimate of risk in relation to other likely conditions such as other cancer or heart attack. It was thus possible to reassure the person. A competent chest physician was therefore able to prevent a long legacy of
usually unnecessary anxiety and allow the person to continue to lead his (almost always these people are male) normal life.

8. From a clinical medical point of view, matters changed when it was decided legally that individuals with pleural plaques became entitled to sue for injury and able to obtain financial compensation. Part of this acknowledged the presence of “anxiety”, an inevitable consequence of bad medical management forced upon doctors by the difficulty of explaining the benign nature of the condition when the law apparently says it is a disease with implied serious consequences. The management of these individuals was thus handed over to lawyers who did not have a strong interest in reducing any anxiety. Since the House of Lords’ decision it has again been possible to manage such individuals according to established medical practice.

9. In making these comments, I should point out that I have appeared in Court in the British Isles and the United States on a number of occasions both for defendants and plaintiffs and have often written expert reports on asbestos cases. My and my colleagues’ research work over a lifetime has been devoted to prevention of industrial and environmental diseases and some has resulted in considerable benefits to working people. The recognition that coal mining caused chronic obstructive lung disease, for example, long disputed by other medical researchers, came about as a result of our research although it was primarily targeted at finding appropriate preventive dust standards. Dust standards in the wool and PVC industries are also based on research I led. I am currently working on a case for recognition of solvent-induced neurological disease in the UK. Regrettably, occupational disease is far from rare in the UK and many workers are seriously disabled as a consequence. In my opinion, however, the medical case for recognition of pleural plaques as a disease is flimsy in the extreme. If their Lordships’ decision were not to apply in Scotland, the financial benefits to workers would be balanced by a return to the situation whereby it again becomes difficult to explain to well people that they are not seriously ill, with the attendant psychological consequences.
Supplementary submission

1. I refer to my earlier evidence dated 3rd July 2008. I wish to supplement this with some comments on likely numbers of cases of pleural plaques in Scotland with the potential to become involved in litigation.

2. The number of future cases in Great Britain of the malignant asbestos-related tumour, mesothelioma, has been estimated by Hodgson and colleagues (British Journal of Cancer 2005;92:587-93). This paper estimates that some 65,000 deaths from this disease will occur between 2001 and 2050. Approximately one tenth of these deaths would be likely to occur in Scotland, making 6500, less say the 1000 or so that will already have occurred since 2001.

3. Assuming all patients with asbestos-related mesothelioma have plaques, this allows estimation of the numbers of cases of plaques currently in Scotland with such radiological abnormalities. Were, say, 100% of individuals with plaques to develop mesothelioma, there would now be c5500 men with plaques currently in Scotland, since it is reasonable to suppose that the large majority of future mesothelioma patients already have plaques as a consequence of past exposure (it is unlikely that current exposures to asbestos will cause mesothelioma). This is a minimum figure for plaques.

3. More realistic figures may be obtained by making assumptions about the risk of developing mesothelioma in individuals with plaques. Thus, if say 50% of those with plaques were to develop the tumour, the numbers currently with plaques would be 11,000 men or if (a more realistic figure) 10% were to develop mesothelioma there would be 55,000 men currently with plaques in Scotland. This would represent rather less than 2% of the adult male population.

4. To put these estimates into perspective, the estimates derived by Peto and colleagues are helpful (Lancet 1995;345:535-39) The highest risks of mesothelioma occur in the cohort of individuals born in the years 1940-58 and risks have declined in cohorts born subsequent to 1948. In those males born in that period, approximately 1% have died or are expected to die from mesothelioma. The highest risks in terms of trades are among shipyard workers, carpenters, electricians, fitters and construction workers in these 1940-1950 birth cohorts, averaging between 2 and 7% over a lifetime. Even such high relative risks do not overall alter life expectancy which depends on more common causes of death. Roughly one in three of us will die of cancer and a similar proportion of cardiovascular disease, usually in old age. The risk of mesothelioma alters the odds of the sort of cancer from which an individual might die rather than altering the likely time at which the inevitable event of death will occur.

5. If the law in Scotland recognises, effectively, that pleural plaques are a disease for which compensation might be obtained through the Courts, it is not unreasonable in the light of what happened after recognition of bronchitis and emphysema (real diseases) in coalminers to expect that law firms might
maximise efforts to obtain clients by advertisement. Since the risks of both mesothelioma and plaques relate to asbestos exposure, the targets of such promotional activity would be those who had worked in the above-mentioned industries. It would be necessary to subject such individuals to radiographic investigation. Since plaques are often not easily diagnosed by simple chest films and may be mimicked by other conditions such as pleural fat pads, it is not difficult to see that this would often include CT scanning. Such investigation, whether positive or negative for plaques, would detect a proportion of incidental abnormalities requiring further investigation and causing attendant anxiety, quite apart from subjecting individuals to unnecessary radiation. The objective of the present proposed law to allow individuals to seek compensation for anxiety would thus have the paradoxical effect of increasing the number of people with this condition, as well as adding to the costs on the NHS. Ultimately the management of litigation-induced anxiety falls on the NHS.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from David G. Owen

AGAINST PRIORITY

David G. Owen*

Monstrously overcrowded asbestos dockets, some courts\(^1\) and commentators\(^2\) argue, should be controlled by a principle of “the worst should go first.” Under this approach, asbestos victims with the worst types of injury are placed on a “rocket docket” for prompt adjudication, in

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1. Many courts agree. Reportedly begun in Massachusetts in 1986, the deferred (“priority”) docket approach spread in the 1990’s to Cook County, Illinois and Baltimore, Maryland, and thence beyond. See Helen E. Freedman, Selected Ethical Issues in Asbestos Litigation, 37 SW. U. L. REV. 505, 508 (2008) (characterizing the priority docket approach as the “Maryland model”). Justice Freedman, who managed possibly twenty-one thousand asbestos claimants in New York, some ninety percent of whom were “functionally ‘unimpaired,'” explains that she applied the deferred docket approach, without consent of the parties, to so-called “unimpaired” claimants, persons who are “not really sick.” See id. The idea was “to restrict the litigation process to individuals who are truly sick, i.e., can demonstrate some objective evidence of functional impairment, or have a malignancy that is related to asbestos exposure by a credible expert or physician.” Id. at 507.

2. Many commentators agree. Peter Schuck should be credited with this catchy aphorism. See Peter H. Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 HARV. J. L. & PUB. POL’Y 541 (1992). See also Mark A. Behrens & Phil Goldberg, The Asbestos Litigation Crisis: The Tide Appears to be Turning, 12 CONN. INS. L.J. 477, 488-93 (2006); Mark A. Geistfeld, Remarks of Mark Geistfeld 20 (Jan. 18, 2008) (unpublished transcript on file with the Southwestern University Law Review); James S. Lloyd, Comment, Administering a Cure-All or Selling Snake Oil?: Implementing an Inactive Docket for Asbestos Litigation in Texas, 43 HOUS. L. REV. 159 (2006); Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 MISS. L.J. 1, 31 (2001) (“Courts must be willing to distinguish between the claims of those who are truly sick and those who are not. The adoption of inactive dockets by courts in Illinois, Massachusetts and Maryland is a good example of a method of controlling claims by the unimpaired.”); Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, Addressing the “Elephantine Mass” of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick, 31 PEPP. L. REV. 271 (2003). For whatever reason, much of the commentary favoring priority comes from defense counsel and academicians directly or indirectly funded by the asbestos or insurance industries.
contrast to victims with lesser injuries whose claims are shunted indefinitely to a deferred, inactive docket. While such a priority approach has a certain intuitive fairness appeal, and while it possesses certain administrative benefits, it is fundamentally flawed. Not only may victims with less serious injuries be deprived indefinitely of judicial resolution of their claims, but the practical effect of such delay is likely to deprive them of any shot whatsoever at a shrinking pie of asbestos compensation funds. Such a priority approach is neither logical nor fair.

I. ASBESTOS AND ITS LEGACY

Once considered a “miracle mineral,” asbestos has served many important uses over the millennia. Possessing extraordinary insulation


5. Asbestos use, and the documented health hazards associated with its use, pre-dates the Christian era. Well known to Egyptians and Romans, asbestos fibers were woven into flameretardant fabrics and incorporated as a binder in cementitious construction. Legend tells of Peter the Great impressing rival leaders of his power by throwing a woven asbestos fiber napkin into a raging fire, later retrieving it unscathed.

John T. Suttles, Jr., Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry, 16 TUL. ENVTL. L.J. 1, 14 (2002). “In the late 1800s, asbestos found many new uses. Powdered asbestos was especially useful, a superb material wherever tough, fireproof, chemically inert insulation was needed. Asbestos became a big industry.” Andrew Alden, Asbestos in a Nutshell: This Miracle Material Has Taught Us Some Lessons, available at http://geology.about.com/od/nutshells/a/asbestosnuts.htm (last visited Mar. 1, 2008).

For centuries, asbestos has been valued because of its flexibility and strength. Moreover, asbestos does not easily burn, conduct heat or electricity, and is not easily affected by most chemicals. Today, asbestos is principally used in cement construction materials, such as pipes, siding, and roofing. It is also used in insulation, fireproofing materials, and automotive parts.

Eileen S. Mazo, Note, Taxing Our Way to a More Polluted Environment, 6 FORDHAM ENVTL. L.J. 357, 359-60 (1995) (citing 1 ASBESTOS 45-64, 73 (Leslie Michaels & Seymour S. Chissick eds., 1979); Brooke T. Mossman et al., Asbestos: Scientific Developments and Implications for Public Policy, 247 SCIENCE 294, 294-95 (1990)). One ancient use was for an altar stone which held a sacred flame, discovered among the ruins of Atlantis near the center of the Earth by the celebrated Lindenbrook Expedition, begun in Iceland in 1880, comprised of Edinburgh professor, Sir Oliver S. Lindenbrook (James Mason), Alec McEuen (Pat Boone), Carla Göteborg (Arlene Dahl), their guide, Hans Belker (Peter Ronson), and Han’s pet goose, Gertrude (played by herself), until eaten by the villainous Count Saknussen (Thayer David). Using the large, dish-like asbestos stone to escape certain doom from giant monsters and other perils lurking at the center of the Earth, the Expedition sat in their asbestos vessel which served as a protective heat shield as it was propelled atop a plume of molten lava upward through a bore hole in a volcano in Stromboli, Italy (an island near Sicily’s Mt Etna), spewing the explorers safely into the Mediterranean Sea (and one, quite...
characteristics, the long, strong, flexible fibers of asbestos can be woven into fabrics, such as fireproof suits that allow humans to walk unscathed into raging infernos.6 During World War II, asbestos products served to insulate boiler rooms on naval ships.7 Yet, despite its substantial virtues, few products rival asbestos for the widespread human harm and suffering this mineral has caused people who have inhaled its lethal fibers floating in the air.8 Deborah Hensler well explains this yin and yang:

Asbestos is a wonderful but harmful natural substance. It is plentiful, it has amazing fire-retardant qualities, and it can be formed into a variety of products that perform useful functions in ships, factories, and office buildings, other commercial and public facilities, and homes. Unfortunately, exposure to asbestos-containing products can also kill people. Asbestos exposure causes mesothelioma, a dreadful cancer that is always fatal. . . . Asbestos exposure also causes a variety of other cancers, including lung cancer [and] . . . also causes non-malignant respiratory disease, termed asbestosis. Victims of asbestosis have difficulty breathing, and severe asbestosis is fatal.9

Not only has asbestos led to massive human suffering, but no product has wreaked such havoc on American courts nor has been responsible for ruining a couple of industries and savaging several others. Since the 1970s, nearly one million persons have filed asbestos injury claims against nearly 10,000 separate defendants.10 Beginning most prominently with Manville in 1982, almost all American producers of asbestos products—now numbering at least 80—have filed for bankruptcy, and every American industry, in almost every state, has experienced at least one bankruptcy from the explosive asbestos litigation.11 George Priest opines that estimates

naked, into a tree). See JOURNEY TO THE CENTER OF THE EARTH (Twentieth Century Fox 1959), based on JULES VERNE, VOYAGE AU CENTRE DE LA TERRE (1864).
6. See, e.g., Frank J. Macchiarola, The Manville Personal Injury Settlement Trust: Lessons for the Future, 17 CARDOZO L. REV. 583, 588 (1996) ("It is a heavy, fireproof, heat resistant, virtually indestructible, fibrous mineral—properties that make it ideal for insulation. It can be manufactured as a fabric. Asbestos insulation can be found in the whole range of buildings and other products that require insulation, including: factories, residences, offices, schools, cars, refrigerators, trucks, and ships." (citation omitted)).
7. Johnstone v. Am. Oil Co., 7 F.3d 1217, 1223 (5th Cir. 1993) (approving jury finding that asbestos was not defective on proof that its effectiveness as heat insulator on Navy ships during World War II helped to win the war).
8. The hazards of inhaling asbestos were well known to the Romans. See Suttles, supra note 5, at 14.
10. See STEVEN J. CARROLL ET AL., ASBESTOS LITIGATION xxiv-v (RAND Institute for Civil Justice 2005) [hereinafter RAND].
11. See A PUBLIC POLICY MONOGRAPH: OVERVIEW OF ASBESTOS CLAIMS ISSUES AND
of eventual claims totaling two to four million are “vast underestimates,” and he predicts that “the asbestos litigation phenomenon will never end.” Whether one concurs with such dire predictions, no one can doubt that the asbestos conflagration continues to rage across the nation and, increasingly, the world. All too closely, the litigation morass that has followed asbestos mirrors its etymological origin from the Greek: “inextinguishable.”

II. LIMITED FUNDS AND JUDICIAL RESOURCES: THE PRIORITY “SOLUTION”

At last count, $70 billion in asbestos claims had been paid by asbestos defendants and their insurers, and future costs of asbestos litigation could amount to another $200 to $265 billion. Now that almost all producers of asbestos products are bankrupt, plaintiffs’ counsel have searched for other,
more solvent defendants with ever more remote connections to asbestos—“peripheral defendants”—such as manufacturers of paper, textiles, and food produced in factories insulated with asbestos which eventually circulated in the air. Peripheral defendants appear now to be bearing the largest burden of damage assessments in asbestos litigation, but claims against them typically are weaker in terms of causation, apportionment, and defensive challenges to the foreseeability of the risk. What all this means is that the aggregate pot of available resources in asbestos litigation appears to be increasingly insufficient to cover the many tens of thousands of new claims, piled on top of hundreds of thousands of existing claims, made upon the resource pot each year. Thus, a major aspect of the asbestos problem is one of limited funds.

But another, enormous dimension to the asbestos problem is the havoc that asbestos litigation has wreaked on the courts compelled to deal with all these cases. In an effort to manage the vast numbers of asbestos claims fairly and efficiently in a world of limited judicial resources and limited funds, courts have been turning to a variety of docket control techniques that accord priority to the most seriously injured asbestos victims. In particular, some courts have divided their dockets in two: an expedited docket (“rocket docket”) for the most serious claims, and a deferred docket (“inactive docket” or “pleural registry”) for less serious claims. Such docket divisions have an appearance of fairness, justice, and administrative practicality that, at first glance, looks positively genius. The underlying priority principle, as previously mentioned, is that “the worst should go first.”


19. RAND, supra note 10, at xxv; see MONOGRAPH, supra note 11, at 3 (describing peripheral defendants as including such parties as Campbell’s Soup, Gerber’s baby foods, and Sears Roebuck).

20. See MONOGRAPH, supra note 11, at 3.

21. With the shift of many traditional asbestos defendants into bankruptcy, bankruptcy courts inherited many of the problems that continue to confound judges in civil litigation. While many problems and solutions in the two contexts are similar, many are different, and the discussion here is directed principally to the civil justice system. Hundreds of articles have been written on asbestos litigation. See, e.g., Symposium, Asbestos Litigation & Tort Law: Trends, Ethics, & Solutions, 31 PEPP. L. REV. 1 (2003); Symposium, Asbestos Litigation, 44 S. TEX. L. REV. 839 (2003). For recent overviews of asbestos litigation, see Carrington, supra note 4; Patrick M. Hanlon & Anne Smetak, Asbestos Changes, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007); Hensler, supra note 9; RAND, supra note 10; MONOGRAPH, supra note 11.
What this type of special docket treatment means for more seriously injured (“worse-off”) victims—those with mesothelioma,22 lung cancer,23 gastrointestinal and other cancers,24 and severe asbestosis25—is that courts adjudicate their claims quite quickly, giving them substantial pieces of a relatively modest, very probably shrinking, compensation pie. What it means for less seriously injured (“better-off”) victims—those with milder asbestosis, pleural scarring (plaques and thickening), and pleural effusion26—is at least three-fold: first, their claims are officially filed, so that a statute of limitations or repose can never bar their claims; second, their claims are placed indefinitely in limbo, such that their access to the justice system is indefinitely delayed; and, third, unless they eventually prove malignancy, permitting them to transfer to the active docket (a remote eventuality),27 they may expect ultimately to receive no access to the justice system at all, and no piece whatsoever of the compensatory pie.28

In short, under docket priority schemes based on the severity of asbestos injuries, more seriously injured claimants win,29 as do the courts;30 but less seriously injured claimants lose.31

22. Mesothelioma caused 81,790 deaths from asbestos in selected industries from 1965-2004 and is predicted to cause another 50,770 from 2005-2029. RAND, supra note 10, at 16 (citing Nicholson study). A more recent study (Price and Ware, 2004) estimates about 90,000 mesothelioma cases from 2005-2049. RAND, supra note 10, at 17.
23. 179,870 deaths from 1965-2004, and 54,580 predicted from 2005-2029. Id. at 16.
24. 50,720 deaths from 1965-2004, and 14,735 predicted from 2005-2029. Id.
25. “Asbestosis is a chronic lung disease resulting from inhalation of asbestos fibers that can be debilitating and even fatal.” Id. at 13. Pulmonary asbestosis is characterized by decreased lung capacity, though some persons diagnosed with the disease have mild symptoms, or none whatsoever. Id. at 13. In 1968, NIOSH reported 77 deaths from asbestosis, a number that had increased to 1,265 in 1999. Id.
26. Pleural scarring is damage to the pleura, a membrane that lines the outside of the lungs and the inside of the chest wall. Pleural effusion is marked by the collection of liquid in the pleural space. Id. at 14.
27. Transfers of this type reportedly are rare. Justice Freedman reports that, among the thousands of asbestos cases she transferred to an inactive docket in New York, she can recall only three transferred from the inactive docket to the active docket. Helen E. Freedman, Remarks of Helen E. Freedman 58 (Jan. 18, 2008) (unpublished transcript on file with the Southwestern University Law Review).
29. Such claimants get much quicker review of their claims and, partially as a result, get a bigger piece of the limited pie.
30. See Freedman, supra note 1, at 508 (reporting that her adoption of a deferred docket may have reduced the active docket by 80 percent).
31. “Under the traditional inactive docket, unimpaired plaintiffs are actually barred from bringing their claims unless and until they meet the impairment requirements. This system accomplishes more than simply prioritizing the claims; it actually prevents unimpaired claimants
III. OBJECTIONS TO PRIORITY

The idea that society should give priority to persons in greater need over persons in lesser need reflects a spirit of charitable, communal solidarity that has deep roots in jurisprudential and political thought. In a world of limited funds for asbestos victims, where the severity of asbestos injuries varies from death to minor lung scarring with no loss of function, and where courts have long and valiantly struggled with vastly overcrowded dockets, how can one quarrel with a priority principle that accommodates the worst first? Objections to priority rest on two pillars— one logical, the other moral.

A. The Logical Frailty of Priority

The premise of priority approaches to dividing the limited pie of asbestos funds from litigation is that persons suffering the worst types of asbestos injuries, being more needy, are more deserving of compensation than persons suffering less serious injuries. Conventional priority schemes, familiar to tort law observers, posit that highest priority is accorded to human life, and then, in decreasing order of importance, to more serious injury, less serious injury, emotional distress, property damage, and, at the bottom of the priority pole, pure economic loss. In the asbestos context, such a priority scheme starts with victims of mesothelioma, who invariably die within one or, possibly, two years; followed by other cancers; severe asbestosis; less serious asbestosis; pleural thickening, scarring, and effusion; fear of contracting asbestos disease; property damage; and pure economic loss, such as the costs of removing asbestos insulation from buildings. The idea of using some such priority scheme in the distribution of limited judicial and economic resources is based on need—the most seriously injured victims, particularly those suffering from mesothelioma, should be given first priority because their losses are the greatest and they therefore have the greatest need.

Putting aside the moral frailty of denying equal respect to persons holding preexisting legal entitlements of lower economic magnitude, a

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32. See infra notes 56 and 57, and accompanying text.
33. See, e.g., Freedman, supra note 1, at 517-18; Geistfeld, supra note 2, at 32; Francis E. McGovern, Asbestos Legislation I: A Defined Contribution Plan, 71 TENN. L. REV. 155, 164-67 (2003) (describing a claim processing system where malignant claims are given priority).
34. See McGovern, supra note 33, at 164-65.
problem examined in the next section, the delivery of legal redress and defendant resources first to victims of mesothelioma and other terminal asbestos injuries fails to deliver on its promise of providing funds to victims in greatest need. The reason for this failure, if tragic, is simple: even if placed on a “rocket docket,” these asbestos victims normally are dead before their cases can be resolved by the litigation system. Assuming dubiously that a mesothelioma victim upon diagnosis proceeds immediately to a lawyer, the lawyer must investigate and otherwise prepare the case in order to ascertain the defendants and their respective shares of damages, to evaluate the various legal issues, to ascertain the plaintiff’s damages, and, since mesothelioma invariably is quickly fatal, how damages should be divided between claims for survivorship and wrongful death. These are complex matters of moment that take considerable time for even an experienced, well-organized plaintiff’s lawyer to resolve sufficiently to file a complaint. Thereafter, even with accelerated dockets, defendants must be provided sufficient time to investigate the claims and organize their defenses. And, after judgment, appeals of such serious claims, partially because of the probability of large awards, are likely.

So, proceeding from the premise that full-fledged litigation rarely provides asbestos dollars to victims of mesothelioma, to whom do such dollars in fact eventually flow? Typically, of course, such dollars ultimately go to a victim’s estate, which normally means the victim’s family. No doubt a victim’s spouse, usually a wife, is often needy and deserving of compensation for prematurely losing her husband. But, with a latency period for this disease of up to sixty years, even if there is a surviving wife, the victim is likely to be quite elderly when he dies and so is likely to have stopped providing his wife with support from wages long before. Moreover, even if the wife is still alive, and even if the husband’s death somehow does remove her support, the fact of the matter is that she also is probably quite elderly herself such that she is unlikely to need support for long.

Apart from a widow, if one exists and has survived, the brunt of the death of a mesothelioma victim typically falls on his children. But their suffering, like their mother’s, is not their own physical suffering but grief from prematurely losing a father (as their mother, if still alive, lost her husband), and possibly some economic loss, normally small or nonexistent because of the victim’s age at the time of death. It will be remembered that

35. See Schuck, supra note 2, at 559.
36. See Freedman, supra note 1, at 506. More conventionally, the latency period of mesothelioma is said to extend up to forty years. See, e.g., MONOGRAPH, supra note 11, at 2; RAND, supra note 10, at 15.
priority is premised on the idea that people in greatest need should be compensated first, and that those who suffer “mere” emotional and economic losses should stand at the very end of the priority line. A need-based rationale does not suggest why a deceased victim’s grown children may need economic support since they, if anything, are less likely to be in need than surviving victims excluded from the most favored claimant group because their injuries are less serious. While better off than mesothelioma victims because they are still alive, less seriously injured victims are nevertheless more needy because they are alive. For example, they may suffer breathing and other physical impairments, even if not severe, that at least partially disable them from earning income, and they may suffer a real and persistent fear that their asbestos injuries will one day blossom into a lethal disease. Although these injuries of better-off victims are far less consequential than death, they stand ahead of emotional and minor economic losses of third-party family members of asbestos victims now deceased. In short, classifying mesothelioma (and terminal cancer) victims as worst off, and compensating their estates first at the expense of less seriously injured victims who are still alive, turns the need-based priority system on its head.

B. The Moral Frailty of Priority

Even more problematic than logical frailty is the moral frailty of asbestos priority schemes. Requiring better-off victims to surrender meaningful rights of redress in order to help worse-off asbestos victims may appear to draw support from John Rawls’ Second Principle of Justice, the “difference principle,” which commands that economic and social inequalities be ordered so as to be “to the greatest benefit of the least advantaged” members of society. 37 Under this principle of “maximin,” Rawls argues that distributions justly may be unequal when they maximize benefits for persons possessing the most miniscule amounts of “primary goods.” 38 This principle of justice of course reflects many other systems of moral, political, and religious thought supporting charitable principles of priority for persons in greatest need. Yet forcing persons who are better off (say, victims of nonmalignant harm) effectively to subsidize persons who are worse off (say, victims of malignant harm) conflicts with two fundamental moral and political precepts on which our republic rests: freedom and equality. 39

38. See id. at 303.
39. On how these values and principles apply to the law of products liability, and the roles of
1. Freedom

In a republic, freedom is the most fundamental, and most important, moral and political value. Among modern philosophers, the one most credited with propounding this ideal is Immanuel Kant, who postulated that freedom is “the one sole and original right that belongs to every human being by virtue of his humanity.” While philosophers and governments must concern themselves to a large extent with notions of equality and group welfare, freedom is the first and most essential ideal within a broad philosophy of government and justice.

The concept of freedom, or “autonomy,” rests upon the notion of free will—the capacity of persons rationally to select personal goals and plans for life and their possession of means to achieve those ends. Freedom thus entails at least two conditions: choice and power. The design of life plans and the selection of means to achieve those goals imply a range of options and opportunities—alternatives from which to choose. As a person’s choices are enhanced, so too is the person’s freedom. Freedom also requires power, for one must have the ability to bring one’s chosen goals to fruition in order to control one’s destiny, in order to be free. To be autonomous, therefore, one must possess requisite mental and physical corrective and distributive justice, see David G. Owen, The Moral Foundations of Products Liability Law: Toward First Principles, 68 NOTRE DAME L. REV. 427 (1993); Richard W. Wright, The Principles of Product Liability, 26 REV. LITIG. 1067 (2007). On how they apply more generally to the law of torts, see, e.g., ALAN CALNAN, JUSTICE AND TORT LAW (1997); JULES L. COLEMAN, RISKS AND WRONGS (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995); Gregory C. Keating, Distributive and Corrective Justice in the Tort Law of Accidents, 74 S. CAL. L. REV. 193 (2000); Richard W. Wright, Right, Justice, and Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995). Much of the remainder of this section draws from David G. Owen, Philosophical Foundations of Fault in Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995) [hereinafter Owen, Philosophical Foundations].


42. I use the two terms interchangeably, although for some purposes there may be value in distinguishing between them. See JOSEPH RAZ, THE MORALITY OF FREEDOM 400-29 (1986).

43. “The will is free, so that freedom is both the substance of right and its goal . . . .” GEORGE W. E. HEGEL, PHILOSOPHY OF RIGHT 20, para. 4 (T.M. Knox trans., 1858) (1821). In Kant’s view, freedom, autonomy, and morality are all inseparably bound together. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 70-71 (L. Beck trans., 1885) (1785). “Autonomy is thus the basis of the dignity of both human nature and every rational nature.” Id. at 54. Kant viewed autonomy, freedom of the will, as “the supreme principle of morality.” Id. at 59.
prowess and adequate physical goods and monetary resources to achieve the objectives one selects.44

Freedom accords persons dignity, for it allows each human to design and follow a life plan distinct from any other. Yet, freedom also forces persons to shoulder a burden, for it places responsibility on each person rationally to plan and live a life “good” for that individual and respectful of other persons.45 While philosophers and theologians may debate forever the notion of what constitutes the ultimate good life and its component virtues, it is each human’s moral privilege—and his or her moral responsibility—to choose particular life goals that he or she deems most worthwhile, and to seek to achieve them through personal choice and action.

Viewed in this way, freedom is the primary moral and political ideal. It is the first condition to protecting or advancing other values, such as equality, altruism, and communal welfare. Thus, whether the ultimate goal of law is thought to be the promotion of individual well-being or the welfare of the group, the first and most important function of the law is to protect and promote freedom or autonomy.

2. Equality

In a crowded world, the freedoms of a multiplicity of individual persons constantly collide as each person’s pursuit of his or her life goals inevitably conflicts with other persons’ pursuits of their own life goals. The law therefore must draw boundaries around individuals, defining where one person’s freedoms end and another person’s freedoms begin.46 The most elementally helpful criterion for drawing such freedom boundaries in a just and enduring society is equality.47

44. RAZ, supra note 42, at 371-73. Conceptions of freedom vary considerably among philosophers. Having the means to be one’s own master has been characterized as “positive” freedom, as distinguished from freedom in its “negative” form, consisting in the absence of interference with one’s activities by others. For the classical formulation of this distinction, see Isaiah Berlin, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 121 (1969), reprinted in LIBERTY 33 (David Miller ed., 1991).
45. “Autonomy is valuable only if exercised in pursuit of the good.” RAZ, supra note 42, at 381.
46. This fundamental concept is nicely captured in Nozick’s “border crossing” metaphor. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 55-58 (1974).
47. The equality ideal has been a profoundly important ethic in moral and political philosophy throughout the ages. Though undeveloped, it was perhaps the central ethic in Aristotle’s theory of corrective justice. [T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it . . . . ARISTOTLE, THE NICOMACHEAN ETHICS bk.V, at 146 (J.E.C. Welldon trans., 1912). Equality
A “strong” version of equality—one that emphasizes equality of resources ("goods")—might require a person holding more goods, A, to transfer enough of his or her goods to B to achieve a state of goods equality between A and B. Yet there is very little call in a free republic for this type of pure distributional equality of goods among its citizens. Instead, most theorists prefer some kind of “weak” equality in which the interests of all are considered of equal order—where the interests of one person have no inherent priority over the interests of another, no matter how many (or what type of) goods one person or the other may possess. “Weak” formulations of equality rest on the premise that each person is entitled to a maximum amount of freedom consistent with an equal right of others, aptly termed an “equality of concern and respect.”

48 Philosophers across the ages, from Plato, Aristotle, Kant, Nozick, and even Rawls and Dworkin, was central to the philosophy of Kant, who considered it to be contained within the principle of freedom. See KANT, supra note 40, at *237-38; see infra note 51. And its elemental power remains at the heart of much contemporary jurisprudence. See GERALD DWORINKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988) ("Every moral theory has some conception of equality among moral agents . . . ."); RONALD M. DWORINKIN, LAW’S EMPIRE 295-301 (1986); ERIC RAKOWSKI, EQUAL JUSTICE (1991); RAWLS, supra note 37, § 11, at 60, §§ 32-40, at 201-51, § 77, at 504; PETER WESTEN, SPEAKING OF EQUALITY (1990) (examining the paradoxes, rhetorical force, and various conceptions of equality); Jeremy Waldron, Particular Values and Critical Morality, 77 CAL. L. REV. 561, 577 (1989) ("[O]ne cannot go anywhere in serious moral thought except on the basis of some assumption about the fundamental equality of human worth."). The innate link between freedom and equality, defined by KANT, supra note 40, at *237-38, is captured succinctly by Hart: “[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.” H.L.A. Hart, Are There Any Natural Rights?, 64 PHIL. REV. 175 (1955), reprinted in THEORIES OF RIGHTS 77, 77 (Jeremy Waldron ed., 1984). The constitutive link between equality of resources and freedom is explained in Dworkin, supra note 41, at 54 (arguing that “liberty and equality are not independent virtues but aspects of the same ideal” by which they help define one another). See also infra note 55.

48. Although the concept derives, through Rawls, from Kant (as well as from Aquinas, Christ, and others), its statement in this form is Dworkin’s. See RONALD M. DWORINKIN, LAW’S EMPIRE 181-82 (1986) (noting that Rawls’ “justice as fairness rests on the assumption of a natural right of all men and women to [an] equality of concern and respect . . . [possessed] simply as human beings with the capacity to make plans and give justice”).

49. See PLATO, LAWS VI.757, at 143 (Taylor trans.), quoted in WESTEN, supra note 47, at 52-53 n.19.

50. See ARISTOTLE, supra note 47, bk.V., at 150-60 (discussing corrective justice).

51. “Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.” KANT, supra note 40, at 30.

52. Nozick may find the least use for equality among major contemporary philosophers. See NOZICK, supra note 46, at 223-24. He is not alone, of course, in this position. See, e.g., Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 537 (1982). For a valuable critique of equality from a leading English legal philosopher, see RAZ, supra note 42, at 217-44.

53. It may seem odd for Rawls and Dworkin to be included among proponents of “weak” equality, for they both view equality as central to their systems. See RAWLS, supra note 37, at 222-24, 453-504; Ronald Dworkin, In Defense of Equality, 1 SOC. PHIL. & POL’Y 24 (1983). Yet
have accorded some such notion of weak equality a central position among moral values. The point of this kind of weak conception of equality, of "equal freedom," is that it proclaims the intrinsic and ineffable worth of every human,54 and it values and protects the right of each person to direct the fruits of his or her labor toward assembling and protecting whatever basket of goods that person deems best. The value of this abstract notion of equality lies not in its substance, for it possesses little if any substantive content, but in its principled structure for interpersonal comparisons that offers a powerful, initial framework for evaluating moral questions when freedoms clash.55

C. The Inseparability of Claimants and Their Interests

In an attempt to justify discriminating against a large class of claimants, asbestos priority schemes are conceptualized by “interest” rather than “claimant.” But an examination of this distinction reveals that it carries little substance and fails to avoid equal-freedom challenge. Interest ordering rests on the premise that certain safety interests, particularly in life and limb, are inherently of a higher order than security against minor bodily injuries and interests in “mere” property and money.56 Interest ordering

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they both subscribe to the notion of “equal concern and respect,” see supra note 48 and accompanying text, which defines the concept weakly. Though Rawls’ difference principle (expressed in his second principle of justice) is thoroughly rooted in equality, his first and “prior” principle of justice, echoing Kant’s own fundamental ethic, is grounded in the liberty ideal: “[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.” RAWLS, supra note 37, at 60.


55. Consider the breadth and power of the Kantian ideal of equal freedom as lucidly expressed by Roger Pilon: [W]e proceed from a [natural law] premise of moral equality—defined by rights, not values—which means that no one has rights superior to those of anyone else. So far-reaching is that premise as to enable us to derive from it the whole of the world of rights. Call it freedom, call it “live and let live,” . . . the premise contains its own warrant and its own limitations. It implies the right to pursue whatever values we wish—provided only that in doing so we respect the same right of others. And it implies that we alone are responsible for ourselves, for making as much or as little of our lives as we wish and can. What else could it mean to be free? Roger Pilon, Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles, 68 NOTRE DAME L. REV. 507, 509-10 (1993) (footnotes omitted).

56. See, e.g., Deryck Beyleveld & Roger Brownsword, Impossibility, Irrationality and Strict Product Liability, 20 ANGLO-AM. L. REV. 257, 260, 273-74 (1991) (utilizing Alan Gewirth’s lexical ranking of goods into three tiers, whereby a person’s physical integrity is ranked as a firsttier, “basic” good, whereas wealth would be ranked as a third-tier, “additive” good).
along these lines—whereby life and higher bodily integrity interests are ranked more highly than lower bodily integrity interests and the security of property and economic interests—has a deep tradition in the law of torts. Yet, this priority ethic is rooted in the *ex ante* context of truly intentional takings by a tortfeasor, in which context (for a variety of reasons) the lexical ordering of major interest categories provides a system of useful markers that serves at once to identify, define, order, and explain society’s most fundamental vested rights. And so the law declares that one person may not intentionally maim or kill another human to protect some jelly jars.

In cases involving only accidental harm, however, where the state judicially allocates scarce resources, lexical interest ordering fits much less comfortably because the freedom interests of all players are entitled to an equality of respect *ex post*. While persons most certainly have important freedom interests in the security of their bodies, persons have equally worthy (if less valuable) freedom interests in their property. And a person’s autonomy depends as well upon the security of his or her wealth—of holdings of money and other property. Indeed, the importance of property and economic interests to a person’s sense of identity, and overall autonomy, has been emphasized by philosophers across the centuries.

57. See W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 21, at 131-32 (5th ed. 1984) (“[T]he law has always placed a higher value upon human safety than upon mere rights in property . . . .”). This premise of tort law is widely shared by the general public. “If asked, most people would probably say that the thing of ultimate value in the world is human life.” PATRICK F. MCMANUS, HOW I GOT THIS WAY 36 (1994).

58. “This is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on.” RAWLS, supra note 37, at 43.


60. Together with liberty, opportunity, and self-respect, Rawls classifies wealth as a “primary good,” since it is “necessary for the framing and the execution of a rational plan of life.” RAWLS, supra note 37, at 433. “Wealth” essentially is “property” by another name, and philosophers from the time of Aristotle have recognized its fundamental importance to the pursuit of goals by human beings. See infra note 61 and accompanying text. As previously noted, some philosophers, such as Alan Gewirth, accord wealth and property a lower value. See supra note 56.

61. “The point of property is . . . to provide an external sphere for the operation of the free will.” Ernest J. Weinrib, Right and Advantage In Private Law, 10 CARDOZO L. REV. 1283, 1291 (1989). “The point, in justice, of private property is to give the owner first use and enjoyment of it and its fruits (including rents and profits) . . . [which] enhances his reasonable autonomy and stimulates his productivity and care.” JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 173 (1980). See ARISTOTLE, supra note 47, bk.IV, at 106-19; HEGEL, supra note 43, paras. 40-42; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988). See also RAZ, supra note 42, at 413.
The equal-freedom premise is that one person’s freedom right in security from accidental harm (whether to one’s interests in life, bodily integrity, emotional integrity, property, or economic wealth) has no greater essential importance than another person’s freedom right to advance and protect his or her own chosen goals—goals that often require the use of property and that may be stored in monetary form. Of course this concept of equality applies only to interests in the abstract, so that the value of each person’s interests of any type must be measured by some fair pecuniary metric. It is true, of course, that the pecuniary value of life and security from severe injury is much greater than the pecuniary value of security from much less consequential loss. Yet, the right of one person to life or security from severe injury is entitled to no more respect than the right of another person to security from minor injury, emotional loss, or property loss. At bottom, the equal-freedom ethic posits that a seriously injured person’s claim for legal redress is morally equal to, not higher than, the claim of a person whose injuries are less severe.62

For these reasons, one must be skeptical of arguments that prioritizing interests across all asbestos victims accords disparate treatment only to their interests, not to them as individuals, and so treats them all equally. Such an argument is that an interest priority scheme fairly accords equal protection to everyone similarly situated, which is all that equality requires. Despite its superficial appeal, this argument at bottom denies the equal-freedom entitlement of all citizens to equal respect for each item in their individual baskets of interests—interests in bodily security (avoidance of death, serious injuries of various types, less serious bodily injuries of various types), emotional security, property security, and purely economic security.

The inseparability of people from their legal interests, and how priorities based on a distinction between them conflicts with the equal-freedom ideal, may be illuminated by an example. Assume that A puts all fruits of his or her labors (wages) into his or her body—yoga and other special exercise, cosmetic and other bodily enhancement surgeries, health foods, various other health products, health spa vacations, and the like. By contrast, assume that B puts all his or her resources into a house. Assume, further, that C tortiously causes an explosion that harms A’s body and B’s house. If C has limited resources, principles of equal freedom would prevent the law from applying a priority rule that protects A but not B.

62. “Interest ordering, based on the absolute priority of certain interests, is out of place” in figuring responsibility for accidental harm resulting from “rough and tumble choices in an imperfect world, where life and limb (as valuable as they surely are) simply must be tossed into the same decisional scales as ‘mere’ property, money, and convenience.” Owen, *Philosophical Foundations*, supra note 39, at 220.
Surely we would reject an argument that giving priority to A would accord equal respect to A and B because they are similarly treated, that both are protected in their bodily security interests prior to their property security interests. Such a priority argument fails because it fully respects A’s freedom right to decide how to order his or her basket of goods while showing no respect whatsoever for B’s similar freedom right. Such an interest-ordering priority scheme, in derogating one person’s freedom right in order to benefit that of another, brazenly flouts B’s right to equal freedom under law.

In short, a person’s freedom to a large extent reflects the degree to which the law respects and protects whatever type of goods the person individually chooses to amass, and the principle of equal freedom requires that the law equally respect each person’s basket of chosen goods.

IV. MORAL PRIORITY

Law in a liberal state, it has been argued, should strive to achieve equal freedom for all its citizens, and to maximize individual choice. Thus far, the moral discussion has explained how priority schemes favoring worse-off asbestos victims violate a right of equal access to both justice and funds by better-off victims who have an equal corrective justice right to limited pools of asbestos resources. It might be thought that better-off asbestos victims (those with less serious injuries) are benefited by an inactive docket that permits them, by tolling statutes of limitations, to keep their claims alive for when they eventually may contract a malignant asbestos disease (such as mesothelioma), at which time their claims will be transferred to the active docket for timely disposition. No doubt statutes of limitations, together with prohibitions in many jurisdictions against “claim-splitting,”

63. The analogy to asbestos priority schemes is strengthened, and the unfairness of such schemes further illuminated, by expanding the number of victims and defining their harms to, say, broken legs suffered by 100 As, and destroyed homes suffered by 100 Bs. Assuming C’s assets are not sufficient to cover all 200 claims, a priority scheme that protects all harms to the 100 As for their broken legs (physical, emotional, and economic) at the practical expense of protecting none of the interests of the 100 Bs for their destroyed homes would be patently unfair.

64. My claim here is a moral argument that law should enforce the equal-freedom right, not a legal argument based on the constitutional right to equal protection of law. Others have argued that asbestos priority schemes do not violate equal-protection constitutional requirements, a topic I do not address. See, e.g., Mark A. Behrens & Manuel López, Unimpaired Asbestos Dockets: They Are Constitutional, 24 REV. LITIG. 253, 291-93 (2005); Lloyd, supra note 2, at 186-88.

65. Whether in the civil justice system or bankruptcy, asbestos victims own property rights arising from principles of corrective justice. For works on corrective justice, see supra note 39.

66. Claim-splitting permits a person to bring a present claim for asbestosis (or other injury) without losing the right to sue later, perhaps decades later, for a mesothelioma or cancer claim that
can present major hurdles for better-off asbestos victims, and the inactive docket device is a creative way to help this class of victim avoid losing their rights to future redress for more serious injury claims.

While inactive dockets help better-off victims preserve their rights to bring eventual actions for more serious injuries, such dockets may be faulted for depriving better-off victims of a meaningful choice to obtain relief for their present, less serious claims. Consistent with principles of equal freedom, courts should allow such claimants an equal right to timely justice—and, with that right, an equal, proportionate shot at the current asbestos fund pie. While designing a full-fledged allocation plan lies beyond the scope of this essay, the basic idea is that better-off claimants should be given a timely opportunity to recover their fair, proportionate amount of the limited asbestos fund pie without losing their rights to future recourse for more serious injuries.

Assume, for example, that a number of asbestos claims are made against one or more defendants whose present and future assets available for distribution to claimants are determined to be $60 million. Further assume that a court or special master determines that all present and future claims are likely to total $100 million. Hence, because available assets would cover sixty percent of all claims, each claimant would be entitled, under equal-freedom principles, to sixty percent of his or her claim.

All claimants under such a proportional approach thus would be entitled to receive current compensation for their current claims, and less seriously injured claimants ideally should be permitted to split their claims and remain on inactive dockets for possible future transfer to active dockets in case they eventually do develop more serious injuries. Any proportional scheme like this no doubt in practice will confront various obstacles, such as prohibitions against claim-splitting in some states, and possibly statutes of limitation. But the virtue of such a proportional approach is that it offers equal access to justice, and equal access to limited pools of funds, to all asbestos victims no matter how severe their injuries.


67. To be meaningful, freedom requires the availability of “an adequate range of choices” and that those choices be “good.” See RAZ, supra note 42, at 373, 379.
To preserve sufficient funds for all asbestos claims, particularly those coming far in the future, valuations of the defendants’ pools of resources and estimates of the numbers and types of future claimants should be conservative, which means that amounts paid to all present claimants should be reduced substantially (and proportionally) from their ordinary litigation values. But such is the price of protecting future claimants, of according them equal respect. And courts might fairly permit claimants with more serious injuries to litigate their claims now and funnel less serious claims out of the traditional judicial system into an administrative compensation system administered promptly according to the principles of proportion just described. Yet any claimant should have a choice to decline to participate in such a present administrative distribution plan and remain instead on the inactive judicial docket, with claim intact, indefinitely. Equal freedom supports some kind of approach along these lines that provides equal access to present redress to each class of claimant, large and small alike.

V. CONCLUSION

Asbestos has become the law’s worst nightmare: too many claims to adjudicate, and too few funds to pay the claims. But the solution lies not in unfairly depriving victims with less serious claims of their right of redress in order to benefit those who are more seriously injured. Not only do “worst-should-come-first” priority schemes fail in their promise of delivering funds to those in greatest need, but the ideals of freedom and equality demand that every holder of a legal claim be treated with equal respect. This means that the law cannot fairly require holders of claims of more modest pecuniary value to surrender those legal entitlements to modest damages in order to subsidize holders of claims worth more. Logic and fairness, resting on principles of equal freedom, compel rejection of priority schemes that sacrifice rights of better-off victims for the benefit of those with injuries more severe.

68. Funneling better-off claimants into such an administrative system merely alters the means by which their claims are administered without derogating their entitlement to legal recourse. Nevertheless, an important, preliminary responsibility of the administrator of such a mechanism would be to separate false claims from good. See Lester Brickman, On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality, 31 PEPP. L. REV. 33, 168 (2003) (“For the most part, asbestos litigation consists of a massive client recruitment effort which relies on the creation and use of specious evidence in a process which has corrupted the civil justice system.”).
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from the Royal College of Physicians of Edinburgh

The Royal College of Physicians of Edinburgh is pleased to respond to the Justice Committee’s call for evidence on the Damages (Asbestos-related Conditions) (Scotland) Bill. Our response is as follows.

The judgement in the House of Lords has accepted the medical evidence that pleural plaques are an indicator of previous exposure to asbestos but are not a cause of disease and do not merit compensation.

Fellows with extensive relevant expertise as both physicians and/or researchers support this decision. Indeed, some of our Fellows with directly relevant experience of court proceedings in the UK and USA are providing detailed evidence direct to the Committee. The College commends their responses and has not repeated their evidence here.

The fatal consequences of asbestos exposure through mesothelioma and lung cancer do not apply to the development of pleural plaques, but there is little doubt that patients can be confused and anxious about “asbestosis” in general and categorise pleural plaques within this group. The College understands this but the medical evidence is clear and competent, and knowledgeable physicians should be in a position to allay these fears. Lawyers seeking to support patients in compensation claims must not be allowed to undermine the medical evidence.

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.

In conclusion, the College supports the House of Lords’ decision and would not wish to see it overruled in Scotland. It is important that members of the public with genuine claims for damage following asbestos exposure are fully supported, but the case for including pleural plaques within this category is very weak. The College is concerned about the psychological consequences for patients if misunderstandings about the risk of pleural plaques are allowed to persist.
Written submission from Dr Martin A Hogg

Background
I should begin by declaring that my interest in this Bill is entirely a disinterested, academic one; I have no other connection or interest to the subject, whether personal or professional, and neither myself nor any member of my family is affected by an asbestos related medical condition.

I have been researching the area of asbestos related injuries for approximately five years, as part of a wider interest I have in the law of causation and the apportionment of damages in delict claims. I have published a number of papers/book contributions in this field: ‘Causation and Apportionment of Damages in Cases of Divisible Injury’ (2008) Edinburgh Law Review Vol 12, pp 101-106; ‘Re-establishing Orthodoxy in the realm of Causation’ (2007) Edinburgh Law Review pp 8-30; ‘The Role of Causation in Delict’ (2005) Juridical Review Part 2, pp. 89-151; ‘Duties of care, Causation, and the implications of Chester v Afshar’ (2005) Edinburgh Law Review Vol. 9, pp 156-167; and ‘Scottish Case Notes’ in B Winiger, H Koziol, B Koch, R Zimmermann (eds) Digest of European Tort Law, Vol I: Essential Cases on Natural Causation (Springer, 2007). I am currently working on a book contribution comparing the law of causation and damage apportionment (including in asbestos cases) in Scotland and Louisiana (both are so-called ‘Mixed Legal Systems’ and thus useful comparators), and I shall be speaking at a conference on causation at the University of Aberdeen next year. My article ‘Re-establishing Orthodoxy in the realm of Causation’ (listed above) was on the precise matter covered by the subject of the Damages (Asbestos-related Conditions)(Scotland) Bill and the Johnston v NEI International case.

The process of law reform in the field of asbestos related injuries
In my published articles ‘Re-Establishing Orthodoxy in the realm of Causation’ and ‘Causation and Apportionment of Damages in Cases of Divisible Injury’ I have argued that it is undesirable to undertake law reform on the basis of an understandable, but often emotionally charged, desire to compensate injured parties, if such law reform cuts across established principles of law with a proven track record of serving the end of justice. I believe that such undesirable instance of law reform occurred when the Compensation Act 2006 enacted for joint and several recovery of damages against defenders shown only to have materially increased the risk of mesothelioma occurring. This legislation reinstituted the unorthodox and unsound view that causation of an actual injury in the real world may be demonstrated merely by showing that a defender increased the risk of that injury occurring. This is a patently erroneous view: the mere fact that I may create a risk of injuring an individual in a particular way does not mean that, if that individual is so injured, it was the risk I created which in actuality caused the injury. The injury may have been caused by any one of a number of other causes present in the background matrix of facts. The provisions of the Compensation Act were defended by some in Scotland at the time of their passage on the basis that they reinstated an allegedly sound Scottish legal position, established originally in Mcghee v National Coal Board 1973 SC (HL) 37, and supported more recently by Lord Rodger in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32, that materially increasing the risk of
injury is the same as materially contributing to that injury. This view, whilst it may have been a Scottish one in the sense that it prevailed after the decision in the Scottish appeal of McGhee, was far from sound (it has been criticised by many scholars working in the field of causation in the law). On the contrary, it is wholly unorthodox and constituted a troubling anomaly in the law for twenty years until it was sensibly replaced by the reasoning adopted by the majority of their Lordships in the Fairchild decision.

I relate this history of the McGhee and Fairchild decisions and the subsequent Compensation Act merely to indicate that responding to public pressure from certain quarters for law reform for reasons that do not make sense when considered against the principles of a field of law taken as whole does not make, in my view, for sensible legal development. I am concerned that what is proposed with the Damages (Asbestos-related Conditions)(Scotland) Bill may prove to be another example of seeking to assist the inflicted at the expense of undermining well established legal principles. If I may, I shall explain more fully what I mean by this below.

The Johnston case and other decisions related to pleural plaques
The Committee is doubtless fully aware of the terms of the decision of the House of Lords in Johnston v NEI International Combustion Ltd. In short, their Lordships decided that asymptomatic pleural plaques did not constitute actionable damage in English Law (nor could such pleural plaques be conjoined with fear of future illness to make for an actionable claim). The decision, although not technically binding in Scotland, has been criticised by some in Scotland on the basis that, it was said, pleural plaques had for two decades been recognised and accepted in the Scottish courts as actionable damage. My own view, however, is that this supposedly established and generally accepted Scottish position is based on no more than a couple of cases decided in the Outer House of the Court of Session in the late 1990s (Nicol v Scottish Power plc 1998 SLT 822 and Gibson v McAndrew Wormald [1998] SLT 562), cases in which it was held that asymptomatic pleural plaques constituted actionable damage merely because that position was not challenged. If one reads the pleadings and decisions in these cases, it will be seen that the courts’ ruling was made without any proper debate of the question whether pleural plaques ought to be considered as constituting a recognised injury under Scots Law, the Court in both cases merely accepting the assumption of both sides that pleural plaques were injurious per se. By contrast, in the decision of the House of Lords in Johnston (the decision that the proposed Bill would reverse) a full consideration of this issue was undertaken.

The problem of pleural plaques as injury
What is the problem for asymptomatic pleural plaques constituting an actionable injury in Scots Law? It is this. Pleural plaques, where they are asymptomatic (as the vast majority are), produce no sensation of pain or discomfort, do not produce any other deleterious effect on health or wellbeing, and do not have any causative effect in relation to other conditions (such as asbestosis or mesothelioma) which an individual may go on to contract. As such, it seems impossible to classify them as an injury under the existing recognised principles defining physical injury in Scots Law. Recognised physical injuries require one (or more) of a number of factors to be present: physical impairment; pain; or visual disfigurement. Merely internal cellular change, which causes no pain, no physical impairment, and no visual disfigurement (such as a painless but visible change in skin pigmentation, for instance) does not therefore seem, under an orthodox view of the matter, to constitute an injury. If the proposed Bill chooses to make such asymptomatic,
internal, cellular change actionable, then it will be constituting statutorily a condition as an injury which would not otherwise be such according to the recognised concept of injury. It is a reasonable question to ask: why would one wish to do so? I can discover no answer other than what appears to be a publicly promoted desire by those ‘suffering’ from asymptomatic pleural plaques that this should be so, and a resultant wish by the Government not to appear mean in denying this demand. Yet, if one type of asymptomatic, internal cellular change is to be recognised as injurious, why not comparable conditions? There seems no sound reason to choose to allow one condition to be recoverable in damages, but not comparable conditions. As the recent Consultation Paper by the Ministry of Justice on pleural plaques (CP 14/08, published in July 2008) puts it, “[i]nterference with the fundamental principles on which the Law Lords’ decision was based could have wider consequences and could be used as a precedent to argue for compensation in other situations.” (para 38)

One should remember, in considering this issue, the crucial point, often forgotten in this debate, that the medical evidence shows that, while pleural plaques are caused by the inhalation of asbestos fibres, and share such causation with symptomatic asbestos related injuries such as asbestosis and mesothelioma, pleural plaques, where they do occur, are not causally related to any instance of asbestosis or mesothelioma which may arise. This point was recognised by their Lordships in the Johnston case, who refer to the medical evidence supporting such a view. I suspect that it is an unconscious and erroneous linking of pleural plaques with asbestosis/mesothelioma by some which leads them to wish to make pleural plaques actionable themselves in damages.

**The problem of assessing damages for pleural plaques**

So, the provisions of the proposed Bill would run contrary to the established view of what constitutes an injury in Scots Law. I also consider it telling that, while clause 1(2) of the Bill states that “a person who has [asbestos related pleural plaques] may recover damages in respect of them”, it says nothing of how damages for such pleural plaques are to be assessed by a court. Its is perhaps unsurprising that this issue has been avoided, as it seems to me to be a well nigh impossible task for a judge to assess damages for an ‘injury’ which produces none of the ill effects which a recognisable injury would do. If I suffer no pain, no physical impairment, and no visual disfigurement, what exactly is the extent of the harm I have suffered? Should it be assessed at £50, £500, £5,000, or some other figure? One answer to that may be that there is prior authority, in the two cases from the 1990s mentioned above, and from similar English cases from that period, for an assessment of damages. Yet prior awards were inevitably purely arbitrary in the sum chosen. A judge has no means of assessing the severity of the ‘injury’ in a pleural plaques case by comparing it with other possible physical injuries of differing severity, as judges are able to do in a normal damages claim. Normally, if I have a condition which produces severe pain, rather than moderate or minimal pain, I get more damages; if I have a condition which means I can barely walk, rather than a slight stiffening of the joints, again I get more damages; or if I have lost three figures, rather than just the tip of one, again I get more damages. Each of these different injuries can be categorised as more or less injurious on a scale, and thus a reference point for assessing the quantum of damages can be discovered. No such process will be capable in relation to asymptomatic pleural plaques. No one instance of such condition is more or less severe than any other, given that there is no pain and no physical impairment in any such instance. So how can the ‘severity’ of the condition be measured? Presumably the only way to do so would be to suggest (falsely I would argue) that the greater the physical extent of the plaques, the
greater the severity of the ‘injury’, even though the greater extent creates no difference in
the pursuer’s health or physical sensation. The only other solution would be to award a
single lump sum for any instance of pleural plaques. But again, how does one arrive at a
figure? Would it be more or less than for a slipped disc, more or less than for a broken
arm, more or less than for pancreatic cancer? No justifiable answer to that question
seems possible.

None of the foregoing should be taken to constitute an objection on my part to recovery of
damages in the small number of cases where pleural plaques do produce physical
discomfort. As Lord Phillips CJ said of pleural plaques in the Johnston case, “[v]ery
occasionally, in fewer than 1% of cases, the patient may be aware of an uncomfortable
grating sensation on respiration.” It seems right that in a case such as that, where more
than de minimis physical discomfort is caused, an actionable injury should be considered
to have been suffered. Under present damages rules that would be so. However, the
proposed Bill makes no requirement for physical sensation or impairment before a claim
may be made, and would treat the 99% of cases, the asymptomatic ones, as equally as
actionable as the 1% of symptomatic ones.

Pleural thickening and asymptomatic asbestosis

The Johnston decision was concerned with pleural plaques only, and not with
asymptomatic pleural thickening or asymptomatic asbestosis, but the theoretical issues
are largely the same. As with the rare variety of symptomatic pleural plaques,
symptomatic versions of these conditions would already be actionable if the symptoms
were more than de minimis. With pleural thickening, if the thickening is extensive enough,
lung function may be restricted, breathlessness may ensue, and chest pains may result.
The same holds for symptomatic asbestosis. Neither symptomatic condition poses any
problems for recovery under existing principles: each would constitute actionable injury.

With asymptomatic pleural thickening or asbestosis, however, the same problem as with
asymptomatic pleural plaques arises: the lack of any pain, physical impairment, or visual
disfigurement means that they do not, at common law, constitute injury. Again, I find it
hard to see why they should. Both pleural thickening or asbestosis may develop into
symptomatic versions of such conditions, in which event the right to damages would be
triggered when this occurs. At such point, the injured person could either seek a one off
award of damages at common law (which might include an element for possible
deterioration of the condition in the future) or an award under section 12 of the
Administration of Justice Act 1982, the latter permitting a provisional claim for an existing
recognised injury at the time of the claim together with an authority given to the injured
party to seek further damages should the existing condition worsen or a serious disease
subsequently develop. This allows those who in fact develop recognised injuries a choice
in pursuing damages claims, but excludes asymptomatic claimants unless and until
symptoms present themselves. This position has always been thought to provide a
sensible means of excluding what might otherwise be a flood of claims by those with no
recognised injury.

I would support the view that the current position should be maintained. Any change, such
as that proposed in clause 2 of the Bill, would have the same effect as clause 1 of the Bill
of will have in undermining the established idea of injury, and would cause the same
problem for the assessment of damages outlined earlier in respect of pleural plaque
claims.
Conclusions
In summary, I consider the proposal in the Bill that asymptomatic pleural plaques, pleural thickening and asbestosis be actionable in damages to be flawed.

My principal concern is that legislating that such pleural plaques, pleural thickening or asbestosis be deemed injurious would be in clear breach of established Scottish principles of the nature of actionable injury. It would create a legal island within an otherwise uniform and coherent law of damages. In effect, it would give a damages claim to the ‘worried well’, when what seems more appropriate is to identify ways to “provide support and reassurance” to such people in order “to help allay their concerns” (I quote these sensible words from the Ministry of Justice’s recent Consultation Paper on pleural plaques). The change proposed in the Scottish Bill will, in my opinion, only add fuel to concerns that we are living increasingly a compensation culture, and could be productive of ever more speculative claims by those worried that they may contract an illness but who may never go on to do so. If the aim of the Bill is to ensure that admittedly negligent employers, occupiers of buildings, or others, who expose people to asbestos fibres should not be permitted to escape the consequences of their negligence, then some other more appropriate regulatory framework should be designed to achieve the goal of holding such persons to account for their negligence. Equally, if the aim is to provide financial assistance to those with pleural plaques (even though I find it difficult to see what purpose such financial assistance would be intended to serve), another scheme (perhaps along the lines of the no fault state compensation scheme proposed for England and Wales) could be established which would not harm the integrity of the law of damages. Allowing the uninjured to claim damages, by turning their non-injuries into injuries, seems a bad way of achieving either of these aims. It would moreover set a dangerous precedent which might be utilised by other categories of person not currently entitled to claim under the existing rules on damages for worry and upset about their asymptomatic conditions. The floodgates once opened are hard to close again.

My secondary concern with the Bill is that it would create an undesirable situation for judges by asking them to concoct a measure of damages for these new statutorily recognised injuries. Without any of the classic marks of an injury to guide the judge, he or she would simply be plucking a figure from the air when compensating a pursuer for having pleural plaques, pleural thickening or asymptomatic asbestosis. Such a practice would run the risk of bringing the courts into disrepute, in that it might be alleged that they had either under-compensated or over-compensated the ‘sufferers’ of pleural plaques, depending on the view taken.

The Bill represents, in my opinion, a worrying trend of modern government to interfere in decisions of the courts made according to orthodox principles and reasoning which have served the law well for many generations. This happened recently with the Compensation Bill. A similar thing is threatened in England and Wales in relation to a proposed Government Bill to overturn a recent ruling of the House of Lords forbidding the use of anonymous witnesses in criminal trials, a Bill which will attack the fundamental principle that an accused has the right to put his accusers fully to the test, which can hardly be possible if their identity remains undisclosed. I believe a similar worrying interference in a perfectly sound and proper decision of the courts will occur if this Bill is passed. Doubtless the Scottish Government will be under much pressure to enact this Bill, given lobbying by asbestos sufferers campaigning groups, but other solutions are possible as the English
proposals show. The passing of this Bill would not only undermine the fundamental concept of an actionable injury in Scots Law merely for the sake of the public appearance of generosity, but it may also have the consequence of channelling the funds of asbestos defenders away from genuinely injured sufferers of symptomatic asbestosis and mesothelioma in favour of the worried well. That concern prompted in recent years a number of US jurisdictions (including Ohio, Texas and Florida, which together accounted for 35% of all US asbestos claims in the period 1998-2000) to enact legislation excluding asbestos claims by the ‘worried well’ (see further on the US developments, P M Hanlon and E R Geise, “Asbestos Reform - Past and future”, Mealey’s Litigation Report, vol 22, Part 5). These US legislative developments, driven in part by the American Bar Association, which voted in 2003 in favour of restricting asbestos claims by unimpaired litigants, legislate for the directly opposite effect to that proposed in the Damages (Asbestos-related Conditions)(Scotland) Bill. It would be regrettable if the much greater experience of the USA in dealing with the complexity of asbestos related injuries were ignored by a Scottish Parliament in a hurry to enact something to deal with this perceived problem.

Dr Martin A Hogg
School of Law, University of Edinburgh
An infringement of a persons bodily integrity by alteration of its chemistry, ought, on general principle to be reparable. The amount ought to be for a Court to decide. Medical science is imperfect. It tells us things that it knows but there are things which it does not know. So the fact that the plaques are asymptomatic should not preclude a claim. There are reasons why a claim should be permitted albeit of apparently low value at the time.

The principal reason is the operation of time bar under the Prescription and Limitation (Scotland) Act 1973 as (often) amended. If it is not possible to make a claim then, if the condition worsens, on the presently favoured view of time bar, (the single starting date approach) the claim could be lost completely. [It may be noted that under the alternative view on time bar, it was possible to treat the discovery of pleural plaques and any subsequent symptomatic disease as two separate starting dates for time bar: Shuttleton v Duncan Stewart & Co Ltd, 2001 SC 802] While views of those consulted by the Scottish Law Commission were divided (SLC para 2.22-2.24) the Commission proposed a single starting date in the Limitation (Scotland) Bill, clause 1(4). Against such a background, likely to become firm, a right to make a claim as proposed by the Damages etc (Scotland) Bill is important.

If by the Damages etc (Scotland) Bill a claim is allowed, under existing UK legislation, s. 12 of the Administration of Justice Act 1982, in most cases it will be possible to seek an award but with a right to return to court outside the time bar if the condition does worsen, thus avoiding the hardship perceived by some consultees in relation to the Limitation (Scotland) Bill. In short the right to make the claim protects the claimant from the loss of a more substantial claim at a later date.

It is not entirely clear to me how this legislation is related to the existing 1982 legislation but I take it that it is not intended that a claim using this legislation would preclude an application under section 12. The present Damages (Scotland) etc. Bill allows action where the condition is “not likely to cause impairment” (Clause 2(1)). The 1982 Act is only triggered if it is “proved or admitted to be a risk” (emphasis added) that there will develop a serious disease or be a serious deterioration. I read the two provisions together as meaning in the core kind of case, that while it might be that it is not likely that impairment will be caused (thus triggering the Bill), it might still be admitted or proved that there is a risk of development of a serious disease or a serious deterioration (thus triggering the 1982 Act). Of course where it is likely that there will be impairment the case can proceed in the usual way be estimating the future loss – it being likely that there will be such a loss (as opposed to merely a risk of such a loss).
I have no expertise in the drafting of legislation. The present Bill appears to meet its (laudable) aims well and I wish it well. I hope these comments help in ensuring that the three related instruments when read together achieve the desired effect.

WJ Stewart
The Law School, University of Stirling
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Des McNulty MSP

I am delighted to respond to the consultation process in connection with the above proposed Bill. The House of Lords judgement in Johnston –v- NEI International Combustion Ltd, published on 17th October 2007, ruled that pleural plaques do not give rise to a cause of action under the law of damages. Prior to this judgement, pleural plaques had been regarded as actionable for over 20 years. I was delighted when in response to a question from myself, Ministers announced on 29th November that the Scottish Government would introduce a Bill to reverse the House of Lords judgement for Scottish asbestos victims. This follows substantial work in which I have been closely involved over a number of years to improve the circumstances of victims of asbestos related disease through, for example, the compensation of victims legislation which was passed through the last Parliament, and the retention of rights of prescription of Alimta to those whose doctors believe it would have a beneficial effect.

On 23rd June 2008, Ministers introduced the Damages (Asbestos Related Conditions)(Scotland) Bill, which would lead to pleural plaques again becoming compensatable under civil law in Scotland. It is my understanding that the provisions of this Bill will take effect from the date of the House of Lords judgement, and will therefore be retrospective. I am pleased to see that in addition to pleural plaques, two other asbestos related conditions, diffuse pleural thickening and non-symptomatic asbestosis, are to be included within the provisions of the Bill. I support this proposed legislation very strongly, and believe that it is in line with the approach taken by the Scottish Parliament in support of asbestos sufferers and bereaved relatives and is consistent with the wishes of the Scottish people.

I believe that those negligently exposed to asbestos in Scotland who were diagnosed with pleural plaques and the other two conditions mentioned in the Bill should be able to raise a civil action for damages and the Bill seems to give effect to that wish.

Des McNulty MSP
Clydebank and Milngavie
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Nautilus UK

About the union

Nautilus UK is the trade union and professional organisation representing 18,000 ship masters, officers, officer trainees and other maritime professionals serving in the UK and international shipping fleets. Besides merchant navy officer ranks, Nautilus UK membership extends to professional staff serving at sea, on oil rigs, marine pilots and related shore-based occupations such as harbour masters, vessel traffic services staff and marine superintendents. Nautilus UK also serves seafarers working in the large yacht sector.

The Union’s response

The Union has, over the years, conducted many cases where members have been found to have asymptomatic pleural plaques, asbestosis and mesothelioma as a result of negligent exposure to asbestos. We maintain an Asbestos Register to which members submit Asbestos Registration Forms informing us of the periods they were exposed to asbestos, with details of the relevant ships, work performed, and protective clothing supplied (if any). Currently there are 294 forms on the register, 58 of which relate to members residing in Scotland.

The Union will still have active members and many retired members who served on ships and in the ship building yards of Scotland in the 1950s and 1960s where they would have been exposed to asbestos without any protection. In the yards this would have occurred during the building and repair processes. On board ships, many of our members, particularly engineers would have been exposed to asbestos for years, as this substance was used as fire protection in accommodation spaces and lagging on exhaust pipes. During essential maintenance and repairs at sea, engineers where frequently exposed to asbestos. Similarly when undergoing repairs in shipyards, often overseas, exposure was considerable. All personnel were potentially affected.

At the time of the House of Lords’ judgment in Johnston -v- NEI International Combustion Ltd on 17 October 2007, the Union were conducting several cases where members had asymptomatic pleural plaques, which had to be discontinued as a result of the Lords' ruling. Even now the Union is running cases where there have been deaths resulting from or contributed to by mesothelioma. The Union anticipates that it will, for many years yet, be receiving information from members and their dependants which indicates that our members were negligently exposed to asbestos resulting in asymptomatic pleural plaques, asbestos-related pleural thickening, asbestosis and, sadly, deaths from mesothelioma.
At the time of the Lords’ ruling in the Johnston case, there was a general outcry from Unions and personal injury lawyers about the effect of this judgment. A major reason for this was that it was recognised that people who live with asymptomatic pleural plaques are under constant fear that the condition will develop into something more sinister like mesothelioma.

For these reasons, the Union welcomes the contents of the Bill and urges the Scottish Parliament to enact it as soon as possible. It is only right that persons who have contracted asymptomatic pleural plaques are able to seek compensation for the fear and stress that this condition will cause, given its potential to contribute to the development of fatal conditions.

In terms of the drafting, there is a point which the Union would wish to raise. It is noted that in clause 2, which relates to asbestos-related pleural thickening and asbestosis, that these conditions are deemed to be not negligible even if they have not caused, are not causing or are not likely to cause impairment of a person’s physical condition (clause 2(1)). The Union suggests that a form of words like those in italics are used in respect of asbestos-related pleural plaques referred to in clause 1(1), so that it is clearer that the mere presence of asymptomatic pleural plaques need not have caused or be causing or be likely to cause impairment of a person’s physical condition to qualify for compensation.

Charles Boyle
Director of Legal Services
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written 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.

1. **EXECUTIVE SUMMARY**

1.1 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.

1.2 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.

1.3 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** – fundamentally and retrospectively changing the law of delict will undermine confidence in Scotland’s stable legal environment, and make it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers.

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

2. **INTRODUCTION**

2.1 On 17 October 2007 the House of Lords, which included two Scottish Law Lords (Lords Rodgers and Hope), unanimously concluded that pleural plaques do not give rise to a cause of action under the law of negligence in England and Wales. This judgment is likely to be highly persuasive in Scotland and has already been quoted in one judgment\(^1\).

2.2 They reached this conclusion on the basis of agreed medical evidence that showed that pleural plaques:

• are, except in exceptional cases, symptomless and therefore do not result in any pain, suffering or loss of amenity
• neither lead to, nor increase susceptibility to, any other asbestos-related condition.

2.3 The Scottish Government is committed to introducing legislation to make asymptomatic asbestos-related conditions compensatable. The ABI is fundamentally opposed to that position.

2.4 In February, the Scottish Government consulted on its partial regulatory impact assessment of the proposed Bill. We welcomed this consultation as opportunity for the Scottish Government to consider afresh the advantages and disadvantages of legislative action.

2.5 More than three-quarters of the responses to that consultation opposed the Bill. We are concerned, however, that the issues raised in those responses have not been properly considered.

2.6 We note that even Scottish Ministers, despite their support of the Bill, accept that pleural plaques do not lead to more serious asbestos-related illnesses. Cabinet Secretary for Justice Kenny MacAskill, when asked about the condition of pleural plaques, is on record as saying "it is benign".

2.7 Insurers remain committed to paying compensation to people with symptomatic asbestos-related conditions.

3. **HELPING PEOPLE WITH PLEURAL PLAQUES**

\(^1\) Lord Uist
3.1 Pleural plaques are nearly always symptomless\(^2\), and they neither lead to, nor increase susceptibility to, any other condition. Where cases do involve symptoms related to the plaques, they will continue to be compensated and are unaffected by the House of Lords decision.

3.2 Despite the medical evidence that pleural plaques are benign (see Annex A), there is a great deal of confusion among people with the condition and their families about what a diagnosis of plaques really means for their health.

3.3 Some people are concerned that having pleural plaques are the first step towards developing a more serious asbestos-related condition, such as mesothelioma. This is not the case, as the agreed medical evidence shows. It is not the plaques themselves that increase a person’s risk, but rather the exposure to asbestos.

3.4 The best way to allay the concerns of people with pleural plaques is to improve their understanding of the condition. This can really only be achieved through ensuring that those people and organisations who communicate with sufferers – the Government, health providers, trade unions - distil the same messages, namely that plaques are usually symptomless and do not increase susceptibility to any other asbestos-related illnesses, including mesothelioma. However, legislation to make symptomless plaques compensatable sends a very different message – the fact that a condition is worthy of compensation suggests that it is more serious than it really is.

3.5 This was a point made by Anthony Seaton, Emeritus Professor of Environmental and Occupational Medicine at the University of Aberdeen:

“It is understandable that individuals with plaques can be worried about their prognosis if they are given misinformation on their significance. The change in case law that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses such as me. I believe we have better things to do, to prevent real diseases.

“There is a risk that the desirability of raising awareness of the nature of pleural plaques and allaying unnecessary concerns could be undermined by the provision of compensation, as this could send mixed messages about the nature of the condition and increase concerns.”\(^3\)

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\(^2\) The presence of pleural plaques does not normally occasion any symptoms. Very occasionally, in fewer than 1% of cases, the patient may be aware of an uncomfortable grating sensation on respiration (Lord Philips CJ, and Lord Justice Longmore, Court of Appeal judgment in Rothwell, January 2006, summarising the agreed medical position)

\(^3\) Professor Anthony Seaton, ‘Close scrutiny needed on asbestos-related disease’ in The Scotsman, 30 October 2007
3.6 Rather than legislating the Scottish Government should be working with the NHS, trade unions and support groups to ensure widespread awareness of current medical knowledge.

3.7 Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who offer free portable x-ray examinations in vans parked in the residential streets or car parks of communities with a history of asbestos-related conditions. They operate on the understanding that if pleural plaques are detected, they will ‘sell’ the claim onto a lawyer for a referral fee. Because they are trying to generate new claims, it is highly doubtful that scan van operators will provide proper reassurance to anyone in whom plaques has been diagnosed that the condition should have no effect on their quality of life. Therefore, more people will be diagnosed with the condition, but will not receive appropriate reassurance about what it means for their health. Additionally, unnecessary x-rays carry health risks of their own. We believe that the use of scan vans should be restricted to ensure that they are not used solely for the purpose of receiving compensation.

4. ARBITRARY INTERFERENCE IN SCOTTISH LAW

Changing the law of delict

4.1 The Scottish Government suggests that the Damages Bill will ensure legal consistency with the situation pre-Johnston. This is incorrect.

4.2 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 anxiety about a risk of future damage is not, by itself, compensatable.

4.3 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.

Wider implications

4.4 Interference with the fundamental principles on which the Law Lords’ decision was based will be used as a precedent to argue for compensation in other situations (see Annex C), with significant cost implications for businesses, consumers and taxpayers. For example, it is likely to lead to calls for compensation in other circumstances where no actionable damage has yet occurred, such as simply for exposure to asbestos, and the worry from such exposure, regardless of whether this had resulted in any symptoms or injury.
4.5 Anxiety is not compensatable under law (see Annex D). If developments in the law of this nature occurred, this could considerably increase the level of litigation and the possibility of weak or spurious claims and could have damaging effects on business and the economy. Even if such claims were not to succeed, the cost of resisting them would be significant.

4.6 The cost of these new claims cannot be quantified as we do not know how many or which conditions would become actionable.

The proposed legislation would contravene defendants’ human rights.

4.7 The Bill contravenes the rights of insurers.

4.8 Article 6 of the European Convention on Human Rights enshrines the right to a fair hearing and determination of civil rights before an independent and impartial tribunal established by law. The European Court of Human Rights has held that this precludes any interference by a legislative body with the administration of justice, with the object of influencing or determining the judicial resolution of a dispute, other than on compelling grounds of the general interest.

4.9 Article 1 of the First Protocol to the Convention guarantees the right to the peaceful enjoyment of property and possessions which includes interests with an economic value. The interest of insurers in the immunity from liability confirmed by the House of Lords in Rothwell has a self-evident economic value. In removing that immunity, the Bill fails to strike the fair balance required by Article 1 between the general interest and the fundamental right of persons to the peaceful enjoyment of their possessions.

5. UNDERMINING BUSINESS CONFIDENCE

Undermining a competitive business environment

5.1 The Scottish Government has said that it is committed to creating a competitive environment within which business can flourish; to attracting inward investment; and to building a culture of entrepreneurship. It has also spoken of the potential to develop Scotland as a forum for international dispute resolution. The use of the legislative power of the state to overturn judicial decisions is inconsistent with these stated aims and, in particular, with their long-term achievement.

5.2 Further, businesses require assurance that the Government is committed to a stable legal environment; investment and wealth-creating activity will be discouraged if businesses perceive undue readiness on the part of Government and legislative authorities to change the law. It is the retrospective nature of the legislation that creates particular unease for the future.

Undermining the financial services sector
5.3 The Scottish Government has identified the financial services sector as a key driver of the Scottish economy. In the 2008 Strategy for the Financial Services Industry in Scotland annual report, First Minister Alex Salmond MSP listed Scotland’s major strengths as a location for financial services including "the major competitive advantage we offer through risk minimisation".

5.4 In contrast, this Bill will significantly increase risk in the insurance sector and Scotland will become a less attractive market in which to write business. The Bill therefore contradicts the Scottish Government's own stated aims in supporting the financial services sector and its overarching objective to achieve sustainable economic growth.

Increasing costs for businesses

5.5 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. To put this into context, annual net employers' liability premium in Scotland is approximately £131m. The Scottish Government’s figure is considerably lower than the UK Government’s because the former fails to take into account the degree of uncertainty associated with the calculation:

- **We do not know how many people have, or will develop, pleural plaques** - the Financial Memorandum fails to consider the uncertainty about the proportion of the population that may develop pleural plaques. There are a number of studies which suggest that pleural plaques are more prevalent among the population than the Scottish Government acknowledges, e.g. one study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques. Further studies are referenced in Annex B.

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

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5 ABI estimate, based on ABI statistics and National Statistics
7 Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)
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. This creates further uncertainty about the potential number of claims.

- **We do not know what the legal costs per claim will be** - prior to the legal challenges which culminated in the House of Lords’ judgment, average legal costs were approximately £14,000 per pleural plaques claim. There is no certainty that legal costs will remain the same post-legislation.

5.6 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.

5.7 A high proportion of these costs would fall to insurers, which may lead to higher employers’ liability and public liability premiums; some insurers may even choose to exit the Scottish liability market. This could undermine the competitiveness of Scottish businesses compared to their counterparts elsewhere in the UK where there might be cheaper and wider availability of cover.

5.8 Further, many companies with gaps in their insurance cover as well as some local authorities will find themselves liable for a portion of any claims.

5.9 The Government also has a significant degree of liability for exposing former employees to asbestos via the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform. The burden of this would fall on the taxpayer.

6. **CONCLUSION**

6.1 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:

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

A.1 The medical evidence on pleural plaques is uncontested by medical experts, and undisputed by claimants and their lawyers. In Johnston, Dr Robin Rudd, a consultant physician in medical oncology and respiratory medicine, acting for the appellants, and Dr John Moore-Gillon, a consultant physician in respiratory medicine and vice-president of the British Lung Foundation, acting for the respondents, prepared a joint report\(^8\) which stated inter alia “we find that we are in general agreement and we do not consider that there are any material differences between our medical views regarding pleural plaques”. The substance of their evidence was as follows:

- The pathogenesis of pleural plaques, while undoubtedly involving a response to asbestos fibres, is not entirely clear but the presence of plaques does not necessarily imply that any damage has been caused to the lungs.
- The plaques (bland fibrous tissue usually situated on the parietal pleura) do not, save in a very rare condition where they are extensive and confluent, impair the ability of the visceral and parietal pleura to slide easily over each other. In almost 25 years of practising in the field of respiratory medicine, having seen many hundreds of asbestos-exposed individuals, Dr Moore-Gillon had seen ‘only a handful’ of cases where pleural plaques were associated with any symptoms. This is because they have a covering of mesothelial cells providing a low-friction surface which, together with a lubricant of pleural fluid, permits this easy movement. Thus the ease and freedom of the lungs’ ability to expand and contract is unaffected.
- Though individual plaques may grow they do no (and cannot) multiply or progress to one of the other recognised asbestos-related conditions. They amount to a ‘biological cul-de-sac’. The plaques themselves are therefore wholly benign and asymptomatic.
- The association of plaques with physical symptoms such as breathlessness is almost invariably explained by the concurrent presence of asbestosis or other co-morbidity unrelated to asbestos.
- Pleural plaques are a ‘marker’ of exposure to asbestos fibres because it is accepted from pathological and epidemiological studies that they are associated with exposure. For that reason only, they are also associated with a risk of serious asbestos-related disease occurring in the future. The magnitude of that risk is assessed, however, by reference to the age and occupational history of the patient and not by the presence of plaques themselves.

\(^8\) Drs Rudd & Moore-Gillon in Rothwell, 13 July 2004
THE PREVALENCE OF PLAQUES

B.1 In his report of 10 November 2004, Dr Moore-Gillon suggested that there are now about 1,500 new cases of mesothelioma diagnosed in the UK each year. There must accordingly be far more than 1,500 cases of pleural plaques arising each year. However, because they are asymptomatic many, and almost certainly most, are not at present diagnosed. When they are diagnosed it is usually as an incidental finding on a chest radiograph carried out for other reasons. For every person that develops mesothelioma in any given period there will be 20-50 people developing plaques i.e. 30,000 to 75,000 per year\textsuperscript{9}. Given that approximately 30% of the asbestos liabilities are Scotland, between 9,000 and 22,000 of these are likely to be in Scotland.

B.2 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\textsuperscript{10}.

B.3 Professor Tony Newman Taylor (one of the most pre-eminent chest physicians in the UK and 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\textsuperscript{11}.

B.4 A study by SJ Chapman concludes “Pleural plaques typically develop 20 to 30 years after exposure, and their incidence increases with longer duration of exposure. They are found in as many as 50% of asbestos-exposed workers, but may also occur after low-dose exposures. The total surface area of pleural plaques measured via CT does not appear to be related to cumulative asbestos exposure”\textsuperscript{12}.

B.5 A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques. Note that this did not specifically look at those occupationally exposed to asbestos, however a relatively high proportion of workers in Glasgow have been exposed to asbestos due in particular to the shipyards\textsuperscript{13}.

B.6 A study by Chailleux & Letourneux cites a 25% incidence of benign pleural lesions in population intermittently exposed to asbestos\textsuperscript{14}.

\textsuperscript{9} Dr John Moore-Gillon, 10 November 2004
\textsuperscript{10} Quoted at a briefing in Westminster on 26 March 2008
\textsuperscript{11} 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”.
\textsuperscript{12} Chapman, SJ et al, "Benign Asbestos Pleural Disease", Curr Opin Pulm Med 2003:9(4), 266-271
\textsuperscript{13} Cugell, DW and DW Kamp, "Asbestos and the Pleura: A Review", Chest 2004:125, 1103-1117
\textsuperscript{14} Chailleux & Letourneux (Rev Mal Resp 1999)
C.1 The law of delict requires that for damage to be compensatable, it 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 claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capability.

“How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. De minimis non curat lex”\(^{15}\).

C.2 On the medical evidence, pleural plaques do not reach this threshold – as Holland J found in *Rothwell*:

“I start by rejecting any notion that pleural plaques per se can be found a cause of action”.

C.3 As the Lord Phillips CJ found when the case was heard at the Court of Appeal:

“It is common ground in this case, rightly in our view, that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded”.

C.4 As Lord Hope of Craighead found in *Johnston*:

“While the pleural plaques can be said to amount to an injury or a disease, neither the injury nor the disease was in itself harmful. This is not a case where a claim of low value requires the support of other elements to make it actionable. It is a claim which has no value at all”.

C.5 And as Lord Uist later acknowledged in his judgment in *Wright v Stoddard International plc*:

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

\(^{15}\) Lord Hoffman in *Johnston*
ANXIETY IS NOT A BASIS FOR A CAUSE OF ACTION

D.1 It is uncontested by medical experts that pleural plaques are harmless. It follows that pleural plaques do not therefore constitute actionable damage.

D.2 However, the Bill seeks to ensure that people get compensation for anxiety that may arise about the risk of contracting a serious asbestos-related disease as a result of a diagnosis of plaques.

D.3 But anxiety is not a basis for a cause of action, even where aggregated. The law only compensates for anxiety where it is part of another more serious injury or disease which would be compensatable alone and without the presence of the said anxiety.

D.4 Johnston affirmed the principle established by the House of Lords in Hicks v Chief Constable of the South Yorkshire Police that mere anxiety about a risk of further damage is not itself compensatable:

“There are also cases which suggest that he may be able to recover damages for anxiety consequent upon an actionable injury. But recovering is predicated upon the existence of actionable injury. There is nothing to suggest that a claimant can rely upon the single action rule to sue in circumstances in which he does not have a cause of action in the first place”.

D.5 The Lords in Johnston also rejected any arguments that the condition could be ‘aggregated’ with the risk of future asbestos disease and/or the anxiety experienced in relation to such risk. Since neither the plaques alone, nor the risk of future damage, nor anxiety about the risk are individually actionable, it follows that they are not collectively actionable either:

“It would be easy to dismiss this argument by applying the simplest of all mathematical formulae: two or even three zeros, when added together, equal no more than zero. It is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at something which is actionable”.

D.6 Thus introducing legislation to make anxiety about pleural plaques compensatable will require fundamental changes to the law of delict.

16 Lord Hope of Craighead
CBI Scotland is the country’s premier business organisation, representing firms of all sizes from all sectors of the economy. We welcome the opportunity to respond to the Scottish Parliament Justice Committee’s call for evidence on the general principals of the Damages (Asbestos-related Conditions) (Scotland) Bill.

CBI Scotland is opposed to the Damages (Asbestos-related) (Scotland) Bill for the following reasons:

- **It will undermine business confidence** – fundamentally changing the law of delict will undermine confidence in Scotland’s stable legal environment, and make it a less attractive place for investment. It will also increase costs for businesses, local authorities and insurers.

- **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 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.

CBI Scotland has had sight of the Association of British Insurers’ written submission to the Justice Committee and, after consideration and consultation with our own membership, would support this submission in full.

**Iain Ferguson**  
*Policy Executive*
The history of the mining and use of asbestos is one of the more unedifying chapters of modern industrial progress. Mine owners in the Cape of Africa noted that many of their workers fell ill with debilitating diseases. The severity and onset varied but no one fell ill in less than 10 years. This presented the owners with a solution; they simply retired their workers after 10 years and returned them to the villages from whence they came and did not think of them again. There many fell gravely ill. In Britain (and other countries; notably America) owners of shipyards and specialist insulation companies made similar findings and commissioned experts to research them. The findings of the research were buried so as not to compromise such important and profitable industries. The dangers appear to have been well known to Government, certainly by the time of WWII but for reasons of war were not acted upon during the period of hostilities. HM Factories Inspectorate issued a warning to all Factories in 1945 regarding the possible dangers of Asbestos. At that stage it was believed that only significant exposure to asbestos was injurious. It has gradually been appreciated that even very minor exposure can be dangerous. One of the reasons that this took appreciation took so long is due to the significant latency period before asbestos related changes develop. Nothing for 10 years but mesothelioma may develop more than 50 years after first exposure. It is wrong to say that a single fibre can cause mesothelioma. There is a dose response relationship. The heavier the exposure the more likely illness and asbestos related changes will occur. What can be said is that the safe exposure limit, in terms of the standard dose response curve, has not yet been determined.

In the early years of the public recognition of the dangers of asbestos exposure had typically been very high. Men developed severe asbestosis. Physicians talked of x rays showing lungs completely white. As many of the men also smoked and the combination of asbestos and nicotine was most invidious many men died prematurely. Then a new condition, mesothelioma, began to be appreciated and linked with asbestos. The incidence of this disease has continued to rise despite the fact that significant exposure largely ceased in the 70s. Partly this was because of the latency but also because lower exposure levels, such as those experienced by people building, and demolishing buildings which contained asbestos (and repairing them,) were now found to cause mesothelioma.

Whilst industry leaders deliberately ignored and indeed hid the dangers of asbestos it is likely that no one understood that the fibres are as insidiously dangerous as they are appreciated now to be. Those who benefited directly from the profits brought by asbestos are long gone, their companies, if they exist at all,
unrecognisable. Many of the insurers of the companies have also disappeared or are simply untraceable. Damages for asbestos related diseases such as asbestosis and, particularly, mesothelioma have increased many times over since original exposure. In short more workers have suffered from asbestos related disease than would have been predicted at the time of exposure and they are generally entitled to significantly more money in damages. The result of all of this is that society faces a large sum in damages in respect of which there was no insurance reserve and in respect of a significant part there is no insurance fund. It is suggested that it is with this in mind that the Scottish Government should assess whether damages in respect of pleural plaques are appropriate.

Pleural plaques are areas of thickening on the pleura which is the membrane surrounding the lung. In lay terms the purpose of the membrane is to provide a vacuum in which the lungs may expand more efficiently. The plaques themselves are approximately the size and thickness of holly leaves. A layer of calcium can form over them in which case they are said to be calcified. Whereas a lesion in the lung would make the lung less efficient a lesion or plaque on the surface of the pleura has no effect on breathing. Due, however, to their well documented relationship with asbestos exposure the existence of plaques constitutes strong medical evidence of exposure to asbestos. Whilst this is medically important it is thought that most workers who have been exposed to asbestos are very aware of that fact.

In England the decision was made to test whether pleural plaques constituted an actionable injury. As their Lordships discuss the position before this test was that pleural plaques were actionable following three cases in the 80s. Ten cases went to trial before Holland J and are reported in Grieves v F T Everard & Sons 2005 EWCH 88 QB. The claimants were successful. Seven cases were appealed the Court of Appeal (Rothwell v Chemical & Insulating 2006 EWCA Civ 27) where the Court of Appeal held by a 2:1 majority that pleural plaques are not actionable. Four of these cases were appealed to the House of Lords in Johnstone v NEI International Combustion 2007 UKHL 39 where the judicial committee held unanimously (though for different reasons which are not always easy to follow) that pleural plaques do not constitute an actionable harm or injury.

