Northern Ireland
Assembly

COMMITTEE FOR FINANCE AND PERSONNEL

OFFICIAL REPORT
(Hansard)

Damages (Asbestos-Related Conditions) Bill

19 January 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Ms Jennifer McCann (Chairperson)
Mr David McNarry (Deputy Chairperson)
Dr Stephen Farry
Mr Paul Frew
Mr Paul Girvan
Mr Simon Hamilton
Mr Daithí McKay
Mr Mitchel McLaughlin
Mr Declan O'Loan
Ms Dawn Purvis

Witnesses:

Mr Neal Brown	)	Royal Sun Alliance (NI)
Mr Stephen Boyles	)	Zurich Insurance
Mr Dominic Clayden	)	Aviva
Mr Nick Starling	)	Association of British Insurers
Amanda Wylie	)	Kennedys Law

The Chairperson (Ms J McCann):

I welcome the following representatives from the insurance industry: Nick Starling, director of general insurance and health at the Association of British Insurers; Dominic Clayden, director of technical claims at Aviva; Neal Brown, commercial operations manager at Royal Sun Alliance;

and Stephen Boyles, business manager at Zurich (NI). Gentlemen, after your opening statement we will move to questions.

Mr Nick Starling (Association of British Insurers):

Good afternoon, Madam Chairman, and thank you for inviting us to give evidence today. I will make just a few opening remarks.

The position of the insurance industry is clear: we are fundamentally opposed to the Bill. Insurers are absolutely committed to paying claims for genuine illnesses caused by negligent exposure to asbestos; our members pay about £200 million a year for mesothelioma and other asbestos-related illnesses.

We oppose the Bill for several reasons. First, pleural plaques are not a disease; they are symptomless, benign and do not lead to more serious conditions. The principle of liability is harm. If the legislation were passed, it would overturn the principle that harm is the basis for the payment of liability claims and could open the way for a wide variety and number of claims based on exposure and anxiety but not actual harm. That would fundamentally change the law of negligence and so undermine business confidence. There has to be an expectation that when a company or an individual goes to court, the court's decision will be upheld and not overturned, especially retrospectively. We believe that the best way to deal with the anxiety experienced by people with pleural plaques is through information and guidance.

We therefore urge the Committee to scrutinise the Bill, the medical evidence, and the compatibility of the Bill with the European Convention on Human Rights very carefully and to look at the substantial potential costs.

Mr Hamilton:

I have carefully studied your correspondence to the Committee over the past months. On one level if pleural plaques were a genuinely compensable condition, I would not care that insurers had to pay out. If that is the law and the established position, that is how it is. However, I care in the sense that somebody ultimately has to pay the insurance premiums and that businesses and, more important, my constituents will be hit in some way.

There are two issues that I want to ask you about. There has been conjecture about the likely

cost. In some ways my question is akin to asking "How long is a piece of string?". You say that the Department of Enterprise, Trade and Investment has set aside about £31 million in the draft Budget to cover possible liabilities but that that figure might be conservative. What might the figure for pleural plaques be in Northern Ireland?

If the Assembly were to pass the legislation in what's left of this mandate or in future, notwithstanding the Scottish case that is going through the legal process, would insurers challenge the legislation in the courts?

Mr Starling:

Costs are extremely difficult to calculate. You said that it was as long as a piece of string; however, another appropriate quotation is Donald Rumsfeld's "known unknowns". Since pleural plaques are symptomless, people find out about them via other interventions. It is extremely difficult to calculate just how many people could present with them, although there are estimates that can be used. One is that for every case of mesothelioma there are between 20 and 50 cases of pleural plaques.

We have not put together estimates; however, the Ministry of Justice in Westminster has. It calculated that, for the UK as a whole, there could be an enormous range of between £3·7 billion and £28·6 billion. Factoring in comparable populations, a figure is reached for Northern Ireland of between £111 million and £858 million. It is extremely difficult to calculate where the figure might be on that basis. The problem with any government-sanctioned compensation scheme is that it encourages people to come forward. For example, it was expected that there would be 150,000 claimants for the British Coal chronic obstructive disease scheme; the actual figure was just short of 600,000 — a factor of four. If legislation were passed and people were encouraged to make claims, the numbers and compensation figures would be extremely difficult to calculate.

