JUSTICE COMMITTEE

Tuesday 9 September 2008

Session 3

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JUSTICE COMMITTEE
20th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*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)

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 GAVE EVIDENCE:

Paul Allen (Scottish Government Constitution, Law and Courts Directorate)
Fergus Ewing (Minister for Community Safety)
Catherine Scott (Scottish Government Legal Directorate)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Euan Donald

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 9 September 2008

[THE CONVENER *opened the meeting at 10:20*]

Interests

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. My first duty today is the pleasant one of welcoming Robert Brown to the Justice Committee. In accordance with section 3 of the code of conduct for members of the Scottish Parliament, I ask him to declare any interests that are relevant to the committee's remit.

Robert Brown (Glasgow) (LD): Thank you for that welcome, convener. I declare my membership of the Law Society of Scotland. Given some of the subjects that the committee is discussing, I should also declare my former partnership in, and later association as a consultant with, the firm of Ross Harper and Murphy, solicitors, in Glasgow. My connection with the firm ceased in 2005, so it is historical. Among other issues, I dealt with medical negligence and reparation actions, which included a small number of asbestosis cases. I acted for pursuers and defenders in different cases, although only for the pursuer in asbestos cases.

The Convener: I am sure that you will find the committee's work stimulating—there will certainly be a lot of it.

Decision on Taking Business in Private

10:22

The Convener: Agenda item 2 is to decide whether to take business in private. Do members agree that our future consideration of the draft report on the Damages (Asbestos-related Conditions) (Scotland) Bill be taken in private?

Members *indicated agreement*.

The Convener: I should have mentioned earlier that, unfortunately, Bill Butler has sent apologies for this morning's meeting, as he is unwell. We hope that he recovers quickly.

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

10:22

The Convener: Agenda item 3 is the Damages (Asbestos-related Conditions) (Scotland) Bill. I have two points before we proceed. First, I see from correspondence that the committee has received from Thompsons Solicitors that one of the companies that has a liability is AGF Insurance, which I worked with many years ago for a few years. I have not been in receipt of any money from the company for a considerable period, although, technically, it has contributed to my meagre pension fund. I wish to put that declaration on record. As members know, when the Parliament has dealt with asbestos-related matters previously, that connection has not inhibited me from voting in a direction that was not totally in the interests of insurance companies. I would not hesitate to do so again if the need arises.

My second point is that we have made strenuous efforts to take oral evidence on the medical condition pleural plaques from those who indicated in correspondence that the condition is an injury and one which should be compensatable. The people from whom we sought that evidence are hospital consultants. Like all hospital consultants, they are busy and so were unable to join us today. However, we have written evidence from them. The strength of that evidence is not diluted by the fact that they cannot appear personally.

Today's principal business is an evidence-taking session with the Minister for Community Safety, Fergus Ewing. I thank him for coming and bringing with him his officials, who are Anne Hampson, Paul Allen and Catherine Scott. I ask the minister to make an initial address, after which we will ask questions.

The Minister for Community Safety (Fergus Ewing): Good morning, colleagues, and thank you, convener. I declare that I am a qualified solicitor and a member of the Law Society of Scotland. I have a certificate to practise, although I am no longer in practice.

For more than 20 years, people with asbestos-related but generally symptomless conditions such as pleural plaques—which are scars on the membrane surrounding the lungs—have been eligible for damages under the law of delict, provided that negligence could be established. That came to be accepted as an established right. Last October, however, in the case of Johnston v NEI International Combustion Ltd, the House of

Lords ruled that pleural plaques are not sufficiently harmful to be eligible for damages. Although that ruling was not binding in Scotland, it was, in the legal sense, highly persuasive, and the expectation was that, here in Scotland, the right to damages for pleural plaques would go.

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

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

Thirdly, people with pleural plaques have a specific physical manifestation of asbestos exposure, which can cause them understandable anxiety for the reasons that I have just set out. That is notably the case because many people with pleural plaques live in our old industrial heartlands and will know, often from family experience, about the potential lethality of asbestos. Although the pleural plaques will not be outwardly visible, those people and their loved ones might have seen X-rays and might frequently see the scars in their mind's eye.

At Westminster, Dr Robin Rudd, an authority in the field, was quoted as saying:

"For many the anxiety is ever present. Every ache or pain or feeling of shortness of breath renews the fear that this may be the onset of mesothelioma. The anxiety is real for all and for some has a serious adverse effect on quality of life."—[*Official Report, House of Commons*, 4 June 2008; Vol 476, c 252WH.]

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

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

10:30

Hard-and-fast evidence was elusive. Unfortunately, insurers were unwilling or unable to provide hard data or estimates, despite our requests. Against that background, it is surprising that the insurance industry has more recently felt able to provide estimates—and they are very high estimates—of the costs that will arise from the bill. We do not find the figures credible, for three main reasons. First, the insurers assert that the costs for Scotland would be 30 per cent of the costs that the United Kingdom Government projects for England and Wales. That figure seems very high. Secondly, the UK Government's projection assumes that the volume of claims will potentially be more than 60,000 per annum. That is well above past experience. In the Johnston judgment, Lord Rodger said:

"For about twenty years pleural plaques have been regarded as actionable … this has not resulted in an unmanageable flood of claims".

Thirdly, the UK Government's projection assumes quite a high award level of up to £13,400 per claim, which is more than 50 per cent higher than we believe recent awards have been. We believe that our estimates, which are based on historical data, give a more realistic assessment. We are confirmed in that belief by a statement made by Deloitte, which estimates that the House of Lords decision could save insurers across the UK up to £1.4 billion over the years, which is one twentieth of the UK Government's equivalent prediction.

I do not want to get too far into commenting on the evidence of others at this point; I am sure that the committee will wish to put questions to me about that. For now, I conclude by recapping the Scottish Government's basic position. We lodged our short bill because, having listened to stakeholders, including parliamentarians, we were persuaded that people who have been negligently exposed to asbestos and who contract an asbestos-related condition, albeit symptomless, should still be able to pursue a damages claim in

Scotland. I believe that the bill will meet that policy objective without making any undue incursion into the general law of delict. More fundamentally, I am confident that the bill will ensure that the law of Scotland reflects our country's values and our expectations of how our fellow citizens should be treated. That is what the bill, and, indeed, the Parliament, are all about.

The Convener: Before we proceed with questions, I wish to follow up something that you said. You spoke about the consultation approach that the Scottish Government adopted for the bill. You will appreciate that the particular route that you took on this occasion is somewhat different from the procedures that are laid down and which normally apply. Would you like to comment on that?

Fergus Ewing: Certainly. As you say, the Government proceeded with a great deal of swiftness. We have of course consulted insurers and stakeholders. There was a consultation from February to April on the partial regulatory impact assessment, following the announcement last November by the cabinet secretary that we would be legislating.