In terms of our Law a man must bring only one claim in respect of a negligent act or continuing acts. Accordingly if pleural plaques are actionable and a man brings such an action and then suffers a more serious disease attributable to the same act or acts he will not (subject to special rules about Provisional damages) be able to bring a claim even though the injury he suffers be much more severe. A man who has been exposed to asbestos who has pleural plaques is estimated to have a 5% chance of developing mesothelioma and a 1% chance of developing asbestosis. These are both serious diseases with the former being inevitably fatal. It is the anxiety caused by worrying that he may develop such conditions which is said to inform the Court as to the level of damages a man should receive. Thus a man may lose his right to claim substantial compensation for
developing a disease because he made a claim for harmless pleural plaques and anxiety. Although it is possible to avoid this with Provisional Damages experience suggests that this is rarely done.

Our Law does not allow actions either for the chance that injury will occur or for the anxiety naturally caused by that chance. As Lord Rodger said at § 88 in Johnston:-

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

He went on in § 90 to say:-

Very understandably, the claimants may be anxious about the plaques, just as they may be anxious about all sorts of other problems and potential problems in their lives. Such anxiety is a normal human emotion. But, if the plaques themselves are not a condition for which the law will intervene to give damages, it would make no sense for it to give damages for anxiety associated with the plaques.

However, if there is physical injury and some unforeseen psychological condition then develops then the injured person can recover in full. (Simmons v British Steel plc [2004] ICR 585.) If there is physical injury then anxiety may also be claimed for. Thus it is important to realise that what the claimants in the test cases were attempting was to create a legal device to allow them to claim for anxiety resulting from exposure to asbestos by founding on a physical injury which of itself caused no symptom nor created any danger. The House of Lords held that the device should fail. The question for the Scottish Government is whether the device should be created by Statute.

The device even thus created is imperfect since by no means everyone who has been negligently exposed to asbestos, and thus who may be deeply worried about developing severe disease, will develop pleural plaques. This means that of workers who have been exposed to the same amount of asbestos by the same employers at the same time only those with pleural plaques will have a claim for the anxiety that all may suffer.

It would be attractive to compensate all men who through their labour (which has created the wealth of our Society) are exposed to a risk of disease or other injury. Similarly most would wish to see victims of childhood abuse compensated in some way. It is unlikely that this can be achieved. As far as singling out one group to be compensated, it is difficult to understand why the development of
harmless and invisible changes internal organs ought to provide a valid criterion for treating persons differently.

The Bill also addresses pleural thickening and symptom free asbestosis. One of the claimants, Rothwell, had, by the time his case was heard by Holland J, developed pleural thickening which was admitted to be symptomless. On that basis his lawyers sought to have his case taken out of the test number but in this they were unsuccessful. However there was not the detailed evidence about the aetiology, progression and effect of pleural thickening as there was of pleural plaques. As far as symptom free asbestosis is concerned there was a concession made by the Defendants that this should be actionable on the basis both that it destroyed “spare” lung capacity and that it was progressive and would lead to breathlessness on exertion (see skeleton argument for Defendants by Michael Kent QC.)

That being so it is suggested that it is both not necessary and premature for Parliament to declare whether either pleural thickening or symptom free asbestosis is actionable.

**Geoff Clarke**

*Advocate*

20 Aug 08

Geoff Clarke is an advocate practicing at the Scottish Bar who specialises in personal injury and who has a special interest in asbestos and other industrial disease litigation. He lectures in delict at the University of Edinburgh.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Andrew Smith QC

EXECUTIVE SUMMARY

- The proposals will be a fundamental change to the substantive law.
- Hitherto, damages have not been payable other than when injury occurs.
- Retrospective change to the law introduces uncertainty that may cause insurers and others to call into question the wisdom of working in the Scottish market.
- The negating of a House of Lords judgment by the Scottish Government sets a precedent that shows an irresponsible attitude.
- There are considerable practical problems that could arise in the operation of the proposed legislation. In particular it may be that the courts will award nominal or no damages for “injury” without symptoms.
- If this legislation is passed, there would be no valid reason for failing to legislate to allow other claimants to obtain damages for fear of injury in the future.

1. INTRODUCTION

I am an advocate in practice at the Scottish Bar and have been so since 1988. I was appointed as a QC in 2002. I am also qualified in England and Wales as a Barrister, since 2006.

My practice in Scotland consists of approximately 50% personal injury work, which includes not only accident claims, but disease litigation claims. I have acted for unions, for individuals in receipt of legal aid, for insurance companies and for private individuals (including companies) who end up in the court seeking to establish their rights by claiming and resisting damages claims. I estimate that about half of my personal injury work is for pursuers who are making the claims, and half is for defenders. A significant amount of my work is in disease litigation. I am a member of the Advocates Personal Injury Law Group, which seeks to establish interest and education among members of Faculty in Personal Injury Work. I have considerable experience of court work, and have appeared on a number of occasions in the House of Lords in personal injury cases. I have been involved in hundreds of damages claims, in all courts in Scotland.

Without wishing to appear to confident of my own experience, I would hope that it can be seen that I have the ability to make this submission on an informed basis. I hold great sympathy for pursuers and claimants who find themselves injured and requiring to seek compensation though the courts.

I am seriously concerned at the way in which the debate in both parliaments has been presented in a knee flexing and anti insurance industry manner.
Similarly the presentation of the issue is on the somewhat simplistic way that we are somehow neglecting the “rights” of individuals to compensation should the Bill not be passed.

Whether it is considered fair or not, our system of justice recognises that the courts are there to determine those rights as they stand in law. The House of Lords concluded in the Rothwell and Johnstone cases that the claimants did not have those rights. To seek to legislate to negate that view is not simply to criticise the considered judgement of the House of Lords but it also introduces an uncertainty to the law. No one can or has accused the judges in the House of Lords of bias or even lack of sympathy. The House of Lords has said what the law is, and always has been: but the Scottish Parliament is now en route to saying “well if that was the law, we are changing it to what we think it should have been.”

As a lawyer, and a Scot, if find the idea that the Scottish Parliament is embarking on a retrospective change in the law to be fundamentally ill considered. It will inevitably bring our legal system and our parliament in to disrepute at least within the legal world, and probably among commercial organisations. Many of the most important cases in the legal world, and throughout the world in general, are Scottish cases. It is a fundamental principle of law and justice that the law should be certain and notorious, and not changed on a whim. It must be flexible and adapt to changes in society and public expectation. But such change should be based on sound principle and only when absolutely necessary.

This certainty in any mature system of justice provides stability to the public, and to commercial organisations that have to operate in that system. And the proposed change will cause uncertainty and will cause, in my view, significant damage to the reputation of Scotland’s legal system. As a lawyer, I find it hard to know how to advise clients as to their legal rights and liability should I know that the law can be changed, and changed retrospectively, by the Government.

The standard of debate has been unfortunate. Much of it has been ill informed. It has been critical in a most emotive and denigrating way of the House of Lords judges¹. It has characterised the insurance industry as being without morals. And it has pointed to the unfortunate plight of individuals who have suffered the physiological changes as a consequence of exposure to

¹ [http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-02.htm](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-02.htm)

especially the comment of Stuart McMillan: “The House of Lords decision said that the condition of pleural plaques does not lead to other asbestos-related illnesses. However, I am sure that the House of Lords has been wrong before.”

See also the comments of Bill Butler:

“As members have said, the issue arises from the disturbing judgment relating to pleural plaques that the House of Lords reached on 17 October. Their lordships made a scandalous and unjust decision that, in effect, found on behalf of employers who have negligently or recklessly caused their workforces to be exposed to asbestos in the pursuit of profit and against the innocent victims of those employers’ recklessness and neglect.” And later:

“This nonsensical ruling, which was based on a piece of semantic trickery over the definition of the term "injury", must not go unchallenged.” Col 3140
asbestos. All of these points are easy to make, but none stands up to analysis. They may make for “sound bites” but legislation should not be enacted simply to raise the profile of individual politicians.

I understand that amongst others, Thomsons solicitors have been instrumental in persuading the Justice Secretary of the need for the Bill to be progressed. It is well known that Thomsons anticipate that they will act for the majority of pursuers seeking damages. There is no doubt that they have a vested financial interest in this legislation being enacted. There are repeated references in the Scottish Parliamentary debate\(^2\) to advice and support provided by pressure groups and from Thomsons solicitors which, it was said “will be material when Parliament decides how to proceed”. \(^3\)

The overwhelming impression that one has is of a one sided piece of legislation, being promoted in the most simplistic of fashions, without any real attempt to examine the issues beyond the emotive reaction that exposure to asbestos should lead to compensation.

It goes without saying that there is no greater fury than a vested interest masquerading as a moral principle.

2. OTHER RESPONSES

I am aware that the Faculty of Advocates has prepared a response to the Bill, in which it broadly supports the introduction of the proposed measures. I am of the firm view that the proposals should not be introduced for the reasons indicated below. I am aware that there is little support for the view I have expressed. Nevertheless it is my view that there the introduction of such measures would be constitutionally, legally and commercially damaging.

3. TERMINOLOGY

It may help to provide some working definitions.

**Mesothelioma** is a medical condition that is always fatal, within about 2-4 years of diagnosis. It is a painful condition and leads to a painful death. It is almost always caused by exposure to asbestos.

**Asbestosis** is a condition which has impaired lung function. At commencement it may be without symptoms. However, it can lead to breathlessness of varying degrees. It is not of itself fatal, but because of the exposure to asbestos there is a risk that the individual will develop mesothelioma. Damages are payable for asbestosis if there is breathlessness. The simple point is that there is an “injury” manifesting as impairment of function.

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\(^2\) [http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-02.htm](http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1107-02.htm) column 3136 for example

\(^3\) 3136
Pleural plaques are changes to the lung tissue. They are generally not with symptoms.

Pleural thickening is a thickening of the lung tissue, as a consequence of multiple plaques. This causes breathlessness, varying in degree and depending upon the extent of the thickening. Thus, this does constitute an “injury” for which damages would be payable.

Anxiety is a psychological condition. However, it is reasonably well established that anxiety (nor indeed depression) of itself would attract damages even if negligently caused. To sound in damages, a psychological or psychiatric condition must be diagnosed using one of the standards from DSMIV or ICD 10, both of which are medical diagnosis manuals used by the psychiatric profession. Thus, anxiety would not be sufficient to permit damages claims. However, should it be sufficient to cause a recognised psychiatric injury, then absent physical injury there can be a claim. See Page v Smith, a decision of the House of Lords.

4. THE LEGAL BACKGROUND

The background has already been well rehearsed but it may be useful to outline the salient points.

It was held by the House of Lords that claimants who were suffering from pleural plaques did not have a right to compensation. The judgment can be distilled in to a series of short propositions:

- The law only permits damages to be paid in the event that injury is caused to a party by the negligence of others.
- Pleural plaques are of themselves asymptomatic. Although they will undoubtedly confirm that there has been exposure to asbestos, the

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4 Rorrison v West Lothian College [http://www.scotcourts.gov.uk/opinions/01166595.html]

“In practice, it is common for pleadings to aver that a pursuer was diagnosed by a psychiatrist as suffering from a specified condition, or to aver more shortly that the pursuer was suffering from a specified condition which is recognised in DSM-IV (the American Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, 1994) or in ICD-10 (the World Health Organisation's International Classification of Diseases and Related Health Problems, Tenth Revision, Vol.1, 1993). Reference to these classifications is helpful as a matter of fair notice, since they "represent the two main diagnostic classifactory systems used by the psychiatric profession". Law Commission Report on Liability for Psychiatric Illness (1998) (Law Comm No.249), para.3.2, note 7. In the present case, I was told by the defenders' counsel, without contradiction, that the pursuer had not pleaded any disorder which was recognised in DSM-IV; and there was no suggestion that the position was any different in relation to ICD-10. I appreciate that what constitutes a recognised disorder is a matter for expert evidence, and I am prepared to proceed on the basis that the classifications given in ICD-10 and DSM-IV are not necessarily conclusive (cf. paras. 3.27-3.29 of the Law Commission's Report). Nevertheless, the pursuer's pleadings must give fair notice that it is her intention to lead evidence that she has suffered a recognised psychiatric disorder, and they should specify what disorder that is. In my view that has not been done in the present case. There is no suggestion that she has ever been diagnosed by a psychiatrist as suffering from a recognised psychiatric disorder, and there is no suggestion that her condition is recognised by any psychiatrist or body of psychiatric opinion as constituting a psychiatric disorder. It follows that an action based on negligence cannot succeed. The action accordingly falls to be dismissed.” [Lord Reed]

5 1996 AC 155
plaques themselves will not develop in to another condition such as mesothelioma.

- If they are asymptomatic, they do not constitute an “injury” and thus there can be no claim for damages. If they lead to breathlessness (viz by resulting in thickening) then they will permit a claim in damages.

It must be clearly understood that this judgment does not stop a claim being made by an individual who is symptomatic and has pleural plaques. Therefore, should an individual with pleural plaques develop breathlessness, or of course mesothelioma or asbestosis, he will be entitled to make a claim as he is “injured”. The medical position is not apparently in dispute and there are repeated references to the contributions of eminent doctors in the field. But the medical experts do not depart from the proposition in the second bullet point above.

The repeated references in the debates to the distress of individuals who have plaques detracts from the reality noted above. They are bound to know already that they had been exposed to asbestos; and therefore, with correct medical advice, they ought to be advised that the plaques do not add anything to that state of knowledge.

5. THE ISSUE FOR CONSIDERATION

Should an individual who has not suffered an “injury” as commonly and legally understood, be entitled to claim damages? This is the issue at the very heart of the debate.

From a legal perspective, it is a surprising suggestion that there should be such a claim permissible. To ordinary individuals, the idea of an injury of some kind requires some disability or disease to manifest itself. If I think I might become disabled or might contract a disease, then generally speaking I will not in ordinary language be considered to be suffering from an “injury”. The Bill proposes that someone should be compensated for something that “might” happen. All that the pleural plaques diagnosis indicates is that there has been exposure to asbestos. Not all individuals who are exposed to asbestos develop disease as a consequence. And if they do, they should generally be compensated for it.

Are there any circumstances where an individual should be able to claim damages without injury?

It has been argued in some debates that there are such cases.

It is suggested that defamation is a claim without injury. However, it is plainly understood in law that the nature of the injury suffered in such actions is damage to reputation. If there is no damage to reputation, there is no right to damages.

The only case that I can conceive of wherein there can be liability without injury is a non injuring assault. For example, to spit at an individual is an
assault for which there may be damages payable. But this is also a special case that is more akin to defamation than physical injury. It involves affront to the individual, even if no damage is caused. It has long been recognised that this is a special kind of claim.

Apart from this exception, there would appear to me to be no circumstances wherein there is, in law, a valid claim without injury. As far as I am aware, there are no other countries that allow claims in respect of pleural plaques or thickening, apart from France where damages are low. There are no common law jurisdictions that do, where the concept of “injury” justifying a claim is of importance. What is proposed is that Scotland should be doing something that no other common law jurisdiction has done.

It may be suggested that Scotland is leading the field. But the other possibility is that there are sound reasons why other jurisdictions have not chosen to adopt such a line. And there are powerful reasons why such a line should not be adopted in Scotland.

5. THE CONCEPT OF CERTAINTY IN LAW

As noted in the introduction, it is a fundamental principle of jurisprudence that the law should be certain. It should not be changed except for good reason of principle. It should not be changed retrospectively except in extreme circumstances.

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 into 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.

6. THE COMMERCIAL REALITY OF LEGISLATING

The idea that the insurance industry is there to make payments for negligence without injury is one which should be treated with extreme caution. Insurance companies are commercial organisations who have obligations to their shareholders. They are not a social fund, there to meet claims, unless there is legal liability to do so.

In the 1980s and 1990s, it became increasingly uneconomical for the insurance industry to operate in the Republic of Ireland. Damages were assessed on a massive scale and costs were escalating. Claims were
perceived as being overstated. The net result was that the London based insurance industry effectively withdrew from that market.

Within the insurance industry, risk is shared in certain circumstances. It is bought and sold as any commodity. Reinsurance is effected by contract between insurers. I have no information about the large insurers who are most vociferous in their opposition to the Bill, but it is conceivable that if there are reinsurers, they will decline to make payment on account of the terms of the reinsurance contract. That could result in a manifest unfairness, whereby the principal insurer cannot obtain a contribution, yet is being forced to pay under the principal contract.

It is regrettable that the standard of debate has lowered itself in some quarters to puerile name calling. The insurance industry provides a public service, albeit at a cost. To engage in name calling in the course of debate is not a seemly way to conduct a debate in a parliament that is trying to present itself as a body of credibility in a country that seeks to promote itself as a commercially viable economic state. The debate in London included such comments as the insurance industry being racked with hypocrisy.

If the Scottish Parliament is prepared to legislate in this case to overturn a judgment of the House of Lords and change the law retrospectively, it is hard to know when it will be prepared to do so again. Insurers may be well advised to withdraw from the Scottish market as they cannot enter into contracts of insurance with any degree of certainty as to what they are providing cover for.

I am entirely unclear why it is that this particular matter is being singled out for special treatment. There are other examples where legislation would be proper, that has been totally ignored. For example, victims of long term sexual abuse are deprived of compensation because their claims are held to be time barred. A change in the law would be simple, removing a procedural bar to claims by individuals who had been abused in the most horrifying way. One cannot help but consider that they have a greater entitlement to compensation than do the “victims” of non symptomatic changes to their lungs. Yet, so far as I know, MSPs are not motivated to rectify that injustice. This change would not be one to the substantive law, but remove a procedural hurdle. What plans does the Parliament have to right this manifest injustice?

THE PRACTICAL PROBLEMS

(i) Once and for all damages

It is well established principle of the law of damages that all claims should be made in the one action. This is a feature of the principle of certainty, allowing a defender to move on knowing that he will not have to make further payment

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6 http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmhansrd/cm080604/halltext/80604h0001.htm
Col 255 WH

7 Bowden v Poor Sisters of Nazareth and others http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldjudgmt/jd080521/bowden-1.htm
of damages. This can operate to the benefit or detriment of either party. For example, if a case concludes with the assumption that an injured person will live for another fifty years with long terms care costs, but unexpectedly dies, then his estate will benefit. There can be no reassessment of damages upon that event. Similarly, if someone unexpectedly improves, or becomes much worse, there can be no reassessment.

It seems to me that there would be a powerful argument, should the Bill be passed in its proposed form that a person obtaining damages for plaques would not be entitled to return to court should they develop symptomatic conditions such as mesothelioma. I raise this as a practical problem, but it illustrates that the alteration to the law that is proposed is one that affects other principles of law too.

(ii) What damages would be payable for asymptomatic “injury”

The Bill gives no guidance at all on how damages are to be assessed. Even if there is, by reason of the legislation, a presumption of injury, the assessment of damages becomes rather difficult. The more serious the damage in terms of symptoms, the higher damages will be. An individual who has no symptoms other than some anxiety, would be entitled to only nominal damages. Although settlements have been made in the past for many thousands of pounds, the basis for these settlements is unclear. It may, of course, be that a view was taken that all future claims were also being disposed of and thus should the pursuer develop mesothelioma, that claim was also being disposed of. I would anticipate that should this legislation take effect, insurers would be well advised to vigorously argue that no, or only nominal damages should be paid.

I have been surprised at some aspects of the debate which seek to point to the blameworthiness of the employers who exposed their employees to asbestos as a basis for damages being payable.

It is of course deplorable that such a well known risk was run by employers. That much is indisputable. However, damages are not assessed by reference to blameworthiness. We have no concept in Scotland of punitive damages, or exemplary damages (which exist in limited circumstances in England). Accordingly, such an approach is irrelevant. It is another example of emotion being used to justify a result.

(iii) The scaring of the well individual

As indicated above, the presence of pleural plaques is simply an indicator. It is an indicator not of the fact that injury may occur. It is an indicator that the individual has been exposed to asbestos. It is suggested that this fear factor of itself is something that will sound in damages and ought to do so.

However, in my own experience, a person who has been exposed to asbestos tends to know that he has been exposed to asbestos in any event. Thus, the presence of plaques does not introduce a fear that did not exist in any event.
One could understand the argument if an individual had no idea that he had been exposed to asbestos, but the presence of the plaques alerted him to the fact that he had been exposed, when he was otherwise unaware of that fact. But that is simply not realistic. It can be envisaged that should this legislation be enacted, the pool group of potential claimants will be those who know that they were exposed to asbestos. If anything, those individuals should be educated that the presence of plaques does not add to their state of knowledge: they are, in effect, irrelevant.

(iv) Why are plaques a special case?

There are numerous examples where individuals could equally make out a case for compensation for what “might” happen.

- The individual who worked in a pub for years in a smoky atmosphere. He may consider that he might contract lung cancer as a result, from passive smoking. Should legislation be introduced to cater for that worried individual?
- A workman who worked on building sites, with skin exposed. If he is worried that he may contract skin cancer through failure of his employers to warn of the risk, should he be entitled to claim damages?
- An individual who lived near a nuclear plant who points to clusters of leukaemia. Should that individual be entitled to compensation for the fear that he may contract that disease too?

There are numerous examples that could be cited. The only difference with the plaques example appears to be that a well organised pressure group, backed by a firm of solicitors who may have a vested financial interest in addition no doubt to their social conscience, is able to present the case for change.

CONCLUSION

As I indicated above, I am of the view that this legislation will bring the Scottish Government in to disrepute. It will cause insurers to consider whether they can have trust in commercial dealing in Scotland. It will set a precedent for the Executive legislating retrospectively to overturn decisions of the judiciary.

I urge that the matter is considered in a balanced way and the full implications of such a course are considered.

Andrew Smith QC
Compass Chambers
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Norwich Union

About Norwich Union

Norwich Union is the UK’s largest general insurer with a market share of around 14 per cent. With a focus on insurance for individuals and small businesses, Norwich Union insures one in seven motor vehicles, 15 per cent of UK households, and around 800,000 businesses. Norwich Union is part of Aviva, the world's fifth-largest insurance group.

Norwich Union were one of the insurers that funded Johnston –v- NEI International Combustion Ltd, on which the House of Lords delivered their decision in October 2007. Norwich Union would welcome the opportunity to discuss the case and the implications of the judgement with Members of the Scottish Parliament.

1. Executive summary

1.1. The Scottish Government has committed to introducing legislation to make symptomatic pleural plaques and other symptomless asbestos-related conditions compensatable.

1.2. The Scottish Parliament and previous Scottish Executives have previously achieved a great deal in promoting legislation and measures to support Scottish people whose lives have been affected by asbestos, either directly themselves or through their families. We recognise and acknowledge Scotland’s long-standing commitment to addressing asbestos-related diseases, and this is something the Scottish Parliament is rightly proud of delivering.

1.3. However, Norwich Union is fundamentally opposed to the proposed legislation, which we believe is flawed for the following reasons.

1.4. In October 2007, the House of Lords, which included two Scottish Law Lords, Rodgers and Hope, unanimously concluded in the case of Johnston –v- NEI Combustion Ltd that pleural plaques do not give rise to a cause of action under the law of negligence.

1.5. It is a medical fact that pleural plaques are symptomless and do not result in any pain, suffering or loss of amenity to those individuals identified with them. It is also a medical fact that pleural plaques neither develop into any of the more serious asbestos related conditions nor do they increase an individual’s risk of developing of these conditions such as mesothelioma. This fact was accepted by the claimants and their medical expert \(^1\) in the House of Lords. As a result in law, no damage or injury has been sustained that sounds in damages.

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\(^1\) Dr Robin M Rudd
1.6. Scottish Ministers themselves accept that pleural plaques are benign \(^2\) and the Bill as drafted refers to asbestos-related pleural thickening as a condition "which has not caused, is not causing, or is likely to cause impairment of a person's physical condition".

1.7. Pleural plaques are a "marker" of exposure to asbestos fibres, but do not in themselves pose an increased risk of mesothelioma or other related conditions. Dr John Moore-Gillon, President of the British Lung Foundation, and Dr Robin Rudd state that pleural plaques are associated with a risk of serious asbestos-related disease occurring in the future. The magnitude of that risk is assessed, however, by reference to the age and occupational history of the patient and not by the presence of plaques themselves\(^3\).

1.8. The Industrial Injuries Advisory Council does not believe pleural plaques should be compensatable. Its report on Asbestos related diseases stated "Pleural Plaques are small localised areas of fibrosis found within the pleura due to asbestos exposure. Plaques do not impair lung function. The Council does not recommend that pleural plaques should be added to the list of prescribed diseases"\(^4\)

1.9. The proposed legislation will instead compensate for anxiety. It rationalises its proposed intervention on the basis that people with pleural plaques suffer anxiety that they will contract mesothelioma, and that they should be compensated for that anxiety.

1.10. The Scottish Government should ease anxiety of people with pleural plaques – rather than by introducing legislation by providing reassurance that a diagnosis is not a 'death sentence' and by improving the understanding of the condition. It is a fact that it will not develop into a terminal illness nor will the quality of life be impaired as a result of a diagnosis of pleural plaques.

1.11. If pleural plaques claims were compensatable the number of claims per annum would increase dramatically from the current number. The additional costs incurred on Scottish claims would likely be passed onto customers in the form of higher insurance premiums. These higher premiums would only apply to Scottish customers. This could make businesses that trade in Scotland less competitive than their English and Welsh counterparts, and make Scotland a less competitive location for prospective businesses and employers considering investing here.

1.12. There will be significant and unjustified costs on business, consumers and tax payers.

1.13. This Bill, if passed, will contravene Article 1 and Article 6 of the European Convention on Human Rights.

1.14. The cost of making plaques compensatable in Scotland is likely to be between £1.1bn and £8.6bn according to Ministry of Justice figures.

\(^2\) BBC Scotland interview with Cabinet Secretary for Justice Kenny MacAskill MSP. 24 June 2008  
\(^3\) Rudd 11 June 2004, paragraph 58 and Rudd 12 November 2003 paragraph 7  
\(^4\) (2006) ICR 1458 (this case was the forerunner in the Court of Appeal to the House of Lords’ decision in Johnston)
2. Introduction

2.1. On 17 October 2007 the House of Lords, which included two Scottish Law Lords: Rodgers and Hope, unanimously concluded that pleural plaques do not give rise to a cause of action under the law of negligence (delict).

2.2. They reached this conclusion on the basis of medical evidence that showed that pleural plaques:

2.2.1. are, except in exceptional cases, symptomless and therefore do not result in any pain, suffering or loss of amenity.

2.2.2. neither lead to, nor increase susceptibility to, any other asbestos-related condition.

2.3. This is accepted by Scottish Ministers as Cabinet Secretary for Justice Kenny MacAskill MSP said on June 24 when the Bill was published, that pleural plaques are benign.

2.4. In February, the Scottish Government consulted on its partial Regulatory Impact Assessment (RIA) of the Bill now before the Scottish Parliament's Justice committee. However the Scottish Government chose not to conduct a standard pre-legislative consultation as is normally the case with Executive Bills. Norwich Union has taken an active approach to this matter, meeting with Members of the Scottish Parliament, Scottish Ministers, and Scottish Government officials. Nevertheless, we are concerned at the lack of a comprehensive consultation and the gathering of all relevant information on this Bill for due consideration.

2.5. We note that in the RIA more than three-quarters of the responses to that consultation opposed the Bill. We are concerned that the issues raised in those responses have not been given proper consideration, and we believe the Justice committee has an important role to play in addressing this.

2.6. There is a great deal of public misunderstanding about pleural plaques. We believe that education and factual information on pleural plaques will provide far more practical compensation for someone with the condition that a financial award which will instead perpetuate any anxiety they might feel about the diagnosis. The Scottish Government, health professionals, employers, trade unions and insurers should all be seeking to reassure a person that pleural plaques does not mean that they are going to develop mesothelioma or any other symptomatic asbestos-related condition.

2.7. We are concerned that this Bill represents a legal intervention by the Scottish Government which may set a dangerous precedent and threaten the stable legal framework which businesses operating in Scotland currently enjoy, and will affect the competitiveness of Scottish businesses compared to their counterparts in the rest of the UK. The Bill, if passed, will compel Norwich Union and other insurers to review our risk pricing and premiums in the Scottish market, which may result in higher costs for Scottish businesses to bear and a less competitive business environment compared to other parts of the United Kingdom and the other economies which Scotland competes with internationally. This is not an option we
would consider lightly, but the nature of this Bill would have a
fundamental change on how we evaluate risks in Scotland and we
have a responsibility to price our products accordingly.

2.8. Making plaques compensatable will inevitably lead to the
resurgence of the “scan van” culture employed by claims farmers
seeking to find claims to sell on to lawyers for a fee. This could lead
to the floodgates opening far beyond the presently 200 sisted claims
and result in significant costs for employers, former employers,
insurers and the government. There is also the very real risk to
public health. The COMARE\textsuperscript{5}) 12\textsuperscript{th} report indicates that CT scans of
asymptomatic individuals offer little or no clinical benefit. By
undergoing scans there are potential hazards such as increasing the
possibility of cancer due to exposure to radiation from the scan,
especially if repeated at regular intervals. The risk of contracting a
fatal lung condition from the inhalation of asbestos fibres is
significantly less, than repeated CT scans.

2.9. We understand that individuals will be anxious when given the
diagnosis of pleural plaques but as already stated, if appropriate and
timely medical advice is given, there should be no ongoing fear that
pleural plaques will go on to develop into a more serious asbestos
related condition. Creating legislation to make pleural plaques
compensatable will set a dangerous precedent which could open the
floodgates for anyone exposed to anything which is alleged to be
harmful.

2.10. Anxiety based claims have been looked at in the past by both
Scottish and English Courts and for very good reasons have been
held not to be compensatable. This view was endorsed by the
Scottish Law Commission in their 2004 report considering damages
for psychiatric injury. To make such claims compensatable would
involve a fundamental change to the law of negligence, and whilst
the Scottish Parliament states they will limit as far as possible the
encroachment on the law of damages, it is politically and legally
difficult to understand how they will justify compensation for plaques
on an exposure basis but to no other group of claimants.

2.11. We also believe that, the Bill contains retrospective provisions
which contravene Articles 1 and 6 of the European Convention on
Human rights, which precludes any interference by the legislature
with the administration of justice designed to influence the
determination of the dispute.

3. Pleural Plaques - The agreed medical facts

3.1. Pleural Plaques are calluses on the lining of the outside of the lung
and can only be seen on x – rays or CT scans. Pleural Plaques are
the result and evidence of exposure to asbestos fibres. They are
symptomless in all but exceptional cases. They do not lead to
mesothelioma or asbestosis; and do not establish that the individual
is more likely to develop either or these conditions than a person

\textsuperscript{5} COMARE stands for Committee on Medical Aspects of Radiation in the Environment
who having also been exposed to asbestos, has not developed pleural plaques.

3.2. In Rothwell –v- Chemical & Insulating Company Ltd⁶ it was agreed by both parties that “plaques do not themselves threaten or lead to other asbestos induced conditions nor are they a necessary precondition to such conditions; they do not increase the risk of lung cancer; they differ from diffuse pleural thickening; and their pathology is entirely distinct from that of mesothelioma”⁷

3.3. The above facts are universally agreed by medical experts and are not disputed by claimants and their lawyers, which is perhaps reflective of the nature of plaques, the majority of pleural plaques claimants resolved their claims on a final basis rather than provisional settlements.

3.4. The factual position is founded firmly in the medical evidence relied upon by both sides in the Johnston litigation. The appellants in Johnston relied on the evidence of Dr Robin M Rudd⁸, the respondents Dr John Moore-Gillon⁹. (President of the British Lung Foundation) The experts prepared a joint report dated 13 July 2004 which stated inter alia “We find that we are in general agreement and we do not consider that there are any material differences between our medical views regarding pleural plaques.” The substance of their evidence was as follows:

3.4.1. The pathogenesis of pleural plaques, while undoubtedly involving a response to asbestos fibres, is not entirely clear (Moore-Gillon, paragraphs 31-33) but the presence of plaques does not necessarily imply that any damage has been caused to the lungs.

3.4.2. The plaques (bland fibrous tissue usually situated on the parietal pleura) do not, save in a very rare condition where they are extensive and confluent, impair the ability of the visceral and parietal pleura to slide easily over each other. In almost 25 years of practising in the field of respiratory medicine, having seen many hundreds of asbestos-exposed individuals, Dr Moore-Gillon had seen “only a handful” of cases where pleural plaques were associated with any symptoms. This is because they have a covering of mesothelial cells (Rudd, 11 June 2004, paragraph 37) providing a low-friction surface which, together with a lubricant of pleural fluid (Moore-Gillon para 17), permits this easy movement. Thus the ease and freedom of the lungs’ ability to expand and contract is unaffected.

3.4.3. Though individual plaques may grow they do not (and cannot) multiply or progress to one of the other recognised asbestos-related conditions. They amount to a “biological cul-de-sac” (Rudd, 11 June 2004, paragraph 53; Moore-Gillon, paragraph 34). The plaques themselves are therefore wholly benign and asymptomatic.

⁶ (2006) ICR 1458
⁷ at 1468 per Lord Phillips of Worth Matravers CJ
⁹ Reports dated 15th May 2004 and Joint Report of 13th July 2004
3.4.4. The association of plaques with physical symptoms such as breathlessness is almost invariably explained by the concurrent presence of asbestosis (not present in any of the test cases) or other co-morbidity unrelated to asbestos (Rudd, 11 June 2004, paragraph 39; Moore-Gillon, paragraph 34).

3.4.5. Pleural plaques are a “marker” of exposure to asbestos fibres because it is accepted from pathological and epidemiological studies that they are associated with such exposure (Moore-Gillon, paragraph 27). For that reason only, they are also associated with a risk of serious asbestos-related disease occurring in the future. The magnitude of that risk is assessed, however, by reference to the age and occupational history of the patient and not by the presence of plaques themselves (Rudd, 11 June 2004, paragraph 58; Rudd, 12 November 2003, paragraph 7).

3.5. Many of the statements which have been made in both Scotland and Westminster in support of legislation are simply inconsistent with the facts as established in that case and have no evidential basis. For example:

"Pleural Plaques are recognised by medical experts as a sign of irreversible damage to the lining of lung" (Stuart Macmillan MSP, West of Scotland (SNP) Scottish Parliament 7th November 2007)

"Pleural Plaques in anyone exposed to asbestos mean that have a greatly increased lifetime risk of developing mesothelioma and a small but significantly increased risk of developing bronchial carcinoma. This will mean people diagnosed with this condition will have to live with the worry of possible future ill health for the rest of their lives." (Scottish Justice Secretary, Kenny MacAskill MSP, 29th November 2007)

"In this instance, the insurers argument is that people who contracted calcified pleural plaques which is a condition that can arise only from exposure to asbestos fibres in their employment, have not suffered injury – never mind the fact that pleural plaques in many instances are the first indication of a life threatening asbestos related disease, such as asbestosis or mesothelioma, and that pleural plaques have physical symptoms such as severe breathlessness and physical incapacity which destroys peoples lives." (Des McNulty MSP, Clydebank and Milngavie (Labour), Scottish Parliament 7th November 2007)

3.6. The RIA also includes erroneous statements such as, pleural plaques “signify greatly increased lifetime risk for developing mesothelioma and small but significantly increased risk of developing bronchial carcinoma.” This is simply untrue and it is on this point we believe a public education campaign is required to ensure no unnecessary anxiety is caused to those diagnosed with pleural plaques. Norwich Union would be happy to play our part in
such a campaign. We believe that a better public knowledge of pleural plaques will be far more effective at reducing anxiety about the condition than any financial award by the Scottish courts.

3.7. We would draw the committee’s attention to the opinion of Anthony Seaton, Emeritus Professor of Environmental and Occupational Medicine at the University of Aberdeen:

3.8. “Confusion arises because exposure to asbestos is also associated with the risk of serious fatal diseases, most notably mesothelioma, and most people with this disease also have pleural plaques. It is understandable that individuals with plaques can be worried about their prognosis if they are given misinformation on their significance. The change in case law that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses such as me. I believe we have better things to do, to prevent real diseases.

“There is a risk that the desirability of raising awareness of the nature of pleural plaques and allaying unnecessary concerns could be undermined by the provision of compensation, as this could send mixed messages about the nature of the condition and increase concerns.”

3.9. As stated above there is no risk of anyone developing mesothelioma as a result of pleural plaques. Pleural plaques are an indicator that someone has been exposed to asbestos. It is exposure to asbestos, not pleural plaques themselves, which increases a person’s risk of developing mesothelioma. A person who has been diagnosed with pleural plaques has no greater risk of developing another asbestos-related condition than a colleague who has had the same exposure but has not developed plaques. Development of mesothelioma is a completely separate process and not linked to plaques formation. Exposure to asbestos can cause several quite separate and independent conditions.

3.10. The lifetime risk of developing mesothelioma for a person who has had occupational exposure to asbestos is low - between 3% and 5%. To put this is into context, the lifetime risk of a male developing prostate or lung cancer is 7% and 8% respectively; the lifetime risk of a female developing breast cancer is 11%.

4. Business Confidence

4.1. The Scottish Government repeatedly states that it is committed to creating a competitive environment within which business can flourish; to attracting inward investment; and to building a culture of

10 Professor Anthony Seaton, ‘Close scrutiny neede on asbestos-related disease’ in The Scotsman, 30 October 2007
entrepreneurship. Norwich Union asserts that this Bill will have the opposite effect, as it will create a less stable environment for the insurance industry. It risks setting a precedent under Scots law for compensating for anxiety rather than actual injury, and while the Scottish Government contents this Bill will be limited only to asbestos-related conditions we have to consider the very real possibility that if enacted, this Bill will encourage claims for compensation over other anxieties rather than actual injuries.

4.2. The Bill also threatens wider business confidence as it would have the effect of driving up insurance premiums, a cost to be borne by Scottish businesses and employers. This in turn would undermine business confidence in Scotland and give the country a reputation for higher business costs than neighbouring jurisdictions at a time of fierce competition for inward investment.

4.3. We are also concerned that the use of the legislative power of the state to overturn judicial decisions is inconsistent with the above aims and their achievement.

4.4. Norwich Union, like all liability insurers, values legal certainty. Liability insurance is inextricably linked to the law of delict, and so without liability insurance, it is doubtful that delict liability as we know it would exist as those who had been wronged would be unable to receive the appropriate compensation for their harm. We believe that this Bill undermines the fundamental principles of the law of delict. This in turn begins to challenge and undermine the entire compensation system. There is a real risk that an unintended consequence of this Bill could be that those claimants with genuine injuries or harm find that they care unable to obtain satisfactory redress. There is also the prospect that some affected businesses may be forced to cease trading under the weight of litigation and compensation bills. This Bill could therefore end up costing people their jobs, because it is a flawed set of proposals.

4.5. We believe that the Scottish Government has significantly underestimated the level of costs that the Bill will impose on Scottish businesses, consumers and taxpayers. The Scottish Government seems to fail to appreciate that higher costs for insurers will be passed onto employers’ liability policyholders in the form of higher premiums, while higher costs for local authorities will fall to taxpayers. The certain increase in demand for x-rays and CT scans to establish the presence of pleural plaques in patients who otherwise would not seek such examinations will also place a strain on the NHS in Scotland in terms of resources and budgets.

4.5.1. The Financial Memorandum for this Bill makes a set of assumptions about the potential number of future claims based on the number of sisted cases, estimating future levels at 200 cases per annum. This underestimates the extent of the problem because it fails to take into account the sharp fall in the number of claims following the Court of Appeal judgment in 2006 (6,000 claims in 2005, fell to 2,250 in 2006). Scotland has

11 Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)
approximately 30% of total UK-asbestos liabilities. The Scottish Government also fails to take proper account of the potential for forum shopping (insert explanation of forum shopping here). The Policy Memorandum dismisses concerns about forum shopping, but contains no substantive detail on exactly how the Scottish Government proposes to do this.

4.6. The underestimation of the number of potential claims prohibits accurate forecasting of the cost of the legislation. The Financial Memorandum suggests that the annual cost to defendants of compensating plaques would between £5.5m and £6.5m, however:

4.6.1. the annual cost to the UK is estimated to be between £252m and £2bn

4.6.2. Scotland has approximately 30% of the UK’s asbestos liabilities; we therefore estimate that a more realistic range on the annual cost of this legislation to defenders would be £76m to £607m.

4.7. A high proportion of these costs would fall to insurers, which would in turn be passed on to employers’ liability policyholders in the form of higher premiums. This would undeniably undermine the competitiveness of Scottish businesses compared to their counterparts elsewhere in the UK where there might be cheaper and wider availability of cover.

4.8. The Scottish Government also overlooks the liabilities of employers with insufficient insurance cover and what measures they may be required to take in order to meet any imposed settlements. The same applies to Scottish local authorities who may also face claims and the costs which councils incur will ultimately have to be met by the taxpayer.

5. Legal Implications

Lack of Material damage – the de minimis argument

5.1. The House of Lords unanimous judgement upheld the Court of Appeal decision that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. It proceeds upon well established principles of the law of tort (or in Scotland the law of delict).

5.2. As Lord Rodger of Earlsferry stated, under the law of negligence for there to be a cause of action for damages for personal injury caused by a defendant’s negligence or breach of statutory duty, three elements must combine namely; there must be 1) negligent act or breach of statutory duty by the defendant, which (2) causes an injury to the claimant’s body and (3) the claimant must suffer material damage as a result. Since the plaques had not caused the claimants any material damages they did not give rise to a cause of action.

5.3. The first principle of tort and delict affirmed by Johnston is that in order to be compensatable any damage must be more than de

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12 ABI estimates, based on data contained in the Ministry of Justice’s consultation paper, Pleural Plaques, 9 July 2008
13 See Paragraph 87 and 88 of the judgement
minimis. The damage must reach a threshold of seriousness if it is to justify the intervention of the law. Pleural Plaques do not reach this threshold. As Lord Uist put it in a Scottish case which followed the decision in *Johnston* “it is not that pleural plaques cause harm which is de minimis it is that they cause no harm at all.”

5.4. Such a ruling is logical as we all have particles (asbestos and otherwise) in our lungs regardless of whether we have been exposed to asbestos in our employment. As Dr Rudd concluded, plaques should not be labelled an “injury” as this would be of “doubtful utility since it would amount to defining all persons who have been exposed to asbestos, including urban dwellers inhaling pollution, as having been injured by it.”

5.5. Anxiety is not a basis for a cause of action even where “aggregated”

5.6. Secondly, *Johnston* also affirmed the principle vouched by the majority decision in the House of Lords in *Gregg – v – Scott*, that a risk of future damage is not itself compensatable: only if the risk materialises will a cause of action emerge.

5.7. Thirdly, *Johnston* affirmed the principle established by House of Lords in *Hicks – v – Chief Constable of the South Yorkshire Police*, that mere anxiety about a risk of further damage is not itself compensatable. The Lords in *Johnston* rejected any arguments that the condition could be “aggregated” with the risk of future asbestos disease and / or the anxiety experienced in relation to such risk. Since neither the plaques alone, nor the risk of future damage, nor anxiety about the risk are individually actionable, it follows that they are not collectively actionable either.

5.8. The RIA states at several points that the House of Lords’ judgment reversed over twenty years of precedent and practice, and that the proposed bill would ensure legal consistency. This is misleading.

5.9. The law has always required that a claim in tort based on negligence, must have proof of damage that is more than minimal. Compensation has therefore only ever been granted where it can be shown that a claimant has sustained damage that is more than minimal. In the past, pleural plaques were compensatable because it was believed that people suffered ill-health as a result of the condition. Medical evidence has advanced and now demonstrates that pleural plaques “have no effect on health at all” (Lord Hoffman); consequently, the ‘more than minimal’ criterion is not met. If this evidence had existed twenty years ago, people with pleural plaques would never have been paid compensation. Therefore, in stopping compensation for pleural plaques, the law is being consistent: the Lords applied the existing law to the latest facts about the effect of plaques on a person’s health. Making compensation available for pleural plaques in light of this new medical evidence would

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14 See Cartledge – v – Jopling (1963) AC 758
16 Dr M Rudd medical report dated 11th June 2004, used Court of Appeal hearing of Rothwell and others
18 Hicks – v – Chief Constable of South Yorkshire Police (1992) 2 ALL ER 65
constitute a fundamental change to the law of negligence. It would put a small section of the population in a special position of being awarded damages in circumstances that fall outside the ambit of the principles of negligence, namely that there is no right of action unless and until there has been injury and harm.

5.10. **Implications for recovery due to risk exposure**

5.11. Legislating to make plaques compensatable on the basis of anxiety would set a dangerous precedent and could open the floodgates to any number of “exposure only” claims. It would mean that a mere creation of a risk of the disease (or of the apprehension of disease) even though no disease was in fact contracted would be sufficient to establish liability and recover damages. This would enable anyone who is anxious about exposure to toxic or potentially toxic substances could seek compensation. It is anticipated that this would lead to an avalanche of litigation, and result in significant legal costs for defendants, including businesses, employers, former employers, local and central government and the insurance industry. These are matters for the court where Scottish Ministers would be unable to intervene.

5.12. The reasons for excluding “pure” risk exposure from recovery are several and cogent. Firstly, by definition exposure to risk while arguing the possibility of future harm, necessarily denotes the current absence of harm. The second more practical reason is that by allowing claimants to recover compensation on the basis that they might be harmed in the future inevitably means that those who do not develop future illness will have a windfall whilst those who do become ill will have been inadequately compensated for the actual damage they have sustained. Thirdly, risk in general is a fact of life for everyone. If the presence of plaques entitles those individuals exposed to asbestos to claim, is this not unfair on those who have exposed to exactly the same risk who have not developed plaques and who are therefore excluded from recovering.

5.13. The decision to make pleural plaques not compensatable is an approach that has been favoured in many comparable jurisdictions around the World, including Australia and US. In almost no other country in the world does an individual with asymptomatic pleural disease and without demonstrable disability receive any compensation. This is so in both countries that governs damages through the Courts and those who have government and employer funded no fault compensation schemes.

5.14. Interestingly in the UK, individuals with pleural plaques are not entitled to any incapacity benefits from the government. As recently as July 2005 the Industrial Injuries Advisory Council 2005 in their report on Asbestos related diseases stated “Pleural Plaques are small localised areas of fibrosis found within the pleura due to asbestos exposure. Plaques do not impair lung function. The Council does not recommend that pleural plaques should be added to the list of prescribed diseases”. It seems incongruous that we may end up in a situation where the Scottish Government forces
compensation to be paid for a condition for which the UK Government does not pay benefits.

5.15. The Scottish Government's Regulatory Impact Assessment is correct in that the legal principle on which the House of Lords based their ruling – that actionable damage requires a perceptible effect on health – can be applied to other asymptomatic asbestos-related conditions. Regardless of whether the Scottish Government introduces the legislation it proposes, people with pleural plaques will continue to be able to raise an action for damages if they later develop an asbestos-related disease. Norwich Union along with other Insurers are committed to paying fast and fair compensation to claimants and, are working on initiatives to streamline the claims process for people with asbestos-related diseases, such as the mesothelioma pre-action protocol, which is currently being considered by the UK Government. We are keen to discuss the protocol's possible application in Scotland.

6. Implications of introducing legislation overturning the House of Lords’ decision

Scan Vans – risk of radiation from CT scans

6.1. Pleural plaques can only be detected on x-ray or computed tomography (CT) scan, so they are usually diagnosed incidentally during the course of routine medical investigations. As such, the majority of people with pleural plaques will likely never know that they have the condition. Our concern is that if plaques were made compensatable there would be a renewed surge in the practice of scan vans being used to identify cases; effectively claims farmers who offer chest x-rays to people who show no sign of ill health, with the sole intention of generating claims and therefore income for themselves, by selling claims to a lawyer for a referral fee. Pleural plaques are symptomless in almost every case and do not cause increase susceptibility to or led to other asbestos conditions. However because plaques are commonly misunderstood, commercial scan vans cause unnecessary distress to people who would otherwise have likely never know they had the condition, and mistakenly believe that having plaques will mean that they will develop terminal cancer.

6.2. Such commercial organisations fail to give advice on the risks of having regular scans to enable individuals to make an informed choice. The best way to tackle anxiety is to provide information and reassurance to make people aware of the real implications of pleural plaques.

6.3. Even more worrying is the evidence collected and reported by the COMARE 12th report, published in December 2007. It stated that “Scanning of the asymptomatic individual by using CT is a practice

19 COMARE 12th report, published in December 2007. ‘The Impact of personally initiated X ray computed tomography scanning for the health assessment of asymptomatic individuals.'
that has implications for public health…. COMARE concludes that there is no evidence that CT scanning for lung conditions is of benefit” In the report it states that regular CT scans cause detriment by

6.3.1. Increased risk of cancer from radiation from the CT scan, especially if scan is repeated at regular intervals say every 5 years aged 40 - 70
6.3.2. Psychological impact with little support and advice provided
6.3.3. Economic and resource implications for the NHS which is likely to become liable for further tests and examinations (individuals fund initial scans but requires NHS to fund further investigations)

6.4. The report states “the most obvious detriment associated with CT scanning is the radiation does itself which will be significant especially if the test is repeated at regular intervals. The does received by an individual can vary substantially depending on they type of scan and protocol used as well as on the machine itself. The potential risk associated with the radiation dose may outweigh the benefit for an asymptomatic individual20.”

6.5. It goes on “The radiation dose is significant, with a consequent predicted increase in cancer risk. Current estimates of age related radiation risks indicated approximately 240 radiation induced fatalities in a population of 100,000 undergoing CT scans every 5 years from age 40 to 70 years 21”. By comparison, 2500 people each year die of mesothelioma. In this context it can be seen that the health impact of frequent scanning is measurable.

6.6. It is inevitable that if compensation is made available for pleural plaques there will be an increase in individuals seeking scans, the public health implications must be taken into consideration.

6.7. Increase in Insurance Premiums

6.7.1. The Scottish Government suggests that legislation may lead to insurers raising premiums for “policies covering liability and death”. We are not sure what this means. Making compensation available based on worry about the prospect of a future disease, rather than damage itself could lead to a raft of new compensatable conditions that would significantly increase costs for defendants. It would be extremely difficult, both politically and legally, to restrict this to asymptomatic asbestos related conditions only. This would have serious cost consequences for not only insurers but also employers, former employers and the Government. This could make ‘third party’ insurances (where an organisation purchases cover to indemnify it against any claims from a third party), such as employers’ liability and public liability insurance, more expensive. These increases would apply to businesses in Scotland and this could affect their competitive position compared to their English and Welsh counterparts: there would be cheaper insurance and wider availability of cover in England and Wales.

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20 Page 17 paragraph 2.35
21 Page 18 paragraph 2.45
6.7.2. For first party insurance policies, such as life, critical illness and income protection, it is the exposure to asbestos, not the diagnosis of plaques, which would affect the premium. However a diagnosis of plaques does confirm exposure to asbestos and as such would have to be declared. Premiums for such policies would not be affected by legislation as the premium is determined by reference to the fact of exposure and not the presence or absence of plaques.

6.8. Impact on Scottish Business

6.8.1. Both the UK Government and the Scottish Government have repeatedly stressed their commitment to business, to creating a competitive environment within which business can flourish, to attracting inward investment and to building a culture of entrepreneurship. London is already an international centre for dispute resolution. It is commonplace for the English courts to determine disputes having no connection with the United Kingdom, other than in respect that the parties chose English law as the governing law of their relationship and conferred on the English courts exclusive jurisdiction. In Scotland, the First Minister and the Justice Secretary have both spoken of the potential to develop Scotland as a forum for international dispute resolution. The use of the legislative power of the state to overturn judicial decisions is entirely inconsistent with these stated aims and, in particular, with their long-term achievements.

6.8.2. Legal and regulatory risks are significant considerations when a business is faced with a decision whether to invest in a particular country and to participate in its markets. Business looks to ensure the security of any investment it makes. It is not merely in politically unstable societies that business can have no confidence in the security of its investments. Even in relatively stable systems, investment and wealth creating activity will be discouraged if business perceives undue readiness on the part of government and legislative authorities to change the law for short-term political ends, particularly where this is done in such a way as to reopen past transactions and to alter private legal relations without reference to the wishes of the parties thereto.

6.8.3. The proposed legislation represents an unprecedented interference with private legal relations, as determined by the courts and with the administration of justice. Not only is the government proposing to overturn an unanimous House of Lords decision, it is also contemplating legislation that would affect pending cases in the courts. As is noted in paragraph 5 of the RIA, the House of Lords’ decision is not strictly binding on the Scottish Courts, although it is seen as highly persuasive. The one Scottish case which is referred to in the RIA has not been taken to appeal and so there has as yet been no definitive decision on the Scottish position. Individual claims remain sisted. The Scottish Government is therefore effectively interfering with the

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outcome of pending judicial process, which has implications in terms of Art 6 of the European Convention on Human Rights.\textsuperscript{23} We would look closely at the legality of any proposed legislation.

6.8.4. This course of action is not obviously consistent with respect for and observance of the rule of law. We fail to see how the Scottish Government can convincingly present Scotland as a secure business environment when it is prepared to countenance such interference with private legal relations and the administration of justice.

6.9. \textit{Costs of implementing}

6.9.1. The RIA states that there are presently 200 claims sisted in Scotland with Thompsons representing a further 400 cases to be pursued. Therefore the estimated outstanding number of claims is 630 and it is likely that a further 200 claims per annum will be pursued.

6.9.2. The cost of these cases the RIA states is £8,000 for damages plus an additional £8,000 for defendant’s legal costs. When calculating the total cost the RIA states the total cost is £16,000 per case this is incorrect as it does not include anything for the claimant’s costs which can be considerable and disproportionate. In England and Wales, Norwich Union have received costs bills of £40,000\textsuperscript{24} on claims where the damages were only £6,000. Whilst at present Scotland has a scale for legal costs, if conditional fee arrangements were introduced then it is likely similar costs would be incurred in Scotland. Our Scottish legal advisers suggest that based on current awards the average cost of a pleural plaques claim including all parties’ costs is nearer £25,000 per case. Therefore the cost of settling the outstanding 630 cases will be in the region of £15.75m with annual cost of £5m based on 200 claims per year. However, as is outlined below, it is our view that if pleural plaques were made compensatable there would be a significant increase in claims.

6.9.3. However, if pleural plaques were made compensatable it is inevitably that the number of claims would dramatically increase. At the October 2007 GIRO Conference, the UK Asbestos Working Party\textsuperscript{25} of the Institute of Actuaries stated that in 1999 the number of plaques claims received each year by insurers in the UK was approx 500, and this rose steeply so that by 2005 just under 6000 claims received per annum. After the Court appeal verdict, the numbers dropped to 2250 approx in 2006 and the partial data for 2007 continued the trend.

6.9.4. Therefore whilst the existing numbers of sisted claims in Scotland are low it is likely they will increase dramatically if legislation was implemented. Whilst Scotland is only 10% of the UK population it has approximately 30% of asbestos related claims due to its

\textsuperscript{23} Stran – v – Greek Refineries – v – Greece (1994) 19 EHRR 293 ‘The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.’

\textsuperscript{24} Berry – v – Cape Darlington (not reported)

\textsuperscript{25} Copy of presentation can be provided if required
connection with heavy industry. It is no coincidence that the increase in claims in England and Wales started in 1999 / 2000 at the same time Access to Justice Act 1999 was implemented in England and Wales. Far from encouraging solicitors to take on riskier cases, the system has simply encouraged solicitors to try and generate further income from the low risk cases they already had. Pleural plaques were part of this scramble by claim farmers to capture low value cases for the income they could generate for themselves and claimants’ solicitors. If plaques was made compensatable in Scotland and as is expected CFA’s (Conditional Fee Agreements) and ATE (After The Event Insurance) premiums are introduced Lord Gill’s civil justice review, it is likely that pleural plaques claims will rise dramatically to something similar to the levels seen in England & Wales prior to the Court of Appeal decision (proportionate to Scotland’s population).

6.9.5. In such a legal climate, it is likely any “scheme” that made plaques compensatable would flush out claims which would otherwise not have been made. The closest example of this within the UK has been with the British Coal COPD scheme. At the outset of this scheme it will be remembered that only around 150,000 claims were expected. On closure of the scheme 592,000 claims had been registered. In contrast to the position on pleural plaques this vast influx of claims was set against an apparently greater degree of statistical certainty, as the number of those involved in the mining industry since 1954 was well known. The deep mine industry was also extremely well served by statistical/epidemiological data establishing the numbers of miners likely to have respiratory conditions (pneumoconiosis field research and pneumoconiosis x-ray data – PFR/PXR).

6.9.6. Dr Moore Gillon in his report of 10th November 2004 stated “In the UK there are now about 1500 new cases (mesothelioma) diagnosed each year…. There must accordingly be far more than 1500 cases of pleural plaques arising each year but because they are asymptomatic many, and almost certainly most, are not at present diagnosed. When they are diagnosed it is usually as an incidental finding on a chest radiograph carried out for other reasons.” He goes on “for every person that develops mesothelioma in any given period there will be 20 – 50 people developing plaques i.e. 30,000 to 75,000 per year.” It is inevitably that if plaques are made compensatable, routine screening by commercial CT scan organisations will lead to a sharp rise in diagnosed cases.

6.9.7. Of course it is not just insurers who pay these claims but also employers. Amongst the most striking effects of the US asbestos crisis has been that in certain situations the well of compensation has run dry. Many companies have become declared bankrupt due to there asbestos liabilities, and as a result there are no more funds available to meet claims. In the UK at present this has been less of a feature but there are two existing asbestos
schemes, namely the Turner and Newall asbestos scheme and the Cape Scheme. Under these schemes the claimants already do not recover full damages. Pressure Groups are critical of these schemes as they fear the funds will be insufficient for the companies asbestos related liabilities, this is a real risk on the Cape Scheme. If the House of Lords decision on pleural plaques was overturned, this would directly reduce the amount of compensation available to future victims of more serious asbestos related diseases.

6.9.8. For many companies with gaps in their insurance cover, they will be liable for a portion of any claims. If the employer no longer exists then the claimant may be left with no one to claim compensation from regardless of whether or not legislation is introduced.

6.9.9. In addition the UK Government also has a significant degree of liability for exposing former employees to asbestos via the UK Government's Ministry of Defence and Department for Business Enterprise and Regulatory Reform who hold the residual historic liabilities for the shipyards, the docks and the steel industry. Whilst the RIA outlines the governments liability based on existing cases, it is our belief that once plaques is made compensatable, coupled with the likely outcome of the civil justice review will lead to significant rise in plaques claims.

6.9.10. There is one group of people who will significantly benefit from the proposed legislation, but whom the RIA neglects to mention – claimant lawyers. It is worth noting the opinion of RIA respondent and advocate Neil Mackenzie who asks the question *cui bono?*. His answer is that the main beneficiaries of this Bill would be lawyers whose legal costs are likely to at least match the estimated £8,000 level of damages. On the basis of the Scottish Government’s figures, there are currently 630 outstanding cases (sisted or backlogged with solicitors). Claimant lawyers would stand to make millions of pounds each year as a result of the Governments proposed legislation. Ninety-percent of Scottish plaques claims are handled by Thompsons solicitors. That means that one firm alone stands to gain over £2million from sisted and backlogged claims, and considerably more in respect of future claims.

7. Benefits of not implementing legislation

7.1. The RIA suggests that to do nothing would be of no benefit to people with pleural plaques, but would be of benefit to relevant employers, former employers, the Government and insurers.

7.2. We recognise that there was confusion about the prognosis for someone with pleural plaques. The House of Lords’ judgment provides the opportunity to end that confusion, and definitively state – based on clear medical evidence - that having pleural plaques does not mean that a person is going to developing mesothelioma or another terminal disease. Legislating to make compensation
available for pleural plaques will not do anything to resolve this confusion or remove anxiety. This was demonstrated in the evidence of the claimants at first instance. Mr Justice Holland in his judgement noted the following: "Mr Storey told me "I do not regard the plaques as any concern save as a pointer that I have been exposed to asbestos and it has had an effect on my lungs(sic)". He drew attention to the litigation process and to the potential size of award as advised by his lawyers, all such tending to play up in his mind a condition that was being played down by the doctors." Other claimants reported similar confusion, such as Mr Quinn who was reported by Justice Holland as saying "He accepted that the doctors had given reassuring advice but pointed out that such conflicted what he read in the magazine and with what he had seen on the internet. The fact that acquaintances had been diagnosed with serious asbestos related conditions contributed to his anxiety – as did the potential for an award in damages at a level which in itself suggested an "obviously serious problem".

7.3. In our opinion, making pleural plaques compensatable will send mixed messages about the condition: the very fact that pleural plaques could be worthy of compensation suggests that it will affect a person’s health. We believe education, not compensation, is the best way of providing peace of mind to people with the condition. The Government, the NHS, health care providers, and support groups should provide information to people with pleural plaques and their families that, despite the diagnosis, they can still lead a normal, healthy life and that they are not at significant risk of developing mesothelioma or any other terminal disease. Norwich Union would be happy to play its role in this.

7.4. Linked to peace of mind, a decision not to legislate would curtail commercial scan van operations, which focus on scanning and diagnosing members of the public for the sole purpose of promoting a compensation claim, without providing necessary reassurance about their general health and well-being and remove significant public health risks from increased unnecessary exposure to radiation.

7.5. A decision not to legislate would also provide legal certainty and avoid any risk of a more widespread challenge to the clear and longstanding legal principle that compensation is only paid for those who suffer material harm from acts of negligence. Despite the Scottish Government’s commitment to “encroach into the law of damages no more than necessary”, once the principle is established for one group of people that anxiety rather than damage is worthy of compensation, there would be serious political and possibly legal difficulties in justifying a denial of similar rights to others in the future.

26 Mr Justice Holland Paragraph 19 J Grieves & Others – v – Everard & Others 2005EWHC 88 (QB)
27 Mr Justice Holland Paragraph 22 J Grieves & Others – v – Everard & Others 2005EWHC 88 (QB)
7.6. Legal certainty is extremely important to businesses, which require assurance that Government is committed to a stable and certain legal environment that enables them to understand their risks fully.

7.7. Pleural Plaques cases make up 65% of all asbestos related diseases, maintaining the House of Lords decision, enables insurers and claimant’s lawyers resources to be focused on ensuring that those unfortunate to be diagnosed with mesothothelioma (and their families) receive full compensation and as quickly as possible.

8. Summary

8.1. In conclusion we do not believe the Damages (Asbestos-related Conditions) (Scotland) Bill should proceed as it fails to address the cause of anxiety amongst the public with regard to pleural plaques, namely the lack of knowledge and understanding of the medical facts about the condition.

8.2. Instead the Bill offers the incentive of financial award based on anxiety about a possible or potential injury rather than compensation for actual injury. This is a very dangerous precedent to set in the law of liability, putting Scots law at odds with almost all other legal systems, and creating the opportunity for claims on conditions not related to asbestos to be lodged.

8.3. Despite the Scottish Government's assurances, there is comparatively little it can do to control this Bill if passed, both in terms of the interpretation of the legislation and the awards based upon it, which may well be de minimis as courts have complete discretion in deciding quantum for such cases where evidence of the affects of anxiety are difficult to accurately assess.

8.4. We believe this Bill will have a negative affect on the insurance and financial services industry in Scotland, one which Scottish Ministers repeatedly cite as a key driver of the Scottish economy and pledge their support to, and the Bill will in turn generate higher costs for employers which will inhibit and even discourage future business growth by indigenous businesses and inward investors.

8.5. We look forward to the opportunity to expand on these points and discuss them with the Scottish Parliament's Justice Committee, which has a great responsibility to consider the Bill, its implications and consequences in the most comprehensive terms in contrast to the approach of the Scottish Government to date.

Dominic Clayden
Solicitor
Director of Claims
NUI Operations
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from the Association of Personal Injury Lawyers

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation, formed by pursuers’ lawyers with a view to representing the interests of personal injury victims. APIL currently has more than 170 members in Scotland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured people.

The aims of APIL are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL’s executive committee would like to acknowledge the assistance of the following members in the preparation of this evidence:

Ruth Martin - APIL Member
David Short - Secretary, APIL Scotland
David Sandison - APIL Member
Allan Gore QC - Past President, APIL
Karl Tonks - Executive Committee Member, APIL
General points

APIL welcomes the commitment of the Scottish Government to this legislation which overturns last year’s House of Lords ruling, which represented a devastating blow for pleural plaques victims.

The fact that pleural plaques are asymptomatic belies the truth that they do represent a physiological change in the body. This fact was raised in an adjournment debate in Westminster Hall on 4 June 2008, when Michael Clapham MP, reading from a letter written by Dr Robin Rudd (consultant physician in medical oncology and respiratory medicine) said:

“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.”¹

“People with pleural plaques commonly experience considerable anxiety about the risk of mesothelioma and other serious asbestos diseases. Despite reassurance offered by doctors that the condition is harmless often they know of former work colleagues who have gone on to die of mesothelioma after being diagnosed with pleural plaques. 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.”²

It is to the Scottish Government’s great credit that it has taken this opportunity to use its authority to set public policy by stating what the law should be, in order to protect the most vulnerable of citizens. Overturning this decision also reflects the polluter pays principle: insurance premiums have already been collected and it is right and proper that the negligent party should make recompense for that negligence.

¹ Hansard 4 June 2008: Column 251WH
² Hansard 4 June 2008: Column 252WH
Specific points of clarification

At this stage, we would like to suggest some minor amendments to the Bill to ensure that the legislation achieves its purpose.

Clause 1 (1) line 4 should be amended to read:

Asbestos-related pleural plaques are a personal injury which is damage actionable in law

**Rationale:** this change represents precisely what the Bill is designed to achieve and avoids any future possibility of the courts deciding that to be actionable requires more than being ‘not negligible’. In order to make the wording of the Bill consistent, the following amendments will need to be made for the same reason:

Clause 1 (3) line 8 should be amended to read:
personal injury or are not actionable in law

Clause 2 (1) line 15 should be amended to read:
condition is a personal injury which is damage actionable in law

In addition, for the sake of consistency, we suggest that sub-clauses 1 (2) and 1 (4) should be included in clause 2, as issues relating to the recovery of damages and liability apply equally to the conditions of pleural thickening and asbestosis.

**Retrospectivity**

Clause 3 (2) line 11 should be amended to read:

with 15 February 2005 and ending with the day on which this section comes into force is

**Rationale:** retrospectivity should be to the date of the High Court decision rather than to the date of the House of Lords as presently drafted because, although only a House of Lords decision is binding in Scotland, the decisions of lower courts in any jurisdiction can be persuasive. Making this amendment will provide clarity and certainty in the legislation.

Lorraine Gwinnutt
**Head of Communications**
Introduction

The Damages (Asbestos-related Conditions) (Scotland) Bill was introduced in the Scottish Parliament on 23 June 2008. The purpose of the Bill, inter alia, is to ensure that the Judgment in the House of Lords case Johnston v NEI International Combustion Ltd [2007] UKHL 39 (hereinafter referred to as "Johnston") does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages. The Bill also provides that asymptomatic pleural thickening and asymptomatic asbestosis, when caused by wrongful exposure to asbestos, continue to give rise to a claim for damages in Scotland.

Background

On 17 October 2007 the House of Lords decided in the case of Johnston that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. As this was an English case the judgment is not binding in Scotland but is highly persuasive and has already been cited with approval in the Court of Session, Scotland's supreme civil court in the case of Wright-v-Stoddard International Plc [2007] CSOH 173. The provisions of the Bill will take effect from the date of the House of Lords judgment, 17 October 2007, and will therefore cover claims which have not been settled or determined by a court before the Bill comes into force. Furthermore, in relation to time bar, the period between 17 October 2007 and the date the Bill comes into force will not count towards the three year limitation period for actions raised in respect of the three conditions covered in the Bill: asbestos-related asymptomatic pleural plaques; asymptomatic pleural thickening and asymptomatic asbestosis.

Submissions on the general principles and stated purposes of the Bill

It is submitted that the English House of Lords decision in Johnston with particular reference to asymptomatic pleural plaques should not be denied being given effect in Scotland by the operation of the Bill if passed for the following reasons:

- The judgment in Johnston was based on new consensual medical evidence that pleural plaques have no effect on health. The case highlights that pleural plaques are not a disease. Historically pleural plaques cases were settled at a time when medical opinion was unclear and it was believed that those with pleural plaques suffered ill health.
• The judgment in Johnston offers reassurance to those with pleural plaques that pleural plaques themselves do not even cause or contribute to a cause of any future asbestos disease developing.

• The judgment in Johnston further clarifies the position of claimants on the matter of time bar. Whereas previously there was doubt whether a person's knowledge that he/she had pleural plaques started the running of the relevant limitation period, Johnston clarifies that it is in no doubt that it does not.

• The judgment in Johnson would act to prevent the practice of claims farmers' offering "mobile" x-rays to individuals the effect of which would cause and create worry and anxiety to individuals where none existed previously, pleural plaques themselves being completely symptomless. Where the judgment in Johnston is precluded from having effect in Scotland this would, it is submitted, inevitably lead to an increase in the claims farmers' practice and/or an increase in individuals seeking x-ray scans. In this, there are, it is submitted adverse public health implications as well as cost implications as a consequence.

Where the Bill is passed into law then it is submitted that:

• It would raise concerns over the fundamental principles of Scotland's legal framework given the retrospective effect of the Bill. It is a cornerstone of a stable and principled legal system that individuals and bodies corporate can depend upon the law as it is promulgated and interpreted by the Courts, without their confidence therein being eroded by the possibility and effect of retrospective legislation.

• It would erode confidence and support in the existing legal axiom of the Scottish Law of Delict that compensation follows where as a result of an act of negligence material harm is occasioned to the pursuer. 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.

• It would set an unfortunate precedent. It would afford the potential to open the floodgates to any number of "exposure" claims. For example, might a one time smoker be entitled to a court judgment and damages on the basis that his past cigarette smoking has materially increased the risk of future lung cancer? Could a long distance lorry driver obtain damages on the basis that his long hours spent driving on busy roads has statistically increased his chances of being involved in a disabling road accident or perhaps even suffering heart disease?
• The law on pleural plaques would be different north and south of the Border. Of itself this would be undesirable but in addition a consequence of that could be that Third Party Insurance (Employers Liability and Public Liability Insurance) could be rendered more expensive for businesses in Scotland and could render insurance cover more restricted in Scotland. This could hand to businesses in other parts of the UK a competitive advantage over their Scottish counterparts.

• Scotland could find itself out of step with most of its European neighbours given that very few European countries award compensation for symptomless asbestos-related conditions.

• Although the judgment in Johnston is restricted to pleural plaques the Bill of course also addresses itself to pleural thickening and asbestosis. In those matters it is proposed that sufferers will not need to prove that those conditions have caused or will cause physical difficulties to make a claim although where they are able to do so damages will be increased. In so far as the Bill seeks to remove the need for such proof this erodes the clear long standing Scottish legal principle of requiring to establish causation and the ability of those involved with the legal process of reparation to rely upon that with confidence.

Ray Gribben
Associate
RSA

RSA is one of the world's leading multinational insurance groups. Our business purpose is to help our customers protect themselves against the risks they face – as we have done for nearly 300 years. Our focus is on commercial and personal general insurance and we write virtually all types. We transact business in some 130 countries and have over 20 million customers around the globe, served by about 22,000 employees.

In the UK, RSA is the largest commercial insurer and is one of the top three general insurers. We have a market share of approximately 10% of the UK employers' liability market, which makes RSA the second largest employers' liability insurer in the UK.

1. EXECUTIVE SUMMARY

1.1 The Government's proposed legislation would allow claims for damages to be made in Scotland in respect of symptomless pleural plaques and other symptomless asbestos-related conditions. RSA is opposed to this for the following main reasons:

1.1.1 Education and support for those affected by pleural plaques is likely to be the most effective means of helping to alleviate the anxiety they may have. Legislation to make pleural plaques compensatable is likely to confuse people and make them worry unnecessarily about the impact of the condition on their health.

1.1.2 The proposed legislation directly overrules a fundamental principle of law that a claimant must have suffered identifiable harm, beyond anxiety, in order to bring a claim in delict.

1.1.3 There will be wider consequences of overruling the relevant principles of law than just allowing claims to be brought in respect of the symptomless asbestos-related conditions referred to in the Bill.

1.1.4 The proposed legislation is inconsistent with undisputed medical evidence that symptomless pleural plaques are not of themselves harmful.

1.1.5 The proposed legislation contravenes the European Convention on Human Rights in that it would operate retrospectively.
1.1.6 There has been an underestimation of the cost associated with the proposed legislation in the accompanying Memoranda.

1.2 While some of the issues above have been considered by the Government in the Memoranda to the Bill, we do not believe the significant concerns that the industry has raised have been properly addressed. We would urge the Justice Committee to take the current opportunity to consider the points we are making and to highlight them to Parliament so that a fully informed debate can occur.

2. INTRODUCTION

2.1 The House of Lords unanimously concluded that applying the established principles of the law of delict to current medical evidence, pleural plaques should not be considered damage which may give rise to a cause of action.

2.2 The Government has proposed introducing legislation which would have the effect of reversing the House of Lords ruling. RSA is opposed to this.

2.3 The Government has previously consulted on a partial regulatory impact assessment of the proposed legislation. RSA was involved in preparing the ABI response to the assessment. RSA responded individually by letter, endorsing the points set out in the ABI response.

2.4 RSA has had opportunity to review in draft the ABI's submissions to the Justice Committee. RSA endorses all of the points made in those submissions. However, given the significant concerns that RSA has in relation to the proposed legislation, it is also making its own submissions focussing on the points that it finds most concerning.

3. EDUCATION AND SUPPORT FOR THOSE AFFECTED BY PLEURAL PLAQUES

3.1 The medical evidence is clear that pleural plaques do not cause or lead to more serious asbestos-related conditions. However, unfortunately people with plaques are still subject to anxiety because of:

3.1.1 confusion as to whether pleural plaques may themselves lead to serious asbestos-related diseases;

3.1.2 confusion as to the diagnosis made and whether or not pleural plaques themselves are likely to cause symptoms; and/or

3.1.3 concern at having been exposed to asbestos.

3.2 The confusion that may give rise to anxiety as described at points (3.1.1) and (3.1.2) above is only likely to be accentuated by the legislation proposed by the Government. Legislation specifying that pleural plaques constitute injury sufficient to found a legal claim for damages sends a message that the condition has greater direct consequences than it does.
Professor Anthony Seaton, Emeritus Professor of Environmental and Occupational Medicine at the University of Aberdeen, has made this point with force in an article quoted in the ABI's submissions.1

3.3 Concern over exposure to asbestos is understandable. However, many individuals will know that they have been occupationally exposed to asbestos, regardless of whether they are diagnosed with pleural plaques. This is a separate issue from the proposed legislation which specifically relates to pleural plaques and other symptomless asbestos-related conditions.

3.4 Our view is that the most effective method of looking to alleviate the anxiety of those affected by pleural plaques is to provide increased information and support to them. This should be the focus of the Government's attention. RSA would be happy to play a role in contributing to this and would be willing to use the expertise that it has gained through its RSA Care rehabilitation scheme. That scheme is intended to provide timely support to workers who have been injured in the workplace ensuring that they return to health, their family and their work as quickly as possible.

3.5 While we realise that it is ultimately a matter for the Government and the medical profession, it seems to us that there are likely to be practical steps that may be taken to increase knowledge and awareness of what a diagnosis of pleural plaques means. In our view, this education and support should encompass general practitioners, those affected by pleural plaques and also others who may be experiencing anxiety due to exposure to asbestos.

4. OVERRULING OF A FUNDAMENTAL PRINCIPLE OF LAW

4.1 It is a fundamental principle of the law of delict that a claimant must have suffered harm in order to bring a claim. This was made clear in the House of Lords decision in Johnston.2

4.2 It follows that the anxiety of a claimant relating to possible future harm, or in relation to a condition that itself is not harmful, will not be sufficient to found a claim.

4.3 Based on current medical evidence, the House of Lords decided that symptomless pleural plaques were not of themselves harmful and so could not, without more, found a claim.

4.4 We understand from the content of the partial regulatory impact assessment and the comments in Annex A to the Policy Memorandum that the Government takes the view that this decision overturned previous

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1 Professor Anthony Seaton, 'Close scrutiny needed on asbestos-related disease' in The Scotsman, 30 October 2007; quoted in the ABI's submission to the Justice Committee
precedent and practice. In our view, this is a mischaracterisation of the decision. The ruling simply applied established legal principle to the current available medical evidence.

4.4.1 The Government's comments on this issue at the second point in Annex A to the Policy Memorandum refer to previous decisions of less senior courts in which pleural plaques were held to found a claim in delict. These did so by seeking to apply legal principles to the medical evidence available at the time.

4.4.2 Notwithstanding these decisions, the correct application of the legal principles to current medical evidence was unclear. It was for this reason that the House of Lords gave permission for a test case on the matter to be heard before it. There is now a clear ruling from the most senior court in the UK (which included two exceptionally highly regarded Scottish judges, Lord Hope and Lord Rodger) as to how the relevant legal principles correctly apply to the most up to date medical evidence.

4.4.3 Unlike the previous Court decisions (including the decisions prior to the House of Lords ruling), the proposed legislation takes no account of established legal principle. It simply states, with nothing more, that pleural plaques are a personal injury which is not negligible and so may found a claim in delict. There is no justification for this by reference to legal principles and it constitutes a fundamental change to those principles.

4.5 Liability insurance is written on the basis of, and in reliance on, the fundamental legal principles applicable to the law of delict. Departing from these legal principles alters the nature of liability insurance both retrospectively and prospectively.

5. WIDER CONSEQUENCES

5.1 The Government's comments at Annex A to the Policy Memorandum indicate that the proposed legislation makes a minimum incursion into the law and will have no application beyond the three asbestos-related conditions referred to in the Bill. We disagree.

5.2 Given the likely pressure on Parliament and the Courts, there is a considerable risk that the proposed legislation would lead to wider consequences. We submit that these risks should be considered at the current stage.

5.2.1 If Parliament is prepared to overrule established legal principle so as to allow recovery in respect of the anxiety relating to three particular symptomless conditions, it is likely to be pressured to do so in relation to anxiety arising in other circumstances. Even if
Parliament does not currently have any appetite for doing this, future Parliaments might, and are likely to come under repeated pressure.

5.2.2 Actions in delict are generally governed by the common law. Put another way, the Court will consider the relevant precedents and reach a ruling as to how the principles contained therein apply to the facts of a particular case. It follows that the law in this area is organic and it is open to claimants to argue that it should be widened. The proposed legislation provides claimants with an opportunity to raise such arguments.

5.2.3 Both Parliament and the Courts are likely to come under pressure to allow recovery in respect of anxiety in the absence of harm. Examples include passive smoking, exposure to the sun and exposure to asbestos which has not given rise to any asymptomatic condition.

5.3 Even if the likely pressure does not lead to a widening of the law, it would lead to increased litigation and uncertainty. This in turn would lead to the incurring of costs and the diversion of resources by businesses, local government and insurers. It will also lead to an unstable legal environment which will be unattractive to Scottish businesses and to insurers looking to operate in Scotland.

6. INCONSISTENCY WITH THE MEDICAL EVIDENCE

6.1 Section 1(1) of the Bill states that pleural plaques are a personal injury which is not negligible. RSA submits that this is inconsistent with the medical evidence which indicates that pleural plaques of themselves are not harmful in the vast majority of cases. There is considerable specific medical opinion to support this view and we would refer to Annex A of the ABI’s submissions to the Justice Committee for a summary of that evidence.

6.2 The medical evidence does not appear to be disputed by the Government. In its comments at Annex A to the Policy Memorandum, the Government accepts that plaques generally do not cause symptoms or disability and do not cause or develop into asbestos-related diseases such as mesothelioma. However, the Government asserts that what plaques signify (i.e. exposure to asbestos) causes anxiety to those with the condition.

6.2.1 The Government’s reliance on anxiety is inconsistent with the wording of the Bill which indicates that pleural plaques of themselves are an injury which is not negligible. It is also inconsistent with the legal principles espoused by the House of Lords that anxiety of itself will not found a claim in delict.
6.2.2 The Government's comments at Annex A to the Policy Memorandum later indicate that "anxiety will be considered as a matter of quantum, not as an aspect of establishing liability". This is relied upon by the Government to assert that the legislation would not constitute a fundamental change to the law of delict. We submit that this is inconsistent with the reliance placed on anxiety in answer to the medical evidence that pleural plaques are not of themselves harmful.

6.2.3 The Government's focus on anxiety, rather than the pleural plaques themselves, adds to our concern as to the wider consequences of the legislation. If anxiety is in fact the trigger for recovery being relied upon, then arguments inevitably arise that anxiety in other contexts should also be sufficient to found claims. The most obvious initial argument would be that all individuals occupationally exposed to asbestos, not just those diagnosed with pleural plaques, should be able to bring a claim against their employers.

7. CONTRAVENTION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

7.1 The provisions of the Bill have retrospective effect other than in relation to cases settled or determined by legal proceedings prior to the Act coming into force (at Section 4). Retrospective law of this kind is contrary to the principles enshrined in the European Convention of Human Rights (ECHR).

7.1.1 Article 6 of the ECHR enshrines the principle of the rule of law and the notion of a fair trial. This is inconsistent with interference by the legislature with the judicial determination of a dispute. This is particularly so where such interference would have retrospective effect.

7.1.2 The First Protocol of Article 1 of the ECHR guarantees the right to peaceful enjoyment of possessions including economic interests. This is inconsistent with the proposed legislation which would lead to a liability attaching to past events in circumstances where there has been a judicial ruling from the House of Lords that such liability does not exist.

7.2 The Policy Memorandum states that the Government believes that the proposed legislation complies with the ECHR. The issues raised above are not expressly considered. The partial regulatory impact assessment did not refer to the possible implications of the ECHR. In contrast, the UK Ministry of Justice Consultation Paper specifically refers to the possibility that retrospective legislation in this area may be contrary to the provisions of the ECHR.
8. UNDERESTIMATION OF ASSOCIATED COST

8.1 In our view the Financial Memorandum published by the Government contains significant underestimation of the likely cost of the proposed legislation to the Scottish taxpayer, the Scottish council taxpayer, Scottish businesses and insurers. This concern is highlighted in some detail in the ABI submissions to the Justice Committee.

8.2 The figures contained in the Financial Memorandum are also inconsistent with those contained in the UK Ministry of Justice Consultation Paper.

9. CONCLUSIONS

9.1 The proposed legislation is likely to accentuate the anxiety that those with pleural plaques may have. The focus of the Government should be in providing education and support to those affected by pleural plaques.

9.2 The wider consequences of the proposed legislation, which overrules fundamental legal principles, do not appear to have been properly considered; nor do relevant issues as to the application of the ECHR. The proposed legislation is inconsistent with accepted medical evidence and has been submitted to Parliament as having significantly lesser cost implications than are actually likely.

9.3 In short, we submit that the proposed legislation has not been properly thought through and could have a negative impact on people with pleural plaques, Scottish businesses and Scottish taxpayers. We would urge the Justice Committee to address this.

Bridget McIntyre
UK Chief Executive
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from AXA Insurance UK plc

About AXA Insurance UK PLC

AXA Insurance UK PLC (AXA) is an authorised insurer for the sale of general insurance in the United Kingdom. AXA is the 4th largest commercial insurance company in the UK.

AXA is a major provider of Employers Liability insurance, with in excess of 80,000 policyholders for this type of business in 2008. AXA handles a significant volume of claims arising from employment related exposure to asbestos on behalf of its policyholders and policyholders of a number of AXA’s antecedent companies.

Prior to the commencement of the Johnston v NEI International Combustion Ltd et al litigation in 2005 AXA Group was involved as a contributing insurer in between 350 and 500 claims in respect of pleural plaques per annum; our involvement being in proportion to the time period of insurance provided and employment periods in each case.

Executive Summary

AXA is wholly opposed to the intention of the Scottish Government to pass legislation in order to reverse the decision of the House of Lords in the case of Johnston v NEI International Combustion Ltd et al.

We wish to place before the Justice Committee evidence to support our view that the Damages (Asbestos Related Conditions) (Scotland) Bill [hereinafter referred to as the Bill] is a fundamentally flawed piece of proposed legislation which should not proceed to enactment on the grounds that:

1. it creates a radical departure from the established law of delict in Scotland that is totally unwarranted by the nature of the medical conditions referred to within the Bill

2. the Scottish Government has greatly underestimated the future economic impact of the Bill by ignoring the potentially adverse consequences for the competitiveness of Scottish business that the Bill will produce

3. the Scottish Government has greatly understated reality in the assumptions it has made of the number & value of claims that will be subject to the Bill

4. the legal effect of the Bill is retrospective in application and as such, as well as posing a threat to the stability of the rule of law in Scotland, is in breach of the European Convention of Human Rights.
5. the Bill is an inappropriate and disproportionate mechanism for dealing with the concerns and interests of those diagnosed with pleural plaques. This is because it is founded upon fundamental misconceptions about the impact of pleural plaques on the present & future health of those diagnosed with the condition. As a result the Bill is wholly misguided in its purpose.

1. Unwarranted changes to the law of delict

The Scottish Government has said that the Bill will restore the law to the position prior to the House of Lords judgement in Johnston v NEI International Combustion Ltd. This is incorrect. The terms of the Bill create a new departure from the established law that is unwarranted by the nature of pleural plaques and which sets a dangerous precedent for the future.

The House of Lords ruling did not alter in any way the established principles of the law of delict. Rather, the Law Lords applied the agreed medical facts about pleural plaques to the existing law. The law of delict requires that any person seeking compensation from another must show that;

- They were owed a duty of care by the defendant
- That duty of care was breached by the action or omission of the defendant
- The breach of duty led to damage that is not insignificant or minimal

The joint medical report prepared in the case of Johnston v NEI International Combustion Ltd by the foremost experts in asbestos related lung conditions (acting for both claimants and defendants) concluded quite clearly and irrevocably that pleural plaques:

- Are wholly benign
- Very rarely lead to symptoms of any kind
- Do not in any way progress or trigger any of the other possible asbestos related conditions such as mesothelioma or asbestosis

Based on this agreed medical evidence the Law Lords determined, as a matter of fact, that asymptomatic pleural plaques do not constitute ‘damage’ sufficient to trigger an entitlement to compensation.

The intention of the Bill under consideration by the Justice Committee is to create a distortion of the law of delict by stating that, notwithstanding the clear factual & unequivocal medical evidence available, pleural plaques (and the other conditions specified in clause 2.2. of the Bill) are to be treated as being “not negligible” and thus shall constitute actionable damage.

We submit that the Bill as drafted is a legislative device to enshrine in law “facts” about pleural plaques and the other specified conditions that are not facts at all. The Government’s own Partial Regulatory Impact Assessment stated clearly that plaques:
“do not generally cause symptoms or disability” and
“do not cause or develop into asbestos related disease”\(^1\)

Despite this, the opening clause of the Bill contradicts these facts by stating:

1 (1) Asbestos related pleural plaques are a personal injury which is not negligible.

We believe that the Justice Committee should be very concerned about the attempt by the Scottish Government to introduce legislation that has the core purpose of revising proven facts and which so manifestly distorts the ordinary course of Scottish law in so doing.

The Scottish Government have said that they intend to make only a minimal incursion into the law of delict. However, there is great risk that once having taken this step for the conditions stated in the Bill the Scottish Government will find it impossible to resist calls for other types of condition to be similarly compensated.

The planned interference with the fundamental principles of the law of delict will be used as a precedent to justify a further widening of the laws relating to compensation. It will be hard for the Government to justify denying similar legal redress to other groups who can show that they have sustained some form of asymptomatic physiological change as a consequence of a possible negligent act by another.

At the publication of the Bill the Community Safety Minister, Fergus Ewing, said, in connection with the possible wider effects of the Bill, that:

“…believe that fears about the wider effects of the Bill are exaggerated”\(^2\)

The Minister and Scottish Government fail to recognise that the continued advance in medical diagnostic procedures will mean, almost inevitably, that further examples of asymptomatic physiological change will materialise in the future that may be linked to potential breaches of duty.

By legislating in relation to pleural plaques the Scottish Government would be signalling its intention to support a wide expansion in the categories of person who can pursue a claim for compensation – at potentially high future cost to industry and the taxpayer. Once the first legislative step has been taken it will be too late to try to curtail the expansion of the operation of law in this way.

2. Destabilising Business Environment in Scotland

The Scottish Government states that its aim is:

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\(^1\) PRIA Consultation Letter 6\(^{th}\) February 2008 www.scotland.gov.uk/Publications/2008/02/05103341/1

\(^2\) Help for Asbestos Sufferers, News Release by Scottish Government 24\(^{th}\) June 2008
http://www.scotland.gov.uk/News/Releases/2008/06/24095151
“to ensure long-term sustainable economic growth ........ (to) create a business environment which actively encourages innovation, entrepreneurialism and high skill levels, helping to encourage the creation, growth and transformation of businesses.”

By publishing this Bill the Scottish Government is taking a step that generates significant risk to a stable business environment in Scotland. The Government seeks to use legislative powers to alter the clear facts established by the medico-legal process and retrospectively to eradicate the application of well established legal principles for the allocation of legal liabilities.

In doing this the Government is indicating strongly that business cannot rely on a settled legal environment in Scotland. The removal of legal certainty in relation to the law of delict by the planned retrospective action has serious consequences for liability insurers and as a consequence for the business community as a whole.

The long term consequences to both business, and indeed the Scottish Government itself, are simply unquantifiable but nevertheless wholly real. If the Bill becomes law liability insurers and re-insurers will be presented with an unstable and unpredictable legal framework in Scotland. The possibility of further, retrospective, changes in the law of delict and of damages cannot be ruled out.

Such uncertainty makes it highly problematic for insurance underwriters to assess the extent of financial risks to be borne by business. Assessing risk in relation to the current legal framework would not be a sufficient basis for calculating the potential exposure of a business because of the threat of future retrospective legislative changes by the Scottish Government. In such an environment any insurer would be faced with grave difficulty when trying to calculate the required level of premium to be charged to individual businesses for both employers & public liability risks so as to ensure that the totality of such risks are spread adequately across the insurance market.

Consequently insurers will have to consider carefully the attractiveness of the liability insurance market in Scotland and the options open to them to manage the uncertainties created by the Bill.