A large proportion of the figures for Northern Ireland falls on the state rather than on insurance companies. For pleural plaques alone up to 2015, you are looking at a cost of about £39·5 million. However, that is subject to a whole range of factors; it could be more.

Mr Hamilton:

Would insurers challenge the legislation in court?

Mr Dominic Clayden (Aviva):

Before I answer your question, I would like to say something about payment, as the two are interdependent. Ultimately, insurance is a cost borne by premium-paying policy holders. Many factors go into a price, but, fundamentally, claims costs feed into premiums. Therefore an element of those inevitably falls back onto premium-paying policy holders.

However, there is a broader issue that I ask the Committee to consider: insurers' very real concern about interventions after a judgement by the highest court on what the law is. It would create even greater concern and would increase the risk of "allocating capital", as insurers say, where we view the risk globally. It would make Northern Ireland a riskier place simply because we could not be certain that when we went to court there would not be a subsequent intervention and that a loading would follow. There would be an additional cost because we would be unsure whether the Executive would intervene again.

Your comment that you do not care whether insurers pay disappoints me.

Mr Hamilton:

My point was that if you have a liability, I do not care. The general point is that if, by whatever means, the law establishes that there is a liability, that does not bother me. I was following on from the concerns that I have.

Mr Clayden:

The precursor to that becomes: should the Executive intervene to legislate? It is public knowledge that insurers have challenged similar legislation in Scotland in the belief that there has been a breach of articles 1 and 6 of the European Convention on Human Rights and possibly a common-law breach on the grounds of irrationality. Therefore, although there is a wide margin for the Executive's legislative position, there is potential for a challenge, which is the position that we have taken in Scotland. To answer your question in short, we would look closely at the legislation. The precedent has been set in Scotland, so although I do not want to prejudge anything, we would be very uncomfortable with making pleural plaques compensable and with the broad principle of courts retrospectively intervening in legislation.

Mr Frew:

Thank you, Chairperson, for letting me in, as I have to leave soon. I have a couple of questions.

You stated that you do not believe that pleural plaques are a disease. Would you say that they are an injury, and, if so, how does it sit with you that they occurred when people were at work, having been instructed to work in that environment? Pleural plaques would not exist if people had not had to do work that exposed them to asbestos. What do you feel about pleural plaques being an injury rather than a disease?

You believe that the Bill contravenes the European Convention on Human Rights. Will you go into more detail on why you feel that to be the case? The Minister said that he believes that the Bill meets all the criteria.

Mr Starling:

I will answer the first part, and then, if I may, I will pass to Mr Clayden for the second. The medical evidence is clear: pleural plaques are not a disease or an injury; they are a benign condition, although one caused solely by exposure to asbestos. That is not denied, and, of course, such exposure might mean negligence. However, the key point is that it is a benign condition that does not lead to a more severe condition. In effect, it is the body's protective scarring, which seals in invasive fibres.

Mr Frew:

What account do you take of the fact that an acknowledgement or proof of exposure to asbestos increases anxiety greatly?

Mr Starling:

It is the account that the courts take that matters. Insurers pay on what the courts decide, and the courts decide on the basis of actual physical harm. There are some cases where pleural plaques are so extensive that there is discomfort in the lungs, and those people can be paid compensation. In addition, there have been cases involving clinical psychiatric conditions resulting from that, and compensation can be payable there. However, the principle of liability is that you do not pay compensation for anxiety or in circumstances in which there is no actual physical harm.

Mr Clayden:

The first instance hearing in Edinburgh on the European Court arguments went on for 21 days — although it felt longer — so I can only give you a précis. Nevertheless, we believe that, under article 1, corporate bodies, like individuals, are entitled to the quiet enjoyment of possessions.

Therefore, telling insurers and employers to make payments for sub-clinical anxiety to what would be, in effect, a special class that would be carved out would be unique and not a reasonable balance of ours or of employers' rights of entitlement to the quiet possession of property. We struggle to see why anxiety for pleural plaques should be carved out as a special case.