The reason for our approach is simple. We felt that, in the interests of all those people with pleural plaques whose cases are currently sisted and awaiting settlement and who expected that, as was the case over the past 20 years or more, they, like others, would receive a settlement, we should not unduly delay or prolong their anxiety about their claims, nor should we prevent the legal process from bringing about the result that is the primary purpose of the bill: to restore the status quo ante and put the law back to what it was before. Over the past 20 years, those who had pleural plaques and everything that goes with them received compensation, and the insurers settled. Presumably, insurers took account of the costs of the settlements in their own premia-setting processes.

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

The Convener: I have no doubt that your alacrity is well intentioned, but, bearing in mind that the matter is turning out to be more complex than most of us had envisaged, it might well have been in the interests of everyone if you had gone through the normal consultation process. I hope that the Scottish Government will remember such considerations in the future.

We will now turn to questions. For reasons of cohesion, the questions will be asked under three headings: medical issues; legal issues; and pecuniary issues.

Robert Brown: Everyone in the committee has considerable sympathy with the issue and with some of the reasons for your policy, minister. However, you are faced with the problem that the view that was expressed by the House of Lords—including two Scottish judges who were in attendance at the time—was unanimous.

On the medical evidence, do you accept the reasoning as being a valid statement of the general principles of Scots law in this area, leaving aside the exception that you are seeking to make?

Fergus Ewing: We do not dispute the medical evidence that was taken. We accept that pleural plaques are not, in themselves, harmful and that they are symptomless, other than in exceptional cases. We accept that they do not cause or turn into more serious conditions.

It is fair to say that the Scottish Government's primary objective is to restore the law to what it was before. We think that that is correct on policy grounds. In my opening statement, I described the basis for that.

I think that it was Robin Rudd—whose evidence you will be familiar with if you have read the House of Lords judgment—who said that those who have been exposed to asbestos are 1,000 times more likely to sustain mesothelioma than the general population is.

Of course, pleural plaques are not the cause of mesothelioma; it is the exposure to asbestos that increases the risk of sustaining mesothelioma. Mesothelioma is a disease that kills and, as far as I am aware, there is no cure for it. It kills fairly quickly, as well—a length of two years has been mentioned in some of the medical advice that I have seen. I do not offer any medical advice today, but we all recognise—and, perhaps, know from constituency interests and general knowledge—that mesothelioma is a fatal disease. If one is diagnosed as having pleural plaques, one will almost certainly be aware of the increased likelihood of suffering a disease that is fatal. If that happened to me or to someone in my family, I would be anxious. Similarly, if it happened to someone in the House of Lords, they would be anxious.

We took that into account as one of the factors that I mentioned in my opening statement. We did so following a debate in Parliament during which I believe we received the support of most parties, including yours.

Robert Brown: Obviously, the central point in relation to the House of Lords judgment that you

are seeking to overturn is the medical finding that pleural plaques are, by themselves, symptomless and, in most cases, harmless. The ruling, therefore, fits with the general principle of the law. Does the Scottish Government have any evidence to the contrary, or does it accept that medical position? Do you have any evidence concerning not only a comparison between those with pleural plaques and the general population but a comparison between those who have been identified as having pleural plaques and the rest of the population who have been exposed to asbestos? In other words, evidentially, does it take you much further to know that people have been exposed to pleural plaques?

Fergus Ewing: I think that Robert Brown is asking on what basis the Government intends to overturn the medical findings of the House of Lords. However, that is not what we are doing. As I said, by and large, we do not dispute the view of the medical evidence that has been taken by the House of Lords or most of the evidence that was given by the insurance industry at last week's meeting of this committee. We are not overturning medical evidence—that is not something that Governments do. We are placing a different interpretation on the evidence. We feel that pleural plaques are not, in themselves, trivial, and that while they do not generally cause pain or have symptoms, one must consider the rest of the facts, namely, the increased propensity and susceptibility to dying due to contracting mesothelioma or bronchial carcinoma.

The second question raises the technical issue of the relative incidence of susceptibility between those with pleural plaques and those without pleural plaques who might also have been exposed to asbestos. As that is a highly technical area—although it is one in which we are not particularly challenging the evidence that was presented to the House of Lords—I would like the officials to have a stab at answering the question.

Paul Allen (Scottish Government Constitution, Law and Courts Directorate): The consensus of the medical opinion that we have seen is that people who are exposed to asbestos are at the same risk of mesothelioma, whether they have pleural plaques or not. The fact that someone has pleural plaques does not mean that they are more at risk of mesothelioma than one of their colleagues who worked the same hours in the same factory as they did. The difference that we see is that pleural plaques are an injury. I think that it was Lord Hope who said, in the Johnston judgment:

"Pleural plaques are a form of injury."

The question that we are considering is whether they are a trivial injury.

Robert Brown: You indicated that you think that there is no difference in the level of risk of developing mesothelioma between those who have suffered pleural plaques and those who have not. Do you have any evidence to offer the committee to back that up?

Paul Allen: I could check with our chief medical officer, who I believe has the relevant research, and write to you with it. My reading of what he has told us is that the balance is pretty much the same across the categories of people who do or do not have pleural plaques if they have had the same level of exposure to asbestos.

The Convener: We would be grateful if we could have that in writing at some stage.

Nigel Don (North East Scotland) (SNP): The evidence that I have heard from several places, including in this committee, is that, almost invariably, those who contract mesothelioma have pleural plaques. If that is the case, I can draw you a diagram that demonstrates quite conclusively that those who discover that they have plaques are at greater risk. They were not at greater risk when they were working, but it is quite clear that, at the point when they know that they have pleural plaques, they move into a section of the population that, at the end of the day, proves to have a higher incidence of mesothelioma. That is the case simply because no one who gets mesothelioma does not have plaques.

Paul Allen: I think that, if I get the chief medical officer to write to you, he will confirm that people who have mesothelioma are invariably found to have had pleural plaques. That is pretty much certain.

Robert Brown: On the minister's earlier reply on the causal connection between pleural plaques and mesothelioma, it is vital that we understand what is being said. My understanding of the evidence that has been heard so far is that there is no causal connection between pleural plaques and the later development of mesothelioma, apart from the fact that pleural plaques are evidence of exposure to asbestos in the first place. Would the minister like to revisit the wording that he used earlier, for the sake of clarity?

Fergus Ewing: I think that I was quite clear earlier. An increased risk of mesothelioma is caused not by the pleural plaques that scar the membrane around the lung—normally the parietal pleura, I believe—but by the exposure to asbestos that led to the plaques. The plaques are proof that someone has been exposed to asbestos. It is, therefore, the exposure to asbestos, evidenced by the plaques, that proves that someone has a greatly increased risk than the general population of contracting mesothelioma and a slightly less

greatly increased risk of contracting bronchial carcinoma.

10:45

Angela Constance (Livingston) (SNP): Given that the key issue is, as you have said, negligent exposure to asbestos, surely people without pleural plaques who have been negligently exposed to asbestos have a right to be compensated.

Fergus Ewing: That is certainly a line of argument. Pleural plaques offer proof that a person has been exposed to asbestos because there will be scarring. Plaques are internal scarring as opposed to external scarring on a person's body. You are right to say that other people in the population have been exposed to asbestos, but it is important to emphasise that the bill's purpose and scope are limited. We are proceeding on the basis of the law of delict. Compensation will arise only after there has been a breach of a duty of care under the common law or various health and safety statutes by an employer who has wrongly allowed employees to be exposed to asbestos, resulting in pleural plaques or either of two other asbestos-related conditions. Proof must be provided.