3. Miscalculations of the Financial Impact

The Scottish Government has significantly underestimated the level of costs that will be imposed on Scottish businesses. The Financial Memorandum suggests that only approximately 200 claims per year would be affected by the terms of the Bill.

This estimate is in our view far too low. We believe the Scottish Government has failed to take into account the short term reduction in the number of annual cases that arose following the Court of Appeal decision about pleural plaques in 2006. Furthermore, the Government has failed to recognise that a

3 http://www.scotland.gov.uk/Topics/Business-Industry
considerable number of past claims for pleural plaque compensation were disposed of without recourse to litigation. Overall there is a great deal of uncertainty about the future volume of people who will develop pleural plaques.

AXA is not able to provide specific data relating to the number and cost of past pleural plaques claims from Scotland, because we have never needed to separate out such cases in our analysis. In any event, there is no information available to insurers on what level of compensation might be determined as appropriate by the Courts once the Bill becomes law. Nor can we tell what the legal costs associated with claims made under the terms of the Bill might be.

The Association of British Insurers has submitted overall evidence in this regard and we support the data and analysis that they have provided.

4. Legislative Competence

The proposed legislative measures would, in our view, be outside the legislative competence of the Scottish Government as defined by s29 of the Scotland Act 1998. By seeking to interfere with the administration of justice and judicial findings of fact in the manner attempted by the Bill the Scottish Government would contravene Article 6 of the European Convention on Human Rights. Article 6 gives rights to a fair hearing and a determination of civil rights by an independent and impartial tribunal.

In addition, the proposed action of the Scottish Government would also contravene the right to peaceful enjoyment of property & possessions (including interests of an economic value) that is conferred by Article 1 of the First Protocol to the European Convention of Human Rights.

It is our submission that, in electing to disturb these rights of employers and their insurers through the terms of the Bill, the Scottish Government fails to pass the test of “fair balance” as required by the Convention. The effect of retrospective interference with the rule of law and of rights in property is great relative to the position of the beneficiaries identified by the Scottish Government.

Furthermore, in our response to the Partial Regulatory Impact Assessment we have already highlighted that the Scottish Government has not shown balance in its consideration of those parties affected by the proposed Bill. In particular, the benefit that the effect of the Bill will provide to claimant lawyers, and one firm in particular, has been wholly unacknowledged by the Government.

Our conservative estimate is that the average amount of claimant legal costs in each case involving AXA and associated with the Scottish jurisdiction (both litigated & non-litigated) is in the region of £7,000. The ABI has estimated that, should the Bill become law, the annual number of pleural plaques claims in the Scottish jurisdiction could be as high as 1,800 – as opposed to the 200 mentioned in the Financial Memorandum.

On this basis the gross income stream for claimant lawyers would be in the region of £12.6m per annum. It is worthy of note that Thompsons solicitors, a
firm very closely involved with lobbying for the Bill and possibly in its drafting, are estimated to be involved in approximately 90% of Scottish pleural plaques cases prior to the Lords judgement.

The Community Safety Minister, Bill Ewing, has said:

“There has been evidence that lawyers who handled personal injury claims have benefited more than the victims. It is certainly not our intention to line the pockets of lawyers. In the past the costs associated with settling such cases have been as high as or higher than the compensation awarded. That is surely wrong. This situation should not continue and that is why I expect lawyers involved in such cases to ensure that they are settled more quickly and more cheaply.”

However, the Scottish Government has taken no tangible steps whatsoever to address this issue.

We submit that the “benefit” to the claimant legal community is wholly disproportionate to the nature of the pleural plaques condition and to the potential harm done to both insurers and businesses in Scotland. The potential income stream for this interest group will be significantly further expanded if, as we believe, the law of delict is subsequently widened in consequence of the initial step taken by the Bill.

In deciding to interfere with the peaceful enjoyment of property & possessions any Government is required to strike a fair balance between the public interest on the one hand and the loss to those affected by the action on the other. We submit strongly that the action of the Scottish Government of introducing this Bill fails to strike that fair balance.

5. A misguided approach to addressing the needs of those diagnosed with pleural plaques

As we have stated elsewhere in our evidence, all of the medical experts involved in the Johnson v NEI Internal Combustion Ltd et al cases, including the expert giving evidence on behalf of the claimants, were agreed as to the benign nature of pleural plaques, the extreme rarity of them producing any symptoms and the lack of any direct association between the formation of plaques and the subsequent development of other asbestos related conditions.

Sadly, much of the commentary surrounding this issue has completely ignored the balanced, impartial and independent medical evidence. Many public statements by politicians on the question of pleural plaques compensation repeat and incorrectly reinforce the perception that pleural plaques constitute a direct causal link with mesothelioma and asbestosis:

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4 Damages (Asbestos Related Conditions) (Scotland) Bill – Explanatory Notes – page 4 – footnote.
5 Help for Asbestos Sufferers, News Release by Scottish Government 24th June 2008
http://www.scotland.gov.uk/News/Releases/2008/06/24095151
“…. never mind the fact that pleural plaques in many instances are the first
indication of a life-threatening asbestos-related disease, such as asbestosis or
mesothelioma”6

“Doctors might tell people who have been diagnosed with pleural plaques not to
worry because it will not necessarily develop into mesothelioma, but one
member of that branch told us that he had just buried a colleague who had been
told the same thing”7.

This may unnecessarily cause greater worry for those with pleural plaques. The
established medical evidence is wholly clear that pleural plaques do not (and
cannot) multiply or progress to become any of the other recognised asbestos
related conditions. Nor is there a risk of anyone developing mesothelioma as a
consequence of having developed pleural plaques.

The development of plaques is an indicator that a person has been exposed to
asbestos, which they may already know, but it is that exposure that gives rise to
the risk of developing other asbestos related conditions. It is not the pleural
plaques that mutate into these conditions. These very clear and unequivocal
medical facts are not a device of the insurance industry, or the House of Lords,
to ‘deny’ those with pleural plaques compensation but carefully researched &
considered medical evidence from the most highly respected respiratory & lung
surgeons in the United Kingdom. They will remain medical facts irrespective of
the extent of litigation or legislation on this issue.

Furthermore, it remains the law that a compensation claim can be brought by the
small minority of persons who are diagnosed with pleural plaques and who are
within the rare group that suffer symptoms as a result. This is undoubtedly also
the case for those diagnosed with pleural thickening and asbestosis who suffer
symptoms as a result of these conditions.

AXA remains wholly committed to fulfilling its policyholder’s obligations to pay
compensation to those who sustain symptomatic asbestos related conditions.
Since the Court of Appeal judgement in Johnson v NEI Internal Combustion Ltd
et al first decided that asymptomatic pleural plaques were non-compensable in
February 2006 AXA has paid out in excess of £15m to such claimants & their
lawyers, with over £7m of this being paid since the House of Lords decision in
October 2007. We continue to work with the rest of the industry and the UK
Government to speed up the claims process where possible, especially for those
claiming following a diagnosis of mesothelioma.

We submit that in promoting this Bill the Scottish Government is not acting in a
way best calculated to look after the true interests of those who are diagnosed
with asymptomatic pleural plaques. People who are diagnosed with pleural
plaques should be made fully aware that the condition is not the first step toward
developing a more serious asbestos related condition. They should be provided

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2007 column 3133

2007 column 3145
with clear, impartial, information about the nature of the changes to their body and the risks that flow from their past working history with asbestos.

Instead of legislating to destabilise the law of delict the Scottish Government should be working with insurers, the NHS and trade unions to ensure full awareness of the facts in respect of pleural plaques and the entitlements that those who have been exposed to asbestos continue to have should they develop a condition that does give rise to symptoms. This would constitute a fair and balanced response to the issue – which the Bill does not.

**Conclusion**

The Bill does not provide effective care and support for those diagnosed with pleural plaques. It is a wholly disproportionate interference with the law of delict. The Bill retrospectively alters the stable rule of law and will have significant consequences for business & insurers. As set out above, its terms are in direct contravention of the European Convention on Human Rights and as such should not be enacted by the Scottish Government.

We urge the Justice Committee to highlight the serious problems associated with the Damages (Asbestos Related Conditions) (Scotland) Bill and to recommend to the Scottish Parliament that the Bill should not progress to enactment.

**Matthew Scott**  
*Head of Liability Claims and Professional Services*
Written 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 views on the Bill and provide evidence directly to the Committee. 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.

EVIDENCE

1. EXECUTIVE SUMMARY

1.1 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 pleural plaques and the general public about what a diagnosis of pleural plaques really means for a person’s health.

1.2 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.

1.3 Zurich opposes this Bill for three main reasons:
- 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 and without any reasonable foundation, 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.
- 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.

1.4 We urge the Justice Committee to highlight to Parliament the issues associated with this Bill.
2. INTRODUCTION

2.1 On 17 October 2007 the House of Lords, which included two Scottish Law Lords (Lords Rodgers and Hope), unanimously concluded that pleural plaques do not give rise to a cause of action under the law of negligence in England and Wales.

2.2 They reached this conclusion on the basis of agreed medical evidence that showed that pleural plaques:
- are, except in exceptional cases, symptomless and therefore do not result in any pain, suffering or loss of amenity
- neither lead to, nor increase susceptibility to, any other asbestos-related condition.

2.3 This judgment, whilst not strictly binding in Scotland, is likely to be highly persuasive and has already been the basis for the judgment in Wright v Stoddard International Plc. In the Wright case Lord Uist considered the House of Lords judgment and made it clear that he would if anything go further:

“In my opinion these passages provide a complete answer to the submission for the pursuer to the effect that pleural plaques are a sufficiently serious injury in themselves to warrant an award of damages. It is not that pleural plaques cause harm which is de minimis: it is that they cause no harm at all.”

2.4 The Scottish Government is committed to introducing legislation to make asymptomatic asbestos-related conditions compensatable. Zurich is fundamentally opposed to that position.

2.5 In February, the Scottish Government consulted on its partial regulatory impact assessment of the proposed Bill. We welcomed this consultation as opportunity for the Scottish Government to consider afresh the advantages and disadvantages of legislative action.

2.6 More than three-quarters of the responses to that consultation opposed the Bill. We are concerned, however, that the issues raised in those responses as to the merits and legality of the approach taken by the Scottish Government have not been properly considered.

3. HELPING PEOPLE WITH PLEURAL PLAQUES

3.1 Pleural plaques are nearly always symptomless, and they neither lead to, nor increase susceptibility to, any other condition.

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1 The presence of pleural plaques does not normally occasion any symptoms. Very occasionally, in fewer than 1% of cases, the patient may be aware of an uncomfortable grating sensation on respiration (Lord Philips CJ, and Lord Justice Longmore, Court of Appeal judgment in Rothwell, January 2006 summarising the agreed medical position)
3.2 It is important to record that where cases do involve symptoms related to the plaques, they will continue to be compensated as before and are unaffected by the House of Lords decision.

3.3 Despite the medical evidence that pleural plaques are benign (see Annex A), there is a great deal of confusion among people with the condition and their families about what a diagnosis of plaques really means for their health.

3.4 Some people are concerned that having pleural plaques are the first step towards developing a more serious asbestos-related condition, such as mesothelioma. This is not the case, as the agreed medical evidence shows. It is not the plaques themselves that increase a person’s risk, but rather the exposure to asbestos.

3.5 The best way to allay the concerns of people with pleural plaques is to improve their understanding of the condition. This can really only be achieved through ensuring that those people and organisations who communicate with sufferers – the Government, health providers, trade unions - distil the same messages, namely that plaques are usually symptomless and do not increase susceptibility to any other asbestos-related illnesses, including mesothelioma. However, legislation to make symptomless plaques compensatable sends a very different message – the fact that a condition is worthy of compensation suggests that it is more serious than it really is.

3.6 This was a point made by Anthony Seaton, Emeritus Professor of Environmental and Occupational Medicine at the University of Aberdeen:

“Confusion arises because exposure to asbestos is also associated with the risk of serious fatal diseases, most notably mesothelioma, and most people with this disease also have pleural plaques. It is understandable that individuals with plaques can be worried about their prognosis if they are given misinformation on their significance. The change in case law that led to individuals with pleural plaques receiving money for a non-disease caused problems in their management. While giving appropriate reassurance and explaining the risks of other asbestos-related diseases in relation to the risks of much more likely diseases, we were obliged to advise them to consult a lawyer – a mixed message with the obvious consequence of causing anxiety. The main beneficiaries have been lawyers and expert witnesses such as me. I believe we have better things to do, to prevent real diseases.

“There is a risk that the desirability of raising awareness of the nature of pleural plaques and allaying unnecessary concerns could be undermined by the provision of compensation, as this could
send mixed messages about the nature of the condition and increase concerns.”

3.7 Professor Seaton’s reference to “misinformation” is important. By legislating to make pleural plaques something they are not, the Scottish Government is only exacerbating the problem. Rather than legislating, the Scottish Government should be working with the NHS, trade unions and support groups to ensure widespread awareness of current medical knowledge.

3.8 It is worth recording that one of the claimants in the test cases (Mr Rothwell) gave evidence that he was not worried about his condition, until he found out he could obtain significant compensation for it:

“I wondered when I saw this how come they are paying compensation for something, what is it, what on earth have I got?”

3.9 Further, making the condition compensatable is likely to lead to a resurgence in scan vans – claims farmers who offer free scans on the understanding that if pleural plaques are detected, they will ‘sell’ the claim onto a lawyer for a referral fee. Because they are trying to generate new claims, it is highly doubtful that scan van operators will provide proper reassurance to anyone in whom plaques has been diagnosed that the condition should have no effect on their quality of life. Therefore, more people will be diagnosed with the condition, but will not receive appropriate reassurance about what it means for their health.

3.10 Pleural plaques can only be detected on x-ray or computed tomography (CT) scan. They are usually discovered during routine medical examinations. As such the majority of people with pleural plaques may not know they have the condition.

3.11 X-rays and CT Scans for purposes other than medical diagnosis or treatment carry unnecessary health risks of their own, as was highlighted in the COMARE report in late 2007. There is real cause for concern as COMARE recommends that regulation of these commercial CT services should be reviewed. They also recommend that clients should be provided with comprehensive information regarding dose and risk of the CT scan, as well as rates of false negative and false positive findings, which is unlikely to happen in the context of a claim that will generate income for the referring scan company.

4. UNDERMINING BUSINESS CONFIDENCE

Undermining a competitive business environment

2 Professor Anthony Seaton, ‘Close scrutiny needed on asbestos-related disease’ in The Scotsman, 30 October 2007
3 Committee on Medical Aspects of Radiation in the Environment, 12th Report
4.1 The Scottish Government has said that it is committed to creating a competitive environment within which business can flourish; to attracting inward investment; and to building a culture of entrepreneurship. It has also spoken of the potential to develop Scotland as a forum for international dispute resolution. The use of the legislative power of the state to overturn judicial decisions is inconsistent with these stated aims and, in particular, with their long-term achievement.

4.2 Further, businesses require assurance that the Government is committed to a stable legal environment. Investment and wealth-creating activity will be discouraged if businesses perceive undue readiness on the part of Government and legislative authorities to change the law. It is the retrospective nature of the legislation that creates particular unease for the future.

4.3 The Government is indicating by its decision to legislate that it has no confidence in the existing judicial system to produce the correct legal outcome even in pending cases (see paragraphs 5.10 and 5.11 below). Quite apart from the Scottish Government's competence to pass such legislation, this sends a very negative message to companies that might be viewing Scotland as a stable system in which to conduct business and resolve disputes.

**Increasing costs for businesses**

4.4 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. To put this into context, annual net employers' liability premium in Scotland is approximately £130m. The Scottish Government’s figure is considerably lower than the UK Government’s because the former fails to take into account the degree of uncertainty associated with the calculation:

- **We do not know how many people have, or will develop, pleural plaques** - the Financial Memorandum fails to consider the uncertainty about the proportion of the population that may develop pleural plaques. There are a number of studies which suggest that pleural plaques are more prevalent among the population than the Scottish Government acknowledges, e.g. one study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques. Further studies are referenced in Annex B.

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5 ABI estimate, based on ABI statistics and National Statistics
We do not know the future number of pleural plaques claims - 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\(^7\) 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. This creates further uncertainty about the potential number of claims.

We do not know what level of compensation will be payable per claim - prior to the Court of Appeal judgment, the average compensation per pleural plaques claim was £8,000. The Financial Memorandum acknowledges that “it is open to speculation as to whether this will be the average cost per case in Scotland by the time the legislation is passed in the Scottish Parliament”.

We do not know what the legal costs per claim will be - prior to the legal challenges which culminated in the House of Lords’ judgment, average legal costs were approximately £14,000 per pleural plaques claim. There is no certainty that legal costs will remain the same post-legislation.

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.

\(^7\) Institute of Actuaries, presented at the GIRO conference, October 2007 (approximate figures)
4.5 A high proportion of these costs would fall to insurers, which may lead to higher employers’ liability and public liability premiums; some insurers may even choose to exit the Scottish liability market. This could undermine the competitiveness of Scottish businesses compared to their counterparts elsewhere in the UK where there might be cheaper and wider availability of cover.

4.6 Further, many companies with gaps in their insurance cover as well as some local authorities will find themselves liable for a portion of any claims.

4.7 The Government also has a significant degree of liability for exposing former employees to asbestos via the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform. The burden of this would fall on the taxpayer.

5. ARBITRARY INTERFERENCE IN SCOTTISH LAW

Changing the law of delict

5.1 The Scottish Government suggests that the Bill will ensure legal consistency with the situation pre-Johnston. This is incorrect.

5.2 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 too justify the intervention of the law; a risk of future damage is not, by itself, compensatable; and anxiety about a risk of future damage is not, by itself, compensatable.

5.3 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.

5.4 What the Scottish Government is arguably setting out to do is to change the facts to which the legal principles were applied, rather than the legal principles themselves. As Lord Uist put it in the Wright case in the Outer House, referred to above:

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

Wider implications
5.5 Interference with the fundamental principles on which the Law Lords’ decision was based will be used as a precedent to argue for compensation in other situations (see Annex C), with significant cost implications for businesses, consumers and taxpayers. For example, it is likely to lead to calls for compensation in other circumstances where no actionable damage has yet occurred, such as simply for exposure to asbestos, and the worry from such exposure, regardless of whether this had resulted in any symptoms or injury.

5.6 Anxiety is not compensatable under law (see Annex D). If developments in the law of this nature occurred, this could considerably increase the level of litigation and the possibility of weak or spurious claims and could have damaging effects on business and the economy. Even if such claims were not to succeed, the cost of resisting them would be significant.

5.7 The cost of these new claims cannot be quantified as we do not know how many or which conditions would become actionable.

**The proposed legislation would contravene defendants’ human rights**

5.8 The Bill contravenes the rights of insurers.

5.9 Article 6 of the European Convention on Human Rights enshrines the right to a fair hearing and determination of civil rights before an independent and impartial tribunal established by law. The European Court of Human Rights has held that this precludes any interference by a legislative body with the administration of justice, with the object of influencing or determining the judicial resolution of a dispute, other than on compelling grounds of the general interest.

5.10 The decision to broaden the proposed legislation to other asymptomatic conditions represents a further tampering with the jurisdiction of the courts. There is no definitive decision on whether asymptomatic pleural thickening or asymptomatic asbestosis is compensatable either in England and Wales or in Scotland. Not only is the Government proposing to overturn a unanimous House of Lords decision, it is also contemplating legislation which would affect pending cases in the courts.

5.11 Indeed the position in Scotland on pleural plaques is also still a pending issue before the courts. The one Scottish case of Wright has not been taken to appeal and so there has as yet been no definitive decision on the Scottish position. Individual cases remain sisted. The Government is therefore effectively interfering with the outcome of pending judicial process, which has implications in terms of Article 6 of the European Convention on Human Rights: see Stran v Greek Refineries v Greece (1994) 19 EHRR 293:
“The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.”

5.12 Article 1 of the First Protocol to the Convention guarantees the right to the peaceful enjoyment of property and possessions which includes interests with an economic value. The interest of insurers in the immunity from liability confirmed by the House of Lords in Rothwell has a self-evident economic value. In removing that immunity, the Bill fails to strike the fair balance required by Article 1 between the general interest and the fundamental right of persons to the peaceful enjoyment of their possessions.

6. LEGISLATIVE COMPETENCE

6.1 The Scottish Government in seeking to pass legislation which contravenes the European Convention on Human Rights is acting outwith its competence under the Scotland Act. There is no reasonable foundation for the proposed interference with Zurich’s rights.

6.2 We urge the Justice Committee to give serious consideration to this point. It is difficult to see how an attempt to change retrospectively the factual position as regards pleural plaques claims, in order to give rights to a particular group of individuals who do not now have those rights but at the expense of others, can be said to be in the general public interest.

7. CONCLUSION

7.1 The Bill fails to address the real issues for people with asymptomatic pleural plaques and is based upon a belief that paying money in some way deals with this condition. It does not respond to the anxieties people have about pleural plaques; it risks damage to the Scottish economy, imposing significant costs on the Scottish taxpayer, consumer and taxpayer; and contravenes the European Convention on Human Rights.

7.2 There is widespread confusion about the effect of asymptomatic pleural plaques on an individual's health and the granting of a right to claim compensation will exacerbate this. It is important to reiterate that claimants who can prove symptoms caused by pleural plaques (a small minority) will continue to be entitled to compensation, as before, without this Bill.

7.3 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 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.

Bill Paton
UKGI Chief Claims Officer
A.1 The medical evidence on pleural plaques is uncontested by medical experts, and undisputed by claimants and their lawyers. In *Johnston*, Dr Robin Rudd, a consultant physician in medical oncology and respiratory medicine, acting for the appellants, and Dr John Moore-Gillon, a consultant physician in respiratory medicine and vice-president of the British Lung Foundation, acting for the respondents, prepared a joint report⁸ which stated inter alia “we find that we are in general agreement and we do not consider that there are any material differences between our medical views regarding pleural plaques”. The substance of their evidence was as follows:

- The pathogenesis of pleural plaques, while undoubtedly involving a response to asbestos fibres, is not entirely clear but the presence of plaques does not necessarily imply that any damage has been caused to the lungs.
- The plaques (bland fibrous tissue usually situated on the parietal pleura) do not, save in a very rare condition where they are extensive and confluent, impair the ability of the visceral and parietal pleura to slide easily over each other. In almost 25 years of practising in the field of respiratory medicine, having seen many hundreds of asbestos-exposed individuals, Dr Moore-Gillon had seen ‘only a handful’ of cases where pleural plaques were associated with any symptoms. This is because they have a covering of mesothelial cells providing a low-friction surface which, together with a lubricant of pleural fluid, permits this easy movement. Thus the ease and freedom of the lungs’ ability to expand and contract is unaffected.
- Though individual plaques may grow they do no (and cannot) multiply or progress to one of the other recognised asbestos-related conditions. They amount to a ‘biological cul-de-sac’. The plaques themselves are therefore wholly benign and asymptomatic.
- The association of plaques with physical symptoms such as breathlessness is almost invariably explained by the concurrent presence of asbestosis or other co-morbidity unrelated to asbestos.
- Pleural plaques are a ‘marker’ of exposure to asbestos fibres because it is accepted from pathological and epidemiological studies that they are associated with exposure. For that reason only, they are also associated with a risk of serious asbestos-related disease occurring in the future. The magnitude of that risk is assessed, however, by reference to the age and occupational history of the patient and not by the presence of plaques themselves.

⁸ Drs Rudd & Moore-Gillon in Rothwell, 13 July 2004
THE PREVALENCE OF PLAQUES

B.1 In his report of 10 November 2004, Dr Moore-Gillon suggested that there are now about 1,500 new cases of mesothelioma diagnosed in the UK each year. There must accordingly be far more than 1,500 cases of pleural plaques arising each year. However, because they are asymptomatic many, and almost certainly most, are not at present diagnosed. When they are diagnosed it is usually as an incidental finding on a chest radiograph carried out for other reasons. For every person that develops mesothelioma in any given period there will be 20-50 people developing plaques i.e. 30,000 to 75,000 per year. Given that approximately 30% of the asbestos liabilities are Scotland, between 9,000 and 22,000 of these are likely to be in Scotland.

B.2 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.

B.3 Professor Tony Newman Taylor (one of the most pre-eminent chest physicians in the UK and 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.

B.4 A study by SJ Chapman concludes “Pleural plaques typically develop 20 to 30 years after exposure, and their incidence increases with longer duration of exposure. They are found in as many as 50% of asbestos-exposed workers, but may also occur after low-dose exposures. The total surface area of pleural plaques measured via CT does not appear to be related to cumulative asbestos exposure.”

B.5 A study of autopsy results for males over 70 years old near Glasgow showed a 51.2% incidence of pleural plaques. Note that this did not specifically look at those occupationally exposed to asbestos, however a relatively high proportion of workers in Glasgow have been exposed to asbestos due in particular to the shipyards.

B.6 A study by Chaillieux & Letourneux cites a 25% incidence of benign pleural lesions in population intermittently exposed to asbestos.

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9 Dr John Moore-Gillon, 10 November 2004
10 Quoted at a briefing in Westminster on 26 March 2008
11 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.”
14 Chaillieux & Letourneux (Rev Mal Resp 1999)
ACTIONABLE DAMAGE IS MORE THAN *DE MINIMIS*

C.1 The law of delict requires that for damage to be compensatable, it 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 claim in tort based on negligence is incomplete without proof of damage. Damage in this sense is an abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy. It does not mean simply a physical change, which is consistent with making one better, as in the case of a successful operation, or with being neutral, having no perceptible effect upon one’s health or capability.

“How much worse off must one be? An action for compensation should not be set in motion on account of a trivial injury. De minimis non curat lex”\(^\text{15}\).

C.2 On the medical evidence pleural plaques do not reach this threshold – as Holland J found in *Rothwell*:

“I start by rejecting any notion that pleural plaques per se can be found a cause of action”.

C.3 As the Lord Phillips CJ found when the case was heard at the Court of Appeal:

“It is common ground in this case, rightly in our view, that the development of pleural plaques is insufficiently significant, of itself, to constitute damage upon which a claim in negligence can be founded”.

C.4 As Lord Hope of Craighead found in *Johnston*:

“While the pleural plaques can be said to amount to an injury or a disease, neither the injury nor the disease was in itself harmful. This is not a case where a claim of low value requires the support of other elements to make it actionable. It is a claim which has no value at all”.

C.5 And as Lord Uist later acknowledged in his judgment in *Wright v Stoddard International plc*:

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

\(^{15}\) Lord Hoffman in *Johnston*
ANNEX D

ANXIETY IS NOT A BASIS FOR A CAUSE OF ACTION

D.1 It is uncontested by medical experts that pleural plaques are harmless. It follows that pleural plaques do not therefore constitute actionable damage.

D.2 However, the Bill seeks to ensure that people get compensation for anxiety that may arise about the risk of contracting a serious asbestos-related disease as a result of a diagnosis of plaques.

D.3 But anxiety is not a basis for a cause of action, even where aggregated. The law only compensates for anxiety where it is part of another more serious injury or disease which would be compensatable alone and without the presence of the said anxiety.

D.4 Johnston affirmed the principle established by the House of Lords in Hicks v Chief Constable of the South Yorkshire Police that mere anxiety about a risk of further damage is not itself compensatable:

“There are also cases which suggest that he may be able to recover damages for anxiety consequent upon an actionable injury. But recovering is predicated upon the existence of actionable injury. There is nothing to suggest that a claimant can rely upon the single action rule to sue in circumstances in which he does not have a cause of action in the first place”.

D.5 The Lords in Johnston also rejected any arguments that the condition could be ‘aggregated’ with the risk of future asbestos disease and/or the anxiety experienced in relation to such risk. Since neither the plaques alone, nor the risk of future damage, nor anxiety about the risk are individually actionable, it follows that they are not collectively actionable either:

“It would be easy to dismiss this argument by applying the simplest of all mathematical formulae: two or even three zeros, when added together, equal no more than zero. It is not possible, by adding together two or more components, none of which in itself is actionable, to arrive at something which is actionable”.

D.6 Thus introducing legislation to make anxiety about pleural plaques compensatable will require fundamental changes to the law of delict.

16 Lord Hope of Craighead
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Clydeside Action on Asbestos

Clydeside Action on Asbestos (CAA) is a charity which was formed in 1985 to provide advice and assistance to those suffering from an asbestos related disease and their families. Today, CAA is the foremost charity in Scotland providing this service.

CAA provides specialist advice on claiming industrial injuries benefits and state compensation. We also advise our clients of their legal right to pursue a civil case for compensation; as the majority of cases of asbestos disease continue to be caused by negligence on behalf of their current or former employer. These men and women not only have physical symptoms but suffer from anxiety, stress and depression knowing that their employers negligence has exposed them to asbestos which could lead to them developing a fatal cancer.

In addition, the anxiety, stress and depression are often compounded by the knowledge that the solicitors acting for the insurers will do everything in their power to place obstacles in the way of their claim for compensation. This has necessitated Clydeside Action on Asbestos becoming actively involved in issues such as Damages Scotland Act 1993, Social Security (Benefits) Act 1992, Rights of Relatives (Damages) (Mesothelioma) Act 2007 etc.

Most recently in the case of Fairchild v Glenhaven Funeral Services Ltd, the insurers attempted to argue that apportionment should apply to cases of mesothelioma. This decision would have left many who suffer from mesothelioma without a realistic chance of compensation. Again a similar argument was revisited in Barker v Corus (UK) Plc. The insurers again tried to use a technical argument regarding liability in cases of mesothelioma and succeeded in the House of Lords. This decision was reversed by the U.K government as it was seen to be grossly unfair. The decision was castigated by the insurers at the time as political interference in the judicial process. Those same criticisms are prevalent today regarding the proposed Bill in Scotland to reverse the recent pleural plaques decision.

It would seem, with the benefit of hindsight, that at least some in the insurance industry now think that the Barker decision in the House of Lords was grossly unfair. In an article in the Post (online) 26/10/2007 Bill Paton chief claims officer at Zurich states … “I accept that, when you step back from Barker it was about injured victims who had far less chance of receiving compensation and was not a sound decision” As we speak, a number of insurers are in court again having raised another issue in the Court of Appeal regarding the technical wording over employers and public liability policy wordings. This is yet another attempt to abnegate responsibility for paying damages to the most badly affected individuals.
With regard to the recent House of Lords decision concerning pleural plaques, it should be noted that all of the defendants in Johnstone v NEI International Combustion Ltd accepted they had negligently exposed the claimants to asbestos. Therefore, the question to be decided was whether someone who has been negligently exposed to asbestos in the course of his employment can sue his employer on the ground that he has developed pleural plaques. CAA believes it is for employers to comply with health and safety law and for the courts to enforce adequate protection and, where appropriate, damages should be paid to employees when employers do not comply with the law.

There has been a breach of the duty of care and an injury sustained by those who develop pleural plaques from negligent exposure to asbestos. Indeed, Lord Hope of Craighead accepted pleural plaques were a form of injury, although he believed that they were not harmful. (Page 19) Lady Smith, dissenting judge in the Court of Appeal decision, said they were comparable to a lesion on the skin caused by a cut or a burn. She could not accept that a visible tissue change was different in nature from a tissue change hidden within the body and believed pleural plaques should attract compensation. This view was endorsed within the Faculty of Advocates response to the proposed Bill in Scotland.

The legacy of asbestos use in Scotland is well documented and the consequences of this legacy are felt across all communities in Scotland. Some 150 people per year in Scotland are diagnosed with mesothelioma, the most serious form of asbestos related cancer. Between 1968 -2004 over 2254 Scottish men and women lost their lives to this disease. The numbers of those diagnosed with this fatal condition are set to rise in the future. (HSE National Statistics). Behind each of the statistics are individuals struggling to cope and their family and friends who have to watch their loved ones struggle to breathe, and in many cases watch them die.

There are also those of course who suffer from so called ‘less serious’ asbestos related diseases such as asbestosis and pleural thickening. For those who suffer from those conditions severe breathlessness can and does affect their quality of life. Latterly, many are left severely impaired and require the use of an oxygen bottle as they struggle for breath.

Then, of course, there are pleural plaques, which until the House of Lords decision, were regarded as a condition for which compensation was merited. This was due to the anxiety caused to the individual knowing that their exposure to asbestos, as evidenced by the physical manifestation of pleural plaques, led to the increased likelihood of developing a fatal disease such as mesothelioma.

But who are the individuals behind the statistics? They are those who were negligently exposed to asbestos by their employers. They are those who have watched family and friends die from asbestos related disease in the knowledge that they too are at a greater risk of developing asbestos related cancer:
from East Kilbride who found out she had pleural plaques when her brother was diagnosed with mesothelioma. She was asked to attend hospital with other members of her family only to find out that she and another brother had pleural plaques. She said about her diagnosis: “The worst part for me is the terrible strain of living in fear that the asbestos in my lungs could suddenly shoot off, and could turn out to be what my brother has”. Sadly, shortly after said this, her brother passed away from his illness. She now faces a lifetime of fear that she too may develop mesothelioma.

from Greenock was initially diagnosed with pleural plaques. He has now had two open pleural biopsies (leaving him with severe scarring) as doctors suspected he may be suffering from mesothelioma. He said: “Asbestos was all over the place, it was like snow falling and we didn’t know at that time it was dangerous. It’s not our fault but now they are not going to give us any compensation.” With the prospect of further tests in the future, he must now just wait and hope.

a former boiler scaler from Glasgow who has pleural plaques. He is now 76 years old. He said he couldn’t socialise any longer because all his friends had died of an asbestos related disease. “There are none of us left” He recalled how he stripped to his ankles to crawl into narrow pipes and scrape them clean from asbestos. He remembered there were times when he started to clean that he couldn’t see for the dust:

“Don’t get me wrong it was a hard drinking culture but you needed something to get through the day. You were in there for hours. When it was time for your break you tapped the side of the pipe/boiler and someone would appear with a pie and milk. They would feed you and you would take a bite and a drink, then you went back to it. It was choking and you were still coughing up weeks later”

experience, and that of many other sufferers of pleural plaques, seems to counter the view expressed by Lord Scott of Foscote that “The inhalation of the fibres and the formation of pleural plaques involved no pain or physical discomfort.” (page 28). Are we to say to sufferers of pleural plaques, that they should deny the evidence of their own eyes and own experience? Is it reassuring or credible to say to sufferers ‘don’t worry, it’s not the pleural plaques you have which increases your likelihood of developing the same disease as you father, brother friend etc it’s actually your exposure to asbestos which leads to the increased risk’?

Phrases such as the “worried well” have been imported from the USA in an attempt to diminish and demean those same sufferers. They are portrayed as somehow wrongly pursuing their legal right to compensation. CAA therefore strongly welcomes the fact that the Scottish Parliament can re-assert their right to pursue this type of claim and remove any stigma attached to litigation for damages. They are not the worried well. As we have seen, many sufferers of pleural plaques faced horrendous working conditions. They were negligently exposed to asbestos and left unprotected by their employers.
They have lost family and friends from asbestos related cancer and they have to face the future in the knowledge that they are at a greater risk of developing asbestos related cancer themselves.

The spectre of ‘scan vans’ was raised by a number of respondents to the Scottish Government Regulatory Assessment. The dangers of radiation are in our opinion genuine concerns and CAA shares those concerns. We would not endorse the use of such vans and actively discourage this practice. However, it is our experience that the use of scan vans is not relevant to Scotland. Our clients are overwhelmingly advised they have pleural plaques by their G.P or chest consultant. We do not have any clients in Scotland who were advised to make a civil claim following a visit to a ‘scan van’. It is our understanding that the use of scan vans was a tool of commercial claims companies, primarily in England. CAA remain concerned regarding many of the practices of some claims companies who have in the past taken between 30-40% of a claimants damages. CAA intimated this particular concern in our contribution to Lord Gill’s review of civil justice in Scotland:

‘Claims companies would appear to operate a system much like that of the contingency fee arrangement; where a percentage is charged to the client on a successful action. However CAA is concerned that far from being a suitable arrangement for difficult cases where there is an actual risk, it is often used in cases where the chances of success are in fact fairly high. Thus, those who are persuaded to use this type of funding, often through high profile media campaigns, are denied the full compensation which their injury merits and no doubt society, through the civil justice system, intended them to have.’

It is accepted within the medical community that early diagnosis and intervention is essential in managing conditions such as mesothelioma. Given this, it is proper that the medical profession investigate and monitor those patients who have pleural plaques. In our experience this is exactly what happens in Scotland.

When pleural plaques are discovered, it is usually after a patient has presented himself to his G.P with symptoms of breathlessness. The patient is usually then asked by the attending physician to undergo breathing tests and subsequently x-rayed or given a CT-scan on the advice of the physician. If it is confirmed that only plaque is present at that time then it is usual for the patient concerned to be given a six monthly check up and then discharged from the clinic with the proviso that should their breathing problems get worse they should contact their G.P or the chest clinic again. This procedure is far removed from the portrayal by some respondents of long queues at commercial scan vans.

Interestingly though, a number of our clients, working in the asbestos industry in the 1960’s, do recall queuing for x-rays. It was their employer who would routinely send them for x-rays to re-assure them that they did not have an asbestos related disease. Of course, it would have had no medical benefit whatsoever as the latency period for asbestos disease is measured in years. This is particularly interesting however in the context of pleural plaques and
psychiatric illness as discussed by Lord Hoffman in his ruling

Lord Hoffman assessed whether it is reasonably foreseeable that the event which actually happened ...the creation of a risk of an asbestos relate disease, would cause psychiatric illness to a person of ‘reasonable fortitude’, He concluded that it was not ‘reasonably foreseeable’ on the part of the employer. However, it raises the question as to why some employers routinely x-rayed their employees to “re-assure” them that they were ‘ok’. If the employer could not have foreseen anxiety then it begs the question as to why they felt the need to expose their employees to potentially harmful radiation for no purpose other than to re-assure them they were ‘ok’.

Unfortunately it appears that the insurers answer to the issue of how pleural plaques are handled by the medical profession today is to request that doctors keep the diagnosis to themselves. 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.

This prompted the minister to say in a statement to the House of Commons.

“Any doctors told to behave in such a way would rightly stick to their professional and principled position on the treatment of their patients. It is grossly irresponsible to suggest that doctors should not tell patients what illness or disease they have, nor explain in detail the consequences. It is disappointing that the insurance industry even thought to suggest such a thing.”

Some respondents seek to heighten the fear of escalating costs if the House of Lords decision is reversed. They quote figures of 20-50 pleural plaques for every mesothelioma. Thus, given 1,500 mesothelioma cases per year there must be 30,000-75,000 per year. Clearly, this is not in fact the case. Thompsons solicitors (who deal with over 90% of Scottish claims) estimate they have around 150 - 200 cases per year.

Indeed a look at the figures compiled by the Health and Safety Executive using figures from 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. The figures show that for 1998 there were 656 cases of mesothelioma reported with 598 cases of benign pleural disease. In 1999 there were 950 mesothelioma cases and 1179 of benign pleural disease in 2000 it was 855 mesothelioma cases to 995 for benign pleural disease. In 2001 there were 917 reported cases of mesothelioma and 845 cases of benign pleural disease In 2002 853 cases of reported mesothelioma and 912 of benign pleural disease In 2003 there were 854 reported cases of mesothelioma and 1075 cases of benign pleural disease. (HSE National Statistics) These figures are far removed from the theoretical estimate of 30,000-70,000

Further it is claimed by one respondent that while Scotland is only 10% of the
population in UK it has 30% of asbestos related claims. However, if you look at actual figures for the mortality rate for mesothelioma, as an indicator of asbestos related disease patterns, and then break it down into regions in the U.K, then Scotland has only two regions in the top ten in the U.K: West Dunbartonshire and Inverclyde. 181 people died in West Dunbartonshire from mesothelioma between 1968-2004 and 90 people died in Inverclyde during the same period.

The total number of mesothelioma deaths in Scotland between 1968-2004 was 2254 and in England during same period there were 19879 deaths from mesothelioma. The total for the U.K was 22213. Therefore, Scotland had roughly 10% of mesothelioma deaths in the U.K between 1968 and 2004 (HSE National Statistics). This is proportionate to the size of population in Scotland. The conclusion can be drawn therefore that, in terms of the numbers of those with an asbestos related disease, Scotland is not exceptional. It has a proportionate number of asbestos related diseases to that of the rest of the U.K Thus, CAA would not expect a rise in claims for pleural plaques, as a reversal of the House of Lords decision would revert the position to that which existed previously.

It is stated in Para 4.11 of the Norwich Union response that: “In almost no other country in the world does an individual with asymptomatic pleural disease and without demonstrable disability receive any compensation.” This is inaccurate. Indeed one of the countries which do compensate individuals without any demonstrable disability is the U.K. This is evidenced in social security law which concerns applications for Industrial Injuries Disablement Benefit in an individual who has asbestosis. Under the Social Security Contributions and Benefits Act 1992 S110 (3) ‘A person found to be suffering from pneumoconiosis shall be treated for the purpose of the Act as suffering from a loss of faculty such that the assessed extent of disablement amounts to not less than 1 per cent.’ General Note subs (3) ‘This requires that a person suffering from pneumoconiosis shall be treated as being disabled to the extent of at least 1 per cent, even if the disablement is in fact negligible.’

Under Reg 20 (1) of the Prescribed Diseases Regulations 1985 a person suffering from pneumoconiosis is entitled to disablement benefit if the resulting disablement is at least 1 per cent. An entitlement to IIDB means a payment may also be claimed under The Pneumoconiosis etc (Workers Compensation) Act (1979). For example, a claimant who is under 37, and has deemed disability of 1%, currently qualifies for payment of £28,762 under the act a 50 year old man would receive £15,306. The government also makes a payment for pleural thickening even where the individual does not meet the threshold of disability of 14% for the purposes of Industrial Injuries Disablement Benefit. In this scenario such an individual would not be entitled to IIDB but would receive a lump sum payment at same level as 1% for asbestosis.

In France, in common with other E.U countries such as Italy and the Netherlands, those exposed to asbestos are entitled to retire early due to the accepted risk of a shortened life expectancy. Indeed, in France the retirement
age is proportionate to the number of years an individual has worked with asbestos. This includes those workers with pleural plaques. (Maud Valat-Taddei, Ministry of Social Affairs labour and Solidarity, France, Asbestos European Conference 2003)

Further in June 2008 a French court ordered an employer to pay compensation of up to 85,000 euros (£66,750) to those who have retired early due to asbestos exposure. The court ordered the employer to pay between 9000 and 85,000 euros (between £7,000 and £66,750) for the loss of 35% of their earnings up to the legal retirement age. (Former employees already receive 65% of their salaries from a government backed fund) In addition the company were ordered to pay 10,000 euros (£7,850) for stress and anxiety to the workers, none of whom has an asbestos related disease (Reuters 4/8/08)

Lord Hope of Craighead concluded his ruling by saying “I share the regret expressed by Smith LJ that the claimants, who are at risk of developing a harmful disease and have entirely genuine feelings of anxiety as to what they may face in the future should be denied a remedy.” The Scottish Parliament has the opportunity to make sure the people of Scotland are not denied this remedy. CAA welcomes the Scottish Government Bill and on behalf of those with an asbestos related disease, would like to thank the Scottish Government and MSP's from all parties who have supported the Bill.
Summary

Asbestos-related pleural plaques are asymptomatic and are not an indicator of any increased risk of other asbestos disease. Conventional chest X-rays are an unreliable way of diagnosing this condition and the preferred approach would be to use computed tomography (CT), which has a much greater level of radiation exposure than a conventional chest X-ray. In order to minimise unnecessary exposure to radiation, the British Occupational Hygiene Society believes that there should be a screening protocol to minimise the population radiation dose from CT scans carried out solely to identify pleural plaques. This screening procedure should be based on the relative risk of the diagnostic procedure versus the risk of asbestos related disease. It should include information about the previous asbestos exposure of the individual, particularly the time since first exposure and the likely intensity of exposure.

The British Occupational Hygiene Society (BOHS)

The British Occupational Hygiene Society (BOHS) is a learned society with the objects of improving scientific knowledge and practice in the prevention of ill health from occupational and environmental hazards. Its members are drawn from a wide range of multidisciplinary specialities and include leading academics and practitioners in the field. Our organisation includes the Faculty of Occupational Hygiene, which provides examinations and qualifications in occupational hygiene. Our publication, the Annals of Occupational Hygiene is acknowledged as one of the leading global scientific journals in the field.

Comments on the draft Bill

1. If this Bill is introduced there should be a system for identifying those persons likely to have had sufficient asbestos exposures to develop pleural plaques. This is essential to minimize unnecessary exposure of potential claimants to ionizing radiation from chest CT scans.

2. In assessing the need for radiographic investigations it is necessary to be aware of the relative reliability of conventional chest radiograph and computed tomography (CT) scans in identifying the presence of pleural plaques.

Hillerdal (1994) commented regarding pleural plaques that: “They are always more widespread and more numerous at autopsy than seen on the roentgenogram, and in fact only 10-15% are seen with conventional radiography.” Parkes (1994) commented that: “Computed tomography is capable of detecting pleural plaques in the lateral pleura which are invisible on conventional radiographs …” and “high-resolution CT (HRCT) is helpful in diagnosing subpleural fat (a cause of wrong diagnosis in 10 to 20% of patients thought to have plaques on plain radiography …” Light (2001) commented that: “Conventional and high-resolution CT scans are more
sensitive at detecting pleural plaques than is the standard chest radiograph. In one study of 159 asbestos-exposed workers with a normal chest radiograph, pleural plaques were detected in 59 (37.1%) by CT scan. … Focal plaques are commonly observed in the posterior and paraspinal regions of the thorax, areas that are poorly seen on chest radiographs”. Seaton (2000) commented that: “Moreover, pleural fat pads and companion shadows may easily be mistaken for plaques, leading to a tendency for false-positive diagnoses. Thus diagnosis of fibrous plaques by routine chest radiography is unreliable. … In cases of doubt, and where the additional radiation is considered justifiable, CT proves a reliable means of diagnosing and defining the extent of plaques.”

It can be concluded that CT scans are not only more sensitive in detecting pleural plaques than conventional chest radiography but are also able to differentiate between pleural plaques and other health conditions that can be mistaken for pleural plaques when using conventional chest radiography.

CT scans are therefore the preferred diagnostic tool for pleural plaques.

3. It is essential to appreciate that the radiation dose to which the patient is exposed during a CT scan is substantially higher than that during a conventional chest X-ray.

For example, the Health Protection Agency (2008) publishes a table on Patient Dose information on its website. The following information has been abstracted from that table:

<table>
<thead>
<tr>
<th>X-ray examination</th>
<th>Typical effective doses (mSv)</th>
<th>Equivalent period of natural background radiation</th>
<th>Lifetime additional risk of fatal cancer per examination</th>
</tr>
</thead>
<tbody>
<tr>
<td>    </td>
<td>    </td>
<td>    </td>
<td>    </td>
</tr>
<tr>
<td>Chest (single PA film)</td>
<td>0.02</td>
<td>3 days 3.6 years</td>
<td>1 in a million 1 in 2500</td>
</tr>
</tbody>
</table>

Note: Approximate risk for patients 16-69 years old; for geriatric patients divide risks by about 5.

4. As the HPA information indicates the risk is strongly associated with the age of the person at the time they receive their CT scan and for people aged 55 years and above is probably about an order of magnitude lower than the average risk for patients between 16 and 69 years (Brenner and Hall, 2007). However, there is no clear health benefit associated with the risk from these investigations and so it could be argued that any radiation exposure is unnecessary in relation to potential health benefits.

5. As can be seen from the above table a CT chest scan exposes the patient to about a 400 times higher radiation dose than a conventional chest X-ray and produces an additional risk of 1 in 2,500 of developing a fatal cancer. Given the possible high number of people seeking compensation it is inevitable that some will ultimately die as a consequence of the diagnostic investigations.
6. It is therefore suggested that to minimize the ionizing radiation risk associated with CT scans undertaken to determine whether a patient has developed pleural plaques, there should be criteria to select only those individuals with sufficient asbestos exposures to have a chance to have developed pleural plaques or other more serious asbestos-related disease.

7. The BOHS believe that it is not appropriate to look for plaques in individuals who have had slight exposure to asbestos, for example less than 0.1 fibres/ml for at least a year, or in people who were exposed less than 10 to 20 years ago. In addition, people exposed to amphibole asbestos would be more likely to have asbestos-related pleural plaques. This group would also be more likely to have an increased risk for mesothelioma.

8. Hillerdal (1997) commented that a typical feature of pleural plaques is their slow progression, that many plaques are not seen until long after a person was first exposed to asbestos. Hillerdal (1991) reported that the mean latency of pleural plaques in a study in Sweden was 33 years. Light (2001) cites data from Epler and his co-workers describing the incidence of pleural plaques in a population of 1,135 patients who had been exposed to asbestos: within 10 years of first exposure, there were no plaques; after 20 years, a 10% incidence; after 40 years, over 50% incidence; with a mean of 33 years between initial exposure to asbestos and development of pleural plaques identified. The same author comments that plaques “usually calcify within several years of becoming evident radiologically and that calcification rarely occurs within the first 20 years of initial exposure to asbestos, but that by 40 years over one third of such individuals have calcified pleural plaques.

9. Light (2001) cites Epler et al as noting that pleural effusions occur sooner after asbestos exposure than do pleural plaques or pleural calcification and that in the study noted above, many patients developed pleural effusions within 5 years of the initial exposure, and all did so within 20 years of the initial exposure. That is, it could be considered that a history of pleural effusions subsequent to likely exposure to asbestos could be a marker that such exposures had occurred.

10. It must be appreciated that not all patients with pleural effusions would have gone to their GP. The importance of having a history of pleural effusions would therefore be as positive information to reinforce a history of exposure to asbestos rather than the lack of such a history being a means of excluding some claimants.

11. The BOHS suggest that there should be a protocol for the diagnosis of asbestos-related pleural plaques and the other conditions covered by the Bill. The purpose of the protocol should be to identify those who are likely to have plaques, based on their previous asbestos exposure and possible history of pleural effusions subsequent to their initial likely exposure to asbestos, so that they can then go forward for medical investigations. The criteria for screening could be based on the length of time since an individual was first exposed to asbestos and the intensity of their exposure (based on an investigation of the possibility of relevant exposure to asbestos by a competent person using a consensus methodology, which we propose should be developed). This approach would have the benefit of minimizing unnecessary exposure to ionizing radiation from the medical diagnostic
investigations. There may also be a net benefit for these individuals in detecting more serious asbestos-related disease.

John Cherrie, BOHS President 2007/08
Robin Howie, BOHS President 1997/98

Disclaimer
The views in the document provide a considered opinion of the issues as they relate to the objects of the society to improve scientific knowledge and practice in the prevention of ill health from occupational and environmental hazards. It may not necessarily coincide with the views of individual members or their employing organisations. It is not intended to convey any legal interpretation.

References


In principle we do not agree that it is appropriate to compensate people for asbestos-related pleural plaques because these conditions are asymptomatic and are not necessarily an indication of any more serious future health consequences than similarly exposed people without pleural plaques. Also, we have concerns that the Bill, and how it is implemented, may be a cause of unnecessary anxiety to the many people who have pleural plaques following past exposure to asbestos; and that the overall numbers – and so the overall cost – may have been under-estimated. There is a small cancer risk from the medical diagnostic procedures needed to identify pleural plaques, however as there is no health benefit from these tests the number of people going forward for investigation should be restricted to those who are likely to have this condition. We make some suggestions aimed at minimising concerns, at streamlining the process, at reducing the amount of medical examinations that involve exposure to radiation; and, generally, at ensuring that, if the scheme goes ahead, public money goes as much as possible to those who have experienced past exposure to asbestos, rather than to professionals involved in the compensation process.

The Institute of Occupational Medicine (IOM)

The Institute of Occupational Medicine (IOM), a self-funding charity, and its subsidiary IOM Consulting Limited were formed with the primary aim of carrying out research, consulting and services to help make workplaces safer and prevent ill-health. Though our activities are international and include environmental as well as occupational risks, our main activities are focused on the health and safety of workers in Great Britain. IOM’s headquarters are based in Edinburgh and IOM is the main source of independent scientific expertise in Scotland concerning occupational health issues.

Comments on the draft Bill

1 In principle we do not agree that it is appropriate to compensate people for asbestos-related pleural plaques because these conditions are asymptomatic and are not necessarily an indication of any more serious future health consequences, compared with similarly exposed people without pleural plaques. In addition, we are concerned that the Bill may increase the anxiety of people who have previously been exposed to asbestos and the medical diagnostic procedures used to identify pleural plaques will increase the risk of cancer for the potential Claimants.

2 We would prefer that the Scottish Government did not proceed with this Bill, but if it does go ahead then we believe that the legislation needs to be
implemented with great care to avoid unnecessary anxiety and risks amongst people with this condition.

3 Pleural plaques are a sign of past exposure to asbestos; and a high proportion of people who have had moderate exposure to asbestos will eventually have pleural plaques. However, a much smaller proportion will develop and die from mesothelioma or asbestos-related lung cancer. Importantly, there is no scientific evidence that pleural plaques are directly associated with asbestos-related cancers; i.e. there is no evidence that people who develop pleural plaques are at greater risk of asbestos-related cancer than others with the same amount of past exposure to asbestos, although there is little reliable scientific information in this area. We feel that many claimants may wrongly construe that pleural plaques are a marker of more serious asbestos illness rather than a marker of past asbestos exposure. In our view, if Parliament enacts this Bill then it will be most important for all stakeholders to give clear and consistent statements about the benign nature of plaques and that having this condition does not mean that there is any greater risk of other serious asbestos conditions. We suggest the Government should convene a group of interested parties to agree a common statement along these lines.

4 While it is widely recognized that pleural plaques are a consequence of past exposure to asbestos, there is very little scientific evidence about the exact nature of the link between the incidence of pleural plaques and asbestos exposure. It is clear that there is generally a long time between being first exposed and the appearance of plaques and that exposure to crocidolite (blue) and amosite (brown) asbestos appears to be more likely give rise to plaques than chrysotile (white) asbestos. More specific information would be helpful in predicting the number of people in Scotland with pleural plaques. A group of French scientists have recently published an article dealing with this topic1. They show that about 50 years after a group of workers are first exposed to moderate to high concentrations of asbestos there will be between 60% and 80% of the surviving population with plaques. Assuming there have been between 30 and 40 thousand people in Scotland who in the past were in jobs that would have given rise to moderate to high asbestos exposure2, for example joiners, plumbers, etc, then the total cost of compensating them could be between £450m and £800m. This seems a very high potential cost given that the condition does not of itself give rise to any health symptoms and does not reduce life expectancy.

5 We firmly believe that there must be a clear protocol for diagnosis of asbestos-related pleural plaques and the other conditions covered by the Bill. The purpose of the protocol should be to channel those who are likely to have plaques towards appropriate medical diagnosis and to screen out those who are unlikely to have plaques. Whilst the exact nature of the relationship between asbestos exposure and pleural plaques is unknown, there is sufficient understanding to screen out individuals with a low probability of having this condition. The screening could be based on the length of time since an individual was first exposed to asbestos and the intensity of their exposure (based on the job that they did or a careful investigation of the
possibility of relevant exposure to asbestos by a competent person). This would also have the benefit of minimizing unnecessary exposure to ionizing radiation from the medical investigations.

6 Currently there are considerable differences between experts in judging the intensity of past asbestos exposure. The Government could take the opportunity to bring together the relevant experts in Scotland to develop a standardized approach to these assessments. We believe this would further help the Courts in arriving at fair settlement of asbestos diseases cases.

7. Finally, if the Bill is enacted there will be a great deal of information collected about the past asbestos exposure of people with pleural plaques. In many cases there will be attempts to identify witnesses who worked with the pursuer and so there is a great opportunity to conduct a research study to further understand the link between asbestos-related plaques and exposure to asbestos, and whether having plaques in any way increases the individual’s chance of more serious asbestos disease.

John Cherrie  
Research Director

Fintan Hurley  
Scientific Director


2 Figure based on an extrapolation of data from a Health and Safety Executive funded project to assess the occupational cancer burden from past exposure to asbestos and other carcinogens (http://www.hse.gov.uk/research/rrpdf/rr595ann6.pdf). Assuming about 10% of those exposed to “high” levels in Great Britain were from Scotland.
Written submission from Councillor Kenny MacLaren

Please find below my response to the above call for evidence by the Justice Committee of the Scottish Parliament. The views contained within this response are my own and do not necessarily reflect the position of Renfrewshire Council or my role as a councillor within that authority.

Introduction
I welcome the general principles of this bill and its extension to cover not only pleural plaques but also asymptomatic pleural thickening and asymptomatic asbestosis. In seeking to ensure that the House of Lords Judgment (17th October 2007) does not have effect in Scotland, this Bill will allow people with pleural plaques caused by wrongful exposure to asbestos to raise an action for damages.

Legislation
The Bill would simply reverse the House of Lords decision of 17th October 2007 (Johnston v NEI International Combustion Ltd), and return Scottish Law to what had been the norm since the early 1980s.

If the House of Lords decision was to stand, then it would effectively overturn more than 20 years of case law. It would also highlight certain anomalies such as where one person may be diagnosed in 2008 with pleural plaques while former work colleagues diagnosed before the House of Lords judgement would have had the right to sue their negligent former employer.

Pleural plaques are an indicator of exposure to asbestos. They create permanent scarring on the lining of the lungs. As highlighted by Lady Justice Smith in an earlier Court of Appeal (2006), she did not accept that pleural plaques are a trivial injury while she also thought that they brought real worry about the future to anyone diagnosed with them. She stated,

“In my judgment, such a tissue change does amount to an injury… The presence or absence of symptoms goes only to the question of how serious the injury is… The plaques are of the same nature whether they are extensive or limited and, in my view, if extensive plaques are an injury, so are limited ones… I cannot accept that a visible tissue change (such as a lesion caused by radiation on the skin) is different in nature from a tissue change which is hidden within the body”.

There is also the issue of anxiety and worry that accompanies a diagnosis of pleural plaques. Many people who develop plaques come from areas in which there was a significant use of asbestos products and have seen friends, family and work colleagues diagnosed with a range of asbestos related diseases including mesothelioma. This causes further distress for people with pleural plaques and their families.
Opposition to the Bill

The main opposition to this Bill comes from the insurance industry. They ran a well organised lobbying campaign to such an extent that some respondents’ contributions to the Partial Regulatory Impact Assessment were almost identical.

It also has to be noted that the prime motive of this industry is to maximise their profits and denying access to compensation for those with pleural plaques and other asbestos related diseases is part of this strategy. This has been seen in previous cases such as the Chester Street case and the Fairfield Case where the insurance industry put the profit motive above the concern for justice for workers who suffered under negligent employers.

Conclusion

In conclusion, I wholeheartedly welcome the general principles of this Bill. It restores the natural justice to people who contract pleural plaques as a result of negligent employers. The arguments put forward by the insurance industry are disingenuous and aimed at restricting compensation claims against negligent employers while maximising their profits.

The Scottish Government should be commended for their swift action in bringing forward this legislation and the support that this has given to people who have contracted pleural plaques through no fault of their own.

Councillor Kenny MacLaren
INTRODUCTION

In order to prevent repetition, I refer to my response to the Partial Regulatory Impact Assessment for the basis for stating that pleural plaques (and by extension asymptomatic asbestosis and asbestos related pleural thickening) do not amount to an actionable wrong.

THE BILL GENERALLY

The Bill is not based on the available evidence, on science or on reason. If passed, it will not be in accordance with the Scots law of delict. It arises because of a policy adopted by the Scottish Government. It is respectfully submitted that the policy is wrong, as it seeks to compensate conditions that do not amount to a personal injury and thus do not amount to an actionable wrong. If, however, the policy is to be proceeded with, it is respectfully submitted that the policy should not be disguised; it should not be presented as based on science, the evidence or on reason; it should declare itself honestly and openly. To do otherwise is to argue that black is white and white is black; this is more appropriate to Alice in Wonderland than to citizens in Scotland.

ARTICLE 1 OF PROTOCOL 1 TO THE ECHR

Article 1 of Protocol 1 to the European Convention on Human Rights provides that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

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

It is accepted that, in terms of ECHR jurisprudence, states have a wide margin of appreciation in determining what a “general interest” is. It is also accepted that the public in general need not benefit, for a measure to comply with Article 1 of Protocol 1. However, Article 1 of Protocol 1 may be said to be breached when the state acts in a manifestly unreasonable way (see, in particular, James v United Kingdom (1986) 8 EHRR 123, para 46). The policy of the Scottish
Government is to allow compensation to persons with asymptomatic conditions which do not amount to personal injury in Scots law. This, it is submitted, is manifestly unreasonable. The effect of enacting a Bill allowing compensation to those with pleural plaques, or asymptomatic asbestosis or asymptomatic asbestos related pleural thickening would be to authorise a third party (the pursuer) to obtain a court decree ordering the defenders (or their insurance companies) to pay damages to the pursuer. The defenders, or their insurance companies, would be obliged to pay such a decree. Their possessions would thus be interfered with, in breach of Article 1 of Protocol 1. A breach of Article 1 of Protocol 1 may result in a declaration of incompatibility, and the striking down of the Act, in terms of s4 of the Human Rights Act 1998.

COMMENTS ON THE VARIOUS SECTIONS IN THE BILL

Section 1(1)
Subsection 1 is at best unnecessary. It is more accurate to refer to it as misleading, illogical and paradoxical: pleural plaques do not amount to a personal injury. They do not result in any physical symptoms. Anxiety on its own does not sound in damages. Describing them as a “personal injury” does violence to the concept of personal injury.

The subsection is unnecessary, if the policy is implemented in its true form, and is not disguised as a personal injury which is “not negligible”.

The wording “not negligible” is not helpful. It does not define positively what pleural plaques amount to. It provides no guidance on the basis upon which compensation may be calculated. It also goes against the present scientific understanding that, in all but the most exceptional cases, pleural plaques are negligible. Once again, this wording seeks to assert precisely the opposite of what is true.

It is respectfully submitted that subsection 1 should simply be deleted.

Section 1(2)
Three points require comment.
1. It is possible for a single pleural plaque to be diagnosed. Section 1(2) refers to “them”. Is a single pleural plaque a personal injury, attracting compensation? The Bill as presently drafted tends to suggest otherwise.
2. There is no test given for liability, although it is assumed that “a person” is only “liable” if s/he has negligently or in breach of statutory duty exposed the person who has pleural plaques. In the Compensation Act 2006, s3(1), which deals with mesothelioma, it is stated that “This section applies where—
   (a) a person (“the responsible person”) has negligently or in breach of statutory duty caused or permitted another person (“the victim”) to be exposed to asbestos,”
It would be considerably clearer, if the draughtsman were to make the test for liability explicit, as was done in the 2006 Act.

3. The issue of apportionment and causation is not addressed. On the contrary, it is stated that a person may recover damages “from a person liable for causing them”. Is the model of causation akin to that in s3 of the Compensation Act 2006, which provides that, in the case of mesothelioma, the responsible person shall be liable “(a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos (i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or (ii) by the responsible person in circumstances in which he has no liability in tort), and (b) jointly and severally with any other responsible person”? Alternatively, is the model of causation that in *Holty v Brigham & Cowan (Hull) Ltd* [2000] ICR 1086, in which the defendants were only liable to the extent of their contribution?

**Section 1(3)**
The words, “are not a personal injury or are negligible” should be deleted, and replaced with “do not constitute injury capable of giving rise to a claim for damages in delict”.

**Section 2(1)**
This subsection ought, for the reasons given in response to s1(1), to be deleted. If a condition “has not caused, is not causing or is not likely to cause impairment of a person’s physical condition” it is not a personal injury. Such a condition should properly be categorised as “negligible”. If the policy of the Scottish Government is for asymptomatic asbestosis and pleural thickening to be compensated, this policy should be honestly adopted in the legislation.

**Section 2(2)**
If subsection 1 is deleted, so should this subsection.

**Section 2(3)**
Once again, this subsection is drafted in the negative. It should be re-drafted in positive form, to clearly set out the conditions for obtaining compensation in the case of persons with asbestos related pleural thickening or asbestosis. It should thus address the requirement for negligent exposure or breach of statutory duty. It should address causation and apportionment.

**Section 3**
There is a presumption against retrospectivity. The laws of delict provide that the right of action arise at the time that loss is caused by a legal wrong. In the case of pleural plaques and asymptomatic asbestosis and asbestos related pleural thickening, there is no loss. There can thus be no right of action in the past. This Act seeks to create a right of action retrospectively. It is thus incompatible with

Section 4
See the comments relating to Section 4.

Section 5
No comment.

CONCLUSION

To allow compensation to be paid to those with pleural plaques or asymptomatic asbestososis or asbestos related pleural thickening is inconsistent with the Scots law of delict. To assert that these conditions are both a personal injury and are “not negligible” is misleading, illogical and paradoxical (but untrue). Whether the Bill asserts that asymptomatic conditions are an actionable wrong, or whether it simply provides that they should sound in damages, it is likely to be incompatible with Article 1 of Protocol 1 and may well be struck down by the Courts. For the above reasons, the Bill should not be proceeded with. At the very least, it requires to be re-drafted.
UCATT welcomes the common sense decision of the Scottish Government to overturn the disgraceful decision of Law Lord’s in October 2007 by introducing the Damages (Asbestos-related Conditions) (Scotland) Bill to the Scottish Parliament on 23rd June 2008.

The reality of asbestos exposure is that our members diagnosed with plural plaques are faced with the mental anguish of knowing that employers exposing them to asbestos may have given them a potential death sentence.

We must be clear here as to where the responsibility lies, many employers know the risks associated with asbestos, they always have, but some choose to play fast and loose with workers lives.

UCATT experiences first hand how harrowing it is speaking to someone suffering from an asbestos related disease, we have to visit families and present compensation cheques to families that have lost loved ones.

Financially calculated recklessness needs to be stopped.

The issue of asbestos related disease is a key issue for the trade union movement and in particular those of us representing building workers.

We know that the peak of associated illness has yet to come and UCATT will continue to speak up for our members and their families on the issue.

In 2007, UCATT legal services undertook twenty legal cases of asbestos related cancers.

We won compensatory payments totalling nine hundred thousand pounds, with a further ninety thousand pounds of claims won yet to be settled.

But no amount of money can ever replace the loss of a loved one, killed because they went to work in an industry where they were exposed to asbestos.

In 2007 eleven of our members, suffered death as a result of exposure to asbestos.

In October 2007 the Law Lords ruled that workers who have developed pleural plaques would no longer receive compensation. Pleural plaques are a scarring of the lung caused by exposure to asbestos fibres.
In their judgement the Law Lords believed that pleural plaques was not an injury that merits compensation as it allegedly was “symptomless”.

However, the Law Lords disregarded that workers diagnosed with pleural plaques experience severe mental distress. In addition, it is often a first stage to developing other asbestos-related diseases such as asbestosis and mesothelioma, the latter being always fatal with a short life expectancy.

The decision to stop payments brings down an established right to compensation, which had existed for 20 years. It is estimated that the ruling will save insurers of companies who exposed their workforce to asbestos more than £1bn over the next four decades.

An individual now diagnosed as suffering from asbestos-related pleural plaques under this law has no claim. Therefore there is no obligation on any employer or insurer to respond to any claim. There is no possibility whatsoever of recovering the costs of the effort in trying to locate employers and insurers just in case the individuals exposed to asbestos develops into one of the compensatable conditions.

Under the old law an individual who suffered from pleural plaques could initiate a claim and obtain compensation on a provisional basis. This gave the individual and the dependents security should one of the serious complications develop in later life. The insurers would be identified and judgment obtained. If the individual were unlucky enough to develop a condition such as mesothelioma it would simply be a question of quantifying the claim. The victim would have the security of knowing that their family was protected.

As the law now stands an individual will have to wait until one of the compensatable conditions develops before being able to pursue a claim. Frequently an individual who develops mesothelioma will die within six months of diagnosis, sometimes even more quickly. Therefore if mesothelioma were diagnosed in an individual who had for many years had pleural plaques then the work in identifying a defendant and insurer, which could have been carried out many years before, would have to be carried out much later and in a very short space of time. The dying victim would not have the security of knowing that his family would be protected.

Anyone who has taken a statement from a person dying of mesothelioma will know what a harrowing experience it is to try and think back over decades to identify exposure occurring many years before in order that the claim can be proved.

This will be particularly problematic if, once the claim is made, the employer’s insurers challenge the accuracy of the information and evidence. If a pleural plaques case had been pursued and all the issues dealt with at the time of the pleural plaques claim being settled then there will be no problem in dealing with areas of contentious evidence if a serious illness develops at a later stage. Union lawyers know the frustration of evidential points being taken by
defendants at the death of a claimant, something that can threaten the success of a claim.

A further obvious disadvantage of the new law is that the investigations will be made far later than if the factual evidence and legal issues had been settled at the time of diagnosis of pleural plaques. For example a 20-year gap between the date of diagnosis of pleural plaques and the diagnosis of a condition such as mesothelioma provides plenty of time for firms to go into liquidation and insurance records to be lost by brokers or underwriters. Therefore a claim that might once have been successful could well be lost.

The ruling and its underlying ignorance and misjudgement appalled UCATT. Following the ruling UCATT sent out a letter to all Members of Parliament alerting them to the disastrous impact of the ruling.

We are delighted that the Scottish Government has taken the lead and put forward this Bill which will simply overturn the decision of the Law Lord’s in Scotland and ensure that Scottish workers can claim compensatory payments for diagnosis of plural plaques.

We hope that all members of the Scottish Parliament gives full support to this Bill and it becomes legislation in due course without any delay.
Appendix 1 – Case Summaries: UCATT Members Asbestos Related Illness Cases since 2000

1. UCATT branch member joiner had a successful claim for mild asbestosis settled in 2004. Compensation was £8000.

2. UCATT member claimed against Glasgow CC and Upper Clyde Shipbuilders for Pleural plaques. Award was £5623.50 after deductions in respect of Chester St insurance govt scheme for former Iron Trades.

3. UCATT member secured £13500 for mild/moderate asbestosis after exposure at the Caledon yard in Dundee.

4. An Uphall-based shopfitter died from mesothelioma. We pursued acclaim against Scottish Midland Coop Soc (Scotmid) for the family and obtained compensation of £111,000.

5. A Dundee joiner who contracted Pleural plaques due to exposure with Caledon yard, Dundee University and Dundee cc. Compensation of £7000 obtained in 2005.


8. Erskine member contracted pleural thickening and pleural plaques-exposure on Clydeside claim against British Shipbuilders- recovered compensation of £11500.

9. A Greenock member recovered £12250 for pleural plaques- claim was against Greenock dockyard.

10. Dunfermline joiner contracted pleural plaques due to exposure with Burntisland Shipbuilding, and Henry Robb Ltd at Leith. Compensation was £10000.


I hope these case summaries are helpful for you. We do of course have a number of asbestosis and Pleural plaque claims ongoing, the latter ones now being re-commenced in anticipation of the Damages Bill going through over coming months.
Executive Summary

Pleural plaques are recognised by medical experts as a sign of irreversible damage to the lining of the lung caused by a history of exposure to asbestos which carries an increased risk of malignant diseases such as the deadly cancer mesothelioma.

The House of Lords decision of October 2007 to uphold the Court of Appeal’s judgement will increase the anxiety of many people who have been exposed to asbestos in their working lives. The judgement overturns some 20 years of legal precedents regarding pleural plaques and denies people the right to hold negligent employers liable for developing this disease.

People with pleural plaques should be compensated for the genuine injury that asbestos exposure has caused. Put simply, this is a matter of social justice. Rather than provide a blow-by-blow legal analysis of this matter, Unite will use this submission as an opportunity to show the very real and human impact of plural plaques and reiterate our anger at the opportunist agenda set by the UK insurance lobby.

The introduction of the Damages Bill by the Scottish Government should ensure the House of Lords judgement does not have effect in Scotland. It is a necessary and just step and will bring some peace of mind to people in Scotland who have been exposed to asbestos through their working lives and subsequently diagnosed with pleural plaques.

1. Background

1.1 Unite in Scotland represents the interests of around 200,000 working people and their families. Unite is the UK’s largest trade union with 2 million members in a range of industries including transport, construction, financial services, manufacturing, print and media, the voluntary and non-profit sectors, local government and the NHS.

1.2 We believe that everyone in society who is unfortunate enough to suffer from occupational-inflicted diseases should receive full compensation to take into account the pain, suffering and financial hardship brought about by injuries inflicted as a result of the negligent actions of employers. This should include adequate compensation for family members to reflect their pain, anxiety and suffering throughout their loved one’s illness and after their death.

1.3 There is no accurate record of how many cases of pleural plaques are diagnosed each year in Scotland. However, the latest available figures
show that there are in the region of 200 actions raised per year in relation to pleural plaques in Scotland.¹

1.4 In February 2005 the High Court in Manchester ruled that sufferers of pleural plaques had the right to seek compensation for the psychological stress they would endure in the knowledge their condition could become fatal. In January 2006 the Court Of Appeal removed the right to compensation for sufferers of asbestos related pleural plaques.

1.5 The House of Lords decision to uphold the Court of Appeal judgement in October 2007 ended a right to compensation of up to £15,000 which has existed for 20 years.

2. **Highlighting the Insurance Lobby Agenda**

2.1 The House of Lords judgment of October 17th 2007 is not binding in Scotland but it has upheld the 2006 Court of Appeal decision which stipulated that a medical condition which has no impact on health could not be compensated and it can be interpreted accordingly. The decision has skewered twenty years of legal precedence which served to compensate sufferers of pleural plaques in the UK who were exposed to asbestos in the workplace.

2.2 It is clear that the UK insurance lobby has fought a virulent campaign to exempt and dilute their liability, and their clients' liability, for pleural plaques by blurring the lines between what is and what is not a genuine medical condition and illness. Insurers are claiming that the increase in pleural plaques cases is evidence of the so-called compensation culture, fuelled by schemes like 'scan vans' and opportunist law firms. The mantra from industry bodies such as the Association of British Insurers throughout has been to spin the line of a fight against a US-style compensation culture emerging in the UK.²

2.3 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. The House of Lords judgment has reinforced our view that insurers are simply placing profit before people.

2.4 Unite is firm in our view that the real cause of the increase in pleural plaques is the widespread and indiscriminate use of asbestos in many

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² Michael Harrison, ‘A wrong-headed ruling on asbestos’, Independent, Jan 26th 2006
industries until the early 1980s and a failure by employers to protect workers.

3. **Case Studies – The Human Impact of Pleural Plaques**

**Stonehaven**

3.1 had been diagnosed with pleural plaques after a drawn-out process following a routine, unrelated operation at St. John’s Hospital in Livingston. X-rays revealed a shadowing of the lungs which his GP later referred to as pulmonary fibrosis. It wasn’t until later moved to Stonehaven in Aberdeenshire that a visit to the Chest Specialist at the Aberdeen Royal Infirmary confirmed pleural plaques which were a marker for asbestos exposure.

3.2 had worked since his early twenties to retirement age in white collar employment but during his teenage years in the late 1950s / early 1960s he had worked part-time in a Glasgow iron foundry. Employed as a labourer he routinely handled and cut asbestos sheeting without any protective equipment. In his 50s, recognised he was becoming increasingly breathless as maintaining his active lifestyle became more difficult. It wasn’t until the diagnosis of pleural plaques was made that the pieces came together.

3.3 was able to carry-on his occupation until retirement but the seeds of anxiety were sown. “Pleural Plaques is a time-bomb. The Doctor could call me tomorrow to tell me I have mesothelioma and sufferers have to live with that prospect every minute of every day. It’s undoubtedly deteriorated my quality of life… I’m more worried, anxious, lethargic… my health is poorer.”

3.4 Despite his condition, still considers himself somewhat fortunate. “I was able to work to retirement-age despite my diagnosis but there are people who have lost their livelihoods in the prime of their lives due to pleural plaques and are desperate for support. This Bill can give peace of mind to many in Scotland but what about the excluded majority across the rest of the UK?”

**Balloch**

3.5 worked as a labourer in the shipyards for a year when he left school. He then went on to become a seaman for around seven more before settling in the construction industry as a scaffolder based in Glasgow where he worked for the best part of thirty years.

3.6 vividly remembers being exposed to asbestos in these industries, particularly while working in the ship boiler rooms. In particular, recalls that when a ship had to be refitted, “The
asbestos had to be broken off the ships piping and my job was to
sweep up what was left.”

3.7 He only found out that he had pleural plaques around four years ago
when he took a bad chest infection and the doctor referred him for an
x-ray in an effort to identify if there was a more serious underlying
problem. “The x-ray revealed pleural plaques which came from being
exposed to asbestos throughout a large part of my working life.”


3.8 When he left school [ ] worked as a mechanic at two sites in
the city for the best part of twenty-two years where he was exposed to
asbestos. “The locations where I worked both had asbestos sheeted
roofs...there were no masks or protective equipment then.”

3.9 [ ] recalls that while his local GP had diagnosed pleural
plaques in 2003 it was some time after this that he became fully aware
of his condition and its implications on his health and quality of life after
visiting a consultant at Gartnavel Hospital in Glasgow. [ ] said, “My life has changed. It’s left me so frustrated. I can’t get out
and about the way I used to. I can’t catch up with friends or go for a
game of snooker which I enjoyed doing for years until pleural plaques
stopped me.”

4. Conclusion

4.1 Unite wholly welcomes the Damages Bill which will bring some peace
of mind to diagnosed sufferers of pleural plaques and their families in
Scotland. Crucially, it will also provide support for those who will be
diagnosed with pleural plaques in the future as a result of occupational
asbestos exposure.

4.2 The devastating legacy of asbestos is widespread in the communities
of towns like Clydebank and Grangemouth where asbestos was
routinely used in the shipbuilding and petro-chemical industries.
Generations of workers negligently exposed to asbestos now suffer
from asbestos-related respiratory problems and diseases such as
pleural plaques, pleural thickening, asbestosis, lung cancer and
mesothelioma. The worst is yet to come. It is estimated that the peak
mortality attributed to mesothelioma will come between 2011 and 2015,
with the highest number of deaths per year being between 1,950 and
2,450.3

4.3 Pleural plaques are the first stage in a continuum which ends in
asbestos-related fatality. We have highlighted the real life examples of
the misery pleural plaques inflicts on everyday lives. It is a harsh reality
that in the UK the majority of people who suffer from pleural plaques -

3 Hodgson, J.T. et al. (2005) British Journal of Cancer 92
and who will be diagnosed with pleural plaques - are exempt from receiving recompense.

4.4 Unite will use this intervention in Scotland as a strong foundation to fight for legal parity across the rest of the UK. We will continue to counter and highlight the protectionist greed of the insurance industry and their efforts to dilute culpability. We will continue to tackle head-on the scourge of health and safety injustice in the workplace.

Unite would like to thank the individuals who contributed personal statements to this submission and to both the Clydebank Asbestos Group and the Clydeside Action on Asbestos Group. For further information please contact:

**Andrew Brady and Peter Welsh**
Campaigns, Policy & Research Unit
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Thompsons Solicitors

1. WHAT AND WHOM THE BILL IS ABOUT

We consider that it is necessary to remind ourselves of what the Bill is and for whose help it is designed. This is all the more important given that there have been responses and reactions, for example, in the Regulatory Impact Assessment, whereby a great deal is said of others about whom the Bill is not about such as judges, taxpayers, insurers, politicians and lawyers.

1.1 Workers

The Bill is about workers in Scotland. They were, for example, laggers, insulators, joiners, shipwrights, engineers, electricians, French polishers, riggers, labourers, cleaners and many others.

1.2 Families

The Bill is also about the families of those workers who not only have to live with the effect on their loved one but who themselves may also have been damaged by asbestos being brought into the household. They are spouses, sons, daughters, fathers and mothers.

1.3 Communities

It is also about our communities for whom the legacy of what happened and justice for them is so important.

1.4 Those Responsible

The Bill is also about employers, occupiers, factory owners, power station operators, Councils, nationalised industries, government sponsored and controlled enterprises and all those who ran our industries. It is also about local authorities who employed skilled workers in direct labour organisation involved in the construction and maintenance of public buildings and houses throughout Scotland.

They all knew that they were exposing workers to risk of injury and death. They took little or no action to protect them. They were negligent, if not reckless, in exposing workers and their families to asbestos.

They were also fully aware that they were in breach of the legislation in force at various times. These were for example, Section 4 of the Factory and Workshop Act 1901, Sections 4, 43 and 47 of the Factories Act 1937, Sections 4, 59 and 60 of the Factories Act 1961, Section 5 of the Factories Act 1959 as re-enacted in Section 29 of the Factories Act 1961, Regulations

It is of note that only certain insurers and a few local authorities have opposed the Bill. There are other insurers, local authorities and defenders who have not spoken out against it.

1.5 The Effects

The Bill is about the effects on these workers and their families of such negligent, reckless and unlawful conduct. Many of them have asbestos loads on their lungs signified by the presence of calcified pleural plaques.

It is accepted by all they are at risk of contracting:

- Mesothelioma, one of the most virulent and painful forms of lung cancer and where death is inevitable in an average time of 14 months.
- Lung cancer itself which, in conjunction with a smoking history, multiplies up to tenfold the risk of lung cancer.
- Asbestosis, a form of pulmonary fibrosis, which can seriously interfere with the exchange of oxygen and carbon dioxide in the lungs leading to chronic disability and, at times, death.
- Pleural thickening which can constrict the expansion and contraction of the lungs and also can lead to more serious diffuse bilateral pleural thickening leading to chronic disability.

With the knowledge of calcified pleural plaques and these risks, there is the inevitable anxiety of those who are advised that they have asbestos on their lungs signified by the calcified pleural plaques. They often describe pleural plaques as the calling card of the other diseases and their possible death.

2. THE BILL IS ABOUT JUSTICE FOR THESE WORKERS AND THEIR FAMILIES

2.1 Liability

Our courts have been available to these workers and their families to call to account those who have so exposed them to establish that they did so negligently, recklessly and in breach of their statutory duty.

2.2 Compensation
They have therefore in some measure been able to right the wrong that has been done to them by obtaining compensation for their anxiety in the knowledge of the calcified pleural plaques and the asbestos on their lungs and the risks of such serious diseases (see Nicol –v- Scottish Power PLC 1998 SLT 822 and see also Gibson –v- McAndrew Wormald & Co Ltd 1998 SLT 562).

2.3 A Right to Return

Having established the negligence, recklessness and breach of statutory duty, the calcified pleural plaques and the presence of asbestos in their lungs, it is open to seek a decree that enables the sufferer to come back to the court to obtain compensation in the tragic eventuality of them contracting these more serious, and at times, devastating diseases. That in turn has given them a measure of security, especially in respect of the loss to their families. It has also provided for them to come back to the court to speedily obtain compensation to improve their quality of life in their last days.

Thompsons has just completed a case where the client had been diagnosed with pleural plaques in 2000. An action was raised against his former employers and this was resolved on a provisional basis, that is an award of £5000 for anxiety which he had by reason of the existence of the pleural plaques and a reservation to come back to the court in the future in the event of him contracting one of the more serious conditions, such as mesothelioma.

The client was subsequently diagnosed with mesothelioma and died very shortly thereafter. His Executor and family were able to make a successful claim for all of the loss, injury or damage arising out of the mesothelioma and did so without requiring to obtain his evidence when he was least able to give it as this had already been established in the case of pleural plaques or otherwise prove liability.

By contrast, there is another case for a client who has been prevented from pursuing his case for pleural plaques and who has subsequently been diagnosed with mesothelioma and we are in the midst of now proceeding with that case and requiring to establish all of the issues in respect of liability including his evidence while he is becoming increasingly ill. This will cause inevitable delay, additional distress and possible prejudice to his case. (See Appendix 3)

3 WHAT THE BILL IS NOT ABOUT

3.1 Education

It is contended that this justice should be replaced by a programme of education.

The immediate perception of the workers and their families would be one of extreme cynicism.
They would recall the past when the very same employers and others gave them such advice as taking milk to protect them from the dangers of asbestos. They will recall being told that white asbestos was harmless. They are now to be told that despite being negligently and recklessly exposed to asbestos, signified by calcified pleural plaques on their lungs, that they are not to worry.

They are not to worry despite the fact that the asbestos fibres on their lungs are carcinogens which are causing irreversible changes which could give rise to mesothelioma or lung cancer.

They are not to worry despite the fact that many of their colleagues and workmates have had calcified pleural plaques and gone on to develop mesothelioma which they themselves have witnessed.

They are told not to worry despite the fact that families in their own community have been blighted with calcified pleural plaques and members of that very family have gone on to develop mesothelioma.

They may be forgiven that this late, sudden attention to education stems from the patronising culture in which they worked in the first place. They will also not be fooled into thinking that such emphasis on education late in the day is for their own benefit.

What is such ‘education’ to be? Is it to be said that “you the worker, and/or you family, have been negligently and recklessly exposed to asbestos, that in doing so there is now an asbestos load in your lungs signified by calcified pleural plaques which may kill you. But at the same time, you are somehow not to worry because if we split hairs, the calcified pleural plaques themselves will not develop into mesothelioma or lung cancer”?

3.2 Lawyers

Those opposing the Bill consider that it will only benefit claimant lawyers.

To run 567 cases, pre and post litigation, is a massive exercise and involves substantial resources, funding, payments to third parties and risks. Thompsons’ profit on these cases is marginal whatever the cost regime elsewhere.

The costs to the insurers and payments made in these cases are their own doing. It is well known that they defend these cases and therefore increase the costs by denying employment, not admitting that their insured knew or should have known of the dangers of asbestos, that they were not in breach of statutory duty and/or try and obtain medical evidence to demonstrate that the worker does not have pleural plaques.

They also engage in an embarrassing exercise of trying to cast around to try and blame anyone else apart from themselves so that they can share the liability and/or reduce the already poor damages to the worker. They argue
over a sum of £5000 where they are only liable to pay certain fractions of that sum. In blaming others, of course, they increase the costs for all concerned.

There is now in place a Protocol under the auspices of the Law Society to which Thompsons have contributed. Instead of complaining about the cost of the pleural plaques cases those opposing this Bill should instead address their minds to implementing that protocol to ensure speedier settlement, avoidance of litigation and reduction of costs. Other major insurers are. (See Appendix 1)

### 3.3 Claims Companies and Scan Vans

The Bill is not about claims companies or scan vans.

Thompsons Scotland does not have a single case from a scan van and nor are our clients or the asbestos groups representing them aware of a single scan van entering or going around Scotland. Interestingly Norwich Union do not point to any actual evidence to such a practice taking place.

If Thompsons have most of the cases anyway and do not have any scan van referrals (nor would accept any) then any question of scan vans becomes insignificant and, we must conclude, simply scaremongering.

It is also interesting to note that in the contribution of one party opposing the Bill raising the spectre of scan vans, there is no mention whatsoever of legislation covering the exposure to radiation for medical/legal purposes. We refer to the Ionising Radiation (Medical Exposure) Regulations 2000 and the Ionising Radiation Regulations 1999. The 2000 Regulations, by virtue of Section 3 (e) applies to the exposure of individuals as part of medical/legal procedures. There are duties placed on those carrying out x-rays and CT scanning in terms of Regulation 4, 5 and 6. There is also failure to mention the current consultation due to end 9 September 2008 by the Department of Health (see paragraph 65 of Consultation Paper CP 14/08, Ministry of Justice “Pleural Plaques“, published 9 July 2008). (See Appendix 2)

### 3.4 Medical Evidence

There is much made about medical evidence having changed and that this is the reason why those who have paid out on pleural plaques cases to date have now sought to oppose this some decades later. The medical evidence has not changed. It has always been known that most cases of pleural plaques will be symptomless and signify exposure to asbestos in the lungs of the person where they are present and that such persons are at risk of serious diseases.

### 3.5 Judges and the Law

It is asserted that the Bill is about creating uncertainty in the legal process.

The Bill is not about creating uncertainty.
Pleural Plaques are actionable damage which gives rise to a right to compensation for anxiety and a reservation to come back in the future in the event of the person developing one of the more serious conditions. The Rothwell case has created uncertainty. The Bill is addressing this problem and making it clear to all concerned that the common law of Scotland will remain as it always was.

However there also seems to be some confusion as to the standing of judicial pronouncements. Judges are not the only source of law. The primary source of law is not judges but our respective Parliaments. There are countless examples of judges coming to a conclusion, either at common law or in respect of interpretation of the application of a statute, or both, which is deemed to be unacceptable to our society. The legislature in reflecting the view of society then adjusts and corrects what that society perceives as the resultant injustice. There are many examples in criminal and civil law where this has occurred. However in the context of asbestos this has had to happen time and again.

- On common law principles and in terms of the Damages (Scotland) Act 1976 where someone settled their case before they died, this would extinguish any rights to certain damages for widows and children after they died. Again this was found to be unacceptable and the Rights of Relatives (Damages) (Mesothelioma) (Scotland) Act 2006 was passed by the Scottish Parliament.

- The House of Lords had also found that damages for mesothelioma should be shared out despite the fact that it had previously found that where a defender had materially increased the risk of exposure to asbestos they were liable (Barker –v- Corus UK Ltd 2006 2 A C 572). This too was held to be unacceptable and the Compensation Act 2006 was brought in at Westminster and accepted by Legislative Consent Motion of the Scottish Parliament.

- 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. (See Appendix 3)

- The common law was also not clear on whether the services rendered by relatives to someone who was suffering from a personal injury could be claimed or indeed services lost by members of the family by reason of a person not being well. This was confirmed and clarified by Sections 8 and 9 of the Administration of Justice Act 1982.
• The common law and statute did not allow damages for certain relatives affected by someone’s death such as grandchildren nor for same sex partners (see Quinn –v- Reid 1981 SLT (Notes) 117, a brother or sister excluded and Telfer –v- Kellock 204 SLT 1290, a same sex partner excluded). The Scottish Parliament changed this by the Family (Scotland) Act 2006 and Civil Partnership Act 2004 (for the history, development and implications of these changes see “Relatives Claims on Death”, Maguire, SLT, Issue 07 2007, PP 43-46).

Here the Scottish Government and a substantial number of MSPs from all parties are of the view that judges again have come to an unjust conclusion which should not be repeated in Scotland.

3.6 Insurance Premiums

Again, in our view, there is a gross overestimation as to the cost to insurers.