I can give you examples that make us query the suggested approach. First, it is not entirely clear why some people who are exposed to asbestos develop pleural plaques while others do not. I do not seek in any way to justify exposure to asbestos. I deal with mesothelioma claims; mesothelioma is a horrible disease and a horrible way to die. However, for two people working in the same employment, both knowing that they have been exposed to asbestos — as is the nature of a great deal of employment — the nature of the Bill would be that if one person develops pleural plaques and one does not, both would have a similar degree of sub-clinical anxiety. Therefore, it is anomalous and difficult to understand why you would carve out legislation to say that one group gets a payment and one does not.

The second feature in carving out a group such as that is that there are other circumstances in which people are aware that they are at increased risk of developing a condition or disease. In balancing the rights of the parties, why carve out one group over another? You may say that those are trivial examples, but they should be explored. We are worried about the principle. For example, exposure to sunlight and sunburn increases the risk of developing skin cancer. Should you consider compensating people who worked on building sites who were exposed to sunlight by not wearing a shirt or by not being provided with sun lotion? Should those who are at greater risk of heart disease and other conditions when suffering withdrawal from drugs be compensated? Those issues create anxiety, but they are not compensable. Carving out those who have pleural plaques calls into question the appropriateness of the suggested approach. The balance raises serious questions in our minds about the proposed legislation.

Thirdly, the other factor is article 6. The issue has gone to trial and, subsequently, the legislative process seeks a closure of access to courts.

That is a brief summary. In trying to summarise 21 days and a great deal of lawyers' time, those are the headlines.

Mr Frew:

You did well.

The Chairperson:

During the debate it was mentioned that the compensation scheme is available in England and Wales. There is no legislation there either, but there is almost an acceptance that compensation should be paid, although the compensation looked at a different form of financing. What are your views on the scheme that operates in England and Wales?

Mr Starling:

The government in England and Wales have decided to pay compensation for people who submitted claims that were stayed because of the Rothwell judgement. That was done on the basis that people had a reasonable expectation of getting some compensation. We are neutral on that. If the government choose to pay people under those circumstance, that is their right.

The Chairperson:

However, you are not saying that those people should not be compensated. You said earlier that you do not think that pleural plaques are a compensable injury.

Mr Starling:

The argument is the same as before: there is no formal liability because there is no injury. I believe that the Government paid compensation on the basis of reasonable expectation that people were going to receive some compensation. Those were their fairly narrow reasons for doing so.

Dr Farry:

I want to pick up on that. You will be conscious that there is considerable public interest in the issue and public demand for compensation. Whether or not that is justifiable is a different issue. If the Assembly tried to address the issue by means of a fixed payment to avoid opening the floodgates to open-ended compensation, would the insurance industry be prepared to consider making a contribution to a fund as an alternative to the provisions in the Bill?

Mr Starling:

No; it would not. If government decided to pay compensation from their coffers, that would come out of general taxation to which the insurance industry already contributes. Therefore the

industry would not put its money into such a fund.

Dr Farry:

Our Minister has argued that insurers were routinely paying out for pleural plaques claims before the Johnston case and that had it not been for that pesky little judgment, that would still be the status quo. In that sense, there is no material difference between that situation and the one that insurers would face if the Assembly passed the legislation.

Mr Starling:

That is how the courts work. Insurers have often paid compensation for new circumstances that they were not aware of before. In the case of pleural plaques, insurers were paying compensation on the basis of premiums that were collected decades before they became compensable in the first place. However, we started to see a very substantial increase in the number of claims and began to get different medical evidence. We had been paying compensation for claims based on uncertain medical evidence and on a concern that pleural plaques were potentially malignant. However, the medical evidence changed, and the challenge was, therefore, made. That challenge was initially made by the Westminster Government and was supported by insurers, because it was felt that the decision needed to be tested in a court of law. It was tested in a court of law, and the outcome is before us.

Mr Clayden:

There was uncertainty from a medical position about what was actually going on with pleural plaques when the first claims were paid. In the first instance, cases were low in number, and when they were tested the courts said that claims had to be paid. However, it became apparent that there was an absolute alignment of pretty much all the medical profession that pleural plaques themselves do not go on to cause any of the other nasty asbestos-related conditions.

