JUSTICE COMMITTEE

Tuesday 2 September 2008

Session 3

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JUSTICE COMMITTEE
19th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)
*Margaret Smith (Edinburgh West) (LD)

COMMITTEE SUBSTITUTES

Aileen Campbell (South of Scotland) (SNP)
Marlyn Glen (North East Scotland) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Des McNulty (Clydebank and Milngavie) (Lab)
Gil Paterson (West of Scotland) (SNP)

THE FOLLOWING GAVE EVIDENCE:

Pamela Abernethy (Forum of Insurance Lawyers)
Gilbert Anderson (Forum of Insurance Lawyers)
Dominic Clayden (Norwich Union Insurance Ltd)
Phyllis Craig (Clydeside Action on Asbestos)
Dr Martin Hogg (University of Edinburgh)
Frank Maguire (Thompsons Solicitors)
Harry McCluskey (Clydeside Action on Asbestos)
Professor Anthony Seaton (University of Aberdeen)
Nick Starling (Association of British Insurers)
Steve Thomas (Zurich Assurance Ltd)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 2 September 2008

[THE CONVENER *opened the meeting at 10:17*]

Interests

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome back members after the summer recess. I remind members and members of the public who are in attendance to ensure that their mobile phones are switched off, as it can be disruptive if they go off during the meeting. I welcome Gil Paterson MSP and Des McNulty MSP, who are not committee members but have a particular interest in some of the matters that will be discussed today.

I welcome Angela Constance, who is a new member of the Justice Committee. In accordance with section 3 of the code of conduct for members of the Scottish Parliament, I invite you to indicate whether you have any interests that are relevant to the committee's remit.

Angela Constance (Livingston) (SNP): For the record, I declare that I am a former local government councillor and a former local government employee—a social worker and mental health officer in the field of criminal justice.

The Convener: I thank you for your declaration and welcome you to the committee. I am sure that you will find the work fulfilling; we can guarantee that you will find it challenging.

Decision on Taking Business in Private

10:19

The Convener: Under agenda item 2, the committee is asked to agree that item 5—consideration of our approach to the Offences (Aggravation by Prejudice) (Scotland) Bill—be taken in private. Is that agreed?

Members *indicated agreement*.

The Convener: The committee is also asked to agree that future consideration of draft reports on its inquiry into community policing and written evidence that is submitted in response to the call for evidence on the Sexual Offences (Scotland) Bill be taken in private. Is that agreed?

Members *indicated agreement*.

Subordinate Legislation

Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2008 (SSI 2008/217)

Offenders Assisting Investigations and Prosecutions (Substituted Sentences) (Scotland) Order (SSI 2008/232)

10:19

The Convener: There are three negative instruments for consideration. No points were raised by the Subordinate Legislation Committee when the first two instruments were considered. Are members content to note the instruments?

Members *indicated agreement*.

Criminal Legal Assistance (Fees and Information etc) (Scotland) Regulations 2008 (SSI 2008/240)

The Convener: The Subordinate Legislation Committee drew the regulations to the committee's attention on the ground that the brevity of the explanatory note is not considered to be in accordance with normal drafting practice. The matter was remitted back to the Scottish Government for clarification. Do members have questions? Are we content to note the regulations now that we have the fuller information that we requested?

Members *indicated agreement*.

Damages (Asbestos-related Conditions) (Scotland) Bill: Stage 1

10:21

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

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

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

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

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

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

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

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

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

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

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

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

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

Pamela Abernethy: No.

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

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

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

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

Gilbert Anderson (Forum of Insurance Lawyers): Let me record my thanks on behalf of the Forum of Insurance Lawyers for the opportunity to give oral evidence on the bill.

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

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

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

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

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

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

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

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

10:30

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

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

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

Pamela Abernethy: No—

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

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

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

Bill Butler: Asbestos?

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

Bill Butler: Snap.

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

Bill Butler: Because the body is under attack.

Gilbert Anderson: Indeed.

Bill Butler: Indeed. Thank you.

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

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

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

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

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

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

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

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

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

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

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

inconsistency is not good for the Scottish legal system.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dominic Clayden: What you suggest was certainly a feature.

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

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

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

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

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

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

10:45

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

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

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

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

Dominic Clayden: Yes.

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

Dominic Clayden: Absolutely. That is the expectation.

Paul Martin: An expectation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Convener: Let us hear from Mr Anderson.

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

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

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

11:00

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

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

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

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

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

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

Pamela Abernethy: No, it has not.

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

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

"there will be 20-50 people developing plaques"

for every person who develops mesothelioma, and that

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

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

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

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

That does not add up, does it?

Nick Starling: As I said earlier, the incidence of pleural plaques is a known unknown. No one knows how many cases there are out there. I am quoting sources such as the chairman of the British Lung Foundation, who I think is a reliable source. I do not know about the HSE figures. By definition, the HSE deals with disease rather than asymptomatic conditions although I do not know whether that explains the difference in the figures. We have always made it clear that there is huge uncertainty around the issue because no one knows precisely the degree of exposure. People in this room will have pleural plaques without being aware of it because they do not carry any symptoms.

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

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

The Convener: Briefly, please.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nick Starling: Yes, of course. We included some information in our submission, and we can make available the Westminster Ministry of Justice's consultation document.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bill Butler: In Scotland?

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

Bill Butler: I hear clearly what you are saying.

11:15

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

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

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

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

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

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

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

Stuart McMillan: I accept that.

Nick Starling: Mesothelioma is a malignant condition—

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

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

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

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

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

Dominic Clayden: Yes.

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

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

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

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

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

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

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

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

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

Steve Thomas: I can perhaps help. You may be alluding to what is known as trigger litigation, which is currently running in England and Wales. That is a piece of litigation that relates to asbestos compensation in which a handful of what we refer to as run-off companies—insurers that are no longer trading or writing business and legacy companies that are endeavouring to look after a fund of money—have brought litigation about policy wording and its interpretation. The live market, including companies such as Zurich and Norwich Union, is opposing that litigation. In effect, we are acting as the defendants and trying to maintain the status quo so that the run-off companies are not successful in their endeavours. That may have been what people have written to you about.

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

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

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

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

up attack, with implications for the more serious cases.

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

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

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

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

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

Des McNulty (Clydebank and Milngavie) (Lab): I have two questions, the first of which is directed at Dr Abernethy. She said earlier that there was not much evidence that those who had pleural plaques would necessarily go on to develop the more serious asbestos-related diseases of mesothelioma and asbestosis. I want to put to her the opposite point. Given that she suggested that those who do not have pleural plaques can contract those serious diseases, what is the weight of evidence as to whether people who do not have pleural plaques but have been exposed to asbestos negligently are more likely to get asbestos-related diseases? How far would you push that argument?

11:30

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

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

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

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

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

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

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

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

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

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

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

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

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

Margaret Smith: You are concerned about—

Gilbert Anderson: The principle.

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

Gilbert Anderson: Well—

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

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

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

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

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

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

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

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

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

11:45

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

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

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

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

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

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

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

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

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

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

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

The Convener: We can leave that for another day.

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

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

I thank the panel for attending. As I said, the session was important and extremely useful to the committee. I will allow a brief suspension for the changeover of witnesses.