The clearest indication of what the Bill will mean is what the law to date has meant i.e the numbers of cases of pleural plaques to date.

We would also point out that, as stated in our response to the Regulatory Impact Assessment, that insurance premiums will have been taken and invested at the time of the employment. As any insurance company would do, the sums realised by these premiums will have been invested. This will either have been distributed by way of profit to insurers or re-invested in the capital created by the premiums. Many of the insurance companies are not involved in new business but are now dealing with the capital and historic liabilities. Those insurers who are still involved in the present day market are very large and the sums involved in the context of such large undertakings would be minimal. We should also add that if the insurance premiums in the past collected for employers liability insurance for asbestos were too low then that is really the responsibility of the insurers and the employers. They should have collected adequate premiums and made long term investments to cover risk of future long-tail claims. It should have been obvious to the insurance industry that such claims were going to arise. Even by the 80’s the long-tail liability should have been appreciated by research by Doll and Peto. Indeed if the insurance industry are complaining then they really only have to look to themselves.

To allow insurance companies to reap a windfall by not having to pay out on pleural plaques cases would create a double wrong to those affected. Not only would those who exposed workers and their families to asbestos negligently and recklessly be avoiding the liability but so would their insurers by negligently and/or irresponsibly failing to assess the very risks for which their policies were intended.

3.7 Insurers will address more meritorious claims
Much is made by those opposing the legislation in making savings on pleural plaques and instead what they regard as more meritorious claims such as mesothelioma.

It first of all has to be said that the worker or family who has pleural plaques is the very worker who may develop mesothelioma. In denying remedies in respect of pleural plaques, they are preventing such persons from coming back to the court with liability established and speedily resolving their mesothelioma case.

The idea that savings will be made on pleural plaques and applied to more meritorious claims is entirely disingenuous. Those opposing the Bill are those very entities which have sought time and again to avoid liability in respect of all asbestos liabilities.

- They took a case to the House of Lords and tried to argue that they were not responsible because their fibre could not be identified as having caused the mesothelioma and pointed to every other fibre they could possibly think of to deflect the blame (Fairchild –v- Glenhaven Funeral Services 2003 1 A C 32).

- They then sought to again avoid liability by trying to establish that they were only liable for a share of the mesothelioma and again pointed to everyone else they possibly could as being responsible (Barker –v- Corus UK Ltd 2006 2 A C 572).

- They are the very entities just now who are trying to avoid paying out on mesothelioma by latching on to interpretations of the policies which they underwrote on employers liability. Despite the clear intention at the time that they were insuring those injured by the employer in question, they are now trying to argue amongst themselves and blame other insurance companies who came along subsequently. It seems that they will do anything, even attack their own fellow members of the insurance industry, to avoid liability (Bolton Metropolitan Borough Council –v- Municipal Mutual Insurance Ltd and Another 2006 EWCA Civ 50).

- Indeed far from the insurers opposing pleural plaques to pay more meritorious claims, the strategy is rather more one of avoiding liability to pay out in all asbestos claims. The steps which they have taken, above, are adequate evidence of this. This pleural plaques opposition is also the beginning of an attack on asbestos cases from the bottom up. They have argued successfully in the case of Terwyn Owen –v- Esso Exploration & Production UK Limited and Hopol Limited (in liquidation) in the Liverpool County Court, Case number 5AB00270 that symptomless asbestosis and pleural thickening are also to be not be actionable damage and therefore should not be compensated.

- Immediately after the House of Lords judgement in Rothwell, the defenders took steps in current cases of asbestosis and pleural
thickening in Scotland to allege that they were symptomless and were not compensatable. The Bill, in preserving the right to pleural plaques, also consistently ensures that rights to compensation to pleural thickening and asbestosis are also preserved.

- We anticipate that another tactic to be used by insurers and employers, having disposed of pleural plaques, asbestosis and pleural thickening by them not being actionable, will then be searching medical records and other evidence to ascertain when it was that claimant subsequently had symptoms from such a conditions to try and get a time as early as possible for there to be actionable damage so that the 3 years will have passed and they can argue that the case is timebarred.

4. THE BILL

We return therefore to whom the Bill is about. The workers and families negligently and recklessly exposed to asbestos have and have had a law which gave them a measure of justice, compensation and security. They have rights. They wish these rights to be underpinned by the Scottish Parliament in the face of developments and potential influence from the law of England and Wales. They do not do so in a posture of pleading. They have always rejected what they regard as ‘tea and sympathy’ as hollow. That would be particularly so if they were now offered by those employers and insurers (as the very ones who were responsible for their plight) ‘education’. Indeed, they would find it offensive. It echoes a patronising culture in which they were exposed to asbestos in the first place. It should be rejected and their rights protected and secured in this Bill by our Scottish Parliament.

Frank Maguire
VOLUNTARY PRE-ACTION PROTOCOL IN SCOTLAND

FOR

DISEASE CLAIMS
1. PURPOSE OF VOLUNTARY PROTOCOL

Diseases defined as:-

“Any illness, physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement, other than physical or psychological injury solely caused by an accident or other similar singular event. A singular sensitising event may be considered appropriate for this Protocol.” (The definition is not restricted to “disease” occurring in the workplace.)

1.1 The Voluntary Protocol has been kept deliberately simple to promote ease of use and general acceptability.

1.2 The aims of the Voluntary Protocol are:-

- To encourage exchange of information at an early stage;
- To resolve disputes without litigation;
- To identify/narrow issues in disputes;
- To enable resolution of claims pre-litigation.

1.3 It also sets out good practice making it easier for the parties to obtain and rely upon information required.

1.4 The standards within the Voluntary Protocol are to be regarded as the normal, reasonable approach to pre-action conduct in relation to Voluntary Protocol cases.
2. INTRODUCTION

A Voluntary Pre-Action Protocol in Scotland

2.1 Unlike England and Wales, there is no statutory basis for a Pre-Action Protocol. The Protocol therefore will require to be entered into voluntarily on an individual case by case basis by mutual agreement. The claimant may request occupational health records before the letter of claim is issued. The request should contain sufficient information to alert the defender to a possible claim including the specific nature of the disease (i.e. asbestosis, noise-induced hearing loss, tinnitus, etc). A mandate (see Specimen Letter 2.1) should be provided authorising release of the occupational health records to both claimant and defender. Records should be provided within 40 days, at no cost to the claimant. It will be for the claimant’s Agent to intimate the claim in the general format of Specimen Letter A1 or A2 and invite the defender or Insurer to agree on a case by case basis that conduct of the pre-action negotiations are to be undertaken in terms of the Voluntary Protocol. When a defender or Insurer accepts a letter in the general format, Letter B will be sent within 21 days of receipt of claim. The claim will proceed in terms of the Voluntary Protocol in respect of the negotiations, disclosure, repudiation of liability, settlement and calculation of fees.

2.2 The Agent is encouraged to notify the Insurer as soon as they know a claim is likely to be made but before they are able to send a detailed letter of claim, particularly for instance, when the Insurer has no or limited knowledge of the events giving rise to the claim or where the claimant is incurring significant expenditure as a result of the disease which he/she hopes the Insurer might pay for, in whole or in part. If the claimant’s Agent chooses to do this, it will not start the timetable for responding.

2.3 The Voluntary Protocol, if entered into, will apply not merely to the personal injury element of a claim but also to other heads of loss and damage.

2.4 Where proceedings are raised in a Voluntary Protocol case, whether for the payment of damages or for the recovery of evidence and other orders under the Administration of Justice (Scotland) Act 1972, without prejudice to any existing rule of law, it shall be open to any party to lodge Voluntary Protocol communications for the sole purpose of assisting the court in any determination of expenses.
LETTER OF CLAIM

3.1 The Agent shall send to the proposed defender (or to his Insurer if known) a detailed letter of claim as soon as sufficient information is available to substantiate a claim and before issues of quantum are addressed in detail. The letter should ask for details of the Insurer if not known and the letter should request that a copy should be sent by the proposed defender to the Insurer where appropriate. If the Insurer is known, a copy shall be sent directly to the Insurer.

3.2 The letter of claim should include:-

(1) Details of the disease or illness alleged;
(2) Main allegations of fault;
(3) Present condition and prognosis;
(4) Outline of financial loss;
(5) Employment history and HMRC schedule (including job titles/duties carried out);
(6) Identity of records required;
(7) Identity of other potential defenders and their insurers if known;
(8) Chronology of relevant events, e.g. dates (period of exposure linked to employment).

3.3. Agents are recommended to use a standard form for such a detailed letter. Specimen Letter A1 or A2 can be amended to suit the particular case.

3.4. Sufficient information should be given in order to enable the Insurer to commence investigations and at least put a broad valuation on the claim.

3.5. The Insurer should acknowledge the letter of claim within 21 days of the date of receipt of the letter. The Insurer should advise in a letter in the terms of Specimen B whether it is agreed that the case is suitable for the Voluntary Protocol. If there has been no reply by the defender or Insurer within 21 days, the claimant will be entitled to issue proceedings.

3.6. Where liability (subject to causation) is admitted, the Insurer will be bound by this admission for all Protocol claims with a gross damages value of less than £10,000.
The exception to this will be when, subsequently, there is evidence that the claim is fraudulent.

3.7. The Insurer will have a period of three months from the date of the Insurer’s response letter to investigate the merits of the claim. By mutual agreement the investigation period can be extended. Not later than the end of that period, the Insurer shall reply, stating whether liability (subject to causation) is admitted or denied and giving reasons for their denial of liability (subject to causation), including any alternative version of events relied upon and all available documents supporting their position.

3.8 The Insurers will disclose the period of employment as soon as the information is known to them and will appoint a lead Insurer. Details of other Insurers will be produced when known.

Documents

3.9 The aim of early disclosure of documents by the parties is to promote an early exchange of relevant information to help in clarifying or resolving the issues in dispute. If the Insurer denies liability, in whole or in part, they will at the same time as giving their decision on liability, disclose any documents which are relevant and proportionate to the issues in question, with reference to those identified in the letter of claim.

3.10 Attached at Appendix A are specimens, but not an exhaustive list of documents likely to be material in different types of claims. Where involvement of the Claimant’s Agent in the case is well advanced, the letter of claim should indicate which classes of documents are considered relevant for early disclosure. Where this is not practical, these should be identified as soon as practicable, but disclosure will not affect the timetable.

3.11 Where the Insurer admits primary liability (subject to causation) but alleges contributory negligence by the claimant, the Insurer should give reasons supporting these allegations and disclose the documents from Appendix A which are relevant and proportionate to the issue in dispute. The claimant’s Agents should respond to the allegations of contributory negligence before proceedings are issued.
Medical Evidence

3.12 A medical report will be instructed at the earliest opportunity, but no later than 5 weeks from the date the Insurer admits liability, in whole or in part, unless there is a valid reason for not obtaining a report at this stage. In those circumstances, the claimant’s Agents will advise accordingly and agree an amended timetable. Any medical report obtained and on which the claimant intends to rely will be disclosed to the other party within 5 weeks from the date of its receipt. By mutual consent, the Insurers may ask the examiner, via the claimant’s Agent, supplementary questions.

3.13 The claimant’s Agent will normally instruct a medical report, will organise access to all relevant medical records and will send a letter of instruction to a medical expert. The Insurer is encouraged to attempt to resolve issues by questioning the claimant’s expert, but may seek its own expert evidence, if appropriate. The claimant’s Agent will agree to disclosure of all relevant medical and DWP records. Any medical report on which the Insurer intends to rely will be disclosed to the claimant’s Agent within 5 weeks of receipt.

Damages

3.14 Where the Insurer has admitted liability (subject to causation), the Claimant’s Agent will send to the Insurer as soon as possible, a Statement of Valuation of Claim (the Statement of Valuation) together with supporting documents, and keep the Insurers advised of any potential delays.

Settlement

4.1 Where the Insurer admits liability (subject to causation) before proceedings are issued, any medical reports, supporting documentary evidence and Statement of Valuation obtained under this Voluntary Protocol on which a party relies, should be disclosed to the other party. Subject to expiry of the triennium, the claimant’s Agent should delay issuing proceedings for 5 weeks from the date the Insurer receives the Statement of Valuation to enable the parties to consider whether the claim is capable of settlement.

4.2 Where a Statement of Valuation with supporting documents has been disclosed under 3.13 and liability and causation are admitted, the Insurer shall offer to settle the
claim based on his reasonable valuation of it within 5 weeks of receipt of such disclosure, serving a counter-schedule of valuation if they dispute the claimant’s Agent’s valuation.

4.3 The claimant’s Agent will advise Insurers whether or not their offer is to be accepted or rejected, prior to the raising of proceedings and in any event within 5 weeks of receipt.

4.4 Where a Voluntary Protocol case settles, cheques for both damages and agreed expenses must be paid within 5 weeks of settlement, which will be either the date when the Insurer receives notification of settlement or, where a discharge is required, the date when the signed discharge is received by the Insurer. Thereafter, interest will be payable by any defaulting Insurer on any outstanding damages due to the claimant and/or expenses due and payable in accordance with the agreed settlement terms, at the prevailing judicial rate from the date of settlement until payment is made in full.

Time Bar

5.1 In the event that the Insurer repudiates liability or that the claimant rejects an offer in settlement, provided that proceedings are subsequently raised within a period of one year from the date of such repudiation or rejection, the date of raising proceedings will be deemed to be the date when intimation of the claim was made in terms of this protocol for purposes of prescription and limitation.

Litigation

6.1 In the event of litigation, the claimant’s solicitors will give the Insurers an opportunity to nominate solicitors to accept service, on behalf of their insured.
Dear Sirs (insurance company)

Re:  Claimant's Full Name
     Claimant’s Full Address
     Claimant’s Date of Birth
     Claimant’s Payroll or Reference Number
     Claimant’s Employer (name and address)
     Claimant’s National Insurance Number

“We are instructed by the above named to claim damages in connection with

a claim for (specify nature of disease i.e. asbestos related pleural thickening).

The Claimant was employed by (insert name of employer) as (insert job
description) from (date) to (date). During the relevant period of his employment
he worked as (description of precisely where the claimant worked and what he did to
include a description of any machines used and details of any exposure to noise
substances)

The circumstances leading to the development of this condition are as follows:- (give a chronology of events)

Your insured failed to:-
(brief details of the common law and/or statutory breaches)

Our client’s employment history is attached. We have also made a claim
against (insert name of the employer and their insurer, with reference, if known)

Enclosed are broad details of our client’s expected financial losses.

At this stage of our enquiries we would expect the undernoted documents to be
relevant to this claim.

This is a claim which we propose should be handled in terms of the Voluntary Pre-
Action Protocol for Disease Claims as agreed between the Law Society of Scotland
and the Forum of Scottish Claims Managers”.

Yours faithfully
SPECIMEN LETTER A2
WHERE INSURERS NOT KNOWN

Dear Sirs

Re: Claimant's Full Name
Claimant's Full Address
Claimant’s Payroll or Reference Number
Claimant’s Employer (name and address)

“We are instructed by the above named to claim damages in connection with
a claim for (specify nature of disease i.e. asbestos related pleural thickening).

The Claimant was employed by you as (insert job description) from (date) to
(date). During the relevant period of his employment he worked as (description
of precisely where the claimant worked and what he did to include a description of
any machines used and details of any exposure to noise substances)

The circumstances leading to the development of this condition are as
follows:- (give a chronology of events)

Our client’s employment history is attached. We have also made a claim
against (insert name of the employer and their insurer, with reference, if known)

Enclosed are broad details of our client’s expected financial losses.

This is a claim which we propose should be handled in terms of the Voluntary Pre-
Action Protocol for Disease Claims as agreed between the Law Society of Scotland
and the Forum of Scottish Claims Managers.

You should acknowledge receipt of this letter, forward it to your Insurers and ask
them to advise us within 21 days of the date of this letter whether the case is to
proceed as a Voluntary Pre-Action Protocol Claim.”

Yours faithfully
Specimen Letter B

Response to Letter of Claim

CLAIMANT’S SOLICITOR

Dear Sirs,

Re: Claimant’s Full Name

Claimant’s Full Address

Employer’s Name

“We are the Insurers of specify period - x - y and acknowledge your letter of ______. We confirm that this claim is to be/is not to be handled under the Voluntary Pre-Action Protocol for Disease Claims agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers.

We will notify you of our decision on liability (subject to causation) within three months of this date. If liability is denied, in whole or in part, we will write to you further in respect of documents requested by you as soon as is practicable.

We will notify you of other issues - gaps in cover/other insurers, who will be coordinating the handling, etc.

Yours faithfully
Dear Sir,

RE (Name and Address)
Date of Birth
Telephone No.
Nature of Disease

“We act on behalf of the above named in connection with a claim for damages in connection with a claim for (insert nature of disease).

We should be obliged if you would examine our client and provide a full and detailed report dealing with the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work, if relevant and giving a prognosis.

Please send our client an appointment direct for this purpose. Should you be able to offer a cancellation appointment, please contact us direct. We confirm we will be responsible for your reasonable fee.

We are obtaining the GP and hospital records and will forward them to you when they are to hand/or please request the GP and hospital records direct and advise that any invoice for the provision of these records should be forwarded to us. (Please provide details of GP and hospitals attended).

We look forward to receiving your report as soon as possible. If there is likely to be any unusual delay in providing the report, please telephone us receipt of these instructions.

When acknowledging these instructions, it would assist if you could give an estimate as to the likely timescale for the provision of your report and also an indication as to your fee.

Yours faithfully
APPENDIX A
STANDARD DISCLOSURE LISTS

WORKPLACE CLAIMS

(i) Accident book entry.
(ii) First aider report.
(iii) Surgery record.
(iv) Foreman/supervisor accident report.
(v) Safety representatives accident report.
(vi) RIDDOR report to HSE.
(vii) Other communications between defenders and HSE.
(viii) Minutes of Health and Safety Committee meeting(s) where accident/matter considered.
(ix) Report to DSS.
(x) Documents listed above relative to any previous accident/matter identified by the claimant and relied upon as proof of negligence.
(xi) Earnings information where defender is employer.

Documents produced to comply with requirements of the Management of Health and Safety at Work Regulations 1999 -
(i) Pre-accident Risk Assessment required by Regulation 3.
(ii) Post-accident Re-Assessment required by Regulation 3.
(iii) Accident Investigation Report prepared in implementing the requirements of Regulations 5.
(iv) Health Surveillance Records in appropriate cases required by Regulation 6.
(v) Information provided to employees under Regulation 10.
(vi) Documents relating to the employees health and safety training required by Regulation 13.
WORKPLACE CLAIMS - DISCLOSURE WHERE SPECIFIC REGULATIONS APPLY

SECTION A - WORKPLACE (HEALTH SAFETY AND WELFARE) REGULATIONS 1992

(i) Repair and maintenance records required by Regulation 5.
(ii) Housekeeping records to comply with the requirements of Regulation 9.

SECTION B – PROVISION AND USE OF WORK EQUIPMENT REGULATIONS 1998

(i) Manufacturers' specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 4.
(ii) Maintenance log/maintenance records required to comply with Regulation 5.
(iii) Documents providing information and instructions to employees to comply with Regulation 8.
(iv) Documents provided to the employee in respect of training for use to comply with Regulation 9.
(v) Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems.
(vi) Instruction/training documents issued to comply with the requirements of Regulation 22 insofar as it deals with maintenance operations where the machinery is not shut down.
(vii) Copies of markings required to comply with Regulation 23.
(viii) Copies of warnings required to comply with Regulation 24.
SECTION C – PERSONAL PROTECTIVE EQUIPMENT AT WORK
REGULATIONS 1992

(i) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6.

(ii) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

(iii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.

(iv) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

(v) Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9.

(vi) Instructions for use of Personal Protective Equipment to include the manufacturers’ instructions to comply with Regulation 10.

SECTION D – MANUAL HANDLING OPERATIONS REGULATIONS 1992

(i) Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i).

(ii) Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i).

(iii) Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii).

(iv) Documents relating to training in respect of manual handling operations and training records.

(v) All documents showing or tending to show the weight of the load at the material time.
SECTION E - HEALTH AND SAFETY (DISPLAY SCREEN EQUIPMENT) REGULATIONS 1992

(i) Analysis of work stations to assess and reduce risks carried out to comply with the requirements of Regulation 2.

(ii) Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the claimant.

(iii) Documents detailing the provision of training including training records to comply with the requirements of Regulation 6.

(iv) Documents providing information to employees to comply with the requirements of Regulation 7.

SECTION F-CONTROL OF SUBSTANCES HAZARDOUS TO HEALTH REGULATIONS 2002

(i) Risk assessment carried out to comply with the requirements of Regulation 6.

(ii) Reviewed risk assessment carried out to comply with the requirements of Regulation 6.

(iii) Copy labels from containers used for storage handling and disposal of carcinogens to comply with the requirements of Regulation 7(2A)(h).

(iv) Warning signs identifying designation of areas and installations which may be contaminated by carcinogens to comply with the requirements of Regulation 7.

(v) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7.

(vi) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

(vii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.

(viii) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

(ix) Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7.
(x) Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 7.

(xi) Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7.

(xii) Maintenance examination and test of control measures records to comply with Regulation 9.

(xiii) Monitoring records to comply with the requirements of Regulation 10.

(xiv) Health surveillance records to comply with the requirements of Regulation 11.

(xv) Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12.

(xvi) Labels and Health and Safety data sheets supplied to the employers to comply with the CHIP Regulations.


(i) Notification of a project form (HSE F1 0) to comply with the requirements of Regulation 7.

(ii) Health and Safety Plan to comply with requirements of Regulation 15.

(iii) Health and Safety file to comply with the requirements of Regulations 12 and 14.

(iv) Information and training records provided to comply with the requirements of Regulation 17.

(v) Records of advice from and views of persons at work to comply with the requirements of Regulation 18.
SECTION H - CONSTRUCTION (HEALTH, SAFETY AND WELFARE)  
REGULATIONS 1996

(i) All documents showing the identity of the principal contractor, or a person who controls the way in which construction work is carried out by a person at work, to comply with the terms of Regulation 4.

(ii) All documents and inspection reports to comply with the terms of Sections 29 and 30.
APPENDIX (2.1)

Application on behalf of a Potential Claimant
for use where a Disease Claim is being Investigated

This should be completed as fully as possible

<table>
<thead>
<tr>
<th>1</th>
<th>Full name of claimant (including previous surnames)</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td></td>
</tr>
<tr>
<td>b)</td>
<td>Address now</td>
</tr>
<tr>
<td>c)</td>
<td>Address at date of termination of employment, if different</td>
</tr>
<tr>
<td>d)</td>
<td>Date of birth (and death, if applicable)</td>
</tr>
<tr>
<td>e)</td>
<td>National Insurance number, if available</td>
</tr>
</tbody>
</table>

| 2  | Location(s) where claimant worked                 |

I authorise you to disclose all your records relating to me/the claimant to my solicitor and to your legal and insurance representatives.

Signature of Claimant  ……………………………………………………………………….

Signature of Personal Representative where claimant has died

………………………………………………………………………...
Dear Sirs,

We are acting on behalf of the above named who has developed the following *insert disease*. We are investigating whether this disease may have been caused:-

- *during the course of his employment*
- *whilst at your premises at (address)*
- *as a result of your product (name)*

We are writing this in accordance with the Protocol for Disease Claims.

We seek the following records:-

*Insert details e.g. personnel/occupational health*

Please note your insurers may require you to advise them of this request.

We enclose a request form and expect to receive the records within 40 days. If you are not able to comply with this request within this time, please advise us of the reason.

Yours faithfully
PERSONAL INJURY DISEASE CASES - PROTOCOL FEES FROM

These fees apply to all types of disease claims.

The fees for claims intimated and dealt with entirely under the Protocol comprise the following elements:

1. Instruction Fee
   - On settlements up to and including £1,500: £320
   - On settlements over £1,500: £700

2. Completion Fee
   - On settlements up to £2,500: 25%
   - On the excess over £2,500 up to £5,000: 15%
   - On the excess over £5,000 up to £10,000: 7.5%
   - On the excess over £10,000 up to £20,000: 5%
   - On the excess over £20,000: 2.5%

NOTES -

1) In addition, VAT (on all elements) and outlays will be payable.

2) In cases including payment to CRU the protocol fee will be calculated in accordance with the following examples:

   (i) Solatium: £5,000
       Wage Loss: £5,000
       CRU repayment: £2,000
       Sum paid to Pursuer: £8,000

       In these circumstances the protocol fee will be based on £10,000 being the total value of the Pursuer’s claim.

   (ii) Settlement as above but repayment to the CRU is £6,000 and only £5,000 can be offset. Payment to the Pursuer is £5,000 and £6,000 to the CRU. The protocol fee will be on £10,000 being the value of the pursuer’s claim, as opposed to the total sum paid by the insurer - £11,000.

3) In cases involving refundable sick pay the protocol fee will be calculated by including any refundable element.

4) Fees calculated in relation to gross damages value of claim.
Appendix 2

MINISTRY OF JUSTICE

Pleural Plaques

Consultation Paper CP 14/08
Published on 9 July 2008
This consultation will end on 1 October 2008

65. The only way that pleural plaques can be recognised is by an x-ray or CT scan. Concerns have been expressed that the provision of future payments for pleural plaques may encourage the use in areas of heavy industry of “scan vans” offering x-rays and CT scans in return for a fee, for the purposes of obtaining a payment. The use of x-rays and CT scans are governed by two sets of regulations, the Ionising Radiation (Medical Exposure) Regulations 2000 and the Justification of Practices Involving Ionising Radiation Regulations 2004. The Chief Medical Officer has indicated that the only case for justifying the procedure in this context would be if there were a reasonable suspicion of asbestos-related lung disease arising from a known risk of asbestos exposure. Initiating an x-ray of CT scan purely based on a wish to demonstrate pleural plaques would not be justified, as pleural plaques are benign and do not impair lung function. The regulations governing the use of ionising radiation apply equally to the NHS and the private sector. Compliance is monitored by a specialist inspectorate within the Healthcare Commission and they are empowered to enforce the regulations. If a private “scan van” were offering x-rays purely for the purpose of assessing eligibility for compensation then the Healthcare Commission could be asked to investigate.
12 Award of provisional damages for personal injuries: Scotland

(1) This section applies to an action for damages for personal injuries in which—

(a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease or suffer some serious deterioration in his physical or mental condition; and

(b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,

(i) a public authority or public corporation; or

(ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order—

(a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

(b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below,

and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are—

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) further damages if he develops the disease or suffers the deterioration.

(5) Nothing in this section shall be construed—

(a) as affecting the exercise of any power relating to expenses including a power to make rules of court relating to expenses; or

(b) as prejudicing any duty of the court under any enactment or rule of law to reduce or limit the total damages which would have been recoverable apart from any such duty.

(6) The Secretary of State may, by order, provide that categories of defenders shall, for the purposes of paragraph (b) of subsection (1) above, become or cease to be responsible persons, and may make such modifications of that paragraph as appear to him to be necessary for the purpose.
And an order under this subsection shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from the Forum of Insurance Lawyers

1. Introduction

1.1 The Forum of Insurance Lawyers (FOIL) is a UK wide association of lawyers who act predominantly or exclusively for insurance clients (excluding legal expenses insurers).

1.2 Amongst the aims of FOIL is the exchange of information among its members, the development of expertise in insurance related issues through education, and the monitoring and advancement of law reform on matters of interest to insurers.

1.3 FOIL is structured on a regional basis. There are ten regions within the UK with each region having a representative to chair and co-ordinate meetings and business within the region. Scotland is a region on its own. The Scottish region focuses on issues affecting insurers under the Scottish legal system. This response has been prepared by members of the Scottish region of FOIL.

1.4 Following publication by the Scottish Government of the Partial Regulatory Impact Assessment (PRIA) on a proposed Bill to reverse the House of Lords' judgement in *Johnston –v- NEI International Combustion Ltd.* and other related cases (“Johnston”) the Scottish region of FOIL produced a response which was submitted to the Scottish Government. We reaffirm the points which we made in that response, a copy of which we attach for ease of reference.

1.5 FOIL welcome the opportunity of providing written views on the stated purposes of the Bill and on the extent to which improvements can be expected from the Bill’s proposed measures. Having had some opportunity to review matters we have a number of concerns on the impact of the Bill if it is to become law in Scotland and these are addressed in this paper.

2. Symptomless Pleural Plaques

2.1 It is accepted by medical experts that except in exceptional cases pleural plaques are simply a marker of asbestos exposure and do not cause harm.

2.2 Pleural plaques result from the body’s natural response to the presence of asbestos fibres. The presence of the foreign fibres is thought to cause a
prolonged low grade inflammatory response resulting in the release of chemical mediators which in turn lead to the laying down of fibrous tissue which wall off the foreign/asbestos fibres.

2.3 Pleural plaques are rarely detected during the first 20 years following exposure to asbestos. However, exposure to asbestos does not necessarily result in the development of plaques, even after 20 years. (Approximately 50% of those exposed to asbestos go on to develop plaques).

2.4 Because they do not lead to symptoms, they are usually discovered during routine chest x-ray or CT scan, or at post mortem.

2.5 The medical experts tell us that most cases of plaques are not diagnosed but that greater use of CT scans are leading to an increased number of people being made aware that they have plaques (otherwise invisible on plain x-ray).

2.6 Dr John Moore-Gillon and Dr Robin Rudd have estimated that there are probably 3,000-15,000 new cases of pleural plaques per year in the UK, of which only a minority are currently diagnosed.

2.7 In summary pleural plaques, except in very exceptional cases, do not cause harm and do not increase the risk of pleural thickening, asbestosis and mesothelioma, beyond the risk that is equally present for anyone else who has been exposed to asbestos and has not suffered pleural plaques. A very small percentage of those exposed to asbestos +/- plaques go on to develop mesothelioma (up to 5%) and asbestosis (1-2%).

3. Pleural Thickening and Asbestosis Without Impairment

Paragraph 16 of the Policy Memorandum which accompanied the Bill describes the conditions of pleural thickening and asbestosis. These conditions can cause harm in the form of impairment of lung function but can be harmless with normal unimpaired lung function being retained.

4. Purpose and Effect of Bill

The fundamental purpose of the Bill is to treat pleural plaques, pleural thickening and asbestosis as harmful injuries regardless of whether they cause harm or not.

The effect of the Bill, if passed, will be to reverse the decision of the House of Lords in Johnston.

5. Legal Principles
FOIL believe that the impact of the Bill will be to dilute and obscure established legal principles which govern the law of delict in Scotland regarding claims for damages for personal injury caused by the fault of third parties.

6. **Johnston and Related Background**

6.1 It is clear that the purpose of the Bill is to reverse a decision of the House of Lords which is essentially grounded on solid legal principle. It is clear that the unanimous decision of the House of Lords in *Johnston* is based upon principles which apply equally to Scots and English law. While the cases decided by the House of Lords concerned individuals with pleural plaques present in the lungs, the legal principles on which *Johnston* was decided apply to all cases involving delictual claims for damages for personal injury. The ramifications of the *Johnston* decision are wide. So too will any legislative attempt to overturn the decision in *Johnston*.

6.2 The House of Lords in *Johnston* made it clear that the decisions in a trilogy of English cases in 1984-1986 (*Church v. Ministry of Defence* 1984 134 NLJ 623, *Sykes v. Ministry of Defence*, The Times 23rd March 1984, and *Paterson v. Ministry of Defence* 1987 CLY 1194) in which awards of damages for asymptomatic pleural plaques with related anxiety were wrong in law. In our view the same applies to the Scottish case of *Nicol v. Scottish Power plc* 1998 SLT 822 which is referred in annex A of the Scottish Government’s Policy Memorandum accompanying the Bill. It may be observed in passing however that the circumstances in *Nicol* were somewhat unusual. In *Nicol* the pursuer genuinely believed that his breathlessness and chest pain were attributable to his exposure to asbestos. The medical position, which was clear and entirely accepted by the court, was that the pursuer suffered from chronic obstructive airways disease consequent upon his long history of smoking and that the pleural plaques on his lungs were asymptomatic.

6.3 The Ministry of Defence did not appeal any of the decisions in the 1980’s, probably because of the low case value and numbers involved. (The damages were assessed at around £1,250/£1,500). Given the increase in the volume of claims insurers took a stand and were successful before the English Court of Appeal and ultimately the House of Lords.

7. **The Dangerous Consequences of “Condition Specific” Legislation**

7.1 **Basic Injustice**

FOIL have grave concerns about “condition specific” legislation such as the Bill. We believe there are unintentional consequences which will lead to injustice. This is essentially because in its present form the Bill would
make a blatant and glaring exception to basic legal principle. We think it is important to highlight and explain these issues.

7.2 Harmless Injury

7.2.1 In his speech in Johnston Lord Rodger of Earlsferry (one of the Scottish Law Lords) referred to a decision of the First Division of the Court of Session in Brown v. North British Steel Foundry Ltd. (1968 SC 51) and quoted from Lord President Clyde in Brown who stated, “To create a cause of action, injuria and damnum are essential ingredients”. It is a fundamental principle: both injuria and damnum need be proved.

Injuria means “legal wrong”; damnum” means “loss”, “harm” or “damage”. In other words, a legal wrong which causes no loss, will not be entertained by the law as sufficient to ground an action of damages.

7.2.2 Applying the foregoing principle in the context of an action for damages for personal injury in the eyes of the law harmless injury is not compensatable. As was stated by Lord Hope of Craighead in Johnston (at para. 47):

“Damages are given for injuries that cause harm, not for injuries that are harmless.”

7.2.3 In short, the law does not allow compensation for harmless injury.

7.3 Consistency and Transparency

7.3.1 The underlying rationales for this rule (ie need of proof of damnum and injuria) are obvious but no less important for that. The law must set generally applicable, objective benchmarks against which claims for damages can be judged. Principles have to be of general application in order to achieve consistency. To treat “like cases alike” is considered to be one of the basic hallmarks of the legal system of a free society subscribing to the rule of law. The setting of objective criteria for a pursuer to fulfil – like proof of a recognisable injury or quantifiable patrimonial loss, promotes both consistency and transparency.

7.3.1 In its present form the Bill is neither consistent nor transparent. In the first place, the Bill does not treat like cases alike: for it allows one particular type of pursuer, someone who has an asbestos-related “non injury” to recover damages, while pursuers in other cases cannot. Examples of such cases are provided in paragraph 8 of this paper. The removal of the objective test of proving harm or loss is thus quite arbitrary and exceptional. But whereas a rational argument can be made for relaxing the rules of proof in cases of personal injury (such as has been done by removing the need for corroboration where none is available) that
rationale does not apply in a case where the pursuer has not suffered any recognisable injury. The rationale for the Bill could be applied to many classes of claimant. In the second place, the Bill is not transparent because it accepts that the standard common law principles of the law of delict will continue to apply (s1(4) of the Bill), but requires the court in effect to call black “white”.

7.4 Practicality, Restrospectivity and Human Rights

7.4.1 Another fundamental principle of justice, grounded in common sense, is practicality: compliance must be possible. The addressee of a particular measure must be able to understand it and to regulate his conduct accordingly. From this rationale has grown the general principle that legislation ought not to be retrospective: no one ought to be punished tomorrow for doing what was legal today.

7.4.2 If the Bill were to become law, not only are employers and their insurers effectively hit with the body blow of being held liable for exposing employees to dust that does not cause the employee any recognised harm; they are then similarly hit with a knock-out: their liability for this non-injury will extend indefinitely both to the past and into the future.

7.4.3 In FOIL’s view there is a compelling argument that the proposed legislation is outwith the legislative competence of the Scottish Parliament and that it would be unlawful for the Parliament to pass the Bill. The following statutory framework should be borne in mind, viz:–

(a) Scotland Act 1998, Section 29(1) provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(b) Section 29(2)(d) of the Scotland Act makes it clear that an Act of the Scottish Parliament which is incompatible with any of “the Convention rights” is outside its legislative competence.

(c) By reference to Section 126(1) of the Scotland Act and Sections 1 and 21 of the Human Rights Act 1998 the Convention rights straddle Articles 2 to 12 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms agreed by the Council of Europe at Rome on 4th November, 1950, as it has effect for the time being in relation to the United Kingdom (“the Convention”).

(d) Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The Scottish Parliament is a public
authority for this purpose (cf Adams v. Scottish Ministers 2003 SC171, para. 10 and 11).

(e) Article 6(1) of the Convention makes it clear that in the determination of civil rights and obligations everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law.

7.4.4 The European Court of Human Rights in Strasbourg has made it clear that rights enshrined in Article 6 guarantee due process in the determination of civil rights and obligations and support for the rule of law. By allowing a very small section of the population to be put in a special position of being entitled to damages contrary to the principle of Scots law that there must be a concurrence of injury and harm, the Bill, if passed, will deny defenders a right to a fair hearing under Article 6. There would therefore be inequality of arms in favour of a very small section of the population. The Bill, if passed, would not be compliant with Article 6 and would be incompetent under Section 29 of the Scotland Act and unlawful under Section 6 of the Human Rights Act.

7.4.5 The Scottish Government should be aware that the jurisprudence of the European Court of Human Rights in Strasbourg on retrospectivity has so developed that in the words of Lord Rodger of Earlsferry “What were formerly nothing more than rules of interpretation have become fundamental principles of our law.”

Furthermore, we note that in his speech in A. v. The Scottish Ministers 2001 SLT 1331 (Judicial Committee of the Privy Council) Lord Clyde highlighted the concerns expressed by the Strasbourg court on retrospective legislation. It is apposite to highlight Lord Clyde’s comments at paragraph 72:

“The Strasbourg jurisprudence does not readily admit the propriety of retrospective legislation. It requires that the reasons for such a course must be treated “with the greatest possible degree of circumspection” (The National & Provincial Building Society v. United Kingdom (1997) 25 EHRR 127, 181, para. 112). The point was summarised in Zielinski v. France (2001) 31 EHRR 19 in these words at para. 57:

“The court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the

The notion of fair trial enshrined in article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute."

The question is whether in the present case there were compelling grounds of the general interest."

There are currently many pleural plaques cases sisted in the Court of Session pending the House of Lords' decision in Johnston. We do not believe that the Scottish Parliament should interfere with the way in which the Court of Session determines these cases.

In our view there is no compelling case on grounds of general interest for making the proposed legislation retrospective. It follows that in our view the proposed legislation is not compliant with Article 6. It would therefore be incompetent under S29 of the Scotland Act. Furthermore, for the Scottish Parliament to pass the proposed legislation would be unlawful under S6 of the Human Rights Act.

7.4.6 If the Bill is passed in our view considerable additional litigation with disproportionate expense is likely to ensue.

7.5 Further Specific Undesirable Consequences Flowing from the Bill

(a) Time would begin to run from the time the claimant was informed of the presence of plaques and he would require to commence litigation within three years, even if he preferred to wait to see if a more serious disease manifested.

(b) The process of litigation itself is a source of stress which would require the claimant to be exposed to information about the worst that could happen.

(c) There is a risk of claims farmers seeking to engender claims by inviting individuals to undergo CT scanning as a precursor (which in itself can create dangers).

(d) The ability to claim a final award is one that which might lead to the claimant seeking to gamble on his own future for the benefit of receiving modest additional damages.

(e) Litigation expenses in this area are disproportionate.

(f) In the event that the Bill is passed there is a likelihood that those resident in England and Wales but not entitled to claim compensation
under English law will seek to find tenuous connection to found jurisdiction in Scotland. This will in turn compound litigation expense.

7.6 **Funding**

The financial burden of meeting such claims and the inevitable litigation which will ensue is one which will be borne ultimately by society at large, either through increase in insurance premiums, or where the Governments are successor to nationalised industries through Government funding.

8. **Examples of Unjust Consequences Flowing from the Bill**

8.1 As highlighted above, condition specific legislation will inevitably result in inconsistency of our private law which, in turn, will discriminate against categories of persons who through third party fault are also placed in a situation where they are at risk of developing an injury or disease at some time in the future. We think it would be helpful to illustrate this with some examples.

8.2 Someone exposed to radiation through the fault of another may be worried about developing cancer. In the event that cancer does develop the individual in question would have a perfectly good claim for damages against the wrongdoer and, given the breadth of the concept of *solatium*, the award would take into account all aspects of pain and suffering, loss of amenity and loss of expectation of life endured by the victim.

8.3 Someone negligently exposed to excessive noise by a wrongdoer may be at an increased risk of suffering hearing impairment. Until such time as the impairment manifests itself there is no harm and no loss. The individual may be worried about suffering hearing loss in the future but until such time as this loss is experienced there is no entitlement to compensation.

8.4 Someone may sustain symptomless degenerative changes in the spine. Such changes may well cause anxiety about the future but until the changes produce symptoms there is no harm. Such changes may well cause anxiety about the future but until the changes produce symptoms there is no harm.

8.5 The foregoing illustrations demonstrate the inconsistencies involved. Why should one category of persons worried about a symptomatic injury or disease developing in the future be entitled to compensation to the exclusion of others? This produces inconsistency, anomaly and, in our submission, injustice. We do not believe that such a situation reflects well on a legal system. The reputation of Scots law could in our view be damaged by the passing of this Bill.
8.6 Further anomalies/injustices could arise within the category of persons negligently exposed to asbestos in the event that the Bill is passed. It is important to emphasise that the fundamental cause of anxiety in such cases is not pleural plaques *per se* but the original exposure to asbestos dust. The plaques merely evidence the exposure. A situation could easily exist in which someone with minimal exposure to asbestos who has plaques is worried. In the event that the Bill is passed such an individual would be entitled to compensation. On the other hand, someone who has endured very heavy exposure to asbestos dust over very many years, and does not have the presence of plaques but is worried, would not be entitled to compensation. By virtue of the *Johnston* decision both individuals in these examples would receive full and proper compensation in the event that they develop actual symptomatic asbestos related disease. In other words the *Johnston* decision produces a fair and consistent result.

9. The Fiction of “Lost” Compensation

9.1 It is noted that at paragraph 12 of the Regulatory Impact Assessment the Scottish Government acknowledges that, if it were to take no action, people with pleural plaques would be able to raise an action for damages if they develop a more serious asbestos related condition. However it is contended that such damages would not compensate them for having pleural plaques or for the anxiety suffered following a diagnosis of pleural plaques. This view is also expressed in the Policy Memorandum which accompanied the Bill (at paragraphs 11 and 24).

9.2 In our respectful submission the Scottish Government’s view on this point is incorrect. As previously highlighted the risk of sustaining an injury is not compensatable. Worry associated with such risk is not compensatable. However, in the event that someone should develop an actual harmful injury through the fault of another the damages awarded by the court will take account of the worry. In this context we would respectfully refer to the comments of Lord Scott of Foscote in *Johnston* at paragraph 66:

“So, anxiety simpliciter cannot constitute the damage necessary to complete the tortuous (ie delictual) cause of action; but if there is some such damage the fact of the anxiety can enhance the amount of damages recoverable.”

9.3 Accordingly, in the event that someone who has been exposed to asbestos dust, has plaques and is worried about the small risk of developing asbestos related disease and goes on to develop such disease, the damages awarded will take account of the earlier worry. As previously highlighted *solatium* in Scots law is a broad concept
encompassing all aspects of pain and suffering, loss of amenity and loss of expectation of life.

10. The Scottish Law Commission

At the very least it is FOIL’s view that before embarking on condition specific legislation which radically alters the principles of the law of delict, the Scottish Government should obtain a detailed analysis, report and recommendations from the Scottish Law Commission.

11. Conclusion

11.1 FOIL acknowledge that the Bill is a well intentioned attempt by the Scottish Government to provide compensation for a certain group of persons wrongfully exposed to asbestos dust, who on all available expert medical evidence have not sustained any harmful injury or impairment, but are anxious about a very small risk of developing asbestos related disease at some time in the future.

11.2 For all the reasons set out in this paper FOIL believe that the Bill will cause many problems, create injustice, and have deleterious consequences for society as a whole.

11.3 We would urge the Scottish Government to withdraw the Bill, or at the very least suspend further procedure pending a detailed analysis, report and recommendations from the Scottish Law Commission.

11.4 We would reiterate that in accordance with existing legal principles any person who suffers actual harmful injury or disease through the fault of another is entitled to receive full damages which will be a sum of money determined by the court that puts him in the position that he would have been but for the injury which he has suffered. Some will rightly observe that no money can compensate for loss of health or presence of mind. That is true on one level but the law, like life, is imperfect. It cannot undo what has been done. It can only compensate in money. The award of damages for solatium for harmful injury encompasses pain and suffering, loss of amenity and loss of expectation of life.
RESPONSE BY FORUM OF INSURANCE LAWYERS (FOIL) (SCOTLAND)

TO

THE SCOTTISH GOVERNMENT CONSULTATION PAPER -

Partial Regulatory Impact Assessment on a Proposed Bill to Reverse House of Lords Judgement in Johnston v. NEI International Combustion Ltd.
Although the House of Lords Judgment in *Johnston v. NEI Combustion Ltd* of 17th October 2007 is not legally binding in Scotland, it is extremely persuasive, given that two highly respected Scottish Judges (Lords Hope and Rodger) concurred with the English Law Lords that there was no actionable damage in these cases reflecting the long established Scots Law principle that in order for an action to succeed, there must be a concurrence of damnum and injuria. The damnum/damage must be more than minimal. Lord Rodger referred to the Scottish case of *Brown v. North British Steel Foundry* where it was held “the mere possibility of damnum will not found a claim for reparation”.

Lord Hope stated: “No action lies for a wrong which has not resulted in some element of loss, injury or damage of a kind that was reasonably foreseeable and for which the claimants can sue” and “damages are for injuries that cause harm, not for injuries that are harmless.”

The intention of the Scottish Parliament is therefore to entitle pleural plaques sufferers to damages despite not having suffered harm, so making this group an exception to the normal rules and principles of Scots Law. Indeed, the Scottish Parliament seeks to extend this exception to individuals suffering from asymptomatic pleural thickening and asbestosis.

As such a fundamental change to the law of negligence may have far reaching consequences, we are firmly of the view the Scottish Parliament should seek the advice of the Law Commission of Scotland.

There are a number of reasons of policy identified by the Court of Appeal in England in the pleural plaques test cases as to why it is undesirable that the development of pleural plaques should give rise to a cause of action –

i) On discovery of the existence of pleural plaques a claimant will be advised that he should bring a claim in order to protect his position, even if he would not otherwise wish to do so unless and until he developed symptomatic disease.

ii) Bringing legal proceedings is stressful. It will result in the claimant’s attention being drawn to all the possible consequences of exposure to asbestos and may well create or augment the anxiety for which compensation will be claimed.

iii) There is a danger that those, such as claims managers, who make a business out of litigation, will encourage workers who have been exposed to asbestos to have CT scans in order to see...
whether they have pleural plaques for the sole purpose of bringing claims for compensation. Such a practice will tend to create stress and anxiety where none exists.

iv) Some claimants will be tempted to claim a final award, thereby, in effect, gambling, to the possible prejudice of themselves and their families, that they will not contract an asbestos-related condition.

v) The costs of litigation in cases such as those before us tend to be disproportionate to the damages recoverable.

vi) It is unjust that the right to recover damages should depend upon the fortuity of whether or not the particular claimant has developed pleural plaques.

This approach is supported by medical experts such as Professor Anthony Seaton who in an article in the Scotsman Newspaper in the days after the Judgement advised MSP’s to scrutinise the scientific issues surrounding pleural plaques as closely as the Law Lords did. Indeed he emphasized that pleural plaques in themselves imply no risk of other disease, they simply indicate that an individual has been exposed to asbestos. They do not develop into cancer and mesothelioma, nor do they interfere with the function of the lungs. He explained the dichotomy for doctors seeing patients with pleural plaques – on the one hand giving reassurance about their condition whilst on the other hand being obliged to advise them to consult a lawyer – “a mixed message with the obvious consequence of causing anxiety”. He pointed out the main beneficiaries would be lawyers and expert witnesses such as himself. He went on “I believe we have better things to do to prevent real diseases”.

Lord Rodger of Earlsferry in the House of Lords also touched on another policy issue – the matter of workers all exposed to asbestos where only some developed pleural plaques. Lord Rodger illustrated the point by identifying two individuals with similar exposure to asbestos. Both are anxious in relation to the risk of developing asbestos related disease in the future. If one of those individuals has pleural plaques but the other has not, should the former be entitled to damages? The anxiety felt by both men is the same. Lord Rodger said that would be an illogical result.

It was explained to their Lordships that a plaque is the body’s physiological response to the presence of foreign fibres within the lung – the body surrounds them with fibrous tissue forming a plaque – and it is only those fibres which are not swept up which may go on to cause more significant asbestos diseases.
If that is indeed the case, then in the analogy given by Lord Rodger of the two individuals with the same degree of exposure to asbestos, it should be the one who does not have plaques who should be more anxious, and is more likely to go on to more specific asbestos related disease such as mesothelioma.

For these reasons it remains our view that damages in asbestos related claims should be restricted to situations where the claimant does in fact suffer harm. This also means there is no requirement to legislate in order to deal with situations where an individual may have been diagnosed with asymptomatic asbestosis or asymptomatic pleural thickening. Legislation seeking to do so again clearly seeks to reverse the long established law of negligence in Scotland. Maintaining the status quo, removes the illogicality of some individuals receiving damages, and others not, purely on the basis of a diagnosis made by CT scan.

The concern at diagnosis goes beyond the fact that pleural plaques can only be picked up by CT scan, and unless it is identified during other medical procedures, will only be diagnosed as a consequence of the actions of claims farmers.

There is a concern that allowing damages in respect of pleural plaques, asymptomatic asbestosis and asymptomatic pleural thickening, will in fact prejudice the position of claimants. As highlighted by the Court of Appeal in the cases of Rothwell and Johnston, claimants may well be tempted to seek a full and final award, as opposed to provisional damages. This in effect is a gamble on their part that they will not contract a more serious asbestos related condition, or that their condition will not worsen significantly.

Turning to the Partial Regulatory Impact Assessment itself, there are a number of matters which arise. The rationale for Government intervention is set out at paragraphs 10 and 11. Concern is raised in relation to any potential award for anxiety following a diagnosis of pleural plaques. This comes back to the fact that anyone exposed to asbestos, whether or not they have any diagnosis of pleural plaques, pleural thickening etc, may well be anxious. By seeking to legislate to allow awards of damages for anxiety for some individuals exposed to asbestos but not others defeats the whole purpose of the legislation. The fact that claims are raised if someone goes on to develop asbestosis, involves awards of damages being made. There is nothing to suggest that awards have not included, or could not include, an element of take account of the anxiety caused as a result of worry about developing asbestos related conditions, before any condition does arise.
OPTIONS

Sectors & Groups Affected

It is accepted that by not legislating, and therefore allowing the Scottish Courts to follow the House of Lords Judgment, claimants with asymptomatic pleural plaques would not recover damages. This would reflect the present law of negligence in Scotland. We would support this approach. To do otherwise would allow an exceptional group of “worried well” to recover damages despite having suffered no harm. In addition, it would leave those fully exposed to asbestos without evidence of plaques unable to recover damages. In addition, many of the employers/former employers are no longer in existence. Sometimes it is impossible to trace insurance cover for these entities.

Benefits

There is no doubt that by not legislating, those who would require to make payment in respect of claims, will benefit. There would be savings in relation to the damages, but also considerable savings in relation to expenses paid to solicitors. The benefit of legislating will be that claimants with pleural plaques will again be able to recover damages, a practice that grew up over several years when payments made were initially small, with little or no solicitors involvement. Laterally the bulk of these cases were litigated with solicitors costs often equaling or exceeding the damages payments. The lawyers involved in this litigation will also benefit.

Costs

By not legislating the individuals with pleural plaques will not receive damages. They will only be in a position to raise claims if they develop a harmful injury as a consequence of an asbestos related condition. There is a suggestion that even those who do go on to develop a more serious condition are losing out on the basis that payments in respect of a serious condition such as asbestosis and/or mesothelioma do not recognise anxiety suffered by the person from the time of diagnosis of pleural plaques. The factual position is that the diagnosis of pleural plaques is often made at or around the time of the diagnosis of the serious condition. In any event the law of Scotland does not presently award damages for anxiety alone.

It is again the position that people exposed to asbestos are going to be anxious whether or not they have pleural plaques.

There are obvious costs which will arise if legislation is introduced to prevent the House of Lords Judgment being adopted in Scotland. It is unclear as to what the level of damages will be if
legislation is introduced. If the damages are as they were prior to the Judgment, then the only additional costs which may arise are as a result of an increase in the number of workers previously exposed to asbestos who have CT scans carried out to establish whether or not they have pleural plaques. This may well result in an increased number of claims with the obvious costs involved. It is also the position that individuals who present to their General Practitioner and claim to be anxious in relation to asbestos exposure may be referred for a CT scan. That will have an obvious effect of increased costs to the health service and increase risk to patients as CT scans are not without their own risks (see COMARE 12th Report [Committee on Medical Aspects of Radiation in the Environment].

Turning to the figures themselves there is a suggested average settlement in terms of damages of £8,000. The paper at paragraph 24 suggests that Defender’s legal costs are of a similar order. It is unclear where this understanding came from, but it is more realistic to suggest a figure of approximately £6,000.

In addition to the damages and the Defender’s costs, there are of course the claimants costs which may well be in the region of £8,000. A typical pleural plaques case which is litigated will therefore have a total cost in the region of £20,000 to £25,000. If there are 630 claims outstanding, then the cost may well be around £13,860,000.

200 actions raised on an annual basis may well involve a total cost, including expenses, of £4.4m.

Clearly if claimants are prepared to settle on a provisional basis against the background that they may suffer an injury in the future due to one of the serious conditions, then the figures will reduce. In those cases the total cost may be in the region of £16,000.

One further possible implication of the Scottish Government legislating is that individuals who previously would have raised their action in England, are likely to seek to raise proceedings in Scotland if legislation is introduced here but not in England. We are likely to see a significant increase in forum shopping. Claimants who may have had minimal exposure in Scotland, and much greater exposure in England, will be entitled to raise their claims in the Scottish Courts. The numbers involved cannot readily be estimated at this stage. It has to be borne in mind that the population of England is approximately ten times greater than Scotland. If only a fraction of those claims can be raised in Scotland, this will still have a significant impact on the total costs facing the Insurance industry and also numerous Government Departments.
Given the uncertainties in relation to the costs, there is merit in seeking to have in place some form of scheme which would govern the appropriate levels of awards and legal costs. This would also hopefully result in a reduction in terms of the numbers of cases which are litigated. This will have an obvious saving to the parties ultimately liable for payments, in terms of legal costs. A figure of £10,000 in respect of full and final damages is suggested. A figure in relation to a provisional award of £2,500 is appropriate.

Possible Wider Implications of House of Lords Judgment

The matter of pleural thickening and asbestosis has been considered at an earlier stage. The factual position is that asbestosis is a clinical condition and requires a clinical diagnosis. Fibrosis may well be seen on CT scan. It is for a chest physician however to provide the diagnosis of asbestosis setting out the extent of any disability or impairment suffered. Without a disability, there should not be a diagnosis of asbestosis.

There is a suggestion that a person with a diagnosis of asymptomatic asbestosis or pleural thickening has the worry of possible very serious disease such as mesothelioma plus the worry that whichever asymptomatic condition they suffer from will itself progress. The Partial Regulatory Impact Assessment suggests that anxiety will exist unless that individual can be told categorically that their condition is non progressive. This highlights the illogicality in seeking to allow damages in circumstances where individuals have pleural plaques, asymptomatic asbestosis and/or asymptomatic pleural thickening. There is of course a very small risk that these individuals who may have been exposed to asbestos go on to develop mesothelioma. There is also a risk that an individual exposed to asbestos but who does not have any of the conditions, will also go on to develop mesothelioma. Any individual who has pleural plaques will have been advised by medical practitioners that it is simply a marker of asbestos exposure, which in themselves do not increase the risk of any other disease developing. The risk of disease is as a consequence of asbestos exposure, not the existence of pleural plaques. This places a person with pleural plaques in exactly the same position as someone exposed to asbestos who does not have the condition.

If someone has asbestosis and/or pleural thickening then they currently can raise a claim and can seek damages. If they do not suffer from any symptoms, and there is medical evidence to suggest that their condition is non progressive, then these individuals are in exactly the same position as anyone else who has been exposed to asbestos. They too will be at some risk of developing mesothelioma. In order to avoid confusion and possibly increased litigation, retaining the status quo
in terms of the law of negligence in Scotland, will mean that those negligently exposed to asbestos, who suffer from symptoms as a consequence of an asbestos related disease will continue to be able to recover damages. This will avoid the illogicality of allowing individuals to receive damages if a CT scan picks up pleural plaques, fibrosis or pleural thickening, while former colleagues who have been equally exposed to asbestos, but who do not have these markings, are not in a position to recover damages.

There is also a concern that this proposed legislative change to the law of negligence in relation to asbestos litigation will require to be considered in relation to other potential areas.

There are claims regularly raised indicating that activities carried out in the workplace have caused degenerative change to joints and the spine which mean that at some point in the future a previously asymptomatic degenerative condition is going to become symptomatic. If an individual has degenerative changes in their spine, then they may well be anxious that at some point in the future they are going to suffer symptoms and require either to give up work or change their job.

The intent of the Scottish Government in legislating to allow individuals who have been exposed to asbestos and have developed pleural plaques to recover damages is to compensate them in relation to the anxiety faced that they may develop a more serious condition in the future. A similar scenario exists in relation to degenerative changes. Those changes could be picked up by CT scan or MRI. Those changes will be present despite the fact that no symptoms currently exist. There is a risk in the future however that the degenerative change will become symptomatic. This causes anxiety to the individual. Should that individual be entitled to raise a claim before they have developed any symptoms?

Another similar situation arises in relation to noise induced hearing loss. Everyone negligently exposed to excessive noise will suffer a damage to their hearing. That damage can be established by way of audiogram even before the individual is aware of the loss. In many situations the awareness of hearing loss will only occur in later years as a consequence of the natural aging process which in itself causes hearing loss. An individual who has their hearing assessed before being aware of any loss, can be advised that a hearing loss already exists which will become more significant in due course. By applying the same rules to this situation, it would allow individuals to raise proceedings and recover damages before they were aware of any hearing loss. That of course is not desirable. It is the case that the claims can only be raised once the individual is aware of the actual hearing loss.
One other obvious concern in relation to allowing damages for asymptomatic asbestosis and asymptomatic pleural thickening is what level of damages are appropriate. It may well be the case that the individual is not going to suffer any progression. If that is the case then should the award of damages be the same as for pleural plaques?

**Small Firms Impact Test**

There is little doubt that legislation to allow damages in relation to pleural plaques, asymptomatic asbestosis and/or asymptomatic pleural thickening is going to involve increased costs to the ultimate paymasters, be that insurance companies, limited companies, Government Departments etc. It is for the Insurance industry to attempt to quantify, but it is inevitable that the increased costs would require to be passed on to business and possibly individuals, by way of increase in premiums.

**Enforcements, Sanction and Monitoring**

The impact of any legislation is to be reviewed after 2 years. This is to determine whether legislation has had any unexpected consequences. Many of the expected consequences of the legislation have been raised in this document, and presumably will be raised by others. Any consequences within that two year period are therefore unlikely to be unexpected. Accordingly if there is a significant increase in the number of claims due to claims farmers, forum shopping etc this will inevitably have had significant additional cost to the parties liable for damages and expenses. That however is not unexpected given the concerns in reversing the long established law of negligence in Scotland.

**ON BEHALF OF FOIL**

**GLASGOW**

3rd April, 2008
INTRODUCTION

The Society has considered the Damages (Asbestos-related Conditions) (Scotland) Bill and has the following comments to make.

The Society supports this Bill.

Background

Political opinion in Scotland in terms of the SPICe briefing has "overwhelmingly favoured taking steps to ensure that the ...ruling ...is not followed in the Scottish Courts". Two debates have taken place in Westminster this year where most participating MPs spoke in favour of introducing legislation. The UK government has published a consultation paper in July 2008 asking whether changing the law of negligence would be appropriate.

On the other hand many in the insurance industry and some local authorities in Scotland have expressed their opposition to the proposals.

The Damages (Asbestos-related)(Conditions) (Scotland) Bill was introduced into the Scottish Parliament on 23 June 2008. The Justice committee was designated as the lead committee and will be taking evidence on the Bill.

The purpose of the Bill is to ensure that the decision in Johnston v NEI International Combustion Ltd [2007]UKHL 39 will not have effect in Scotland. The House of Lords ruled that asymptomatic pleural plaques (an asbestos-related condition) will not give rise to a cause of action because they do not signify damage or injury which is sufficiently material to found a claim for damages in tort (delict). This judgment is not binding in Scotland but is highly persuasive.

The conditions covered by the Bill are pleural plaques, pleural thickening and asbestosis. Pleural plaques are small areas of scarring on the membrane of the lungs. They do not generally cause any symptoms or disability and do not cause other asbestos related conditions. They are nonetheless an indicator that a person has been exposed to asbestos which in a small number of cases increases the lifetime risk of developing other asbestos related conditions such as mesothelioma. Pleural plaques are detected by X-ray or CT scan -- those given such a diagnosis report heightened anxiety at the increased risk of developing fatal asbestos-related diseases in some cases resulting in a recognised psychiatric illness.
In Johnston, Lord Rodger of Earlsferry explained that "For about twenty years pleural plaques have been regarded as actionable. Courts have awarded damages for them. Employers and their insurers have settled many damages for them. Even though this has not resulted in an unmanageable flood of claims, in the present cases the defendants and their insurers have taken a stand. They wish to close the gates by establishing that asymptomatic plaques are not actionable. They failed before Holland J, but succeeded in the Court of Appeal: [2006] ICR 1458. With the leave of the Court of Appeal, the claimants now appeal to this House."

The House of Lords confirmed it is a condition of liability to make reparation in delict that the pursuer has to have suffered harm because of the defender's wrongful conduct. The succinct Latin motto is damnum injuria datum. As Lord Rodger stated, "So far as the law of tort is concerned, it is trite that the "ground of any action based on negligence is the concurrence of breach of duty and damage" and that "a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible"...

This means that there must be both damnum or loss and injuria or breach of the duty of care before there can be liability in negligence. The risk of future damage or anxiety about such risk arising from a breach of duty is not in itself sufficient to justify compensation.

Professor Thomson in an article in the Edinburgh Law Review calls the case a "Paradigm of Orthodoxy" EdinLR Vol 12 pp259-261. He explains that "Johnston is a judicial response at the highest level to the difficulty of awarding adequate compensation under the current law of delict to the victims of asbestos... Johnston is a paradigm of orthodox legal reasoning..."

Yet there must be some sympathy for the claimants. Lord Hope expressed regret that the claimants "who are at risk of developing a harmful disease, and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy"

**The Society's position**

The Law Society of Scotland has considered the Bill and has the following comments to make:

a. The Society supports this Bill which will reverse the decision in Johnston v NEI International Combustion Limited.

b. It is competent for the Scottish Parliament to amend the law in this way. Similar statutory amendments have been made to the law on contributory negligence by the Law Reform (Contributory Negligence) Act 1945, the law of Limitation of actions by the Limitation Act 1963 and the introduction of strict liability across a range of issues especially in Health and Safety at Work.
c. 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.

However, it is important that this Bill is not seen as setting a precedent for other claimants with other conditions. In particular no similar legislation in the future should be introduced without proper full consultation. 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.

d. The Society has been asked to comment specifically on the issue of legal costs. There are relatively straight forward cases which would normally settle. For settlements of £9,000 - £11,000 damages the claimant's solicitors will receive £2,125 plus VAT, plus any outlays such as medical and records costs. If the case does not settle and is defended then typical costs might be around £7,000 or £8,000. This will only be paid to the Pursuer's agent if the case is won. The Society does not have detail on what the Insurer's pay their solicitors.

I attach a copy of the voluntary pre-action protocol in Scotland for disease claims (which details the steps to be taken in disease claims was agreed between representatives of claimants and insurers. This also contains information about the fees which apply in such cases.
VOLUNTARY PRE-ACTION PROTOCOL IN SCOTLAND

FOR

DISEASE CLAIMS
1. PURPOSE OF VOLUNTARY PROTOCOL

Diseases defined as:-

“Any illness, physical or psychological, any disorder, ailment, affliction, complaint, malady or derangement, other than physical or psychological injury solely caused by an accident or other similar singular event. A singular sensitising event may be considered appropriate for this Protocol.” (The definition is not restricted to “disease” occurring in the workplace.)

1.1 The Voluntary Protocol has been kept deliberately simple to promote ease of use and general acceptability.

1.2 The aims of the Voluntary Protocol are:-

- To encourage exchange of information at an early stage;
- To resolve disputes without litigation;
- To identify/narrow issues in disputes;
- To enable resolution of claims pre-litigation.

1.3 It also sets out good practice making it easier for the parties to obtain and rely upon information required.

1.4 The standards within the Voluntary Protocol are to be regarded as the normal, reasonable approach to pre-action conduct in relation to Voluntary Protocol cases.
2. INTRODUCTION

A Voluntary Pre-Action Protocol in Scotland

2.1 Unlike England and Wales, there is no statutory basis for a Pre-Action Protocol. The Protocol therefore will require to be entered into voluntarily on an individual case by case basis by mutual agreement. The claimant may request occupational health records before the letter of claim is issued. The request should contain sufficient information to alert the defender to a possible claim including the specific nature of the disease (i.e. asbestosis, noise-induced hearing loss, tinnitus, etc). A mandate (see Specimen Letter 2.1) should be provided authorising release of the occupational health records to both claimant and defender. Records should be provided within 40 days, at no cost to the claimant. It will be for the claimant’s Agent to intimate the claim in the general format of Specimen Letter A1 or A2 and invite the defender or Insurer to agree on a case by case basis that conduct of the pre-action negotiations are to be undertaken in terms of the Voluntary Protocol. When a defender or Insurer accepts a letter in the general format, Letter B will be sent within 21 days of receipt of claim. The claim will proceed in terms of the Voluntary Protocol in respect of the negotiations, disclosure, repudiation of liability, settlement and calculation of fees.

2.2 The Agent is encouraged to notify the Insurer as soon as they know a claim is likely to be made but before they are able to send a detailed letter of claim, particularly for instance, when the Insurer has no or limited knowledge of the events giving rise to the claim or where the claimant is incurring significant expenditure as a result of the disease which he/she hopes the Insurer might pay for, in whole or in part. If the claimant’s Agent chooses to do this, it will not start the timetable for responding.

2.3 The Voluntary Protocol, if entered into, will apply not merely to the personal injury element of a claim but also to other heads of loss and damage.

2.4 Where proceedings are raised in a Voluntary Protocol case, whether for the payment of damages or for the recovery of evidence and other orders under the Administration of Justice (Scotland) Act 1972, without prejudice to any existing rule of law, it shall be open to any party to lodge Voluntary Protocol communications for the sole purpose of assisting the court in any determination of expenses.
LETTER OF CLAIM

3.1 The Agent shall send to the proposed defender (or to his Insurer if known) a detailed letter of claim as soon as sufficient information is available to substantiate a claim and before issues of quantum are addressed in detail. The letter should ask for details of the Insurer if not known and the letter should request that a copy should be sent by the proposed defender to the Insurer where appropriate. If the Insurer is known, a copy shall be sent directly to the Insurer.

3.2 The letter of claim should include:-

(1) Details of the disease or illness alleged;
(2) Main allegations of fault;
(3) Present condition and prognosis;
(4) Outline of financial loss;
(5) Employment history and HMRC schedule (including job titles/duties carried out);
(6) Identity of records required;
(7) Identity of other potential defenders and their insurers if known;
(8) Chronology of relevant events, e.g. dates (period of exposure linked to employment).

3.3. Agents are recommended to use a standard form for such a detailed letter. Specimen Letter A1 or A2 can be amended to suit the particular case.

3.4. Sufficient information should be given in order to enable the Insurer to commence investigations and at least put a broad valuation on the claim.

3.5. The Insurer should acknowledge the letter of claim within 21 days of the date of receipt of the letter. The Insurer should advise in a letter in the terms of Specimen B whether it is agreed that the case is suitable for the Voluntary Protocol. If there has been no reply by the defender or Insurer within 21 days, the claimant will be entitled to issue proceedings.
3.6. Where liability (subject to causation) is admitted, the Insurer will be bound by this admission for all Protocol claims with a gross damages value of less than £10,000. The exception to this will be when, subsequently, there is evidence that the claim is fraudulent.

3.7. The Insurer will have a period of three months from the date of the Insurer’s response letter to investigate the merits of the claim. By mutual agreement the investigation period can be extended. Not later than the end of that period, the Insurer shall reply, stating whether liability (subject to causation) is admitted or denied and giving reasons for their denial of liability (subject to causation), including any alternative version of events relied upon and all available documents supporting their position.

3.8. The Insurers will disclose the period of employment as soon as the information is known to them and will appoint a lead Insurer. Details of other Insurers will be produced when known.

Documents

3.9. The aim of early disclosure of documents by the parties is to promote an early exchange of relevant information to help in clarifying or resolving the issues in dispute. If the Insurer denies liability, in whole or in part, they will at the same time as giving their decision on liability, disclose any documents which are relevant and proportionate to the issues in question, with reference to those identified in the letter of claim.

3.10. Attached at Appendix A are specimens, but not an exhaustive list of documents likely to be material in different types of claims. Where involvement of the Claimant’s Agent in the case is well advanced, the letter of claim should indicate which classes of documents are considered relevant for early disclosure. Where this is not practical, these should be identified as soon as practicable, but disclosure will not affect the timetable.

3.11. Where the Insurer admits primary liability (subject to causation) but alleges contributory negligence by the claimant, the Insurer should give reasons supporting these allegations and disclose the documents from Appendix A which are relevant and proportionate to the issue in dispute. The claimant’s Agents should respond to the allegations of contributory negligence before proceedings are issued.

Medical Evidence
3.12 A medical report will be instructed at the earliest opportunity, but no later than 5 weeks from the date the Insurer admits liability, in whole or in part, unless there is a valid reason for not obtaining a report at this stage. In those circumstances, the claimant’s Agents will advise accordingly and agree an amended timetable. Any medical report obtained and on which the claimant intends to rely will be disclosed to the other party within 5 weeks from the date of its receipt. By mutual consent, the Insurers may ask the examiner, via the claimant’s Agent, supplementary questions.

3.13 The claimant’s Agent will normally instruct a medical report, will organise access to all relevant medical records and will send a letter of instruction to a medical expert. The Insurer is encouraged to attempt to resolve issues by questioning the claimant’s expert, but may seek its own expert evidence, if appropriate. The claimant’s Agent will agree to disclosure of all relevant medical and DWP records. Any medical report on which the Insurer intends to rely will be disclosed to the claimant’s Agent within 5 weeks of receipt.

**Damages**

3.14 Where the Insurer has admitted liability (subject to causation), the Claimant’s Agent will send to the Insurer as soon as possible, a Statement of Valuation of Claim (the Statement of Valuation) together with supporting documents, and keep the Insurers advised of any potential delays.

**Settlement**

4.1 Where the Insurer admits liability (subject to causation) before proceedings are issued, any medical reports, supporting documentary evidence and Statement of Valuation obtained under this Voluntary Protocol on which a party relies, should be disclosed to the other party. Subject to expiry of the triennium, the claimant’s Agent should delay issuing proceedings for 5 weeks from the date the Insurer receives the Statement of Valuation to enable the parties to consider whether the claim is capable of settlement.

4.2 Where a Statement of Valuation with supporting documents has been disclosed under 3.13 and liability and causation are admitted, the Insurer shall offer to settle the claim based on his reasonable valuation of it within 5 weeks of receipt of such disclosure, serving a counter-schedule of valuation if they dispute the claimant’s Agent’s valuation.

4.3 The claimant’s Agent will advise Insurers whether or not their offer is to be accepted or
rejected, prior to the raising of proceedings and in any event within 5 weeks of receipt.

4.4 Where a Voluntary Protocol case settles, cheques for both damages and agreed expenses must be paid within 5 weeks of settlement, which will be either the date when the Insurer receives notification of settlement or, where a discharge is required, the date when the signed discharge is received by the Insurer. Thereafter, interest will be payable by any defaulting Insurer on any outstanding damages due to the claimant and/or expenses due and payable in accordance with the agreed settlement terms, at the prevailing judicial rate from the date of settlement until payment is made in full.

Time Bar

5.1 In the event that the Insurer repudiates liability or that the claimant rejects an offer in settlement, provided that proceedings are subsequently raised within a period of one year from the date of such repudiation or rejection, the date of raising proceedings will be deemed to be the date when intimation of the claim was made in terms of this protocol for purposes of prescription and limitation.

Litigation

6.1 In the event of litigation, the claimant’s solicitors will give the Insurers an opportunity to nominate solicitors to accept service, on behalf of their insured.
Dear Sirs (insurance company)

Re: Claimant’s Full Name
Claimant’s Full Address
Claimant’s Date of Birth
Claimant’s Payroll or Reference Number
Claimant’s Employer (name and address)
Claimant’s National Insurance Number

“We are instructed by the above named to claim damages in connection with

a claim for (specify nature of disease i.e. asbestos related pleural thickening).

The Claimant was employed by (insert name of employer) as (insert job description) from (date) to (date). During the relevant period of his employment he worked as (description of precisely where the claimant worked and what he did to include a description of any machines used and details of any exposure to noise substances)

The circumstances leading to the development of this condition are as follows:- (give a chronology of events)

Your insured failed to:-
(brief details of the common law and/or statutory breaches)

Our client’s employment history is attached. We have also made a claim against (insert name of the employer and their insurer, with reference, if known)

Enclosed are broad details of our client’s expected financial losses.

At this stage of our enquiries we would expect the undernoted documents to be relevant to this claim.

This is a claim which we propose should be handled in terms of the Voluntary Pre-Action Protocol for Disease Claims as agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers”.

Yours faithfully
Dear Sirs

Re: Claimant's Full Name
Claimant's Full Address
Claimant’s Payroll or Reference Number
Claimant's Employer (name and address)

“We are instructed by the above named to claim damages in connection with

a claim for (specify nature of disease i.e. asbestos related pleural thickening).

The Claimant was employed by you as (insert job description) from (date) to (date). During the relevant period of his employment he worked as (description of precisely where the claimant worked and what he did to include a description of any machines used and details of any exposure to noise substances)

The circumstances leading to the development of this condition are as follows:- (give a chronology of events)

Our client’s employment history is attached. We have also made a claim against (insert name of the employer and their insurer, with reference, if known)

Enclosed are broad details of our client’s expected financial losses.

This is a claim which we propose should be handled in terms of the Voluntary Pre-Action Protocol for Disease Claims as agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers.

You should acknowledge receipt of this letter, forward it to your Insurers and ask them to advise us within 21 days of the date of this letter whether the case is to proceed as a Voluntary Pre-Action Protocol Claim.”

Yours faithfully
Specimen Letter B

RESPONSE TO LETTER OF CLAIM

CLAIMANT’S SOLICITOR

Dear Sirs,

Re: Claimant’s Full Name

Claimant’s Full Address

Employer’s Name

“We are the Insurers of specify period - x - y and acknowledge your letter of ______. We confirm that this claim is to be/is not to be handled under the Voluntary Pre-Action Protocol for Disease Claims agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers.

We will notify you of our decision on liability (subject to causation) within three months of this date. If liability is denied, in whole or in part, we will write to you further in respect of documents requested by you as soon as is practicable.

We will notify you of other issues - gaps in cover/other insurers, who will be coordinating the handling, etc.

Yours faithfully
Dear Sir,

RE (Name and Address)
Date of Birth
Telephone No.
Nature of Disease

“We act on behalf of the above named in connection with a claim for damages in connection with a claim for (insert nature of disease).

We should be obliged if you would examine our client and provide a full and detailed report dealing with the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work, if relevant and giving a prognosis.

Please send our client an appointment direct for this purpose. Should you be able to offer a cancellation appointment, please contact us direct. We confirm we will be responsible for your reasonable fee.

We are obtaining the GP and hospital records and will forward them to you when they are to hand/or please request the GP and hospital records direct and advise that any invoice for the provision of these records should be forwarded to us. (Please provide details of GP and hospitals attended).

We look forward to receiving your report as soon as possible. If there is likely to be any unusual delay in providing the report, please telephone us receipt of these instructions.

When acknowledging these instructions, it would assist if you could give an estimate as to the likely timescale for the provision of your report and also an indication as to your fee.

Yours faithfully
APPENDIX A

STANDARD DISCLOSURE LISTS

WORKPLACE CLAIMS

(i) Accident book entry.
(ii) First aider report.
(iii) Surgery record.
(iv) Foreman/supervisor accident report.
(v) Safety representatives accident report.
(vi) RIDDOR report to HSE.
(vii) Other communications between defenders and HSE.
(viii) Minutes of Health and Safety Committee meeting(s) where accident/matter considered.
(ix) Report to DSS.
(x) Documents listed above relative to any previous accident/matter identified by the claimant and relied upon as proof of negligence.
(xi) Earnings information where defender is employer.

Documents produced to comply with requirements of the Management of Health and Safety at Work Regulations 1999 -
(i) Pre-accident Risk Assessment required by Regulation 3.
(ii) Post-accident Re-Assessment required by Regulation 3.
(iii) Accident Investigation Report prepared in implementing the requirements of Regulations 5.
(iv) Health Surveillance Records in appropriate cases required by Regulation 6.
(v) Information provided to employees under Regulation 10.
(vi) Documents relating to the employees health and safety training required by Regulation 13.
SECTION A - WORKPLACE (HEALTH SAFETY AND WELFARE) REGULATIONS 1992

(i) Repair and maintenance records required by Regulation 5.
(ii) Housekeeping records to comply with the requirements of Regulation 9.

SECTION B – PROVISION AND USE OF WORK EQUIPMENT REGULATIONS 1998

(i) Manufacturers' specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 4.
(ii) Maintenance log/maintenance records required to comply with Regulation 5.
(iii) Documents providing information and instructions to employees to comply with Regulation 8.
(iv) Documents provided to the employee in respect of training for use to comply with Regulation 9.
(v) Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems.
(vi) Instruction/training documents issued to comply with the requirements of Regulation 22 insofar as it deals with maintenance operations where the machinery is not shut down.
(vii) Copies of markings required to comply with Regulation 23. (viii) Copies of warnings required to comply with Regulation 24.
SECTION C – PERSONAL PROTECTIVE EQUIPMENT AT WORK REGULATIONS 1992

(i) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6.

(ii) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

(iii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7.

(iv) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7.

(v) Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9.

(vi) Instructions for use of Personal Protective Equipment to include the manufacturers’ instructions to comply with Regulation 10.

SECTION D – MANUAL HANDLING OPERATIONS REGULATIONS 1992

(i) Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i).

(ii) Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i).

(iii) Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii).

(iv) Documents relating to training in respect of manual handling operations and training records.

(v) All documents showing or tending to show the weight of the load at the material time.
SECTION E - HEALTH AND SAFETY (DISPLAY SCREEN EQUIPMENT)
REGULATIONS 1992

(i) Analysis of work stations to assess and reduce risks carried out to comply with the requirements of Regulation 2.

(ii) Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the claimant.

(iii) Documents detailing the provision of training including training records to comply with the requirements of Regulation 6.

(iv) Documents providing information to employees to comply with the requirements of Regulation 7.

SECTION F-CONTROL OF SUBSTANCES HAZARDOUS TO HEALTH
REGULATIONS 2002

(i) Risk assessment carried out to comply with the requirements of Regulation 6.

(ii) Reviewed risk assessment carried out to comply with the requirements of Regulation 6.

(iii) Copy labels from containers used for storage handling and disposal of carcinogenics to comply with the requirements of Regulation 7(2A)(h).

(iv) Warning signs identifying designation of areas and installations which may be contaminated by carcinogenics to comply with the requirements of Regulation 7

(v) Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7

(vi) Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7.

(vii) Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7

(viii) Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7

(ix) Documents providing information, instruction and training in relation to the
Personal Protective Equipment to comply with Regulation 7

(x) Instructions for use of Personal Protective Equipment to include the manufacturers’ instructions to comply with Regulation 7.

(xi) Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7.

(xii) Maintenance examination and test of control measures records to comply with Regulation 9.

(xiii) Monitoring records to comply with the requirements of Regulation 10.

(xiv) Health surveillance records to comply with the requirements of Regulation 11.

(xv) Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12.

(xvi) Labels and Health and Safety data sheets supplied to the employers to comply with the CHIP Regulations.


(i) Notification of a project form (HSE Fl 0) to comply with the requirements of Regulation 7

(ii) Health and Safety Plan to comply with requirements of Regulation 15.

(iii) Health and Safety file to comply with the requirements of Regulations 12 and 14.

(iv) Information and training records provided to comply with the requirements of Regulation 17.

(v) Records of advice from and views of persons at work to comply with the requirements of Regulation 18.
SECTION H - CONSTRUCTION (HEALTH, SAFETY AND WELFARE) REGULATIONS 1996

(i) All documents showing the identity of the principal contractor, or a person who controls the way in which construction work is carried out by a person at work, to comply with the terms of Regulation 4.

(ii) All documents and inspection reports to comply with the terms of Sections 29 and 30.
APPENDIX (2.1)

Application on behalf of a Potential Claimant
for use where a Disease Claim is being Investigated

This should be completed as fully as possible

Company:
Name:
Address:

<table>
<thead>
<tr>
<th>1</th>
<th>Full name of claimant (including previous surnames</th>
</tr>
</thead>
<tbody>
<tr>
<td>a)</td>
<td>Address now</td>
</tr>
<tr>
<td>b)</td>
<td>Address at date of termination of employment, if different</td>
</tr>
<tr>
<td>c)</td>
<td>Date of birth (and death, if applicable)</td>
</tr>
<tr>
<td>d)</td>
<td>National Insurance number, if available</td>
</tr>
<tr>
<td>e)</td>
<td>Location(s) where claimant worked</td>
</tr>
</tbody>
</table>

I authorise you to disclose all your records relating to me/the claimant to my solicitor and to your legal and insurance representatives.

Signature of Claimant

Signature of Personal Representative where claimant has died

………………………………………………………………………

………………………………………………………………………
Dear Sirs,

We are acting on behalf of the above named who has developed the following *insert disease*. We are investigating whether this disease may have been caused:

- *during the course of his employment*
- *whilst at your premises at (address)*
- *as a result of your product (name)*

We are writing this in accordance with the Protocol for Disease Claims.

We seek the following records:

*Insert details e.g. personnel/occupational health*

Please note your insurers may require you to advise them of this request.

We enclose a request form and expect to receive the records within 40 days. If you are not able to comply with this request within this time, please advise us of the reason.

Yours faithfully
PERSONAL INJURY DISEASE CASES - PROTOCOL FEES FROM

These fees apply to all types of disease claims.

The fees for claims intimated and dealt with entirely under the Protocol comprise the following elements:

1. Instruction Fee
   
   On settlements up to and including £1,500    £320
   On settlements over £1,500    £700

2. Completion Fee
   
   On settlements up to £2,500    25%
   On the excess over £2,500 up to £5,000    15%
   On the excess over £5,000 up to £10,000    7.5%
   On the excess over £10,000 up to £20,000    5%
   On the excess over £20,000    2.5%

NOTES -

1) In addition, VAT (on all elements) and outlays will be payable.

2) In cases including payment to CRU the protocol fee will be calculated in accordance with the following examples:

   (i) Solatium    £5,000
   Wage Loss    £5,000
   CRU repayment    £2,000
   Sum paid to Pursuer    £8,000

   In these circumstances the protocol fee will be based on £10,000 being the total value of the Pursuer’s claim.

   (ii) Settlement as above but repayment to the CRU is £6,000 and only £5,000 can be offset. Payment to the Pursuer is £5,000 and £6,000 to the CRU. The protocol fee will be on £10,000 being the value of the pursuer’s claim, as opposed to the total sum paid by the insurer - £11,000.

3) In cases involving refundable sick pay the protocol fee will be calculated by including any refundable element.

4) Fees calculated in relation to gross damages value of claim.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from the Scottish Trades Union Congress

1. Introduction

1.1. The STUC is Scotland’s Trade Union Centre. Its purpose is to coordinate, develop and articulate the views and policies of the Trade Union Movement in Scotland reflecting the aspirations of trade unionists as workers and citizens.

1.2. The STUC represents over 644,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy. Promoting safer and healthier workplaces is central to the STUC’s mission as is fighting for justice for those who have suffered injury or disease as a result of negligent employers.

1.3. The STUC very much welcomes the introduction of the Damages (Asbestos Related Conditions) (Scotland) Bill by the Scottish Parliament and welcomes the opportunity to make this written submission to the Justice 1 Committee.

2. Background

2.1. The STUC have supported asbestos groups in seeking these changes and have made previous representations to the Scottish Parliament. We supported the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill in the last session of the Parliament and welcomes past and present efforts by the parliament to tackle injustice for asbestos victims.

2.2. As an organisation the STUC recognises that exposure to asbestos in the workplace can result in psychological injuries as well as physical. We therefore welcome this Bill from the Scottish Government as we believe that this will right the injustice suffered by asbestos victims as a result of the House of Lords judgement in Johnstone v NEI International Combustion Ltd.

3. Origins of the Bill

3.1. Diagnosis of any asbestos related condition has a devastating effect on the victim and their families, irrespective if the injury or disease displays physical symptoms or not. The House of Lords judgement referred to above does not take into account the anxiety, stress and mental anguish that such a diagnosis places on the victims, many of whom describe the diagnosis as a life sentence,
not knowing when, or if, they may develop a fatal asbestos related condition.

3.2. For some families there is more than one diagnosis of pleural plaques, a reflection on the past industrial age where family members followed each other into shipyards, insulation and other heavy industries where the use of asbestos was widespread and the dangers well known by employers. In such cases some have developed mesothelioma, heightening the anxiety amongst other family members. Similarly, some sufferers witness former colleagues develop terminal diseases and wonder when it will be their turn. It is inconceivable that stress and anxiety to this extent may not be seen as worthy of compensation.

3.3. While recognising that pleural plaques does not cause mesothelioma or asbestos related lung cancer it does result of an increased risk of developing fatal conditions. Therefore we believe that it is right that all non-malignant asbestos related conditions are compensatable and that employers and their insurance who knew of the risks cannot walk away from their liability for negligent exposure to asbestos fibres.

3.4. The efforts of the insurance industry in challenging the decision that led to the House of Lords judgement ruling that victims of pleural plaques were not compensatable was the latest in a number of attempts to deny asbestos victims, and their families their rightful compensation.

3.5. The STUC remains concerned that insurers continue to challenge cases of asbestos related disease. The dangers of asbestos exposure were well known and documented throughout the last century but insurers continued to write policies and collect premiums from employers.

3.6. Therefore the STUC welcomes the Government proposals to ensure that the legislation be retrospective and agrees that this is the only way to ensure that the House of Lords judgement is completely overruled and does not leave any victims denied compensation.

4. **Alternative Approaches**

4.1. The STUC support the view of the Scottish Government that sufferers should be properly compensated and provided with clear information and support in relation to their condition, a role asbestos support groups carry out extremely effectively.

4.2. We disagree with the view that education of the condition should be the only approach and see this as another attempt by the industry and insurers to deny victims compensation,
4.3. We would have grave concerns of the Scottish Government took no action and we do not see this as an option.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from Meg Henderson

I accept that I’m entering this debate a little late, but I hope the committee will still agree to consider what I have to say. And my apologies in advance if it’s a bit long-winded, I finished a book yesterday and I’m still in writer mode.

Some years ago I wrote a book about Clydebank and the Asbestos issue naturally came into it. In the course of researching the book I had to learn a great deal about Asbestos-related diseases, but since then the subject has come considerably closer to home.

In the late 1950s my husband was an electrician in John Brown’s in Clydebank and in Fairfield’s in Govan. Over the years many men he knew have died of Asbestosis and each time he said “How in hell did I escape?” As a former medic who used to work with men affected with the full range of Asbestos-related illnesses, I used to silently add “As far as you know.”

Last year he had routine blood tests that showed a hormone our GP said “indicated something going on in his chest,” and a chest x-ray was indicated. This is medic-speak for Lung Cancer, but having little time for my former colleagues’ coy little euphemisms, I made him spit out the actual words. For the last five years, maybe longer, my husband had developed a dry cough when he lay down at night and when he exerted himself, he was also a bit breathless occasionally. Being a medic I had noted these symptoms, but he insisted he was just “getting on.” He comes, however, from a very long-lived and healthy line, his great-great grandmother lived to 116 and only died when a beam fell on her during a hurricane in Barbados – she was a plantation-owner. Anyway, we had just become grandparents for the first time, our son had just become a father, it wasn’t the time to visit this kind of fear on anyone, least of all my husband, who is one of life’s worriers. In my experience a trouble shared isn’t always a trouble halved, often it’s doubled or, depending on who it’s shared with, quadrupled. There seemed nothing to be gained from throwing this worry out there until and unless and until there was something to worry about. So I told him he should’ve had an x-ray but the request had slipped through the net, nothing to worry about, part of the usual routine etc.

It took a couple of weeks to have it done, and another couple for the result to come through, sleepless weeks of anxiety for me, as I re-noticed every symptom. When it was first suggested that the Lords decision would be overturned in Scotland, a member of the insurance industry remarked that we were now suggesting people should be compensated for anxiety. One day I intend paying him a visit to discuss with him the effects of living with even a few weeks of anxiety. Eventually I learned from the GP that there was no cancer present, but there were “areas of calcification consistent with exposure with Asbestos.” Had he, the GP wondered, ever been exposed to Asbestos? So there I was feeling incredibly grateful that he “only” had lung scarring,
though we don’t know yet the degree of the problem. And had he ever been exposed to Asbestos? Had anyone in shipbuilding or associated with it not been?