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

Angela Constance: I understand what you are saying about pleural plaques being proof or evidence of exposure to asbestos and about the bill's restricted nature, but are there other routes to pursue under the law for individuals without pleural plaques who have been negligently exposed to asbestos and can establish evidence of their past exposure to it—for example, if they can prove that there has been a health and safety breach?

Fergus Ewing: Persons who have been diagnosed with pleural plaques have a definite physical manifestation of their exposure to asbestos that will become a focus for their anxiety—indeed, the condition has been described as a ticking timebomb. Awarding damages for anxiety and risk alone has never been part of our law of delict. I understand the argument that you advance, but we do not propose to take it up in considering this bill, or any other bill. I stress for readers of the *Official Report* of this meeting that the bill is tightly framed. It is designed purely to restore the right of action to those who enjoyed that right before; it is not designed to extend that right in any way. It is important that I state that clearly for the record.

Angela Constance: I understand perfectly the point that you make, but I am simply trying to establish whether other avenues already exist for people without pleural plaques who have been negligently exposed to asbestos and can provide evidence of that. Is there an avenue that they can pursue in Scots law other than the avenue proposed in the bill?

Fergus Ewing: That question is for a lawyer in practice to advise on rather than me—I am not in practice. I am not aware of any legal redress that such a person would possess under Scots law, but there may be learned friends out there who disagree with me. The advice that I have received is that there is no such legal redress in the law of Scotland. That is where we stand. I am pleased that I have had the opportunity to state that clearly for the record on the Government's behalf.

The Convener: I tend to agree with the minister, but we will get information on that matter for the member. We have spent a long time on the first issue, as it is important, but I think that everybody is now clear. We shall move on.

None of us is in the business of making life worse for people. However, it was suggested last week that, by legislating, the Government could worsen the condition of people with pleural plaques through increasing their anxiety. Do you agree with or refute that argument?

Fergus Ewing: I do not really understand it, as the bill will restore the right to receive compensation to those who can prove that their pleural plaques arose as a result of negligence by their employers. As a result of the bill, people in such a situation will be entitled to receive compensation and will therefore be in the position that similar people were in until the House of Lords judgment. It might be better if I understood the argument, but I dismiss it anyway.

It is not only the money that is of comfort to people who pursue such claims—the finding of fault and the acceptance of responsibility are also of comfort. Giving back to people the rights that they have enjoyed for the past two decades and that they expected to continue to have will be likely to allay rather than cause anxiety.

Stuart McMillan (West of Scotland) (SNP): The insurance industry has suggested that as many as one in 10 of the adult population has pleural plaques. Professor Seaton's best estimate is that around 55,000 males in Scotland have pleural plaques. What is your assessment of the

prevalence of the condition in Scotland? What is the basis for your calculation?

Fergus Ewing: I read the *Official Report* of last week's meeting carefully and, if my memory serves me correctly, it was Professor Mark Britton who referred to the estimate that one in 10 people may have pleural plaques, but that was not his opinion; he quoted that statistic after hearing it from somebody else. If that is the case, there has been a form of medical hearsay. Later in that meeting, Professor Seaton was helpful in expressly saying that there was no scientific basis for the one in 10 figure. I think that the figure is therefore anecdotal evidence that may or may not have emerged from what a pathologist said to somebody at some time in the past. No scientific data on the matter exist.

On Professor Seaton's prediction, the bill's rationale, as set out in the policy and financial memoranda, which members will have read, clearly recognises that there are factors that are difficult to pin down when we make projections. Any estimate is an estimate, and we are making a forecast. We have sought to use the historical, empirical evidence that exists. We have considered the number of people who have pursued claims and have based our estimates of the bill's likely costs on the evidence of what has actually occurred. We recognise that, for various reasons, not everyone who has been entitled to make a claim has done so. It is accepted in the medical evidence that pleural plaques have a long latency period—it can be 20 or 30 years before they manifest themselves, presumably as the fibrous tissue seeks to cover the asbestos particles in the membrane or pleura surrounding the lung. Therefore, there are several variables.

Professor Seaton, the UK Government and the Association of British Insurers have all offered opinions—somewhat doom-laden predictions—but we have preferred to proceed on the basis of what has actually happened. I think that we will consider that evidence further, and I am certainly prepared to discuss it at length, but that has been our rationale. Rather than pick one expert who says that the number of people with pleural plaques is X thousand and another who says that it is Y thousand, we have considered what has actually happened. We have considered the number of cases that have been pursued and have identified that evidence as the yardstick for estimating the bill's costs, which are, of course, really eliminated savings, because they are costs that applied before the House of Lords judgment. Before that judgment, insurance companies were paying those costs and charging premiums. The term "increased costs" that they use is a slight misnomer; they will simply not make savings that might otherwise have arisen.

The Convener: Leaving aside the one in 10 figure, although we recognise the rationale behind the calculation of costs, which we will come to later, the 55,000 figure did, in fact, have evidence to back it. Has no empirical study been carried out on the likely number of cases?

Fergus Ewing: I am aware that there are differing views on this matter. I certainly saw Professor Seaton's statement regarding the figure of 55,000. I think that I am right in saying that he said that the figure was based on a fairly simple calculation. I have not studied that, nor have I had the opportunity since last week to obtain any detailed medical opinion on his view, which I would really have to do. In the interim, I do not know whether my officials can offer anything else in relation to Professor Seaton's estimate.

Paul Allen: The chief medical officer for Scotland has confirmed that the position is as it is outlined in the UK Government's consultation paper: that there is no hard-and-fast evidence about the level of pleural plaques. There are best guesses on the basis of studies rather than a clear-cut picture. Nick Starling said in evidence last week that the insurers' estimate was that the level was up to one in 10, which obviously suggests that that is the maximum. We have no figures, and I am not aware of any clear figures on the level of pleural plaques in the population. What we are clear about is that the key feature for the purposes of the bill is the number of people who have been diagnosed with pleural plaques who wish to pursue their claim and can prove negligence.

Fergus Ewing: Perhaps I can just add that it was useful last week that Gil Paterson referred to the Health and Safety Executive evidence that, in 2006, an estimated 1,258 cases of benign non-cancerous pleural disease were reported in the whole UK. That evidence derives from reports to the THOR/SWORD/OPRA surveillance schemes in 2006. I appreciate that that information may be for a slightly different purpose than the one that is before us today, but I mention it because the HSE figures seem to give broad support for our modest prediction as opposed to the alarmist predictions at the other end.

The HSE has dealt with this matter because it is its job to do so in relation to claims under the industrial injuries disablement benefit scheme. The HSE statistics support our broad approach that Scotland has 10 per cent of the instances of asbestos-related diseases in the UK and not 30 per cent. That figure is very much in line with the HSE statistics, which are some of the few hard-and-fast, factual statistics that we have as opposed to projections and hypotheses, which I know we must consider as best we can. However, I submit that the HSE data are generally

supportive of the rationale that the Scottish Government has employed.