11:50

Meeting suspended.

11:52

On resuming—

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

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

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

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

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

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

explanation of the implications of having pleural plaques.

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

The Convener: Much easier.

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

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

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

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

12:00

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

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

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

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

"pleural plaques are harmless indicators of past asbestos exposure"

that are

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

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

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

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

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

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

Bill Butler: The question is pretty simple.

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

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

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

Bill Butler: Yes, but by and large—

Professor Seaton: It is not a simple question. It is easy to frame what appear to be simple questions. I know of nobody who has studied the issues who would disagree with what I have said. I know most of the major players in the field in Britain, the United States and Europe and I would say that we are unanimous. However, you could, of course, go to a radiologist or general practitioner who has not studied the field and does not know the literature who might take a different view.

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

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

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

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

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

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

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

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

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

Nigel Don: Forgive me, but this part of the logic is crucial, and I really want to nail it. If I could say that every patient who contracted mesothelioma or asbestosis had pleural plaques—a figure of 95 per cent would be fine for the basis of the argument—I would be able to conclude that the development of pleural plaques indicated a different statistical regime. That would apply even if, under the

original regime, in which you had never measured or gone looking for plaques, the figure had been less. In other words, if everybody who developed mesothelioma or asbestosis had, on the way, developed plaques, the intermediate stage where you found plaques would change the statistical likelihood of the patient in front of you developing mesothelioma or asbestosis.

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

Plaques are harmless—there is no doubt about that. Pathologically, they are scars. They have a nice lining over them, they do not interfere with the function of the lung and so on, and they are not pre-malignant. They are a sign that someone has been exposed to asbestos, but it is the intensity of the exposure to asbestos that is the cause of mesothelioma. That is the difference.

Nigel Don: I am entirely with you. I am using plaques purely as a marker or an indicator. I am not suggesting that they are in any sense malignant or pre-malignant. They are merely an indicator that the patient is in that fraction of the population that is, because it has been checked, at greater risk of developing mesothelioma than the population of which they were a part before the test was done.

Professor Seaton: They are in the population that is at greater risk of mesothelioma. That population is the population of individuals in that birth cohort who have been exposed to asbestos.

Nigel Don: Yes.

Professor Seaton: The people with plaques are at no greater risk than are the people without apparent plaques within that population. If we adjust for age and exposure to asbestos, plaques do not mean that someone is at greater risk. That is the important point. If we compensate someone for having pleural plaques, it is logical to compensate all those people who do not have pleural plaques but who had the same exposure to asbestos. The trouble is that plaques do not indicate the intensity of exposure. That is a critical fact.

Nigel Don: I am with you there, but can I go back to the other end of the argument? If everybody who is found to have mesothelioma has plaques—

Professor Seaton: Well, pretty well everyone does.

Nigel Don: All right—pretty well everyone. I mean, near enough that we can have the argument and the discussion—

Professor Seaton: But they are not always radiologically apparent, which is what the bill is about, as I understand it.

Nigel Don: Perhaps not, because the definition in the bill has nothing to do with how plaques are measured. It is just concerned with whether plaques exist, so it does not matter whether there has been an X-ray or CT scan.

Professor Seaton: That opens a can of worms.

Nigel Don: It might open a can of worms but, nonetheless, if we are changing the law—sorry, we are getting into evidence in law, and we should never do that, because by and large it is a mistake.

My concern is to try to establish whether the development and discovery of pleural plaques puts a person in a different fraction of the population. Purely and simply because of the observation that a person has pleural plaques, we are entitled to draw the conclusion that they have been exposed to sufficient asbestos that they are more likely to develop mesothelioma, because the people who develop mesothelioma develop pleural plaques on the way.

Professor Seaton: Well, yes. I think I said that, if someone has pleural plaques, they are at greater risk of having mesothelioma than are people in the population at large, including you and me. Well, not me, because I have been exposed to asbestos. You probably have as well, as an engineer. However, a person is not at greater risk than are other people who have done the same job, if you like. It is the job and the exposure that are critical, not the plaques.

12:15

Nigel Don: I entirely accept that the person is not at greater risk than those who did the same job but happen to be different physiologically such that they are fortunate enough not to respond to asbestos in the same way. I am with you there, but if those who have contracted mesothelioma have plaques, I think—I must be careful here—that those who know they have plaques are entitled to take the view that they are now known to be at greater risk of developing mesothelioma than the population in which they were before the test was done.

Professor Seaton: That is absolutely correct and it lies behind the point about anxiety that I was trying to explain previously. As I understand it, the issue is about compensation for anxiety about the possibility of developing serious and fatal diseases. When a good chest physician is confronted with a patient with pleural plaques, he will try in so far as is possible to give the facts. The facts are not wholly reassuring, but they are sufficiently reassuring to stop the patient becoming obsessed with mesothelioma and just waiting for it to arrive. In other words, the risks are lower than many other well-known risks, such as those from smoking.

My reason for putting down my views in writing for the committee is related to the medical difficulties that would be consequent on the law saying one thing to the individual and me trying to say another, but you are quite right to say that the person with pleural plaques has reason to worry. That worry could be allayed if the person came to a chest physician such as me who, having found out the person's exposure to asbestos, could explain what that risk was in relation to, say, the risk of dying from cancer.

Your risk and mine of dying from cancer—our common shared risk—is one in three. If someone has a risk of one in 20 of dying of mesothelioma—which is not uncommon in people with pleural plaques—that adjusts somewhat the likelihood of what sort of cancer they will die of. It does not influence their life expectancy. That depends on more common causes of death, such as other sorts of cancer, heart disease and so on.

That is how I try to explain the matter to patients. I do not try to pull the wool over people's eyes; I try to give them the facts and it is then up to them. If a person is a naturally nervous sort, the issue might become a cause of prolonged anxiety; if they are the usual phlegmatic Scot, they will go and have a beer and not worry about it very much. There are all sorts of gradations in between.

Nigel Don: If possible, I would like to put some numbers—and certainly some algebra—on this. As members of the general population, we have a one in a million chance of dying of mesothelioma. Is that right?

Professor Seaton: Yes, the chances are one in a million when unrelated to asbestos exposure. Mesothelioma is an uncommon disease.

Nigel Don: Forgive me, but let us now forget the general population. If we know that we have been exposed to asbestos—as you and I probably have—the risk is different but it is still pretty low.

Professor Seaton: Yes.

Nigel Don: If someone who has been exposed to asbestos asks you what are their chances of developing mesothelioma, your answer is one in something.

Professor Seaton: Yes.

Nigel Don: If, however, a comprehensive X-ray scan or whatever reveals the existence of pleural plaques, that person's chances of developing mesothelioma are statably higher because they are in a smaller population of people who are likely to develop the disease. I think, if I may say so, that that is the nub of what we are about. At that point, someone who knows that they have plaques is entitled to be anxious—albeit not much—that they are at greater risk of developing a disease that they will have contracted from asbestos.

Professor Seaton: They will not be at greater risk than their workmates who do not have plaques—which is an important point—but it is true that they are at increased risk of developing mesothelioma.