He worked mainly in the engine rooms of boats under construction, putting in junction boxes, points and lighting. At the same time the various pipes, hot water pipes, exhaust pipes, etc, were being lagged with wet Asbestos – the men called it “Monkey Dung”, I’d imagine there were reasons for that – and when it had dried and been smoothed off, Asbestos cloth was cut by hand and sewn over the layer of Monkey Dung. As this was happening he was working on, under and around the pipes, and while other areas were also sprayed with wet Asbestos. Different part of the boat were welded at different times, and when the sun shone through the gaps the Asbestos dust in the air was so thick, he says, “that it was like trying to shine a torch through smoke.” As part of a minimal attempt to keep the place tidy, men swept up, distributing the dust everywhere. These men were mainly deaf and dumb and, sadly, they were rarely addressed by their names, instead they were called “The Dummies”. It was a different age and the shipyards were harsh places for anyone to work in, but their deafness caused them no extra problems, the hearing couldn’t hear either because of the noise in the yards. Toilet facilities in the yards weren’t even basic, and there were no washing or canteen facilities either. The men who worked directly with Asbestos were called “The White Mice” because they were always coated in a film of dust, but everyone was to some degree, and they couldn’t wash it off. Because there was no canteen, they ate where they worked, covered in the dust, breathing it and eating it.

The Kings of the shipyards were the riveters, later welders, they knew it and so did everyone else. They were afflicted with that well known Scots condition, “a fine conceit o’ themselves,” and if you talk to those old guys now, you’ll find they are still afflicted with it! They spent their working day bent over their torches, inhaling the fumes. So, to prove that their employers cared about the welfare of their employees, this group was given a pint of milk a day on health grounds. At the same time they, and all the others, were being poisoned with Asbestos, though the effects had been known about from around 1880.

And now we discover from Dr Pamela Abernethy that Pleural Plaques are “a good thing.” Well, I don’t know about the rest of you, but I submit we stop mass screenings for and vaccinations against every known disease and, instead, send out teams of medics to give the populace a few concentrated whiffs of Asbestos dust. I also suggest that Dr Abernethy should be first in line. In fact, I’m rapidly coming to the conclusion that the people affected should be paying the insurers for this “good thing,” rather than seeking compensation from them. On a personal note, I have to say that I was shocked the other day to find a friend appearing for the insurers before you on Monday. I’m not enamoured of solicitors as a breed, but I know there are exceptions, and I have always considered that, being a man of integrity, morality and ethics, he gave them a good name. And, of course, business is business and all that, but you have to have some standards and I always
thought he had enough not to accept that particular shilling. Another pair of
blinders falls, as does our friendship, some things are truly unforgivable. I
have always felt his support for Partick Thistle masked a deeper failing than
knowing nothing about football.

So my family now faces whatever level of this condition my husband has at
the moment, and later. I know what’s up ahead, at best my immediate worry
about Lung Cancer has now changed to a long term one, and it changes the
dynamics of family life in ways you wouldn’t imagine. Our relationship as a
couple has changed, I’m now aware that I have to look after him, and so is he.
Of course, that happens in any marriage when one falls ill, but he didn’t, he
was given this by employers who knew they were doing it. I now have to make
sure he stays healthy and avoids colds, because chest infections are a real
worry now. For the same reason I make him avoid getting wet – he loves hill-
walking - and ensure that he eats properly instead of just when he feels like it,
that when he’s tired he rests, that the house is warm when we otherwise
might not have bothered putting the heating on. I can see that my son now
treats him differently, though he tries to hide it, his perception of his big strong
Dad has changed years before it should have and for reasons other than age.
These manifestations of anxiety, these changes in the way our family
operates, have never been considerations before and, because of what
caused them, I resent that they should be now.

And why give compensation? Well, in my experience the only time any
industry takes notice of how it treats its employees is when money is
surgically removed from them, to get them to sit up and take notice you have
to hit them in the wallet. That, unfortunately, is just a fact of life, and one of the
reasons for making them pay up in this case is as an example to others that
their actions, or lack of them, will cost them money. That is a great motivator,
perhaps the only one, as morality doesn’t count. And the men and women
affected have every right to be compensated for lung scarring caused by their
workplace conditions, just as they would for scarring of the face.

What I’ve described here is how it has affected us personally and it has
affected millions of others to differing degrees in ways they perhaps don’t
have the words to describe. But even so, words cannot adequately describe
the waiting game we all play, watching for the next symptom, and the next.
That is what life is now like for my family, and for all the others affected.
Pleural Plaques has been described as “a calling card for other illnesses.”
That’s absolutely accurate and every family in receipt of that calling card lives
in a state of chronic anxiety. Scotland’s politicians now have the opportunity to
make a stand and do the decent thing for every family involved. They should
take it.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Written submission from George Tomlinson

My problem is this – because I have not been a resident of the UK since 1984, I have therefore required a private medical/health insurance. I have had such a cover for about twenty years, my current premium for 87/88 being £4325.00.

When I was diagnosed with pleural plaques about ten years ago, it occurred to me that such a diagnosis could jeopardise my insurance. I have sought legal advice regarding this, also for about ten years, culminating eventually in an arranged meeting with Mr Stephen Bell, Advocate, on the 18th September.

To be aware at my age (66) that because of my exposure to asbestos, and through no fault of my own, that I or my family may have to find the cash to pay for any treatment required, should I, for example, be involved in an accident, have a heart attack or develop mesothelioma causes me a great deal of stress. From experience I know that the first question asked by the ambulance crew or hospital is “How do you intend to pay”. I would like to be able (or my family) to answer with confidence. Substantial hospital bills would require selling the family home (mesothelioma e.g.). Also the premium I pay, 5000/6000 next year for sure, could be money down the drain.

If I don’t receive assurance from Mr Stephen Bell that my present insurance is adequate, or that I have recourse via my ex-employer’s insurers, would they, i.e. my ex-employer’s insurers, provide cover, or at least recommend an insurance company willing to take me on?

Am I entitled to compensation for legal costs?
I reply to your request for my views on the bill which aims to restore the right to damages for pleural plaques. As a physician who has specialised in asbestos related diseases of all types for more than 25 years and who has treated thousands of patients with mesothelioma and lung cancer, I should like to draw the attention of Members of the Scottish Parliament to some points.

1. Pleural plaques are pathological change in the membrane which surrounds the lung, caused by inhalation of asbestos fibres.

2. The plaques themselves usually do not cause symptoms although they may cause discomfort, pain and breathlessness in exceptional cases when they are very extensive.

3. Pleural plaques are detected on chest x-ray in less than 1% of the general population and when they are present enquiry almost always reveals a history of asbestos exposure.

4. People with pleural plaques are at risk of developing diffuse pleural thickening causing breathlessness, asbestosis of the lungs causing breathlessness, lung cancer which is usually fatal and mesothelioma, a cancer which can occur in the lining of the chest cavity or in the lining of the abdominal cavity which is almost invariably fatal, usually within 12 to 18 months of the first symptoms.

5. 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.

6. 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.

7. 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.
Justice Committee

Damages (Asbestos-related Conditions) (Scotland) Bill

Supplementary written submission from Clydeside Action on Asbestos

Correspondence to Clydeside Action on Asbestos from consultants who believe pleural plaques merit compensation.
Phyllis Craig
Senior Welfare Rights Officer
Clydeside Action on Asbestos
246 High Street
Glasgow
G4 0QR

Dear Ms Craig

PLEURAL PLAQUES

Thank you for your letter of the 2nd of July 2008 regarding this issue. I do apologise for the delay in replying, however your letter arrived just before my summer holiday and I have not been able to get round to replying before now.

As you no doubt know I am very well versed in the issues regarding pleural plaques. I have been dealing with asbestos related lung disease for over twenty-five years and for over twenty years I have been preparing medical reports for the courts. Many of these have been pleural plaque cases and I have seen hundreds of such patients. The issues are surprisingly complex. There is of course no doubt that having pleural plaques is in the vast majority of cases not the cause of any physical symptoms, however as you say patients can and do become anxious that they may develop a more serious asbestos related problem. These are not caused by the development of the plaques merely the plaques are an indicator that the subject has had asbestos exposure and is therefore more likely to suffer further asbestos related problems. I think one of the big difficulties is that the prominence and extent of the plaques is only very loosely correlated with the likelihood of developing further asbestos related disease and asbestos exposed individuals can and do develop asbestos related problems particularly mesothelioma even if they do not have plaques. As I understand it part of the legalistic problem is that because the plaques cannot be readily "seen" by the sufferer they are not accepted as being a constant reminder of the problem.

The stance I have always taken with pleural plaques is that in this enlightened age when people are much more aware of health issues particularly asbestos related problems than they were in the past then to be told that one has a marker of potential illness such as this is a cause of anxiety worthy of compensation particularly as the poor unfortunate sufferer can do absolutely nothing about it. This is unlike other markers of disease such as a raised cholesterol which can be modified by medication or even smoking which of course can be stopped.

Contd....
2. PLEURAL PLAQUES

I have always said that pleural plaques should be regarded as an injury and I continue in that view, however I do accept that that is not a universal opinion among chest physicians. I strongly support the reintroduction of the ability to obtain compensation for pleural plaques in Scotland.

I am more than happy to provide any further information to whoever might request it and I would be happy to be involved with the parliamentary process if I can be of any help.

Yours sincerely

Dr Allan Henderson
Consultant Physician
Dear Ms Craig

Pleural plaques

Pleural plaques are areas of thickening of the lining of an individual's chest as a result of past exposure to asbestos. In the majority of cases this causes no physical symptoms. It may occasionally cause a grating discomfort, even pain. It never causes breathlessness and is not premalignant.

However, many individuals with pleural plaques are aware of the other potential consequences of past asbestos exposure. Indeed this is often at first hand with past workmates and colleagues, if not family members, succumbing to diseases such as mesothelioma, lung cancer, asbestosis. Hence, 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.

Hence, I believe that individuals with a diagnosis of pleural plaques should resume the right to pursue a civil claim for damages.

Yours sincerely

COLIN SELBY
Consultant in Respiratory Medicine
Dear Phyllis,

I understand that the previous entitlement to civil damages for those diagnosed with pleural plaques related to asbestos exposure has been overruled by the House of Lords. I understand that the Justice Minister in Scotland has introduced a bill to overturn the House of Lords decision.

In my experience imparting the diagnosis of pleural plaques to patients who are aware that they have been exposed to asbestos in the past has engendered worry and distress. This is due to a greater awareness in the public’s mind of the association between asbestos exposure and the subsequent development of mesothelioma or other asbestos related disorders.

I would like to fully support the Bill to reverse the House of Lords ruling which is being proposed by Kenny McAskill, Justice Minister and that those diagnosed with pleural plaques should continue to have a right to pursue civil damages.

With kindest regards,

Professor John Welsh
Professor in Palliative Medicine
SCWIAC
4th August 2008

Ms. Phyllis Craig
Senior Welfare Rights Officer
 Clydeside Action on Asbestos
245 High Street
Glasgow, G4 0QR.

Dear Ms. Craig,

Thank you for your recent letter regarding whether or not civil damages should be paid to those diagnosed with pleural plaques.

Developing pleural plaques is certainly an indication that the patient has been exposed to asbestos although it does not give an indication of the extent of that exposure and this will vary greatly in individual cases. Pleural plaques are not thought to lead directly to any of the other benign varieties of asbestos induced pleural disease nor be a pre-cursor of malignancy. However persons with plaques can develop diffuse pleural thickening and can be associated with an increased incidence of mesothelioma (due to the previous exposure). There is some evidence they are at increased risk of developing mesothelioma as well. There is also some evidence that they may have an increased risk of developing bronchial carcinoma but again the extent of this risk will depend upon the degree of exposure experienced rather than the presence of pleural plaques.

There is therefore evidence that although pleural plaques themselves will not cause any problem, that due to the asbestos exposure they are at increased risk of developing asbestos related diseases that will cause them harm. This will no doubt generate worry and anxiety. I feel that the previous principle of paying a small amount of compensation for pleural plaques associated with signing an agreement that no further payment will be made in the development of more serious disease was wrong. In this way some patients who did not develop any harm (apart from anxiety) from the asbestos related condition, gained compensation while others who then developed more serious diseases from the asbestos did not get adequate compensation.

I would therefore say that those with pleural plaques should be able to claim for increased worry and anxiety regarding developing asbestos related diseases in the future, but they should not be made to sign a disclaimer saying that they will not claim again if they develop one of the more serious asbestos related conditions from which they are at increased risk. Like many medical matters it is always difficult to come to a black and white decision over an area that is mainly grey, but I hope this is of some help.
Please get back to me if you wish to discuss it further.

Kind regards.

Yours sincerely

Stanley C Wright MD FRCP
Consultant Respiratory Physician.
Euan Donald  
Assistant Clerk, Justice Committee  
Room T3.60  
The Scottish Parliament  
Edinburgh  
EH99 1SP

4 September 2008

Dear Sir

JUSTICE COMMITTEE EVIDENCE - 2 SEPTEMBER 2008

I refer to my evidence to the Justice Committee on Tuesday and, as promised, I enclose a copy of the schedule of the stats demonstrating the profile of the insurers/indemnifiers in the existing 567 cases of pleural plaques.

If there is any further information or clarification you require, I would be happy to provide this.

Yours sincerely,

Frank Maguire  
Thompsons Scotland

Enc

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TOTAL CASES 567
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(1) – Royal and Sun Alliance

Single – 1.06%
Multi – 4.41%
TOTAL – 5.47%

(2) – Norwich Union

Single – 1.24%
Multi – 2.29%
TOTAL – 3.53%

(3) – Zurich

Single – 2.82%
Multi – 4.76%
TOTAL – 7.58%

Definitions:

SINGLE

Single is where the exposure will have been wholly with that particular insured.

MULTI

Multi will be where that employer, and therefore their insured, will be sharing the liability and costs with other defenders/insurers.
Mr Bill Aitken MSP
The Scottish Parliament
Edinburgh
EH99 1SP

4 September 2008

Dear Mr Aitken

Thank you for the opportunity to give evidence to the Justice Committee on the Damages (Asbestos-related conditions) (Scotland) Bill. During the session you requested that we provide further actuarial data on the estimated costs of this Bill.

I attach the actuarial statistics I referred to in my oral evidence from the Ministry of Justice consultation documents, and the Institute of Actuaries’ presentation to the 2007 GIRO conference, and trust you will distribute these to your Committee colleagues.

I would like to take the opportunity to commend the evidence given by Professor Seaton and Dr Hogg. I was pleased that Professor Seaton highlighted the complexity and uncertainty around the issue of pleural plaques and I thought Dr Hogg’s points on the legal consequences of the Bill were very important. I also note that Frank Maguire and Phyllis Craig agreed that pleural plaques are symptomless in all but a handful of cases.

In considering a Bill such as this, we recognise that the Committee has a complex and challenging task in which they hear contrasting evidence from a number of parties with a vested interest in the Bill; insurers, lawyers, trade unions, campaign groups, businesses, amongst others. However, we would urge the Committee to pay particular heed to the medical evidence submitted to date as we consider that the medical community is the only contributor to your deliberations which can be described as wholly independent with no vested interest in any way in the passage of the Bill.

In her oral evidence Ms Craig referred to an article in the Insurance Times suggesting that Bridget Prentice accused the insurance industry of encouraging doctors not to tell patients that they have pleural plaques. This story is entirely untrue. The quote the story refers to follows a Westminster Hall debate on 23rd January 2008. The transcript can be found at: http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080123/halltext/80123h0009.htm. I trust this clarifies the matter and I would ask if at your next meeting you are able to note this on the record in order to correct Ms Craig’s claim, which we had no opportunity to do at the time.

I would be grateful if you could provide me with copies of the papers both Frank Maguire and Phyllis Craig referred to in their evidence session.

Finally, I would urge the Committee to consider taking evidence on this Bill from the Institute of Actuaries on the actuarial forecasts for the costs associated with this Bill. It was clear from our
meeting on Tuesday that there is concern amongst the Committee members at the wide variance between the Scottish Government estimates for the costs associated with the Bill, and those cited by the Ministry of Justice in their consultation paper. The Institute of Actuaries would seem the most reliable source of such information and associated explanations as you seek the most informed and comprehensive evidence on this Bill on which to base your decisions.

I hope you find this information useful and would be happy to answer any further questions you, or the Committee, might have.

Yours sincerely

Nick Starling
Director of General Insurance and Health
KEY STATISTICS FROM MINISTRY OF JUSTICE CONSULTATION ON PLEURAL PLAQUES

Number of cases of Pleural Plaques diagnosed obtained in the course of medical examinations of other conditions:

Estimated numbers of benign pleural plaques: 4,500 over 2002-2006, giving average of 900 per year (source: http://www.medicine.manchester.ac.uk/coeh/thor/). The consultation paper notes that the data is likely to have been underestimated, given the asymptomatic nature of pleural plaques.

Approximation of those exposed to asbestos:


Estimate of those exposed to asbestos who develop Pleural Plaques:

25 -50 % of people = 1-2.5 million people (source example: Chapman SJ et al (2003), "Benign Asbestos Pleural Disease" *Curr Opin Pulm Med* 9(4), 266-271. Estimate around 200,000 – 1m who will actually be diagnosed.

Costs:

Average cost to settle claim £11,500- £13,400 (source - UK Asbestos - The Definitive Guide, available http://www.actuaries.org.uk)

Potential cost of future cases:

£3,670 million - £28,640 million (source - Govt own estimates, p 42 consult document)
The 2007 GIRO Conference
UK Asbestos Working Party II

Brian Gravelsons
Darren Michaels
Robert Brooks
Andy Whiting

2-5 October 2007, Celtic Manor, Wales
Working Party Members

Andy Whiting  Graham Sandhouse
Anita Morton  Gregory Overton
Brian Gravelsons  Matthew Ball
Charlie Kefford  Peter Taylor
Dan Beard  Robert Brooks
Dan Sykes  Rory Galloway
Darren Michaels  Sean O’Ceallaigh
Terms of Reference

- Facilitate a more detailed data collection exercise
- Workshop presentation of recent trends for GIRO 2007
- Develop relationship with HSE
- Review of recent legal developments
- Develop relationship with DWP and Government
- Update insurance industry projections
- Summary paper of developments and implications for GIRO 2008
What has been achieved so far?

- Review of recent legal developments
- Development of relationship with the HSE
- Summary data collection completed
- Initial analysis of data collected and other relevant statistics
Caveats

- Today’s presentation is very much work in progress
- Time has only allowed an initial review of the summary data collected
- Key trends have been identified for discussion, but…
- No conclusions can currently be made in relation to the AWP 2004 estimates
- Areas for further investigation have been identified
Asbestos Working Party 2004 Summary

- Cost of claims notified to end of 2003 £1.3b (£0.7b meso, £0.6b non-meso)
- Estimated future UK Insurance cost due to asbestos related claims £4-10b
- Central estimate of £6b (£4.4b meso, £1.6b non-meso)
- This was broken down as follows:

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</tbody>
</table>
Pleural Plaques

- High Court (February 2005)
  - Brought by Insurers and DTI who argued pleural plaques should not be categorised as an illness or disease
  - Judge found in favour of claimants
  - Argued although don’t cause any physical harm, they do cause anxiety
  - Reduced levels of compensation
  - Reduced incentive for full and final settlement

- Overturned by Court of Appeal January 2006 (2 to 1)
  - Pleural Plaques do not amount to a compensatable injury
  - But clear statements made on general level of award of damages
  - Judges who decided not recoverable agreed with other’s (higher) view on compensation

- Appeal to the House of Lords was heard end of June 2007
  - Judgement expected later this month (October 2007)

- Hindson – High Court (January 2007)
  - Higher award due to younger age and greater risk
  - Either: “Last man compensated or flag raiser for other victims”
Barker v Corus & Compensation Act

- House of Lords (May 2006)
  - Where employee exposed to dust by several employers need to seek proportionate share of compensation from each
  - Significant public outcry against decision
  - Effectively Overturns Fairchild (May 2002)
- Government agreed to address via Compensation Act (25 July 2006)
  - “Exceptional Step in Exceptional Circumstances”
  - Those suffering from Mesothelioma due to another’s negligence can receive full compensation from “any responsible person”
  - That person can recover contributions from other “responsible persons”
  - Effectively reinstates post Fairchild position
  - Insurers unable to recover uninsured/unknown periods of insurance
- Subsequent changes to FSCS
  - Previously FSCS could not contribute where claim settled in full by third party
- Intended changes to Pneumoconiosis Act
  - DWP intends to make Government payments recoverable against any party who subsequently compensates sufferer
  - Driven by desire to ensure Act payments available to all
  - Likely in 2008
Bolton MBC v MMI & CU – Public Liability

- High Court (May 2005)
- Court of Appeal (February 2006)
  - Mr Green worked for a sub-contractor carrying out demolition work on BMBC site between 1960 and 1963 where exposed to asbestos
  - Mesothelioma diagnosed 1991
  - Ruled that MMI liable based on wording of PL policy
  - “bodily injury or illness which occurs during currency of policy”
  - Ruled that injury did not occur during exposure but at manifestation of disease
Employers’ Liability Insurance

- Following BMBC v MMI some Insurers have reviewed EL wordings
  - “Injury occurring”
  - “Injury sustained”
  - “Injury caused”

- First test cases have been submitted for consideration to High Court in 2008
HSE update

- Case Control Study run by Julian Peto
  - Results based on full occupational histories
  - Potential for results to alter HSE model projections
- Lung asbestos burden analyses
  - Electron microscopy of lungs from mesothelioma cases lung cancer controls plus younger workers without heavy past exposures
  - Determine whether evidence for continuing asbestos exposure, particularly in construction industry.
  - Three years before complete
- Further update to HSE mesothelioma projections may need to consider:
  - Incorporating “background” mesothelioma deaths – 50 to 100 a year
  - Possible effects of exposure early and later on in life
  - Confidence intervals, based on MCMC – however, not this year
- HSE are also in process of assessing what can reliably be said about risks due to low level asbestos exposure
HSE projection (2001) vs. 2005 deaths

Male mesothelioma deaths

Deaths per year

Year

HSE (non-clearance)
Observed deaths

4th October 2007
UK Asbestos Working Party II
AWP 2004 – Mesothelioma claims

Modelled male mesothelioma deaths and claims

Year

Deaths per year

- HSE (non-clearance)
- Gross-up claims (AWP 2004)
- Observed deaths

4th October 2007

UK Asbestos Working Party II

The Actuarial Profession
making financial sense of the future
AWP 2004 – Headlines & assumptions

- Mesothelioma projections very uncertain
  - HSE model used to project future claims
  - Future numbers very dependent on the over 80’s
  - Assumed each case has claims with around 2.5 companies - only about a third of people are making insurance claims

- Lung cancer numbers based on HSE model / judgement

- Asbestosis numbers peaking?
  - Numbers based on exposure / latency model

- Pleural plaques based on judgement
AWP 2007 – Mesothelioma claims

Modelled male mesothelioma deaths and claims

Deaths/Claims per year

- HSE (non-clearance)
- Gross-up claims (AWP 2004)
- Gross-up claims (AWP 2007)
- Observed deaths

Year


4th October 2007

UK Asbestos Working Party II

The Actuarial Profession
making financial sense of the future
Theories for increase?

A. Increase in propensity to sue

B. More claims per death
   - Claims being shared more between insurers

C. Insurers exposure different from UK exposure
   - Take up of EL cover by companies (compulsory 1972)
   - Moving from nationalised industries to private firms

D. Speed-up and backlog of claims
   - Claims being identified faster
   - Catch-up from claims on hold due to legal cases

E. HSE curve is under-estimating recent deaths
Industrial Injuries Disablement Benefit Statistics (IIDB)

Mesothelioma deaths and disablement benefit cases 1981-2005

Deaths/Cases per year

- HSE Death Certificates
- IIDB Disablement Benefit
Industrial Injuries Disablement Benefit Statistics (IIDB)

Mesothelioma deaths and disablement benefit cases 1981-2005

- HSE Death Certificates
- IIDB Disablement Benefit
- AWP Summary Data
Incidence by age

Mesothelioma by age band Apr 2002 - Dec 2005

<table>
<thead>
<tr>
<th>Age band</th>
<th>Number of Deaths/Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 to 34</td>
<td>HSE (7,302)</td>
</tr>
<tr>
<td>35 to 39</td>
<td>IIDB (4,920)</td>
</tr>
<tr>
<td>40 to 44</td>
<td>AWP2007 (4,025)</td>
</tr>
</tbody>
</table>

4th October 2007  UK Asbestos Working Party II
Age distribution

Mesotheliomas by age band Apr 2002 - Dec 2005

<table>
<thead>
<tr>
<th>Age band</th>
<th>Percentage share</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 to 34</td>
<td>0%</td>
</tr>
<tr>
<td>35 to 39</td>
<td>5%</td>
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<td>40 to 44</td>
<td>10%</td>
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<td>45 to 49</td>
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<td>50 to 54</td>
<td>20%</td>
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<td>55 to 59</td>
<td>25%</td>
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<td>60 to 64</td>
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<td>65 to 69</td>
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<td>70 to 74</td>
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<td>75 to 79</td>
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<tr>
<td>80 to 84</td>
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<tr>
<td>85 plus</td>
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</tbody>
</table>

- HSE (7,302)
- IIDB (4,920)
- AWP2007 (4,025)
Propensity to claim

Propensity to claim IIDB by age band

Data: Apr 2002-Dec 2005
Propensity to claim by year

Propensity to claim IIDB by age band by notification year

Age band
- to 59
- 60 to 64
- 65 to 69
- 70 to 74
- 75 to 79
- 80 plus

Notification year
- Apr-Dec 2002
- Jan-Dec 2003
- Jan-Dec 2004
- Jan-Dec 2005
Average costs

Consistent data within companies from
- 2003 for mesothelioma; and
- 2004 for non-mesothelioma claims.
Mesothelioma claims status

- 43% of mesothelioma claims notified still open
- 18% of claims settled at no cost
- At 2003 37% of claims from still open

Mesothelioma claims status by notification year

- Settled at nil
- Settled at cost
- Open
AWP 2007 – Lung cancer claims

- Historically poor data capture
- Increase in number of claims possibly due to:
  a) Helsinki criteria;
  b) Improved data
- Projected figure for 2007 (based on partial data) continues this trend
AWP 2007 – Asbestosis claims

- Increase in claims based projected figure for 2007 (based on partial data)
- Consistent with previous years
AWP 2007 – Pleural plaques claims

- Drop off in claims from 2005 due to Court of Appeals verdict
- Projected figure for 2007 (based on partial data) continues this trend
Summary and Next Steps

- No conclusions can currently be made in relation to the assumptions underlying the AWP 2004 projections
- The questions raised in this workshop require answers
- Require more detailed data to help answer these questions
- Working Party key objective for 2008 is to review the previous working party projections and update where appropriate in light of the current trends identified
- Conclusions in GIRO 2008 Paper
Scottish Government

I am writing to provide some of the supplementary information that was offered by the Scottish Government when we gave oral evidence to the Committee earlier this week. Separately, the Chief Medical Officer will provide the promised medical information.

Scottish Court Service (SCS) Data

The Minister advised the Committee of data provided by the SCS on the volume of asbestos-related personal injury claims raised in the Court of Session in each of the past 3 years. Subsequently, we have obtained from SCS a little further information, relating to earlier years, which gives added reassurance that the figures for more recent years were not atypically low. The information that we now have from the SCS is as follows:

- 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;
- 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)

There are 2 points that I should make about the SCS data:

a) the statistics on asbestos-related cases are not restricted only to pleural plaques cases. SCS have not hitherto recorded pleural plaques cases separately but, self-evidently, after removing cases relating to (i) live mesothelioma, (ii) post-mesothelioma (i.e. a relative’s claim), (iii) asbestosis etc, the number relating to pleural plaques and other asymptomatic conditions would be rather lower.

b) Nigel Don MSP asked "whether a significant number of cases may go under the radar", by which I think he meant that SCS data may under-estimate the true number of cases because some will get settled without being raised in court and recorded by SCS. It is certainly right that some cases are settled without litigation being initiated, but our understanding (as mentioned in the Financial Memorandum, para 13) is that - even though many/most cases are eventually settled at the door of the court, without a hearing - about 75% of pleural plaques cases are raised in court. Therefore, as indicated to the Committee, we believe that, while they do not tell the whole story, the SCS data do give a useful yardstick for historic caseload.

Health and Safety Executive (HSE) Data

We referred to various data provided by the HSE and it may be helpful if I detail the sources. One was the June 2008 publication "Mesothelioma Mortality in Great Britain: Analyses by
Geographical Area and Occupation 2005" (www.hse.gov.uk/statistics/pdf/mesojune08.pdf). In particular, tables 5 and 7 show the spread across Great Britain of deaths from mesothelioma, demonstrating that between 1981 and 2005:

- 25,716 men died of mesothelioma in Great Britain, of whom 2,617 were in Scotland
- 4,187 women died of mesothelioma in Great Britain, of whom 378 were in Scotland

As regards data on the state Industrial Injuries & Disablement Benefit scheme, in discussion with HSE we have been informed that:

"Over the last 5 years, new Scottish cases of mesothelioma, lung cancer with asbestosis and pleural thickening assessed in the Industrial Injuries and Disablement Benefit scheme accounted for 10.4%, 12.2% and 5.3% of GB cases respectively"

This suggests that, at least as regards state compensation, the propensity to claim for asbestos-related disease is not dramatically higher in Scotland than in Great Britain overall.

I hope this information will be helpful to the Committee in their consideration of the Damages (Asbestos-related Conditions) (Scotland) Bill. Please do not hesitate to contact me should the Committee require further information.

Paul Allen
Head of Damages and Succession Branch, Civil Law Division
I have read the transcript of the evidence given by the Minister for Community Safety and officials to the Committee on 9 September 2008 and I note that the Committee might welcome some further comment on the medical issues that were discussed during that evidence.

In column 1091, Robert Brown asked if the risk of mesothelioma faced by those who have been exposed to asbestos and who have subsequently developed pleural plaques is different from the risk in the rest of mesothelioma experienced by a similarly exposed population that has not yet developed pleural plaques. 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.

In column 1092, Nigel Don expresses the view that everyone diagnosed with mesothelioma will have plaques. Again, the consensus of opinion is that this is probably correct – at least as regards asbestos-related mesothelioma – although it is difficult to confirm. 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.

The significance of the plaque is that it confirms exposure to asbestos and puts the patient in a group at considerably higher risk of developing mesothelioma.

In column 1095, there was discussion about the prevalence of pleural plaques in the adult population. The figure of 55,000 adult males in Scotland was mentioned in Professor Seaton’s evidence and I believe that came from extrapolation of figures obtained in a post mortem study carried out elsewhere in the UK. There is no good evidence as to the presence of plaques in the general population. It is clearly unethical to x-ray the whole population to determine who has plaques. Such a project would cause more ill health than it detected. Most studies of the prevalence of plaques have been carried out in a population known to have been exposed to asbestos and therefore at high risk. Usually, the detection of plaques has been by on chest x-ray or CT scan. Where studies of plaque prevalence in the general population have been attempted, they have usually relied on direct inspection of the pleura at post mortem. In post mortem studies it is obviously difficult to be certain about past occupational exposure since the patient is clearly unable to give such a history and often these studies do not report interviews with relatives. However, it is clear that some plaques develop as a result of an exposure to types of fibre other than asbestos and the past history of occupational exposure is essential if a diagnosis of asbestos-related pleural plaques is to be made. Advice received from respiratory physicians confirms that in almost
every case of pleural plaques identified at x-ray in Scotland, a past history of work in an asbestos-related industry is available.

Another compounding factor in attempting to estimate the prevalence of plaques in the general population is that when people have a chest x-ray it is usually because they have a respiratory problem and, therefore, their risk of having pathology identified is greater than normal. Given Scotland’s industrial history, a figure of 55,000 is by no means unreasonable but, that said, it does not appear to be based on robust evidence.

Although the number of mesothelioma cases in Britain has been steady over the past few years with around 2,000 in the UK and 200 in Scotland, Scottish data shows that the annual incidence in men in the 50 -55 age groups is falling. This suggests that over the next 10 years, the number of mesothelioma cases in Scotland will decline as the cohort of older men, exposed to asbestos in the 1950s and 1960s, becomes smaller.

Dr Harry Burns
Chief Medical Officer
Supplementary written submission from Clydeside Action on Asbestos

Response to correspondence by Mr Nick Starling, Director of General Insurance and Health

Further to oral evidence being heard on the Damages (Asbestos Related Conditions) (Scotland) Bill at the Scottish Parliament on the 2 September 2008, Mr Nick Starling Director of General Insurance and Health for the ABI has formally written to the committee to request that a correction be made to a statement I made with regard to an article published in the Insurance Times.

Although Mr Starling claims that the story is …“entirely untrue”… I would respectfully request further clarification as to which aspect of the story is “untrue”. Indeed in the Insurance Times (31 January 2008) the headline was entitled “Minister Slams Insurers over Pleural Plaques“. In this article it was reported that Justice Minister Bridgette Prentice had accused the Insurance Industry of asking doctors not to tell patients that had pleural plaques. I would therefore suggest that Mr Starling should contact the Insurance Times if there is a dispute as to how the article had been framed.

I would also like to take the opportunity of informing Mr Starling that the statement made by me did indeed form part of my submission which was available prior to evidence being heard. Therefore Mr Starling had ample opportunity to discuss the statement with myself in greater detail.

Clydeside Action on Asbestos would like to request that this response be made public as we believe that Mr Starling felt that it was either unnecessary or inappropriate to contact us directly on the matter.

May I take the opportunity of thanking you and the committee members for giving Clydeside Action on Asbestos the opportunity of being heard.

Phyllis Craig
Senior Welfare Rights Officer
Dear Bridget,

**ASBESTOS-RELATED PLEURAL PLAQUES**

I am writing to let you know that the Scottish Government has introduced a Bill to the Scottish Parliament to overrule the House of Lords Judgment in Johnston v NEI International Combustion Ltd. The Damages (Asbestos-related Conditions) Scotland Bill is being published today and, along with accompanying documents, is available at http://www.scottish.parliament.uk/business/bills/billsInProgress/index.htm

In summary, the Bill:
- provides that asbestos-related pleural plaques amount to a material personal injury capable of founding a claim in damages;
- clarifies that asymptomatic asbestos-related pleural thickening and asymptomatic asbestosis continue to be actionable;
- has retrospective effect and applies to cases which have not been settled, or determined by a court, before the date the Bill comes into force.


I am very pleased to be able to provide this confirmation that the Scottish Government has fulfilled its promise to bring forward legislation to ensure that the House of Lords Judgment
does not have effect in Scotland. No doubt your colleagues with constituencies in Scotland will also be pleased that, at least in Scotland, people with pleural plaques will still be able to hold to account those who negligently exposed them to asbestos.

You will of course have been aware of our firm intention to introduce legislation, because of announcements to this effect by Kenny MacAskill, Cabinet Secretary for Justice in the Scottish Government and confirmation of this intention in exchanges between our officials. Your Department (and other relevant UK Departments) also received the partial RIA which was the subject of consultation earlier this year. I am therefore at a loss to understand why, during the Westminster Hall debate on 4th June, you referred to a "deafening silence" on our part. I understand that your department has not wished to share with mine your latest thinking on the House of Lords Judgment, but I look forward to seeing the consultation paper which I understand your Department will be issuing soon.

FERGUS EWING

FERGUS EWING
August 2008

Dear Fergus

Pleural Plaques

Thank you for your letter of 24 June providing details of the Bill which you have introduced to the Scottish Parliament in relation to the House of Lords judgment on pleural plaques.

As you may be aware, the Ministry of Justice published its consultation paper on pleural plaques on 9 July, and the closing date for responses is 1 October. The consultation paper can be accessed at http://www.justice.gov.uk/index.htm.

Kind regards

BRIDGET PRENTICE
27 August 2008

Dear Bridget,

Thank you for your letter of 10 August, responding to mine of 24 June. It was helpful to see your department's consultation paper on the options for action south of the border, following the House of Lords Judgement in *Johnston v NEI International Combustion Ltd*. These are clearly matters for you, but I was naturally interested to note that the document leaves open the possibility of the UK Government promoting legislation in this area.

As regards our own Bill, we are continuing to maintain a dialogue with stakeholders. In that context, the issue of ultimate financial liability has been raised. We are clear that the purpose and effect of our Bill is not to introduce any new obligations, but simply to confirm that in Scotland — notwithstanding the recent House of Lords Judgement — it remains the case, as it has been for some twenty years, that symptomless asbestos-related conditions such as pleural plaques are an actionable injury under the law of delict. On that basis, we are equally clear that ultimate financial liability for claims — whether settled out of court, or by judicial decision — will lay where it always has. In other words, it will be the negligent employer (or their successor, or their insurer) who bears the ultimate cost, whether that is a domestic or foreign private sector company, a local authority, the Scottish Government, or a department of the UK Government (with the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform being the departments likely to be most frequently involved): I note that departments with such liabilities would, of course, have made provision to cover such costs long before the House of Lords ruling. In our view, in principle and in law there will be no justification for any of these bodies, when they are responsible for
negligent acts or omissions that have led to exposure to asbestos and the consequent development of an asbestos-related condition, to attempt to change practice and pass on the ultimate financial costs to any other body.

We believe that this expectation, about which we have been clear from the outset, is the right and proper one. I welcome the fact that, whatever our other differences, this aspect has not been challenged by UK Ministers in the context of our dialogue about how to respond to last October's House of Lords Judgement. I hope that we will be able to continue to liaise constructively as, in our respective ways, we attempt to take appropriate action to deal with the terrible legacy of asbestos. For example, I would be interested to be kept in touch with progress as regards the review of pleural plaques in relation to the GB-wide Industrial Injuries Benefit Scheme.

FERGUS EWING
Dear Fergus,

Thank you for your letter of 27 August. Both our consultation and your Bill raise issues for UK Government spending and this is something that we will of course need to consider. This is a complicated matter in a number of respects and we are looking at all these issues in conjunction with our consultation.

You will know that the process for dealing with this matter will be informed by the Statement of Funding policy. However it would not be appropriate for us to reach any decision until the outcome of our consultation is known and the exact terms of your legislation have been finalised in the Scottish Parliament.

In relation to your query that provision will have already been made to cover similar costs, the law was made clear by the House of Lords in October 2007. As a result the need to make provision to meet such costs was effectively removed from all relevant organisations, including government departments, insurers and local authorities. Any change to this position would clearly represent a new obligation, compared to the status quo following the House of Lords judgment.

You have also expressed an interest in the review being conducted by the Industrial Injuries Advisory Council. I will ensure that you are sent a copy of the review as soon as it is published.

Kind regards,

BRIDGET PRENTICE
PLEURAL PLAQUES - DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

I am writing in response to your jointly signed letter of 3 September. Thank you for understanding our necessary delay in replying.

Bridget Prentice at the Ministry of Justice has recently written to Fergus Ewing setting out the UK Government’s position on the spending issues raised in both their consultation paper on pleural plaques and your Bill. The letter reflects my Department’s position in this matter.

I am copying this letter to Yvette Cooper (Chief Secretary to the Treasury) and John Hutton at BERR. I am also copying this letter to Fergus Ewing MSP (Minister for Community Safety, Scottish Executive) following his letter on this subject to Bridget Prentice at Ministry of Justice.

DESBROWNE

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Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP
Minister for Community Safety  
Fergus Ewing MSP 
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E: scottish.ministers@scotland.gsi.gov.uk

Bridget Prentice MP  
Parliamentary Under-Secretary of State  
Ministry of Justice  
Selborne House  
54-60 Victoria Street  
LONDON  
SW1 6QW

9 October 2008

Thank you for your letter of 29 September about our Damages (Asbestos-related Conditions) (Scotland) Bill. I am concerned to learn that the UK Government may be contemplating the possibility that, in cases involving its departments, costs relating to damages claims for pleural plaques in Scotland could be passed on to the Scottish Government, effectively enabling Whitehall to reassign financial responsibility for its asbestos-related liabilities here. I hope you will be able to conclude swiftly that this would not be an appropriate course of action in this case.

While I understand that the circumstances have been difficult given our differing positions it is nevertheless still surprising that, as regards policy principles, it has taken nearly a year for a UK Minister to suggest that there is a prospect of the Statement of Funding Policy being invoked in this way. Since November 2007, when we confirmed our intention to legislate (and our expectations as regards financial responsibilities), the essential purpose and effect of our Bill has been absolutely clear – i.e. to secure the status quo ante, no more and no less, in relation to pleural plaques which develop as a result of exposure to asbestos where there has been a negligent breach of a duty of care. As regards the Bill's financial implications, officials in UK Government Departments (e.g. the MoD and BERR) felt this was a sufficiently clear basis to enable them to provide robust estimates to us over the winter of 2007/8: we were very grateful for their assistance.

I note that you say that it would not be ‘appropriate’ for you to reach any decision before the exact terms of the legislation are finalised by the Scottish Parliament. This appears to present something of a ‘chicken and egg’ impasse, as the Scottish Parliament (not unreasonably) will wish to be aware of the financial position before it finalises the legislation. I am sure the UK Parliament would take the same view and that, at an early stage in the legislative process, UK Ministers would routinely provide MPs with information about what the costs would be and how they would be met. The Scottish Parliament ought not be given any less information so, while I respect that you do not wish to pre-empt decisions on how you will proceed in England and Wales, I would ask that you reconsider your position as
regards Scotland, especially as the tight drafting of our Bill means that implications of any resulting Act have long been quite clear.

Leaving aside timing aspects, I am troubled by the approach that the UK Government may be taking to the substantive issues. There seems to be a suggestion that, though every other potential defender (e.g. the Scottish Government, local authorities, private sector employers and their insurers) will continue to be responsible for the financial consequences of their asbestos-related liabilities, it may be justifiable for the UK Government to seek to transfer their responsibilities. As a matter of principle, that cannot be right.

As regards the operational aspects, I infer from what you say that you do not dispute that, in the decades prior to the House of Lords ruling, UK Government Departments should have been making and were making provision for anticipated pleural plaques claims. That is a good starting point. It confirms that for 5, 10, 20 and more years, the UK Government had recognised these historic obligations (and that, therefore, they cannot reasonably be described as “new”) and also that money was available to meet them. It could reasonably be said that, given that such provision had been made, it would have been very premature for those departments to reallocate it as a windfall immediately after the House of Lords ruling, especially as that ruling was not binding throughout the whole UK. It would certainly appear premature to reallocate it in the few weeks ahead of a decision on whether or not the changed position would be extended to Scotland – a decision which was taken and announced quite shortly after, and in the same financial year as, the House of Lords ruling. Our firm expectation, therefore, remains that the UK Government will take a reasonable approach and accept that it would be quite inappropriate to seek to invoke the Statement of Funding Policy in this instance.

You will appreciate that these matters are of great interest to the Scottish Parliament’s Justice Committee, which is in the process of scrutinising our Bill. Indeed, I was asked directly about them when I gave evidence last month. Additionally, the Committee’s interest in the dialogue between our respective administrations has been underscored by a letter which the (now former) Defence Secretary, Des Browne MP, sent to its Convener: that letter indicated that the UK Government’s position would be clarified in a letter that you would be sending to me. Not surprisingly, the Convener has asked for a copy of your letter. Given the specific terms of Mr Browne’s letter, that seems to be a reasonable request and so, in order to assist the Committee and Parliament, I would like to provide the Convener with a copy of your letter, along with the recent preceding correspondence on these matters (beginning with my letter of 24 June). I would propose to do so a week after the date of this letter, unless you raise any objections with me. If you do have concerns about this, I could instead write to the Committee to provide my account of the position – it may be your preference, however, for them to receive your actual letters rather than having your position paraphrased.

Finally, I would reiterate what I said at the conclusion of my previous letter: in dealing with the legacy of asbestos, we would hope for a constructive dialogue. To that end, I would welcome an opportunity to meet with you to discuss how we move forward.

Yours sincerely,

FERGUS EWING
Dear Bill,

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

I indicated in my letter of 9 October that I would be pursuing further with the UK Government the spending issues associated with the Damages (Asbestos-related Conditions) (Scotland) Bill. As promised, I am writing now to provide you with an update on the position in relation to the Statement of Funding Policy.

While our Financial Memorandum makes due reference to the Statement of Funding Policy, it has from the outset been our clear position that it would be inappropriate for the UK Government to seek to invoke it in this instance. For example, on 29 November 2007 the First Minister informed Parliament:

"There are questions about the liabilities of United Kingdom departments. I stress that their liabilities will be exactly those that they would have expected to have before the House of Lords judgment was issued. I expect not only UK and Scottish Government departments, but Scottish society and the private sector, to meet their full obligations when the Parliament changes the law in the interests of justice for the Scottish people."

It has therefore been of some concern that, as the Justice and Finance Committees have also discovered, the UK Government has remained largely silent on the issue over the intervening months. While we would have anticipated that this indicated that they had no quarrel with our stated position, recent correspondence suggests that this may not be the case. As a consequence, there may yet be an attempt to penalise the Scottish Government for acting to preserve the system that provides an avenue for redress for those who develop what we regard as being a material injury, pleural plaques, as a result of being negligently exposed to asbestos.

In order to put the Committee fully in the picture as regards the current position, I am enclosing copies of relevant correspondence between myself and Bridget Prentice MP, Parliamentary Under-Secretary of State at the Ministry of Justice. The five letters are dated...
24 June, 10 August, 27 August, 29 September and 9 October. I should make clear that it is unusual for such correspondence to be released, but as this correspondence was specifically drawn to the Committee’s attention by a UK Cabinet Minister and as Ms Prentice herself has raised no objections, I feel that given the importance of the issue it is appropriate to provide it to you as you requested.

You will see that the correspondence ends at the moment with me reiterating the Scottish Government’s firm expectation that a reasonable approach will be taken by the UK Government and, specifically, that it will be accepted that it would be entirely inappropriate to seek to invoke the Statement of Funding Policy in this instance. A reply is awaited. I will advise you and Parliament of any further progress as soon as I can.

Turning to the Bill more generally, I would like to take the opportunity to express my thanks to the Committee for its swift yet thorough scrutiny of our proposals and the associated evidence. Of course, I am extremely pleased that the Committee’s report agrees that individuals with pleural plaques should be able to continue to pursue compensation where there has been contributory negligence and I welcome the fact that it recommends that the Bill’s principles should be supported. We are now giving careful attention to the full terms Committee’s report and I look forward to further constructive dialogue as matters progress.

FERGUS EWING

FERGUS EWING
Bill Aitken MSP
Room T3.60
The Scottish Parliament
Edinburgh
EH99 1SP

20 October 2008

Dear Bill,

Thank you for your letter of 17 September to John Hutton, concerning my Department’s liabilities should the Scottish Parliament vote in favour of the above Bill and pleural plaques are again made compensatable under civil laws in Scotland. I am replying as this matter falls within my portfolio and apologise for the delay in doing so.

Fergus Ewing (Minister for Community Safety, Scottish Executive) has also written to Bridget Prentice at Ministry of Justice (MoJ) about this same issue. Bridget’s letter of 29 September 2008 to Fergus explains the UK Government’s current position on the subject of Pleural Plaques. I attach, for your information, a copy of Bridget’s letter.

In summary, it would not be appropriate for us to reach any decision until the outcome of MoJ’s consultation in England and Wales is known and the exact terms of your legislation have been finalised in the Scottish Parliament.

I will write to you again in due course.

I am copying this letter to Yvette Cooper (Chief Secretary to the Treasury), Des Brown (Ministry of Defence), Bridget Prentice (MoJ), and Bill Aitken MSP (Convener, Justice Committee at the Scottish Parliament).

PETER MANDELSION
Andrew Welsh MSP  
Convener, Finance Committee  
The Scottish Parliament  
Room T3.60  
Edinburgh  
EH99 1SP

October 2008

Thank you for your letter of 3 September to John Hutton, concerning my Department's liabilities should the Scottish Parliament vote in favour of the above Bill and pleural plaques are again made compensatable under civil laws in Scotland. I am replying as this matter falls within my portfolio and apologise for the delay in doing so.

Fergus Ewing (Minister for Community Safety, Scottish Executive) has also written to Bridget Prentice at Ministry of Justice (MoJ) about this same issue. Bridget's letter of 29 September 2008 to Fergus explains the UK Government's current position on the subject of Pleural Plaques. I attach, for your information, a copy of Bridget's letter.

In summary, it would not be appropriate for us to reach any decision until the outcome of MoJ's consultation in England and Wales is known and the exact terms of your legislation have been finalised in the Scottish Parliament.

I will write to you again in due course.

I am copying this letter to Yvette Cooper (Chief Secretary to the Treasury), Des Brown (Ministry of Defence), Bridget Prentice (MoJ), and Bill Aitken MSP (Convener, Justice Committee at the Scottish Parliament).

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Business Motion: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-2819—That the Parliament agrees the following revision to the programme of business for Wednesday 5 November 2008—

after

followed by Stage 1 Debate: Damages (Asbestos-related Conditions) (Scotland) Bill

insert

followed by Financial Resolution: Damages (Asbestos-related Conditions) (Scotland) Bill

The motion was agreed to.

Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12): The Minister for Community Safety (Fergus Ewing) moved S3M-2796—That the Parliament agrees to the general principles of the Damages (Asbestos-related Conditions) (Scotland) Bill.

Jackson Carlaw moved amendment S3M-2796.1 to motion S3M-2796—

insert at end—

“but, in so doing, notes the terms of the Justice Committee’s Stage 1 report, in particular the concerns expressed with regard to the Financial Memorandum, and calls on the Scottish Government to provide the Parliament with a more detailed analysis of the likely cost implications, from such information as is available to or can be obtained by the Scottish Government, prior to the Bill being considered at Stage 3.”

After debate, the amendment was agreed to (DT).

After debate, the motion as amended was agreed to (DT).

Accordingly the Parliament resolved—That the Parliament agrees to the general principles of the Damages (Asbestos-related Conditions) (Scotland) Bill but, in so doing, notes the terms of the Justice Committee’s Stage 1 report, in particular the concerns expressed with regard to the Financial Memorandum, and calls on the Scottish Government to provide the Parliament with a more detailed analysis of the
likely cost implications, from such information as is available to or can be obtained by
the Scottish Government, prior to the Bill being considered at Stage 3.

**Damages (Asbestos-related Conditions) (Scotland) Bill: Financial Resolution:**
The Minister for Community Safety (Fergus Ewing) moved S3M-2797—That the
Parliament, for the purposes of any Act of the Scottish Parliament resulting from the
Damages (Asbestos-related Conditions) (Scotland) Bill, agrees to any expenditure of
a kind referred to in Rule 9.12.3(b)(ii) of the Parliament’s Standing Orders arising in
consequence of the Act.

After debate, the motion was agreed to.
**Business Motion**

The Presiding Officer (Alex Fergusson): The next item of business is consideration of business motion S3M-2819, in the name of Bruce Crawford, on behalf of the Parliamentary Bureau, setting out a revised business programme. I call Bruce Crawford to move the motion.

14:34

The Minister for Parliamentary Business (Bruce Crawford): I took the matter to the bureau on Tuesday past, so that a proper discussion could be had about when the financial resolution to the Damages (Asbestos-related Conditions) (Scotland) Bill should be debated. I am glad to say that the discussions that I had with business managers at that time were conducive.

Bill Aitken (Glasgow) (Con): Having considered this matter as fully as he can, is the minister in a position to reassure Parliament that this is the proper way of going forward and that, if we agree to this motion, the matter will receive the proper consideration that it deserves?

Bruce Crawford: I thank Bill Aitken very much for his intervention.

At the Parliamentary Bureau meeting, all business managers very properly raised a number of concerns about the financial resolution, particularly with regard to its impact on the insurance industry and the availability of appropriate information and figures from a variety of sources. We also had a very useful discussion about how, in the light of the Justice Committee’s report, we could properly address the issues. Given Jackson Carlaw’s very helpful amendment, business managers were happy to proceed in the way that we are going to this afternoon.

I hope that at decision time we can all agree to the financial resolution, which was well examined by the Justice Committee. The committee carried out a very useful examination of the legislation’s complicated nature, questioned a lot of witnesses and produced a very considered report that contains a lot of detail. In such circumstances, we had no option but to proceed with the financial resolution.

Of course, the financial resolution does not necessarily need to be agreed to today to ensure that the bill completes stage 1 successfully—that can be done at a later date. However, whatever happens, we must ensure that the financial resolution is agreed to at some point, because otherwise it will be difficult to allow the bill to proceed from stage 1. [Interruption.] I hope that the whole Parliament is in a position to agree that the financial resolution is—if I guess correctly what is happening behind me—the best thing that has ever happened since sliced bread.

I hope that members understand why I have gone on at some length on the matter and that Parliament will be pleased to pass the business motion.

I move,

That the Parliament agrees the following revision to the programme of business for Wednesday 5 November 2008—

after followed by Stage 1 Debate: Damages (Asbestos-related Conditions) (Scotland) Bill

insert followed by Financial Resolution: Damages (Asbestos-related Conditions) (Scotland) Bill

The Presiding Officer: Amazingly, no member has asked to speak against the motion. [Laughter.]

Motion agreed to.
Damages (Asbestos-related Conditions) (Scotland) Bill: Stage 1

The Presiding Officer (Alex Fergusson): The next item of business is a debate on motion S3M-2796, in the name of Fergus Ewing, on the Damages (Asbestos-related Conditions) (Scotland) Bill. I invite all members who wish to speak to press their request-to-speak buttons.

We had quite a lot of time available for the debate; now we just have a bit of time available. [Laughter.]

14:39
The Minister for Community Safety (Fergus Ewing): I thank my parliamentary colleague Mr Crawford, not least for his ingenuity, and I apologise for being late.

First, I thank Bill Aitken and the Justice Committee for its scrutiny of the Damages (Asbestos-related Conditions) (Scotland) Bill and its stage 1 report. I also thank everyone who gave oral and written evidence to the committee and those who provided the Government with information, particularly in response to our consultation on the partial regulatory impact assessment.

I know that several representatives of the campaign groups are in the gallery, anxiously awaiting the Scottish Parliament’s decision on the general principles of the bill. I thank Tommy Gorman and Bob Dickie, who are two of the leading campaigners, for meeting me last week. The Cabinet Secretary for Justice also met campaigners from Clydeside Action on Asbestos.

The origins of the bill are well known. Pleural plaques have been regarded as actionable for more than 20 years, but a House of Lords judgment on 17 October last year ruled that, in the absence of symptoms, the condition does not give rise to a cause of action under the law of damages. That judgment is not binding in Scotland, but is highly persuasive. It has caused consternation among those who have been negligently exposed to asbestos and among their representatives, including MSPs. Indeed, concern appears to go wider than that. Let me quote the remarks of two of the judges who were involved in the judgment. Lord Scott said:

“the conclusion that none of the appellants ... has a cause of action against his negligent employer strikes, for me at least, a somewhat discordant note.”

Lord Hope said:

“I share the regret expressed by Smith LJ that the claimants, who are at risk of developing a harmful disease... and have entirely genuine feelings of anxiety as to what they may face in the future, should be denied a remedy.”

In sum, the judgment led to a palpable sense of injustice. When the application of the law appears to result in injustice, it is the duty of legislators to address the situation.

Against that background, there was a great deal of consensus when the issues were debated in Parliament last November. The cross-party concern that exists was reflected in a range of well-informed speeches. I hope to maintain a similar consensus today.

The purpose of the bill is straightforward: it is to keep things as they have effectively been for the past 20 years, and to ensure that people who have been negligently exposed to asbestos and have developed a symptomless asbestos-related condition continue to be able to raise a claim for damages in Scotland. The bill meets that policy objective while making the minimum incursion into the general law of delict.

Many people in Scotland will be unfamiliar with the term “pleural plaques”. Pleural plaques are scarring of the pleura—membranes that surround the lungs. The Scottish Government understands and accepts that pleural plaques in themselves are generally not and do not become debilitating; they do not in themselves give rise to physical pain. However, for the reasons that I gave in my oral evidence to the Justice Committee, the Scottish Government’s view is that pleural plaques are not a negligible injury. They are and ought to be seen as a material injury for the purposes of the law of delict. Pleural plaques that are associated with exposure to asbestos signify a greatly increased lifetime risk of developing mesothelioma and a small but significantly increased risk of developing bronchial carcinoma, compared with the risk for the general population. Indeed, an eminent medical expert who gave evidence to the House of Lords, Dr Robin Rudd, has said:

“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.”

Let us not forget that, in areas that are associated with Scotland’s industrial past, people with pleural plaques are living alongside friends who also worked beside them and are witnessing the terrible suffering of those who have contracted serious asbestos-related conditions, one of which is mesothelioma. That can cause genuine and understandable anxiety that they will suffer the same fate. We cannot ignore that or turn our backs on those who in the past contributed to our nation’s wealth. Therefore, we intend to do two things: we intend to explore options for alleviating anxiety by improved provision of information and...
advice; and, through the bill, we intend to preserve the right to seek redress from employers or the insurers of employers whose negligent breach of a duty of care led to asbestos exposure and consequent scarring of the membrane around the employee’s lungs.

Employers and insurers have registered concern about the costs that they may incur and the implications for our economic competitiveness. We understand that concern, but we believe that it is seriously exaggerated. To give one example of that exaggeration, the Association of British Insurers suggested that 30 per cent of United Kingdom asbestos exposure and asbestos-related disease may occur in Scotland. However, the ABI has not yet given us any evidential basis for that assertion, whereas we were able to provide the committee with clear evidence from the Health and Safety Executive demonstrating that the level is closer to 10 per cent. We know that successful economies require a competitive business environment. We are working to foster such an environment, but we believe that economic growth on its own does not give a complete picture of the success of a nation. We should balance the need for business-friendly policies with actions that protect the people who contribute to our nation’s wealth. That is partly what we mean by the economy being sustainable.

Given what I have said, it should come as no surprise that, as well as warmly welcoming the committee’s endorsement of our objectives and of the principles of the bill, I agree with the committee that the bill’s financial implications must be understood fully. Specifically, I appreciate why there was a recommendation that, ahead of stage 3, the Scottish Government should revisit the estimates that were given in our financial memorandum. We are doing that. We are already seeking further information from insurers and from the actuarial profession’s United Kingdom asbestos working party. We aim to analyse any new information carefully and to report the results to Parliament in good time. On that basis, I see no need to resist Jackson Carlaw’s amendment. I should say that the actuarial profession itself has admitted that “it is difficult to make a sensible estimate”.

Therefore, it is unlikely that any amount of work would lead to absolute clarity and unanimity. For now, my view is that our financial memorandum is as clear and robust as it could have been, in the circumstances.

One aspect on which I have less confidence is the UK Government’s position on the pleural plaques liabilities of its departments. The UK Government suggests—which was painfully experienced by Bruce Crawford just a moment ago—that constructive dialogue between the Scottish Government and Westminster in the next few weeks should be a priority?

Richard Baker (North East Scotland) (Lab): Does the minister accept that the UK Government has not ruled out a discussion, at the very least, on the issue with the Scottish Government, and that constructive dialogue between the Scottish Government and Westminster in the next few weeks should be a priority?

Fergus Ewing: Yes. I welcome that intervention and the approach that it signifies. I will be happy to engage fully with all parties on the issue so that we can—as I hope—achieve consensus among all parties that the UK Government should continue to meet its responsibilities in the future, as it has done in the past.

I hope that all members will follow the recommendation of the Government and the committee and support what will be a short but vital piece of legislation that will provide justice to all those who have been negligently exposed to asbestos and who go on to develop a related condition that, although symptomless in general medical terms, is nevertheless not negligible in human terms.

I move,

That the Parliament agrees to the general principles of the Damages (Asbestos-related Conditions) (Scotland) Bill.

The Presiding Officer: I call Jackson Carlaw to speak to and move amendment S3M-2796.1. Mr Carlaw, you have up to 11 minutes.
alleviate in any way the suffering of people who are afflicted with the terminal asbestos-related condition mesothelioma continued to be available, whatever the deliberations of the National Institute for Health and Clinical Excellence elsewhere. That objective was clear-cut and was, without doubt, an early example to me of how parties working together in the Scottish Parliament can act decisively, and the objective was achieved. That came after the extraordinary partnership in previous parliamentary sessions, in which I was not a participant, and which again drew support from all sides of the chamber, leading to the earlier legislation, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007.

What goes around comes around, for it seems that our business in this matter is never quite concluded. Following the decision of the House of Lords in October last year, this Parliament was rightly afforded the opportunity—in a members’ business debate that was secured by Stuart McMillan—to discuss the implications that, although they might not be binding in Scotland, are nonetheless persuasive, with the seemingly inevitable consequences already resulting. That earlier debate gave voice to our indignation at the consequential injustices that arose from the ruling.

What was again striking on that occasion was the cross-party—indeed all-party—dismay at the course of events. It is worth re-reading the many speeches in that specially extended debate. They are a testament to the acute suffering of individuals, to the frustration that many have felt in the face of obduracy, and to the unswerving commitment of organisations such as Clydeside Action on Asbestos and individuals in the community and this Parliament since 1999 and before then. I, too, join the minister in welcoming interested representatives to the chamber today. Not one speech in that debate was made without obvious feeling. I expect that several members who spoke then will also do so today. It might reasonably be observed on second reading that, in the wake of the perceived shenanigans at that point, passions were naturally aroused. That is the case not least because of the many examples—to which members can bear witness—of impacts on the lives of too many families of the painful suffering and death of those who have been unfortunate enough to endure mesothelioma, the seemingly random nature of its development and the understandable anxiety that is caused in anyone who is diagnosed as having pleural plaques.

I was struck by Gil Paterson’s reflection in that previous debate on his experiences as an employer in the Scottish retail motor industry. Such was my experience in a Glasgow-based family concern that was established in the early 1920s and which operated for 80 years thereafter in the burgeoning motor industry, from the earliest Ford products, through the war effort, to the development of the heaviest of commercial vehicles and on to the explosion of the individual retail market.

On a previous occasion some time ago, the minister referred to my “car-selling days”. In truth, the industry is far more multifaceted than that: we sold motor products of all shapes, sizes and applications. We supplied parts, routinely serviced cars, vans and trucks and we repaired badly damaged products. We took care and pride in the welfare of our employees and we acted on the best practice and advice. However, having traded continuously on a site that was established in the early 1920s, we found that time proved that the industrial knowledge of those early days was ignorant of many things that were learned later; for example, lead in petrol, the dangers of prolonged exposure to fumes and the asbestos time bomb.

However, like Gil Paterson, whatever efforts we made as employers were underpinned by comprehensive insurance to ensure that any unforeseen injuries that occurred saw the needs of our people properly met whenever that proved to be necessary. We certainly did not expect our insurers to abdicate their responsibility or, worse still, having met claims in a fashion or by some precedent for many years, to then set that practice aside in a bloodier and less honourable age. What particularly irked me in our earlier debate was the seeming eye to a chance of the Johnston v NEI International Combustion Ltd case and the judgment that brought to an end established grounds for compensatory claims.

That is not to ignore the technical concerns of some about precedents that the bill might set. However, neither would it have been appropriate to allow those concerns to have derailed its progress and, in any event, addressed as they are, we agree with the general principles of the bill. In the amendment that I will move, we provide Parliament with the opportunity to give voice, if the amendment is agreed to, to the concerns that the Justice Committee noted about the financial memorandum.

What we seek to achieve with our amendment is reasonable but crucial; simply put, it is the securing by this Parliament of the widest and best-informed judgments and estimates as to what the financial consequences of the bill might prove to be.

Mr Swinney is not known for being louche with his cash, or rather with the Government’s cash—or, quite possibly, with both. I am not sure whether Fergus Ewing is equally tight. However, it seems reasonable for the Parliament to avoid standing accused of producing damning, wild and self-serving estimates without having to hand—subject
I welcome the recognition that the we hope—
the best possible estimates of our own.

For the moment, the Justice Committee appears
to believe that the more likely costs rest
somewhere in between the hyperbole of some
representations that were made to the committee
by the insurance industry, the even greater
speculation in some media and the smaller
Government calculation.

Given that Westminster is not cracking a whip of
its own to take a principled stand, it is surely
appropriate to pursue the committee’s view that
the potential cost to the Scottish consolidated fund
should be clear, and to establish whether UK
departments might be inclined to invoke the
statement of funding policy, which is the explicit
requirement to fund any costs arising to UK
departments from Scotland-only legislation. I
anticipate that that will be amply demonstrated by
Bill Aitken when he talks about the Justice
Committee’s report. As he will illustrate, many of
the workplaces where exposure to asbestos was
prevalent were in the public sector. Potential
consequential claims on them following the
passage of the bill cannot be based on wishful
thinking. I welcome the minister’s measured
acceptance and recognition of that possibility and
his willingness to discuss matters reasonably and
as widely as possible.

It is arguable that, by creating a clearly defined
legal right to compensation, rather than using
custom and practice, the legislation might in all
probability lead to an increase in the numbers that
are diagnosed and a further increase in the
number of compensatory claims. Both the process
diagnosis and a potential subsequent claim will
have an incremental cost attached. Surely we
must not allow ourselves to be in ignorance of the
best possible evidence on these matters prior to
stage 3. If we are to match our moral ambition—as
is, I believe, our collective intent—with our duty to
act responsibly, we should understand properly
the likely costs. I welcome the minister’s
willingness to do so.

I turn now not to technicalities but to the issue at
hand. Others will no doubt set out the medical
facts of the condition of pleural plaques. I will
confine myself to acknowledging that they are
asymptomatic in character. Having pleural plaques
is not a guarantee that one will develop asbestosis
or mesothelioma, but it is a prerequisite and, as
the minister stated, it increases the chances of
that by 1,000 times. As such, those who are
identified as having pleural plaques will inevitably
be anxious in the face of the certainty of a grim
prognosis should either condition follow.

I welcome the recognition that the we hope
unique circumstances surrounding pleural plaques
will be properly restricted in the bill. We can
therefore accept that this exceptional bill is not a
fresh precedent to be exploited. That treads on
legal complexities that others will, I imagine,
discuss with more authority, but the restriction sets
aside the one potential objection to our proceeding
with the bill.

Throughout the Parliament there is a
determination to act. We can all share that
ambition, but we should also all share a collective
duty to ensure that all the consequences of the
legislation that we might approve are fully
understood—or, at least, that we understand them
to the best of our ability. I call on the Scottish
Government to ensure that that is so and I invite
the Parliament to support the amendment in my
name.

I move amendment S3M-2796.1, to insert at
end:

“but, in so doing, notes the terms of the Justice
Committee’s Stage 1 report, in particular the concerns
expressed with regard to the Financial Memorandum, and
calls on the Scottish Government to provide the Parliament
with a more detailed analysis of the likely cost implications,
from such information as is available to or can be obtained
by the Scottish Government, prior to the Bill being
considered at Stage 3.”

The Presiding Officer: I said at the beginning
of the debate that we have a little time in hand, so
I am happy to offer at least the next three
speakers up to 10 minutes each. I invite Bill Aitken
to speak on behalf of the Justice Committee and
remind him that he has up to 10 minutes.

14:58

Bill Aitken (Glasgow) (Con): I reiterate my
declaration of interests, which is recorded in the
Justice Committee’s minute of 9 September. I also
reiterate the commitment that I gave at that time:
that I would not be inhibited in any respect in
acting as I consider fit.

I know that members will have read the Justice
Committee’s report, but I will in any case do them
the courtesy of expanding briefly on the history of
the matter at hand.

The genesis of today’s debate is the case of
Johnston v NEI International Combustion Ltd. For
many years, people who suffered from the
condition known as pleural plaques were able to
make claims on the ground that there had been
negligent exposure to asbestos in the course of
their employment. They were not high-value
claims, but insurers, influenced by the rise in
settlements and in associated legal costs in
particular, eventually resisted them.

After sundry procedure in the English courts, the
House of Lords determined in October last year
that sufferers would no longer be able to institute
actions for compensation in respect of such

claims. As has already been said, the House of Lords decision is not binding in Scotland, but it is persuasive, and at least one Court of Session action—Helen Wright v Stoddard International plc—has failed as a result of the application of the Lords’ ruling.

The matter first came before the Parliament by means of a members’ business debate introduced by Stuart McMillan. Feelings ran high, which was understandable although, as events were to prove, perhaps a little unwise. For my own part, I perhaps acted with unusual prescience in indicating that any further parliamentary process should be based on a clear, cool and forensic examination of the facts. In any event, the Government announced an intention to legislate in November last year and within two months issued a regulatory impact assessment on the potential impact on industry employers and Government departments.

The Government’s response was speedy and humane, but although we can all have 20:20 vision in hindsight, the committee is critical of the truncated consultation process that was followed. That view is shared by, for example, the Law Society of Scotland, and there can be little doubt that a more measured approach to the consultation process might have enabled the Government and the committee to deal more adequately with problems that have subsequently come to light. No one doubts the Government’s good intentions in this matter, but if a fuller consultation process had been followed a number of the complex issues that have come to the committee’s attention would have been brought out much earlier.

In any event, the committee moved to consider evidence from a variety of witnesses, including the Association of British Insurers, the Forum of Insurance Lawyers, academics, medical professionals and representatives of pleural plaques sufferers. We also heard from the Scottish Government and, in particular, from Fergus Ewing, the Minister for Community Safety. The committee records its appreciation and thanks those who gave evidence.

The evidence enabled the committee to establish the nature of the condition known as pleural plaques. As Mr Ewing said, pleural plaques are a scarring of the pleura or lung tissue caused by exposure to asbestos fibres. One great tragedy of post-war industrial Britain has been the impact of asbestos-related conditions, which have resulted in claims that, in total, have been settled for billions of pounds but, more important, in considerable ill-health, suffering, shortened life expectancy and, frequently, painful death. Against that background, it is hardly surprising that this is such an evocative issue.

Pleural plaques are, however, an asymptomatic condition; someone can have pleural plaques all their life and not know it. Most sufferers are diagnosed following medical exploration of other conditions and injuries. The condition does not necessarily lead to anything more sinister. It is not that pleural plaques will result in the sufferer’s developing asbestosis or mesothelioma, but equally one cannot develop such critical illnesses without having pleural plaques. The committee had little difficulty accepting that people who are diagnosed as having pleural plaques will suffer anxiety and concern.

The legal position is that, to make a recovery in accordance with the law of tort, it is necessary to demonstrate loss or injury. In the simplest example, someone at work who falls off a faulty ladder and breaks his leg can demonstrate an unsafe system of work and personal injury and therefore make a successful claim. The issue with pleural plaques is different, and the committee concluded that changing the law would undoubtedly change the law of tort—albeit on this limited basis only.

Such a change cannot be undertaken lightly, and it is important to stress that, in doing so in this case, we act on the basis that the wording in the bill is restricted to asbestos-related conditions of the type in question. The bill is not the thin end of the wedge in respect of asymptomatic conditions generally, and the rationale is simply to return the law to the position that applied prior to the Johnston determination. It also recognises the peculiar, if not unique, circumstances surrounding asbestos-related conditions in Scotland.

The most complex aspect of the matter, and the one that caused the committee the most concern, is finance. The committee had difficulty accepting the evidence that the insurers provided. In our view, they made an overestimation. We also had serious concerns about the adequacy of the Government’s financial memorandum. A number of figures are still flying around. Some cannot possibly be accurate; others may be.

We have to consider the potential impact on the Scottish consolidated fund. For example, one figure that is flying around is that the total UK cost of claims could be £4.8 billion. I cannot say whether that figure is right or wrong. The insurance industry gave evidence to the effect that 30 per cent of the potential liability could apply in Scotland. I do not accept that, but at the same time and bearing in mind the profile of Scottish industry, I accept that we cannot simply apply a pro rata calculation on the basis of population.

We also have to remember that many of the workplaces in which people were exposed to asbestos were in the public sector. Yards on the upper Clyde were nationalised in the 1970s and
remained in public ownership until the early 1980s. Rosyth and the former Yarrow shipyard in Glasgow—the latter of which Glaswegians will remember as the Navy yard—were always in the public sector. We must also remember that council and health board direct works departments carried out work that would have led to asbestos exposure. That has to be borne firmly in mind.

The statement of funding policy makes it clear that where Scotland increases the liabilities, the Westminster Government can look to Scotland to meet those liabilities from the Scottish consolidated fund.

Robert Brown (Glasgow) (LD): Bill Aitken may be aware of the figures, which are worth bringing into the debate. Between 1981 and 2005, 25,716 people died of mesothelioma in Great Britain, of whom 2,617 were in Scotland. The figures for other asbestos-related cases over the years are similar. Does he agree that that suggests that the number of cases in Scotland is proportionate to the population?

Bill Aitken: I remain uneasy, but the extent of that unease is not considerable. The pro rata calculation is 10 per cent; taking account of the industry profile, my calculation is that a figure of 12.5 per cent would be more accurate. The argument remains that we have to recognise that public sector involvement in claims will inevitably be higher in Scotland than in other parts of the UK. It would be unfortunate if our efforts to attempt to do something to assist pleural plaque sufferers impacted elsewhere.

We have to appreciate that the impact of a substantial call on funds to pay for claims could be considerable. I am pleased that the minister has acknowledged that it is essential that we obtain the fullest possible further information. If the matter is not reconciled, it is difficult to see how the Parliament can proceed as we wish to proceed at stage 3.

Although it is not for me or the committee to direct the Government down any particular route of inquiry, it should commission actuarial research to ascertain the likely number of claims and the impact not only on the public sector but on the private sector. We also have to consider the impact on the national health service of a significant increase in demand for diagnostic checks.

It is essential that the Westminster Government make a statement of intent on its stance on the application of the statement of funding policy. I have written to ministers down south on several occasions—the matter is now on the public record—as did the convener of the Finance Committee but, thus far, the Government down south has not clarified the position. I say in the strongest possible terms that it is vital that we have clarification under that heading before we pursue the matter further.

Given the history of asbestos injuries to which I have referred, there is considerable and unanimous sympathy for pleural plaques sufferers. We want to help, but we cannot do so on the basis of a blank cheque. There is considerable unease about the potential liabilities involved and the impact that they would have on public services, apart from anything else. If the bill is to proceed, as we hope it will, the Government must provide the appropriate reassurance and remove that unease.

The Presiding Officer: As members will realise, 10 minutes is a fairly elastic description of the time that is available to speakers in the debate. I call Richard Baker, who also has an elastic 10 minutes.

Richard Baker (North East Scotland) (Lab): Thank you, Presiding Officer—I will try to be as elastic as I can.

The Parliament has a proud record of standing up for people in Scotland whose lives have been affected by exposure to asbestos at their workplace. On a number of occasions, we have heard about the devastating impact that that can have on individuals and families. During consideration of the bill, we have heard about the stress and anxiety that inevitably follows a diagnosis of pleural plaques. I welcome the fact that ministers have introduced the Damages (Asbestos-related Conditions) (Scotland) Bill; it will come as no surprise that today the bill will receive Labour members' support.

In the previous session, my colleague Des McNulty led a debate on the impact of asbestos-related diseases. He proposed a member's bill on compensation for the relatives of sufferers of mesothelioma, which prompted the Scottish Executive at that time to introduce the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill and to ensure its rapid passage through Parliament, steered by Cathy Jamieson and Hugh Henry. The Damages (Asbestos-related Conditions) (Scotland) Bill continues that important work and is a hugely important step forward. As members have indicated, the bill arises from cross-party concern about the impact of the House of Lords ruling of 17 October last year.

In a debate led by Stuart McMillan, members from all parties expressed concern about the impact of the Lords' decision, which overturned the established position of 20 years that, where there has been wrongful exposure, individuals diagnosed with pleural plaques can pursue an
action. I am pleased that that cross-party approach has continued in the Justice Committee. The committee is to be congratulated on its careful scrutiny of the bill, which involved looking at a range of aspects of the bill’s impact and informed its recommendation to Parliament that the bill is a proportionate response to the House of Lords judgment.

The committee received compelling evidence on the impact of pleural plaques from Clydeside Action on Asbestos and from my trade union, Unite, which has campaigned long and hard on the issue. In its submission, Unite referred to the experience of one of its members in Stonehaven, in my region of the North East, who said:

“Pleural Plaques is a time-bomb. The Doctors could call me tomorrow to tell me I have mesothelioma and sufferers have to live with that prospect every minute of every day. It’s undoubtedly deteriorated my quality of life ... I’m more worried, anxious, lethargic .... my health is poorer.”

With such a toll on individuals, it seems incredible that it should be suggested that those with responsibility should walk away. Although there has been cross-party support for the bill, there was not unanimous support in the evidence that was submitted to the committee. In particular, the Association of British Insurers has opposed the bill; it has made the case that pleural plaques do not lead directly to mesothelioma—the same case that was made in the House of Lords. Even if that is accepted, there is still the fact of the scarring that results from exposure to asbestos; in those cases, it must be proven that there was wrongful exposure.

I welcome the minister’s comments on education about the impact of pleural plaques, but the argument that education, not compensation, is the answer does not wash. It is not enough to say to someone who suffers the kind of mental anguish that is described by the member of Unite whom I cited that their pleural plaques will probably not lead to mesothelioma, when so many sufferers have seen many former colleagues suffer the terrible fate of developing that dreadful and deadly disease. The minister referred to the evidence of Dr Rudd, who said that the risk of developing mesothelioma by those who have pleural plaques because of exposure to asbestos is 1,000 times greater than it would otherwise be.

I am surprised that insurers have challenged the bill’s legal competence, particularly given the Law Society of Scotland’s submission in support of it, in which it stated that it was competent for the Scottish Parliament to amend the law in such a way and that there are examples of precedent.

The main area of contention, to which the convener of the Justice Committee has just referred, is cost. That is why we have a reasoned amendment to the financial memorandum; it reflects the committee’s concerns about the greatly differing cost estimates that the Scottish Government and the insurers provided. To be frank, some of the insurers’ more spectacular estimates seem wild in light of the evidence from Thompsons Solicitors, which has long experience of bringing such cases. The amendment reflects the fact that ministers can provide only such further financial information as it is possible for them to obtain. That point is particularly pertinent when it comes to evidence to support the higher cost estimates. In any event, I do not believe that those estimates will bear much further scrutiny and I am confident that, when we debate the bill at stage 3, we will have enough information to make the right decision and that the bill will be passed.

I note that although it is still necessary to resolve whether the UK Government will make payments or whether UK ministers will invoke the statement of funding policy, the UK Government has in no way closed the door to discussion. I hope that further constructive dialogue on the issue is possible between the Scottish Government and the UK Government. The latter has been consulting to find its own way forward but the Scottish Parliament needs clarity because we in Scotland have agreed that the bill provides the best way for us to ensure that, despite the House of Lords judgment, sufferers of pleural plaques can bring cases.

Whatever debates we have had and whatever further information we receive on the financial memorandum, I am hopeful and confident that parliamentary consensus will continue throughout the bill’s progress through Parliament, to its conclusion at stage 3. If victims of pleural plaques have been wrongfully exposed to asbestos, it is important that they are recompensed by the people who are responsible. It is fair and reasonable that they should be, particularly given the emotional trauma that a diagnosis of pleural plaques brings with it—I am sure that many people who are in the public gallery would be able to give us personal evidence of that. That is why the Parliament should once more act to support those who are affected by exposure to asbestos, why it should build on what it has already achieved on that important matter of justice and why the Labour Party will support the bill today.

15:18

Robert Brown (Glasgow) (LD): In these days of economic and financial crisis, it is easy to downplay the legacy of the industrial diseases that still plague Scotland and blight the lives of many people as an unwelcome aftermath of the days when manufacturing industry, rather than financial services, were the identifying mark of Scotland’s economic success. Exposure to asbestos—the
fear, damage and loss that go with it—is at the top of the list. It is a curse that can strike individuals, families and communities 40 years after they were exposed.

Asbestos-related diseases are characterised by the way in which they strike at whole communities that have worked in shipbuilding, construction or engineering. In those industries, brother has followed brother and son has followed father in contracting asbestos-related diseases; wives and girlfriends who washed overalls have been exposed; employers’ negligence or breach of statutory duty is arguably more culpable than in any other branch of industry; and the main disease—mesothelioma—is nastier and more certainly terminal than almost every other.

The consequences of asbestos exposure include pleural plaques, which are the subject of the debate. The condition is one of several that are dealt with in this limited bill. It is asymptomatic and, according to the medical evidence, does not cause mesothelioma, but, in the words of Unite, it is the calling card for the development of more serious and terminal asbestos-related illness. That is why the Justice Committee found that the risk of people with pleural plaques developing mesothelioma is many times greater than that in the general population and that the resultant effect on people’s lifestyle and sense of wellbeing is substantial and adverse. It is also why the committee was not persuaded by the suggestion from eminent medical sources that the anxiety felt by those diagnosed with pleural plaques can be allayed by appropriate medical explanations. Too many people in too many communities, particularly in Glasgow and the west of Scotland, have had sad family experiences to the contrary.

As a lawyer, I know that hard cases make bad law and I am interested in the logic and coherence of Scots law, developed as it has been from case to case over many years. I do not have any doubt that the decision of the House of Lords in Johnston v NEI International Combustion Ltd, delivered just over a year ago, was legally correct. The judges said, on the basis of agreed medical evidence—that is an important point—that pleural plaques cause no symptoms and impair no function. They cause no other diseases and do not reduce life expectancy. They do not therefore amount to an injury or to compensatable harm as defined by the law as it stands.

I believe, however, that justice was not represented by a decision that flew in the face of real experience and overturned the accepted and commonsense position that had endured for 20 years: that pleural plaques were compensatable. I was persuaded by, and supported, the campaign to overturn the Johnston decision, and I welcome the Scottish Government’s decision to legislate on the issue. In passing, I pay tribute to the extensive work done on the issue by Clydeside Action on Asbestos and other campaign groups.

I want to address three consequential matters, some of which have been touched on and others of which have not. The first is whether the bill is consistent with the usual principles of the law of delict. The convener of the Justice Committee, Bill Aitken, dealt with that in part. The committee took the view that it was a departure from the normal law, but one that was narrowly defined, had no effect on other conditions and was proportionate and just. My view is reinforced by the fact that the bill is supported by the Law Society of Scotland and the Faculty of Advocates, although not of course by all solicitors or all advocates. I mention in passing that although anxiety by itself is not normally enough to establish harm and causation, once harm has been established, anxiety sounds in damages. Accordingly, the legal point might be viewed as fairly narrow and technical in any event.

The second point is to press the minister further on whether the Lords’ decision and their reasoning as amended by the bill has any effect on the likely judicial approach to valuing the quantum of damages. We do not want to amend the right to damages in this instance, only to have a further dispute on the level of damages that would result and the amount of damages appealed again through the system. We had some engagement on that in committee, but the minister might want to give further reassurance on the matter. The bill gives no guidance on it and I am not convinced that it establishes a clear right to damages at the previously accepted level or, indeed, at any particular level. I hope that the minister will look closely at that before stage 2.

The third point is the financial consequences of the bill, which is the biggie in this debate. As Bill Aitken mentioned, matters were not helped by the inadequate consultation process that was undertaken in the lead-up to the bill. Some issues might have been flushed out and others might have been dealt with more satisfactorily at an earlier stage. The committee found the financial area the most difficult one, and it was not satisfied by the evidence that we received from the Scottish Government, the claimants’ representatives and those of the insurance industry that their figures were an adequate representation of the bill’s likely costs.

Our worry is heightened by the possibility, which as we have heard has still not been clarified, that the UK Government might invoke the statement of funding policy because of the perceived financial effects on Government liabilities arising from the defence industry and others. It would be unsatisfactory to pass legislation without having greater clarity on those issues, which also more...
directly affect the finances of the Scottish Government and local authorities.

I did not previously realise—I am indebted to the ABI for the information—that the Johnston case was originally brought or stimulated as a test case by lawyers acting for the Department of Trade and Industry, which of course carries the residual liabilities for actions and liabilities for former nationalised industries. As we have heard, they are a significant component of the industry liability in this regard. The DTI was joined only later by the insurers, who no doubt saw some advantage to their finances in this matter.

We have had a full assessment by the UK Government of its prediction, which differs greatly from that of the Scottish ministers, but in the light of the information about the origin of the Johnston case there is perhaps some qualification to be made as to the independence or otherwise of the UK Government in its assessment of this matter.

My view is that of the committee, which is that the costs of the bill are likely to be greater than is suggested in the financial memorandum. Settlement levels might be lower than they have been, there seems no need for legal costs to be as high as the suggested £8,000 when we have, in effect, an agreed basis for settlement of suitable cases, and the Law Society of Scotland has provided information on the scale of settlement for extrajudicial fees that are applicable in such cases, but I do not accept the wilder predictions of the insurance industry. Although the evidence points to the Scottish share of UK claims being roughly proportionate to the population rather than the higher proportion that has been suggested—I agree entirely with Fergus Ewing on that point—it is credible that a settled legal situation might lead to a rise in the number of claims, as others have argued.

I do not accept the proposition, advanced by the insurance industry, that the bill infringes its property rights. Undoubtedly the industry’s bill for asbestos claims will be bigger than it would have been without it, but the costs will be essentially the same as they would have been without the House of Lords legal judgment, from which the industry was happy enough to claim savings.

In my view there will be no difference in principle if this Parliament sees fit to restore the previous position through legislation, but it is vital that the minister re-examines the available evidence and makes a comprehensive attempt to assess realistically the effects of the bill in the light of all the figures that have been exposed by the committee’s inquiry and beyond. There may be some merit in the convener’s suggestion that actuarial inquiry should be made. If necessary, the minister should recast the financial memorandum, although that is in a sense a subsidiary matter. I welcome his reassurances, but I want to make it clear that he would make a serious mistake if he believed that the financial memorandum is just a cosmetic exercise. It is not; the financial memorandum is a proper financial exercise that is fundamental to the work and duty of the Parliament.

This is a just bill. It will right a significant wrong. It will bring justice to many people who have legitimate worry, anxiety and impairment of wellbeing—substantial harm in anyone’s language—as a result of significant negligent or wrongful acts of omission by their former employers. The Government must do its job properly, too, by founding this act of justice on a solid and defensible financial base. In passing the bill at stage 1, the Parliament must know that it will have a clear idea before stage 3 of how much in broad terms the bill will cost private industry and the public purse at all levels.

I have great pleasure in supporting the general principles of the bill.

The Deputy Presiding Officer (Trish Godman): We move to open debate.

15:27

Stuart McMillan (West of Scotland) (SNP): I am happy to take part in the debate both as a member of the Justice Committee and as the member whose motion on pleural plaques was considered in the members’ business debate last year to which others have referred. Coincidentally, today’s debate takes place in the same week one year on from that members’ business debate, which was attended by 24 MSPs of all parties. I was grateful for their support and for the speeches that they made. The fact that the debate had to be extended because so many members wanted to contribute shows the importance of the issue to the Parliament.

I am delighted that the Scottish Government introduced the bill after listening to the arguments that were put forward by campaign groups such as Clydeside Action on Asbestos, whose members, along with other campaigners, I welcome to the public gallery today. Their campaign for justice has been on the stocks for some time because they were aware of the impending outcome of the House of Lords ruling. The ruling was issued on 17 October last year, but targeted campaigning had taken place in preparation for that decision which, unfortunately, favoured the insurance companies over sufferers from pleural plaques.

I have had meetings with Clydeside Action on Asbestos on several occasions. At one of those meetings, I agreed with colleagues Gil Paterson MSP, Bill Kidd MSP and Councillor Kenny McLaren to take the issue to last year’s Scottish
The committee also commented on the consultation process that the Scottish Government used; Bill Aitken mentioned that. Our recommendations about the consultation are in paragraphs 15, 16 and 17. There is no doubt that consultation on any bill is vital, and this bill is no different. However, some of the consultation responses are disappointing. I was disappointed that North Lanarkshire Council and Angus Council did not back the proposals.

During the evidence session on 2 September, it was said that

“plaques are a good thing and do not cause harm.”—[Official Report, Justice Committee, 2 September 2008; c 1025.]

The thud of committee members’ jaws hitting the table was thunderous. The witness continued with a further explanation of that statement, but by that time the genie was out of the bottle. Pleural plaques are markers of exposure to asbestos and they are scarring on the pleura. Furthermore, they signify an increased risk of developing mesothelioma, as we have already heard today. That does not tell me that pleural plaques are “a good thing”.

Asbestos-related illnesses affect the whole of Scotland. They affect people who have worked in heavy industry such as shipbuilding on the Clyde and house building throughout the country. However, they also affect family members who have inhaled asbestos particles from overallis. I have met a lady who suffers from pleural plaques because of that.

I welcome the bill and the Justice Committee’s report on the bill. The Parliament has a chance to ensure that people in Scotland have a right to justice, and the Scottish Government should be commended for that. I hope that the UK Government gets on board and follows the lead to ensure justice down south as well. I support the bill and look forward to its becoming law at some point in the future.

Finally, once again, I commend the campaigners, including Clydeside Action on Asbestos, for their tireless work in highlighting asbestos-related injustices, and I commend the Scottish Government for introducing the bill.

15:34

Des McNulty (Clydebank and Milngavie) (Lab): As the member who represents Clydebank, the issue of asbestos has been with me since my first election. In fact, my predecessor, Tony Worthington, who was the MP for Clydebank, spent many years taking up such issues on behalf of the Clydebank Asbestos Group and Clydeside Action on Asbestos. Those issues were generated...
by the fact that the insurance industry kept trying to find new ways of taking away compensation.

That is the reality of the history of campaigning on asbestos. The insurance industry has continually sought to reduce its liability to the people who are victims of asbestos. It has been

The occurrence of asbestos-related disease is not random—it is not evenly distributed throughout the population. It particularly affects people who have worked in the shipbuilding and engineering industries, many of whom, certainly in Clydebank, know one another. If one goes to the annual general meeting of the Clydebank Asbestos Group year after year and looks round the room, one will see that someone who was there the previous year is no longer there. All the people in that situation have friends, relatives and workmates who have suffered from a variety of asbestos-related diseases. We cannot tell them that pleural plaques are not linked to other forms of asbestos-related disease. The relevant legislation was agreed to unanimously. We have ensured that licensed treatment that offers hope or succour continues to be made available in Scotland and have set an example to the rest of the UK, which I am delighted that it has followed. The intention of the bill that we are debating today is to overturn the House of Lords ruling that denied compensation to people who are afflicted by pleural plaques as a result of exposure to asbestos.

The occurrence of asbestos-related disease is not random—it is not evenly distributed throughout the population. It particularly affects people who have worked in the shipbuilding and engineering industries, many of whom, certainly in Clydebank, know one another. If one goes to the annual general meeting of the Clydebank Asbestos Group year after year and looks round the room, one will see that someone who was there the previous year is no longer there. All the people in that situation have friends, relatives and workmates who have suffered from a variety of asbestos-related diseases. We cannot tell them that pleural plaques are not linked to other forms of asbestos-related disease because they know perfectly well the history of the onset of such disease.