One of the features of the Rothwell case was absolute agreement between the claimant's and the defendant's medical experts. In fact, part of the reason for that challenge was that the world had moved on and there was clarity. It should be borne in mind that a significant body of medical opinion believes that, in that situation, paying compensation would be counterproductive for someone who has been told that they have pleural plaques. Emeritus Professor Seaton, who gave evidence in Edinburgh, said that the message should be that plaques will not lead to something else but are a mark that a person has been exposed to asbestos.

Dr Farry:

I have one final question to tease this out. I appreciate and understand your point that pleural plaques are not an injury in the sense that they do not have any symptoms, they do not harm or inhibit lung function and do not, in themselves, necessarily indicate any higher risk of exposure to asbestos. Equally, however, someone could argue that, notwithstanding the lack of direct consequences, there has nevertheless been a violation of bodily integrity, because a substance is on that person's lungs that is not on the lungs of other people. If someone in the workplace got covered in paint, they would not experience a direct physical consequence from that, but they would nevertheless experience a change to their body.

Mr Starling:

That is the point at which the courts decide, which they did in the Rothwell case. I emphasise that insurers follow courts' decisions on whether they have to pay compensation. We are neither doctors nor experts in medical conditions; we have to go by what the courts decide

Dr Farry:

You said that the legislation, perhaps wrongly, accentuates people's sense of anxiety about pleural plaques and that an alternative government response would be to invest in public health information to explain to people that it is not a problem. Would the ABI be prepared to partner the government in funding such a campaign to address people's misconceptions about pleural plaques? Would that be viewed as a more reasonable way of addressing people's concerns?

Mr Starling:

We are prepared to work with government, and we are doing so with the government in England and Wales. We have put our money towards research into mesothelioma. Members have put £3 million towards research to find a cure or treatment for mesothelioma. That is a good use of our funds, but we would certainly work with the government to get the message across. Our sense is that people will listen more closely to advice from doctors and other people.

Mr O'Loan:

I understand the points that you make. Stephen has asked questions that I was going to ask about the Minister's view that you were collecting premiums over the years, so I will not delve into that. Stephen also asked about the compensation scheme, which I will pursue further. Is there a

precedent for the insurance industry to short-circuit a claim area by creating a scheme or no-fault-admitted concession to defuse a situation rather than every case being subjected to a test?

Mr Starling:

I am not aware of any. I am thinking of the Motor Insurers' Bureau, which has a slightly different approach that covers uninsured drivers.

Mr Clayden:

There have been schemes over the years, including one that operated for a company called Turner & Newall. I cannot remember the full circumstances, but it involved a US company acquiring a UK company only to find later that it had insufficient funds to meet all claims. However, a scheme was agreed whereby the funds that were available were dealt with under the terms of an agreement to reduce legal costs, etc, so that the people who suffered got as much as possible.

A scheme was introduced as a result of miners' claims for chronic obstructive pulmonary disease. Although the government paid for most of the miners' compensation out of general taxation, there were complexities; there was privatisation, part privatisation, and bits were hived off the mining industry over the period. An insurance element followed the same scheme, and, from memory, it was in the low percentages. Schemes have been used in the past.

Mr Starling:

These are circumstances in which there is injury and liability. I am answering from the point of view of a scheme where there was no liability.

Mr O'Loan:

Those are interesting examples. Even if the Bill became law, a person who developed pleural plaques would not automatically get compensation; negligence would have to be tested and proven. In other words, there would have to be failure on the part of an employer to exercise a duty of care to an employee.

What happens in asbestos cases? Was there a particular point when the medical information, as happened with tobacco, became absolutely clear that asbestos was a dangerous substance? From which point were employers under a clear duty to operate in the light of that new information?

Mr Starling:

I shall answer the general point first. My understanding is that, in most cases, if it is clear that there has been negligent exposure to asbestos, liability is fairly straightforward. There is a great deal of discussion about the point at which employers should have realised. As was mentioned at the beginning, insurers are paying out £200 million a year because they recognise that there is liability due to negligent exposure; that is usually relatively straightforward to establish.