You can forget about asbestosis, which is very uncommon nowadays, but mesothelioma is a critical and common disease. There are about 2,000 cases a year in the United Kingdom.

Nigel Don: So the diagnosis of plaques is, in your view, a justification for some level of anxiety. The statistics have changed, simply because we know more.

Professor Seaton: I said right at the beginning that it is absolutely sure that someone who is told that they have pleural plaques will initially be anxious as a consequence. The job of the doctor is to tell the patient about likelihoods. Afterwards, the patient will usually feel reassured that their condition is unlikely to develop into a more serious disease. What you say is quite right; I do not think that there is any great difference of opinion between us on this point.

I have tried to practise preventive medicine all my career; I have tried to find ways of preventing these diseases. You mention anxiety. The seeking out of people with pleural plaques is, of course, causing anxiety, as is the information that is widely available to people with asbestos exposure. In some cases the anxiety is justified, but in most cases it is needless. Who knows in the individual case? Knowing that you have worked in the asbestos industry is a cause of anxiety, and that is quite understandable. Having pleural plaques is an additional cause of anxiety—but unjustifiably so, because having the plaques should not add to the anxiety already caused by knowing that you have worked in the asbestos industry.

The Convener: Gil Paterson, has your point been answered?

Gil Paterson: Not yet. For clarity, I wonder whether Professor Seaton will say whether pleural plaques are caused only by exposure to asbestos.

Professor Seaton: To all intents and purposes, yes. Many other things cause fibrosis of the pleura, but asbestos-related pleural plaques are very characteristic pathologically.

I hope that I am here to give committee members information. Diagnosing pleural plaques is not straightforward. If you take a chest X-ray and have it read by four radiologists, two will see pleural plaques and two will not. There is inter-observer variability. Indeed, there is also intra-observer variability: if I look at a batch of 400 X-rays on several occasions—something that I have done regularly for epidemiological studies—I will sometimes miss the plaques and I will sometimes find them, on the same film.

Diagnosis is not straightforward. Furthermore, shadows that look like pleural plaques might not be pleural plaques. Further investigation might show that they are fat tabs under the ribs or that they are what we call companion shadows. There is scope for misdiagnosis—which raises the problem of the requirement for further investigation. In medicine, further investigation is fraught with all sorts of problems. It can lead to the finding of coincidental things that then lead to further investigation, harm, and increased exposure to radiation.

Like all questions, that one was not completely simple.

The Convener: That is becoming apparent.

Gil Paterson: I am still at it with my questions.

The Convener: Can you continue at it briefly?

Professor Seaton: I am sorry about my answers, but I am not going to pretend that the issues are straightforward when they are not.

Gil Paterson: I would like to clarify this. If someone has pleural plaques, they came from exposure to asbestos. Or is that too simple?

Professor Seaton: I am prepared to concede that there is a characteristic sort of pleural plaque that can be quite easily diagnosed radiologically and that is certainly due to asbestos.

Gil Paterson: Are there any other diseases—you may have a different description—that are similar to pleural plaques? Is there anything else, that is similar, that you can view, that may develop into something else? Is there something similar to pleural plaques, or is it only pleural plaques that have a signature that signifies that the person has been exposed to asbestos? Is there anything else that has a signature that can be somewhat confused with pleural plaques?

Professor Seaton: The question as I understand it is whether, when we see what we think are pleural plaques on someone's X-rays, we can say that the person has been exposed to asbestos. The answer to that is yes. There is another question, which is whether there is anything else that looks like pleural plaques and can be mistaken for them. The answer to that question is also yes—particularly fat pads under the ribs.

I am not sure whether there was a third question hidden in there.

Gil Paterson: My main question is whether there is some other stamp that shows that something is there but will remain dormant although there is a good chance that something else will happen in a certain number of people.

Professor Seaton: In relation to asbestosis?

Gil Paterson: No, anything. In other words, is there anything peculiar to pleural plaques? Is it a unique condition? You say that pleural plaques are harmless, but an above-average proportion of the people who are identified as having them are likely to have an asbestos-related disease. Is there anything else like that that is not related to asbestos?

Professor Seaton: Yes. If someone drinks too much whisky, it is easy to determine their risk of developing cirrhosis by doing blood tests on them. There are many medical indicators of future disease. Pleural plaques are different in that they are an indication of exposure to the toxic agent.

It is off the top of my head, but I will pursue the whisky analogy—in fact, let us say wine and not make it too Scottish. Someone who drinks too much claret might have a red nose, which would be an indication of drinking too much alcohol, which would also scar that person's liver, but the red nose would not be the cause of the scarred liver—the alcohol consumption would. Similarly, plaques are an indication of exposure to asbestos, and it is exposure to asbestos that causes the serious diseases. Does that help?

Gil Paterson: Yes. Thanks very much.

The Convener: We have one final question from Paul Martin.

Paul Martin: I have two questions, actually.

Professor Seaton, you suggest that anxiety has been amplified by the involvement of solicitors in what you believe should be the domain of the medical profession. Do you accept that, in the information age in which we live, if I visit a consultant I can seek a wide range of information without visiting a solicitor? That may not have been the case 30 years ago, but now I can do a Google search for "pleural plaques" and find a wide range of information about the condition; I would not need a solicitor to provide me with it.

Professor Seaton: Sorry, but—

Paul Martin: You have made considerable play of the anxiety that is created by the implications of the present legal framework. My point is that people can become anxious as a result of information from different sources—it does not have to be provided by solicitors.

12:30

Professor Seaton: Oh goodness, no—all sorts of things can make people anxious, but lawyers are pretty good at it. Surely everyone recognises that the process of litigation is a huge cause of anxiety. Someone can make themself anxious by looking on the web—that is commonplace nowadays.

Paul Martin: But your submission suggests that causing that anxiety is monopolised by the litigation industry. My point is that, following a visit to the consultant, people can be anxious for many reasons. Twenty or 30 years ago, a visit to the consultant would probably have been people's only source of information on their condition. We cannot get away from the fact that the public are much better informed about conditions and have opportunities to follow through on that, without the need to visit a solicitor. Do you accept that anxiety can be created in different ways following a consultation?

Professor Seaton: I do not think that I implied that lawyers are the only cause of anxiety. I accept that doctors cause a great deal of anxiety if they give people uninformed advice. All I am saying is that it makes it difficult for chest physicians to give the impartial and objective advice that they should give if there is a conflict between what they say and what the law says.

Paul Martin: I appreciate that, but your submission states that the medical process has been "handed over to lawyers". I am trying to make an objective point. The point that I am trying to extract from you is that the process of creating anxiety is not necessarily handed over to lawyers, because anxiety can be created in different ways.

Professor Seaton: I have spoken on the issues for 30 years, although I make it clear that I am no expert on the legal matters. When the law appeared to be changing and patients of mine were entering into the litigation process, I was informed by a lawyer that I would be regarded as medically negligent if I did not tell patients that they should or had the right to consult a lawyer. That was unequivocal advice that I was given by a law firm in Glasgow at the time. I remember it clearly because I made the point to that lawyer—who I think is here—that that made it difficult for me to give patients sensible and helpful advice. I had to put the issue into perspective and tell them that their chances of getting serious diseases were slight, although they had a somewhat increased risk, but then add, "By the way, you must go and see a lawyer."