Stuart McMillan: Thank you, minister. I do not know whether you have seen the document that committee members received over the past few days from the Association of British Insurers entitled "The 2007 GIRO Conference UK Asbestos Working Party II". The information in one of the document's pages puts a question mark for me over the evidence that the insurance industry provided to the committee about what may happen in the future if the bill is passed. The document states that the projection is that the trend of decreasing numbers of pleural plaques claims will continue in 2007. It is a stark reduction, going from just under 6,000 in 2003 down to about 1,200 or 1,300 in 2007. That information seems to conflict with other information that the insurance industry has provided.

The Convener: I think that the minister is operating under a bit of a disadvantage. I take it that you do not have the document, minister.

Fergus Ewing: I am sorry, but I do not, so I think that it would be wrong for me to offer a comment on it. I can comment on evidence that has been given to the committee because I read the witnesses' evidence from last week's meeting in the *Official Report*.

11:00

The Convener: In fairness to you, minister, I think that you should restrict your remarks to that evidence.

Fergus Ewing: We certainly heard the evidence from the insurance industry at last week's meeting. We have sought to engage with the insurance industry. The Cabinet Secretary for Justice met industry representatives on 1 November 2007. Since then, officials have met other industry representatives, and Mr Swinney and I met representatives of Scottish Widows. We want to continue the dialogue with the insurance industry. That is the practical thing to do. I say that deliberately here today because that remains our position and I expect to continue to engage directly with the insurance industry. It performs a necessary role in society and is an important part of the economy—it has a job to do.

I was heartened to note, however, that Paul Martin secured the admission from Dominic Clayden at last week's meeting that, in fact, there may be no increases in premiums because of the bill. Indeed, the position seemed to be that the ABI was taking its position to avizandum, as it were, and intended to consider the bill after its passage was concluded. I am not sure that anything necessarily prevents the ABI from considering the bill as it is now. However, one prediction was that there would be no increase in the insurance premiums, which would be good news.

On the other hand, of course, there have been somewhat dramatic reports of extremely high costs. The ABI has come up with those figures, but we do not recognise the basis for them. Some of them seem to be no more than a form of economic embellishment or financial embroidery. We prefer our rationale of looking at the facts as they have been in Scotland, supported by the HSE and by the statistics that we have been able to glean from the Scottish Court Service on the number of asbestosis-related cases raised in Scottish courts. We are therefore looking at the facts. We also engage in conjecture, but we think that some of the figures quoted have been close to alarmist, so we do not acknowledge that they are likely to be valid or accurate.

The Convener: Thank you. We turn now to Angela Constance.

Angela Constance: I think that the question that I intended to ask has been well explored.

The Convener: You are happy with the answers that you got.

Angela Constance: Yes.

The Convener: That means that we can move on to the legal issues questioning, which will be opened by Nigel Don.

Nigel Don: Good morning, minister. I want to try to rationalise for the sake of our legal brothers what we think the basis of the bill is. I fully understand your contention that the Government is simply trying to restore the law to the way that it was previously. That is admirable. However, there is an argument that the House of Lords demonstrated that the law previously was wrong and that previous awards of damages were made on the basis that pleural plaques were an injury, although actually they are not. Therefore, there seem to be two ways of rationalising what we propose to do. One is to allow a claim for the anxiety, which we must all understand is real. The alternative would seem to be to allow a claim for the internal scarring on the ground that it is a physiological change. Do you accept that pleural plaques do not fall within the existing recognised principles defining physical injury in Scots law?

Fergus Ewing: No. We take a different view of the legal significance of pleural plaques. We do not dispute the medical evidence, but we reach a different conclusion from that drawn by the noble lords. We do not accept that one can disaggregate the scarring from the anxiety. A pursuer in a case is taken as a person in the round and more than just a part of the case is considered. What is considered is the effect that the pleural plaques

have had on his or her life, the person's age and circumstances and all the facts of the case.

Nigel Don: If the bill is passed, are you confident that the courts will not use it to extend the law of delict to cover exposure to other materials that, with the benefit of hindsight, are known to be dangerous?

Fergus Ewing: I am pleased that you asked the question, because I am grateful for the opportunity to answer it. In our opinion, there is absolutely no way in which the bill, if it becomes law, could be used to widen the extent of claims to include claims that are based purely on anxiety. That cannot happen. As I said, the bill was drafted specifically to secure its objective and to go no further, which is important—I am grateful to Mr Don for allowing us to confirm that the bill has been framed with that very much in mind.

Nigel Don: How would the Parliament and the Government respond to groups that might make a similar case, albeit that they might involve smaller numbers?

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

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

The Convener: To some extent you have again anticipated what Angela Constance was about to ask.

Angela Constance: The minister might be aware that when Dr Hogg gave evidence to the committee he asked why exposure to asbestos should be treated differently from exposure to other types of risk. He asked why people who have been wrongly exposed to asbestos should be treated differently from people who have been negligently exposed to substances such as

"coal dust, silica dust, bauxite dust, beryllium, cotton dust and silica and iron mixtures".—[*Official Report*, *Justice Committee*, 2 September 2008; c 1066.]

Those are all rather noxious substances, exposure to which is not in the best interests of people's health, as Dr Hogg made clear quite poignantly.

Fergus Ewing: I picked up a different aspect of Dr Hogg's evidence, which was about the Parliament's role in legislating. However, in the case of diseases that involve a significant element of pain and suffering, there is a clear entitlement to solatium. That applies to a great many conditions that are associated with coal dust. Therefore, such cases are already dealt with in the corpus of the law of Scotland.

We plan to do nothing further than legislate in the context of the bill.

Paul Martin (Glasgow Springburn) (Lab): I want to ask about the principle of the Parliament's ability to legislate independently of concern about what follows and the impact that the legislation might have. Surely the principle is that the Parliament should be allowed to pass legislation without being concerned about what follows. There might be arguments about that in the context of the bill, but why should we be concerned about claims that might be made as a result of the Parliament setting the principle? I just pose the question to the minister; I have no particular view on the matter.

Fergus Ewing: I am not sure that I entirely understood the question. If a cause arises in future on which the Parliament thinks that there should be legislation, I have no doubt that Mr Martin and other members will raise the issue and we will consider it. However, we are here today to do a specific job, which we will do.

If Mr Martin is asking whether the Government is trying to fetter the Parliament in any way, the answer is that of course it is not. I am here to speak for the Government, not for the Parliament. When we legislate, we must be mindful of the consequences, especially the costs, which is why we have gone to considerable trouble to set out a rationale for the estimate of costs to business of £5.5 million to £6.5 million per year, which is set out in the financial memorandum.

If Mr Martin wanted to introduce a member's bill to extend the right to claim compensation to other circumstances, it is plain that he would be entitled to do so and that we would debate the matter as and when it arose.

Paul Martin: I am sorry about how I posed the question; perhaps I can simplify it. Should parliamentarians who are considering the bill be concerned that the bill might have the knock-on effect of establishing a principle whereby other claims could be made? Why should we be concerned about what might arise if the bill is passed? If we were concerned about the knock-on effects of bills, we might not progress with a number of bills.