Mr O'Loan:

Is all exposure now treated simply as negligent exposure?

Mr Clayden:

No, unfortunately. I wish that lawyers made life that easy. The issue is similar to industrial deafness and some other industrial conditions to which various factors contribute, such as the state of knowledge at the time —

Mr O'Loan:

That is the particular point that I raised.

Mr Clayden:

From memory, the governing legislation started off with dust, so it was not related specifically to asbestos. Legislation on dust began in the 1920s or 1930s; I would not want to be held on the dates, but it goes back a long way. It was updated over time, and it varies according to how much asbestos a company was using and whether the company was large or small. A series of cases revolved around compensation not being awarded because there was no negligence for spouses. In the 1950s and 1960s, typically, a male worker would go home and dust out his overalls, so there are cases in which, unfortunately, wives or children developed mesothelioma. The state of knowledge of what an employer was required to do at that time meant that it was not compensable. I am afraid that it is a complex area.

Mr McLaughlin:

I apologise for missing the beginning of your presentation. In the answers that I have heard so far there was discussion about the fact that the world and science have moved on and that there is new medical evidence. Was there a time before Johnston when you dealt with cases involving

pleural plaques on the same basis as those involving asbestos exposure? Given what we are discussing, what is the history of the matter?

Mr Starling:

Claims started to be payable from the early 1980s. As always in these matters, a particular court case triggered it, on the basis of which, where there was negligence and where there were pleural plaques, compensation was paid until a case was brought that overturned it.

Mr McLaughlin:

Did the products that you were selling or the premiums that you were collecting distinguish between asbestosis, other asbestos-related diseases and pleural plaques? Was there any specification?

Mr Starling:

In that case, many of the premiums were collected decades ago; to be honest, long before anyone considered asbestos compensation at all, let alone for pleural plaques.

Mr McLaughlin:

I know that, in your view, medical evidence is paramount. Does new medical evidence completely contradict or supersede previous evidence on pleural plaques or are the two juxtaposed while the courts decide on a judgement?

Mr Clayden:

Medical knowledge has simply moved on over time. One of the features of the Rothwell/Johnston cases was that claimants' and defendants' medical experts agreed; the courts were not left to choose which they preferred. That part of the case was accepted entirely by all parties. There will always be someone — although I have not come across them — who does not accept that, but mainstream medical evidence agrees that pleural plaques are benign and will not go on to cause any nasty asbestos-related diseases. That is where medical science is.

One of the views expressed by the House of Lords was that if medical evidence moved on, the decision would have to be looked at again.

Mr McLaughlin:

If you are not prepared for this question, you may need to correspond with us on it. Are there any

asymptomatic conditions that you accept responsibility for?

Mr Clayden:

I cannot think of any, but we will write to you to confirm that.

The Chairperson:

We have heard in the medical evidence that pleural plaques are a longer-term condition, but if two people are exposed to asbestos and one of them develops pleural plaques, do they have a greater risk of developing other diseases and illnesses? In the longer term, is the person who has pleural plaques more likely to develop other illnesses, such as lung cancer, than the person who does not have pleural plaques?

Mr Clayden:

My understanding is that the loading exposure of asbestos is the same. Hypothetically speaking, if two people work on adjoining benches, the exposure is exactly the same, and my understanding is that the long-term statistical chance of developing lung cancer, mesothelioma or asbestosis is identical. I have not seen a specific study on that, but my understanding is that the risk is the same.

The Chairperson:

In the longer term, is the person who has developed pleural plaques more likely to develop other illnesses?

Mr Clayden:

I believe that the risks are exactly the same. Part of our concern relates to the arbitrary nature of the issue.

Ms Purvis:

I apologise for missing the start of your presentation. This is about employers' negligence and a breach of a duty of care. If an employer is found to be negligent, do you believe that an employee can pursue a personal injury claim against that employer?

Mr Starling:

There need to be two components. There needs to be negligence, and the employee needs to have

the disease or the injury. Our contention of the judgement on Rothwell is that there was absence of harm; therefore, it was not compensable.