I do not know whether the advice that I was given was right or wrong, but that was the advice that I was given at the time. In my teaching from then on—I have taught many of the chest physicians in Britain—I have taught that patients with pleural plaques should be told of their right to go and see a lawyer. That has been my teaching for more than 20 years now.

Paul Martin: You will have heard in the previous evidence the references to scan vans and to the possibility of their being introduced in Scotland. Do you have any knowledge of scan vans operating in Scotland or in other parts of the UK?

Professor Seaton: That depends on what you mean by scan vans.

Paul Martin: We heard that businesses in different parts of the country are using scan vans to identify pleural plaques.

Professor Seaton: I think that what you mean are mobile X-ray units.

Paul Martin: That is right.

Professor Seaton: I certainly believe that there are such things as mobile CT units in Scotland, because I have come across people who have had X-rays taken by them. They provide expensive X-ray facilities to hospitals that do not have them. In general, however, there is less of a need for them in Scotland because the national health service is better provided with such facilities and getting a CT scan in the local hospital is usually quite straightforward. I am pretty sure that such units exist, but I am not saying that they are used to trawl for patients or to get business for lawyers.

The Convener: So you are saying that you are pretty sure that there are vans of this type, but that they might be part of the NHS.

Professor Seaton: I think that there are. I know of hospitals in which people have talked about the mobile unit coming around. However, as for the question of who owns it—

The Convener: Are you talking about mobile units in remote areas?

Professor Seaton: Yes. However, I do not think that that is relevant to this issue.

The Convener: No. I can see why you have given that answer to the question, but I do not think that the scan vans that you are talking about are the same as the scan vans that we have in mind, which are organised by personal injury lawyers.

Professor Seaton: I have not come across such things. That said, of course, there is a commercial interest in maximising the number of people who come forward with pleural plaques, although that can be done through press advertisements and so on. Indeed, I expect that that would happen.

I carried out the very successful research on the association of dust exposure with chronic lung disease that led to coal miners in Britain receiving compensation. For all sorts of complicated reasons not unrelated to very poor planning, ill-thought-out regulation and the ill-thought-out consequences of that regulation, it resulted in gross oversubscription and huge amounts of public money not necessarily going to waste but going into the pockets of doctors and lawyers. I think that, with this legislation, there is a risk not only to the insurance companies—which have already made their case—but of public money going to waste. After all, many claims nowadays are against the public sector.

The Convener: Thank you for that evidence, Professor Seaton. We have no more questions for you at this stage, but I ask that you remain at the table in case we need any more advice.

We now have a few questions for Dr Hogg, who has provided a very full and extremely useful submission. Dr Hogg, if we are prepared to construe pleural plaques as a physical injury, why should those who were wrongfully exposed to asbestos not be in a position to obtain a recovery and compensation?

Dr Martin Hogg (University of Edinburgh): Of course a personal injury—if that is what you want to call it—should come under the law of damages, but as earlier witnesses have made clear, this bill is not just about pleural plaques; it begins to tinker with the fundamental requirements of an action of delict in Scotland, which for me is the more troubling aspect. Every legal system has to work out the fundamental requirements for bringing a claim in delict. As you have heard, those requirements are that a person must be owed a duty of care that has been breached by the defender; that they must suffer recognised damage; and that there must be a causal connection between the breach of duty and the damage.

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

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

The Convener: To some extent, you might have anticipated the question that Stuart McMillan intended to ask.

Stuart McMillan: In your submission, you say:

"The Bill represents, in my opinion, a worrying trend of modern government to interfere in decisions of the courts made according to orthodox principles".

Do you agree that it is the role of MSPs and of Parliament to make laws to rectify what politicians might deem to be unjust situations or decisions?

Dr Hogg: If the common law is patently wrong and erroneous, Parliament can intervene, provided that it does so on a principled and sound basis, but Parliament has tended to interfere in our law of delict and our law of obligations very infrequently over the past several hundred years, because the general view of Scots lawyers is that we have an extremely good law of delict that has been worked out over a long period of time and which has come to conclusions that most people, certainly on the issue of damage, acknowledge are sensible.

In my submission I mentioned that, in general, one of three types of a mark of damage is required before one can say that damage has occurred. Those three marks of damage exist for very good reasons—their purpose is to prevent a flood of claims by people who might simply have been exposed to a risk of injury but who have not actually been injured. For example, if I drove down the road carelessly, without looking where I was going because I was fiddling with my compact disc player, looked up at the last minute, saw a pedestrian whom I was about to strike and injure, and put the brakes on, with the result that they were not injured, I would have broken my duty of care to that pedestrian, but I would not have caused them any damage. I would certainly have exposed them to a risk of injury and made them

extremely anxious about the idea of being struck, but I do not think that we would want to say that they should be entitled to damages, because according to the orthodox principles of the law there would be no indication that they had suffered any damage.

There is nothing wrong with the Scottish Parliament examining the issue of damage in general. If MSPs thought that the traditional common-law marks of damage were not sufficient to allow people whom they thought had a rightful claim to compensation to be compensated, that would be a perfectly reasonable enterprise for the Parliament to engage in, but only if it considered the issue in the round and thought about when exposure to risk should give a right to compensation. It is an incomplete and rather unsatisfactory way of proceeding to simply pluck from the general population one category of people who have inhaled one type of substance and to say that those people, who according to orthodox principles are well, will now be called unwell.

Stuart McMillan: I am sure that the Cabinet Secretary for Justice will take on board your comments about damage in general when he reads the *Official Report* of today's meeting, but the bill focuses on a specific area. Do you agree that MSPs and the Parliament can make decisions in this area, if they see fit to do so?

12:45

Dr Hogg: Yes, but after I read the bill it was not clear to me why you want to tell a category of people who, according to the rules of delict that we have had for hundreds of years and according to medical criteria, are not injured that they are injured and to give them the right to compensation. As an academic who has an interest purely in seeing that the law is generally coherent and sensible, I am entitled to ask why the Parliament wants to do that, but nothing that I have been able to find out about the background to the bill has provided me with an answer. I suspect that it wants to do it because it does not want to appear unsympathetic to people who, quite reasonably, are anxious about their state of health and because not doing what it proposes to do would make it look cruel and unconcerned about such people, as lawyers are typically accused of being. You must look below the appearance of generosity that the Parliament wants to give and ask whether you are acting for sound reasons that make sense according to the law as a whole, within which you must operate and for which you must legislate. That is the issue that concerns me.

Stuart McMillan: I am sure that all MSPs want to ensure that justice is done for everyone in Scotland.

Dr Hogg: I do not doubt that; I am questioning whether in this case justice will be done. The common law on damage that we had for a long time has ensured that justice is done. It has allowed reasonable claims to come to the courts, but it has said to people who have not been and may never be injured that they should wait to see whether they have been injured. If they have, they are entitled to compensation according to all the rules that we operate. If we jump the gun, we will open up a can of worms around compensating people merely because they have been exposed to risk. No legal system of which I know has gone down that road.