When the insurance industry tells us that pleural plaques are "a good thing", as Stuart McMillan mentioned, not only do MSPs' jaws hit the floor but people who really know about asbestos-related disease—people who know what has happened to their comrades, friends and workmates—say, "That is absolutely not right." We know that, by and large, the people who have pleural plaques are those who end up in the category of people who suffer from dreadful diseases such as asbestosis and mesothelioma.

When the insurance companies gave evidence to the Justice Committee, in essence, they sought to deny that people who have pleural plaques have suffered any injury. It is true that someone who has pleural plaques does not face a death sentence in the way that a mesothelioma sufferer does. Pleural plaques arise when the body responds to the irritation that is caused by a particularly dangerous type of foreign body—asbestos fibres.

The victim of pleural plaques is fortunate if he or she does not contract one of the more serious asbestos-related diseases, but the person who exposed them is responsible whatever the prognosis. The fault is caused by the negligent exposure of the individual to asbestos. It is the fact that people were negligently exposed to asbestos that gives rise to the danger to their health. I believe that those who were negligent or their successors or their insurers should be expected to pay compensation for such actions once it can be demonstrated that the victim has been affected, regardless of whether they have been diagnosed as suffering from a life-threatening condition such as mesothelioma or a condition such as pleural plaques that, at present, does not appear to have symptoms.

Jackson Carlaw: When Mr McNulty poses the case as he does, he sounds extremely combative, but does he accept that the negligence that took place under certain employers was not wilful negligence? In some cases, injuries arose as a result of action that was not known to be negligent at the time but which was proved to have been negligent only subsequently.

Des McNulty: That is a matter that is dealt with by the courts. There is abundant evidence that some of the bigger employers knew quite a lot about the impact of asbestos and continued to expose people to it even though they understood some of the potential consequences. People feel strongly that the damage that is done to them should be recognised and compensated.

Paul Martin (Glasgow Springburn) (Lab): Does Des McNulty agree that asbestos was a banned substance pre-1965 and that it has been known as a poisonous substance since 1892?

Des McNulty: That is right. It is important that we acknowledge the damage that has been done to people. There are people still alive who will be victims of asbestos, and there are people who have died who have been victims of asbestos. It is important to the campaigners, relatives and families that the situation is acknowledged. That is often more important to people than monetary compensation. They want the fact that they, or their friends or relatives, have been damaged by exposure to asbestos to be acknowledged by the courts.

There should be a higher level of compensation for those with mesothelioma to take account of the seriousness of the impact. Mesothelioma is fatal in
every case and it is a particularly pernicious form of cancer. However, those with pleural plaques have also been affected by exposure to asbestos, and the impact on them should also be recognised. A proportion of those who have pleural plaques will develop asbestosis or other life-threatening bronchial conditions. That predicted impact is a source of anxiety to those people.

No one who is not exposed to asbestos will get a life-limiting asbestos-related disease. The responsibility of the companies and insurers stems from their negligence in allowing people to work in an environment that it was known was likely to damage their lungs. It is the fact of exposure rather than the extent of damage that is the cause of liability. There is not a no-damage excuse for negligence, especially when there are physical signs of exposure. Damage has occurred, and the issue for the courts should be how much damage has occurred and how that should be reflected in the amount of compensation.

The insurers have suggested that the passage of the legislation will open the floodgates to a hugely increased number of compensation actions. It may well be that there is a slight increase, perhaps partly as a result of publicity generated by the bill. However, the records that have been made available by Frank Maguire of Thompsons Solicitors, which deals with 90 per cent of asbestos cases in Scotland, show that there is a clear pattern in the number of pleural plaque cases emerging in this country. There is no reason why, once the backlog of cases has been dealt with, we will not continue to have the pattern pointed to by Mr Maguire. My one caveat is that the epidemiological evidence suggests that the peak number of those contracting asbestos-related diseases may not be reached until 2015. The time bomb of past exposure to asbestos is still exploding.

I am delighted that the bill has been introduced. The Parliament has not failed victims of asbestos in the past. We have done the right thing before and we are doing it again. I commend the Government for introducing the bill, and I encourage members on all sides to support it and, in particular, its principles at stage 1.

15:43

Nigel Don (North East Scotland) (SNP): It may come as little surprise—at least to some members of the Justice Committee—that I will take a slightly different tack. We all agree on the principle of the bill. We defend what we are doing as a matter of policy—other members have done that, and I am happy to endorse it—but the committee has struggled to rationalise it as a matter of law. Because we can rationalise it as a matter of policy, that has not worried the committee. I shall try to find a basis of law in the most unlikely place, namely the House of Lords judgment in Johnston v NEI International Combustion.

It will come as a surprise to discover that within their noble lordships’ judgments lie the bones of an analysis by which they could have arrived at completely the opposite answer. By assembling some of those bones, I hope that I shall be able to provide us with a skeleton that will give us a satisfactory basis for the bill. I am not suggesting that the noble lords got it wrong. I am not even qualified to stand in front of them and put that case. It is of course axiomatic that a unanimous decision of the House of Lords is law.

However, my analysis considers what might have been, on the basis of what their lordships said in their judgment. Because the analysis must be brief, I will say at the outset that nothing I say is intended to be critical of their lordships or of the counsel who brought the case. If anything that follows appears to be critical, please take what I have just said as my statement of intent. An important point about anxiety also comes up in the case, but I do not think that I shall be able to cover it this afternoon, so I shall not try.

My fundamental point arises from the fact that the cases covered by the judgment were brought in England under the law of tort, for which, in Scotland, read “delict”. I will quote from Lord Scott, omitting a couple of phrases that do not alter the sense. In paragraph 74 of the judgment, he said:

“In my opinion … a cause of action in tort cannot be based on the presence of asymptomatic pleural plaques, the attendant anxiety about the risk of future illness and the risk itself. It cannot be so based because the gist of the tort of negligence is damage and none of these things, individually or collectively, constitutes the requisite damage. But the conclusion that none of the appellants … has a cause of action against his negligent employer strikes, for me at least, a somewhat discordant note. Each of the appellants was employed under a contract of service. Each of the employers must surely have owed its employees a contractual duty of care, as well as and commensurate with the tortious duty on which the appellants based their claims. It is accepted that the tortious duty was broken by the exposure of the appellants to asbestos dust. I would have thought that it would follow that the employers were in breach also of their contractual duty. Damage is the gist of a negligence action in tort but damage does not have to be shown in order to establish a cause of action for breach of contract. All that is necessary is to prove the breach.”

The fundamental point is that, to sue successfully for breach of contract, one does not need to prove damage, only that there was a breach of contract.

Those of us who have been exploring these issues will appreciate that the accepted medical evidence is that pleural plaques are not injurious in themselves. Because they are internal and hidden, they are not a disfigurement and are thereby not actionable. The biggest legal problem derives from
the fact that the leading cases at first instance proceeded on the basis that plaques were the injury.

In his summary in paragraph 3 of the judgment, Lord Hoffmann pointed out that, in the case of Church v Ministry of Defence in 1984, Judge Peter Pain had said that there was damage caused

"by the asbestos passing through the lungs and causing the plaques to form."

A month later, in Sykes v Ministry of Defence, it was enough that there had been a

"definite change in the structure of the pleura".

Three years later, in Patterson v Ministry of Defence, plaques, the risk of future disease, and anxiety became the basis of the action.

Lord Hoffmann said in paragraph 6:

"Since these decisions, claims have regularly been settled on the basis that pleural plaques are actionable injury."

However, Lord Rodger said in paragraph 84:

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

It seems to me that the courts could have arrived at the solution that we now seek to impose by statute as a matter of policy, first, if they had recognised that the relevant damage is the presence of asbestos in the lungs and not the presence of plaques—plaques are merely evidence of asbestos, and, incidentally, the only evidence that we can get—and, secondly, if they had considered the cases as breaches of contract of employment. The presence of foreign bodies in the lungs would surely have been adequate evidence of a breach of the common-law duty to provide a "safe system of work", which was the legal formula in English law that preceded legislation on health and safety.

The minister and I have referred to Lord Scott's discomfort. I cannot help feeling that their noble lordships could see the unsatisfactory nature of the decision that they were required to reach. Lord Mance had the last word in the final paragraph:

"In agreement with both Lord Hope and Lord Scott, I also note that the scope of an employers' contractual liability might require examination in another case, but it has not and cannot be examined in this case."

It seems to me that their lordships understood that, if the case had been brought under contract law, they could have reached a more satisfactory answer. They could see that the answer that they produced was unsatisfactory. I hope that my analysis will provide some comfort to members that we are legally doing the right thing.

15:50

**Cathy Peattie (Falkirk East) (Lab):** Pleural plaques may be benign in the strict medical sense, but there is nothing benign about someone knowing that they have had sufficient exposure to asbestos to develop the condition. There is nothing benign about someone knowing that such exposure means that they are at a considerably greater risk of developing mesothelioma than people who have no asbestos-related symptoms. There is nothing benign about the impact of pleural plaques on someone’s physical and mental wellbeing. Therefore, I do not accept the generalisations about pleural plaques being harmless.

My husband has pleural plaques and thickening. He has always had a healthy lifestyle, he never smoked and he always worked and kept fit, but he has problems with shortness of breath, is prone to chest complaints and had to retire early. Those things are not life threatening, but I object to such symptoms being dismissed as medically trivial. I do not consider internal injuries such as scarred lungs—with or without symptoms—to be medically trivial; nor do I consider the negligence of employers who have exposed workers to asbestos to be medically, ethically or legally trivial.

The case against compensation focuses on the lack of a proven causal relationship between pleural plaques and fatal asbestos-related diseases. It is said that correlation is not a proof of cause and effect, but that argument is a red herring. It is not a question of whether pleural plaques lead to mesothelioma; the fact is that they share a common cause. Pleural plaques may not cause mesothelioma, but the exposure that causes them also puts people at a much higher risk of developing serious diseases.

Dr Robin Rudd notes:

"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."

It is all very well to say, as the chief medical officer does, that it is the level of exposure to asbestos that matters. The chief medical officer also notes that, although there is no easy test for such exposure, it

"would be reasonable to assume that the vast majority of mesothelioma cases do have plaques."

Not wanting to be too sweeping, however, the chief medical officer maintains that

"there remains the possibility of a patient developing mesothelioma but not having any plaques."

Let us face it: pleural plaques are indisputable evidence of membership of a high-risk group. It does not matter how many times people are told
that pleural plaques will not significantly affect them; they are bound to see that that is nonsense when they are clearly affected. Any attempt to dismiss or brush aside the significance of pleural plaques as benign is unlikely to change that. If the situation is to be explained honestly to those who are affected, it must be accompanied by an appraisal of future risks that those who are opposed to compensation would have them believe are somehow unrelated to their pleural plaques.

Dr Rudd also comments:

“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.”

Given the difficulties that those making claims have always experienced, we must be very careful with this legislation. The considerable body of evidence used by those who believe that pleural plaque sufferers should not be compensated was drawn primarily from the insurance industry. Insurance companies and their lawyers are masters of obstruction and any dubiety in a claim provides a platform for endless challenges and delays. The families of victims are all too well aware of the cruel torture of the game of waiting, delaying and diversions that companies play with all the legal weaponry at their disposal to avoid paying out any sooner or any more than is absolutely necessary. We should not add to their arsenal and, as we have heard today, we must find a way around the finance issue to ensure that it does not become a barrier. As the bill progresses through Parliament, we must take care that it does what we want it to do.

I congratulate Clydeside Action on Asbestos, Unite and the other unions that have campaigned so hard for this legislation. I urge the Parliament to do the right thing and support the bill.

15:56

Gil Paterson (West of Scotland) (SNP): I well remember the meeting with members of Clydeside Action on Asbestos that Stuart McMillan referred to. When they told me about their case and campaign, I was convinced by their arguments. To me, the story was simple: a person—or, indeed, a group of people—is unwittingly exposed to and damaged by asbestos; and someone is responsible and must be held accountable.

For many years, that is exactly how the law worked. People who had been damaged by exposure to asbestos and could prove that through the presence of pleural plaques would be entitled to compensation. I might add that, at a mere £8,000, the compensation was not a king’s ransom. Nevertheless, the important point was that their injury was recognised by the courts.

In October 2007, after a concerted campaign by representatives of those who, in one form or another, were responsible for the damage done by asbestos, everything changed. Workers—and, in many cases, their families—who had been exposed to asbestos and had developed pleural plaques had their right to compensation overturned by the House of Lords. Can anyone imagine the situation of workers who had been kept in the dark by their employers about the effects of inhaling asbestos—and, even worse, who brought home to be washed clothes containing the asbestos particles that, in time, would kill their loved ones—now having to come to terms with the House of Lords closing the door on recognition of and compensation for the very pleural plaques that were often forerunners of worse to come?

The House of Lords turned the clock back in more ways than one. It took us back to an era in which industrial barons could operate with impunity and workers, including children, had no recourse to compensation when damaged by the industrial process. The law protected the barons, not those whom they damaged. History, unfortunately, has a habit of repeating itself.

The logic behind the House of Lords ruling is that as contamination by asbestos causes only internal scarring and no visible damage, and as no ill effect follows from the scarring of a person’s lungs, there is no need for compensation. I do not agree with that at all. Never mind the physical damage to the lung, what about the psychological damage that those with pleural plaques commonly suffer? They have to live with that experience, witness its effects on others and see their friends and former workmates fall to life-taking illnesses. Those people worry about their future, what will happen to them, what their injuries will lead to and who is to look after their families. It is no wonder that they suffer psychological damage. Of course, not all of them contract life-threatening illnesses, but their common worry is, “Who is going to be next?”

We should make no mistake about the importance to sufferers of recognition that a wrong has been done and that someone will do something about it. People who have, through no fault of their own, been damaged to the point that their life is threatened need our support. It is shameful in the extreme that recognition of their injury, which there was for so long, has been taken away.
I am proud of the swift action that the Scottish Government has taken, which has been well received. I am equally proud of the mostly unreserved support that has been shown across the chamber for enacting the bill. It is good that the Parliament has stood firm on the notion that there would be a miscarriage of justice if the House of Lords ruling was allowed to stand, but there are other profound reasons for backing the bill.

To its shame, the Westminster Government meekly accepted hook, line and sinker the bad judgment that the House of Lords made. Westminster MPs decided to turn their backs on the victims of pleural plaques. The Scottish Parliament is united and determined to reverse the House of Lords ruling, and has embarrassed or twitched the conscience of Westminster MPs, forcing them to rethink their position on pleural plaques. Therefore, the campaign by Clydeside Action on Asbestos to seek or, I should say, to continue the right to claim compensation for those who suffer from pleural plaques, although aimed at the Scottish Parliament to affect the law of Scotland, has done an enormous service not only for individuals and families in Scotland, but for sufferers in other parts of the United Kingdom whom Westminster abandoned. As we progress the bill in Scotland, let us hope that our actions will cause something positive to happen quickly in England.

Most folk think that a person who has been damaged by asbestos must have been involved in heavy industry in some way. We must dispel that notion. Workers who are involved in repair work, such as joiners, electricians and plumbers, are at risk. In some cases, few such workers have a clue that asbestos is evident while they work. Even teachers who have never been near an industrial site die as a result of asbestos-related illnesses every year. When the trace work is carried out, there is conclusive evidence that they were contaminated in class. Therefore, the issue is not only a heavy industry concern; the effects of asbestos reach across society. I hope to expand on that point in the chamber on another day in the near future.

I want to address a point that was well made by Jackson Carlaw. My family business is involved with the car industry. Most folk think that cars are welded together and that is it, but modern cars are somewhat different. They have been changed because of the accidents that can happen as a result of vehicles’ rigidity. Adhesives and bondings are used in constructing them so that when the car crumbles, the person inside will be protected. Those materials are, of course, often very toxic. My business not only supplies such goods; we have technical advisers who go out and demonstrate them. Therefore, I put on the front line individuals whom I know extremely well and have worked with for a long time. We know what we are doing and how to do it and a duty of care is involved, but something could happen that we were unaware of. If that happened, I would not expect to walk away from my liabilities. Similarly, I do not expect anything different for sufferers of pleural plaques. Therefore, I whole-heartedly support the bill.

16:04

Jackie Baillie (Dumbarton) (Lab): Like other members, I welcome the bill. The clash of arguments and discordant voices sound in the Parliament many times, but just as often the Parliament rings with the sound of agreement and the quieter but perhaps more powerful murmur of assent. I am pleased that there is agreement on this occasion.

As others have said, the bill will remove the obstacle of the House of Lords ruling and provide for compensation to be given, as it once was, to those who develop pleural plaques. In my humble layperson’s view, that is without doubt absolutely the right thing to do. I will not attempt to explain in any great detail or to second guess the House of Lords ruling in the case of Johnston v NEI International Combustion Ltd. Far better people than me have considered those matters. I commend to the Parliament Bill Aitken’s cogent explanation, the Justice Committee’s report and the interesting alternative view that Nigel Don proffered. However, I am clear that, although the judgment relates to England and Wales, there would be an impact in Scotland, in that it is persuasive in our courts.

As Bill Aitken rightly said, in the case of Helen Wright v Stoddard International plc, the judgment has had an impact. Lord Uist, who presided over the case, used the House of Lords ruling to conclude that pleural plaques caused no harm at all. Quite simply, we need to fix that. I agree absolutely with the minister that we need to return to the situation in which workers who have pleural plaques can claim compensation. When all is said and done, that is ultimately what matters.

I gently suggest to Gil Paterson that he is wrong in his analysis of Westminster and UK Government activity on the matter. I am pleased that there is growing support at Westminster to do the same as we are doing in Scotland. An increasing number of MPs support the introduction of legislation to reverse the effect of the House of Lords decision. Equally, I am pleased that the Ministry of Justice is working on that by consulting on whether changing the law of negligence would be appropriate.

Gil Paterson: I acknowledge the member’s point that Westminster MPs are picking up the
cudgel, particularly the Scottish ones. My point was that, in the first instance, they turned their backs. They are coming to the game because of this Parliament’s action and the way in which we are conducting ourselves.

Jackie Baillie: I hope that the member will agree that the issue is to encourage the right action. The bill has come about not only as a consequence of the Parliament, but because of the considerable effort of many outside the Parliament, including the Clydebank Asbestos Group, Clydeside Action on Asbestos, Thompsons Solicitors and the trade unions. Stuart McMillan has been involved, and my colleagues Des McNulty and Duncan McNeil have pursued the issue diligently. When my Westminster colleague John McFall MP is not giving the banks a hard time on the Treasury Committee, he has been unwswerving in his support for the victims of asbestos-related conditions, on issues such as the availability of the drug Alimta for the treatment of mesothelioma and compensation for sufferers of pleural plaques. All those people, including the minister, have contributed to our reaching this point today, and they should be commended for that.

I acknowledge that there is a different view. I have considered the evidence that insurers have presented. It gives an interesting insight into their thinking, but neither the Government nor the committee is persuaded, and nor am I. Compensation for pleural plaques has been awarded for more than 20 years. Although I acknowledge the right of insurers to bring test cases before the courts and the House of Lords, it is equally the province of the Parliament to ensure that compensation can continue to be paid.

I am glad that the minister has accepted Jackson Carlaw’s reasoned amendment, because it is essential that we bottom out the costs that are contained in the Scottish Government’s financial memorandum. Doing so will allow us to reduce the margin of uncertainty to an acceptable level and will enable dialogue between the respective Parliaments. I agree with Richard Baker that the costs suggested by the insurers appear—dare I say it?—to border on the creative. Equally, there is a divergence on the number of pleural plaques claims. All of that can now benefit from further scrutiny.

Robert Brown was absolutely right to outline the impact of asbestos on whole communities. All members probably know someone who is affected by an asbestos-related condition. Those conditions are particularly prevalent in the west of Scotland. Issues arise, such as whether the condition is a result of a brief employment or a lifetime’s; which of a number of industries, including shipbuilding, construction and engineering, was involved; and whether the employment was in the public or private sector. Those are all important considerations, but they are not the central issue that is before us. For me and the Parliament, the issue is one of justice.

Des McNulty is absolutely right. Let us not forget that pleural plaques are brought about by exposure to asbestos that can and does lead to terminal illness. That exposure was negligent and people with pleural plaques should be compensated. This afternoon, we go a long way towards setting the situation right.

16:10

Bill Kidd (Glasgow) (SNP): I thank the Justice Committee for its report and my colleagues in the chamber, who have conducted today’s debate in the dignified manner that the subject calls for.

The Association of British Insurers has said:

“Insurers are committed to paying fast, fair and efficient compensation to people who are injured or made ill as a result of their employer’s negligence; in 2006, our members paid out over £1.2 billion in employers’ liability claims.”—[Official Report, House of Commons, 23 January 2008; vol 470, c 461WH.]

That is fair and clear. However, it has also been said, and it will be repeated, that when people are exposed to asbestos through employment, they are exposed to the considerable risk of developing pleural plaques, asbestosis and mesothelioma. That exposure will have been as a result of the manufacture of chrysotile or its use by employers in construction, shipbuilding and other industrial processes. Secondary exposure of workers’ spouses and children only compounds the problem of the insidious nature of white asbestos.

Who is to blame for the illnesses of all those who have been exposed to such material? Surely such exposure must be a result of employers’ negligence. By implication, the only people who can provide recompense, albeit of a paltry amount, are the insurers of those employers, as stated by the ABI in the quotation. So where is the problem?

The idea is that workers and/or their families who are injured or made ill by exposure to asbestos as a result of employers’ negligence make employers’ liability claims, and then justice prevails. However, that does not happen. The insurers have decided that they will take the premiums but renge on their part of the deal. They challenge whether pleural plaques—the scarring and thickening of the thin membrane that covers the lungs and the lining of our chests—can be considered to be an injury.

Pleural plaques are an indicator of considerable exposure to asbestos, which has been shown to be a major factor in the development of other related illnesses, such as asbestosis and
mesothelioma. If someone has witnessed their family, friends and work colleagues develop such serious and life-taking illnesses, they might be excused for demonstrating a little anxiety about or possibly even fear of the same thing happening to them. That is especially the case when, as the minister and other speakers have mentioned, Dr Rudd, the leading expert on asbestos-related illness, was quoted as saying:

“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.”

That would make me anxious, as anyone with pleural plaques has every right to be.

The idea that those with pleural plaques are just uninformed and worrying needlessly or that pleural plaques are really a sign that lungs are healthily forming scabs over invasive asbestos fibres is an insult and takes a diabolical liberty with the feelings of the ordinary men and women who made this country’s wealth with the sweat of their brows.

It has been my privilege to get to know the men and women who, through Clydeside Action on Asbestos, have campaigned for justice—for themselves, their families and for others whom they do not even know. I am proud to be on their side in this struggle for compensation for the injuries caused to their bodies by the insidious scourge of white asbestos.

The insurance companies’ view is that pleural plaques are asymptomatic thickening and scarring of the lining of the lungs—so what. Pleural plaques are a non-malignant disease—so it does not matter. Pleural plaques do not cause any symptoms or disabilities—so there is no cause for concern. What a disgraceful attitude.

How many of the insurers put their hands up when I asked them recently whether they would volunteer to contract such a benign condition during the course of their employment? Not one did so, and I do not think that any of the rest of us would do so either.

If someone has pleural plaques, they are more likely to develop asbestosis and mesothelioma. No one knows who is going to develop those killer diseases, so those who have plaques have every right to be anxious. Their lungs have an unnatural scarring that is caused by exposure to a dangerous material. Those people got that condition by working hard in order to raise their families. They paid their taxes and helped our industries to reach the stage at which they could pay big insurance companies to compensate employees financially when required.

The Association of British Insurers says that there is a duty on its part, and on the part of its members, to pay out when there has been employer negligence. There has been employer negligence when exposure to asbestos has caused scarring to workers’ lungs.

This Parliament will deliver on its duty to our people; by doing so, it will set an agenda that I hope will cause the London Government to give serious thought to reversing the House of Lords decision that affects people with pleural plaques in England and Wales.

16:16

Bill Butler (Glasgow Anniesland) (Lab): I support the motion in the name of the minister. As deputy convener of the Justice Committee, I put on record my appreciation of the stunning work of the clerking team and the invaluable assistance of the Scottish Parliament information centre in the stage 1 scrutiny process that the committee undertook.

The need for the bill arose from the House of Lords judgment on 17 October 2007, in which it ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages. That judgment reversed more than 20 years of precedent and practice. In effect, the ruling meant that those who suffered anxiety as a result of the presence of pleural plaques could no longer pursue damages against the industries that had left them exposed to asbestos dust in a breach of their common-law duty of care and of various statutory duties under health and safety at work legislation. That was the direct consequence of the part of the Lords ruling that said that the mere presence of pleural plaques in the claimant’s lungs was not a material injury capable of giving rise to a claim for damages in tort, or, in Scotland, delict.

Unsurprisingly—and quite rightly—there was a public outcry about the Lords judgment. It was variously described as disturbing, scandalous and bizarre. It was certainly viewed—correctly in my opinion—as manifestly unjust, and I congratulate the present Scottish Government on introducing the bill in response to widespread public concern to correct the error.

The Justice Committee’s stage 1 report makes it plain that their lordships were fundamentally mistaken in their view. We should not pretend otherwise; we should be plain about that.

In paragraph 71 of the report the committee states its belief that

“it is right and proper that pleural plaques sufferers should be able to continue to pursue compensation”,

given that for the past 20 years damages have been awarded to those exposed to asbestos. The
committee found that nothing presented in evidence undermined that precedent.

In paragraph 72, the committee states its view that, for people with pleural plaques, the "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."

Consequently, the committee—again, correctly in my view—was "not persuaded by the suggestion that the anxiety felt by those diagnosed with pleural plaques can be allayed by ... medical explanations."

On the question of injury, my colleagues and I agreed in paragraph 84 of the report 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."

The committee was unanimous in its view that the bill will not "overturn or undermine this law generally as the Bill is expressly restricted to asbestos related conditions", as the convener said in his opening remarks.

We agreed that, thus, the bill "represents a proportionate response to the House of Lords judgement."

I hope that members will agree that the stage 1 report is proportionate, not only in the particular recommendations to which I have referred but in its entirety. The committee found the evidence put forward by sufferers and their supporters compelling, and I pay tribute to, among others, Clydeside Action on Asbestos and Unite, the GMB and other trade unions.

Let me be plain: the bill is necessary because their lordships made a profoundly wrong decision—a decision that, in effect, found in favour of employers who had negligently or recklessly caused their workforce to be exposed to asbestos in the pursuit of profit, and against the innocent victims of those employers’ recklessness and neglect. That is wrong.

Who are the victims? They are our fellow citizens, who spent their working lives in the shipbuilding, construction and fishing industries. They are the Rosyth dockyard worker who was exposed to asbestos, with no protection of any kind, over two and a half years in the late 1950s. They are the retired pipe fitter from Leith who was never told of the dangers and who was forced into early retirement at the age of 53. Those are the victims: real people, whose real lives have been affected and blighted.

The Lords’ decision left 214 people whose cases are in court, and more than 400 others whose cases have still to be heard, in a judicial no-man’s-land. At any time, insurers acting on behalf of employers could move to have the cases thrown out by the Court of Session. Indeed, that has happened in one instance, but we as a Parliament can prevent further such injustice from being visited on the innocent victims and their families, who have already had to endure so much.

We can do that by acting together as the Parliament of Scotland. The previous Labour-led Executive found space in its legislative programme for Parliament to pass the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. That act rightly attracted the unanimous support of the Parliament. It showed that we can act across party boundaries when we know that a wrong needs to be righted.

We must act once again as a united legislature to remedy an injustice. We must restore our fellow citizens’ right to compensation in respect of pleural plaques and—this important point has not yet been mentioned—reserve their right to make a further claim for compensation if, tragically, they go on to develop other, fatal, asbestos-related conditions.

I hope that members of all parties and none are united on the matter. The people of Scotland demand that justice be done, and they are right to do so. The people of the UK make the same demand, and they are right, too. I hope that work is done effectively in all the Parliaments on this island. Let us heed the wishes of the people and support the bill at stage 1.
challenged the inequities one by one. We have highlighted the insurance industry’s delaying tactics and its attempts to spin out cases to avoid or reduce liability, which would happen if the person in question were to die before settlement. We have exposed the use of the blanket denials that, for example, forced victims to prove that the QE2 was built at the John Brown yard at Clydebank.

The change in court rules has seen the fast-tracking of cases that are brought by those who are terminally ill. As Bill Butler said, a new act will make it easier for mesothelioma victims and their families to be compensated properly. Another step in that direction will be taken if the general principles of the bill are agreed at decision time. If we go on to pass the bill, we will ensure that pleural plaques sufferers can pursue claims for damages.

We need to remember that the chamber can do that only with the support of Clydeside Action on Asbestos and our friends in the trade unions. We also need to remember Frank Maguire—who has not been mentioned in the debate and who will be embarrassed to be mentioned now—for all his work and the support that he has given members across the parties in tackling the issue and making things easier for those involved. I stress the word “easier”; although we have made it less difficult for people to get compensation, we should remember that it is still not easy for them to do that.

On Monday, I made a statement—over the telephone, but I will sign it off later—to the legal representatives of a family in my constituency, one of whom is an ex-foreman with whom I worked. The statement established where he worked, for whom and with whom, all of which are requirements if a claim is to be progressed.

Last week, I worked on a case with an old friend, Joe McLaughlin; he is now an elderly man, but was formerly a full-time official in my area. A family had contacted me because they had had great difficulty in establishing a family member’s work record. As these old pairt people do, Joe had kept records from 50 years ago. A phone call to my friend resulted in the branch contributions from 50 years ago—it was a delightful and satisfying moment. I could not wait to tell the family.

As I said, it is difficult to say anything new. I am delighted that we are making progress. We are discussing a measure that is not only historic in nature, as Gil Paterson alluded; people out there today are still being affected. It is worth noting for the record the hidden killer campaign that the Health and Safety Executive has mounted in recent weeks. The HSE is reminding us that asbestos continues to be a major problem—it is a hidden killer that takes the lives of 20 people a week. More people die of asbestos-related disease in the UK than die in road accidents.

The campaign reminds us that, despite the fact that asbestos has been banned for a considerable time, people such as joiners and electricians are still being exposed to it. The HSE reckons that there are still 500,000 non-domestic buildings that contain asbestos. People out there continue to work in difficult circumstances. In addition to working on behalf of the victims of the past, parliamentarians have a role to play—with our friends in the trade unions and campaigners—in highlighting the dangers of the present. People are still in danger of being exposed to asbestos, but if we get things right, we will avoid compensation claims and wrangles over the law.

I appreciate being able to speak in the debate. I thank the committee for all its work.

16:29

Robert Brown: The debate has been an excellent one. We have heard contributions from across the chamber and from a number of different perspectives. Some members spoke with passion: Cathy Peattie, for example, spoke from personal experience and the wider context of health and safety issues in Scotland, should have been the last member to speak in the open debate.

As many members have said, this is a just cause. It is the proper business of the Scottish Parliament to put right injustice in the way that we are doing in the bill. It is also right that the matter should be analysed properly, that the remedy should be effective and that we should know its implications in cost terms. I reiterate my earlier point about the level of damages and the need to avoid the potential of further dispute after the bill has been passed, which could delay sufferers’ rights. I continue to have concerns about that.

I will concentrate on the figures. Those are made up of the level of damages or costs, which is the multiplicand; the number of cases annually; future predictions of the number of cases, which may peak at a certain point; and the percentage of UK cases that occur in Scotland, which we have discussed previously. Linked to those factors are the implications for the private insurance industry and for government—both local government and national Government in Scotland and at Westminster.

Consideration of some of the compensation figures that have been suggested illustrates the
difficulty of arriving at satisfactory figures and the need for fresh analysis by the Government. In the UK Government’s paper, a compensation figure of £5,000 to £7,000 is mentioned. That is the original figure from 1987 or thereabouts, when the first cases came before the courts. It is suggested that the typical figure in England and Wales may now be substantially higher—£11,500 to £13,400. The Scottish Government has proposed a figure of £8,000, which is based on figures from 2003-04; that is another complication. It is worth mentioning that in the Johnston case as it went through the courts, the figure was assessed at £4,000. I assume that that estimate was based on the medical evidence that was available to the Court of Appeal and the House of Lords. All the figures relate to provisional damages for situations involving pleural plaques. The range of figures that I have given shows the difficulty of arriving at a judgment on the measure for such damages.

Earlier I touched on the question of legal costs. The Scottish Government has assumed pursuer’s costs of £8,000 and defender’s costs of £6,000, but I think that those estimates are too high. The Law Society of Scotland, which was asked specifically about the point, gave evidence that a settlement for damages of £9,000 to £11,000 will produce an extrajudicial settlement fee of £2,125 plus VAT and outlays for medical reports and records. In undefended cases, which I think pleural plaques cases will be once the bill has been passed, it does not seem reasonable to arrive at costs of £8,000 for the pursuer and £6,000 for the defender. There are uncertainties that are capable of a degree of resolution. It is not the job of the minister or the Parliament to fix the amount, but it is ministers’ job to indicate, from the advice that they have received from officials and from legal advice, that there is a clear basis on which judges can apply the effect of the law. That is the point that I am trying to make.

I do not want to go into the number of cases, which is a much more complicated issue. Ministerial correspondence contains a great deal of evidence on the progress of personal injury actions and shows that over the past few years the number of asbestos-related actions that have been raised in court has remained fairly steady: there were 164 such actions in 2003, 270 in 2004, 287 in 2005, 325 in 2006 and 279 in 2007. That is a relevant point. There is also information on the number of Scottish cases of mesothelioma, lung cancer with asbestosis and pleural thickening that have been subject to the industrial injuries and disablement benefit scheme. In the past few years, they have accounted for 10.4 per cent, 12.2 per cent and 5.3 per cent of Great Britain cases. That points to a level of cases that bears some relation to Scotland’s share of the UK population, as does the number of instances of death from mesothelioma.

Those things need to be sorted out. However, although we need to have a clearer idea on those points, it does not take away from the fact that the background to the bill is the need to do justice for the sufferers of pleural plaques. That is why, like other parties in the Parliament, the Liberal Democrats back the bill. It is a just and proper bill. It puts right an injustice, whatever the legal arguments that we have analysed in the course of the debate. I look forward to the Scottish Parliament agreeing today to the general principles of the bill and the financial memorandum. I also look forward to the further debates that we will have on the detailed issues at stages 2 and 3.

16:35

John Lamont (Roxburgh and Berwickshire) (Con): The debate has been interesting, not least because the principles behind the bill have caused me to give the issue a considerable amount of thought. As we have heard from a number of members, the bill’s purpose is to deal with whether someone who has been negligently exposed to asbestos in the course of his employment can sue his employer for damages on the ground that he has developed pleural plaques.

We have heard from a number of members about the awful effects that asbestos-related illnesses can cause—in particular, I note the personal experiences of Cathy Peattie’s husband, which she mentioned in her speech. I do not think that any of us would dispute the distressing and disturbing effects of such diseases, but I have some concerns about what the bill might do from a legal perspective and about the considerable uncertainty surrounding its financial impact.

We can say that the bill simply attempts to replicate the practice from 1980 to 2005, when damages were awarded to claimants who had developed pleural plaques. We can also say that those people who go on to develop serious illness as a result of their exposure to asbestos should have a claim in law for damages. However, like Nigel Don, I believe that we should move cautiously to overrule what the House of Lords determined in the Johnston case. The law lords gave careful consideration to the law of damages, and their judgment reversed more than 20 years of practice. I am sure that they did not take that decision lightly. They ruled that, as pleural plaques cause no symptoms, do not cause or lead to other asbestos-related diseases and do not shorten life expectancy in themselves, their mere presence in a claimant’s lungs is not a material injury capable of giving rise to a claim for damages.
Mr Don asked whether the issue could be dealt with under contract law rather than under the law of delict—or tort, as it is in England. I suspect that claimants always pursue the route of tort or delict because of the level of damages available under that area of law compared with that which is available under contract law.

I read with some interest the medical opinions that were submitted to the Justice Committee that pleural plaques do not, in themselves, cause any symptoms in sufferers. However, once diagnosed, they are likely to cause anxiety that something more serious may develop in future. The question is whether that should be sufficient in itself to entitle the sufferer to compensation.

There were two clear views in the evidence that was submitted to the committee on that point. In the debate, members have focused predominantly on only one. Witnesses such as those from Clydeside Action on Asbestos took the view that the bill was an opportunity for sufferers to get some form of redress against those who had negligently exposed them to asbestos. The alternative view of the insurance industry and some lawyers is that compensation should not be available simply because someone has come into contact with asbestos. There was concern about the impact that the bill would have on the law of Scotland, in that it would open up the opportunity for other people who became aware that they were at a greater risk of an injury in the future to make claims.

Other members focused on the reasons why we should support the bill. As devil’s advocate, if nothing else, I will focus on the alternative view. I have a lot of sympathy for the view that making compensation available for pleural plaques when they have no negative effect on health runs counter to the Scots law of delict and could open the way for more widespread challenges to other longstanding legal principles on which we have relied in the past. That causes me quite a lot of nervousness.

Bill Butler: Which view does the member agree with?

John Lamont: As I said, I am simply putting forward different views from different aspects of the debate. Today’s debate has focused on one side, but the Justice Committee took a much more balanced approach. I simply express reservations and concerns, from a lawyer’s perspective, on the effect that the bill might have on the law of Scotland.

I am not saying that the bill would necessarily have such an effect. However, we need only look at the unintended results of the introduction of the Human Rights Act 1998 by the UK Parliament to see how the bill, if enacted, might unravel into results that we might not have intended.

I want to look briefly at the financial implications, which are probably at the core of my concerns. That issue was raised by a number of members, but not by them all. The Justice Committee noted considerable differences in the estimates that were provided by the Scottish Government and by the insurance industry regarding the number of pleural plaques claims that were likely to arise in Scotland in any given year. The insurance industry and the Government—if the latter is being honest—have great difficulty in accurately predicting the number of future pleural plaques claims. There is uncertainty regarding how many people have been exposed to asbestos; of those who have been exposed, there is uncertainty regarding how many will develop pleural plaques; of those who have developed pleural plaques, there is uncertainty regarding how many will be identified as having pleural plaques; and of those so identified, it is uncertain how many would make a compensation claim. There is also uncertainty over the value of a claim, with the claim’s inflation being a particular issue for the insurance industry.

I agree that it will always be difficult to predict accurately the costs that are involved in implementing such bills. However, if we are simply replicating what the law was prior to 2005, surely there should be a clear indication of the likely costs. The Scottish Government should have clear and verifiable estimates, as should the insurance industry.

Bill Kidd made a number of points about the insurance industry. The important point to make is that the issue is not just the insurers; there is a big issue for the Scottish Government, which is the employer in a number of cases and which will have to pay out as well.

I am happy to support the motion as amended by Jackson Carlaw’s amendment. However, there are financial issues that must be fully considered before the bill can be progressed.

16:42

Paul Martin (Glasgow Springburn) (Lab): We have heard a number of powerful and thoughtful speeches. I give special recognition to Des McNulty and Duncan McNeil, who with others have campaigned on the issue since the Parliament’s formation. I am proud of the stance that the Parliament is, I hope, taking. However, given what John Lamont said, I am not sure of that. I take it, though, that the Conservatives support the bill.

We are taking a stance on behalf of the hard-working men and women throughout Scotland who have been negligently exposed to asbestos. Like
others, I pay tribute to the role that unions such as Unite have had, alongside Clydeside Action on Asbestos, in addressing the serious challenges that claimants face.

The key word for me during this stage 1 debate has been “negligence”. To all those who protest against and oppose the bill, particularly the insurance companies, I say that we would not be here were it not for the fact that—I direct this point to Jackson Carlaw—employers exposed their workers to asbestos. Indeed, it has been known since 1892—this fact has been clarified—that asbestos is a poisonous substance. The Justice Committee received written evidence that industry leaders on some occasions deliberately ignored and, indeed, hid the dangers of asbestos. That written submission has not been contested. It is important to take that into consideration, while entering into the spirit of consensus on the issue and ensuring that we take it forward.

The more that I consider the issue, the more concerned I become about the way in which men and women have been labelled a problem by the insurance industry. Let us be clear: the claimants are victims. The problem is with those employers who exposed the victims to asbestos. I refer to the evidence that we received from the insurance industry. Perhaps it is not surprising that it raised concerns that the enactment of the bill would result in insurance premiums increasing. However, from the evidence that we received, I believe that that view is speculative and has little effective written evidence to support it.

During an evidence-taking session, I asked Dominic Clayden—the director of technical claims at Norwich Union Insurance Ltd—the following question:

“So it is possible that there will not be an increase in premiums.”

Despite his having provided us with significant written evidence advising that there would be an increase in insurance premiums, he admitted in his response:

“There may not be, but if the bill is enacted, it will create an upward pressure on premiums in Scotland.”—[Official Report, Justice Committee, 2 September 2008; c 1032.]

I cannot help observing that another pressure on premiums may be the massive legal costs that the industry has incurred as a result of raising 10 test cases in England and Wales. Perhaps the industry’s vigorous and aggressive approach towards dealing with those claims has raised the possibility that insurance premiums might be increased.

Several witnesses on various occasions said, “Of course, this is an emotive subject.” Of course the subject is emotive. It is emotive for those who have been exposed to asbestos and for their worried families. They should make no apologies whatsoever for being emotive.

What compounds such feelings of anxiety is that the insurance industry’s answer to the problem is to educate claimants to condition them into thinking that they need not worry any further about their condition. Once again, I cannot help observing from my recent experience of submitting a life assurance form, for which I was subject to the usual interrogation process that many of us will have experienced, that the insurance company did not say that I need not advise it of particular medical conditions. As I recall, I was interrogated about, and had to submit details on, every possible medical condition. If the insurance industry advises that information on pleural plaques need not be submitted in a medical insurance application form, I am sure that we will be able to take the issue forward.

As several members have said, pleural plaques are not visible. The disease causes irreversible damage to the lining of the lung such that, if it involved visible tissue, compensation would obviously not be denied. The fact that pleural plaques do not affect a person’s external appearance should be irrelevant.

On the financial memorandum, it is not often that I disagree with Bill Aitken but I am not uneasy with the challenges that we face in respect of the bill. Of course the Parliament’s role is to scrutinise any legislation that is introduced, but the challenges that the bill presents are no different from those that we face with every piece of legislation that is introduced. Let us be clear on one thing: the political will of the Parliament is to proceed with the bill. I believe that that view will prevail.

I read with interest the Hansard report of the debate that was secured by Jim Sheridan MP. In a powerful speech, he used his personal experience of having worked in Glasgow’s shipyards to provide an account of the irresponsible attitude of employers. He said:

“I remember times when we could see asbestos dust floating in the air. The foremen would tell us to carry on working because it would not do us any harm. I do not blame the foremen or managers, because they were only doing as they were told.”—[Official Report, House of Commons, 23 January 2008; vol 470, c 460WH.]

That is the account of a man who personally experienced the shipyards.

In conclusion, we on the Labour benches believe that the bill deals with an industrial legacy of which Scotland’s employers should be ashamed. It is important that we use this opportunity to put that shameful legacy behind us.
16:49

Fergus Ewing: The debate has been very positive. I cannot recall one in which there has been such consensus in the chamber—that is to be welcomed by us all. Jackson Carlaw set the tone when he made clear his support for the bill. Throughout the debate, we have had thoughtful, passionate and moving contributions. Particularly in respect of the latter, we heard from Cathy Peattie about how this matter has touched her family. We heard passionate contributions from the two Bills—Butler and Kidd—and I hope that it is not too mischievous of me to reflect in passing that any matter upon which Jackson Carlaw and Bill Butler manage to unite to some extent is—


Fergus Ewing: Yes, it is something approaching a miracle, as Mr Brown said.

It is my duty to apply myself to some of the serious points that were made in the debate, not least of which are the committee’s criticisms. I start with the criticism of the consultation, which Bill Aitken properly mentioned when he opened for the committee. I acknowledge the concerns about our consultation approach. We did move quickly, but I maintain that were right to do so and, in practice, we had little alternative. It is important to recall that the circumstances were unusual and that 20 years of precedent had been set aside. The UK Government moved swiftly to announce that it would not legislate straight away. In such circumstances, it was important to get clarity in Scotland, not least, as Bill Butler pointed out, for those whose cases are in limbo. We need to provide clarity for those people who are waiting in the legal system limbo. As a lawyer, I know that delays in legal cases are hard enough for clients to deal with, but when the delay is induced by Parliament, it only makes things worse.

We moved quickly to consult on a partial regulatory impact assessment from February to April, as is recorded in paragraph 12 of the financial memorandum. That was a fair attempt at as detailed and thorough a consultation as we could muster. Not everyone replied to it by any means, but we received solid contributions, not least from the Law Society of Scotland, that supported the bill and our approach. There was a great deal of support for our general approach. So, although the committee had its criticisms, I hope that it appreciates that there were reasons for moving swiftly and that we believe that we were right to do so.

Robert Brown properly raised the issue of quantum. If the bill becomes law, how much will be awarded to future claimants who have pleural plaques as a result of their employers’ negligence? As Mr Brown knows, the bill does not address quantum—the amount awarded to any particular litigant—because that is properly a matter for the courts. It is not for Parliament to lay down how much an individual should be awarded because, even among those who have pleural plaques, there are differences. Every litigant who goes to court is in different circumstances. They will be different ages and have different life expectancies. One of the features of pleural plaques is the long latency period; it can take 30 years for the condition to be diagnosed in some cases. All cases are different and it would be difficult to set out on the face of the bill a formula for calculating quantum. It would be a departure from the laws of delict, to which many members have referred in general terms.

However, the bill will follow Parliament’s consensual approach. Members may have amendments that they wish us to consider, and I will meet any member of the Parliament—or anyone who is listening to the debate—who thinks that they can improve the bill. My officials will study carefully any serious proposal.

It is our understanding that, prior to the House of Lords judgment, the courts understood that pleural plaques caused no physical symptoms, but awarded compensation for the anxiety that sufferers felt. That being the case, in our view the rationale for awarding quantum should be the same after the passage of the bill as it was before the House of Lords ruling. We see no reason to assume or to speculate that the approach that is followed in future will be different from that which was followed in the past.

The issue that, rightly, has prompted the most comment concerns the financial estimates. Let me restate what I said at the outset of the debate. Although detailed work has been done to provide estimates that are as sound as it has been possible to produce, further work has been initiated to provide reassurance that those estimates are far more robust than the insurance industry claims them to be. I will inform Parliament of the outcome of that further work on the estimated cost of the bill as soon as I can.

That said, it is not unreasonable for me to point out that the provisions of the financial memorandum from paragraph 11 until the end are extremely detailed. Members might not be surprised to learn that I spent some considerable time on those paragraphs. Not many members have had the opportunity to go into each of them in detail—time has perhaps not permitted them to do so—but they provide the best possible estimate of the likely costs.

Paragraph 13 says:

“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 admit that we are not trading in certainty. There is no mathematical formula that we could apply; were there any such formula, I would fear for the fate of people who have the condition because they would know when they were likely to meet their maker. That would be a chilling mathematical formula; however, no such formula exists.

It is clear that there is a degree of uncertainty about future numbers of pleural plaques claims, but I want to give a brief description of the rationale that we applied as we set about the task of preparing the financial memorandum, on which the debate has centred. It is extremely simple—we examined the claims that were made over the past few decades. We looked at how many cases were pursued, how many went to court and how many were settled. We reached the best figure that we could arrive at. We appreciate the assistance of the Scottish Court Service and of Thompsons, the firm that has acted in about 90 per cent of the cases in question. We met them and studied the figures, which are in the financial memorandum.

The same is true of the estimated cost of £8,000 a case, plus legal expenses. That is the best figure that we could get. We did not get figures from the insurance companies, which said that their figures were commercially confidential. I hope that members will agree that we have done our best in the financial memorandum, and I thank my officials for their efforts.

I will conclude by mentioning some of the other issues that have been raised. It will be a good thing if the bill is agreed to when it moves to stage 3. As many members have eloquently said, it will redress an injustice. I am immensely heartened by what Richard Baker said in his intervention at the beginning of the debate about his willingness to engage with us in further constructive dialogue with the UK Government in relation to its statement of funding policy. We can return to the issue. I will be happy to meet Richard Baker and representatives of all other parties on that issue.

Although this Parliament is standing up, as many members have said, for the people of Scotland; is cognisant of our industrial heritage; and is aware of the problems and ills of the past, about which members such as Gil Paterson spoke movingly, we in the Scottish National Party would like every person in the UK who has pleural plaques to be able to pursue their claims, and we very much hope that where the Scottish Parliament leads, Westminster will follow.

**Damages (Asbestos-related Conditions) (Scotland) Bill: Financial Resolution**

17:00

The Presiding Officer (Alex Fergusson): The next item of business is consideration of motion S3M-2797, in the name of John Swinney, on the financial resolution in respect of the Damages (Asbestos-related Conditions) (Scotland) Bill.

Motion moved,

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Damages (Asbestos-related Conditions) (Scotland) Bill, agrees to any expenditure of a kind referred to in Rule 9.12.3(b)(ii) of the Parliament’s Standing Orders arising in consequence of the Act.—[Fergus Ewing.]

The Presiding Officer: The question on the motion will be put at decision time.
Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Sections 1 to 5 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Bill Butler
Supported by: Robert Brown

1 In section 1, page 1, line 4, leave out <is not negligible> and insert <causes actionable damage for the purposes of the law of delict>

Section 2

Bill Butler
Supported by: Robert Brown

3 In section 2, page 1, line 13, leave out <For the avoidance of doubt,>

Bill Butler
Supported by: Robert Brown

4 In section 2, page 1, line 15, leave out <is not negligible> and insert <causes actionable damage for the purposes of the law of delict>

Bill Butler
Supported by: Robert Brown

5 In section 2, page 1, line 19, leave out subsections (3) and (4)
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the groupings (that is, the order in which amendments will be debated). The text of amendments set out in the order in which they will be debated is not attached on this occasion as the debating order is the same as the order in which the amendments appear in the Marshalled List.

Groupings of amendments

Approach to achieving the Bill's objectives
1, 2, 3, 4, 5
Damages (Asbestos-Related Conditions) (Scotland) Bill: The Committee considered the Bill at Stage 2.

Amendment 1 was moved and, with the agreement of the Committee, withdrawn.

The following amendments were not moved: 2, 3, 4 and 5.

Sections 1, 2, 3, 4 and 5 and the Long Title were agreed to without amendment.

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament
Justice Committee
Tuesday 2 December 2008

[THE CONVENER opened the meeting at 10:18]

Damages (Asbestos-related Conditions) (Scotland) Bill: Stage 2

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. We have a full turnout, so there are no apologies.

Agenda item 1 is stage 2 consideration of the Damages (Asbestos-related Conditions) (Scotland) Bill. Members should have the marshalled list of amendments and the groupings.

Section 1—Pleural plaques

The Convener: Amendment 1, in the name of Bill Butler, is grouped with amendments 2 to 5.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. Amendments 1 to 5 have been lodged on behalf of Clydeside Action on Asbestos, with the support of the Clydebank Asbestos Group, Unite and people acting for sufferers of pleural plaques. The purpose of amendments 1 and 4 is to achieve no more than what the Scottish Government intends to achieve, but in a clearer, more direct and more economical way and in a way that will not give rise to unnecessary questions that will have to be resolved by a court. Amendments 2, 3 and 5 are consequential on amendments 1 and 4, and would remove unnecessary provisions.

There is absolutely no difference between what the Government intends to do through the bill and the intention of those who represent victims of pleural plaques; the only difference is over how the intention should be achieved. The intention is that victims who have developed pleural plaques as a result of the negligence of some other person should be entitled to recover the same amount of damages as they were able to do before the House of Lords decision in the Rothwell and Johnston case. In effect, that means that, first, victims would be able to return to court in the event of their contracting in future a disease that is caused by asbestos and which constitutes a serious deterioration. That is especially important with regard to malignant diseases such as mesothelioma and/or asbestos-related lung cancer. Secondly, the victims would be entitled to claim damages not only for pleural plaques, but for the anxiety about the risk of contracting such diseases in future. It is essential for the bill to give effect to that intention clearly. However, for reasons that I will explain, there are doubts as to whether it will do so.

I turn to amendment 1. Section 1(1) states:

“pleural plaques are a personal injury which is not negligible.”

The explanatory notes state that the intended meaning is that

“pleural plaques are material damage that is not de minimis for the purposes of claiming delictual damages.”

The trouble is that section 1(1) does not say what the Government says it is intended to mean. As a result, several eminent lawyers have taken the view that it is open to question whether section 1(1) will achieve what the Government intends.

If we are to achieve the intention, the starting point is to ascertain exactly what the crucial question was before the House of Lords in the case of Rothwell and Johnston. Lord Hoffman put his finger on it when he asked, at paragraph 10 of the judgment:

“Are pleural plaques actionable damage?”

Lord Hope of Craighead and Lord Rodger of Earlsferry made statements to the same effect in paragraphs 39 and 90. It is therefore clear that the crucial question in the case was whether pleural plaques are an actionable damage. The House of Lords answered the question in the negative, so the bill must provide clearly that pleural plaques are a personal injury that causes actionable damage.

Unfortunately, section 1(1) does not make it clear that pleural plaques are a personal injury that causes actionable damage for which damages may be recovered. As that is the intention, why not say so clearly? Amendment 1 would achieve that by providing simply that pleural plaques are a personal injury that causes actionable damage for the purposes of the law of delict.

That would achieve the Government’s purpose more clearly and directly and in a way that would be understood immediately in any court of law.

I suppose that the Government will argue that the intention is achieved by stating:

“pleural plaques are a personal injury which is not negligible.”

I am told that judges use various expressions to describe what is meant by the term “actionable damage”. Sometimes, they use the expression “material damage”, or they talk about real damage, as distinct from purely minimal damage, or damage that is beyond what could be regarded as
negligible. However, section 1(1) does not refer to damage at all. The words “not negligible” describe the seriousness of the injury, which is a question of fact rather than one of law—the question of law is whether the personal injury causes damage that is actionable.

Another problem with the drafting of section 1 is that it does not make it clear that pleural plaques are an actionable personal injury for which damages can be recovered under the law of delict. Delict is the name given to the common law under which damages can be recovered for negligence or some other breach of duty. Section 1(2) says that damages are recoverable, but it does not mention the basis on which that can happen. The section could be read as imposing strict liability without any fault or breach of duty at all, which of course is not the intention. Section 1(4) attempts to restrict the width, but again, it does not mention that it is talking about delictual liability. It could be referring to another kind of liability, such as liability under a contract of employment. Members will remember that, at stage 1, the committee was concerned that the bill could have an effect, intended or otherwise, on other areas of law. Amendment 1 would make it clear that the provision applies only for the purposes of the law of delict.

There is an even more fundamental problem with section 1. As I said, the intention is that victims who have developed pleural plaques as a result of the negligence of some other person should be entitled to recover the same amount of damages as they were able to do before the House of Lords decision in the Rothwell and Johnston case, including damages for anxiety about the risk of contracting a more serious disease from asbestos in the future. That is achieved through amendment 1, I contend.

If the bill says that pleural plaques are an actionable damage for the purposes of the law of delict, it would automatically follow that a victim who has developed pleural plaques in consequence of the wrongful act or omission of another person would be able to recover damages from that other person without any fault or breach of duty at all, which of course is not the intention. Section 1(4) attempts to restrict the width, but again, it does not mention that it is talking about delictual liability. It could be referring to another kind of liability, such as liability under a contract of employment. Members will remember that, at stage 1, the committee was concerned that the bill could have an effect, intended or otherwise, on other areas of law. Amendment 1 would make it clear that the provision applies only for the purposes of the law of delict.

Section 1 is silent on that. In my view, it is therefore extremely doubtful whether that result would be achieved under the bill.

I should make it clear that I am absolutely not saying that the Government’s intention would not be secured by section 1. My point is simply that its wording gives rise to unnecessary doubts or questions, which will have to be argued over in court. In relation to such a matter, it is desirable that the Parliament should not pass legislation that gives rise to such doubts. The position ought to be made clear—as it is, I contend, by amendment 1.

The purpose of amendment 2 is to leave out subsections (2) to (4) of section 1. The subsections are unnecessary in consequence of amendment 1. As has already been explained, it would follow automatically from amendment 1 that a victim who has developed pleural plaques in consequence of the wrongful act or omission of another person would be able to recover damages from that other person. That achieves the purpose of subsections (2) and (4) in a clearer, more straightforward and more economical way. Subsections (2) and (4) can therefore be deleted, as they are unnecessary.

I contend that subsection (3) is also unnecessary. It is drafted on the mistaken assumption that the bill is reversing or abolishing an existing rule of common law: that pleural plaques do not constitute actionable damage. However, there is no such rule, and that is therefore not what is happening under the bill. This is an extremely important legal point, I have been advised. There is no authoritative judgment in Scots law that pleural plaques do not constitute actionable damage. The English decision in the Rothwell and Johnston case has created uncertainty, however. The bill removes any uncertainty created by that case, and it clarifies what the law is. That is the aim of the bill, and it is achieved by section 1(1), as amended, and by section 4(2), which makes it clear that the provision is retrospective. Section 1(3) is simply unnecessary.

Amendment 2 will ensure that the legitimate expectations of people who suffer from pleural plaques are being preserved in Scotland. In other words, the bill will support the human rights of those who suffer from pleural plaques.

The purpose of amendment 3 is to leave out the words “For the avoidance of doubt”.

at the beginning of section 2(1). Those words are unnecessary, and their omission will help to bring section 2 into line with section 1.
Robert Brown (Glasgow) (LD): As they say in the courts, I adopt the reasoning of my good friend, Mr Butler. I will add one or two further comments. The point about clarifying, rather than changing, the law is extremely important, and it is supported by the wording that the Government has used both in the bill’s long title and in the explanatory notes.

Paragraph 5 of the explanatory notes states:

“The purpose of the Bill is to ensure that the HoL Judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages.”

It is not about changing the law; it is about ensuring that there is an understanding of what the law is.

I turn to the slightly different point about the phrasing of the amendments. The long title of the bill is:

“An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.”

The long title bears a greater resemblance to the wording that is used by Bill Butler in his amendments than it does to the Government’s slightly more contorted phrasing, dare I say it, in the text of the bill. The proposed phrasing in Bill Butler’s amendments is more economic. Personally, I think that it is more elegant, and that it bears more relationship to the normal phraseology that was adopted in the House of Lords judgment and which appears in the normal concepts of law that apply in this area.

Amendment 1 limits the changes that are effected by the bill to the law of delict. I should explain that actions may be brought under different headings—under the law of contract, for example. There is nothing in the House of Lords judgment that we need to deal with in that context. Adopting the proposed phrasing in the amendment does the minimum necessary to limit the provisions and fit them into the concept of delict.

The committee was concerned that the bill should not drive a coach and horses through the normal concepts that operate in this area of law. The amendments seem to provide a more elegant and satisfactory phrasing. They do away with the need to focus on issues of causation. Bill Butler said that, if we are not careful, there could at least be a suggestion that a strict liability interpretation might be put on the Government’s current wording.

Because the proposed phrasing does not change the law, but rather clarifies it, we avoid the need to get into complex issues around retrospect, which is always a complicated issue for Parliament. Parliament does not like legislating...
reversely, and I think that the amendments avoid that difficulty.

The issue is not one of principle, as has already been said. Nobody is arguing—on the Government side or on our side—about the direction of travel. The issue is a technical one of phraseology, and of ensuring that the objective that we share is met in the most satisfactory way and in a way that leads to the fewest possible subsequent arguments about what the law might mean or what Parliament might have intended.

I turn to a slightly different point on the quantification of damages. I made a number of noises at an earlier stage about whether issues would arise with the way in which judges approached the quantification of damages in these cases. I am satisfied that that is not an appropriate issue on which to lodge amendments; nevertheless, I would be grateful for further reassurance from the minister that the matter has been thought about and that it is not the Government’s intention that the wording in the bill should change in any way the rules that ordinarily apply and the way in which judges have hitherto quantified damages.

The Convener: Minister, the debate is not about the intent of the bill. Everybody is satisfied that we have, to use a legal phrase, consensus ad idem on the intent of the bill. However, it is important that certain issues are made sufficiently clear so that we can see where we are going, bearing in mind the potential for future proceedings. It would be useful if, in responding to the comments that have been made, you could tell the committee whether you would consider taking legal advice from the Lord Advocate in the event of Mr Butler’s amendments not being agreed to for one reason or another.

The Minister for Community Safety (Fergus Ewing): I am extremely grateful to Bill Butler and Robert Brown for setting out clearly the arguments for the amendments. I believe that all MSPs share the common objective of providing Parliament, at stage 3, with a bill that restores the right of legal action to those who, through negligence or breach of duty on the part of their employer, were wrongfully exposed to asbestos, as a result of which they have suffered scarring of the pleura—the membranes surrounding the lungs. We all share that common purpose. In that respect, today’s debate, perhaps unusually for Parliament, is not at all adversarial. I am tempted to call it a discussion or a conversation—or even a national conversation.

The Convener: Do not push it too far, minister.

Fergus Ewing: The keyword is non-adversarial. We are all trying to achieve the same objective.

I will depart from my original intention in the light of what I have heard and will explain a bit of the background that led us to adopt the approach that we have taken. That might help members and those—some of whom may be here—who have legal expertise and a close interest in the topic, who may want to reflect on what we say today about how we intend to proceed to stage 3.

Officials have been working closely with Frank Maguire—who is in the public gallery—on the bill since November 2007. On 13 August, he advised my officials that he and colleagues had concerns as to whether the bill, as introduced, would meet the policy intent. He had obtained the opinion of senior counsel on the matter, which was submitted for consideration. Subsequently, officials met Mr Maguire, Professor Joe Thomson and Iain Jamieson on 20 August 2008. At that meeting, Mr Maguire and his colleagues focused on whether section 1(1) should read “personal injury causing material damage” rather than “personal injury which is not negligible”.

Following that meeting, officials wrote to Mr Maguire, advising him that our aim is to ensure that the bill’s provisions achieve our objectives as securely as possible.

Following consideration of the issues, officials wrote again to Mr Maguire, on 7 November, explaining why we had reached the view that the suggested amendments to the bill were not necessary and informing him that officials would be happy to discuss the issues further with him should he continue to have reservations. In his reply of 25 November, Mr Maguire suggested a different way forward that did not use the terms “not negligible” or “material damage”. He asked for consideration to be given to the amendment of section 1(1) so that it would read:

“Asbestos-related pleural plaques are a personal injury which causes actionable damage for the purposes of the law of delict”.

That is what the amendments that we have before us today would do.

I mention all that because I want to make two points clear: the legal friends of the Parliament have been in dialogue with the legal friends of the bill in seeking to implement the objectives that we all share; and the amendments that are before us today emerged from the process in a slightly different form from that which was originally discussed. The amendments emerged in their current form for the first time only last week, which paves the way for further discussions, to which I will turn later.

We do not think that the amendments, although they are well intentioned, will achieve the aims that we all share. Our belief is based on several specific reasons, which I will outline as briefly as
possible. In some respects, the amendments introduce weaknesses that may, unintentionally, defeat the objectives of the bill. My remarks on amendment 1 also apply to amendment 4, which is identical. Amendment 1 has, essentially, two effects. The first is to replace the concept of "a personal injury which is not negligible" with the concept of something that "causes actionable damage". The second is to specify that the provisions are for the purposes of the law of delict.

Both those effects cause me concern for reasons that I will now explain.

I see the attraction of the idea that there should be an express reference to the law of delict; however, it is unnecessary. The Official Report already shows that the law of delict is our primary purpose. More important, such an idea could be unhelpful. Defenders may use it to argue that the legislation's scope had been narrowed so that it applied only to delictual matters, not to associated areas of law, and to frustrate the claims that we all want to facilitate. I know that that is not the intention of those who drafted the amendment, but I fear that that may be its effect. That is the clear legal advice that I have received. I therefore suggest that we pause to reflect before going down that route.

One would be hard pressed to find, in all the statutes that relate to the law of delict, any precedent for a provision of that nature. I have a list of such statutes, which I will not read out now but which I will make available to those who are interested. That will prove my point that the wording in the amendment is not a formulation that one finds in the existing laws that relate to these matters.

Our assessment of the phrase "actionable damage" is that such terminology would be no improvement on the current wording. We settled on the term "not negligible" only after very detailed consideration of all the possible alternatives, of which there were a number. For example, we considered "de minimis" but decided that, with respect to our learned friends, we did not want to introduce too much Latin into our legislation. Other alternative terms that we considered were "material" and "not significant". We settled on the phrase "not negligible" in large part because it reflects the language that has been used by the courts in the relevant cases. Notably, the phrase "not negligible" was used in the Rothwell and Johnston case as well as in the Cartledge case.

We also settled on the phrase because, on close examination, the alternatives might not be as effective as they may first appear to be. We have particular reservations about the potential effect of the alternative that is suggested in amendments 1 and 4. If we consider the judgments in the case of Johnston, it is clear that, when considering whether pleural plaques were actionable, the judges used the phrases "actionable damage" and "actionable injury" interchangeably. In that context, actionable damage is synonymous with actionable injury. If amendment 1 was agreed to, the bill would read:

"pleural plaques are a personal injury which causes actionable damage".

That is the same as saying, "Pleural plaques are a personal injury which causes actionable personal injury." Bill Butler suggests that we introduce the concept of actionable damage, but the amendment would create a tautology. For the sake of clarity, I repeat that it would lead to the law saying, "Pleural plaques are a personal injury which causes actionable personal injury." That is a form of tautology—or a way of saying the same thing twice. It is a circular definition.

We cannot accept the formulation in amendments 1 and 4 because it would risk creating confusion and uncertainty where we all wish there to be clarity. For those reasons, I conclude that amendments 1 and 4 are undesirable. The same is true of the slightly different versions that some members might know were suggested by the Law Society of Scotland. Its versions are not before us today, but I state that for the record, in case we or others outwith the Parliament consider the issues again.

As I said, we all share the same objectives. I cannot give a commitment on the outcome, but with the committee's agreement, I intend to seek further, early discussions before stage 3 with the stakeholders, notably the Law Society of Scotland and Thompsons. My officials have already been in touch with Michael Clancy and Frank Maguire to suggest such discussions. We might yet find a formulation that satisfies their concerns without risking the mischief that we fear might arise from the current versions of the amendments, which I have spelled out as clearly as I can today. I explained our thinking at greater length than usual for reasons that I hope I made clear—indeed, they are self-evident.

Amendments 2 and 5 are consequential on amendments 1 and 4. We believe that the provisions that they seek to remove are integral to the bill. For example, in section 1, subsections (2) to (4) convey the clear message that pleural plaques are actionable within the framework of the law of delict. We are particularly concerned about the proposed removal of subsection (3) because it is a specific instruction to the court not to apply the common law reasoning that was applied in the
case of Johnston. We believe that that is crucial if we are to achieve the policy intention.

I add a comment to respond directly to what Bill Butler and Robert Brown said about the status, import or effect of the case of Johnston. It is correct to say that a House of Lords decision is not binding on the Scottish courts, but I think we all know that it is highly persuasive. There is little or no doubt that the Scottish courts would follow Johnston, which would therefore become the law. Indeed, that clear expectation led to the introduction of the bill.

I have not read the case report, but I understand that there has been a Scottish case, Wright v Stoddard International, in which the Scottish courts appear to have accepted the reasoning in Johnston. The remarks in Wright were not, to use a Latin phrase, obiter dicta, which means that they were not the main element or ratio of the case but a judicial aside. Nonetheless, that case shows that the Scottish courts would apply Johnston. There is not much doubt about that. However, Bill Butler and Robert Brown are correct to say that it needs to be understood that the House of Lords ruling is highly persuasive but not binding.

Finally, I turn to the revision of section 2 that is proposed in amendment 3. Section 2 was drafted to reflect the fact that the Johnston judgment dealt only with pleural plaques and made no direct reference to other symptomless asbestos-related conditions. Although it could be argued that a court would come to similar conclusions on those conditions, that has not been tested, hence the inclusion of the phrase "For the avoidance of doubt".

We adopted that approach in order to clarify the existing law. Amendment 3 is unlikely to be unduly problematic, but leaving out that phrase could create the inference that symptomless pleural thickening and asbestosis are not actionable. None of us would want that inference to be drawn from the bill. That is why our advice has been that it is important to leave in the phrase "For the avoidance of doubt".

One might say, "When in doubt, spell it out". That is my favourite phrase, although I do not know whether I have persuaded my advisers to adopt it. Through the approach that we have taken, we are attempting to "spell it out" to ensure that those two other conditions are not affected in the way that I mentioned.

In conclusion, I hope that members appreciate that the Government’s worries about the amendments arise solely from our desire, which all members share, to get the matter right and ensure that appropriate redress is as certain as possible. On the basis of the Government’s willingness to look again at the drafting in discussion with stakeholders, I respectfully ask Bill Butler to withdraw amendment 1 and not to move the other amendments in the group.

Bill Butler: I thank the minister for his full explanation of the Government’s doubts and concerns about the amendments.

We all have the same aim. The Government and the entire Parliament want a bill that meets the policy intent as stated. If I may pun as the minister did, that is our commission, and it is one to which we all subscribe. It is essential that what we do today and at stage 3 gives clear effect to the bill’s provisions. The minister acknowledged that I lodged my amendments to try to give a clearer, more direct and more economical understanding of the bill’s intent. However, he clearly signalled some areas in which there are fine points of law that need further discussion, and I am not qualified to contest those.

Happily, the minister has been able to give the committee today an undertaking not only that the opinion of the Lord Advocate will be sought and duly considered but that there will be fruitful discussions between the Government and interested parties—or, as the minister said, that the Government will seek discussions with stakeholders before stage 3. He said that there has been dialogue with the friends of the bill. In the Parliament, we are all friends of the bill, and I believe that the same is true of the population of Scotland.

On that basis, given the clear undertakings that the minister gave on the record today, and given the fact that I do not pretend to have the necessary qualifications to be able to deal with the legal nuances that the minister has outlined, I am prepared to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.
Amendment 2 not moved.
Section 1 agreed to.

Section 2—Pleural thickening and asbestosis
Amendments 3 to 5 not moved.
Section 2 agreed to.
Sections 3 to 5 agreed to.
Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and those who participated in the debate for the spirit in which the bill has been debated.

10:56
Meeting continued in private until 12:15.
I am writing to provide a reassessment of the financial implications of the Damages (Asbestos-related Conditions) (Scotland) Bill, in accordance with the shared wishes of the Scottish Government and Parliament as expressed in the motion passed at the conclusion of Stage 1. The information should help to give reassurance that, as initially recommended by your Committee in its report of 13 October 2008, the Scottish Government has made every effort to reconsider the adequacy of the Financial Memorandum and to establish whether the UK Government will invoke the Statement of Funding Policy. I intend to arrange for the formal submission of a new Financial Memorandum, picking up the relevant points.

Statement of Funding Policy (SFP)

Let me address the SFP first. As you know from the correspondence that I shared with you in the autumn, the Parliamentary Under-Secretary at the Ministry of Justice, Bridget Prentice MP, had indicated that until such time as the UK Government has announced its approach to pleural plaques south of the border, it will not confirm its position on the SFP. Unfortunately, that announcement has not yet been made. It was to have been made in November, but was postponed with no firm timetable being set (as far as we are aware). A letter last month from Ms Prentice, in response to my letters of 9 October, 14 November and 7 January, simply indicated that, as had already been stated in a Westminster Hall debate in November, the announcement would be made “soon” and, until then, no indication – not even a contingent one – can be given as regards the SFP. In the circumstances, therefore, I am regrettably unable to provide new information about whether the UK Government will invoke the SFP. All I can do is restate that – for the reasons that were given in the earlier correspondence – it is quite legitimate to believe that UK Government Departments ought to
continue to accept responsibility for the financial consequences of their asbestos-related liabilities, as they have in the past.

Reassessment Process

Turning to the overall financial implications of the Bill, I can assure you that the aim of the Scottish Government is to reach the most robust projections possible. Consequently, we shared the concern about the wide disparity in projections at Stage 1, as encapsulated in paragraph 5.5 of the written evidence of the Association of British Insurers (ABI)¹:

"[The Scottish Government] 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".

That statement requires to be treated with some caution because, for example

- as is evident from the table entitled "summary of additional costs arising from the Bill" at the conclusion of the Financial Memorandum, the annual figures of £5.5m and £6.5m related only to private sector defenders, and did not represent the Scottish Government’s projection of the full annual costs associated with the Bill, which were rather higher;

- the annual figures of £76m and £607m, and the total figures of £1.1bn and £8.6bn, do not appear in the UK Government’s consultation paper but seem to reflect a calculation by the ABI, based on its contention that 30% of asbestos liabilities are in Scotland (paragraph B1 of the ABI’s written evidence).

Nevertheless, the disparity is still very significant and requires to be explored. Therefore, I enclose a paper which provides a reassessment of the financial implications, based on all the information now available to us. It may be helpful if I outline the process that we adopted to produce this. Essentially, I instructed officials to do 3 things:

- the first was to look afresh at the data that were previously supplied to us, notably by stakeholders in response to our consultation exercise on the provisional Regulatory Impact Assessment in February-April 2008. (Members will be aware that we have already published all of the non-confidential responses².)

- the second was to review material that has come to light subsequently. This included the evidence that stakeholders gave to your Committee at Stage 1. It also included the consultation paper issued by the Ministry of Justice in July. (Though we have not been afforded formal access to all the responses that were received by the Ministry of Justice, we have considered those which we were able to track down because they were published on the internet by their authors.) It included too the consultation paper issued by the Northern Ireland Government in October.

- the third was to seek out and consider new material. For example, as you suggested, we made direct contact with The Actuarial Profession to seek their views, specifically those of its UK Asbestos Working Party. Their contribution is attached in an Annex to the enclosed paper. Also attached in that Annex is new correspondence from the ABI. The ABI identified a number of law firms thought to be involved in pursuing pleural plaques cases in Scotland, so officials wrote to each of them to seek information about the nature of their activity.


I put on record that the Scottish Government is grateful for the co-operation received from a number of stakeholders — including supporters, opponents and neutrals as regards the merits of the Bill — in this endeavour. Unfortunately, we have not been provided with any information about the work that the Ministry of Justice have in hand to reassess the financial projections set out in their July consultation paper. Nor did they feel able to share factual information about the assumptions underlying their original projections.

**Revised Financial Estimates**

The enclosed paper notes that The Actuarial Profession has commented in relation to mesothelioma projections that "as information emerges on mesothelioma the range of potential outcomes is widening rather than the reverse." Our further work on pleural plaques has suggested something similar. However, as shown in the paper, we have been able to reach tentative conclusions about the order of magnitude of the Bill's financial implications with the headline figures — based on the assumptions and subject to the uncertainties described in the paper — being as follows:

- the number of backed-up claims in Scotland could be between 690 and 1040, which will cost between £14.66m and £22.88m in total (the midpoint of which is £18.77m). This compares with a projection in June’s Financial Memorandum of c. £20m.

- if the peak year for claims is 2015, then in that year the number of new claims created in Scotland could be between 341 and 848, which will cost between £7.25m and £18.79m for that year (the midpoint of which is £13.02m). This compares with a projection in June’s Financial Memorandum of c. £7m-£8m in 2015.

- from the enactment of the legislation up to and including the anticipated peak year — and assuming that in 2009 claims will be created which, had it not been for the Appeal Court and House of Lords judgements, would otherwise have been created in 2006-2008 — the total number of new claims created in Scotland could be between 2826 and 5928, which will cost between £60.05m and £131.31m (the midpoint of which is £95.68m). In present value terms that equates to between £53.60m and £116.30m (the midpoint of which is £84.95m). No aggregate estimates for this period were provided in the Financial Memorandum.

To the extent that our estimates are now higher than they were in June 2008, this is primarily the result of two factors. First, in light of new data and representations from the insurance industry, we now proceed on the basis that between 10% and 40% of claims in Scotland have historically been pursued by firms other than Thompsons (whereas we had originally worked from a single figure of 10%). Second, in light of new information and concerns about the validity of using projections of trends in future mesothelioma deaths as a proxy for trends in future pleural plaques claims, and while acknowledging the degree of uncertainty associated with it, we have explored an alternative approach to determining what the future rate of change might be. We have also made revisions in order to take account of the fact that not all claims are successful, and this has the effect of making the estimated costs lower than they would otherwise be.

Although our overall estimates of the Bill's anticipated financial implications remain broadly of the same magnitude as those set out in June’s Financial Memorandum, what this new exercise has done is:

- enhance our confidence that the more extreme projections in some of the submissions made to the Justice Committee lack any real foundation; but
• throw into much sharper relief the degree of uncertainty that surrounds all projections. They are dependent on a very wide range of unknowns, with potentially significant implications for what eventually transpires.

I believe the paper is reasonably clear in the circumstances, but please let me know if any aspects require clarification.

Conclusion

Of course, the Scottish Government has acknowledged from the outset that there is inherent uncertainty about future numbers of pleural plaques claims: thus June’s Financial Memorandum noted 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”. I do not seek to pretend that the additional work that we have undertaken has dispelled the uncertainty and resulted in precise projections. That would be an unrealistic expectation, bearing in mind the acknowledgement of The Actuarial Profession that there is “uncertainty surrounding costs relating to pleural plaques” and “it is difficult to make a sensible estimate that could be used for financial planning”.

Nevertheless, estimates do have to be made and I believe that in all the circumstances we have produced the most thorough Scotland-specific projection of the financial implications of ensuring that the civil justice system preserves rights of redress in relation to asymptomatic asbestos-related conditions. It seems to me that your Committee and the Parliament were correct to suggest that this reassessment should be produced, but correct as well, in endorsing the Bill’s aims, to conclude that it is appropriate, as a matter of fundamental principle, that individuals with pleural plaques should retain the right to pursue compensation where their condition has arisen as a result of another’s negligence exposing them to the potentially lethal substance of asbestos. The Scottish Government remains convinced that this is the principled and just position, and so I hope that the Bill will continue to enjoy widespread support when it reaches Stage 3.

I am copying this letter to Andrew Welsh MSP, in his capacity as Convener of the Finance Committee, as well as to the clerks of his Committee and yours. Arrangements are also being made to place copies in SPICe.

FERGUS EWING

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS

Actuarial Projections

1. The extent and consequences of conditions arising from exposure to asbestos have long been of concern, not least to the insurance and actuarial professions. The Actuarial Profession's UK Asbestos Working Party, an industry-wide expert group drawn primarily from the insurance sector, was established to review the situation and in 2004 produced a report, "UK Asbestos – The Definitive Guide". This detailed report estimated that in the period 2004-2040 there would be between 19,000 and 104,000 claims for pleural plaques / pleural thickening across the UK and that the total cost of those claims would be between £200m and £1.4bn.

(NB no estimates of the total cost of claims in Scotland were given, but:

- if the share of UK claims were 10%, then the range would be between £20m and £140m, equating to an average, over the period, of between £0.55m p.a. and £3.89m p.a.; whereas
- if the share of UK claims were 30%, then the range would be between £60m and £420m, equating to an average, over the period, of between £1.67m p.a. and £11.67m p.a.)


3. Some months later, however, in responding to a Ministry of Justice consultation exercise 3, The Actuarial Profession stated that "it is difficult to make a sensible estimate that could be used for financial planning". In that response, The Actuarial Profession also endorsed a methodology which produced projections that appeared to be up to 20 times higher than had been published in the 2004 Definitive Guide and, in explaining this, said:

"The projections for pleural plaques included in the Working Party Paper 2004 are not relevant, and therefore should not be used, as they were made prior to the various legal decisions that have since occurred, and they also referred to insurance claims and not the incidence of the condition. In our experience, the incidence of asbestos-related claims has been impacted significantly by socio-economic factors including the availability of compensation and rising public awareness of asbestos-related conditions.

"It is likely that the future insurance claim number projections contained in the 2004 paper would underestimate the position if pleural plaques were compensable. It is worthy of note that more progress has been made on models for mesothelioma, but as information emerges on

1 www.actuaries.org.uk/__data/assets/pdf_file/0004/34969/Lowe.pdf
2 www.deloitte.com/dttl/press_release/0,1014,id%25253D%252526cid%25253D175806,00.html
mesothelioma the range of potential outcomes is widening rather than the reverse.”

4. The response confirmed too that “the UK Asbestos Working Party is not currently looking at pleural plaques, and therefore has not considered future projections in relation to pleural plaques”.

5. Separately, in December 2008, The Actuarial Profession responded in similar vein to inquiries made on behalf of the Scottish Government. The response is given at Annex A to this paper. Key points include:

- the previous Working Party’s projections “should not be considered relevant” because of the impact of subsequent court cases, the anticipated resultant increase in public awareness and an observed increase in the propensity for a person to make a claim for compensatable asbestos-related conditions.

- the Working Party’s focus has been on mesothelioma, so “no work has been performed looking at the key drivers behind pleural plaques insurance claims” and “The Actuarial Profession does not have its own projection for the future number of pleural plaque diagnoses”.

- although it “does not consider the methodology and assumptions used by the Ministry of Justice in estimating the range of 200,000 to 1.25 million diagnosed cases to be unreasonable”, if similar analysis had been performed by the Working Party it “may have used different assumptions and produced an alternative range” i.e. it “could produce higher or lower figures”.

- such an exposure-based framework is preferred to an approach which attempts to use past numbers as a base for estimating future numbers.

- a point estimate, or narrow range, for future cost projections is considered less appropriate than a wide range which reflects the inherent uncertainties of the situation.

- the Working Party has no data on the proportion of UK pleural plaques cases that might occur in Scotland, but considers that – with some caveats – the HSE’s mesothelioma statistics (which have Scotland at about 9%) could provide “a reasonable guide”.

- the Working Party comments that, when compared to industry data, the Scottish Government’s Regulatory Impact Assessment seems to provide low estimates of past claim levels and numbers of stayed claims.

6. The Actuarial Profession’s response also signposts the latest (2008) report and presentation4 from the UK Asbestos Working Party which, while focusing on mesothelioma, contain some observations which may have some read-across to other asbestos-related conditions, including pleural plaques.

4 www.actuaries.org.uk/?a=138775 and www.actuaries.org.uk/?a=139401
7. Each of these points is worthy of consideration and they are taken into account in this paper.

Scottish Government Estimates and Projections

8. For its part, the Scottish Government has always acknowledged that preserving rights to financial redress for pleural plaques etc, as proposed by the Damages (Asbestos-related Conditions) (Scotland) Bill, will have significant financial implications. It has also acknowledged that those financial implications are difficult to calculate with any precision. The difficulty arises because, while it should be straightforward in theoretical terms to quantify their overall size, i.e., it is essentially the average cost per claim multiplied by the number of claims, each of those two elements is subject to a range of uncertain variables. Moreover, much of the relevant information is commercially sensitive, as was illustrated in a recent article in the Insurance Times:

‘You get a ridiculously huge range from actuaries,’ says David Williams, managing director of claims at AXA. ‘The real cost of asbestos claims is a highly sensitive issue and there’s a huge debate about the different approaches to reserving for them. If I were to tell you the figure for asbestos in our reserves I’d get sacked.’

9. Nevertheless, to try to understand and clarify the relevant variables and their consequences before introducing legislation, the Scottish Government:

- taking account of the work of the previous 4 months, produced a partial Regulatory Impact Assessment (PRIA) for wide consultation over the period February – April 2008.
- considered the responses to the consultation exercise and undertook further research and dialogue with stakeholders over the period April – June 2008.
- taking account of the work of the previous 8 months, produced a revised final Regulatory Impact Assessment (RIA), data from which fed into the Financial Memorandum presented to Parliament in June 2008.

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5 http://www.insurancetimes.co.uk/story.asp?storycode=374785
6 the PRIA, a summary of responses to the PRIA consultation exercise, and copies of all the non-confidential responses to that exercise are available respectively at:
www.scotland.gov.uk/Publications/2008/06/cor972/responsesummary
www.scotland.gov.uk/Publications/2008/09/Johnston-NE1-responses/content
7 the RIA and Financial Memorandum are available respectively at:
10. While June’s publications reflected the Scottish Government’s assessment of the information provided to it in the preceding months, that information was not comprehensive. This reflects the fact that there is no single source of information about pleural plaques claims, and the fact that individual stakeholders – whether pursuers, defenders, court authorities etc – have only partial information. Moreover, several key stakeholders were unable (e.g. because of data-storage issues) or unwilling (e.g. because of commercial confidentiality) to provide data on their projected liabilities in Scotland – notable and welcome exceptions as regards defenders were departments of the UK Government, i.e. the Ministry of Defence (MoD) and Department for Business, Enterprise and Regulatory Reform (DBERR). Where data were not forthcoming, the Scottish Government had little option but to make estimates based on the data that were available.

11. Since June, the Scottish Government has continued to keep the estimated financial implications under review, specifically in light of new material originating from the UK Government’s Ministry of Justice and the insurance industry and, latterly, the evidence submitted to the Scottish Parliament. Dialogue has been pursued with the departments of the UK Government, the Association of British Insurers (ABI) and individual insurance companies, law firms acting on behalf of pursuers or defenders in pleural plaques cases, The Actuarial Profession and the Health and Safety Executive (HSE). In the wake of that dialogue, the purpose of this paper is to present refreshed estimates of the financial implications, by re-examining projections of the average cost per claim and the number of claims. Information is set out in the attached annexes:

   - Annex A: selected source documentation
   - Annex B: estimates of the average cost of recent cases
   - Annex C: projections of the average cost of future cases
   - Annex D: estimates of the number of recent cases
   - Annex E: projections of the number of future cases
   - Annex F: estimates of the number of existing claims on hold.
   - Annex G: distribution of costs between private and public sectors

Conclusion

12. On the basis of the work described in the attached Annexes, it seems reasonable to estimate that:

Recent Past

- in the recent past, the number of ultimately **successful claims** created each year in Scotland may have ranged between 165 – 290 (see Annex D) and, at an average cost in real terms of £25,000 (see Annex B), would have amounted annually to between £4.13m – £7.25m, with the midpoint of that estimated range being £5.69m per annum.
- in the recent past, the number of ultimately **unsuccessful claims** created each year in Scotland may have ranged between 55 – 68 (see Annex D)
and, at an average cost in real terms of £10,000 (see Annex B), would have amounted annually to between £0.55m – £0.68m, with the midpoint of that estimated range being £0.62m per annum.

Overall, it is estimated that in the recent past the cost in real terms of relevant claims created in Scotland has ranged between £4.68m – £7.93m per annum, with the midpoint of that estimated range being £6.31m per annum.

Backed-up Claims

• as regards the backlog of claims (i.e. claims which were created previously, but which have yet to be determined either way), the number of ultimately successful claims may range between 518 – 832 (see Annex F) and, at an average cost in real terms of £25,000 (see Annex B), would amount to between £12.95m – £20.80m in total, with the midpoint of that estimated range being £16.88m.

• the number of ultimately unsuccessful claims may range between 172 – 208 (see Annex F) and, at an average cost in real terms of £10,000 (see Annex B), would amount to between £1.72m – £2.08m in total, with the midpoint of that estimated range being £1.90m.

Overall, It is estimated that the cost in real terms of backed-up claims in Scotland could range between £14.67m – £22.88m, with the midpoint of that estimated range being £18.78m.

Future Claims

• Projecting the number of future claims in Scotland – e.g. the rate of increase, the timing of the peak, and the rate of decrease – is problematic because of the range of major uncertainties and assumptions involved. This naturally has implications for attempts to project the likely costs associated with those claims. In light of this, several scenarios have been considered to indicate the potential costs arising from future claims.

• The scenarios are underpinned by several assumptions, which are explained in the Annexes to this paper. Essentially, the most significant are as follows:

  1. the number of claims either begins from a low base (220 claims in 2005) or a high base (358 claims in 2005) (see Annex D);
  2. until a peak year in 2015, the number of claims per year increases on average at between 4.5% and 9% per annum (see Annex E);
  3. 75% of claims will be successful in a low base flow outcome scenario, while 80% of claims will be successful in a high base / high outcome scenario (see Annex D); and
  4. on average, in real terms, a successful claim costs £25,000 overall, while an unsuccessful claim costs £10,000 overall (see Annex C).

• Using these assumptions, several potential streams of costs associated with pleural plaque claims have been estimated for the period 2006-2015. (This is in the expectation that a number of claims that would otherwise
have been created between 2006 – 2009 were not, because of the impact of the decisions of the Appeal Court and House of Lords in 2006 and 2007, but will be activated once the Bill is enacted.)

Table 1: Projected Pleural Plaques Claims Created in Peak Year, 2015

<table>
<thead>
<tr>
<th>Successful &amp; Unsuccessful Claims</th>
<th>Lower Rate of Increase (claims increase by 4.5% p.a.)</th>
<th>Higher Rate of Increase (claims increase by 9% p.a.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Claims</td>
<td>Costs</td>
<td>Number of Claims</td>
</tr>
<tr>
<td>S = 256</td>
<td>£6.40m</td>
<td>S = 391</td>
</tr>
<tr>
<td>U = 85</td>
<td>£0.85m</td>
<td>U = 130</td>
</tr>
<tr>
<td>T= 341</td>
<td>£7.25m</td>
<td>T = 521</td>
</tr>
<tr>
<td>S = 450</td>
<td>£11.25m</td>
<td>S = 687</td>
</tr>
<tr>
<td>U = 106</td>
<td>£1.06m</td>
<td>U = 161</td>
</tr>
<tr>
<td>T = 556</td>
<td>£12.31m</td>
<td>T = 848</td>
</tr>
</tbody>
</table>

(S = Successful, U = Unsuccessful, T = Total)

Overall, therefore, it is estimated that the cost in real terms of new claims created in Scotland in 2015 could range between £7.25m – £18.79m, the midpoint of which is £13.02m.