Fergus Ewing: I think that the technical answer to your question is that any act of Parliament will be interpreted by the court on its terms—and only on its terms. If something is not in the act, it will not happen. Again, I am not quite sure what you are asking—I am sorry if I am failing to comprehend.

Paul Martin: My question might have been answered. I was asking whether, if the Parliament interrogates a bill before passing it, we should be concerned about the knock-on effects and other legislation that might arise.

Fergus Ewing: I think that I understand what you are driving at. When we pass a piece of legislation, it is incumbent on the Government to be as clear as possible about its impact. In this case, we are concerned to restore the right to claim compensation to people who had that right, but we are also anxious to ensure that there are no further consequences. We have decided to right a specific wrong.

Of course, members and people who are outside the Parliament might argue that there should be other reforms. That will always be the case. However, such reforms will not arise from the bill and nor can the bill ever be interpreted as founding a claim in another area. It is important to make clear to insurers and business in general that we are legislating because we think that it is right to do so and that we are not planning to extend the approach to other areas. I am grateful for the chance to emphasise that to the people who will no doubt be interested in reading the *Official Report*.

Robert Brown: The minister has clearly explained the motivation for the bill and the basis on which the bill is progressing, with which I am inclined to agree. However, there is an underlying issue. What is the principle of the legislation? Is it a matter of extending, in a general sense, the definition of what constitutes injury in the common-law principles of the law of Scotland, or is it—as I think that the minister is telling us—a matter of saying, "Okay, whatever the general principle might be, for this particular establishable and supportable reason, we are making an exception to it for people who suffer from pleural plaques"? On what principle is the Government proceeding?

11:15

Fergus Ewing: Mr Brown has cleverly posed two alternatives, neither of which I entirely agree with. I was about to answer, "The latter," before I realised that Mr Brown was suggesting that we were proceeding to contradict the whole basis of the law of Scotland in relation to delict, which has developed over centuries.

We are simply restoring a right to claim for a specific group of people who have been wrongfully exposed to asbestos. That is it. We believe that those people have suffered an injury. We take a different view from that of the House of Lords on the significance of that. We are not granting a right to compensation on the basis that there has been no injury. There has been an injury. We differ on the conclusions that we draw about its seriousness. We do not believe that the injury is trivial and we have received about 250 testimonies to that effect from people who are involved. However, the bill respects the principles of Scots law in connection with delict.

Stuart McMillan: The ABI argued in written evidence that the bill contravenes the right of insurers to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to which article 6 of the European convention on human rights refers. Are you satisfied that, in departing from the House of Lords judgment, the bill complies fully with the ECHR?

Fergus Ewing: Compliance with the ECHR is of course one test that must be considered for every bill. We say in the policy memorandum that we are satisfied that the bill complies with the ECHR and no player has contradicted that view, but I am aware that the ABI has raised that as a potential issue.

Perhaps the ABI refers to the retrospective element. We want to ensure that cases that are sisted—cases that are on ice or in abeyance—will be able to be pursued. I understand that the ECHR does not outlaw all retrospection but permits an element of it. The retrospection in the bill is for a clear and manifest purpose. It will not introduce an entirely new piece of legislation but restore the law to what it was when those claimants consulted their lawyers and pursued their claims.

We have considered the argument, which we do not think has merit. I do not know whether Paul Allen or Anne Hampson wants to add anything on the ECHR, since the committee has raised the issue.

Paul Allen: The UK Government's consultation paper says clearly that the matter is for the Scottish Parliament, which suggests that it accepts that the bill falls within our devolved competence and implies that it thinks that the bill is within the ECHR. I do not know whether Catherine Scott has anything to say from a legal point of view, but my understanding has always been that the bill is ECHR compliant.

Catherine Scott (Scottish Government Legal Directorate): The Government considered article 6 of the ECHR as part of its preparations for introducing the bill. The Government is satisfied that the bill is not incompatible with the convention.

Robert Brown: I will ask about a technical development. Given the principle that a person may bring only one claim in respect of a negligent act—that is subject to rules about provisional damages—could the bill create a situation in which

someone who received compensation for pleural plaques might have difficulty in or be debarred from subsequently raising an action for a more serious ailment such as mesothelioma?

Fergus Ewing: I was about to offer a legal opinion, but I paused, because I am not entirely certain that it would be correct.

The Convener: I am sure that it will come with the appropriate health warning.

Fergus Ewing: In the old days, one would take several months before doing this kind of thing.

I understand that no difficulty exists, because of the Administration of Justice Act 1982—I will perhaps ask Catherine Scott to give me marks out of 10 in a moment. I understand that a claim for mesothelioma can be raised if that condition later develops. The Westminster Parliament introduced a provision on that in the early 1980s, to which Frank Maguire referred last week when he gave an example of a statutory measure that was necessary and of why one cannot always rely on m'learned friends in the House of Lords to do what people in society believe is necessary for fairness. I ask Catherine Scott to say whether that statement is correct, broadly speaking.

Catherine Scott: The Administration of Justice Act 1982 was considered while we drafted the bill. We are satisfied that the interaction with that act is effective.

Fergus Ewing: Angela Constance made the point last week that if someone raises an action for pleural plaques, that establishes exposure to asbestos. Many people who go on to contract mesothelioma die before their claims are settled, which causes great anguish and anxiety. I am not casting aspersions about who is responsible for any individual case. However, one argument is that when pleural plaques and negligence have been established, it is easier to sustain a successful claim for a life-threatening disease, if someone is in that unfortunate position. Angela Constance was right to raise that in her questioning.

The Convener: The issue has been canvassed.

Does anyone have other questions under the heading of legal issues?

Nigel Don: When should we discuss forum shopping? Many folk have worked both north and south of the border. Would no more than a week in a Scottish shipyard be enough to allow someone who habitually worked in England to bring a claim in Scotland? What is the legal and financial significance of that?

The Convener: The point is interesting.

Fergus Ewing: We have anticipated and considered the matter, which might be relevant if the Ministry of Justice in England and Wales decides not to introduce a counterpart measure. That would mean that the law in Scotland gave people a right to claim compensation if they could establish exposure and negligence, whereas that would not be the case in England and Wales. The advice to us is that people furth of the border could not succeed unless they established a substantial Scottish connection. The normal principles of jurisdiction apply, so forum shopping would not be easy.

The issue is relevant. I do not know whether Catherine Scott or Paul Allen has anything to add.

Catherine Scott: I support the minister. The normal rules of jurisdiction and applicable law would apply. Those rules are well established and are designed to address issues such as forum shopping. They would sort the matter out.

Nigel Don: I do not know what "substantial" means in this context. Will you quote a case or a number that shows us what it means?

Fergus Ewing: A separate corpus of law deals with establishing jurisdiction. That law has developed to ensure that Scotland deals with Scottish cases and not with cases from Panama, Uruguay or England, for example. I have no details of that law with me but, in preparation for today's meeting, I was advised that a substantial Scottish connection is needed. If someone had worked not in Scotland but in a shipyard in England, it is common sense that establishing liability would be difficult.

