JUSTICE 1 COMMITTEE

Wednesday 6 December 2006

Session 2

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JUSTICE 1 COMMITTEE
† 48th Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE

Ian Babbs (Asbestos Action Tayside)
Ronald Conway (Bonar and Co Solicitors)
Phyllis Craig (Clydeside Action on Asbestos)
Tommy Gorman (Clydebank Asbestos Group)
Ian Johnston (Forum of Scottish Claims Managers)
Frank Maguire (Thompsons Solicitors)
David Taylor (Forum of Insurance Lawyers)
Lisa Marie Williams (Association of British Insurers)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 6

† 47th Meeting 2006, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 6 December 2006

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

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

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

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

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

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

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

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

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

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

Tommy Gorman: Very much so.

Phyllis Craig: Very much so.

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

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

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

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

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

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

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

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

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

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

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

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

10:00

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

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

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

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

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

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

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

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

Marlyn Glen: We certainly will.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Phyllis Craig: It is always helpful to seek the advice of people such as Lord Mackay. That does no harm. If they can come up with further suggestions that may assist the passage of the bill, it is an excellent idea.

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

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

Mr McFee: So the number is very small.

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

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

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

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

10:15

Mr McFee: Yes, I understand that.

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

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

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

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

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

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

Mr McFee: Please do.

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

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

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

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

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

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

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

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

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

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

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

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

Mrs Mulligan: Earlier, I asked the families' representatives about the fact that the bill focuses solely on mesothelioma. Is that the right way forward for the Executive or should it keep in reserve a power to add in other illnesses?

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

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

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

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

10:30

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

Mrs Mulligan: That is clear, thank you.

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

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

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

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

Following the Barker v Corus case and the Compensation Act 2006, even if we cannot show which employer—all the employers might have materially increased the risk—caused the condition or show medically at which point it was caused, a special case is made for mesothelioma and special circumstances surround it. Causation of mesothelioma is regarded in a different way from that of asbestosis. If an employer materially increased the risk of mesothelioma, the employer is taken to have caused it fully. That applies to all the defenders. Therefore, in the example that I gave, causation would not be split 50:50; whoever materially increased the risk would be liable for 100 per cent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Frank Maguire: Yes.

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

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

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

10:45

Frank Maguire: I take the convener's point, though, that the insurers and defenders have not had notice that that was going to happen. If the Scottish Executive indicated now that, once royal assent is given, the act will be retrospective from now, that might make me feel a bit easier regarding any human rights challenge in future.

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

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

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

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

Frank Maguire: We have 90 per cent of cases.

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

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

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

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

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

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

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

The Convener: So you would not need a court.

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

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

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

Stewart Stevenson: Would it be fair—

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

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

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

Frank Maguire: Yes.

The Convener: We will put that to the insurers.

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

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

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

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

Frank Maguire: The insurers can speak for themselves, but what will happen is that an insurer will evaluate a claim on the basis of what the damages for the insured person are and what the damages for the prospective widow and children will be. I agree that most cases settle; the percentage of cases that settle is in the high 90s. Very few cases do not settle.

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

Frank Maguire: That is correct.

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

Frank Maguire: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Stewart Stevenson: That is a serious point.

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

11:00

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

Mr McFee: Would it affect the interim payment?

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

Mr McFee: The interim payment may be repayable.

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

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

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

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

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

Stewart Stevenson: From?

Frank Maguire: The insurer.

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

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

Stewart Stevenson: So the claimant in effect pays.

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

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

Frank Maguire: My apologies.

The Convener: We are all enlightened.

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

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

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

Sorry, what was the second question?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Convener: Okay.

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

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

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

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

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

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

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

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

11:15

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

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

Frank Maguire: There are provisional damages, whereby the pursuer can get the damages now and the court makes a reservation for them to come back in the future if there is a risk of serious deterioration. The court has what we could call a provisional mechanism in injury cases, which could be adapted to mesothelioma.

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

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

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

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

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

Frank Maguire: Yes.

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

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

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

Frank Maguire: No.

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

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

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

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

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

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

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

Frank Maguire: Someone—

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

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

Stewart Stevenson: Give me an example.