Table 2: Projected Pleural Plaques Claims Created in 2009 – 2015 for Period 2006 – 2015

<table>
<thead>
<tr>
<th>Successful &amp; Unsuccessful Claims</th>
<th>Lower Rate of Increase (claims increase by 4.5% p.a.)</th>
<th>Higher Rate of Increase (claims increase by 9% p.a.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Claims</td>
<td>Costs</td>
<td>Number of Claims</td>
</tr>
<tr>
<td>S = 2119</td>
<td>£52.98m</td>
<td>S = 2732</td>
</tr>
<tr>
<td>U = 707</td>
<td>£7.07m</td>
<td>U = 911</td>
</tr>
<tr>
<td>T= 2826</td>
<td>£60.05m</td>
<td>T = 3643</td>
</tr>
<tr>
<td>S = 3724</td>
<td>£93.10m</td>
<td>S = 4802</td>
</tr>
<tr>
<td>U = 873</td>
<td>£8.73m</td>
<td>U = 1126</td>
</tr>
<tr>
<td>T = 4597</td>
<td>£101.83m</td>
<td>T = 5928</td>
</tr>
</tbody>
</table>

Overall, therefore, it is estimated that the cost in real terms of new claims created in Scotland for the decade 2006-2015 could range between £60.05m – £131.31m in total, the midpoint of which is £95.68m.

- In interpreting these figures, it is essential to keep in mind that:
  - in terms of caseload, the figures are highly sensitive to the assumption and uncertainties outlined in the attached Annexes;
  - in terms of value, no account has been taken of the factors, outlined in Annex C, which might reasonably be expected to exert some downward pressure on costs.
whether or not 2015 is the peak year for claims, which is the assumption here, there will be costs thereafter. In other words, the above figures do not reflect the full costs of the Bill, as no estimate has been made of the caseload and associated costs subsequent to the anticipated peak. (Estimating the rate of decrease in newly created claims is subject to a range of significant uncertainties, bearing in mind the age profile of the population that is most at risk from exposure to asbestos.)

- In interpreting these figures, it is also important to note that the above tables provide cost projections in real terms. However, in order to meaningfully compare the total costs of claims estimated under different scenarios, each cost stream can be discounted to obtain its present value, in line with HM Treasury guidance. The estimated present values are shown in the tables below:


<table>
<thead>
<tr>
<th></th>
<th>Lower Rate of Increase (claims increase by 4.5% p.a.)</th>
<th>Higher Rate of Increase (claims increase by 9% p.a.)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of Claims</td>
<td>PV of Costs</td>
</tr>
<tr>
<td>Successful &amp; Unsuccessful Claims</td>
<td>Lower Base</td>
<td>S = 2119</td>
</tr>
<tr>
<td></td>
<td>S = 2732</td>
<td>£63.6m</td>
</tr>
<tr>
<td></td>
<td>U = 911</td>
<td>£8.1m</td>
</tr>
<tr>
<td></td>
<td>T = 3643</td>
<td>£68.6m</td>
</tr>
<tr>
<td>Higher Base</td>
<td>S = 3724</td>
<td>£83.2m</td>
</tr>
<tr>
<td></td>
<td>U = 1126</td>
<td>£10.0m</td>
</tr>
<tr>
<td></td>
<td>T = 4597</td>
<td>£116.3m</td>
</tr>
</tbody>
</table>

Overall, therefore, it is estimated that, in present value terms, the cost of new claims created in Scotland for the decade 2006-2015 could range between £53.6m – £116.3m in total, the midpoint of which is £84.95m.

- Again, it should be noted that these values are dependent on the assumptions used in their estimation. They are subject to the same caveats as Table 2.

- The ranges given should not be regarded as minima and maxima – i.e. they do not represent the lowest and highest possible costs, simply the range which, on the information available, appears to be the most likely.

Civil Law Division
February 2009
1. Throughout this paper, a hyperlink is generally provided for key source documentation that has already been published. A good deal of information has also been published by the Justice Committee. This Annex provides details of source documentation that has not been previously published, as follows:

- correspondence from the Scottish Government to the Department for Business, Enterprise and Regulatory Reform, dated 22 December 2008.
- correspondence from the Department for Business, Enterprise and Regulatory Reform to the Scottish Government, dated 27 January 2009.

Scottish Government
February 2009
I am writing in response to your letter of 22 October in which you requested further examples of insurers who have pleural plaques claims, to ensure that the Scottish Government's information on costs and number of pleural plaques cases is as accurate as possible.

We have provided as much further information as was possible to gather in the given timeframe, in a separate table. The table shows on a preliminary analysis of figures from insurers compared to Thompsons figures, on a like for like comparison, that Thompsons are involved in approximately 60% of claims. It should be noted that there may be double counting of figures where there is more than one insurer associated with a claim.

As indicated to the Justice Committee in my letter of 29 September, it is difficult to predict the number of future pleural plaques claims, based on the current numbers of outstanding claims in Scotland, as they will be lower than they otherwise would have been because of the Court of Appeal judgment, following which significantly fewer claims were brought because there was no entitlement to compensation. This fall-off is clearly shown in the graph we presented from the UK Asbestos Working Party to the Justice Committee.9

We would expect that the pleural plaques claims figures to increase dramatically as a result of the proposed legislation, not least because of the high public awareness of this issue. In other words, the trend already seen by the Institute of Actuaries between 1999 and 2005 would certainly accelerate.

Yours sincerely

Nick Starling
Director of General Insurance and Health

9 The UK Asbestos Working Party is part of the Institute of Actuaries.
# ABI-provided information on Pleural Plaques Claims in Scotland

<table>
<thead>
<tr>
<th></th>
<th>Norwich Union</th>
<th>AXA</th>
<th>Zurich</th>
<th>RSA</th>
<th>Chester St</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Claims</td>
<td>51</td>
<td>36</td>
<td>107</td>
<td>46</td>
<td>413 (315 FSCS cases)</td>
</tr>
<tr>
<td>i) litigated</td>
<td>40</td>
<td>11</td>
<td>52</td>
<td>11</td>
<td>183 (info on FSCS share of cases only)</td>
</tr>
<tr>
<td>ii) non-litigated</td>
<td>11</td>
<td>25</td>
<td>55</td>
<td>35</td>
<td>132 (info on FSCS share of cases only)</td>
</tr>
<tr>
<td>Thompsons-provided number of existing cases (includes both lead/non-lead cases)</td>
<td>20</td>
<td>8</td>
<td>43</td>
<td>31</td>
<td>248 (Iron Trades/Chester St)</td>
</tr>
<tr>
<td>Cases where lead insurer on a 'joint' claim</td>
<td>Unknown</td>
<td>20</td>
<td>Unknown</td>
<td>25</td>
<td>Unknown</td>
</tr>
<tr>
<td>Definition of a Scottish case</td>
<td>Cases being pursued by Scottish lawyers, where any litigation is likely to be commenced in Scotland</td>
<td>Usually where the Claimant's solicitors live in Scotland, however some cases with English Solicitors who have Scottish Claimants, where exposure was in Scotland</td>
<td>Cases being pursued by Scottish lawyers</td>
<td>Cases being pursued by Scottish lawyers</td>
<td>Any case where the claimant is represented by a solicitor based in Scotland and where the relevant exposure occurred in Scotland</td>
</tr>
</tbody>
</table>
ACTUARIAL PROFESSION
make financial sense of the future

ANNEX A

The Actuarial Profession

Actuarial Profession response to:

Scottish Government - Constitution, Law and Courts Directorate
Letter from Paul Allen, 12 November 2008

12 December 2008

This response is given by the GIRO UK Asbestos Working Party of the UK Actuarial Profession.

Background

The UK Asbestos Working Party has considered the particular points that have been raised in a letter to the Actuarial Profession from Paul Allen, Constitutional Law and Courts Directorate (Civil Law Division) of the Scottish Government dated 12th November 2008. The response outlined below will focus on addressing the points raised with some further observations.

The response represents the collective views of the UK Asbestos Working Party (referred to in this response as “The Working Party”, “We” or “Us”) and has been endorsed by the General Insurance Practice Executive Committee of The Actuarial Profession.

The current UK Asbestos Working Party consists of the following members:

Matthew Ball
Dan Beard
Robert Brooks
Naomi Couchman
Brian Gravelson (chairman)
Charlie Kefford
Darren Michaels
Patrick Nolan
Gregory Overton
Stephen Robertson-Dunn
Emiliano Ruffini
Graham Sandhouse
Jerome Schilling
Dan Sykes
Peter Taylor
Andy Whilling
Matthew Wilde
John Wilson.

The above group consists of actuaries working for either insurance or reinsurance companies or actuarial consultancies with considerable experience in the area of analysing asbestos-related liabilities.

The current working party is the direct successor of the working party that produced the 2004 paper “UK Asbestos – The Definitive Guide” which is available at:

The UK Asbestos Working Party reformed in 2007 in order to primarily perform research into the key drivers behind the increase in the number of mesothelioma insurance claims notifications. No work has been performed looking at the key drivers behind pleural plaques insurance claims.

The work carried out by the UK Asbestos Working Party following the presentation in 2007, is summarised by the presentation at the 2008 GIRO convention. This presentation outlines the key highlights of the more detailed paper “UK Asbestos Working Party Update 2008”.

Page 1 of 7
The Actuarial Profession
making financial sense of the future

The presentation and the paper are available on the Profession’s website at:
http://www.actuaries.org.uk/?a=138775
http://www.actuaries.org.uk/?a=139401

The paper, and therefore the summary presentation, concentrated on mesothelioma as per the objectives of the Working Party. It does include statistics in relation to pleural plaques that were derived from an insurance market survey performed by the Working Party in 2007.

Issues raised by Constitutional Law and Courts Directorate (Civil Law Division)

1) the highest estimate in the 2004 Definitive Guide projected that across the UK pleural plaques claims would peak for one year at 17,000 p.a. and would be under 10,000 p.a. for all but 5 years...

The 2004 paper “UK Asbestos – The Definitive Guide” set out three projections (labelled low, medium and high) of overall insurance market claims for pleural thickening and pleural plaques. The projection labelled high did indeed peak for one year at 17,000 p.a. and was under 10,000 p.a. for all but five years. Whilst the methodology applied at the time was sound, these pleural plaques projections were based on information that is now more than five years out of date and should no longer be considered relevant in the current environment. We expand on this point in the additional observations below.

2) confirmation that...

The Actuarial Profession’s view now is that over the next twenty years the number pleural plaques claims will average 62,500 p.a. (i.e. the estimate of up to 1.25 million diagnosed cases, given in paragraph 29 of the impact assessment that accompanied the Ministry of Justice’s consultation paper, divided by 20)?

The Actuarial Profession does not have its own projection for the future number of pleural plaque diagnoses as the Working Party has concentrated on looking at the key drivers behind mesothelioma claims as set out in the 2008 paper “UK Asbestos Working Party Update 2008”. The estimate outlined above is the upper end of the range of 200,000 to 1.25 million quoted by the Ministry of Justice as set out in the consultation paper. The deduction regarding average claim levels is your own and has not been put forward by the Ministry of Justice or The Actuarial Profession.

As discussed in more detail later the Working Party does not consider the methodology and assumptions used by the Ministry of Justice in estimating the range of 200,000 to 1.25 million diagnosed cases to be unreasonable. It provides a clear indication of the significant levels of uncertainty that exists in estimating these claims at this time.

3) whether The Actuarial Profession has any data about the proportion of projected UK pleural plaques claims that would be expected to arise in Scotland?

The Actuarial Profession does not have such data. The market survey / data collection exercise conducted by the Working Party did not include information in respect of region. However, The Actuarial Profession is aware of publicly available data with regard to mesothelioma claims that may shed some light on the proportion of claims that might relate to Scotland. This data is outlined in the Further Observations section of this note.

4) Additionally, our attention has been drawn to a presentation given to the GIRO Convention in 2007, which set out provisional information and noted that conclusions would be detailed in a paper for the 2008 GIRO Convention. It would be helpful to know, if possible, whether those conclusions are now
As mentioned above, a presentation was made at GIRO 2008 and a detailed paper in relation to the key considerations an actuary should be aware of in relation to mesothelioma claims was produced. Both the presentation and the paper are, as stated above, available from the Profession's website.

5) It would be especially helpful to know, as regards the 2007 presentation's graph on the annual level of pleural plaques claims, whether The Actuarial Profession has been able (a) to assess the reasons for the pre-Court of Appeal increase – for example, the extent to which the various factors listed under "Theories for Increase?" played a role – and (b) to project what the future trend might have been had the Court of Appeal (and House of Lords) upheld the ruling of Mr Justice Holland.

The "Theories for Increase" highlighted in the presentation related solely to the increase observed in mesothelioma claims and not to pleural plaques claims. The Working Party has considered mesothelioma claims in detail and has not looked at pleural plaques claims.

6) In the 2004 Definitive Guide, in the part on "Calcified Pleural Plaques" in section 7.4 "Derivation of average claim amounts", it is stated that: "Pleural Plaques claims can be made up of awards for: The presence of scarring on the lungs; Anxiety; The risk of developing mesothelioma; Possible disadvantage in the labour market; Solicitor's costs." and "The range of awards is typically £3,500-£7,500 on a provisional damages basis, £12,500-£17,500 on a full and final basis." Am I right in interpreting this to mean that the figures £3,500-£7,500 and £12,500-£17,500 include an element for legal fees and, if so, could the Working Party clarify whether this is just pursuers' legal fees, just legal fees, or both?

The ranges quoted were indicative and excluded all costs i.e. were just amounts paid for damages. There were a number of average claim amounts outlined in section 6 of the 2004 Definitive Guide that were derived directly from actual claims data or market opinion. These reflected the relative proportion in the data between provisional and final payments.

For ease of reference, we reproduce the averages that were included in the 2004 Guide:

- £10,741 is an estimate for the average amount of damages excluding costs that was paid to a pleural plaque claimant. This estimate relates just to pleural plaques and was obtained from the market survey conducted.

The following amounts included both pleural plaques and pleural thickening. It was assumed that 90% of claims related to pleural plaques:

- £11,000 was derived from the survey data as the average claim paid by insurers, this included claims settled at no value and included costs.
- Assuming that 20% of claims were settled at no cost and that all legal costs were an estimated 30% of claim amounts, a figure of £9,625 was obtained which represented the average claim paid by insurers excluding both claims settled at no value and legal costs.
- This is equivalent to £12,500 paid to each claimant excluding legal costs, allowing for the fact that a typical claimant would receive compensation from more than one employer and/or insurer.
Further Observations

The pleural plaques projections as set out in the 2004 UK Asbestos Working Paper ("UK Asbestos - The Definitive Guide") should not be considered relevant in the current environment for the following reasons:

- The 2004 projections were made prior to the various judgements in relation to pleural plaques (High Court, Court of Appeal and the House of Lords ruling).
- One of the implications of the above judgements is that the public awareness in respect of pleural plaques has increased. This is likely to have led to more claims than was anticipated and outlined in the 2004 paper.
- We have observed that the propensity for a person to make a claim to have increased since 2004 for compensable asbestos-related conditions.

The 2004 paper noted that there were potentially huge numbers of future claims, and as such the projections made in 2004 could turn out not to be appropriate in the future. In our view, it is likely that the future insurance claim number projections contained in the 2004 paper would underestimate the position if pleural plaques were compensable.

It is worth pointing out that the numbers of pleural plaques insurance claims presented in the 2008 paper differ to those set out in the 2004 paper. This is because the numbers in the 2008 paper relate purely to pleural plaques insurance claims that have been separately identified as such from the respondents to the insurance market survey in 2007 in particular, no allowance has been made for:

- Insurance claims that are known to be asbestos-related, but can not be separately identified by disease type by the respondent.
- Companies who did not participate in the insurance market survey.

The numbers in the 2004 paper did include these factors i.e. a 100% insurance market number of all potential pleural plaques insurance claims was estimated and these were combined with pleural thickening claims. Allowing for these differences, the 2008 and 2004 sets of numbers are broadly consistent.

It is also worth highlighting that the data relates to insurance claims notifications, not to underlying claimants. One claimant will often make claims against more than one employer / insurer and hence in order to estimate the number of claimants in respect of the insurance claim notifications, a claims to claimant conversion factor should be applied. The 2004 paper estimated that each pleural plaque claimant would make around 1.3 insurance claims. No further work has been performed in relation to pleural plaques to check if this factor remains reasonable.

Using the claims to claimant factor of 1.3, the number of pleural plaques claimants prior to the various judgements (High Court, Court of Appeal and House of Lords) was roughly 6,000 for the total insurance market. As noted above, it is likely that this number would have increased if it had not been for the Court of Appeal and House of Lords judgements, though it is not possible to assess this impact reliably. It is therefore not possible to reliably estimate potential future numbers based on past claim numbers.
In the absence of reliable projections based on past claim numbers, an exposure-based framework is often adopted. Such a framework has been adopted by the Ministry of Justice as set out in the consultation paper 14/08. The Working Party considers that the methodology and assumptions used by the Ministry of Justice are not unreasonable although if the Working Party were to perform a similar analysis we may have used different assumptions and produced an alternative range.

Such alternative assumptions could produce higher or lower figures at both ends of the range quoted and so the low and high figures should not be regarded as lower or upper bounds. It is the significant uncertainty in selecting appropriate assumptions that gives rise to the wide variation in possible outcomes. In this light, we would suggest it is not possible to derive a point estimate of the expected future cost of pleural plaques claims with any degree of certainty. We consider it inadvisable for the authorities to base a decision upon any point estimate, or narrow range, of potential future claims numbers given this significant uncertainty.

The Working Party does not have any data about the proportion of pleural plaques cases that would be expected to arise in Scotland. However, an insight in respect to the potential proportion can be obtained from the mesothelioma statistics by region that is published on the HSE website. The HSE show the number of mesothelioma recorded deaths in Great Britain by region. An extract from the HSE website (www.hse.gov.uk/statistics/table/mesoth01.htm) is given below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Mesothelioma Deaths</th>
<th>Scotland Mesothelioma Deaths</th>
<th>% Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>1,357</td>
<td>131</td>
<td>9.6%</td>
</tr>
<tr>
<td>1998</td>
<td>1,541</td>
<td>155</td>
<td>10.1%</td>
</tr>
<tr>
<td>1999</td>
<td>1,615</td>
<td>156</td>
<td>9.8%</td>
</tr>
<tr>
<td>2000</td>
<td>1,633</td>
<td>140</td>
<td>8.5%</td>
</tr>
<tr>
<td>2001</td>
<td>1,862</td>
<td>158</td>
<td>8.5%</td>
</tr>
<tr>
<td>2002</td>
<td>1,858</td>
<td>170</td>
<td>9.1%</td>
</tr>
<tr>
<td>2003</td>
<td>1,887</td>
<td>166</td>
<td>8.8%</td>
</tr>
<tr>
<td>2004</td>
<td>1,979</td>
<td>179</td>
<td>9.9%</td>
</tr>
<tr>
<td>2005</td>
<td>2,047</td>
<td>176</td>
<td>8.6%</td>
</tr>
<tr>
<td>2006</td>
<td>2,056</td>
<td>169</td>
<td>8.2%</td>
</tr>
<tr>
<td>Total</td>
<td>17,855</td>
<td>1,802</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

These figures may give a reasonable guide as to what a potential ratio could be for pleural plaques.

We note, however, some drawbacks with relying on this information:

- This data relates to where the death was registered, and hence may not be consistent with where the exposure took place.
- As it is based on mesothelioma, it may not be indicative of the potential ratio for pleural plaques claims.
- These figures do not allow for the potential impact of a situation where claimants may seek to demonstrate a sufficient connection with Scotland in order to make a claim.

With regard to the estimates in the Regulatory Impact Assessment 2007/61 (RIA), the Working Party would like to highlight that the estimate of 200 per annum appears low when compared to other
The level of pleural plaque claims recorded prior to the various relevant judgements (High Court, Court of Appeal and House of Lords rulings) was of around 6,000 pa. Using a 9% ratio for Scotland, it might be expected that the number of Scottish pleural plaques claims was around 540 per annum. In an environment where these claims are compensable once more we would expect this number to increase.

The Working Party has estimated, and included in their response to the Pleural Plaques Consultation Paper 14/06, the number of pleural plaques claimants notified prior to October 2007 who have not received compensation to be around 12,000 for just the insurance market (i.e. excluding government-related claims). This figure has been based on responses to an insurance market survey that were collected by the UK Asbestos Working Party in 2007/8. The number of people diagnosed may be a lot higher than this figure. Using a 9% proportion would indicate that the number of these pleural plaques claimants that relate to Scotland could be around 1,100, which seems to be higher than the estimates of the backlog of cases contained in the RIA.
About The Actuarial Profession

The Actuarial Profession is governed jointly by the Faculty of Actuaries in Edinburgh and the Institute of Actuaries in London, the two professional bodies for actuaries in the United Kingdom.

A rigorous examination system is supported by a programme of continuing professional development and a professional code of conduct supports high standards reflecting the significant role of the Profession in society. Actuaries’ training is founded on mathematical and statistical techniques used in insurance, pension fund management and investment and then builds the management skills associated with the application of these techniques. The training includes the derivation and application of ‘mortality tables’ used to assess probabilities of death or survival. It also includes the financial mathematics of interest and risk associated with different investment vehicles – from simple deposits through to complex stock market derivatives.

Actuaries provide commercial, financial and prudential advice on the management of a business’s assets and liabilities, especially where long term management and planning are critical to the success of any business venture. A majority of actuaries work for insurance companies or pension funds – either as their direct employees or in firms which undertake work on a consultancy basis – but they also advise individuals, and advise on social and public interest issues. Members of the Profession have a statutory role in the supervision of pension funds and life insurance companies as well as a statutory role to provide actuarial opinions for managing agents at Lloyd’s.

The Profession also has an obligation to serve the public interest and one method by which it seeks to do so is by making informed contributions to debates on matters of public interest.
Response from The Actuarial Profession to follow-up query from the Scottish Government, 6 January 2009

The pleural plaques claims from the GIRO Convention 2007 slides did not represent the total insurance market, it represented the results from the data collection exercise. It also did not include all participants to the data collection exercise so that the data across all years shown in the slide was consistent (i.e. from the same number of participants).

The 2008 paper gives the total of all pleural plaques claims from the data collection exercise. Appendix G shows that the peak number is 6,250. It is estimated that this represents around 80% of the total insurance market.

Therefore 100% of the total insurance market would equate to 6250 / 0.8 = 7,813 claims.

One claimant could result in more than one insurance claim. We do not have recent data in relation to the claimant to claims relationship, so we have used the assumption in the AWP 2004 paper that suggested this relationship was 1 claimant made 1.3 claims on average. Therefore the total number of claimants is estimated as 7,813 / 1.3 = 6,010 i.e. roughly 6,000.
LETTER TO THE MINISTRY OF DEFENCE

19 December 2008

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

I am writing to thank you for all the assistance you have given us in our consideration of the financial implications of the Damages (Asbestos-related Conditions) (Scotland) Bill. While we acknowledge that there is no certain way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim, the data which you have kindly provided will help us to provide the Scottish Parliament with the best possible analysis.

To recap, from the information you have provided, our understanding is that MoD currently has 37 open Scottish pleural plaques cases which would be estimated to cost, on average, £14,000 (£8,000 damages plus £6,000 legal costs) to settle, giving a total cost of around £518,000 for settling existing cases. For the purpose of attempting to predict potential future liabilities in Scotland you agreed that, on the basis of the 37 cases being backed up over 3 years we can assume, with great caution, that there might be in the region of 12 pleural plaques cases raised against MoD each year giving a cost per annum of around £168,000.

You also advised that Morton Fraser LLP defends MoD cases in Scotland; the majority of such cases are pursued by Digby Brown Solicitors. Finally, you advised that at the time of the HoL Judgment, MoD had over 750 pleural plaques claims across the UK, 37 (under 5%) of which were Scottish.

We may wish to pass a copy of this letter to the Scottish Parliament, as part of the package of further financial information that Ministers have undertaken to provide. If there is anything in what I have said that causes you difficulty, therefore, it would be appreciated if you could let me know as soon as possible.

My thanks once again for your assistance.
LETTER TO THE DEPARTMENT FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

22 December 2008

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL

I am writing to thank you for all the assistance you have given us in our consideration of the financial implications of the Damages (Asbestos-related Conditions) (Scotland) Bill. While we acknowledge that there is no certain way of estimating how many individuals who have pleural plaques as a result of negligent exposure to asbestos will ultimately make a claim, the data which you have kindly provided will help us to provide the Scottish Parliament with the best possible analysis.

To recap, from the information you have provided, our understanding is that:

• for British Shipbuilders (BS), BERR has 134 existing cases which would be estimated to cost around £1,252,050 (damages and legal costs) to settle. Projected aggregate costs for future BS cases are likely to be in the region of £4,333,500 (damages and legal costs) for an anticipated 540 cases.

As regards BS pleural plaques cases raised in the past, the proportions that originated from Scotland were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Proportion</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000/01</td>
<td>15.4%</td>
</tr>
<tr>
<td>2001/02</td>
<td>8.9%</td>
</tr>
<tr>
<td>2002/03</td>
<td>10.9%</td>
</tr>
<tr>
<td>2003/04</td>
<td>10.6%</td>
</tr>
<tr>
<td>2004/05</td>
<td>12.9%</td>
</tr>
<tr>
<td>2005/06</td>
<td>14.4%</td>
</tr>
<tr>
<td>2006/07</td>
<td>25.0%</td>
</tr>
</tbody>
</table>

You are checking whether it is possible to provide information about the proportion originating in Scotland over the whole period.

• for British Coal (BC), liabilities have now moved to the new Department of Energy and Climate Change (DECC). There are 4 existing BC cases which would be estimated to cost £121,000 to settle and the projected aggregate costs for future BC cases are likely to be around £640,000 for an estimated 40 cases.

As regards BC pleural plaques cases raised in the past, you are checking whether there is information available about the proportions that originated from Scotland.

Therefore, the estimate of overall liability for both current and future BS/BC cases is £6,346,550. The projected BS/BC cases are likely to span over 15 years but the figures provided do not include any uplift for inflation or assessment for litigated cases.

You advised that the overall numbers provided are based on actuarial work undertaken before the heightened debate and ongoing publicity on pleural plaques. Therefore, their estimate cannot be viewed as a definitive forecast should compensation for pleural plaques be entrenched under Scottish law. BERR is also responsible for the National Dock Labour Board (NDLB) and litigation is ongoing at present to establish the scope of the common law duty of care owed to the claimants by the NDLB. You have indicated that it is possible that you may need to include figures in respect of the NDLB at a later date.

Costs of settling BS/BC future cases could therefore increase if any or all of the following occurs: a) the legislation encourages more people to raise claims; b)
damages awards increase; c) legal costs increase; d) NDLB cases have to be included.

You also advised that BERR’S solicitors in Scotland are Eversheds who deal with non- litigated cases and Simpson & Marwick who deal with litigated cases. Capita deal with non- litigated cases and McClure Naismith LLP deal with litigated cases for DECC. You confirmed that the majority of Scottish BS cases are pursued by Thompsons Solicitors (60%) while BC cases are pursued in equal proportion by the firms Thompsons, Corries and Morisons.

We may wish to pass a copy of this letter to the Scottish Parliament, as part of the package of further financial information that Ministers have undertaken to provide. If there is anything in what I have said that causes you difficulty, therefore, it would be appreciated if you could let me know as soon as possible.

My thanks once again for your assistance.
EMAIL FROM THE DEPARTMENT FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

27 January 2009

Apologies for not getting back to you sooner, but as you will appreciate the position in this area is not straightforward.

I am able to confirm the following in respect to your letter of 22 December 2008:

1. The financial information stated in respect of the British Shipbuilders Corporation and the former British Coal Corporation accurately reflects the figures as updated by our claims handlers in November 2008.

2. It has not been possible to do any further work on proportions of cases that originated from Scotland over the whole period. However, it would seem that from the more recent percentages that the Scottish proportion has increased.

3. It is too early to provide any meaningful information on future asbestos liabilities for the National Dock Labour Board (NDLB). These were the first cases which have been brought against the NDLB where such issues of principal have been raised. Numbers which may be affected by the recent Judgement which went against BERR remain unknown.

4. Your paragraph identifying the different solicitors and claims handlers on our behalf requires some amendment. The British Shipbuilders Corporation still exists and therefore it is the Corporation (and not BERR) who engage Eversheds. Eversheds in turn engage Simpson & Marwick to handle BS’s litigated cases in Scotland. It should also be made clear that Capita (claims handlers) and McClure Naismith (Scottish solicitors) deal with DECC’s Coal Health liabilities in Scotland.
DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
ESTIMATES OF THE AVERAGE COST OF RECENT CASES

1. The costs associated with any successful case essentially comprise (i) any award of compensation to the pursuer (quantum) and (ii) legal costs.

2. The Scottish Government developed estimates of these costs in the first half of 2008 as follows:
   - in February 2008 the PRIA estimated that, on average, quantum would amount to £8,000 and defenders' legal costs would amount to £8,000: i.e. that an average case would cost £16,000 in total.
   - in June 2008, taking account of information and views received since publication of the PRIA, the final RIA estimated that, on average, the total cost would be £25,000. (As explained at paragraph 16 of the Financial Memorandum and paragraph 29 of the RIA, this comprised quantum at £8,000, pursuer's legal costs at £8,000 and defenders legal costs at £6,000, plus an extra £3,000 to cover interim inflation and minimise the chances of the costs being underestimated.)

3. The figure of £25,000 also corresponds with advice to Norwich Union from their legal advisers, as subsequently set out in written evidence¹⁰ to the Justice Committee.

4. The Scottish Government is not aware of any compelling evidence to suggest that this estimate is unreasonable. For instance, it does not appear to have been challenged seriously in the evidence that was submitted to the Justice Committee. (NB although paragraph 6.9.2 of Norwich Union's written evidence did criticise the RIA for significantly underestimating the cost per case, this criticism appears actually to relate to the estimate in the earlier PRIA and to fail to take account of the fact that, in response to comments from stakeholders about the PRIA, the Scottish Government raised that estimate for the final RIA).

5. While the figure of £25,000 is below that used by Ministry of Justice in its consultation paper, the difference is not huge (i.e. the consultation paper postulated a range between £25,500 and £27,400, the bulk of which was derived from estimates in the Scottish Government's Financial Memorandum).

6. It is concluded that an estimate of £25,000 for successful claims in the recent past remains reasonable.

7. As regards unsuccessful claims, these cannot be treated as cost-free. Although there will be no compensation award, there are likely in most cases to be some legal costs – in contrast with successful claims, these costs would essentially be borne by the pursuers' side. Bearing in mind that (i) there

would be no compensation award and (ii) the legal costs on average are likely to be somewhat lower than with successful claims (as the reasons for lack of success will often be associated with cases concluding at a relatively early stage — e.g. when it becomes apparent that a case is time-barred, or that a relevant solvent defender cannot be identified), and having consulted firms with significant experience in this area, it would not seem unreasonable to suggest that at most the overall costs for unsuccessful claims might average up to £10,000 each.

Civil Law Division
February 2009
DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
PROJECTIONS OF THE AVERAGE COST OF FUTURE CASES

1. The Scottish Government is not aware of any firm basis for expecting that the average cost of successful pleural plaques claims will be markedly higher or lower in future than in the recent past.

2. It should be noted, nevertheless, that the Scottish Government is aware that there are several factors that could potentially lead to downward pressure on costs in the future. Although the Scottish Government has endeavoured to avoid speculating more than is absolutely necessary, it is perhaps appropriate to put them on the record.

3. It is anticipated that the courts generally will determine quantum in much the same way as they have in the past. However, there may be some limited degree of reduction in quantum in future – e.g. to the extent that, in the past, awards have included an element to cover the claimant’s general anxiety that he might go on to develop a more serious asbestos-related condition, such as mesothelioma. (This is because, taking account of the views of insurers and others, the Scottish Government intends to explore options for enhancing understanding of pleural plaques and, to the extent that they are successful in alleviating anxiety about future ill-health, such efforts may lead to a reduction in the level of compensation awarded it.)

4. As regards legal costs, there may be some limited degree of reduction in future:

4.1 if defenders and/or pursuers alter their approach to processing such cases, particularly those of a more routine nature. For example, it may be that inter-insurer arrangements could be further and beneficially developed.

4.2 to the extent that the voluntary pre-action disease protocol (introduced in Scotland in the summer of 2008, following discussion between the Law Society of Scotland and the Forum of Scottish Claims Managers) results in earlier sharing of information and, potentially, earlier resolution.

4.3 to the extent that changes in the limit of the privative jurisdiction of the Sheriff Court\(^{11}\) result in a lower proportion of pleural plaques cases being litigated in the Court of Session. (The Opinion of Lord Drummond Young in the case last year of Catherine Hylands v Glasgow City Council provides some support for the suggestion that this might occur.)

4.4 to the extent that Lord Gill’s review of civil courts (which is due to report in the Spring of 2009) leads to reforms that further improve the efficiency of civil justice procedures in Scotland.

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\(^{11}\) e.g. the limit was raised from £1,500 to £5,000 in January 2008
5. It is impossible at this stage to quantify the combined impact of these factors – it may be negligible, but potentially it could be quite significant. It is also difficult to estimate the timing of any impact. However, by the middle of the next decade, when asbestos-related claims are expected to be approaching their peak, it is possible tentatively to suggest that these factors could result in a reduction in the average cost of pleural plaques claims of anything from 0% to 25%, i.e. resulting in average costs per successful claim (in today’s prices) being between £18,750 and £25,000.

6. However, while it seems reasonable to expect that there will be some reduction in costs as a result of these factors, the Scottish Government has taken the position that it would be premature for the purposes of this legislation to anticipate what that could amount to. Therefore, it seems reasonable to utilise the current price figures (see Annex B) of £25,000 for the purpose of projecting future costs for successful claims and £10,000 for unsuccessful claims.

Civil Law Division
February 2009
DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
ESTIMATES OF THE NUMBER OF RECENT CASES

1. The Scottish Government’s approach to estimating the annual number of pleural plaques claims in recent years is set out in its PRIA (paragraph 8), final RIA (paragraphs 26 and 27) and Financial Memorandum (paragraphs 12, 13 and 14).

2. Essentially, on the understanding that Thompsons solicitors have acted in approximately 90% of pleural plaques claims in Scotland in recent years, data provided by that firm was used as a basis for estimating the overall caseload. The resulting estimate of recent caseload was:
   - 200 new claims for pleural plaques per annum;\(^\text{12}\)
   - 20 new claims for asymptomatic asbestosis / pleural thickening per annum.

3. In reaching these estimates, Thompsons’ data for 2007 were excluded from the calculations as it was felt that the figures for that year were likely to have been significantly depressed by the emerging implications of the Johnston case. However, it could be argued that data for 2006 should also be excluded, as the Appeal Court ruling in January may have impacted on figures for that year. This may appear premature (i.e. because the Appeal Court ruling was under appeal), but for the sake of argument if the 2006 data are excluded then the resulting estimate of caseload would be:
   - 215 new claims for pleural plaques per annum;
   - 22 new claims for asymptomatic asbestosis / pleural thickening per annum.

4. In broad terms, if it is the case that approximately 75% of claims are raised in court, such estimates appear not to be out of line with independent data supplied by the Scottish Court Service\(^\text{13}\).

5. The underlying understanding that approximately 90% of recent cases in Scotland had been dealt with by Thompsons was made explicit in the PRIA in February 2008. It seems not to have been seriously disputed at the time, was consequently used again for the final RIA and Financial Memorandum in June 2008, and again seems not to have provoked contrary suggestions. Officials nevertheless conducted informal soundings (e.g. with the Scottish Court Service and a significant defender) and received further reassurance that a figure of around 90% was not unreasonable.

\(^\text{12}\) at the time, estimates for Government Departments and local authorities were added to the figure of 200. It has subsequently been appreciated, however, that (to avoid double-counting) those estimates should not have been added, because the figure of 220 cases created by pursuers should already incorporate cases raised against all defenders including public authorities.

\(^\text{13}\) www.scottish.parliament.uk/s3/committees/justice/inquiries/damages/SGandCMOsupplementary.pdf
6. Latterly, however, it has been suggested to the Scottish Government that, while Thompsons undoubtedly dealt with a significant majority of past Scottish cases, 90% may be an overstatement and, therefore, estimates made on that basis may be an understatement of the true Scottish caseload. Thus, as revealed in Annex A to this paper:

- based on information provided by some of its members, ABI has suggested that Thompsons share may be nearer 60%;
- based on its assessment of the overall UK caseload, The Actuarial Profession has suggested that perhaps 540 claims may have arisen annually in Scotland.

7. It is not clear whether this new information is entirely robust. However, if utilised, the new information provided by the ABI (together with the calculation at paragraph 3 above) appears to suggest that in the recent past there could have been something like 325 new pleural plaques claims and (working on the same ratio as before) 33 new claims for asymptomatic asbestosis / pleural thickening each year – 358 relevant claims in total.

8. Likewise, the new information provided by The Actuarial Profession is interesting, but also requires to be treated with some caution. It appears to be quite sensitive to the assumption that claimants spread their claims over 1.3 defenders on average: if the assumption were raised slightly, the estimate of Scottish caseload could fall significantly (e.g. from 540 to 350 based on an assumption of 2.0 defenders). In considering this issue, it is relevant to note that it is not unusual for claimants to spread their claims quite widely, sometimes over half a dozen or so employers / insurers. Moreover, The Actuarial Profession has itself acknowledged that the figure of 1.3 is rather dated and, in the context of other work (i.e. on mesothelioma), the UK Asbestos Working Party has considered whether claimants in recent years have been spreading their claims across more defenders than hitherto. A further consideration is that the UK caseload may be disproportionately comprised of claims from England and Wales, given Norwich Union’s contention (at paragraph 6.9.4. of their written evidence to the Justice Committee\(^1\)) that implementation there of the Access to Justice Act 1999 played a significant role in increasing the number of cases south of the border.

9. Against this background, it seems appropriate – while bearing in mind the reservations outlined above – to suggest that in the recent past the annual number of new claimants for conditions covered by the Bill is likely to be in the range 220 – 358, respectively reflecting the original assumptions and the new information provided by the ABI (as per paragraphs 2 and 7 above).

10. However, it is not only the number of claims made, but also the balance of claims made successfully and unsuccessfully, that are relevant in determining the level of costs arising. (In the UK Asbestos Working Party’s report on mesothelioma, this is referred to as the “success rate”).

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allowance was made for success/failure rates in the Scottish Government's original estimates, because there was a focus on seeking not to underestimate costs, but in light of the additional information coming forward it now seems appropriate to take account of this consideration. It seems that a conservative assumption would be that approximately 20%-25% of claims might ultimately have concluded unsuccessfully – e.g. because of difficulties tracing a relevant solvent defender, difficulties tracing insurance in force at the time, the impact of time-bar, difficulties in proving negligence and, in some cases, the death of the claimant. On that basis, the relevant range would be 165 – 290 successful claims, where (i) the lower number assumes 220 claims were made each year and 25% failed and (ii) the larger figure assumes 358 claims were made each year and 20% failed.

11. This does not mean, however, that unsuccessful claims can be disregarded for costing purposes – there will be costs associated with such claims, albeit generally for pursuers and their agents rather than defenders, as outlined at Annex B. For costing purposes, the relevant range is taken to be 55 – 68 unsuccessful claims (i.e. being 220 total claims minus 165 successes at the lower end, and 358 total claims minus 290 successes at the higher end).

12. In summary, on this basis:

- the most costly scenario would be 358 new claims p.a., with 290 (i.e. 80%) ultimately being successful and 68 (i.e. 20%) ultimately being unsuccessful;
- the least costly scenario would be 220 new claims p.a., with 165 (i.e. 75%) ultimately being successful and 55 (i.e. 25%) ultimately being unsuccessful.

Civil Law Division
February 2009
DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
PROJECTIONS OF THE NUMBER OF FUTURE CASES

1. Uncertainty around estimating the number of past claims is as nothing compared with the uncertainty associated with projecting the number of claims that may arise in future years.

Historic Approach

2. In the PRIA, final RIA and Financial Memorandum, the Scottish Government sought to utilise recent historic data as a starting point for its projections for the future, acknowledging that there is two decades’ worth of experience of operating under a regime in which pleural plaques are treated as being potentially compensatable.

3. In the Johnston case, Lord Rodger had observed that “for about twenty years pleural plaques have been regarded as actionable. Courts have awarded damages for them. Employers and their insurers have settled many claims for damages for them... this has not resulted in an unmanageable flood of claims...”

Indicative data from Scottish sources supports the view that there has not been a flood of claims here in recent years. There are indications, however, that there has been a degree of instability and that, though it may be masked to an extent by the impact of the Johnston case (i.e. with claims not being progressed until the status of pleural plaques is finally resolved), it seems likely that there has been some underlying increase in pleural plaques caseload.

4. If it is accepted that there has been an increase in pleural plaques claims in recent years, the question as regards projecting for the future is for how long and at what rate will this continue? A diagrammatic representation of the issue is provided by figure 1.

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Figure 1

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In a "best case" scenario caseload rises slowly, peaks early and then declines quickly, whereas in a "worst case" scenario caseload rises quickly, peaks late and then declines slowly.

5. In addressing this central question, data from a range of historic sources may help to inform an assessment.

5.1. Data on cases recently pursued in Scotland. The following table has been constructed on the basis of data supplied by Thompsons solicitors and by the Scottish Court Service (SCS) and shows the percentage change in caseload over the previous year. Thompsons’ data relate to the number of newly created claims for pleural plaques. SCS data do not relate only to pleural plaques, but to the number of all asbestos-related personal injury claims raised in the Court of Session. (The data for 2007 and perhaps 2006 will have been affected by the decisions in those years, by the House of Lords and Appeal Court respectively, in the Johnston case.)

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thompsons</td>
<td>n/a</td>
<td>+45%</td>
<td>-35%</td>
<td>-35%</td>
</tr>
<tr>
<td>SCS</td>
<td>n/a</td>
<td>+6%</td>
<td>+13%</td>
<td>-14%</td>
</tr>
</tbody>
</table>

5.2. Data on UK claim levels. UK-level data from The Actuarial Profession and the ABI appear to support the view that there has been a significant upward trend in claims for asbestos-related conditions, including pleural plaques, in recent years. For example, the ABI’s supplementary submission\(^\text{16}\) to the Justice Committee incorporated a 2007 presentation by the UK Asbestos Working Party with a graph which appears to suggest that pleural plaques claims across the UK increased at a rate of c.60% p.a. between 1999 and 2004. (It is unclear whether the increase is due entirely to an increase in the number of individual claimants: some of the other explanatory factors postulated by the UK Asbestos Working Party in relation the increase in mesothelioma claims may also be relevant to pleural plaques – e.g. claimants spreading claims over more defenders, or a speeding up in the processing of claims. Moreover, evidence from Norwich Union about the impact of the Access to Justice Act 1999 suggests that the increase is likely to have arisen primarily in England and Wales, rather than Scotland.)

5.3. Data on UK diagnostic levels. As regards diagnoses of benign pleural disease\(^\text{17}\), HSE data on "work-related and occupational respiratory disease: estimated number of cases reported by chest physicians to SWORD and occupational physicians to OPRA, 1998-2007" show a fluctuating but essentially quite flat situation:

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\(^{17}\) [www.hse.gov.uk/statistics/tables/thorr01.htm](http://www.hse.gov.uk/statistics/tables/thorr01.htm)
Thus, the average annual number of reports in the period 1999-2001 was 1057 while the average annual number of reports 5 years later, in the period 2004-2006, was 1307, representing an increase of 24% in total or approximately 4.5% per annum.

It is important to note, however, that these statistics are affected by several variables which makes the assessment of trends problematic. Statistical modelling by the University of Manchester over the period 1999-2007 to take account of some of these effects showed no evidence of a trend over the period (the estimated percentage change in 2007 compared with 1999 was between -17% and +28%). Therefore, and because of fairly narrow 10-year timeframe, the figure of 4.5% as an estimate of recent linear change should be treated with extreme caution.

6. As regards forward-looking data sources, one option may be to look at other conditions which, like pleural plaques, are asbestos-related and have a long latency period. In this regard, mesothelioma appears to be the only asbestos-related condition for which projections of the future burden are already available. The projections, which are produced by the HSE, suggest that mesothelioma deaths could rise by a total of 20% over the period to the peak year of 2015.

7. In seeking to address the question of whether the future trend in pleural plaques claims would be likely to be nearer the best case or worst case scenarios outlined at paragraph 4, it was the HSE-sourced projection for future mesothelioma deaths that was utilised in the PRIA, final RIA and Financial Memorandum. Thus, it was stated that "predictions of future mesothelioma deaths may provide the best guide to the potential scale of further rises in cases of pleural plaques". However, while it appeared after discussion with the HSE that this could be the best available proxy for the future trend in pleural plaques claims, it was acknowledged at the time that it was an imperfect one. Specifically, though the conditions of pleural plaques and mesothelioma have a common cause (i.e. asbestos) they are distinct: notably, most people with mesothelioma are likely to be diagnosed as such (and diagnosed quite quickly) because of the severity of their symptoms, whereas, in the absence of symptoms, the proportion of people with pleural plaques who actually go on to be diagnosed as such (and the timing of that diagnosis) will depend on a range of variables.

8. Since the publication of the final RIA and Financial Memorandum in June 2008, additional information has emerged which suggests further caveats are appropriate in utilising the existing projections of mesothelioma.
deaths to forecast the trend in future pleural plaques claims. Notably, the UK Asbestos Working Party's most recent findings appear to suggest that – for a variety of potential reasons, probably including an increased "propensity to sue" – the observed increase in compensation claims for mesothelioma is outstripping the projected increase in mesothelioma deaths. In addition, the Working Party has noted that Professor Peto – an acknowledged authority in the area of asbestos-related conditions – is pursuing further research and it may be that the peak in mesothelioma deaths will be later than 2015.

9. Given the caveats surrounding the use of projections for mesothelioma deaths as a proxy for projecting pleural plaques claims, it may be advisable to consider whether any of the historic data sources are capable of shedding any additional light on the situation. It would seem unsafe to utilise the data at paragraph 5.1 for this purpose, given that they relate only to a relatively short timeframe. There also appear to be a number of difficulties in utilising the trend data at paragraph 5.2 to inform long term projections. These difficulties arise because – as is illustrated in the UK Asbestos Working Party's 2008 report on mesothelioma, which has exhibited a broadly similar trend in claims – the relative sharp increase in recent years may be due to a range of factors which are difficult to distil. If it is due in some degree to claimants spreading their claims over more defendants, the data may give an exaggerated picture of the increase in the number of claimants. If it is due in some degree to an increased propensity to sue (e.g. if 6 out 10 people diagnosed with pleural plaques opted to sue in 1999, whereas 8 out of 10 people diagnosed with pleural plaques opted to sue in 2005) then there may have been a step-change in recent years but, clearly, the propensity to sue cannot increase indefinitely and will at some point plateau: at that point, the trend in claim levels might be expected more closely to match the trend in diagnoses.

10. As regards long term projections, the historic data at paragraph 5.3 may be the least bad option for informing illustrative projections. Thus, options might include:

- utilising the figure of 4.5%, tentatively derived from HSE-sourced data about diagnostic reports for benign pleural disease, and assuming that pleural plaques claims will increase at that average annual rate until the peak.
- utilising an adjusted version of that figure, bearing in mind that – for the purposes of projecting future numbers of claimants – it may be appropriate to allow for an increased propensity for individuals to have their pleural plaques diagnosed or to sue as a result of such diagnosis (e.g. perhaps as a result of increased public awareness arising from the litigation and legislation). Unfortunately, such an adjustment would have to be very rough and ready, e.g. perhaps doubling it to 9% p.a.

11. The following table summarises potential high and low projections of the number of future successful claimants p.a., after applying these various approaches to the figures in paragraph 9 of Annex D (i.e. a starting
point of 165 – 290 successful claimants per annum in Scotland), as detailed in Appendix 1 to this Annex.

<table>
<thead>
<tr>
<th></th>
<th>2010 Peak</th>
<th>2015 Peak</th>
<th>2020 Peak</th>
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<tbody>
<tr>
<td><strong>Original Assumption</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20% up by 2015)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Increase of 4.5% p.a.</td>
<td>H = 361</td>
<td>H = 450</td>
<td>H = 561</td>
</tr>
<tr>
<td></td>
<td>L = 206</td>
<td>L = 256</td>
<td>L = 319</td>
</tr>
<tr>
<td>Increase of 9% p.a.</td>
<td>H = 446</td>
<td>H = 687</td>
<td>H = 1056</td>
</tr>
<tr>
<td></td>
<td>L = 254</td>
<td>L = 391</td>
<td>L = 601</td>
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</tbody>
</table>

(NB The range of different options offered for the peak year requires some explanation. In the 2004 Definitive Guide, the UK Asbestos Working Party suggested that pleural plaques claims might peak around 2006-07, hence the use of 2010 as an earlier date than that provided in the Financial Memorandum. Asbestos-related mesothelioma deaths have been projected to peak in 2015, hence the use of that date as per the Financial Memorandum. 2015 is also the anticipated peak year in Ministry of Justice consultation paper. And 2020 is used to reflect (a) the possibility that the peak date for projected mesothelioma deaths may be revised backwards as a result of further research, and (b) to take account of the fact that (because of their symptomless nature) pleural plaques may be diagnosed rather later than mesothelioma.)

12. Working on the same basis, the following table summarises potential high and low projections of the number of future unsuccessful claimants p.a.

<table>
<thead>
<tr>
<th></th>
<th>2010 Peak</th>
<th>2015 Peak</th>
<th>2020 Peak</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Original Assumption</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20% up by 2015)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Increase of 4.5% p.a.</td>
<td>H = 85</td>
<td>H = 106</td>
<td>H = 132</td>
</tr>
<tr>
<td></td>
<td>L = 69</td>
<td>L = 85</td>
<td>L = 106</td>
</tr>
<tr>
<td>Increase of 9% p.a.</td>
<td>H = 105</td>
<td>H = 161</td>
<td>H = 248</td>
</tr>
<tr>
<td></td>
<td>L = 85</td>
<td>L = 130</td>
<td>L = 200</td>
</tr>
</tbody>
</table>

13. A further alternative might be to multiply the original figures in the UK Asbestos Working Party’s 2004 report by some factor (or range of factors) to reflect an appreciation of the possible extent of the uncertainties about, for example, propensity to sue. However, the UK Asbestos Working Party seem clear that those figures should be completely disregarded and, in any event, it would seem impossible empirically to devise a factor (or range of factors) that would be clear and robust.
14. The tables at paragraphs 11 and 12 help to illustrate the degree of sensitivity to the assumptions made. For the purposes of endeavouring to project the future number of successful claims, it may be reasonable – subject to explicit caveats about the empirical basis being shallow and the existence of alternative approaches which could yield higher and lower figures – to utilise its lower and higher figures (i.e. 165 + 4.5% p.a. and 290 + 9% p.a.) as a basis for projections of future successful claimant numbers and costs (while making clear, as does The Actuarial Profession in relation to estimates made using an alternative methodology, that these should not necessarily be regarded as lower or upper bounds). This would mean utilising the following range for calculations:

- if the peak year were 2010, then
  - the most costly scenario would involve 551 new claims in that year, with 446 (i.e. 80%) ultimately being successful and 105 (i.e. 20%) ultimately being unsuccessful;
  - the least costly scenario would involve 275 new claims in that year, with 206 (i.e. 75%) ultimately being successful and 69 (i.e. 25%) ultimately being unsuccessful.

- if the peak year were 2015, then
  - the most costly scenario would involve 848 new claims in that year, with 687 (i.e. 80%) ultimately being successful and 161 (i.e. 20%) ultimately being unsuccessful;
  - the least costly scenario would involve 341 new claims in that year, with 256 (i.e. 75%) ultimately being successful and 85 (i.e. 25%) ultimately being unsuccessful.

- if the peak year were 2020, then
  - the most costly scenario would involve 1304 new claims in that year, with 1056 (i.e. 80%) ultimately being successful and 248 (i.e. 20%) ultimately being unsuccessful;
  - the least costly scenario would involve 425 new claims in that year, with 319 (i.e. 75%) ultimately being successful and 106 (i.e. 25%) ultimately being unsuccessful.

Exposure-based Approach

15. The Actuarial Profession has expressed reservations about taking an historic approach to the projection of future claims as regards pleural plaques and noted that, in the absence of reliable projections based on past claim numbers, an exposure-based framework might be adopted. This was indeed the approach taken by the Ministry of Justice in its consultation paper. And the projections in that consultation paper were utilised by the ABI in evidence to the Justice Committee.

16. A central assumption in the ABI's projections has been that Scotland accounts for 30% of UK asbestos liabilities. In terms of caseload, based on the projections in the Ministry of Justice consultation paper, this seems to
imply an expectation that the total number of future claimants in Scotland might be in the range 60,000 – 375,000 (i.e. 30% of 200,000 – 1,250,000).

17. However, there seems to be little basis for assuming that Scotland’s share of UK asbestos liabilities is markedly out of line with Scotland’s share of the UK population. The Scottish Government’s understanding, based on HSE mesothelioma mortality data and conveyed to the Justice Committee by letter\(^1\), is that Scotland appears to have about 10% of asbestos-related conditions. Also:

- HSE data on reports of benign pleural disease have Scotland at about 10% of the GB total\(^2\);
- with appropriate caveats, The Actuarial Profession suggested in recent correspondence (see Annex A) that 9% of the UK total might be a reasonable figure, based on HSE data.

18. It therefore appears that 10% would be a reasonable proportion to apply to any UK-level projections. (A figure appreciably above 10% would seem possible only if it were anticipated that there would be a very significant level forum shopping and, as noted in the Policy Memorandum, the Scottish Government’s view is that, whilst forum-shopping may be attempted, it is expected that established rules of jurisdiction and applicable law will ensure that only cases with a substantial Scottish connection will be tried in Scottish courts under Scots law.)

19. If it is accepted that 10% is a more appropriate figure than 30%, then two-thirds of the ABI’s projection of annual costs in Scotland (£76m - £607m) falls away, leaving projections based on the underlying exposure-based approach of between £25m and £202m per annum. This wide range is indicative of the degree of significant uncertainty surrounding the large number of variables within the underlying model employed by the Ministry of Justice, and the UK Asbestos Working Party has advised that the range could have been still wider had they sought to make projections in this way.

Conclusion

20. As regards accurately projecting future claim levels, there are evident limitations to both the historic and the exposure-based approaches. The concerns about the historic approach, however, ought not to be overstated. For example, while The Actuarial Profession is wholly correct to note the likely impact of recent litigation and legislation, and the attendant publicity, on recent and future claim levels and specifically that:

- “The 2004 projections were made prior to the various judgements in relation to pleural plaques (High Court, Court of Appeal and the House of Lords ruling)”

\(^1\) www.scottish.parliament.uk/s3/committees/justice/inquiries/damages/SGandCMOsupplementary.pdf
\(^2\) www.hse.gov.uk/statistics/tables/thor04.htm
• "One of the implications of the above judgements is that the public awareness in respect of pleural plaques has increased. This is likely to have led to more claims than was anticipated and outlined in the 2004 paper."

• "We have observed that the propensity for a person to make a claim to have increased since 2004 for compensatable asbestos-related conditions."

There are several countervailing considerations that should be borne in mind:

• The purpose of the Bill is to secure the status quo ante, and to that extent is simply maintaining the legal position that was understood to exist in 2004;

• Publicity around the High Court ruling in February 2005 (that pleural plaques were indeed eligible for compensation), together with news that the ruling would soon be challenged in the Appeal Court, may well have raised awareness20 and led to a surge in new claims in 2005 as potential claimants sought to get in 'under the wire'. To that extent, projections which begin with data incorporating caseload in 2005 – as the Scottish Government's do – may already reflect some of the impact of greater public awareness. A further relevant consideration is that asbestos-related conditions tend to be heavily concentrated in particular localities and, to that extent and because of the long-running support activity of trades unions and campaign groups, awareness in those localities is likely to have been relatively high for some time.

• Likewise, as the Scottish Government's projections utilise quite recent data, they may already reflect any increased propensity to make a claim.

21. Additionally, while an exposure-based approach does have value, not least in illuminating both the sensitivity of projections to underlying assumptions and the degree of uncertainty, it also has limitations as a guide to policy for the same reasons. Its value is dependant on all relevant assumptions being identified and quantify as clearly as possible. It is unfortunate that the Scottish Government has been unable to obtain further background information about the assumptions utilised for this issue.

22. Taking account of these considerations and also of the benefits of founding projections, so far as possible, on real experience, it does not appear unreasonable to continue – with caution – to take an historic approach to the projection of future costs.

Civil Law Division
February 2009

20 It is also a relevant factor, however, that asbestos exposure was heavily concentrated in particular communities, linked to Scotland's industrial past, and in those communities awareness of the issues arising from that exposure can be anticipated to have been already relatively high, even before the additional publicity generated by the Johnston case.
POTENTIAL SUCCESSFUL / UNSUCCESSFUL CLAIMANT NUMBERS

1. This table provides projections, under four scenarios, of the number of ultimately successful / unsuccessful claimants who may raise a claim each year:
   
   (a) from a low starting point (i.e. 220 claimants p.a., with 165 (i.e 75%) being successful and 55 (i.e. 25%) being unsuccessful – see Annex D) the numbers rise at an average rate of 4.5% p.a.
   
   (b) from a high starting point (i.e. 358 claimants p.a., with 290 (i.e. 80%) being successful and 68 (i.e. 20%) being unsuccessful – see Annex D), the numbers rise at an average annual rate of 4.5% p.a.
   
   (c) from a low starting point, the number of claimants rises at an average rate of 9% p.a.
   
   (d) from a high starting point, the number of claimants rises at an average annual rate of 9% p.a.

<table>
<thead>
<tr>
<th>Year</th>
<th>(a) 165 [55], rising by 4.5%</th>
<th>(b) 290 [68], rising by 4.5%</th>
<th>(c) 165 [55], rising by 9%</th>
<th>(d) 290 [68], rising by 9%</th>
</tr>
</thead>
</table>

Ave annual no. over first 5 yrs 189 [63] 332 [78] 215 [72] 378 [89]
Total no over first 5 years 943 [315] 1658 [389] 1076 [369] 1892 [444]

Ave annual no. over first 10 yrs 212 [71] 372 [87] 273 [91] 480 [113]
Total no over first 10 years 2119 [707] 3724 [873] 2732 [911] 4802 [1126]

Ave annual no. over first 15 yrs 239 [60] 420 [98] 352 [117] 619 [145]
Total no over first 15 years 3584 [1195] 6299 [1477] 5281 [1760] 9281 [2176]
2. As noted elsewhere, arguments can be made for assuming that the peak year will fall in 2010 or 2015 or 2020. Therefore, for ease of reference, this table provides an overview of potential caseload covering all three of those scenarios, based on assumptions of annual average increases of 4.5% and 9% until the peak year. For the calculations within this paper, however, the working assumption remains that 2015 will be the peak year.

3. In terms of costing the potential caseloads, it would seem reasonable to assume that:
   - many/most of the claims that may otherwise have been created in 2006-2008 (a) will have been deterred by the Appeal Court and House of Lords judgements of 2006/7, and (b) will come on stream when the legislation is enacted;
   - claims will generally be concluded / paid in the year after they are created.

Civil Law Division
February 2009
ANNEX F

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
ESTIMATES OF THE NUMBER OF EXISTING CLAIMS ON HOLD

1. In order to assess fully the financial implications of the Bill, it is necessary – in addition to making projections for claims that may arise in the future – to take account of the backlog of existing claims that have been put on hold, primarily as a result of the Johnston case.

2. The PRIA, final RIA and Financial Memorandum each utilised an estimate of 630 backed-up pleural plaques claims in Scotland. This was based on information that Thompsons have 567 backed-up claims, and, once again, on the understanding (explained in Annex D) that Thompsons account for approximately 90% of Scottish caseload (i.e. 567 / 0.9 = 630). Had the proportion indicated in the ABI’s more recent evidence been utilised, the number would have been 945 backed-up cases (i.e. 567 / 0.6 = 945).

3. On this basis, and on the assumption that claims for asymptomatic asbestosis / pleural thickening run at approximately 10% of the level of claims for pleural plaques, it is possible to estimate that the number of backed-up claims that could be affected by the Bill is between 690 and 1040. (NB the top end of this range appears to be broadly in line with the estimate recently provided by The Actuarial Profession.)

4. However, as explained in Annex D, as regards defenders it is not the number of claims made, but the number of claims made successfully, that is of primary relevance in determining the level of costs incurred. Therefore, again making the conservative assumption that some 20%-25% of claims might ultimately conclude unsuccessfully, the relevant range would be 518 – 832 successful claims, where (i) the lower number assumes 690 backed-up claims of which 25% will fail and (ii) the larger figure assumes 1040 backed-up claims of which 20% will fail.

5. On that basis, it could be that there will be 172 – 208 unsuccessful claims from amongst the back-up caseload (i.e. being 690 total claims minus 518 successes at the lower end, and 1040 total claims minus 832 successes at the higher end).

Civil Law Division
February 2009

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21 at the time, estimates for Government Departments and local authorities were added to the figure of 630. It has subsequently been appreciated, however, that (to avoid double-counting) those estimates should not have been added, because the figure of 6300 cases created by pursuers should already incorporate cases raised against all defenders including public authorities.

ANNEX G

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
FINANCIAL IMPLICATIONS
DISTRIBUTION OF COSTS BETWEEN PRIVATE AND PUBLIC SECTORS

1. Aside from the issue of what the overall level of the Bill's financial implications will be, questions have been asked about their distribution.

2. Particular attention has been focused on the split between private and public sectors, with some concern being expressed that in Scotland public sector involvement in claims might be higher than in other parts of the UK. This seems to reflect a perception that in Scotland a disproportionately high number of the workplaces in which people were exposed to asbestos were in the public sector. In an attempt to explore this concern, a range of information has been analysed.

3. Information was sought from relevant UK Government Departments, (i.e. MoD and DBERR, which appear to be key public sector defenders in pleural plaques cases) about the share of their recent, current and projected caseload that originates from Scotland.

3.1 DBERR

Past: DBERR has provided data in relation to claims stemming from British Shipbuilders and British Coal. Claims relating to British Shipbuilders are by far the more numerous and the proportion of those past claims which originated from Scotland were as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>2000/01</th>
<th>2001/02</th>
<th>2002/03</th>
<th>2003/04</th>
<th>2004/05</th>
<th>2005/06</th>
<th>2006/07</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scotland</td>
<td>15.4%</td>
<td>8.9%</td>
<td>10.9%</td>
<td>10.6%</td>
<td>12.9%</td>
<td>14.4%</td>
<td>25.0%</td>
</tr>
</tbody>
</table>

So Scotland's share of past claims has fluctuated between 8.9% and 15.4% of the UK total across the years, with the exception of 2006/7. (It may be that Scotland's higher share in 2006/7 reflects the fact that, south of the border, pleural plaques claims were being challenged in what became known as the Johnston case.)

Current: As regards backed-up cases, DBERR advised initially that they had around 136 open Scottish pleural plaques cases (relating to British Shipbuilders and British Coal) and that the cost of settling these cases, including legal costs, was likely to be in the region of £1,200,000. Subsequently, DBERR has advised that they now have 134 existing British Shipbuilders cases, which will cost around £1,252,050, to settle and 4 existing British Coal cases (for which the new Department of Energy and Climate Change is now responsible) which are likely to cost £121,000. The revised estimate for backed-up claims within DBERR's remit therefore totals £1,373,050 (a rise of £173,050).

Future: As regards future cases, DBERR initially advised that its overall liability in Scotland (going forward to a peak in 6 to 8 years time and then falling away) was likely to be in the region of £5,300,000. Subsequently,
the projections have been reduced to an overall total of £4,973,500 over the next 15 years as follows:

- total projected future costs for British Shipbuilders cases are £4,333,500 for an anticipated 540 cases.
- total projected future costs for British Coal cases (which are now the responsibility of the Department of Energy and Climate Change) are £640,000 for an estimated 40 cases.

(NB DBERR emphasise, however, that the figures do not include any uplift for inflation or assessment for litigated cases. Further, DBERR has advised that the overall numbers provided are based on actuarial work undertaken before the heightened debate and ongoing publicity on pleural plaques. Therefore, the projections cannot be viewed as a definitive forecast should compensation for pleural plaques be permitted in Scotland. Additionally, DBERR is responsible for the National Dock Labour Board (NDLB). Litigation has sought to establish the scope of the common law duty of care owed to claimants by the NDLB and it may be that figures in respect of the NDLB will require to be included at a later date.)

3.2 MoD

Current: MoD has also advised that they have 37 open Scottish pleural plaques cases and anticipate an average cost of £14,000 (£8,000 damages plus £6,000 legal costs) giving a total cost of around £518,000 in settling these existing cases. Subsequently, MoD advised that the 37 Scottish cases were part of an overall caseload of 750 pleural plaques claims: the Scottish share equates to approximately 5% of the total MoD caseload.

Future: As regards projections for potential future liabilities in Scotland, MoD confirmed that (on the basis of the 37 cases being backed up over three years) it could be assumed, with caution, that there may be in the region of 12 pleural plaques cases raised against MoD per year (giving a cost per annum of around £168,000).

4. The data from these Departments suggests that they do not experience or anticipate a claim level in Scotland that is markedly out of line with Scotland’s share of the UK population. This seems tentatively to support a conclusion that public sector liability is not significantly worse in Scotland than elsewhere in the UK.

5. Some indication of the potential level of public sector exposure can also be gleaned from the history of the ownership of Scottish shipyards and their insurance arrangements. The history is complex, but broadly the current situation as regards responsibility for meeting valid compensation claims is understood to be as follows:
• Chester Street (formerly Iron Trades Insurance Co Ltd) and Financial Services Compensation Scheme\textsuperscript{23} – the Upper Clyde yards of (1) Upper Clyde Shipbuilders (inc. John Brown and Co (Clydebank) Ltd, Alexander Stephens & Sons Ltd, Charles Connell & Co Ltd and Fairfields (Glasgow) Ltd) and (2) Yarrows (now Kendrick Computing Co Ltd)

• DBERR / British Shipbuilders (inc. Scotts and Lithgows, as agreed with Chester Street up to 1970, Barclay Curle and Govan Shipbuilders Ltd 1973-88).

• Ministry of Defence – Rosyth yards

• Various Private Companies/Insurers (e.g. through employers liability insurance) – e.g. Yarrows Shipbuilders Ltd/BAE Systems Marine (YSL) Ltd for post-1966 cases; Harland & Woolf Ltd; Fairfield Shipbuilding and Engineering Company Ltd and a number of smaller companies

6. The Scottish Government’s conclusion is that there seems to be little evidence for suggesting that the burden on the public sector in Scotland has been, or will become, disproportionate. At the same time, the Scottish Government sees no reason to project that the public sector’s share of the overall burden will fall dramatically.

Anticipated Public Sector Costs

7. The overall projections for the public sector costs are as follows:

\textbf{Backed-up Public Sector Claims}

• Ministry of Defence: £518,000

• British Shipbuilders / British Coal: £1,252,050 and £121,000

• Scottish Government: £75,000

• Local Authorities: £1,000,000

\textbf{Future Public Sector Claims}

• Ministry of Defence: £168,000 p.a. (but, if a rate of increase of 4.5% - 9% p.a. is assumed, potentially rising to a peak of £261,000 - £398,000 p.a.)

• British Shipbuilders / British Coal: £4,333,500 and £640,000 over 15 years (i.e. equivalent to £331,567 p.a. but, if a rate of increase of 4.5% - 9% p.a. is assumed, potentially rising to a peak of £498,000 - £760,000 p.a.)

• National Dock Labour Board: zero (based on current assumption)

• Scottish Government: negligible (but, if a rate of increase of 4.5% - 9% p.a. is assumed, potentially rising to a peak of £50,000 p.a.)

\textsuperscript{23} The Financial Services Compensation Scheme (FSCS), the UK’s statutory fund of last resort for customers of authorised financial services firms, is funded by levies on firms authorised by the FSA. It can pay compensation if a firm is unable, or likely to be unable, to pay claims against it.
• Local Authorities: £425,000 - £450,000 p.a. (but, if a rate of increase of 4.5% - 9% p.a. is assumed, potentially rising to a peak of £660,000 - £1,042,000 p.a.)

(The figures for the Scottish Government and local authorities have been generated by the Scottish Government on the basis of information received. The base figures for the other public sector defenders have been provided by the relevant departments of the UK Government.)

Civil Law Division
February 2009
This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill as introduced in the Scottish Parliament on 23 June 2008

DAMAGES (ASBESTOS-RELATED CONDITIONS) (SCOTLAND) BILL
[AS INTRODUCED]

REVISED FINANCIAL MEMORANDUM

CONTENTS

1. This revised Financial Memorandum is published to accompany the Damages (Asbestos-related Conditions) (Scotland) Bill in order to reflect further information provided to the Parliament during the Bill’s Parliamentary passage prior to Stage 3. Changes to the text since the original Financial Memorandum (SP Bill 12–EN) was published are indicated (except in the summary table of costs) by sidelining in the right margin.

2. The revised Financial Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

INTRODUCTION

3. Pleural plaques incidence is thought to be rising largely as a result of asbestos exposure, most commonly associated with industries such as shipbuilding. However, they can only be detected on x-ray or CT (computed tomography) scan so are usually diagnosed incidentally during the course of medical investigations. There is no accurate record of how many cases are diagnosed each year in Scotland. It has been estimated that up to half of those occupationally exposed to asbestos will have pleural plaques thirty years after first exposure.\(^1\) Mesothelioma is the only asbestos related disease for which projections of the future burden are available. Given pleural plaques also have a long latency, and in the absence of other evidence, predictions of future mesothelioma deaths may provide the best guide to the potential scale of further rises in cases of pleural plaques. Annual mesothelioma deaths in Great Britain are expected to rise by up to 20% between now and a peak around 2015. Following this, indications are that the mortality rate will then decline. (Although these projections rest on a number of uncertain (and largely unverifiable) assumptions, the timing and scale of the maximum annual death toll is not highly sensitive to these uncertainties.)

4. It is recognised, however, that while both conditions are asbestos-related with a long latency, there may be some divergence between future trends in (i) deaths from mesothelioma and (ii) compensation claims for pleural plaques. For example, it is possible that:

the clearly symptomatic nature of mesothelioma and the generally asymptomatic nature of pleural plaques may lead to a divergence in diagnostic trends;

any increase/decrease in the “propensity to sue” may lead to divergence between trends in diagnosed cases and trends in compensation claims.

5. Therefore, it may be that – as an alternative guide to the potential scale of further rises in compensation claims for pleural plaques – account should be taken of recent historical trend data on reports of diagnoses of “benign pleural disease” (adjusted as far as possible to reflect potential changes in propensity to sue), rather than utilising predictions of future mesothelioma deaths. Unfortunately, conclusive data are lacking in relation to past diagnoses of benign pleural disease. But taking account of the data which are available, an extremely tentative assumption might be that there has been an increase in the order of 4.5% per annum on average in recent years. There is little basis for determining how this figure might then be adjusted in order to capture potential changes in propensity to sue, but for indicative purposes a very rough and ready option might be to double it to 9% per annum.

6. Applied cumulatively and with a peak around 2015, this would imply that claim numbers might be 55% to 137% higher than recently (rather than 20% higher, as under the original scenario).

7. As regards estimating the future trend in claims for compensation for pleural plaques, the relative merits of utilising these two options (i.e. projections of future mesothelioma deaths or records of historic pleural disease diagnoses) has been discussed with HSE who have confirmed that the degree of uncertainty is significant and that, therefore, it is not possible to conclude which would be the more accurate.

Basis for calculating costs in this memorandum

8. The Scottish Government consulted on a Partial Regulatory Impact Assessment (PRIA) for the Bill from February to April 2008. Responses to this consultation (where confidentiality has not been requested) are available in the Scottish Government Library, K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD (Tel:0131 244 4565) and at http://www.scotland.gov.uk/Publications/2008/09/Johnston-NEI-responses/content. A summary of responses is available at http://www.scotland.gov.uk/consultations. The final RIA is available at http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/partial-assessments/full. Information gained from responses to the consultation on the PRIA was used in preparing the original (June 2008) financial memorandum as well as the final RIA. The main components for calculating costs are numbers of cases and cost per case. The calculations result in maximum costs, in the sense that they proceed on the basis that all claims will be successful. On past experience, however, it seems that a more realistic estimate would result if calculations incorporated a conservative assumption that only 75%-80% of claims will be successful, with the rest being unsuccessful (e.g. due to time-bar, or inability to identify a relevant defender).

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3 [http://www.scotland.gov.uk/consultations](http://www.scotland.gov.uk/consultations)
Numbers of cases

9. 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. In the PRIA we used a figure of 200 actions raised per year in relation to pleural plaques in Scotland. Insurers’ representatives take the view that this figure is too low in relation to estimates of future claims for a number of reasons:

- the figure of 200 in the PRIA was described as being cases raised in court. Cases are also settled without going to court. However, as indicated in footnote 4, the figure we used in the PRIA was actually based on new cases created, which is a combination of cases settled without being raised in court, and actions raised in court. We inadvertently referred to cases created as “actions raised” in the PRIA and apologise for any confusion caused. The ratio is roughly 75% raised in court to 25% settled without going to court;

- publicity about pleural plaques could lead to more people claiming;

- increasing numbers of older people getting scans for other reasons could lead to more claims;

- there could be increased use of speculative fee arrangements (no win, no fee) which could lead to more claims. Our understanding is, however, that most asbestos-related cases are already funded in this way;

- there could be increased activity by claims management companies which would increase scanning and numbers of claims. Our understanding is that claims management companies have not had much of a presence in Scotland to date.

10. Clearly there is a degree of uncertainty about future numbers of pleural plaques claims. However, in the absence of any firm figures to the contrary, we consider that a reasonable basis on which to proceed may be: 200 cases a year at the outset as explained in footnote 4, within which are cases against Government Departments (see paragraphs 16 and 27) and cases against local authorities (see paragraph 20) as well as cases against private sector employers and their insurers. In relation to asymptomatic pleural thickening and asymptomatic asbestosis, our best estimate of an average number of cases raised per year is 20 and, within this, we have made a notional allocation of 2 cases to local authorities and none to Government Departments (based on enquiries), with the rest (18) falling to business. This gives an overall total of 220 claims annually for the conditions covered by the Bill.

11. On our original assumption, there is currently a build up of around 630 pleural plaques cases because of the House of Lords Judgment and earlier judgments in the English courts. Approximately 250 of these cases are currently stisted (suspended) by the courts and roughly 380 are backed up with solicitors: this includes 218 backed up cases against the Scottish Government, other Government Departments and local authorities (see paragraphs 16, 20 and 27). We understand that there may be a total backlog of around 60 cases involving asymptomatic pleural thickening and asymptomatic asbestosis and, within this, we have made a notional allocation of 5 cases to local authorities and none to Government Departments (based on

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4 Figures provided by Thompsons Solicitors, who deal with approximately 90% of pleural plaques cases. The figure of 200 is an annual average of the figures for new cases created in the years 2004-2006, and extrapolated for Scotland
enquiries), with the rest (55) falling to business. This gives an overall total of 690 backed-up claims.

12. However, correspondence from insurers’ representatives has provided new data and has again challenged the assumptions underlying the Scottish Government’s figures. If the alternative scenario outlined by this correspondence were utilised, it could suggest that:

- there may be 325 claims created each year for pleural plaques and 33 claims created each year for asymptomatic pleural thickening and asymptomatic asbestosis, totalling 358;
- there may be backed-up around 945 pleural plaques claims and around 95 claims for asymptomatic pleural thickening and asymptomatic asbestosis, totalling 1040.

Cost per case

13. Following consultation on the PRIA, the best information available to us is that settlement costs are in the region of £22,000 per case (made up of £8,000 compensation payment, £8,000 pursuer’s costs and £6,000 defender’s costs). This figure is an average derived from litigated and unlitigated claims, which we understand it would be difficult for insurers to disaggregate. The figure is based on final settlement costs, but some pursuers opt for provisional damages, which would be lower. This figure is based on the known 2003-04 settlement figures, from the period prior to the legal challenges which culminated in the HoL Judgment. It is therefore open to speculation as to whether this will be the average cost per case in Scotland by the time legislation is passed by the Scottish Parliament. We think that a reasonable working assumption for the purposes of this memorandum is an average cost per successful case of £25,000. However, for those claims which conclude unsuccessfully there is no compensation payment and, on average, the legal costs are also likely to be lower (i.e. because the reasons for lack of success are often linked to the early termination of a case): we think that a reasonable working assumption for the purposes of this memorandum is an average cost per unsuccessful case of £10,000 at most. (Separate figures have been provided by other Government Departments and are used in paragraph 27).

Wider implications

14. Some respondents to the consultation on the PRIA have expressed concerns that the legislation will have wider implications and will pave the way for claims for other conditions which are not compensatable at present, with consequential costs for defenders. However, the legislation, as drafted, will apply only to 3 asbestos-related conditions and will have no effect beyond these conditions. Legislation about any other conditions would need to be argued on its merits and would need to be passed by Parliament.

5 having surveyed several of its member companies, the Association of British Insurers suggested that Thompsons Solicitors may deal with nearer 60% of pleural plaques cases. It has also been suggested that the figures for new cases created in the year 2006 may have been depressed below normal by the impact of the Appeal Court judgement in January of that year.

6 again utilising figures provided by Thompsons Solicitors, but i) excluding data post-2005 (which may have been affected by the litigation before the Appeal Court and House of Lords) and ii) assuming that they deal with approximately 60% rather than 90% of cases.
15. We have been informed that, in response to the legislation, the cost of employers’ liability and public liability insurance premiums in Scotland is likely to increase (see also paragraph 29).

**COSTS ON THE SCOTTISH ADMINISTRATION**

**Scottish Government**

16. There are currently 3 ongoing cases for which the Scottish Government (SG) has responsibility as a defender. The cost of settling these cases is unknown but is likely to be around a maximum of £75,000 (see paragraph 13). Less than one case is raised against SG annually. The future cost for such cases is therefore expected to be negligible; even if there were an increase in caseload it seems unlikely that at its peak it would exceed £50,000 p.a. However, there is a possibility of the UK Government invoking the Statement of Funding Policy between itself and the devolved administrations, which would mean that the Scottish Government would be asked to meet any additional costs incurred by UK Government Departments (see paragraph 27). The Statement says that, where decisions taken by any devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the United Kingdom Government or, alternatively, decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust such extra costs, the body whose decision leads to the additional cost will meet that cost. It is, however, by no means certain that the Statement would apply in relation to this legislation.

**Scottish courts**

17. It is not anticipated that the proposed legislation will significantly increase the costs to the Scottish courts. Most cases are raised in court, but settled extra-judicially (98% of all personal injury cases raised in court settle extra-judicially). The costs arising from cases settled extra-judicially (e.g. registration of cases) will be absorbed within existing resources and can be regarded as negligible. It is not possible to quantify accurately either current or future costs to the courts in dealing with cases settled judicially. While the cost of a sitting day to the court is known, this covers both appeal work (with 3 judges) and first instance work (with a single judge). Information held does not break down the appeal and first instance costs, therefore the cost cannot be equated or broken down to a particular type of case. Bearing this in mind, the average cost of a case (which will be heard over 4 days and based on Inner House costs) is likely to be in the region of £14,500. However, as noted above, only 2% of cases raised are actually settled in court. Therefore the annual cost to the court of settling these cases is likely to be in the region of £72,500 – £101,500\(^7\) initially and by the peak year may be in the region of £112,375 – £240,555\(^8\). Around 33% of the cost of any increased workload flowing from the legislation will be recouped from the parties, in the form of court fees in accordance with normal costing and recovery procedures in the Scottish courts. The Scottish Court Service consulted in February 2008 on an increase in court fees to increase the proportion of costs recovered from court users; new subordinate legislation was made by the Scottish Ministers in June 2008 and came into force on 1 August 2008.

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\(^7\) £72,500 = 220 cases x 2% = 5 cases x £14,500 (i.e. utilising the original assumption of caseload, see paragraph 10) whereas £101,500 = 358 cases x 2% = 7 cases x £14,500 (utilising the alternative assumption of caseload, see paragraph 12)

\(^8\) £112,375 = £72,500 + 55%, whereas £240,555 = £101,500 + 137% (as per paragraphs 5 and 6)
18. With reference to the backlog of cases (see paragraph 11), the extent to which court costs will be incurred will depend on how the sisted and other pending cases are taken forward and in particular how many are settled without further court action. However, on the basis of what is in the preceding paragraph the costs are likely to be in the region of £203,000 – £304,500.\(^9\)

**Legal aid**

19. In cases where legal aid is granted and the case is subsequently successful, the legal aid costs and outlays will in the majority of cases be offset against the award of expenses made against the unsuccessful party and, if relevant, against the award of damages. However, except for medical negligence cases, almost all personal injury actions are now funded by speculative fee agreements and/or trade union assistance. Therefore, there is unlikely to be any increased cost to the Legal Aid Fund.

**COSTS ON LOCAL AUTHORITIES**

20. The proposed change has implications for local authorities in relation to employer liabilities. We do not have firm information about the overall costs incurred by local authorities in defending claims. Only 3 local authorities responded to the consultation on the PRIA. However, follow-up enquiries with authorities lead us to think that reasonable estimates would be an annual figure of 20 claims and a backlog of 40 claims, including cases involving asymptomatic pleural thickening and asymptomatic asbestosis. The cost of settling these claims, assuming that there are no co-defenders and that all are successful, is likely to be £500,000 per annum and £1,000,000 to settle the backlog (see paragraph 13). However, on the more realistic assumption that the proportion that would be successful would be in the region of 75%-80%, the cost would be:

- between £425,000 p.a. and £440,000 p.a.\(^10\)
- with between £850,000 and £880,000 for the existing backlog.\(^11\)

21. With reference to paragraph 3, based on a 20% increase in cases by 2015, the annual figures above of £425,000 - £440,000 can be extrapolated to a peak of around £510,000 – £528,000.\(^12\) However, with reference to the alternative approach outlined at paragraph 5, based on an increase in cases of 4.5% per annum or 9% per annum, the annual figures can be extrapolated to a peak of around £660,000 – £1,042,000 in 2015.\(^13\) Local authorities may experience an effect on insurance premiums as the insurance industry has indicated that to legislate could make third party insurance (e.g. employer’s liability, and public liability) more expensive in Scotland, but this possible increase has not been quantified.

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\(^9\) £203,000 = 690 cases x 2% = 14 cases x £14,500, whereas £304,500 = 1040 cases x 2% = 21 x £14,500, utilising respectively the original assumption in paragraph 11 and the alternative assumption in paragraph 12.

\(^10\) £425,000 p.a. = 20 claims x 75% successful x £25,000 plus 20 claims x 25% unsuccessful x £10,000, whereas £440,000 p.a. = 20 claims x 80% successful x £25,000 plus 20 x 20% unsuccessful x £10,000.

\(^11\) £850,000 = 40 claims x 75% successful x £25,000 plus 40 claims x 25% unsuccessful x £10,000), whereas £880,000 = 40 claims x 80% successful x £25,000 plus 40 claims x 20% unsuccessful x £10,000).

\(^12\) £510,000 p.a. = £425,000 + 20%, whereas £528,000 p.a. = £440,000 + 20% (as per paragraph 3)

\(^13\) £660,000 p.a. = £425,000 + 55%, whereas £1,042,000 p.a. = £440,000 + 137% (as per paragraphs 5 and 6)
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on business

22. Pleural plaques are particularly strongly associated with occupational exposure to asbestos within the construction, steel and shipbuilding industries, including the former nationalised industries. However, there is evidence from occupational analyses of mesothelioma deaths that exposure may have occurred across a fairly wide range of jobs in the past both within and outwith these sectors. End users of asbestos products had substantial risks as well as those manufacturing the products themselves.

23. The Bill will have implications for employers and former employers in the relevant sectors and for their insurers. There would be savings to insurers and employers if the Scottish Government were to take no action. Whether employers and insurers incur additional costs over what they might otherwise have expected will depend on whether there is an increase in the number of claims and whether the cost of settling claims increases.

24. With reference to paragraphs 10 – 13, the cost for the backlog of all outstanding claims would range from £14,663,000 to £22,880,000\(^{14}\). Deducting the elements attributable to local authorities\(^{15}\) and Government Departments\(^{16}\), would suggest that within the overall total the costs for the remaining cases would range from £11,843,950 to £20,033,950\(^{17}\).

25. The overall base-point annual cost would range from £4,675,000 to £7,876,000\(^{18}\). Deducting the elements attributable to local authorities\(^{19}\) and Government Departments\(^{20}\), would mean the annual costs for the remaining cases would range from £3,761,000 to £6,947,000\(^{21}\).

26. With reference to paragraph 3, based on a 20% increase in cases by 2015, the figures above of £3,761,000 - £6,947,000\(^{22}\), for costs falling to organisations outwith local government and Government Departments, can be extrapolated to a peak of around £4,513,200 – £8,336,400.

\(^{14}\) £14,663,000 = 690 claims x 75% successful x £25,000 plus 690 claims x 25% unsuccessful x £10,000), whereas £22,880,000 = 1040 claims x 80 % successful x £25,000 plus 1040 claims x 20% unsuccessful x £10,000.

\(^{15}\) as per paragraph 20

\(^{16}\) as per paragraphs 16 and 27

\(^{17}\) £11,846,950 = £14,663,000 less £850,000 for local authorities, £75,000 for the Scottish Government and £1,891,050 for UK Government Departments, whereas £20,033,950 = £22,880,000 less £880,000 for local authorities, £75,000 for the Scottish Government and £1,891,050 for Government Departments.

\(^{18}\) £4,675,000 = 220 claims p.a. x 75% successful x £25,000 plus 220 claims p.a. x 25% unsuccessful x £10,000, whereas £7,876,000 = 358 claims p.a. x 80 % successful x £25,000 plus 358 claims p.a. x 20% unsuccessful x £10,000, utilising the original assumption in paragraph 10 and the alternative assumption in paragraph 12 respectively.

\(^{19}\) as per paragraph 20

\(^{20}\) as per paragraph 27 (NB the figure of £4,973,500 from BERR cover a 15-year period - for current purposes an assumption is made that this begins at around £321,000 p.a., rises by 20% to a peak of around £385,000 p.a. in the middle of the next decade, and then falls away again).

\(^{21}\) £3,761,000 p.a. = £4,675,000 less £425,000 for local authorities and £489,000 for UK Government Departments, whereas £6,947,000 p.a. = £7,876,000 less £440,000 for local authorities and £489,000 for UK Government Departments.

\(^{22}\) £4,513,200 p.a. = £3,761,000 + 20%, whereas £8,336,400 p.a. = £6,947,000 + 20%.
However, with reference to paragraph 5, based on an increase of between 4.5% p.a. and 9% p.a. until 2015, the figures can be extrapolated to a peak of around £5,841,000 - £16,555,000²³.

27. We understand that there are:

- 37 backed up Scottish cases raised against the Ministry of Defence (MoD). The average reserve placed on each claim by MoD is £14,000 (including legal costs). Therefore settlement of these Scottish cases is likely to cost around £518,000. On the basis of the 37 cases being backed up over 3 years we can assume, with caution, that there are likely to be in the region of 12 pleural plaques cases raised against MoD per year with an annual cost of £168,000; and

- primarily for their interest in British Shipbuilders and to a lesser extent the former British Coal Corporation, the Department for Business, Enterprise & Regulatory Reform (BERR) with the Department of Energy and Climate Change (DECC) have 138 open Scottish pleural plaques cases. The cost of settling these cases, including legal costs, is likely to be in the region of £1,373,050. Based on actuarial reviews undertaken on their coal and shipbuilders liabilities, BERR has informed us that overall liability in Scotland (going forward to a peak in 6 to 8 years time and then falling away) is likely to be in the region of £4,973,500 for about 580 cases (i.e. 540 in relation to British Shipbuilders and 40 in relation to British Coal). There is no indication that pleural plaques cases have been raised against any other Government Department.

28. These figures have been supplied by the UK Government Departments²⁴ based on their current assumptions. For comparative purposes, however, if the assumptions outlined at paragraph 5 were applied (i.e. rates of increase between 4.5% p.a. and 9% p.a.) then the peak year might have MoD incurring costs of between £261,000 and £398,000, and BERR/DECC incurring costs of between £498,000 and £760,000.

29. As already noted, insurers anticipate that they will incur additional costs as a result of the legislation. They have indicated that higher costs for insurers would be passed on to Scottish business customers in the form of higher insurance premiums. Only when the insurance industry has considered the legislation as introduced, and taken a view on the risks it presents, would any quantification of increased cost of insurance premiums be possible.