Ms Purvis:

This legislation that we are examining would redefine pleural plaques as an injury. Therefore, employees could pursue compensation claims through the courts.

Mr Starling:

That is my understanding of what the legislation seeks to do.

Ms Purvis:

If my employer was negligent, and I ended up with a tiny scar on my finger due to an injury at work, I could pursue a claim for that injury through the courts. Pleural plaques are tiny scars on the lungs, which, in my mind, prove that there was exposure to asbestos and, therefore, they are an injury to the lung. Like a scar on a finger, they may not develop into a long-term illness or terminal disease, but they are still an identification of an injury. That is the purpose of the Bill. You said that you would abide by the courts' decision. The Bill will free people up to pursue personal injury claims from employers through the courts, so what is the problem?

Mr Starling:

There are a number of layers here. I will pass over to someone who pays the claims in a moment, but the fundamental principle is that courts in this country decide what constitutes liability and what constitutes personal injury. That has always happened, and it is unprecedented for Governments and Assemblies to step in and redefine that personal injury. That is how the system has always worked.

Ms Purvis:

Sorry, did that not happen when people were able to pursue claims before the Johnston case? Did the courts not step in and decide otherwise?

Mr Starling:

The courts decided, but the courts evolve. They are looking all the time at what constitutes personal injury. Historically, the courts have made more things claimable for than not. However, that case went the other way. When I say that we abide by the courts, I mean that we abide by the

courts' decision of what constitutes harm and injury. There is always going to be a slightly grey area in some cases, and that is why the courts are there to arbitrate. They clearly did that in the case of pleural plaques. In the early 1980s, when the courts determined that pleural plaques should be compensable, insurances companies started paying out compensation, and when they decreed in the Rothwell case that they were not compensable, insurers stopped paying out. That is the principle that we follow.

Mr Clayden:

The issue has been looked at in the House of Lords and in Scotland. Lord Rogers, sitting in the House of Lords, indicated that there is a triple test. First, has there been a breach of duty? With asbestos cases generally, that is not really an issue. Secondly, has there been an injury to the claimant's body? Thirdly, has there been a material damage as a result? The judges clearly held that a material damage is not caused as a result pleural plaques.

In Scotland, Lord Uist subsequently looked at the issue, and his view was that pleural plaques do not cause de minimus harm, and that, in fact, they cause no real harm at all. Compare a person with a scarred finger with a person who does not have anything visibly wrong with them when viewed externally. Pleural plaques are totally asymptomatic. The courts approach to the possibility of carving out pleural plaques as a separate category was that it would be departure from the approach taken to injury as a whole, and they were not prepared to do that.

Ms Purvis:

Those people are not medical experts; they are legal experts.

Mr Clayden:

Ultimately, we are dealing with the law. In the Rothwell case, medical evidence was heard from the claimant and the defendant's experts, and that was the consensus view.

Ms Purvis:

However, the medical experts also had a consensus view that pleural plaques are an indication of exposure to asbestos and that they are small, scar-like adhesions on the lungs.

Mr Clayden:

That is right.

Ms Purvis:

I am not a medical expert either. However, I am in favour of the legislation, because I believe that that exposure to asbestos means that an employer has been negligent and in breach of its care of duty to an employee and that the very fact that pleural plaques are on a person's lungs is an indication of an injury, because the plaques would not be there had the person not been exposed to asbestos.

I do not see the difficulty with legislation that allows people to pursue compensation claims that they were previously allowed to pursue prior to the Johnston case. It is wholly unfair that cases were stayed or stopped and that people were from prevented from pursuing claims that they were allowed to pursue previously. It is the job of legislators, particularly those in this Assembly, to do what is right and fair and to help people to improve their quality of life. However, a court will ultimately decide on compensation claims, not the Assembly.

The Chairperson:

No other members have indicated that they wish to ask any further questions. If we need to clarify any more issues, we will write to you. Thank you very much for coming along.

The Chairperson (Ms J McCann):

I welcome Amanda Wylie, partner from Kennedys Law. Normally, we ask witnesses to make a short opening statement, before opening up the meeting for members' questions.