In my submission, I mention that in the US, which has much more history of dealing with asbestos claims, the three states with most experience in that area have done the exact opposite of what the Scottish Parliament is proposing to do. They have said that they want not to channel funds to those whom they call the worried well but to ensure that people have genuinely recognised asbestos-related injuries before they bring claims. If we ignore that great experience from comparable jurisdictions, we will make Scots law look rather foolish and will give the impression that we are rushing into doing something without considering properly the issue and the experience of other jurisdictions that have much more history of dealing with asbestos claims.

The Convener: Dr Hogg, you have anticipated Nigel Don's question. Would the member like to raise any further issues?

Nigel Don: Dr Hogg, you will have heard my exchange with Professor Seaton. Will you comment on the logic—I hope that it can be described as logic—with which I finished? We seem to agree that, whatever the cohort in which someone started, once they have been diagnosed with pleural plaques they are part of a group of people who appear statistically to be at higher risk of developing mesothelioma. At that point, there is the trigger of a perceivable injury—the anxiety that results from their knowing that they are at greater risk than they were before they had that evidence.

Dr Hogg: You are correct to say that such people are aware that they are in a category of persons who are at higher risk of developing mesothelioma. The question is, should that knowledge, coupled with anxiety about the issue, give rise to a right to claim damages? There are many situations in which people become aware that they are at greater risk of an injury in the future, but in general we do not say that merely coming to know that they are at greater risk of injury gives someone a right to damages, for the simple reason that that would cause a huge

amount of litigation to compensate people who may never go on to suffer an injury.

Nigel Don: That is my legal question, which I think is a new one. You are right to say that we have not done this before. The issue that we are looking at may be the corollary of the extra salary that we pay to people who do dangerous things.

If someone wants to do a seriously dangerous job—I am not sure what such jobs might be, although working offshore is certainly one—their income will to some extent be greater as an economic consequence of the risk that they choose to take.

Dr Hogg: Yes, but that is a matter of contracting—

Nigel Don: I see that Professor Seaton is shaking his head. I know that the agricultural industry, for example, is dangerous and yet agricultural wages are low. Other things being equal, however, there would be—

Professor Seaton: With respect, that is a terrible misconception. The Scottish Trades Union Congress got rid of the concept of danger money years ago—thank goodness.

Nigel Don: The STUC might have got rid of it, but in reality we routinely pay people more for doing dangerous things than for doing undangerous things.

Dr Hogg: It is right to point out that anxiety can be compensated, but traditionally the law in Scotland, England and other jurisdictions has allowed that anxiety is only compensated if it can be connected to a recognised, present personal injury. If someone has a physical injury that is beyond doubt and they are worried that it might lead to the risk of another injury in the future, that can be compensated as part of what in law is called solatium—compensation for pain and suffering.

As a check on the flood of claims that could arise, however, the courts have always said that that anxiety must be attached to a demonstrable, present personal injury. At the moment, pleural plaques are not considered to be a personal injury for the reasons that I have stated, and I would not want them to be. That is how anxiety fits into the picture. We do not help people who are anxious and not yet unwell if we fuel their anxiety by saying, "We think you should be given compensation for your condition."

One of the committee members asked whether it is just lawyers who create the anxiety. It is not, but a piece of parliamentary legislation could add to that anxiety if it tells people who are well that they are in fact unwell, as section 1 of the bill does.

Nigel Don: We acknowledge that we are developing and changing the law in a direction that you perhaps feel is bad and which is certainly not the direction in which we have gone historically. Is there not a case for developing in that direction, in that people are, perhaps, entitled to be anxious if they find themselves in a category of people who appear to be at a greater risk as a result of what someone did to them—or as a result of what someone did not do to protect them?

Dr Hogg: That would be a legitimate development if it was done in a consistent, joined-up way, by examining the whole issue of risk exposure in law. Risk exposure is a notoriously tricky subject: the House of Lords has examined it in a number of cases in recent years, with regard to what kind of risk should or should not give rise to compensation.

Simply plucking one group out of the population and saying that their exposure should give rise to compensation is not carrying out law reform in a sensible fashion. I suspect that if the silica lobby or the bauxite lobby had lobbied a bit harder, they might find that they, rather than just the asbestos lobby, were included in the legislation that is before us today.

The job of members of the Scottish Parliament is to take an overall view of the law, rather than simply to listen to one particular group and say, "Well, we feel sorry for you so we will compensate you." As MSPs, you are the guardians of the whole of the law, and if you want to carry out that very rare act of involving yourself in the law of obligations—a largely untouched area of law—you must have clear and sensible reasons for doing so, which should relate to the fundamental idea of when someone is injured.

That is what I want to lead you back to: every legal system struggles with the idea of when, for the purposes of a delict claim, someone is injured. From what I have heard about the parliamentary deliberations on the matter, I have not yet gained a sense that you as MSPs have thought really hard about why you want to change the marks of injury to include simply exposure to risk, and where it might lead if you were to make that change.

Paul Martin: You suggest in your written submission that a more appropriate regulatory framework could be designed to hold those who negligently expose people to asbestos to account. Can you give us an idea of how you envisage such a scheme working, and the compensation that victims could expect?

Dr Hogg: I am not even sure that compensation would necessarily be involved. There are two ways to approach the matter. One is to firm up the rules about people being exposed to noxious

substances. That approach could be developed—although it is not an issue that I have thought about in depth; I merely suggest it as an alternative, by way of trying to prevent the exposure from happening in the first place. That would, of course, have costs to industry and occupiers of buildings.

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

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

Paul Martin: I take you back to the issues around potential litigation in other areas and other industries. Do you accept that exposure to asbestos is a specific area and that, as the Cabinet Secretary for Justice has said, the issue needs to be taken forward, to recognise the wrongs of the past?

Dr Hogg: It represents the biggest incidence of exposure to a noxious substance that can lead to symptomatic conditions—although I am prepared to be corrected by my medical colleague. However, it is not just a numbers game. If there are other categories of condition that might begin as asymptomatic conditions but which could go on to become symptomatic conditions, it seems rather unfair to people in those other categories not to consider their symptoms.

In Florida, it has been decided to legislate not simply on asbestos, but on silica. The legislators there have considered the issue in a broader context.

Paul Martin: Do you accept that this is an issue for Parliament?

Dr Hogg: Of course it is.

Paul Martin: I appreciate your commentary on the matter and your academic contribution, but it is for parliamentarians to consider the issue. In considering how to proceed with the bill, they should not be affected by the fact that somebody else might wish to highlight their own case. Why should that affect us?

Dr Hogg: I was suggesting that sensible law reform would consider the issue of exposure to noxious substances, which creates risk in the round. Doing things a little bit at a time is not, in my opinion, a coherent way of reforming the law. If you were just to consider asbestos, that would mask the underlying problem, and it would mean tinkering with the rules governing when there may be actionable damage. To consider one thing at a time plasters over the underlying problem. It would mean tinkering with well-established rules about when someone has suffered a personal injury. I suggest that picking out one condition, for no apparent reason as far as I can see—apart from its producing the greatest number of cases—does not give a good impression on the international stage.

Paul Martin: Why do you say that the rules are well-established?