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

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

The Convener: If the issue needs to be sorted out, it is for Parliament to do that. We are trying to understand a process in which we have never been involved. The bill team has told us that there are two actions to be settled and two separate processes. If your evidence is that it is unhelpful for there to be two stages and that you would like there to be one, we need to explore how we can achieve that.

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

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

Frank Maguire: Yes.

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

The Convener: There are two separate claims.

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

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

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

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

11:23

Meeting suspended.

11:35

On resuming—

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

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

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

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

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

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

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

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

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

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

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

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

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

Lisa Marie Williams: I listened to it outside.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr McFee: So it is not really in place.

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

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

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

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

Lisa Marie Williams: That is correct.

11:45

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

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

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

Lisa Marie Williams: Yes.

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

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

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

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

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

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

Mr McFee: I beg your pardon.

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

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

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

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

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

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

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

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

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

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

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

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

The Convener: Is anybody arguing that?

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

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

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

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

Lisa Marie Williams: I was just answering the questions.

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

Mr McFee: The issue is in the submissions.

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

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

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

payment can be made while the claimant is still alive.

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

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

Lisa Marie Williams: Absolutely.

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

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

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

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

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

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

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

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

Marlyn Glen: But the claimant gets a smaller amount.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12:00

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

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

Lisa Marie Williams: People already take advantage of the interim payment system in England and Wales. We are working closely with the DWP because it is an area that the insurance industry takes very seriously.

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

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

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

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

The Convener: They have done so in the past.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lisa Marie Williams: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mrs Mulligan: And do you welcome that?

David Taylor: Yes.

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

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

Margaret Mitchell: Are you saying that if the Executive had extended the provisions to cover other conditions, there would have been the element of uncertainty that you mention but, as you know that the specific provision in the bill applies only to mesothelioma sufferers, there will not be that uncertainty and premiums will not be affected?

Lisa Marie Williams: It is for each individual member to make decisions on their own premiums. However, the situation is more certain than it would be if the Scottish ministers could extend the provision without any further consultation. We definitely welcome that.

Margaret Mitchell: Is it fair to say that your concern is not an on-going one and that the situation has been clarified by what has been said about the uniqueness of the case and the fact that the provision will be restricted to these sufferers only?

Lisa Marie Williams: Yes.

Stewart Stevenson: I have a fairly specific question for Ian Johnston. In your submission to the Scottish Executive's consultation, you highlighted the possibility of double counting in relation to loss of wages and loss of family support. What basis did you have for saying that and do you now have that concern?

Ian Johnston: Since I have seen the bill, I no longer have that concern.

The Convener: Do you have a view about the impact of the Coulsfield report on mesothelioma sufferers? Has the accelerated approach that we now have in Scotland made any difference to the insurance industry?

Lisa Marie Williams: Not that I am aware of. We welcome the quick settlement of those claims.

Stewart Stevenson: In previous sessions, there was some discussion about the date on which the bill should come into operation. As drafted, it would be seven days after royal assent is given, which might be around the beginning of April. Would there be any effect if the day were brought forward to approximately now, on the basis of a minister in the Scottish Executive saying that that was their intention? If, for the sake of argument, a Scottish minister were to say on Friday this week that their intention was for the bill to become operative on 8 December 2006, what implications might that have for you?

12:15

Ian Johnston: It would be helpful at this point if I were to read a communication that I issued to the Justice Department on 3 August. I emphasise that it was only on behalf of our members. I wrote:

"On behalf of our members I am also pleased to be able to confirm that we will, pending the new legislation, behave in accordance with the proposed changes when faced with a claim by a living claimant."

Stewart Stevenson: So, de facto, if not de jure, you are behaving as if the bill is in force.

Ian Johnston: Yes.

Stewart Stevenson: Thank you for that. What about the other witnesses?

Lisa Marie Williams: Obviously, we do not like retrospectivity as a rule, taking into account questions of certainty and all sorts of human rights reasons. However, during the aftermath of the

Barker v Corus case, we agreed with the DWP that all claims following the date of that judgment and prior to the passing of the Compensation Act 2006 would be treated under the terms of that act. I do not see that we would have a problem with it at all.