Costs on individuals

30. There will be no significant costs to individuals arising from this amendment. The effect of the legislation is that individuals who develop the asbestos related conditions in the Bill through negligent exposure to asbestos in Scotland will be able to raise a claim for damages. In Scotland, most asbestos related actions are funded by Speculative Fee Agreements and/or trade

²³ £5,841,000 p.a. = £3,761,000 + 55%, where £16,555,000 p.a. = £6,947,000 + 137%.
²⁴ it is understood that the average cost per case for UK Government Departments is lower than that assumed generally partly because they have taken account of the fact that they will be co-defenders in a significant proportion of cases, therefore not bearing the entire cost, and partly because of different treatment accorded to defenders’ legal costs.
union assistance. The insurance industry has confirmed that premiums for first party insurance policies (e.g. life, critical illness, income protection) would not be affected by the legislation.
This document relates to the Damages (Asbestos-related Conditions) (Scotland) Bill (SP Bill 12) as introduced in the Scottish Parliament on 23 June 2008

### SUMMARY OF ‘ADDITIONAL’ COSTS ARISING FROM THE BILL

<table>
<thead>
<tr>
<th>Costs on Scottish Administration</th>
<th>Costs on Local Authorities</th>
<th>Costs on Business and the State</th>
<th>Costs on other Bodies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scottish Government (see paragraph 16) – £75,000 to settle existing cases</td>
<td>(see paragraphs 20 and 21) £850,000 – £880,000 to settle existing cases</td>
<td>Business (employers, former employers and their insurers) (see paragraphs 24 to 26) – £11,843,950 – £20,033,950 to settle existing cases</td>
<td>Individuals (see paragraph 30) – None</td>
</tr>
<tr>
<td>Future annual cost negligible, but possibly reaching up to £50,000 per annum by 2015</td>
<td>For the future £425,000 – £450,000 per annum increasing to a peak of £660,000 – £1,042,000 per annum around 2015 and then decreasing</td>
<td>For the future, £3,761,000 – £6,947,000 per annum increasing to a peak of £5,841,000 – £16,555,000 per annum around 2015 and then decreasing.</td>
<td>For the future, none.</td>
</tr>
<tr>
<td>Courts (see paragraphs 17 and 18) - £203,000 - £304,500 for existing cases</td>
<td></td>
<td>MoD (see paragraph 27) – £518,000 to settle existing cases</td>
<td></td>
</tr>
<tr>
<td>For the future £72,500 – £101,500 per annum, possibly rising to £112,375 – £240,555 per annum by 2015 and then decreasing.</td>
<td></td>
<td>For the future £168,000 per annum, but alternatively by 2015 may be in the region of £261,000 - £398,000 per annum, and then decreasing.</td>
<td></td>
</tr>
<tr>
<td>Legal Aid (see paragraph 19) - Negligible</td>
<td></td>
<td>DBERR (see paragraph 27) – £1,373,050 to settle existing cases</td>
<td></td>
</tr>
<tr>
<td>For the future, negligible.</td>
<td></td>
<td>For the future, around £321,000 per annum, rising by 2015 to around £385,000 per annum, then falling (with £4,973,500 overall liability over 15 years), but alternatively by 2015 may be reach £498,000 - £760,000 per annum and then decreasing.</td>
<td></td>
</tr>
</tbody>
</table>

(Shaded areas relate to future claims, unshaded areas relating to back-up existing claims.)
Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 5          Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Fergus Ewing

1 In section 1, page 1, line 5, leave out from first <a> to end of line 6 and insert <they constitute actionable harm for the purposes of an action of damages for personal injuries>

Fergus Ewing

2 In section 1, page 1, line 7, leave out from <are> to <negligible> in line 8 and insert <do not constitute actionable harm>

Fergus Ewing

3 In section 1, page 1, line 10, leave out from <for> to end of line 11 and insert <in damages in respect of personal injuries>

Section 2

Fergus Ewing

4 In section 2, page 1, line 14, after <caused> insert <and>

Fergus Ewing

5 In section 2, page 1, line 14, leave out <or is not likely to cause>

Fergus Ewing

6 In section 2, page 1, line 19, leave out from <it> to end of line 21 and insert <such a condition constitutes actionable harm for the purposes of an action of damages for personal injuries>

Fergus Ewing

7 In section 2, page 1, line 22, leave out subsection (4) and insert—

<( ) Any rule of law the effect of which is that such a condition does not constitute actionable harm ceases to apply to the extent it has that effect.
But nothing in this section otherwise affects any enactment or rule of law which determines whether and in what circumstances a person may be liable in damages in respect of personal injuries.

Section 3

Fergus Ewing

In section 3, page 2, line 5, leave out from <mentioned> to <condition> in line 6 and insert <to which section 2 applies>

After section 3

Derek Brownlee

After section 3, insert—

Annual financial impact report

(1) As soon as is practicable, and no later than six months, after the end of a relevant period the Scottish Ministers must prepare and lay before the Scottish Parliament a report containing the information specified in subsection (2).

(2) That information is—

(a) the costs—

(i) incurred by the Scottish Administration and each of the groups of bodies mentioned in subsection (9); and

(ii) estimated by the financial memorandum to be incurred by the Scottish Administration and each such group of bodies, in implementing this Act in the relevant period to which the report relates;

(b) the total costs—

(i) incurred by the Scottish Administration and each of the groups of bodies mentioned in subsection (9); and

(ii) estimated by the financial memorandum to be incurred by the Scottish Administration and each such group of bodies, in implementing this Act in the period from Royal Assent to the end of the relevant period to which the report relates;

(c) the difference between the figure listed for each of the Scottish Administration and the groups of bodies mentioned in subsection (9) by virtue of—

(i) subsection (2)(a)(i); and

(ii) subsection (2)(a)(ii); and

(d) the difference between the figure listed for each of the Scottish Administration and the groups of bodies mentioned in subsection (9) by virtue of—

(i) subsection (2)(b)(i); and

(ii) subsection (2)(b)(ii).

(3) The difference identified by virtue of—
(a) subsection (2)(c) must be stated as an amount; and
(b) subsection (2)(c) or (d) must be stated as a percentage of the relevant figure in the financial memorandum (unless the relevant figure in the financial memorandum was zero).

(4) Subsection (5) applies where—
(a) any difference stated as mentioned in subsection (3)(a)—
   (i) is between £1 million and £5 million (but only where the relevant figure in the financial memorandum was zero); or
   (ii) exceeds £5 million;
(b) any difference stated as mentioned in subsection (3)(b) is—
   (i) less than 95%; or
   (ii) greater than 105%.

(5) The report must—
(a) explain the reason for the difference; and
(b) set out any action the Scottish Ministers propose to take as a result of the difference arising (or the reason for no action being proposed).

(6) In preparing the report the Scottish Ministers must—
(a) invite the groups of bodies mentioned in subsection (9) to provide them with such information as the groups of bodies consider relevant; and
(b) take account of any relevant information provided to them by those groups of bodies (whether in response to an invitation under paragraph (a) or otherwise).

(7) Where the financial memorandum provided information in relation to other bodies, individuals or businesses further broken down by body or person, the report may do likewise.

(8) Where the financial memorandum did not provide a cost in relation to any relevant period, the costs to be provided by virtue of subsection (2)(a)(ii) or (b)(ii) must be (or, as the case may be, include) the relevant figure for the most recent relevant period for which the financial memorandum did provide a cost.

(9) The groups of bodies are—
(a) local authorities;
(b) other bodies, individuals and businesses.

(10) The Scottish Parliament may (no earlier than whichever is the later of the end of five years after Royal Assent or any period covered in the financial memorandum) by resolution agree that no further reports require to be prepared or laid under subsection (1).

(11) For the purposes of subsection (10) a period is not covered in the financial memorandum if the only cost arising in that period is identified in the memorandum as an ongoing cost.

(12) In this section—
"relevant period" means—
(a) the period between Royal Assent and the end of the first full financial year after that date;
(b) each subsequent financial year;

“financial memorandum” means the last financial memorandum published to accompany the Bill for this Act (and where that memorandum was a supplementary financial memorandum, means that memorandum as read with any previous financial memorandum).>
Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. In this case, the information provided consists solely of the groupings (that is, the order in which amendments will be debated). The text of amendments set out in the order in which they will be debated is not attached on this occasion as the debating order is the same as the order in which the amendments appear in the Marshalled List.

Groupings of amendments

Note: The time limit indicated is that set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups must (subject to Rule 9.8.4A of Standing Orders) be concluded by the time indicated, although amendments may still be disposed of later in proceedings.

Group 1: Approach to achieving the Bill’s objectives
1, 2, 3, 4, 5, 6, 7, 8

Group 2: Annual financial impact report
9

Debate to end no later than 40 minutes after proceedings begin
Damages (Asbestos-related Conditions) (Scotland) Bill: Bruce Crawford, on behalf of the Parliamentary Bureau, moved S3M-3651—That the Parliament agrees that, during Stage 3 of the Damages (Asbestos-related Conditions) (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the Stage being called) or otherwise not in progress:

Groups 1 and 2: 40 minutes.

The motion was agreed to.

Damages (Asbestos-related Conditions) (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to without division: 1, 2, 3, 4, 5, 6, 7 and 8.

Amendment 9 was moved and, with the agreement of the Parliament, withdrawn.

Damages (Asbestos-related Conditions) (Scotland) Bill: The Minister for Community Safety (Fergus Ewing) moved S3M-3542—That the Parliament agrees that the Damages (Asbestos-related Conditions) (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 98, Against 16, Abstentions 0).
The Presiding Officer (Alex Fergusson): The next item of business is stage 3 proceedings on the Damages (Asbestos-related Conditions) (Scotland) Bill. In dealing with amendments, members should have the bill, which is SP bill 12; the marshalled list, which is SP bill 12-ML2; and the groupings, which I have agreed. The division bell will sound and proceedings will be suspended for five minutes for the first division this afternoon. The period of voting for the first division will be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate and 30 seconds for all other divisions.

Section 1—Pleural plaques

The Presiding Officer: Amendment 1, in the name of the Minister for Community Safety, is grouped with amendments 2 to 8.

The Minister for Community Safety (Fergus Ewing): To set the context for the individual amendments that the Government has lodged, I will briefly recap what I said during the stage 2 proceedings. I made clear the Government’s willingness to engage with stakeholders to ensure that the bill provides a clear and effective means of securing justice for people who have been negligently exposed to asbestos and internally scarred as a result, physically and often mentally and emotionally.

As will be recalled, after careful deliberation I reluctantly concluded at stage 2 that I could not support the amendments that Bill Butler had lodged, even though I wholly appreciated the intention behind them and admired the clarity with which they were explained. However, I reassured the committee that my intention ahead of stage 3 was for officials to seek further early discussion with stakeholders with a view to reaching a mutual understanding and agreement with those who share the Parliament’s objectives. I am pleased to inform members that we have listened to stakeholders, in particular, the Law Society of Scotland and Thompsons Solicitors, which have worked with us on the further development of our thinking on the detail of the bill. We have now reached broad agreement.

Amendments 1 to 8 fulfil the undertaking that I gave the committee to introduce amendments at stage 3 that meet the Scottish Government’s concerns and the concerns that Bill Butler and Robert Brown articulated at stage 2.
I now turn to specifics. Amendment 1 addresses two concerns that stakeholders had about section 1. They were unsure that section 1(2) would effectively ensure that pleural plaques would continue to be actionable in damages. There was criticism that the wording of section 1(2) could be read as creating a strict liability, which was not the policy intention. Amendment 1 introduces into the bill the concept of “actionable harm” to represent the existing legal test that must be satisfied for pleural plaques to be actionable under the law of delict. If we read sections 1(1) and 1(2) together, the bill, by providing that plaques are

“a personal injury which is not negligible”,

provides that plaques constitute “actionable harm” in law. By “actionable harm” in this context, I do not mean anything different from the phrase “material damage” as used by Lord Rodger of Earlsferry in the Johnston case.

Amendment 2 is consequential on amendment 1. It replaces the wording in section 1(3),

“are not a personal injury or are negligible”,

with wording that refers to “actionable harm”, on the basis that “actionable harm” covers both those concepts.

Amendment 3 changes the language of section 1(4) to remove any possible inference that the bill deals only with causation issues. As amended, subsection (4) makes it clear that all other rules of law, both common law and statutory law, regarding the circumstances in which someone can be held liable to pay damages in respect of personal injury continue to apply in pleural plaques cases.

Amendments 4 and 5 amend section 2(1) to make it clear, in line with policy intent, that section 2 deals only with asymptomatic pleural thickening and asymptomatic asbestosis. That represents a departure from the bill as introduced, in which section 2, although it primarily deals with asymptomatic asbestos-related conditions, also encompasses—it could be argued—symptomatic versions of those conditions. Symptomatic pleural thickening and asymptomatic asbestosis clearly remain actionable under the law of damages, so it is neither necessary nor desirable to include them in the bill.

Amendments 6 and 7 make changes to section 2 so that the provisions in respect of asymptomatic asbestos-related conditions in that section are consistent with sections 1(2) to 1(4), as amended.

Amendment 8 is consequential on the amendments made to section 2(1). It revises section 3(1)(a)(ii) so that it refers simply to conditions to which section 2 applies—those being asymptomatic asbestosis and asymptomatic pleural thickening. I hope that members have followed all that.

Having listened to all our stakeholders, I believe that the amendments that have been lodged both satisfy their concerns and continue to achieve the policy intention of ensuring that the House of Lords judgment on pleural plaques does not have effect in Scotland, so that people who have been negligently exposed to asbestos who go on to develop an asbestos-related condition may pursue an action for damages.

I move amendment 1.

Bill Butler (Glasgow Anniesland) (Lab): Justice Committee members and the minister will recall that I lodged stage 2 amendments that were intended not to change the effect of the bill but to ensure that it was clearly achieved. I withdrew those amendments in view of the undertaking that the minister gave to consider them further and to have discussions with the people on whose behalf the amendments were lodged. They were lodged on behalf of Clydeside Action on Asbestos, with the support of the Clydebank Asbestos Group, Unite and others acting for people suffering from pleural plaques.

I am happy to say that, since then, those discussions have taken place and agreement has broadly been reached on what amendments are required for the purpose. Those are the amendments that have been lodged by the minister.

The minister has explained the amendments in detail, but it might be helpful if I add a few words on how they are perceived by those who represent victims of pleural plaques. On amendment 1, the main difficulty that I previously had with section 1 was the considerable doubt as to whether subsection (1), which provides that

“pleural plaques are a personal injury which is not negligible”,

had the effect of providing that pleural plaques constituted actionable damage for the purposes of the law of delict. That was primarily because the subsection seemed to be making a statement of fact, rather than serving as a legal statement. I believe that that doubt is now removed by the amendment that is made to subsection (2) by amendment 1, which spells out the legal consequences of subsection (1). The bill will now provide that,

“Accordingly,”

pleural plaques

“constitute actionable harm for the purposes of an action of damages for personal injuries”.

I consider that that achieves the same effect as the equivalent amendment that I lodged at stage
In particular, I do not consider that a difference exists between "actionable damage" and "actionable harm" or between "for the purposes of the law of delict" and "for the purposes of an action of damages for personal injuries".

As the minister said, amendments 2 and 3 make consequential amendments to sections 1(3) and 1(4). My view continues to be that those subsections are unnecessary, because their effect is adequately achieved by other provisions in the bill. However, they appear to do no harm, in view of the proposed amendments to them.

Amendments 6 and 7 bring section 2 into line with section 1, as amended by amendments 1 to 3.

Those are the reasons why I am content with the group of amendments, as are those on whose behalf I lodged the original stage 2 amendments in the committee. I record my sincere appreciation for the Scottish Government's willingness to listen to the concerns and to co-operate with a view to reaching an agreed solution to them. Such rational co-operation has been a hallmark of the bill's process. Accordingly, Labour will support the amendments.

Robert Brown (Glasgow) (LD): I will comment briefly, primarily to thank the minister for his attitude, on which Bill Butler touched. Underlying the amendments and our discussion at stage 2 was concern from the committee about the coherence of the law, how the law was expressed and the use of words that have common acceptance in different situations.

A number of words have been used in this context to describe damages, damages for personal injury and some of the concepts that accompany that in the traditional textbooks, in the House of Lords judgment in the Johnston case and in several other cases. The words tend to vary a little. One concern was that some of the phraseology that the Scottish Government's draftspeople used had to be linked in and that other words had to be introduced.

The discussion that has taken place has improved the situation. The amendments bear a distinct resemblance to those that were withdrawn at stage 2. It is appropriate to agree to the amendments, now that they have been sorted out by parliamentary draftsmen and individuals with an interest.

It is important to state the law as clearly and precisely as possible. Sometimes, that can look like fiddling about with matters—the stage 3 amendments involve an element of that. However, it is important to have precise meanings that courts can judge on and practitioners can apply and which have a common meaning to everybody who must deal with them. With these amendments, we will achieve that elegantly and coherently.

Fergus Ewing: I thank Bill Butler, Robert Brown and the other Justice Committee members for the way in which these somewhat technical matters were dealt with. We all wanted to pursue a shared objective. With the assistance of the Law Society and Thompsons, we will do that when the amendments have been agreed to. For that, I thank everyone who was involved.

Amendment 1 agreed to.

Amendments 2 and 3 moved—[Fergus Ewing]—and agreed to.

Section 2—Pleural thickening and asbestosis

Amendments 4 to 7 moved—[Fergus Ewing]—and agreed to.

Section 3—Limitation of actions

Amendment 8 moved—[Fergus Ewing]—and agreed to.

After section 3

The Presiding Officer: Amendment 9, in the name of Derek Brownlee, is in a group on its own.

Derek Brownlee (South of Scotland) (Con): The amendment in my name is rather tortuous to read, as things in my name often are, but it is relatively simple at heart. It would ensure that the projected costs under the bill are monitored after royal assent and that explanations are provided for any significant variance. Similar amendments have been lodged to other bills that are in progress, as the issue is of general application rather than specific to this bill.

Some might consider that the amendment is too prescriptive or that it represents overkill. However, I argue that the reporting mechanism is relatively simple. The first subsection would simply require a report to be laid before Parliament each year on the costs that have arisen under the bill, no later than six months after the end of the financial year. Given that the Scottish Government published its consolidated accounts, which cover everything that it does, within the allotted timeframe last year, there can be no suggestion that the timescale in subsection (1) of the new section that amendment 9 would insert in the bill is too onerous.

15:15

Subsection (2) sets out what the report should contain: in essence, the annual and accumulated
costs incurred under the act, and their equivalents in the financial memorandum, together with the difference between the two sets of figures. The only real effort that the report would require is the identification of the actual costs that are incurred, which we might legitimately expect the Government to want to know in any case to assess the cost effectiveness of its policy interventions.

Subsections (3) to (5) set out de minimis provisions to trigger a further duty on ministers to report its explanation of why costs are higher or lower than expected and what, if anything, they propose to do in response. That duty would be triggered only if the variance met one of the thresholds in subsection (4). However, given that subsection (5) does not set out the level of detail that ministers would have to provide in explaining the reasons behind cost variances, the requirement would not be particularly onerous, even if it were to be applied in every case.

Subsection (6) would place a general duty on ministers to consult bodies in preparing information for the report in the same way that they consult in preparing for a financial memorandum. However, as most relevant bodies would have been identified in the process of preparing the financial memorandum, the duty would be less onerous on external bodies and Government than the preparation of the estimates in the financial memorandum.

Subsection (7) is permissive and not prescriptive. Subsection (8) deals with situations where the financial memorandum includes no figure for later years. Subsection (9) details the groups of bodies other than central Government on whom relevant costs might fall. I have used the same headings that rule 9.3 of the standing orders for financial memorandum uses. Subsection (10) would allow the Parliament to suspend reports without repealing the entire bill after a period of five years following royal assent. Subsection (11) is on the interpretation of subsection (10) and subsection (12) deals with terminology.

As I said, the general principle is a simple one. It is that routine examination of cost estimates should be made after, and not only before, a bill has been passed. The aim of doing that is not only to learn lessons on the effectiveness and cost effectiveness of the policy intention for a bill but to ensure improvement in the process of making future cost estimates. Such a process need be neither time consuming nor unwieldy. Indeed, it is easier and cheaper to collect such information from the outset and not to have to go back through records in response to parliamentary questions or freedom of information requests.

Routine examination of the accuracy of cost estimates and the questions that such examination raises would offer a further level of financial scrutiny to legislation that would allow any emerging problem to be dealt with more speedily than would otherwise be the case. If agreed to, the section would mark a new approach for the Parliament. If it were adopted more generally, it would lead to a much more robust system of legislative scrutiny than exists at present either in the Scottish Parliament or at Westminster. That makes it a tempting proposal for the Government.

I move amendment 9.

Richard Baker (North East Scotland) (Lab): The bill has enjoyed unanimous support so far and I hope that that continues to be the case today. However, I am afraid that I cannot support the amendment in the name of Derek Brownlee, even though he made his case in an unusually reasonable manner.

Amendment 9 looks to the wider issue of post-legislative scrutiny, particularly the impact of costs once a bill has been passed. The issue is one that parliamentary committees can take up at any point in time. There is no need to amend the bill to do that. This is not the most appropriate way for the Parliament to engage in this level of scrutiny.

There has been a lot of debate on the costs of the bill. In this case, we have to accept that we cannot come up with an exact figure for the resource that is required to implement the bill. Amendment 9 addresses not only the cost on Government and local authorities but the cost on individuals and businesses. In those cases, surely insurers will be responsible for meeting the majority of costs, as they have been in the past. I do not accept the predictions of future costs that the insurance industry has produced. In my view, they are significantly overinflated. Based on the information that was available to them, Scottish ministers have done their utmost to come up with the most realistic estimate of costs.

The amendment does not make it clear what would happen to the report or what its intention would be. If passed, the amendment would create further uncertainty for victims of pleural plaques, which is not a desirable outcome.

Given that the best indications that we have are that costs are not extraordinary and that the level of payments to victims of pleural plaques is not unreasonable, I believe that the best way forward is for us to pass the bill without the amendment, and I will vote accordingly. I am not saying that Mr Brownlee has not made reasonable general points about post-legislative scrutiny and the costs of legislation once it is in place, but those are matters for parliamentary committees, rather than for an amendment to legislation.

Robert Brown: I agree entirely with Richard Baker’s remarks, especially his last comment.
Scrutiny of the costs of legislation is a matter for the Public Audit Committee and, before legislation is passed, for the Finance Committee.

Derek Brownlee said that the amendment was tortuous, and it is. I would go further—my eyes closed before he reached the end of his speech. The amendment could have been drafted only by a chartered accountant or someone in that general area of employment. The central point that the member made about the need for close scrutiny of the financial implications of parliamentary legislation is correct—no one would dispute it—but the mechanism that he proposes is complex. It would be an interesting exercise to have someone cost the cost of the amendment.

I agree that it is relatively easy to present in a suitable way the costs incurred by the Scottish Administration—the matter could also be addressed by the Public Audit Committee asking the appropriate questions at the right time. However, as Richard Baker indicated, subsection (9) of the new section that the amendment would insert in the bill includes “other bodies, individuals and businesses.”

I am not entirely sure what the restrictions would be, but identifying which bodies, individuals and businesses would be affected is a complex task. Some of the information might be complex business information—I do not know—but it would certainly not be easy to get from the multitude of bodies that would be affected. That is the case even with this bill, but I am given to understand that from now on Derek Brownlee will seek to include such provisions in all bills, which is a worrying thought. The cost of doing that across the board would be very significant.

The Parliament has set up processes, which have been refined from time to time, to examine in advance the costs of and the financial memoranda to bills. Financial memoranda have their limitations; in the case of this bill, issues have arisen in relation to the costs of damages and the number of pleural plaques claims. However, as a result of that exchange, we have secured much more accurate and usable information about the cost of the bill than that with which we began. It is up to each committee, when examining bills, to identify the priorities that ought to be pursued.

In short, the device that is proposed in the amendment is extremely bureaucratic and the Liberal Democrat group does not support it. However, we support careful and proper scrutiny by the appropriate committees of the on-going costs of the public administration, in particular, of bills of this sort.

Patrick Harvie (Glasgow) (Green): Derek Brownlee might wish that I were not the person to back him up, but it is about time that someone did. From time to time, parliamentary committees have questions about the information that is provided in the financial memorandum to a bill during committee scrutiny. On the face of it, what Derek Brownlee is seeking to achieve seems entirely rational. He is asking the Government to provide financial information in a regularised form at the post-legislative stage. I am interested in that general argument, although I am not convinced that amendment 9 is the right way of achieving what he seeks.

Before Derek Brownlee closes, I would like him to consider why we should focus purely on the financial aspects of legislation. During parliamentary scrutiny of a bill, we consider issues of human rights compliance, the bill’s policy objectives and its impact on equalities issues and the environment. We have already asked the Government to subject its spending plans—its budget—to a carbon assessment. During pre-legislative and legislative scrutiny, we also look at the financial consequences of bills, as best we understand them. It is for committees to set their agendas, but if our intention is to formalise or regularise post-legislative scrutiny in some way and to have Government provide the information that will enable committees to carry out such scrutiny better, why should we focus only on the financial aspects of legislation, rather than on its wider impact on equalities, the environment and policy objectives? I would be interested to hear the comments of both Derek Brownlee and the minister on that issue.

Fergus Ewing: I thank Derek Brownlee for clearly outlining his thinking on the purpose that he sought to achieve by lodging amendment 9. He has raised an important issue about post-legislative scrutiny and the opportunity to compare the actual costs of bills with the costs that were provided in financial memorandums. Mr Brownlee will not be surprised to hear that I have a great deal of sympathy with the aims that he seeks to achieve, given that I was deputy convener of the Finance Committee during the previous parliamentary session.

Issues of post-legislative scrutiny of finance such as Derek Brownlee raises are, of course, familiar. His proposal would help all members to achieve a better understanding of the costs of legislation, which is an entirely reasonable and sensible aim. The Government accepts that there should be routine examination and reporting of the costs that arise as a result of legislation such as the bill that we are considering today, and we undertake to do that for this and other new legislation.

However, there are opportunities for a simpler and more flexible approach, which would achieve the same laudable objective as the approach that
is envisaged in amendment 9. Members of different parties—Mr Baker and Mr Brown—set out technical objections to the way in which Mr Brownlee seeks to achieve his objective. The Cabinet Secretary for Finance and Sustainable Growth has indicated that he wants to meet Mr Brownlee to discuss and agree the appropriate mechanism to handle the issue. He will report back to the Parliament on the steps that will be taken.

**Derek Brownlee:** I thank Patrick Harvie—the list of people to thank is not as long as it might have been. I will resist the temptation to rebut Robert Brown’s comments about chartered accountants, although I note that he is perhaps the only lawyer in the country who is opposed to complex legislation.

The substantive point that Robert Brown raised, which Richard Baker also mentioned, is whether proposed new subsection (9) refers to too broad a group of bodies. I simply point out that amendment 9 uses the same wording as the rule in the Parliament’s standing orders that sets out which groups must be considered in relation to financial memoranda. Therefore, to suggest that the approach in amendment 9 would be too broad for post-legislative scrutiny might also be to suggest that it is too broad for pre-legislative scrutiny. As far as I am aware, the approach in standing orders has operated since financial memoranda were first provided. Although Mr Brown’s objection appears superficially accurate, closer examination reveals that there is less substance to it.

Patrick Harvie asked why we should scrutinise only financial matters. He made a valid point about the need to extend post-legislative scrutiny to other areas. I am a member of the Finance Committee, so perhaps it is inevitable that I have a bias towards financial aspects of post-legislative scrutiny. The member made a reasonable point.

Robert Brown suggested that the proposed reporting mechanism might be incredibly costly. I point out that, in relation to the Climate Change (Scotland) Bill, the Government estimates that to map all Scotland’s carbon emissions and progress against targets in the bill would cost only £60,000. Given the volume of proposed legislation that the Parliament is considering, it would be surprising if significant additional costs were incurred as a result of the Parliament agreeing to amendment 9. Indeed, additional costs might be prevented by the provision of an early warning system that would alert us to costs that were going awry.

I acknowledge the minister’s constructive tone and, in particular, his acceptance of the principle of routine post-legislative scrutiny, which is key. I am happy to explore the potential for a non-legislative solution to the problem so, on the basis of what the minister said, I seek leave to withdraw amendment 9.

**Amendment 9, by agreement, withdrawn.**

**The Deputy Presiding Officer (Alasdair Morgan):** That ends consideration of amendments.
The Damages (Asbestos-related Conditions) (Scotland) Bill

The Deputy Presiding Officer (Alasdair Morgan): The next item of business is a debate on motion S3M-3542, in the name of Fergus Ewing, on the Damages (Asbestos-related Conditions) (Scotland) Bill.

15:30

The Minister for Community Safety (Fergus Ewing): The Damages (Asbestos-related Conditions) (Scotland) Bill is short and its aim is simple: to defend a right that has been understood to exist for some 20 years. However, the associated issues are profound and complex. That fact was underscored by the work of the Justice Committee, and I pay tribute to all its members for their careful scrutiny. The committee reached the important conclusions that the bill’s financial implications should be reassessed and that, as a matter of principle, the law of Scotland should allow redress for individuals whose bodies are scarred, albeit internally, after negligent exposure to asbestos. The Scottish Government agrees.

As regards principles, we know that pleural plaques are a scarring of the membranes that surround the lungs. We are clear, too, that pleural plaques in themselves are generally not, and do not become, debilitating and that they do not give rise to physical pain. However, the Scottish Government’s view is that pleural plaques cannot be dismissed as negligible; rather, they must be regarded as a material injury and actionable harm.

That view is informed by the understanding that people with pleural plaques who have been heavily exposed to asbestos at work have a risk of developing a vicious and incurable cancer—mesothelioma—that is 1,000 times greater than the risk for the general population. I will repeat that: people with pleural plaques are 1,000 times more likely to develop mesothelioma, which leads to a quick and often painful death.

A diagnosis of pleural plaques does not mean that a person will necessarily develop mesothelioma, but it does mean that the person knows that his body has been invaded and changed by asbestos. Knowing that, and knowing that asbestos is lodged in his system, he and his family might suffer permanent anxiety, particularly if they live in a community with first-hand experience of the pain and suffering that is inflicted by asbestos.

We must also remember that, as Lord Hope noted, a person with pleural plaques has already sustained an injury. It is both internal and painless, but it exists and is imprinted on the consciousness of those who are diagnosed. It might be rendered more vivid by the fact that it cannot be checked in the mirror every morning. Why is the injury there? In the cases to which the bill applies, it is there because, when the dangers of asbestos were well known and should have been guarded against, there was negligence. Some employers failed in their duty of care and put people in harm’s way without proper protection. In effect, they played Russian roulette with their employees’ health.

The bill’s opponents say that people who are affected should not be able to take legal action until they develop a condition with debilitating physical symptoms, but the Scottish Government believes that conditions such as pleural plaques are serious enough to constitute actionable harm. The bill is both an effective and proportionate way in which to ensure that that is the case and to deliver justice.

We were assisted by a number of individuals and organisations in reassessing the bill’s financial implications as thoroughly as possible. It was particularly helpful to have input from the actuarial profession, and I thank Bill Aitken for suggesting that. We reflected on all the information that was available to us, and two weeks ago I wrote to the convener of the Justice Committee to provide the outcome. I am grateful that the material was immediately published for all to see.

In the time available, I cannot go through every detail of what is a lengthy document, but I will pick out some key points. Taking on board new information, we conclude that, around the middle of the next decade, annual costs are likely to have risen to a peak of between £7 million and £19 million. While significant, that is hugely below the insurance industry’s claim that annual costs will average between £76 million and £607 million over the next 20 years.

Our original estimates were towards the bottom end of what we now believe to be the most likely range, which reflects two key changes. First, taking account of data that insurers recently made available, we make allowance for the possibility that the volume of past claims, which was our starting point, may be higher than was previously believed. Secondly, taking account of doubts about the validity of estimating future trends in pleural plaques claims on the basis of projected trends in mesothelioma deaths, we identified an alternative approach based on published Health
and Safety Executive data in recent reports on benign pleural disease, which suggested a potentially higher rate of increase in the future. We are confident that our estimated range is more credible than that provided by the insurers, whose estimates may have been inflated by several factors, including insufficient attention to the differences between the legal systems north and south of the border.

I will say one more thing about the costs. I find it unacceptable that legal costs may account for nearly two thirds of the overall average total cost of £25,000 to settle a claim. That is a legacy of the way in which systems for contesting relatively low-value claims have developed. For the future, I hope that defenders’ and pursuers’ agents will consider whether a less adversarial approach might benefit. I hope that the reforms that flow from Lord Gill’s review will improve matters. No decision has yet been communicated by the United Kingdom Government on the statement of funding policy, so I cannot provide any new information, but we are firm in our view that it would be inappropriate to invoke the statement of funding policy in relation to the bill.

We have listened to all arguments and relevant people and bodies on matters of principle, drafting and finance. Whether they are friend or foe, we have reflected on what they have had to say. We have no quarrel with the insurance industry: we recognise its importance, we want it to thrive, and we appreciate that its opposition to the bill has been conducted, for the most part, constructively. However, I hope that the opposition ends when the bill is passed and that the insurers respect the will of the legislature of the Scottish people and compensate those who have been injured because of their clients’ negligence.

The bill restores access to justice for those who, through no fault of their own, were negligently exposed to asbestos and the risks that it brings and who have developed a scarring of the membrane around their lungs. The bill deserves the support of every member of Parliament.

I move,

That the Parliament agrees that the Damages (Asbestos-related Conditions) (Scotland) Bill be passed.

15:38

Richard Baker (North East Scotland) (Lab): The Parliament has acted in unity before to protect and advance the rights of workers who have been recklessly exposed by their employers to asbestos, whose health has suffered dramatically as a result, and whose families have also borne scars of trauma and loss. Labour members are proud of the previous Scottish Executive’s Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and of the work of Des McNulty, who initially pursued the issue as a member’s bill, Bill Butler and Duncan McNeil. Of course, members on all sides have frequently made the case for sufferers of mesothelioma and their families. Stuart McMillan initially introduced a members’ business debate to raise the Parliament’s concerns about the impact of the House of Lords ruling.

Members have been moved to act by the experiences of the people whom they represent, and we are moved to act as a Parliament today. It is right that we look to pass the Damages (Asbestos-related Conditions) (Scotland) Bill, which we are pleased the Scottish Government has introduced and which we hope will unite the Parliament once more to protect the rights of those whose health is affected and who are at risk of serious illness because of employers’ faults. We have previously had very good, non-partisan debates on those issues, which are of such great importance, and I am sure that that will be the spirit of this debate.

We welcome the introduction of the bill, and I very much welcome the minister’s opening speech and, indeed, the sensible amendments that we passed earlier, which strengthen the bill’s effectiveness—Bill Butler pursued that issue at stage 2. It would be good to receive further information from the minister later about his discussions with Mr Brownlee on what action will be taken on the costs. That issue has been debated by members, but there might still be matters that require further discussion.

Once again, the Justice Committee has diligently and effectively scrutinised legislation to ensure that the bill that we pass has been improved by the committee process. Today, we must pay tribute in particular to the tireless campaigning work of Clydeside Action on Asbestos, which has represented the victims of asbestos exposure so passionately and persuasively and has received wide recognition for its work. We must also acknowledge the work of the trade unions—my union, Unite, in particular, I am pleased to say—which have provided excellent representation for their members. We also acknowledge Thompsons Solicitors for all its work, which has helped to ensure that the bill is as effective as possible in reversing the House of Lords judgment.

As the Parliament has heard many times throughout the years, mesothelioma leads to a speedy and painful death. The insurance industry has argued that pleural plaques are not harmful in themselves and do not necessarily lead to mesothelioma, but the opposite case has been put irrefutably by members of all parties during the debates on the bill. Pleural plaques cause not just...
anxiety but ill health. As I mentioned in the stage 1 debate, a Unite member from Stonehaven said:

“Pleural Plaques is a time-bomb. The Doctors could call me tomorrow to tell me I have mesothelioma and sufferers have to live with that prospect every minute of every day. It’s undoubtedly deteriorated my quality of life ... I’m more worried, anxious, lethargic. ... my health is poorer.”

I do not believe that employers or the insurance industry should be able to walk away from that.

The approach of Labour members is clear: the crucial issue is that the bill be passed. We hope that it will be passed unanimously, given that it has received the support of all parties so far. Our job is to make the right provision in Scotland to enable people with pleural plaques to regain the right to claim compensation.

Gil Paterson (West of Scotland) (SNP): Do the member and the greater number of colleagues agree that the impact of passing the bill will be felt furth of Scotland? I firmly believe that passing the bill will benefit sufferers not just in Glasgow but in Gateshead, for instance, because the legislation will put some pressure on the UK Government to deliver a similar bill in Westminster.

Richard Baker: First, let me pay tribute to Gil Paterson for his efforts on the issue. Having attended a number of members’ business debates on the sufferers of asbestosis and pleural plaques, I know that he has been involved in the issue over the years and has taken it seriously.

I have been in dialogue with my Westminster colleagues and I know that they, too, want to make progress on the issue. UK ministers have undertaken a full consultation about what measures should be taken in light of the House of Lords ruling, and it is right that they give the issue full consideration. UK ministers have engaged in the kind of consideration and consultation that our Justice Committee has said is important in dealing with such matters, so I do not think that they should be criticised for that.

It is right that Westminster looks to make progress; the bill that we are considering is right for us, but it is right that we look to progress across the country. On that basis, I hope and am confident that Scottish Government ministers will continue to have constructive dialogue with their counterparts in Westminster, which is the right way to take the issue forward.

The key issue for members is to ensure that we make the right provision in Scotland. We must do the right thing by the victims of pleural plaques and by those who have so effectively taken their case to this Parliament in arguing that their rights to justice and compensation were, unfortunately, removed by the House of Lords judgment. That is a wrong that needs to be righted.

I maintain that passing the bill will not in any event result in unbearable costs for the Parliament or others, and the minister rightly said that this is an issue of justice. I hope that today is a day on which the parties come together in a spirit of unity—as has so often been the case in Parliament in the past—to take action to defend the rights of those who have been recklessly exposed to asbestos in the workplace. That is why the bill has Labour’s whole-hearted support.

15:45

Bill Aitken (Glasgow) (Con): As has already been canvassed this afternoon, the Parliament cannot, in any legislative activity now and in the future, fail to take into consideration the financial consequences. That is particularly apposite at the present time.

When the Government started on its legislative path, members—particularly those on the Justice Committee—will have been aware of my concerns about the adequacy of the financial memorandum. It appeared from the start to be inadequate, and it gives me absolutely no pleasure to note that even in the best-case scenario I appear to have been proved right.

Although some of the evidence that came before the Justice Committee seemed to verge on hyperbole, there was a general and genuine recognition of a potential problem and, accordingly, the minister undertook to clarify the actual figures. I acknowledge that he has made genuine and sincere efforts to do so; unfortunately, that has simply not been possible and we are left with considerable uncertainty.

In his letter to the Justice Committee dated 25 February, Mr Ewing correctly made the point that the further inquiries had made some of the more extreme projections look very unlikely. According to the minister, the projections are dependent on a wide range of unknowns, with potentially significant implications for what eventually transpires.

The estimate of the number of new cases varies from 2,826 to 5,928, and the estimate of the potential costs varies from £60 million to £131 million, exclusive of the costs to the national health service when people seek diagnostic checks. Those variations give rise to concerns that do not appear to have been anticipated by the proponents of the bill, although I freely acknowledge that they may have anticipated those costs and decided that, in social terms, there is a justification for proceeding.

Although much of the cost will be met in the private sector by insurance companies, there is also a public sector involvement. Insurance companies have made few friends in Parliament,
bearing in mind the way in which they dealt with mesothelioma claims, and they can fix pricing to overcome any increase in liabilities, but they are being asked to fund a retrospective liability, which is never satisfactory.

Bearing in mind the nationalised shipyards and Ministry of Defence work, there is a public sector involvement that has not been fully or accurately reflected in the papers helpfully provided by Mr Ewing. There must be a lot of potential liability lurking around the activities of local authorities, development corporations and their statutory successors, and health boards, and the costs could be considerable. I endorse the minister’s view on the way in which the legal component of those potential liabilities has soared.

The matter has been compounded by the fact that, despite correspondence from the minister to Westminster ministers and from me as convener of the Justice Committee to the Secretary of State for Business, Enterprise and Regulatory Reform Lord Mandelson, the Westminster Government has failed to answer a basic and material fact. Under the statement of funding policy, when Scotland increases liability, the Scottish Government must pay for it. As a considerable amount of the potential liabilities relates to work carried out in the public sector, a potential cost has clearly not been quantified that could impinge on our ability to provide public services in health, education and other areas.

It is extremely regrettable that the Westminster Government has not indicated its intentions with regard to the funding implications under the Scotland Act 1998. It is clear that the level of cooperation on the production of statistics that the Scottish Government could have expected has not been forthcoming, and members may think it significant that the Westminster Government has not indicated any legislative line. Despite what Mr Baker said in all sincerity, it is clear that the Westminster Government has problems with the issue.

In a letter to the Justice Committee, the Law Society of Scotland stated that we were correct to raise concerns about the financial implications and underlined the importance of Parliament being satisfied with the financial aspects of the bill. I say, with regret, that the Parliament cannot be satisfied. We are being asked to sign a cheque that cannot be quantified and, although we could all think of many less deserving recipients—Mr MacAskill referred to a few earlier—we have to consider the wider picture.

I am conscious of the emotive nature of asbestos-related conditions in west central Scotland, and I appreciate and respect the views of members of other parties, but we have to understand the financial realities. I therefore regret to advise the Parliament that the Conservatives are unable to support the legislation.

15:51

Robert Brown (Glasgow) (LD): On behalf of the Liberal Democrats, I am glad to agree with the proposition that Parliament should agree to pass at stage 3 the Damages (Asbestos-related conditions) (Scotland) Bill.

Like others, I pay tribute to the work of Phyllis Craig and her team at Clyde Action on Asbestos and to the other campaign groups. I thank Government ministers and their officials for their support and supportive attitude since the House of Lords judgment in the case of Johnston, which started everything off. It might have been helpful in our consideration of costs and the bill’s technicalities if a full consultation had been held in the usual way, but the work of the Justice Committee, which scrutinised the bill, has helped to overcome those difficulties. I entirely accept that, on this non-partisan issue, ministers were seeking to make progress in the most effective way.

Bill Aitken is usually reasonable on such matters, but his comments on funding and on the effect on the public purse somewhat gilded the lily. I agree with his concerns about the failure of the UK Government to respond on the statement of funding policy because it does not have to wait for a decision on what will happen in England—the statement of funding policy relates only to the implications of the decision in Scotland.

I share the Government’s view that the proper approach for us is to say that we have compensated for pleural plaques for 20 years, that everything was known about and taken into account, that we should continue to operate as before and, therefore, that there will be no implications for the UK Government beyond those that were known about before. It would be helpful if the UK Government could speedily arrive at that position.

The Scottish Parliament information centre briefing for the stage 3 debate contains an illustrative chart that shows the distinction between the cost of existing cases and the annual costs for different public bodies and for private business. The graph shows clearly that the costs for the public sector are small—under £3 million in total to date and under £750,000 for the estimated annual costs thereafter. I am prepared to accept that the figures may be wrong by a fraction, because there will always be a high degree of speculation in any such situation, but by anyone’s account we are talking about relatively small figures for the public sector.
The insurance industry has made its concerns about private sector costs known to us, but the figures that the Government has eventually emerged with bear a reasonable relationship to the figures that it began with in the financial memorandum. We are talking about an average cost of £25,000, and I feel that it should be possible for the legal costs to be reduced once a mechanism is in place.

We have knocked on the head the suggestion that 30 per cent of the claims might have come from Scotland—that is manifestly not the case. The figure of 9 per cent, which is used for benefits claims and things of that kind, is much more likely to be correct. We also have solid figures for past claims, which give us both information about the history of the issue over some years and confidence in postulating the figures for what is said will be the peak year of 2014. We have reasonably robust figures that will enable the Parliament to support the bill in broad knowledge of the general direction of travel and accepting that there is an element of speculation about any future figures.

In the light of some previous comments, I must say that I do not accept the wider criticisms that have been made of the House of Lords judgment or of the judges involved. A bench that includes Lord Hope and Lord Rodger could be expected to produce a legally impeccable judgment, which is what it did. Moreover, it upheld the majority judgment of the appeal court—perhaps because, for the first time, the courts had the benefit of detailed expert medical opinion, which was agreed by both sides at that time, on the nature of pleural plaques and their precise relationship to the original exposure to asbestos and to any subsequent development of mesothelioma. The judges themselves were not unsympathetic; indeed, several of them raised the possibility that such cases might be raised more satisfactorily as a breach of contract rather than as a delictual wrong based on negligence.

Nevertheless, the fact that the case was legally correct does not necessarily mean that it satisfied our sense of justice and fair play. Also, technically, the judgment was won on an English appeal, so it fell to the Scottish Parliament to consider what the law should be in Scotland. Legislative action here is, of course, a matter for us.

I have spoken about the characteristics of asbestos cases in the chamber before. They include the incubation period, the fact that the cases frequently affect whole families and communities—brother following brother, son following father, and wives cleaning overalls contaminated with white dust—and the fact that they arose at a time when, although the risks were long-known to employers, they were not fully appreciated by employees.

As the minister mentioned, compensation has been paid for 20 years on the basis that those people’s asbestos exposure was, in the words of Dr Rudd, a consultant physician whose evidence was mentioned in committee, more than 1,000 times that of the general population. I remind members of the words of Unite, which said that pleural plaques are the calling card for the development of more serious and terminal asbestos-related illnesses.

I hope that, during the passage of the bill, we sorted out the issue of the coherence of the law, and in exchanges with the minister we dealt with the financial issues. My judgment—and I hope, that of the Parliament—is that continuing the right to compensation as it was understood before the Johnston judgment is right: there should be compensation for people who, through no fault of their own but through the blameworthy fault of others, understandably feel that they have a death sentence hanging over them like the sword of Damocles.

Against that background, this is a good bill that brings succour and equity to a lot of people who have suffered because of their exposure to asbestos through their employers’ negligence. It is right that they should continue to be compensated when they contract pleural plaques, and it is eminently right that we pass the bill today.

15:58

Stuart McMillan (West of Scotland) (SNP): I expect an element of justice to be reinstated for the people of Scotland shortly after 5 pm this evening. I expect the Damages (Asbestos-related Conditions) (Scotland) (Bill) to be passed by the Parliament, which will once again send a message to Scotland and elsewhere that the Scottish Parliament is prepared to act in the interests of the people of this country.

I will take particular pleasure in casting my vote this evening because I have been involved in moving the campaign and the bill forward since before the bill was introduced to Parliament. Shortly after I was elected, Councillor Kenny MacLaren of Renfrewshire Council arranged for me to meet Phyllis Craig of Clydeside Action on Asbestos. The impending House of Lords decision and its ramifications for sufferers of pleural plaques was explained to me and I was asked to assist. With the help of Councillor MacLaren, we started to put the wheels in motion.

I offered to introduce the draft bill as a member’s bill, but we agreed to try first to convince the Scottish Government to introduce the bill, as that would guarantee it speedier progress through the
Parliament. Thankfully, the meetings between Clydeside Action on Asbestos, Frank Maguire of Thompsons Solicitors and the Scottish Government were successful. Gil Paterson, Bill Kidd and I invited Phyllis Craig and Frank Maguire to the Scottish National Party conference in 2007 to lobby all and sundry. I do not think that many SNP MSPs left the conference without meeting them and realising what pleural plaques were and what the implications of the House of Lords decision would be. When I was informed that the Scottish Government was to introduce the bill, I was delighted, but I realised that there was still a lot more to do.

During the early stages of the bill, when I was a member of the Justice Committee, it was obvious that there was unanimous cross-party support for the bill. It was also obvious that there was a sense of injustice, and that the committee could do something about it. I am proud of the scrutiny that we gave the bill and of the report that we published.

At this point, I pay tribute to the members of the Justice Committee for their work in scrutinising the bill. I was, of course, disappointed to hear Bill Aitken’s comments. I respect the fact that he queried the financial aspects of the bill throughout the committee process, but I take this opportunity to urge the Conservatives to change their decision. I advise them not to paint themselves as they were in the 1980s, which is what they will do if they vote against the bill this evening.

I was born in Barrow-in-Furness in England, but I grew up in Port Glasgow, as my parents decided to return to the town. My father was a coppersmith and worked in the shipyards, as did many other family members. Health and safety conditions in the yards were not as stringent as they are now, and some of the raw materials that were used then would not be used now—the main one, obviously, being asbestos.

If I were given a pound for every story that I have heard about the white mice—not only in the past but since I have been involved in campaigning with Clydeside Action on Asbestos—I would be a wealthy man. The stories shocked me, but I was shocked even more by those about women contracting asbestos-related conditions as a result of shaking their husbands’ overalls before washing them. That brought home to me just how potent and dangerous asbestos is, and how indiscriminate it can be. It can affect the whole population.

I am pleased that the Scottish Government and the Scottish Parliament have listened to the arguments. I am sure that the vast majority of the people of Scotland will support the decision that we make on the bill. I know that they will support us in doing the right thing tonight, just as they supported us when we did the right thing two weeks ago and voted for Jackie Baillie’s Disabled Persons’ Parking Places (Scotland) Bill.

During Bill Kidd’s recent members’ business debate on action mesothelioma, I urged the insurance industry to work in tandem with organisations such as Clydeside Action on Asbestos and the Clydebank Asbestos Group, instead of fighting claims at every single turn. Today, I again ask the insurance industry to be proactive in moving this issue forward and not to challenge the will of the Parliament in the courts, as the media has reported might happen. If we pass the bill, there is no reason whatsoever for the insurance industry to mount a legal challenge to the will of the Parliament.

Before I close, I welcome to the public gallery representatives of Clydeside Action on Asbestos, particularly Phyllis Craig, who is a rock for the charity; Frank Maguire of Thompsons Solicitors; representatives of Clydebank Asbestos Group; and Councillor Kenny MacLaren. Their hard work will be rewarded. More important, I want to welcome all those in the public gallery who suffer from pleural plaques and other asbestos-related conditions. Today is about allowing them the opportunity to obtain an apology for their condition—a condition that was contracted because they went to work and someone else neglected health and safety regulations. Today is about them being able to move on with their lives. Most important, today is about them obtaining justice—justice that they deserve. Part of Scotland’s industrial legacy will be put right today.

I urge the Parliament to vote with one voice and unanimously back this bill.

16:04

Bill Butler (Glasgow Anniesland) (Lab): I support the motion in the name of the minister. As a Justice Committee member, I put on record my gratitude to the clerking team and to SPICe for their sterling work and invaluable assistance as the bill progressed through its various stages.

I express my admiration for the commitment and dedication of those who have campaigned tirelessly to have this vital reform enacted: Clydeside Action on Asbestos; the Clydebank Asbestos Group; the GMB; Unite—both the Amicus and T&G sections; the Union of Construction, Allied Trades and Technicians; Thompsons Solicitors; and, above all, those with asbestos-related conditions and their families.

As members will know, the need for the bill arose from the House of Lords judgment on 17 October 2007, which ruled that asymptomatic pleural plaques do not give rise to a cause of action under the law of damages.
The judgment reversed more than 20 years of precedent and practice. In effect, the ruling meant that those who suffered anxiety as a result of the presence of pleural plaques could no longer pursue damages against the industries that had, in a clear breach of their common-law duty of care and of various statutory duties under health and safety at work legislation, left them exposed to asbestos dust. That was the direct consequence of the part of the Law Lords' ruling that said that the mere presence of pleural plaques in the claimants' lungs was not a material injury capable of giving rise to a claim for damages in tort or, in Scotland, delict.

Unsurprisingly, there was a public outcry about the judgment, which was variously described as disturbing, scandalous and bizarre. It was certainly seen, correctly in my opinion, as manifestly unjust. I congratulate unreservedly the current Scottish Government on introducing the bill in response to the widespread public demand to correct a gross error.

Members will recall that the Justice Committee's stage 1 report made it plain that their lordships were fundamentally mistaken in their view, and we should not pretend otherwise. We should be plain about it: they were wrong and we are here today to right that wrong.

As the Justice Committee said in its report, the bill
"represents a proportionate response to the House of Lords judgment."

Members agreed that
"pleural plaques, as an internal physiological change, could be considered an injury under Scots common law;"

and noted
"that the effect of the resultant anxiety on a pleural plaques sufferer could be deemed injurious to their wellbeing."

The bill will restore the right of our fellow citizens to compensation in respect of pleural plaques and, importantly, reserve their right to make a further claim for compensation if, tragically, they go on to develop other, fatal, asbestos-related conditions.

It is a good bill and it is a necessary reform. Their lordships, as from time to time they do, made a profoundly wrong decision—a ruling that, in effect, found in favour of employers who had negligently or recklessly caused their workforce to be exposed to asbestos in the pursuit of profit, and was against the innocent victims of those same employers' recklessness and neglect. That is manifestly wrong.

Who are those victims? They are our fellow citizens who spent their working lives in shipbuilding, in the construction industry and in the fishing industry. They are our friends and neighbours and we, as parliamentarians, must never forget their suffering or that of their families.

Our task at Holyrood is to pass legislation that attempts to redress injustice—this is such a law. As has been said, this Parliament has a good record in passing such legislation. Today, we can all prevent further injustice from being visited upon the innocent victims and their families—people who have already had to endure so much. When the bill is passed—I am sure that it will be—it will rescue from a judicial no-man's-land the hundreds of people whose cases are in court or are still to be heard.

I was hopeful that today we would act as a united legislature in remedying an injustice. I was shocked—and I am not using hyperbole—to hear Bill Aitken say that the Tories would not be able to support the bill. I make a plea to Bill Aitken and his party to reconsider their decision, because not supporting the bill would be shameful. If the Tories wish to rehabilitate themselves for past offences, they should support the bill at 5 o'clock; otherwise, they will be left in a position that the public will not understand and for which they will be rightly criticised. I tell Bill Aitken and his party that the people of Scotland demand that right be done; they are correct to do so and I hope that the Tories will reconsider.

It is for such causes that I—and, I suspect, all of us—came into politics. This kind of legislation demonstrates that the Scottish Parliament has a purpose and can deliver for working men and women, and I and the Labour Party support the Damages (Asbestos-related Conditions) (Scotland) Bill.

16:11

Bill Kidd (Glasgow) (SNP): It seems like such a long time since we set out on the road of reversing the ill-considered judgment of the House of Lords on the right of asbestos victims with pleural plaques to challenge the big insurance companies for compensation. I say that it seems like a long time, but in political terms we have reached the bill's third and final stage—with due awareness of its importance to those affected by this condition—with as much alacrity as the parliamentary process allows. The fact that that has come about as a result of the co-operation of members of parties right across the chamber is a sign of a mature and decent Parliament that represents the people, not vested interests. Of course, the Justice Committee is also to be thanked for its efforts.

The Scottish Government and, in particular, Fergus Ewing, the minister responsible for overseeing the bill's progress, are due very considerable praise for expediting through Parliament this important legislation in the face of...
pressure exerted by members of the Association of British Insurers. Moreover, Clydeside Action on Asbestos and Thompsons Solicitors have been tirelessly partners on the side of the angels in the process.

According to the ABI, in 2006, its member companies paid out more than £1.2 billion in employer liability claims—and quite right too, given that the employers were liable. After all, they had been deficient in protecting their workers against injury.

We have to remember that in such situations the insurers pick up the tab. However, they do so not out of their own pockets, but from the payments made to them by employers whose workers are insured against harm as they ensure that their bosses and company shareholders—and, by extension, the insurers themselves—earn the wealth that allows them to live in conditions in which their bodies, at least, do not have to be exposed to chrysotile or other noxious asbestos products.

Insurers play an important role in modern society and make a very good profit from running what is a regulated business. They have to be kept in line and in place, which is where Parliaments come into their own. Insurers should not expect—and certainly should not be allowed—to make excess profits by reneging on their side of the deal to compensate workers made ill in carrying out their daily duties and on whose backs this country’s wealth was built.

I said earlier that the House of Lords judgment was ill considered. Some might say that that is a matter of opinion; however, it is the opinion of the great majority of the members of the Scottish Parliament that their lordships were wrong. In a civilised and democratic society, there must be an unbreakable compact between the people and their Parliament that the politicians are there to defend the people from harm and to enhance society as a whole for the benefit of all.

I reiterate what I said in our debate on pleural plaques on 5 November last year:

“The Association of British Insurers says that there is a duty on its part, and on the part of its members, to pay out when there has been employer negligence. There has been employer negligence when exposure to asbestos has caused scarring to workers’ lungs.”—[Official Report, 5 November 2008; c 12043-4.]

Therefore, according to their membership organisation, the insurers of employers whose workers have suffered scarring of the lung tissue—pleural plaques—as a result of negligent exposure to asbestos have a duty to make compensation payments. If they will not stay true to that duty, it is down to members of the Scottish Parliament to ensure that they do so.

The Parliament is delivering on its compact with the people, and I hope that all members will do so when it comes to decision time. We must reverse the misjudgement of the House of Lords. Perhaps Westminster will be shamed into doing the same. I certainly hope so.

16:16

Des McNulty (Clydebank and Milngavie) (Lab): This morning, I spoke at a Clydebank Seniors Forum meeting. There were between 80 and 100 people—mainly women—in the room, many of whom had friends or relatives who had contracted asbestos-related conditions, such as pleural plaques, asbestosis and mesothelioma. Clydbank is the hottest spot in Scotland for asbestos-related diseases. Those diseases are not found solely in Clydbank—the west of Glasgow, parts of Tayside and West Lothian have high levels of asbestos-related diseases—but because of its unique industrial history, its shipbuilding yards, engineering factories, the concentration of the construction industry there and particularly the asbestos plant that was there for many years, Clydbank is the epicentre of the epidemic of asbestos-related diseases.

Asbestos-related diseases have decimated cohorts of the population. People are no longer alive because asbestos got into their lungs and destroyed the life that they should otherwise have had. It has also affected the lives of members of their families. Over the past several years, the Parliament has had a proud record of dealing with those people and providing justice for them. We argued hard on a cross-party basis that people should not die before they got their mesothelioma cases into court. That was happening. We speeded up the process by which such cases are dealt with. That was done on a cross-party basis for the right reason: to provide justice for people.

When cases were coming to court and victims were getting justice before they died, we found that what was happening affected the compensation rights of their relatives, who had previously been entitled to compensation but whose claims were then disbarred because justice was being delivered. The Parliament changed the law in Scotland to ensure that relatives’ rights were protected. That was the right thing to do.

What we are doing today is also right. The right of individuals to claim compensation for pleural plaques had been in existence for 20 or more years. People had been entitled to claim compensation. That compensation was withdrawn because the insurance industry took forward cases to try to evade its responsibilities. It was not the first time that the insurance industry had tried to do that; it has repeatedly tried to evade its responsibilities. It tried to argue that it could pay
compensation only if it could be established absolutely that a particular company was responsible for the contamination of the individuals.

At Westminster and Holyrood, we have sent the insurance companies homewards every time that they have come to evade their responsibilities. I am delighted that we are going to do that again. We are here to stand up for the rights of not insurance companies, but our fellow citizens, as Bill Butler pointed out. We should do that on behalf of Scotland and the communities that we represent.

The issue is not party political and I have never treated it as such in all the years in which I have campaigned on it. People from all political parties have stood up for what is right. I remember when I first started campaigning on asbestos in the Parliament, the late Margaret Ewing was among the first members to support me. She did so because she had been a member for East Dunbartonshire and so understood fully the situation of her constituents at that time and of people throughout Scotland. I am delighted that Fergus Ewing is continuing that work in progressing the bill. Members from all parties have put their shoulders to the wheel. As Bill Butler pointed out, campaigners have done so too, including the Clydebank Asbestos Group in my constituency, Clydeside Action on Asbestos and people from Tayside and West Lothian. The Scottish Trades Union Congress has played an important role, as have Unite, the Union of Construction, Allied Trades and Technicians, the GMB and other trade unions. All those organisations have campaigned for, and done, what is right.

In the end, the Parliament will not be judged by the boxing games in which we occasionally engage or the party-political squabbling, which comes one day and goes the next and is forgotten about; what will be remembered is whether we did the right thing. On asbestos, the Parliament has consistently done the right thing and I am absolutely delighted that it will do the right thing again today.

16:22

**Nigel Don (North East Scotland) (SNP):** I echo everything that has been said. This late in the debate, there is not much to say, and I do not want to repeat everything for the sake of it.

I take members back to the House of Lords judgment in the Johnston case. The judgment gets a bad press, but we should recognise that the law was not satisfactory and that their lordships knew that the whole basis on which people had been proceeding had been wrong for a long time. As I did in the stage 1 debate on 5 November last year, I will refer to the judgment, in which Lord Rodger stated at paragraph 84:

“The asbestos fibres cannot be removed from the claimants’ lungs. In theory, the law might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis or mesothelioma.”

The implication is that is that what the law should have held, which would have been good English law. However, as Lord Rodger went on to say, “the courts have not taken that line.”

I wonder whether their lordships might take from this debate a cautionary tale about the way in which they have developed the law. That will be history in a few minutes’ time, because I am sure that we will pass the bill. It is easy to blame their lordships, but they could have got it right earlier if they had thought about how the law should develop. However, one way or another, they did not do so.

I want to address the uncertainty about costs, by pointing out that costs are always uncertain. The numbers that we have heard about today are a salutary reminder of the uncertainty of costs in the real world. I do not think that that is particularly unusual. We sometimes flatter ourselves by thinking that our estimates are more accurate than they are. Bill Aitken is no longer in the chamber—although I am sure that he will be back to vote on the bill—but I remind the Tories that the estimates that we have are estimates of a cost that would have been borne had the law not been changed by the House of Lords in the Johnston judgment. I accept that we do not know what the numbers are, but we did not know what the numbers were before the judgment and they are still the same numbers that they would have been. By putting the law back to where it would have been, we are not changing the numbers—and we still do not know what they are.

Comment has already been made about the legal costs and about the fact that, once the bill is passed, the insurance company will have nowhere to hide. The next step for the insurance company—whose rights I am perfectly prepared to defend, although it does not have any rights because of things being put back to the way that they were—should be to find ways forward that reduce the legal costs in what should be, by and large, incontestable cases. I appreciate that some cases are contestable on the facts, but where they are incontestable, there is absolutely no sense in the company continuing to pay large sums of money to lawyers—although I love lawyers dearly when they have a good case to argue. In that way, the costs to the insurance company can be reduced and the process will be speeded up, which will be good for the victims who need to be
compensated. I hope that the ABI will take that on board.

I come to a more substantive point about the European convention on human rights. This might seem a slightly tangential point, but members will find out where I am going. We generally accept that, although the ECHR has some interesting and, occasionally, unfortunate side effects, it basically gives us a good way forward when we are considering people’s rights and how we set up, interpret and use the law.

This very afternoon, the Cabinet Secretary for Justice commented on the costs to the Government of paying for slopping-out cases, on the basis that slopping out is—apparently—in breach of the ECHR. That money flows from the public purse and goes directly to convicted criminals. As far as I can see, the Conservative party supports that—although I am sure that it acknowledges that it is an unfortunate result of the ECHR.

I note that Government policy, which is endorsed across the Parliament, is to try to support drug addicts out of their addiction. As I understand it, the Tories support the expenditure of public funds to help those who have chosen to become addicted—or who have chosen to risk becoming addicted, at least. They are prepared to support the expenditure of public funds to help those who, in principle, could themselves choose to stop. Is it not strange to hear the Tories say that they do not support the recovery by those who have been the victims of negligent employers of compensation, either from the employers directly or from those who stand behind them, be they Government or insurer? I have to join the growing list of members who feel that the Tories have quite simply got it wrong. The argument is wrong, and I suggest to Bill Aitken and his colleagues in all certainty that if they do not support the recovery by those who have been the victims of asbestos-related disease.

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Duncan McNeil (Greenock and Inverclyde) (Lab): I welcome the bill. More important, it will be welcomed by my constituents in Greenock and Inverclyde who have been diagnosed with pleural plaques and who have had their rights to compensation temporarily denied. Those rights will correctly be restored today. The disease, with all its aspects, will be properly acknowledged. Once again, the Parliament, with cross-party support, has come down on the side of the victims of asbestos-related disease.

More than most, the campaigners I met today, who are in the public gallery, will well understand that this country has an adversarial system of justice, in which the ill and the dying have been victimised time and again. We have heard from Des McNulty how that has happened. There have been delays and blanket denials at the terminal point in many people’s lives. Their very existence—and where they worked, who they worked for and what ship they worked on—was denied. They were nothing in the system. Today, we hear that some of that injustice is being addressed.

As Nigel Don said, in a stage 3 debate, we often repeat what others have said, and, as members have said, I am pleased that the Scottish Parliament has a proud record in this area. Back in 2000, I hosted one of the Parliament’s first members’ business debates on mesothelioma, with the support of 45 back benchers. We have hung together on the issue for a long time.

I have been aware of the plight of asbestos throughout my time as an MSP and in my life before entering the Scottish Parliament. As many do only too well, I understand the difficulties and the humiliations that victims have sometimes had to endure at the hands of the courts in trying to obtain the justice that they were well due.

Over the years, several members have distinguished themselves on the issue. I am happy to recognise the contribution of politicians from all parties. As has been said, the late Margaret Ewing campaigned on the issue here and in Westminster. I also recognise the contributions of Robert Brown, Stewart Stevenson, Pauline McNeill, as the Justice 1 Committee’s convener, Hugh Henry, in his ministerial role and—of course—Des McNulty, whose record I contend is second to none.

I regret that, unless the Conservatives change their minds, we have lost Bill Aitken along the way. He is another member whom I would like to have commended today. I consider the costs and the price that is paid to be much more than a line on a balance sheet; they include the cost to health, the impact on communities and on families, the ultimate price that too many have paid and the indignity that people have suffered. Like others, I ask the Conservatives to ask themselves again about costs and price and to move beyond the balance sheet.

The Justice Committee’s work should—rightly—be praised. We might have lost Bill Aitken along the way, but I am pleased that the parliamentary campaign has new recruits, such as Bill Kidd and Stuart McMillan, who have continued the Parliament’s tradition. Bill Butler’s work is also to be recognised.

The progress that has been achieved could not have been accomplished without the efforts of victims—I was reminded of that today when I met...
campaigners. Despite terminal illness, victims have fought the good fight literally until their last breath. In the debate in 2000, I paid tribute to Owen Lilly—a Clydebank man who showed true Clydeside spirit. He participated in a film that shocked many by showing the horrors of mesothelioma and brought home the plight of victims to a wider audience. Joe Baird, my old friend and the chairman of the shop stewards in Scott Lithgow, fell victim to asbestos. Despite his problems, he retained his dignity, his humanity and his campaigning spirit throughout that difficult time. Despite their illness, people such as Jim McAleesese have provided support for the Inverclyde support group for many years.

Of course, for those who have lost relatives to this awful disease, the fight continues. The families refuse to give up the fight for what is rightly theirs—the right and just campaign. They have been ably supported by campaign groups such as Clydeside Action on Asbestos and Clydebank Asbestos Group, by friends in the trade union movement—in the GMB and Unite—and by lawyers such as Frank Maguire of Thompsons Solicitors, who have all played a major part in bringing about the bill.

All parties can—rightly—be proud of the Parliament’s record on the issue. We have consistently highlighted the insurance industry’s dirty tactics and its attempts to spin out cases to avoid or reduce its liability. The bill marks another milestone for the Parliament, which, as Bill Kidd said, is connected to its communities and knows where they stand. However, it is the external influences—the unions, lawyers, pressure groups and victims—that have given the Parliament another opportunity to do what is right. I urge all parliamentarians to pass the bill, to ensure victory today, which will belong to all the campaigners for this just cause.

16:35

Mike Pringle (Edinburgh South) (LD): I am sure that this is the final chapter—at least, I hope that it is—in legislation on the asbestos-related condition mesothelioma. I congratulate Clydeside Action on Asbestos and the other campaigning groups. I hope that their members can now look to the future and spend their time on more pleasant issues than those that they have had to address over the past few years.

I was on the Justice 1 Committee in the previous session of the Parliament when the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was passed. Although it was a relatively short bill, it not only addressed a serious social issue but was quite complicated. As the minister said, the aim of the Damages (Asbestos-related Conditions) (Scotland) Bill is to tackle a serious social issue, and it will do that when—as I am sure it will be—it is passed later today. Although I am not a member of the Justice Committee, I am pleased to speak in this stage 3 debate. I apologise in advance to Justice Committee members if my knowledge is not quite as keen as theirs.

In a number of court cases from the early 1980s until 2005-06, damages were awarded to claimants who had developed the asbestos-related condition pleural plaques. As Bill Butler, Bill Kidd—both of whom, I am sorry to say, are no longer in the chamber—and other members said, the decision of the House of Lords in the Johnston v NEI International Combustion Ltd case prevented claimants from going to court and claiming damages for injury caused by exposure to asbestos many years previously.

I am not qualified to say whether the House of Lords decision was right or wrong. On 29 November 2007, the Scottish Government announced that it intended to introduce a bill to overrule in Scotland the House of Lords judgment. The Government said that the provisions of the bill would take effect from the date of the judgment. The Liberal Democrats were, and are, delighted to support the Scottish National Party in legislating to overturn the House of Lords judgment on pleural plaques.

Given that people with pleural plaques were exposed negligently to asbestos over many years and that, for the 20 years prior to the ruling, damages were awarded, it is of course appropriate to continue to make such awards. The case for that was well made by Richard Baker in his speech. I agree entirely with my colleague Robert Brown: the bill will restore claimants to the position that they were in before the decision was delivered in October 2007. It will enable them to negotiate settlements and to raise actions in the courts, if they want to do that.

A considerable amount of the Justice Committee’s time was take up with questions on how much all of this will cost and what the number of claimants is. One key principle in the statement of funding policy is that, when a devolved Administration takes a decision that has financial implications for departments or agencies of the UK Government, the body whose decision leads to the additional cost will meet that cost. If UK departments and agencies were to invoke that provision, the result would be a considerable impact on the Scottish consolidated fund.

Based on the figures in the financial memorandum, the annual cost will be around £6 million. I thank the minister for giving the chamber an update on those figures today. I understand Bill Aitken’s considerable concerns on how much all of this will cost, but I bow to Nigel Don’s greater
knowledge of the issue. If Bill Aitken was listening to what Nigel Don said, I hope that he will have changed his mind on the matter.

I agree with Nigel Don that the cost of compensation will not be as much as some have suggested. As my colleague Robert Brown said, the question of finance could have been cleared up if the consultation on the bill had gone on for a little longer and had been carried out in slightly more depth.

The financial memorandum indicated that calculations of how much the bill will cost are based on the assumption that perhaps 200 cases a year will settle, with an average cost of £25,000 each. Several members have referred to the cost of lawyers, but I hope that not every case will cost £25,000. Not everyone agrees with the costs that are given in the financial memorandum; the insurance industry, in particular, thinks that they may be substantially higher. It estimates that the Scottish Government has significantly underestimated the level of unjustified costs that the bill will impose on defendant businesses, local authorities and insurers. Only time will tell who is right. It was only to be expected that the insurance companies would say that costs will be much greater than they may eventually turn out to be. For a long time, those companies have been getting insurance premiums, which should now help to compensate them.

Given that people with pleural plaques have been negligently exposed to asbestos, and given that for the past 20 years they have been awarded damages, the Liberal Democrats’ view is that appropriate damages should continue to be awarded. That is why we will support the bill.

16:41

John Lamont (Roxburgh and Berwickshire) (Con): Today’s debate has again brought to the Parliament’s attention the possibly horrific consequences of an asbestos-related condition. None of us would dispute the distressing and disturbing effects of an asbestos-related illness. However, as I said during the stage 1 debate on the bill, I have a lot of sympathy for the view that has been expressed by some that to make compensation available for pleural plaques when plaques themselves have no negative impact on health runs contrary to the Scots law of delict.

As Bill Aitken indicated, we have serious concerns about the cost implications of passing the bill. Now more than ever, we must behave responsibly when using the public purse. We must focus on what the financial memorandum says and on the bill’s possible implications for the Scottish public sector—councils, health boards and other public bodies throughout Scotland. A local hospital or school could be closed to allow a health board or council to pay for possibly unknown claims to be settled.

Despite the best efforts of the Scottish Government, which complied with the Justice Committee’s request for further research, there remains considerable doubt about potential liabilities and costs to both the private and the public purse.

Fergus Ewing: Will the member clarify whether the Conservatives have decided that they cannot support the bill because they think that the ultimate liability may be substantially in excess of the existing amount? If liability remains at the current levels—essentially, that is what we are assuming—would the Conservatives be willing to support the bill?

John Lamont: The key point is that estimates vary—the number of claims that may be made in the future is unquantifiable. There is no reliable way of estimating how many individuals have pleural plaques as a result of exposure to asbestos and will ultimately make a claim. There is uncertainty about how many people have been exposed to asbestos, how many of those who have been exposed will develop pleural plaques, how many of those who develop pleural plaques will be identified as having an asbestos-related condition, and how many of those who are identified will make compensation claims.

There is also uncertainty about the exact value of a claim, with claims inflation being a particular issue for the insurance sector. Furthermore, with pleural plaques having a long latency period of 20 to 30 years, it is difficult to predict when the claims peak will occur. It is worth bearing in mind that there is currently a build-up of about 630 pleural plaques cases as a result of the House of Lords judgment and earlier judgments in the English courts.

The best information that is available to the Scottish Government suggests that settlement costs are made up of about £8,000 for compensation, £8,000 for pursuer’s costs and £6,000 for defender’s costs. Those figures are based on the known 2003-04 settlement figures, which come from the period prior to the legal challenges that culminated in the House of Lords ruling.

Stuart McMillan: I fully appreciate the cost issues that the member has highlighted, but does he think that pleural plaques are a good thing?

John Lamont: I am not arguing that pleural plaques are or are not a good thing; the point is what they lead to. Having pleural plaques is not a medical condition; the illness that they lead to is the condition, and the law provides that compensation is payable in the case of illness.
We are concerned about the unknown and unquantifiable costs that the public sector might face. In the financial memorandum, the Scottish Government said:

“a reasonable working assumption for the purposes of this memorandum is an average cost per case of £25,000.”

As Bill Aitken said, more than just the insurance sector could be affected by the bill. The Scottish Government is the named defender in a number of on-going cases in the Scottish courts.

We should not forget about the possible costs on the NHS, as patients seek X-rays on the off-chance that they might have pleural plaques. The Cabinet Secretary for Health and Wellbeing has said that it costs £115 for a computed tomography X-ray to be done to determine whether pleural plaques are present.

The Scottish Government should routinely monitor how much it is costing to implement new laws—the bill will be a good example. If amendment 9, which Derek Brownlee lodged, had been agreed to, and there was a significant cost overrun, ministers would have been forced to explain why the overrun had happened. The Government has accepted the principle of post-legislative scrutiny, so there will be no hiding place for cost increases.

The Conservatives voted for the bill at stage 1 after amending the motion to call on the Government “to provide the Parliament with a more detailed analysis of the likely cost implications”.

We have considered the analysis. Despite our sympathy with victims, we will vote against the bill, because we cannot be sure of its implications for the public purse.

16:46

Paul Martin (Glasgow Springburn) (Lab): We have heard powerful speeches, particularly from members who support the bill.

The Justice Committee, of which I am a member, carefully considered a wide range of issues during the passage of the bill. During the process I learned a great deal about asbestos and its history. For example, I learned that asbestos has been known to be a poisonous substance since 1892. I heard from people who had worked with asbestos about employers’ unacceptable practices. The negligence of employers is an important aspect of the debate, as the minister made clear.

During the committee’s consideration I listened carefully to the case that the insurance industry made. First, the industry said that it was concerned that premiums could increase; then it said that they would increase; then it was not quite sure. The industry provided the committee with little evidence to back up its views.

I listened with interest to Derek Brownlee’s comments on amendment 9. Derek Brownlee says that he is concerned about post-legislative scrutiny, but he has not remained in the chamber for the debate. He wants the Scottish Government to make a commitment to seeing things through, but he has shown little commitment to doing that himself. I am pleased that the Parliament rejected amendment 9, which was ill thought out. I am disappointed that Mr Brownlee’s party singled out the Damages (Asbestos-related Conditions) (Scotland) Bill for special treatment.

John Lamont talked about uncertainty. I do not want to lecture members, but all members—especially those who have been in the Parliament since 1999—know that the Parliament faces challenges to do with uncertainty almost daily.

Bill Aitken: Does Mr Martin accept that it was entirely coincidental that Mr Brownlee lodged his amendment to the Damages (Asbestos-related Conditions) (Scotland) Bill? Similar amendments will be lodged in future debates; amendment 9 just happened to be the first of its type—it had nothing to do with the bill.

Paul Martin: Conservatives have proposed a template for scrutinising legislation in the future. I look forward to hearing more about their proposals.

The Parliament has faced challenges with regard to other bills. I remember a similar debate about the Smoking, Health and Social Care (Scotland) Bill, when businesses raised concerns about the potential impact that the ban would have on them. I also remember such a debate regarding the Licensing (Scotland) Bill in 2005. This is not the first time that the Parliament has faced challenges regarding the impact that legislation will have on businesses. Nigel Don eloquently crystallised many of the issues, which were worth raising.

Having listened to the debates on the matter, I am clear that the bill should be passed with no ifs, buts or maybes. The hard-working men and women who were negligently exposed to asbestos have had enough of the insurance industry’s attempts to evade its responsibilities. It is time for the Parliament to put that wrong right. The Parliament should be proud of the stance that it has taken on behalf of the many hard-working men and women throughout Scotland who were negligently—I make that point again—exposed to asbestos.

As others who have spoken in the debate did, I pay tribute to the trade unions, such as Unite, that played a role alongside Clydeside Action on
It was evident to me during the committee’s consideration of the bill that the insurance industry was well represented and spared no expense in legal matters. I am delighted that the hard-working men and women were given the same opportunity for legal representation by Thompsons Solicitors. The process highlighted the important role that the unions play in ensuring that our workers are fairly treated and given legal representation in the workplace.

The bill deals with an industrial legacy in Scotland that needs to be put right. It is important that we grasp the opportunity to put that shameful legacy behind us. I call on the Parliament to support the passing of the bill.

16:52

Fergus Ewing: I thank members for their contributions to today’s proceedings. Like the entire passage of the bill, the debate has been conducted in a constructive and thoughtful tone, which does the institution of the Parliament some credit.

The purpose of the bill is straightforward. In effect, it is to keep things as they have been for the past 20 years. It is not often that someone in the SNP argues passionately for the status quo, but in effect that is what we are doing this afternoon. The bill’s purpose is to ensure that people who have been, as Paul Martin said, negligently exposed to asbestos have the right to compensation and access to justice.

Many members thanked specific individuals. I, too, thank the Justice Committee and acknowledge the huge and constructive role that was played by a number of groups and individuals, notably Clydeside Action on Asbestos and Thompsons Solicitors. As Duncan McNeil said, we should thank a great many individuals in trade unions and the unions themselves. Without their work, we would not have the legislation that has been passed during the Parliament’s existence to tackle injustice in relation to asbestos. I also thank my officials for the work that they have done and their painstaking attention to detail, particularly as detail has not been in short supply in the bill.

In areas that are associated with Scotland’s industrial history, notably shipbuilding and construction, people with pleural plaques are living alongside friends who worked with them and witnessing the terrible suffering of those who have contracted serious asbestos-related conditions including mesothelioma. That causes them terrible anxiety that they will suffer the same fate. The Scottish Government believes that we have a clear moral obligation to address that. We should not turn our backs on those who contributed to our nation’s wealth in the past.

I turn to the main issues that were raised in the debate. First, I will respond to the issue that was raised by the Conservatives. In a democracy, there is nothing wrong with having such a dissenting voice, even if I profoundly disagree with what it said this afternoon. There are costs associated with doing the right thing. Members have seen the revised financial implications, which show that, while the costs may be greater than we anticipated initially, they are unlikely to be anywhere near the range of costs that the insurance industry presented.

I will reply specifically to others’ arguments about costs and say why I believe that they are wrong and why, in anticipating that there will be a huge surge in claims, the insurance industry’s arguments are flawed. I echo the arguments of Mike Pringle, Robert Brown and many other members in other parties in that regard. First, our bill seeks simply to preserve the status quo. In the 20 years before the House of Lords ruling, when pleural plaques were deemed to be compensatable, there was no unmanageable flood of claims. Where is the flood? There has been no such flood. Why would one assume that there will suddenly be a huge flood of claims? Where is the rational basis for that proposition?

Secondly, before the House of Lords judgment, public awareness of pleural plaques in key communities was already high because people such as Des McNulty, Duncan McNeil, Stuart McMillan and many others had publicised the issue and kept it going. Awareness is high because we have had legislation in the Parliament in a number of respects to tackle previous flaws regarding the lack of access to justice for people who suffer from asbestosis. With all that information constantly being presented by elected parliamentarians—and rightly so—awareness is high. How can the insurance industry argue, therefore, that after the passing of the bill—and as a result of my making this speech and our having this debate—awareness should suddenly be exponentially higher than it was before? What on earth is the rationality in that claim?

Gil Paterson: As the minister is aware, just before the House of Lords rescinded the relevant legislation, there was a massive amount of publicity about the issue but no discernible increase in the number of claims. Will he comment on that?

Fergus Ewing: I agree entirely with the member’s point, which is the third argument that I would adduce in support of my argument that the
costs are likely to continue as they were in the past and at a sustainable level.

The Conservatives’ argument seemed to be that legislation should not proceed unless we can have certainty about what the financial cost will be. If that were the test for legislation, we would not have much legislation, because it is simply not possible to predict with precision what the costs will be. In fact, the actuarial profession said that “it is not possible to derive a” perfect “estimate of the expected future cost”.

If perfection in future estimated costs were a sine qua non of legislation, there would not be any negligence legislation, any compensation for personal injury or any right of recourse to the courts. It seems to me that, wittingly or otherwise, the Conservatives have set up an impossibly high hurdle—a kind of 30ft fence that the high-jump team now has to jump over in passing any legislation.

With respect, I point out to my Conservative colleagues that, two weeks ago—on the same day that Parliament debated action mesothelioma day—an insurance company announced that it had made £759 million in pre-tax profits in a single year. I have nothing against profits, but that is pretty high. Equally, an ABI statement declared that the UK insurance industry contributed £9.7 billion in taxes in a single year. In that context, I hope that Bill Aitken agrees that our estimates of the bill’s financial implications may not seem too daunting.

This has been an excellent debate. The Parliament has shown what it is capable of doing. I am delighted and proud to have had the task, on behalf of the Scottish Government, to move that we pass the Damages (Asbestos-related Conditions) (Scotland) Bill and to defend and confirm the right of access to justice for those who have been negligently exposed to asbestos and have sustained injury as a result.
Decision Time

17:02

The Presiding Officer (Alex Fergusson):

There are two questions to be put as a result of today’s business. The first question is, that motion S3M-3542, in the name of Fergus Ewing, on the Damages (Asbestos-related Conditions) (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

### For

- Adam, Brian (Aberdeen North) (SNP)
- Allan, Alasdair (Western Isles) (SNP)
- Baillie, Jackie (Dumbarton) (Lab)
- Baker, Clare (Mid Scotland and Fife) (Lab)
- Baker, Richard (North East Scotland) (Lab)
- Boyack, Sarah (Edinburgh Central) (Lab)
- Brown, Keith (Ochil) (SNP)
- Brown, Robert (Glasgow) (LD)
- Butler, Bill (Glasgow Anniesland) (Lab)
- Campbell, Aileen (South of Scotland) (SNP)
- Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
- Coffey, Willie (Kilmarnock and Loudoun) (SNP)
- Constance, Angela (Livingston) (SNP)
- Crawford, Bruce (Stirling) (SNP)
- Cunningham, Roseanna (Perth) (SNP)
- Curran, Margaret (Glasgow Baillieston) (Lab)
- Don, Nigel (North East Scotland) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Eadie, Helen (Dunfermline East) (Lab)
- Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
- Fabiani, Linda (Central Scotland) (SNP)
- Ferguson, Patricia (Glasgow Maryhill) (Lab)
- Finnie, Ross (West of Scotland) (SNP)
- FitzPatrick, Joe (Dundee West) (SNP)
- Foulkes, George (Lothians) (Lab)
- Gibson, Kenneth (Cunningham North) (SNP)
- Gibson, Rob (Highlands and Islands) (SNP)
- Gillon, Karen (Clydesdale) (Lab)
- Gordon, Charlie (Glasgow Cathcart) (Lab)
- Grahame, Christine (South of Scotland) (SNP)
- Grant, Rhoda (Highlands and Islands) (Lab)
- Gray, Iain (East Lothian) (Lab)
- Harvie, Christopher (Mid Scotland and Fife) (SNP)
- Harvie, Patrick (Glasgow) (Green)
- Henry, Hugh (Paisley South) (Lab)
- Hepburn, Jamie (Central Scotland) (SNP)
- Hume, Jim (South of Scotland) (LD)
- Hyslop, Fiona (Lothians) (SNP)
- Ingram, Adam (South of Scotland) (SNP)
- Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
- Kelly, James (Glasgow Rutherglen) (Lab)
- Kerr, Andy (East Kilbride) (Lab)
- Kidd, Bill (Glasgow) (SNP)
- Lamont, Johann (Glasgow Pollok) (Lab)
- Livingstone, Marilyn (Kirkcaldy) (Lab)
- Lochhead, Richard (Moray) (SNP)
- MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
- Macdonald, Lewis (Aberdeen Central) (Lab)
- Macintosh, Ken (Eastwood) (Lab)
- Martin, Paul (Glasgow Springburn) (Lab)
- Marwick, Tricia (Central Fife) (SNP)
- Mather, Jim (Argyll and Bute) (SNP)
- Matheson, Michael (Falkirk West) (SNP)
- McArthur, Liam (Orkney) (LD)
- McAvaney, Mr Frank (Glasgow Shettleston) (Lab)
- McCabe, Tom (Hamilton South) (Lab)
- McConnell, Jack (Motherwell and Wishaw) (Lab)
- McKee, Ian (Lothians) (SNP)
- McKelvie, Christina (Central Scotland) (SNP)
- McLaughlin, Anne (Glasgow) (SNP)
- McMahon, Michael (Hamilton North and Bellshill) (Lab)
- McMillan, Stuart (West of Scotland) (SNP)
- McNeill, Duncan (Greenock and Inverclyde) (Lab)
- McNeill, Pauline (Glasgow Kelvin) (Lab)
- McNulty, Des (Clydebank and Milngavie) (Lab)
- Morgan, Alasdair (South of Scotland) (SNP)
- Mulligan, Mary (Linlithgow) (Lab)
- Munro, John Farquhar (Ross, Skye and Inverness West) (LD)

### Against

- Adam, Brian (Aberdeen North) (SNP)
- Allan, Alasdair (Western Isles) (SNP)
- Baillie, Jackie (Dumbarton) (Lab)
- Baker, Clare (Mid Scotland and Fife) (Lab)
- Baker, Richard (North East Scotland) (Lab)
- Boyack, Sarah (Edinburgh Central) (Lab)
- Brown, Keith (Ochil) (SNP)
- Brown, Robert (Glasgow) (LD)
- Butler, Bill (Glasgow Anniesland) (Lab)
- Campbell, Aileen (South of Scotland) (SNP)
- Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
- Coffey, Willie (Kilmarnock and Loudoun) (SNP)
- Constance, Angela (Livingston) (SNP)
- Crawford, Bruce (Stirling) (SNP)
- Cunningham, Roseanna (Perth) (SNP)
- Curran, Margaret (Glasgow Baillieston) (Lab)
- Don, Nigel (North East Scotland) (SNP)
- Doris, Bob (Glasgow) (SNP)
- Eadie, Helen (Dunfermline East) (Lab)
- Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
- Fabiani, Linda (Central Scotland) (SNP)
- Ferguson, Patricia (Glasgow Maryhill) (Lab)
- Finnie, Ross (West of Scotland) (LD)
- FitzPatrick, Joe (Dundee West) (SNP)
- Foulkes, George (Lothians) (Lab)
- Gibson, Kenneth (Cunningham North) (SNP)
- Gibson, Rob (Highlands and Islands) (SNP)
- Gillon, Karen (Clydesdale) (Lab)
- Gordon, Charlie (Glasgow Cathcart) (Lab)
- Grahame, Christine (South of Scotland) (SNP)
- Grant, Rhoda (Highlands and Islands) (Lab)
- Gray, Iain (East Lothian) (Lab)
- Harvie, Christopher (Mid Scotland and Fife) (SNP)
- Harvie, Patrick (Glasgow) (Green)
- Henry, Hugh (Paisley South) (Lab)
- Hepburn, Jamie (Central Scotland) (SNP)
- Hume, Jim (South of Scotland) (LD)
- Hyslop, Fiona (Lothians) (SNP)
- Ingram, Adam (South of Scotland) (SNP)
- Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
- Kelly, James (Glasgow Rutherglen) (Lab)
- Kerr, Andy (East Kilbride) (Lab)
- Kidd, Bill (Glasgow) (SNP)
- Lamont, Johann (Glasgow Pollok) (Lab)
- Livingstone, Marilyn (Kirkcaldy) (Lab)
- Lochhead, Richard (Moray) (SNP)
- MacAskill, Kenny (Edinburgh East and Musselburgh) (SNP)
- Macdonald, Lewis (Aberdeen Central) (Lab)
- Macintosh, Ken (Eastwood) (Lab)
- Martin, Paul (Glasgow Springburn) (Lab)
- Marwick, Tricia (Central Fife) (SNP)
- Mather, Jim (Argyll and Bute) (SNP)
- Matheson, Michael (Falkirk West) (SNP)
- McArthur, Liam (Orkney) (LD)
- McAvaney, Mr Frank (Glasgow Shettleston) (Lab)
- McCabe, Tom (Hamilton South) (Lab)
- McConnell, Jack (Motherwell and Wishaw) (Lab)
- McKee, Ian (Lothians) (SNP)
- McKelvie, Christina (Central Scotland) (SNP)
- McLaughlin, Anne (Glasgow) (SNP)
- McMahon, Michael (Hamilton North and Bellshill) (Lab)
- McMillan, Stuart (West of Scotland) (SNP)
- McNeill, Duncan (Greenock and Inverclyde) (Lab)
- McNeill, Pauline (Glasgow Kelvin) (Lab)
- McNulty, Des (Clydebank and Milngavie) (Lab)
- Morgan, Alasdair (South of Scotland) (SNP)
- Mulligan, Mary (Linlithgow) (Lab)
- Munro, John Farquhar (Ross, Skye and Inverness West) (LD)

The Presiding Officer: The result of the division is: For 98, Against 16, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Damages (Asbestos-related Conditions) (Scotland) Bill be passed.
Amendments to the Bill since the previous version are indicated by sidelined in the right margin. Wherever possible, provisions that were in the Bill as introduced retain the original numbering.

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

[AS PASSED]

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

1 **Pleural plaques**

(1) Asbestos-related pleural plaques are a personal injury which is not negligible.

(2) Accordingly, they constitute actionable harm for the purposes of an action of damages for personal injuries.

(3) Any rule of law the effect of which is that asbestos-related pleural plaques do not constitute actionable harm ceases to apply to the extent it has that effect.

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

2 **Pleural thickening and asbestosis**

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

(2) Those conditions are—

(a) asbestos-related pleural thickening; and

(b) asbestosis.

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

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

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

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

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

(i) asbestos-related pleural plaques; or

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

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

(2) For the purposes of sections 17 and 18 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (limitation in respect of actions for personal injuries), the period beginning with 17 October 2007 and ending with the day on which this section comes into force is to be left out of account.

4 **Commencement and retrospective effect**

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

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

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

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

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

5 **Short title and Crown application**

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

(2) This Act binds the Crown.
Damages (Asbestos-related Conditions) (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes.

Introduced by: Kenny MacAskill
On: 23 June 2008
Bill type: Executive Bill