Nigel Don is right to raise the matter. The Scottish Government wants no dubiety about the issue, and we do not believe that it exists. Of course, that is another point on which we are happy to engage with all the interested parties, such as the ABI and the Law Society of Scotland, which supports the bill, as does the Faculty of Advocates. We are concerned to have an open approach and we will discuss the issue if it is serious. Were it a serious issue, I would be concerned. Westminster can decide what is done down south, but we do not want to be a proxy for paying claims down south. No one would propose or welcome that.

Having set out the general line of argument, I should say that we dismiss forum shopping, because we do not believe that it is a factor. However, I have stated the position for the record, so that if others take a contrary view, they can contact us and let us know their arguments. I have no doubt that the point could be considered if the bill proceeded to stage 2, when amendments could be lodged to restrict further the possibility of forum shopping. I am glad that Nigel Don raised that general issue, because it is germane. I welcome the committee's interest.

The Convener: That takes us neatly to financial matters.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Good morning, minister. I was grateful to hear you say in your opening remarks that you are not a practising solicitor, so we will not expect any bills for the questions that we are about to put.

You have discussed some of the financial aspects of the bill and commented on evidence that the committee heard last week. Given that the asbestos-related conditions in the bill are asymptomatic and the value of any claims is likely to be relatively low, will the costs of litigating in relation to such conditions be disproportionately high?

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

"This figure is an average derived from litigated and unlitigated claims".

Many people might conclude that it would be unfair for the injured party to receive £8,000 and for lawyers to receive £14,000. That second figure includes not only lawyers' fees but the cost of reports and medical evidence, which are not cheap, as Robert Brown will know from his experience. The figures also include other costs, such as VAT.

I am not here to castigate the legal profession but, as a lawyer, I will say that the level of costs is a concern. I have seen a press release from the ABI on that and I have seen other material from lawyers that challenges the level of costs. I hope that Lord Gill's review will examine that seriously, particularly whether the Court of Session is the appropriate forum for cases that have relatively small monetary value and are in a well-trodden area of law where no legal issues of note emerge. I am pleased that the Law Society has developed protocols that are designed to address the very problem that Cathie Craigie rightly raises. On the face of it, the lawyer receives quite a good deal in comparison with the injured party.

Fees might be substantially less in cases that do not go to court. When a case goes to the Court of Session, a huge amount of work and quite a lot of lawyers are involved. Perhaps that is why the figures appear to be relatively high.

I have invited the ABI by correspondence to consider the matter. I have not yet received a reply, but I am happy to engage with it if it so wishes.

Cathie Craigie: I am happy that discussions about that matter are on-going. I hope that we will be able to learn from and understand better the issue and perhaps improve procedures when the Gill review reports.

How are judges expected to calculate the amount of damages to be awarded?

11:30

Fergus Ewing: You might not be surprised to hear me say that that is a matter for judges and not for Government ministers. That is because of the separation of powers. It is not for Government ministers to opine on such matters; it is for judges to do so. We sought the best available evidence on the levels of award that have been made over the past 20-odd years, which brought us to the figures in the financial memorandum.

We have no reason to take the view that claims will be settled for a lesser value than before. I am reminded that our judges generally look to previously reported cases as a yardstick or indication of what they should award in cases of a similar nature. That is part of the process of assessing quantum in any case. However, the bill deals with liability; it does not deal with quantum.

Nigel Don: As I understand it, the bill will continue legal liability, but on a different basis. It seems to be accepted now that pleural plaques are not the major injury on which the original damages were awarded. Is it therefore possible that, although the bill says that the damage is not de minimis, judges might decide nonetheless to award nominal damages rather than the current figures, which are rather higher than nominal?

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

Cathie Craigie: Just so that I am clear in my mind, the figures in the financial memorandum and your comments this morning are based on cases from the past that you have examined. Is it correct that nothing in the bill should change the case

history on which judges have been able to rely for guidance in settling cases?

Fergus Ewing: That is absolutely correct. It will be for judges, not Government ministers, to assess quantum, as it always has been. The information that we obtained is the best information that we could obtain. It presupposes around 200 cases of pleural plaques in Scotland a year—I think that 218 is the actual figure, once we add in figures from various Government departments and so on.

I was anxious that we did not get evidence from the insurance industry when we asked for it, although there has been a lot of publicity of late about other figures that we have seen. I was anxious to determine whether there was any method of corroborating the information that we obtained from Thompsons, which repeated in its evidence to the committee last week that it handles 90 per cent of claims. Although I did not doubt that evidence, I was anxious to get some general corroboration that that was the incidence of claims. We got a broad indication from the Scottish Court Service that that is about the right level of asbestos-related cases raised in the Court of Session. There were 287 cases in 2005, 325 in 2006 and 279 in 2007. I was anxious to ensure that we had the best possible evidence for the committee, because I take financial memoranda extremely seriously.

If insurers want to share more information with us, we will examine it. I appreciate that there are issues of commercial confidentiality, which they raised to explain why they did not come forward with more statistics at last week's evidence session.

Cathie Craigie: One of my colleagues might go into that in more detail.

I am sure that the minister is aware that the UK Government is consulting on a paper that considers the issues in relation to changing the law of negligence and invites views on whether that would be appropriate. It also asks for views on the merits of establishing a no-fault payment scheme for individuals who have been diagnosed with pleural plaques. Has the Scottish Government explored the option of introducing such a scheme as an alternative to changing the law?

Fergus Ewing: Yes. We looked at a no-fault compensation scheme. Cathie Craigie is right: the Ministry of Justice's consultation paper refers to a no-fault scheme on a great many occasions—34—and considers the possibility of creating a freestanding no-fault compensation scheme. We believe that there are serious difficulties with that, which I think the Ministry of Justice in England recognises.

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

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

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

The Convener: Before we go to Robert Brown, I make the point that you are correct in what you say about the operation of those schemes. One issue is that the number of cases was grossly underestimated.

Fergus Ewing: I noticed that that was the case in relation to one of the schemes—I think that the number of cases was twice what it had been previously. Since we propose to restore the pursuit of claims on the basis of proving fault—proving not only that pleural plaques exist but that they exist because of wrongful exposure to asbestos—we argue that our rationale of looking at the facts is the correct approach.

Even if we do not have the support of all members of the House of Lords, I am reassured by the fact that Lord Rodger said that the floodgates have not opened. The law has been as it has been for the past couple of decades and more, and the floodgates have not opened—there has not been an explosion. There has been the possibility of website touting and scan vans and the wider dissemination of information about pleural plaques—a website contains 11 pages of details of legal firms that operate in the field. However, despite all that, despite the increased

knowledge, despite the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 being passed in the previous session of Parliament and despite this bill, the floodgates have not opened. There are those who say that there will be 25,000 or 30,000 claims, despite the fact that in the Court of Session there are only about 300 personal injury claims a year. The evidence is not with them; it is with us.