Dr Hogg: Over hundreds of years, people have brought litigation before the courts in which they say, "I have been injured." Over a great period of time, the courts have developed the idea of when somebody should be considered to be injured. The sands of time have helped to identify the marks of harm that the legal system recognises. To change one of those long-established marks of harm without seeming to know why is a slightly dangerous thing. The common law of delict and of obligations in general works very well, because it has involved a great sifting of the rules over a long period of time, at the end of which good sense and justice seem to have prevailed. Suddenly, however, we seem to be changing tack, and I am not quite sure why.

13:00

The Convener: Stuart McMillan has one brief further point for Professor Seaton.

Stuart McMillan: Towards the end of paragraph 6 of your submission, you say:

> "They indicate that some asbestos has passed through the lungs and reached the lung lining and has then been inactivated by a scar reaction. They do thus represent an injury in the sense that a scar on the skin represents a previous cut or burn."

I will describe the first point that came to my mind when I read that, on which I would like clarification. I will take the issue away from pleural plaques and asbestos-related conditions to another walk of life.

If somebody is injured or burned when using equipment or raw materials at work because their workplace has not complied fully with health and safety legislation, and if that injury or burn is not life threatening, should they be allowed to claim for damages?

Professor Seaton: You know that I am not a lawyer; the issue is for lawyers to comment on. I understand that compensation for an injury requires a calculation to translate the severity of that injury into monetary terms. It does not compensate people for anything, any more than paying people money for anxiety makes them less anxious—it certainly does not achieve that.

In law, an injury might be regarded as a serious injury if it caused pain and suffering, which would be compensated, or it might be regarded as a trivial injury. If someone scratched their finger at work, they probably would not sue for damages, although I am sure that they would be entitled to. The law might take the view that that was a trivial matter on which to go to court.

My point is that something has happened in the body when a person gets a pleural plaque—a lawyer who gave evidence earlier explained what might be happening. However, a pleural plaque causes no pain or suffering and implies no further illness in the future. In those circumstances, I would have thought that a judge might decide that the condition was not worthy of any financial reward.

Stuart McMillan: Your submission says that an injury has occurred. It says:

"They do thus represent an injury".

Professor Seaton: If you are going to change the whole law on the basis of a strict interpretation of injury as something that can be a scratch, the answer is yes—I am being honest. It is some sort of injury; it is the healing process of an injury.

The Convener: This is actually a legal point, so I ask Dr Hogg to speak briefly.

Dr Hogg: The question of scarring is interesting. We tend to associate a scar with a visible injury. As my submission says, the physical appearance that we present to the world is important. That is why external alterations to our bodies, such as a scar, can constitute injury, even if we do not suffer pain—although that would generally occur with a scar—and even if no physical impairment is caused.

The problem with pleural plaques is that the word "scar" is used to describe them, but not in the way that a lawyer would think of a scar—as a visible injury. I understand that it means a fibrous tissue change around the asbestos fibre, which is really an internal cellular change. However, the word "scar" triggers in many people's minds the idea that pleural plaques are therefore injurious. If we return to the legal marks of an injury, we discover that pleural plaques are not injurious, because they do not cause physical impairment, pain or suffering or a visible change in the person's appearance. That is why pleural plaques are not an injury, whereas an external scar is and would be compensatable, as long as it were more than a tiny scratch, which would be a de minimis injury in law.

Stuart McMillan: We are not focusing on a small scratch that somebody gets at work, which could happen in any workplace. You made a point about whether there is external, visible scarring, but a pleural plaque is still a scar, albeit an internal one.

Dr Hogg: Using the word "scar" is one way to describe a pleural plaque, but it leads people to think that there must be an injury. In a pleural plaque, the cells cluster around a fibre of asbestos and, in an attempt to destroy it, they die and create a fibrous deposit. If we explain it in that way and take out the word "scar", it is less obvious, even to the layperson, that the pleural plaque should be called an injury. When we use the word "scar", it conjures up ideas of injury.

My point is that it is important to remember that, where a scar is an injury, it is visible. Where there is simply an internal cellular change that we could call a scar if we wanted to use that word but in relation to which no ill-effects are produced, calling it a scar can lead people to the wrong conclusion that it is injurious.

The Convener: Thank you, gentlemen. That was extremely helpful.

13:06

Meeting suspended.

13:07

On resuming—

The Convener: I welcome our final panel of witnesses. I apologise for the fact that you have been kept waiting for so long, but you will appreciate that the matter is important and we require to be as thorough as possible.

The final witnesses are Frank Maguire, solicitor advocate at Thompsons Solicitors; Phyllis Craig, senior welfare rights officer at Clydeside Action on Asbestos; and Harry McCluskey, secretary of Clydeside Action on Asbestos. Mr Maguire, we are grateful for the long, detailed submission that you gave us, which is helpful and which means that we can move straight to questions.

Bill Butler: Good afternoon, colleagues. In written evidence to the committee, to which I have

already referred, Professor Anthony Seaton refers to pleural plaques as

"harmless indicators of past asbestos exposure"

that are

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

How do you respond to that statement?

Frank Maguire (Thompsons Solicitors): It seems to be a variation on the scan van idea—the idea that cases are somehow being provoked by other people such as lawyers or claims farmers. It is suggested that those people are out there trying to find people who might have been exposed to asbestos, getting them X-rayed or CT scanned to find out whether they have pleural plaques, and taking forward claims. That just does not happen, as far as our cases—and those of other lawyers whom I know—are concerned.

What happens is that the person is of an age at which they have medical problems, such as breathing problems or whatever, and they go to their GP or to the hospital for investigation. The finding of pleural plaques might or might not be incidental. The person might have a breathing problem to which pleural plaques would be relevant, or they might have a different scan because they have a heart problem. The doctor tells them about the findings on the X-ray or the CT scan, including the findings other than pleural plaques if there are any, and then—rightly—tells them what those findings might mean. The findings could signify that the person has been exposed to asbestos to such an extent that they have an increased risk of getting one of the more serious conditions. That is what the doctors do.

When a person gets such information, they ask themselves what they can do. One thing that they can do is find out what rights they have. After such a meeting, they might go to Clydeside Action on Asbestos, which gives them advice on their rights. Those rights reflect how they react. People are not only anxious—they come away from the meeting angry because someone has exposed them to asbestos to such an extent that their life may be threatened. When the person goes to see a lawyer, they ask whether they have any rights and the lawyer says that they do. They have the right to call the company or employer to justice and find them liable for breach of statute duty or common law duty. They have a right to compensation for the anxiety that has been caused because of what the company or employer has done, and that gives them a resolution or the beginnings of a resolution. They recognise that someone can be called to account, which may somehow assuage their anger. There is recognition that they have been harmed and that they will get something for their anxiety, which is all that the law can do for them. We also tell people that they have a right to return to court. If they establish those two things, they can return to the court for a claim to be made if they get mesothelioma, diffuse bilateral pleural thickening, asbestosis or lung cancer. That is another concern that they have. They worry about what will happen to them and their families if they get one of those conditions.