Ms Amanda Wylie (Kennedys Law):

Thank you, Chairperson, for your invitation to appear before the Committee this afternoon. I am in a slightly different position, because I am a defence lawyer. Last week, you heard from claimant lawyers, and I am afraid that you will be hearing from the other side of the fence today. My clients are mostly insurers and self-insured bodies and companies. I will speak on their behalf today; more particularly, on behalf of self-insured companies. My second hat is that I am the area representative on the Forum of Insurance Lawyers, but any mistakes or opinions in the submission are entirely my own.

I am happy to outline the bullet points in my written submission that I think may be relevant or to take members' questions, whichever is convenient.

Mr McLaughlin:

Welcome, Amanda, and thank you for your paper. I have only one question, that which I put to the previous witnesses. In section 3.1 of the paper, you made reference to other asymptomatic diseases. Will you give us an indication of the diseases that you are thinking about?

Ms Wylie:

Not to be trite, but, in relation to workplace-related type injuries, one need only think back relatively recently to the smoking ban that came into workplaces. People working in offices may have been exposed to smoke and may see, for instance, a higher increase in lung cancer but, at the minute, be asymptomatic. Potentially — not to use the old adage of the floodgates — that is something for which people may seek compensation, because they may say that that may result in injury, even if it is asymptomatic at present.

Mr McLaughlin:

Are there any other examples?

Ms Wylie:

I have no other examples offhand, but I am quite happy to do some research in that area if the Committee would like me to.

Mr McLaughlin:

Are there any examples in which insurance liability was accepted for asymptomatic diseases or conditions?

Ms Wylie:

Not to my knowledge or in my experience. Getting back to the principle of actual harm or injury or, as we colloquially call it, damages, if a claim is brought before the court in respect of a breach of duty of care to an individual that has resulted in injury, there are two purposes of the damages or awards of the court. First, it compensates for general damages, which is pain and suffering. That goes back to the point about asymptomatic conditions; if there is no pain and suffering, how can that be compensable? Secondly, it provides compensation for special loss, which is loss of wages or any other loss that may be sustained as the result of an accident.

Mr O'Loan:

You say in your submission that:

"The intent of this Bill is to circumvent or usurp a decision of the highest court which binds the Northern Ireland Judiciary and is therefore inconsistent with its stated aim of maintaining and supporting an independent judiciary in which the public may have confidence."

That is a very strong statement.

Ms Wylie:

I say again that that is my own opinion.

Mr O'Loan:

If we had a written constitution, I dare say that we could test that in court. I suppose that it is being tested in the Scottish legal challenge.

Ms Wylie:

That is correct.

Mr O'Loan:

Surely, legislatures do that all the time. They respond to decisions made in the courts and sometimes think that the law needs revision. The mere fact of disputing a court decision and introducing legislation that would change it is hardly unprecedented. I would have thought that that would be commonplace.

Ms Wylie:

I accept that the legislator has the right to make a law that represents the will of the voting public. What the Bill is trying to do is in a slightly different context because the legislator is trying to define what personal injury is, and I do not believe that that is the responsibility of the legislator. The judges have the facts in front of them, and they have the benefit of expert medical evidence. They can come to a decision on the status of the law and the status of the facts as presented to them. As an officer of the court, I may be seen as being biased, but to overturn what is really a legal precedence would be contrary to maintaining the separation of the judiciary and the state. In other words, just because there is an unpopular decision, the state should step in. After all, the decision came down in 2007, and it is now 2011, so there has been some passage of time.

Mr O'Loan:

That ties in with the point that I made in the plenary sitting about whether we are challenging the fundamental principles of the law. I do not think that we are; we are addressing the question. Is this particular issue so different that the well-established general principles of the law cannot satisfactorily deal with it? That is our debate.

Ms Purvis:

In your response to the Committee, you said that the Bill may be in contravention of the Human Rights Act 1998. However, during Monday's debate, the Minister said that in light of all the information that is available, he was happy to say that the Bill is legally competent. What evidence did you use to conclude that the Bill is in possible contravention?