Robert Brown: Before we leave the question of quantification, I want to be clear that the bill will do what it says on the packet. It does not expressly reverse the House of Lords judgment, which, among other things, said that pleural plaques were symptomless and did not cause any harm, and that anxiety was not compensatable. Given that the earlier judgments on which damages were based—which I confess I have not read—were made by lower court judges in England, is there any scope for the bill to be interpreted in a way that differs from the Scottish Government's interpretation, taking account of the House of Lords judgment, which has not been overruled?

Fergus Ewing: I think that Robert Brown, like most lawyers, knows the answer to his question before he has finished framing it.

Robert Brown: I do not, which is why I am asking it.

Fergus Ewing: I would have thought that you might know. The answer is that acts of Parliament, such as acts of the Scottish Parliament in devolved areas, are binding on the lowest person in the land and on the House of Lords. As Robert Brown knows, House of Lords decisions on civil matters have a particular status in Scots law. They are not binding; they are not part of our law—

The Convener: Persuasive is the word.

Fergus Ewing: Indeed. They are persuasive. That is, persuasive not in the way that we use the term but in a way that has legal significance, which means that it is expected that a House of Lords judgment will be followed. I believe that there is one case in which the House of Lords judgment was followed—I think that it was in the outer house, but I could be wrong. We expect that the House of Lords judgement would have been followed, but it is not necessary for legislative purposes that we name the case in the act of Parliament. The case arose from England rather than from Scotland. As a matter of technical practice, the law applies because it is an act of Parliament. It will become binding because it is an act of the Scottish Parliament in a devolved area. That is the technical answer.

Robert Brown: With respect, minister, that is not quite my point. My point is that the bill indicates that if someone has pleural plaques it is compensatable—it is not negligible; it is not de minimis—but beyond that it does not give any indication of the basis on which judges are to quantify that. Given the views that were expressed in the House of Lords—which on quantification are not expressly overturned—is the bill watertight? Can it deliver damages at something like the level previously indicated? Should we have any concerns about that?

Fergus Ewing: As I have said several times, the bill simply restores the status quo ante, so the law will be as it was before the House of Lords judgment. The question is: in the light of the House of Lords judgment, could a lower amount be awarded? I have already said that that is a matter for judges and that the bill deals with liability rather than with quantum. The bill does not deal with quantum issues but, as I outlined in my response to Angela Constance's question, we can see no rationale that would lead to a different approach being taken from the one taken in the past in assessing quantum, which was to examine previous cases and follow them as a broad yardstick and aid in computing the compensation amount.

Paul Martin: What is your current assessment of the financial implications of the bill to both business and the state?

11:45

Fergus Ewing: The financial consequences are set out in the financial memorandum, which is one of the documents that had to be submitted with the bill. As Paul Martin knows, a summary of the costs is set out in the memorandum, on page 9, and the figures therein have been consulted on. The headline figures are that there is £17,125,000 to settle existing cases and, thereafter, there is broadly speaking, £5.5 million per annum, increasing to £6.5 million per annum at the peak—in around 2015—and then decreasing. We mention costs that will apply to the Ministry of Defence and the Department for Business, Enterprise and Regulatory Reform and costs on local authorities of £1 million to settle existing cases and £500,000 per annum increasing to £600,000 per annum. There will be smaller costs to the courts and the legal aid costs will be negligible. The cost to the Scottish Government will be £75,000.

Those are our best estimates and the memorandum explains how we arrived at each figure. At my behest, that explanation is provided in some detail because of the seriousness that we attach to the task. I have already explained our fundamental rationale in arriving at the figures, which is that we considered what has actually happened in the past—not what might happen according to somebody else's hypothesis.

Paul Martin: We have heard evidence that the regulatory impact assessment hugely underestimates the bill's potential cost and that the annual cost to Scotland of legislating in the manner that is proposed in the bill would be between £76 million and £607 million. What are your views on that evidence?

Fergus Ewing: I have seen those annual figures, which were quoted by the ABI. Obviously, we do not accept those figures and we do not recognise them as being the best estimate because of several factors, some of which I have already described. The figures presuppose that Scotland would have a 30 per cent share of pleural plaques cases, but evidence suggests that there would be a much lower figure of 10 per cent, if that. Those figures are based on a scenario in which the number of people who make claims will increase greatly: basically, the ABI has assumed that there will be a massive growth in the number of people making claims.

We have heard evidence that the incidence of asbestos exposure in the population may be higher than is known to be the case and that the number of people with pleural plaques may be greater than the number who have submitted claims. That is absolutely taken as read. However, we have worked on the basis of the number of people who have made claims and the number of people who have been diagnosed as having pleural plaques and who can prove that they were exposed to asbestos in the workplace as a result of a breach of a duty of care under common law or the various health and safety statutes over the years. In essence, we believe that our approach is correct. Although we understand the approach that others take, we disagree strongly with the resultant figures.

Paul Martin: We have been given a figure of an annual cost of between £76 million and £607 million. Will you put on record what you expect the annual figure to be? I appreciate that you have given us some figures, but what is your estimate of the total?

Fergus Ewing: Looking to the future, we expect the cost on business and the state to be of the order of £5.5 million per annum, increasing to a peak of £6.5 million around 2015.

Paul Martin: What discussions have taken place with United Kingdom Government ministers about their intention to invoke the statement of funding policy?

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

Paul Martin: Have you or the Cabinet Secretary for Justice met UK ministers to discuss the issue?

Fergus Ewing: I have exchanged correspondence with Bridget Prentice, the minister who has, I understand, been dealing with the issue in relation to a consultation paper in England. I have written to her and would be happy to meet her to discuss with her any aspects of the matter. I do not know whether there is a particular purpose that Mr Martin thinks would be served by such a meeting, but I would be happy to meet her to discuss issues of mutual concern.

Paul Martin: I asked the question because helpful evidence may be provided in such an exchange of correspondence, which would add to the debate. I understand, from the information with which we have been provided, that the statement of funding policy will be an integral part of any settlement. It will be important that there are exchanges of correspondence and that constructive dialogue takes place in respect of the statement of funding policy.

Fergus Ewing: I have no objection in principle to pursuing that course of action, although I do not think that anything in the correspondence that I have received would particularly constitute evidence. I would welcome an assurance—which we have not yet received—from Bridget Prentice that the MOD and other UK departments that are responsible for negligence in relation to asbestos conditions will continue to accept their responsibility. I assume that Mr Martin is not suggesting that their doing otherwise would be correct.

Paul Martin: I am asking a straightforward question. Has there been a constructive dialogue on securing the success of the bill—if it is enacted—by ensuring that UK Government ministers comply with the statement of funding policy, and that the MOD or any other organisation that is responsible accepts liability? I am not suggesting anything contrary to what you say: I am just asking whether there has been a constructive dialogue between your department and UK Government ministers.