Justice gives the person a recognition that they have been harmed and that someone is being brought to account for that; it gives them something for the anxiety that has been caused; and it gives them resolution in respect of what may happen in the future. I hope that when a person has been to see a lawyer or Clydeside Action on Asbestos, they go away reassured or comforted having been told what may happen.

Lawyers are not medical people. The information that we receive and give to clients is from medical experts. We say that the medical expert has said what the risks are—we say the same thing that Professor Seaton says. We make up nothing. People get further reassurance from us. They are told what the position is by their medical adviser and by us. However, some people do not worry much, matters prey at the back of some people's minds, and some people are very worried no matter what one does.

13:15

Phyllis Craig (Clydeside Action on Asbestos): Professor Seaton is perfectly entitled to hold the opinion that he holds, but I do not think that it represents what the majority of medical professionals think. For the record, I have papers on plaques that I would like to hand in today. I have asked for the opinions of chest consultants, palliative care consultants and oncologists who have looked after people with plaques and other conditions.

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

Let us turn to the kind of educational programme that people could be offered. One of our clients with pleural plaques has a husband and brother

who also have pleural plaques. Her other brother was also diagnosed with the same condition. Sadly, he died earlier this year of mesothelioma. Many of our clients talk of family members, others in their community and former work colleagues who have pleural plaques. Often, they tell us that they have watched loved ones and friends develop mesothelioma as a result of exposure to asbestos. If that is what they have witnessed, how can educational programmes help by saying, "Don't you worry. These plaques will never hurt you."

Perhaps the insurance industry wants doctors not to tell people that they have pleural plaques. As we say in our submission:

"In an article, initially reported in the Insurance Times 31/1/08, it was revealed that U.K Justice Minister Bridgette Prentice had accused the insurance industry of asking doctors not to tell their patients they had pleural plaques."

Is that an example of an educational programme?

The committee heard earlier from Professor Seaton, whom I respect, but with whose opinion I disagree. Medical opinion often changes. Indeed, not so long ago, a case of lung cancer but no other radiological evidence of an asbestos-related disease would have merited no compensation. Legislation changed that. We have to take on board the fact that the people about whom we are talking have been negligently exposed to asbestos and that a physical change in their lungs causes them severe anxiety. The situation is compounded by the fact that they have seen family members who were also exposed to asbestos develop conditions that led to their death.

Harry McCluskey (Clydeside Action on Asbestos): I have worked for many years as a volunteer, including with Clydeside Action on Asbestos. To my knowledge, over the past 25 years or more, a diagnosis of pleural plaques has always resulted in compensation being paid. However, the insurers are now telling us that, in medical terms, pleural plaques are harmless and that they do no damage to the lungs. It has taken the industry quite a long time to come up with the report, given that it has paid out over all the years.

As others said today, pleural plaques are a scarring on the lungs. For something to be scarred, it has first to be cut. If someone cuts into something, a certain amount of damage is bound to result. Pleural plaques can and do cause breathing problems. As others have said, the most serious aspect of the condition is its devastating nature. I put a different light on it: I call it a disease on the mind. That is exactly how I and other victims see it.

When a victim is first diagnosed with pleural plaques, he is told that that is what he has got. That might not mean too much to him, but it is a different ball game when he is told that the cause was inhaling dangerous asbestos fibres. Earlier, we heard about the worry and anxiety that that brings into someone's life. That is exactly how it is: worry, stress and fear, not only for the victim, but for their family, too.

Over the past few years, we in Clydeside Action on Asbestos have had quite a number of cases in which victims have come to us after being diagnosed with pleural plaques and have later gone on to develop mesothelioma or lung cancer and have died. We have many cases of that. To me, there should be no argument today. Pleural plaques should be fully compensated, as should pleural thickening and asbestosis.

All five types of asbestos-related disease that I know of are incurable. Three of them can be progressive and the other two are terminal. If a victim develops one of the three progressive types of asbestos-related disease, he can still go on to develop one of the other terminal diseases and die. The victim does not have much going for him.

Let me give one more true fact. I had four very close friends—ex-workmates—who, like me, contracted an asbestos-related disease. They worked with me in Clydeside Action on Asbestos to help other victims. Sadly, three of them went on to die of mesothelioma and the other died of lung cancer through asbestos. I heard the good professor talking about a million-to-one shot, but that is pure rubbish as far as I am concerned. It might be pointed out that I am still here, but my four friends are away. I do not have an answer to that, but I can say that, as I said earlier, this is a disease on the mind. It is there 24/7. Tomorrow, it could be my turn. That is the way that I have got to look at it.

Bill Butler: Thank you, Mr McCluskey.

Convener, Ms Craig mentioned medical evidence that is contrary to that which we heard from the good professor. Could that evidence be submitted to the committee for our consideration? I know that we will take oral evidence next week from those who take a contrary medical view to that of the professor.

The Convener: It would be useful if that could be provided, Ms Craig.

Phyllis Craig: Yes.

The Convener: Thank you.

We have got a lot out of those answers. We will proceed with the next set of questions, which is from Paul Martin.

Paul Martin: What difference does a compensation award make to someone who has been diagnosed with an asbestos-related disease such as pleural plaques?

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

If you are asking what the amount of money means to people, you could ask what such money means to anyone who has mesothelioma, or what it means to anyone who was physically abused. It does not mean anything, but it is the only remedy that people have.

Harry McCluskey: As a victim who was diagnosed with an asbestos-related disease—I worked as a lagger—I had to take early retirement. I previously earned a good wage, but now I cannot work. I live on the mere money that I can get from the social, which is not very much. I would certainly be worthy of any compensation that I got. It is much needed. I could then help my family out.

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

Paul Martin: Professor Seaton talked about the anxiety that is caused as a result of the legal profession's pursuit of a claim. Do you think that that is the case in respect of your firm or any other firm?

Frank Maguire: As you know, we deal with around 90 per cent of the cases and the remaining 10 per cent are dealt with by trade union lawyers and other extremely responsible lawyers. The situation in Scotland is not like that in England and Wales, which might be questionable in some respects. I do not know any lawyers who go out to farm claims. We always receive the cases from a group or a trade union or via the medical profession.

Des McNulty: I would like to draw on your long experience of dealing with these matters. This morning, we heard, from the representatives of Norwich Union and Zurich Assurance in particular, some dramatic estimates about the number of potential claims and the implications for employer premiums as a result of the proposed change in the legislation. Based on your understanding of the number of claims coming through the system and the exposure of those and other companies, can you shed any different light on what we were told?

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

Our database does not support the wild figures that you heard earlier, which are accompanied by the assumption that scan vans and so on would be used, but we have never worked like that in Scotland. My estimates are based on empirical data. We get 200 claims a year, and I can see no great reason why that would not continue.

On the exposure of the various parties, our database allows us to see who the defender is and who the insurer is for individual cases. We can also tell whether the insurer is the sole responsible party or whether there is more than one responsible party. We do not have that information for about 25 per cent of the cases, as we are still investigating them. It might be that no defender can be found or that there is a solvent defender with no insurance. In about 77 per cent of the cases, however, we can identify the relevant information.