David Taylor: In general terms, we would have concerns about making any legislation retrospective, for reasons that have already been expressed. Certainty is potentially usurped if legislation is made retrospective. However, I do not have any particular comments to make on the—

Stewart Stevenson: But, in the specific terms in which I put the question, if it were to be stated that the bill, once enacted, would be put in operation from Friday this week, albeit that we will not pass the bill for some months, that would provide certainty. That is certainly not opening the door to claims going back several years. Would you have any concerns about that situation? I have heard from your two colleagues that, in essence, they would not have concerns about that.

David Taylor: I would not have any concerns over and above the concerns that have already been expressed. I appreciate that it is a very short window of time that we are talking about.

The Convener: I reassure you that the committee is mindful of the issues that you have raised about the dangers of retrospection. According to the evidence that we have heard, a number of cases are already being held in abeyance. That cannot be so in every case, and we cannot direct the course of events, but the narrow issue for us to consider is whether a retrospective provision would make any difference. Our thinking will be influenced by what you have to say about whether there might be any prejudice caused to your industry. You might have heard me say earlier that another way of exploring this matter, as we have done in the past, is to discuss the management of cases with the Court of Session and to find out whether the court might be able to assist. I think that fewer than 100 cases are waiting for the bill to pass.

Lisa Marie Williams: It is my understanding that the situation is similar to the time following the Barker judgment but before the passing of the Compensation Act 2006. If the cases that are currently waiting for judgment are not allowed the same rights as those that are brought after enactment, it is unfair on the former cases. Following the Barker case, most claims were stayed until the Compensation Act 2006 came into effect. That allowed those people who had had a judgment in the intervening time to get the same level of compensation.

The Convener: That is useful to know.

The matter that Mr Maguire raised with us in his closing remarks perhaps confused the committee—I wish to clear up some of that confusion. Do you have a view about the matter of court procedure? When we had the Executive officials before us, we asked them to clarify what would now be involved under the bill. They told us that there would be two parts to the process. First, there would be the claimant themselves settling in respect of their claim. Then, the family would come along later. Do you have a view on whether that is one action or two actions? Does it make any difference to you?

David Taylor: We cannot see how it could be anything other than two actions. If the sufferer's claim is settled, that claim would be at an end; a further set of court proceedings would then be required in order to litigate the claims of the relatives.

Mr Maguire touched on provisional damages. He made it clear in his oral evidence that the rule on provisional damages could not, as it stands, apply to this situation. However, via the Sheriff Court Rules Council or the Court of Session Rules Council, it might be possible to amend the rule on provisional damages to deal with this specific situation. That issue is not covered in any detail in the consultation papers; it would have to be considered carefully.

The Convener: The issue has only just arisen.

David Taylor: It is a procedural issue to do with the way in which claims can best be processed. Amending the rule seems to be a possibility. Indeed, a member of FOIL touched on that in a consultation paper that she prepared.

Margaret Mitchell: If the claimant died, would you not treat the whole thing as one case with the executor acting on behalf of the relatives? The information would all be there and there would be no reason to have two cases. The only reason I can see for perhaps having two cases would be if the circumstances of the relatives who were to be the beneficiaries had changed substantially in the interim. However, if the information was as it had always been, would it not be beneficial to treat the whole thing as one case?

David Taylor: Indeed it might be. Apart from anything else, doing so would probably cut the costs for all parties. As I say, my understanding is that, under the existing law, two separate actions would be required. If I understood Mr Maguire's final position on the matter, that is what he thought as well.

The Convener: We will obviously explore the issue further. It has been helpful to hear your views.

We have no further questions, so it only remains for me to thank you for your evidence this morning. Your approach to the committee has been extremely welcome and I thank you for going into detail to help us to understand all the issues surrounding the bill.

Subordinate Legislation

Act of Sederunt (Fees of Sheriff Officers) 2006 (SSI 2006/539)

12:23

The Convener: We have one more item of business, on subordinate legislation. I refer members to the note prepared by the clerk on the act of sederunt. As no members wish to comment, are we prepared simply to note the instrument?

Members *indicated agreement*.

The Convener: I remind members that the next meeting of the Justice 1 Committee will be on Tuesday 12 December, when we will undertake further consideration of our draft report on our inquiry into the Scottish Criminal Record Office.

Meeting closed at 12:23.

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