Fergus Ewing: I have exchanged correspondence with Bridget Prentice and we have made it clear that we expect that what has happened in the past will continue. We raised the issue last November and there has been no contradiction by Bridget Prentice or anybody else. I assume that if Westminster were otherwise

minded—that seems to be the issue behind Mr Martin's question—it would say so, but it has not. Nevertheless, I am in correspondence with Bridget Prentice and it would be helpful for Westminster to confirm that the MOD will continue to honour its commitments to Scotland in the future, as it has in the past, in accepting and settling cases in which there has been negligent exposure to asbestos of its former employees. I hope that that is something around which the committee can unite in agreement.

The Convener: It is appropriate to confirm to Fergus Ewing that I wrote last week on behalf of the committee to Bridget Prentice, the UK minister, and the Secretary of State for Defence regarding these important issues, which need to be resolved. We have not yet received a reply.

The minister will have got the message from committee members that there are concerns about the accuracy of the financial memorandum. I have listened to what you have said and there is one point on which I take issue with you. If we accept the UK figures and that the argument that 30 per cent of liability will come from Scotland is wrong, we have also to accept that 10 per cent seems to be an unduly optimistic figure. We need to bear in mind the profile of the Scottish engineering industry over many years, including the nationalisation of the shipyards in the mid-1970s and the situation at Rosyth. Also, the history of asbestos cladding in Glasgow means that many employees in the council's former building and works department were engaged in stripping out asbestos. With all that in mind, the figure of 10 per cent seems to be unrealistic.

Fergus Ewing: My first instinct was very much along those lines in examining the issue with officials as part of the early preparation of this work. However, when one looks at the available evidence, it seems to me that the 30 per cent figure cannot be sustained by any data. First, perhaps I can quote the data that persuaded me that the qualitative arguments to which the convener has alluded, and which may at first sight lead to the conclusion that there would be a greater proportion of asbestos-related disease in Scotland than in England, actually do not appear to be the case. The Health and Safety Executive data on asbestos-related mesothelioma deaths show approximately 10 per cent of the Great Britain total being in Scotland. I have detailed data on this, but I am just giving you the headlines.

Secondly,

"data on asbestos-related claims assessed under the State Industrial Injuries Disablement Benefit Scheme"

show that

"the last five years has Scotland accounting for 10.4% of mesothelioma claims, 12.2% of lung cancer with asbestosis claims and 5.3% of pleural thickening claims."

In an area in which hard data are not always easy to find, the HSE data have persuaded me that the Government has some ballast to support our rationale that 10 per cent and not 30 per cent is a fair figure.

The Convener: It seems to me that it is more than just a passing coincidence that the 10 per cent figure is also the pro rata figure for the population. As you said, every instinct tells you that the figure is seriously open to question.

Fergus Ewing: That is not what the HSE data indicate. The convener would have to take up the issue with the HSE.

I am not a student of industrial history in England, but I know that a great many shipbuilding workers would also have been exposed to asbestos in yards there. The data that we have are the data upon which we have proceeded. There is no basis in the evidence that we have seen for assuming a 30 per cent rather than a 10 per cent allocation.

In your opening remarks, convener, you said that committee members have expressed dissatisfaction or concern on elements of the Government figures in the financial memorandum. I may not be remembering all the questions that have been put, but I am not aware that members have expressed concern or doubt about specific items in the financial memorandum. If that is the case, however, I am happy to do my best to answer the questions. You may have concerns, convener, but I cannot recollect others raising issues that have cast doubt on any of the major figures that we cite in the financial memorandum. I say that for the record and to be clear on the matter. Given the relative scarcity of evidence, I think that we have done a relatively good job. That said, if any member thinks that the Government has erred in any way, I am open to hearing their reasoned evidence-based doubts.

Nigel Don: You commented on the number of cases about which the Scottish Court Service has alerted you. I do not doubt the statistics—my question is simply whether a significant number of cases may go under the radar, so to speak. I do not know how the industry works in this regard. Is it likely that a significant number of cases that the insurance companies and local authorities deal with are handled without the rest of the world noticing them? Could the numbers be significantly wrong because a significant amount of stuff does not appear in the numbers?

12:00

Fergus Ewing: As is the case with so many of the questions, you are asking whether something is possible. It is possible that I will win the lottery tomorrow, although it is unlikely, given that I do not

buy tickets. To be serious, it has not been easy for us to obtain much of the data that we would like. I alluded to the fact that the insurers have not provided us with data. I understand why they have not done so, although they have more recently felt free to share data on the costs that they say might arise from the bill; we disagree with them on that issue. They have not shared data relating to the cases that they have handled.

We have data from the Scottish Court Service, the HSE, the CMO and the lawyers who operate in the area, principally Thompsons Solicitors, who say that they have dealt with 90 per cent of cases and have given us information on the number of cases that they handled between 2004 and 2006. We have taken an average figure of 200 from that information and have added 18, to take account of cases in the public sector that we would not expect Thompsons Solicitors to handle. During the consultation on the partial regulatory impact assessment that took place between February and April this year, we received only three responses from local authorities, which was a bit disappointing. However, my officials made further inquiries to ascertain whether we were on the right track.

It has not been an easy task for us to get data, but we are confident that the data that we have are the best that are available to us. If, in subsequent conversations, the insurers were to tell us that they have handled 1,000 cases in Scotland and provide us with their records, I would, of course, consider that information and engage with them. However, the figures that we have produced were consulted on in spring this year. I understand that neither they nor the quantum of the figures have been contradicted. No one has told us that the average figure for compensation is not £8,000 but £4,000 or £16,000, or that the number of cases per year is not 200 but 2,000 or 500. If they want to do so, my door is open. We have approached the issue in a logical way. Through their industry, my officials have procured the best evidence that is available to us: we have proceeded on the basis of that evidence.

The Convener: I have a final question that is probably in breach of the rule book of politicians, because I genuinely do not know the answer to it. The shipyards that were nationalised in the late 1970s were privatised some years into the Thatcher Government—probably about 10 years later. Would there have been an employers' liability insurance policy, or would there have been a self-insurance scheme, as a result of which the state would be liable for any claims occurring during that time?

Fergus Ewing: We will double-check that. From looking at various other issues over the years, I understand that it is the habit of public bodies in Britain to self-insure for the period for which they have liability and, thereafter, for private companies to be required to obtain employers' liability insurance. We will come back to the committee on that point.

The Convener: That is fine.

Stuart McMillan: Last week, the committee was told that pleural plaques could be "a good thing". Do you think that pleural plaques are "a good thing"?

Fergus Ewing: I certainly do not. To be fair to last week's witnesses—I think that Dr Abernethy was the first to raise the issue—it was plain that they were not making that argument seriously. Paul Martin was right to pursue the point with tenacity last week. If insurers were asked about the matter, they would say that pleural plaques are not "a good thing", but an injury that causes extreme anxiety. It was unfortunate that the phrase arose, but it was dealt with well by members of the committee last week.

The Convener: As members have no further questions, I thank the minister and his officials for their attendance. I note the minister's point about on-going dialogue. Can I take it that you will share with us anything pertinent or relevant that arises?

Fergus Ewing: I will do so in so far as that does not contravene any rule of correspondence. We want to be as open as possible in relation to these matters. I will be interested to see what reply the committee obtains from Bridget Prentice.

12:05

Meeting continued in private until 12:46.

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