On our database, there are 567 cases, of which Norwich Union has 3.52 per cent. Of that number, it is the sole defender in 1.23 per cent and part of a multidefender situation in 2.29 per cent. Obviously, the 1.23 per cent of cases for which it is the sole defender represents a greater cost to the company than the 2.29 per cent in relation to which there is shared liability.

Royal and Sun Alliance has 4.46 per cent of our cases. Of that number, it is the sole defender in 1.06 per cent and a joint defender in 4.4 per cent.

Zurich Assurance has 7.48 per cent of our cases. Of that number, it is the sole defender in 2.82 per cent and a joint defender in 4.76 per cent.

Those are the figures on the exposure of the commercial enterprises, based on empirical data. I

regard their exposure to the impact of pleural plaques cases in Scotland as minimal.

13:30

Des McNulty: Just to put a number on it, let us assume that an insurer was responsible for 10 per cent of the claims in Scotland. What would that amount to in pounds?

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

Des McNulty: How much would the claims be for?

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

The Convener: Mr Maguire dealt with scan vans in his response to earlier questions, so we will move straight—

Phyllis Craig: Sorry, could I make a point about scan vans?

The Convener: Very briefly.

Phyllis Craig: The insurance industry's submissions referred to scan vans, but we have come across scan vans only from clients who have enlightened us that they were subject to X-rays carried out by their employers after their asbestos exposure. That was done to ascertain that they did not have pleural plaques although, because of the latency period, pleural plaques would not have shown up anyway. However, if pleural plaques are not dangerous, why would an employer expose people to radiation when there was no need to do so?

The Convener: You have posed the question. Thank you for that intervention.

Frank Maguire: Convener, as I gave out a lot of statistics and numbers, would it be helpful to give you a schedule that provides a profile of the cases? I have not calculated percentages, but I can give them to you by e-mail if you like, although they are available from the evidence anyway.

The Convener: It would save our having to calculate them if you did that.

Margaret Smith: Does your set of figures include what you regard as the state's potential liability as well as that of insurance companies?

Frank Maguire: Yes, the state liability figures are included.

Margaret Smith: That is fine. We can put that into evidence. I just wanted to check that we had both sides of the equation.

Frank Maguire: The figure for the British Shipbuilders Corporation is 16.74 per cent, but the biggest one is for the Iron Trades Insurance Group, which is basically a run-off company of Norwich Union and is not a commercial enterprise; it has a finite estate, which someone administers, but it does not get any premiums or do any business.

Margaret Smith: We heard earlier, and have just heard again to some extent, about the potential impact on premiums and on insurance companies and about the commercial nature of insurance companies. My salary and allowances are in the public domain and members around this table are well used to what we get paid being subject to public scrutiny. How do you respond to the criticism that the legal profession, rather than those who suffer from pleural plaques and the anxiety that they might bring, will be the primary beneficiaries of the bill?

The Convener: Before you answer, Mr Maguire, I note that we have received a late submission from the Law Society of Scotland that details the fees. However, do you wish to augment that information?

Frank Maguire: Yes, I was going to mention that as well. Obviously, we must watch out for claims farmers and percentage claims companies that take away a swatch of someone's damages. In my firm and in other trade union firms, we separate the compensation award from the court costs. The auditor of court assesses the court costs and decides whether they are reasonable or necessary, so they are objectively referenced. Those costs include outlays for medical records, court dues, health and safety experts and medical experts. In addition, the lawyer has taken on the risk of the case being lost, which may mean exposure to tens of thousands of pounds in costs.

In so far as Thompsons and the trade unions are concerned, the member gets the compensation and the lawyer gets the court costs. There is no question of the client's claim being eaten into by a lawyer taking a 25 or 30 per cent cut, which can often happen with damages. The client gets the damages and we get the judicial costs, which are objectively justified. We are able to do that because we have built up expertise. I have a whole department dealing with nothing but asbestos cases. We have economies of scale and data. We do not reinvent the wheel every time; we know who all the defenders and witnesses are, and we are therefore able to do what we do competitively and efficiently.

The defenders are now recognising that if they do not admit liability, if they go hard on the time bar or if they argue among themselves, the costs of the case will increase. There is nothing that I can do about that. If they do not recognise it, I

have to get the evidence and information, and do the representation in court to get that.

Dr Abernethy mentioned the industrial diseases pre-action protocol, which we have been involved in, along with the Law Society and defenders firms. In my paper and in that of the Law Society, the committee can see that there is now a way in which we can get liability admitted early, the diagnosis agreed early and the compensation paid out quickly. The fees for that kind of case would be about £1,900.

Angela Constance: In your capacity as a lawyer, do you think that the bill has wider implications for the law of damages? It was suggested earlier that the bill is a fundamental assault on the founding principles of the law, which have been built up over a period.

Frank Maguire: There is a jurisprudential difference here. Dr Hogg is very much in the judicial supremacy area, which says, "Let judges get on with it. Do not interfere with them, whatever conclusions they come up with," whereas the real situation is that judges develop, interpret and apply the law. Of course, the Scottish Parliament can also legislate on issues that it perceives to be unjust or considers should be remedied. What is happening here is that the judges, through their orthodoxy, have reached a particular conclusion that is unjust. That is when an issue comes to the Scottish Parliament, for it to consider whether the result from the Scottish courts is unjust. That has happened time and again. This is not the only time that the Scottish Parliament has considered what the judges have done or have not done—this is not just civil law and criminal law—and has said, "We do not agree with that." Previously, before the Scottish Parliament, those injustices would have continued. Now that we have the Scottish Parliament, they are addressed and rectified quite speedily.

With regard to the Compensation Act 2006, the legislative consent motion passed by the Scottish Parliament represented a change to the conclusion of the House of Lords. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was another change that was introduced by the Scottish Parliament. Allowing grandchildren to claim, under the Family Law (Scotland) Act 2006, was another area in which the Scottish Parliament wanted a different conclusion from the one that the judges felt able to reach. The Civil Partnership Act 2004 allowed same-sex partners to claim. Even the reservation to go back to court is a creature of statute. The judges did not develop that; Westminster developed it in 1982.

There is this idea that we cannot go into the law and change it. Under the Protection from Harassment Act 1997, someone is entitled to civil damages for anxiety alone. That was felt necessary by the legislators, and therefore it is another area where we come in. The idea that there will be wide repercussions from these cases is wrong. This is not new. We have had compensation for pleural plaques cases for the past 20 or 30 years. All we are doing is saying, "Please clarify that we are still entitled to these damages." As the committee has heard in evidence, calcified pleural plaques are caused only by asbestos. There are no problems about other causes. These cases have been compensated until now and we want them to continue to be compensated. I do not see the great fundamentals of the law of delict being overturned or upset, but I do see that, on this occasion, the law of delict has reached a conclusion that is unjust and the Scottish Parliament can rectify it.

The Convener: I thank Mr Maguire, Ms Craig and Mr McCluskey for giving evidence. It has been exceptionally useful and the committee is obliged to you.

Harry McCluskey: I want to mention one thing. It is not only Clydeside Action on Asbestos. My friends at the back are from the Clydebank Asbestos Group, which has been actively supporting the bill from day one.

The Convener: I am sure that that is the case, Mr McCluskey. Thank you.

13:41

Meeting continued in private until 13:42.

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