Ms Wylie:

It is for the Committee to get its own legal advice in relation to whether the matter is human rights compliant, but I believe that there may be recourse to the Human Rights Commission on the point. My reason for putting forward the opinion as stated is that the Bill is supposed to be retrospective, and I know from Monday's debate that the Minister thought that that might be dealt with by not making it retrospective. However, to me, the argument then is circular. If the Bill is not retrospective, the Act will not be retrospective. Are you not going to be in the position whereby all claims between the Johnston case and the Bill becoming law will not be dealt with in any event?

In addition, in relation to the point about article 6 of the European Convention on Human Rights, anybody has a right to a fair trial. With the passage of time, and it is only human nature, memories fade and tracing employers becomes more difficult. If you do not mind, I will take the point wider. I act for self-insured companies. With such companies, whatever happens comes off their bottom line. They do not look to insurers. They look to their bottom line and to what they may have to pay out.

Should the Bill become law, a company would have to pay out on the basis that pleural plaques are designated as an injury. As you heard from the previous witnesses, usually liability is not generally in dispute in asbestos-related cases, and it would not now be in dispute for pleural plaques. Therefore, they face money coming off their bottom line.

Historically, premiums have been collected in relation to insurers and the adage is that insurance companies have broad backs and they can take it, but one should bear in mind that there are self-insured companies that may be insured only up to a certain point. Insurance companies have become insolvent over the years, for example, Iron Trades; therefore, they are not immune. If pleural plaques are going be an additional source of compensation payouts, the surviving insurers, self-insured companies or uninsured companies will have to bear that loss. That is a wider business point in relation to attractiveness for investment in Northern Ireland. No one doubts that the Bill is well intentioned, but it needs careful scrutiny before you decide to make it law.

Ms Purvis:

I have some sympathy with employers that were not aware of the consequences of exposure to asbestos and were found to be liable after the fact. However, if an employer has breached its duty of care, and an employee is entitled to claim compensation, the employer should pay that compensation.

Ms Wylie:

No one is arguing against that. I suppose that this is where maybe there is a separation of language. No one doubts that anyone who has been injured as a result of an employer's negligent breach of their duty of care and who experiences pain and suffering should be compensated. No one denies that. However, I go back to your earlier analogy about the scar on your finger, which you likened to scars and pleural plaques on lungs. You are well in tune now with the idea that the joint medical position in the Johnston case was that pleural plaques are a benign condition. However, for you to have sustained that scarring on your finger, even if it is a small scar, you would have to have suffered a laceration, perhaps followed by stitches, and you would have been presented with a cosmetic defect, for which you would have been compensated based on general damages for your pain and suffering. This case is slightly different, because pleural plaques can only be detected radiologically, and, based on medical evidence — again, I concede that I am a lawyer and not a medical expert — they do not produce pain and suffering, and there is no cosmetic defect, because, generally, people do not even know that they are there —

Ms Purvis:

They are still a defect on their lung.

Ms Wylie:

But if you are thinking about scarring, the general basis on which compensation is awarded for scarring is cosmetic defect.

Ms Purvis:

In my mind, they are still a defect and, therefore, an injury. If we could move on —

Ms Wylie:

But there is no pain and suffering.

Ms Purvis:

I do not accept that, because constituents who are suffering pain as a result of pleural plaques have come to me. I see them all the time, and whether their suffering is related to their condition or to other conditions, I see the very real toll that it is taking on them —

Ms Wylie:

From a psychological point of view?

Ms Purvis:

No, from a physical point of view. If the Bill does not go through and does not apply retrospectively, would we be in potential breach of the Human Rights Act, because we would not be allowing individuals to have access to justice? If people — I know that you were talking about employers, but I am thinking about employees — are allowed to pursue compensation claims, but the Bill does not relate back prior to the Johnston case, would we be denying them access to justice?

Ms Wylie:

If you mean that the Bill is not retrospective and that you are dealing only with a few claims going forward, arguably, you would fall back on the position that the state of the law at that time was that pleural plaques were not compensable and, therefore, when the Bill is enacted, any claims going forth would be compensable. Potentially, everything is open to challenge, but whether such a challenge would be successful is another matter.

Ms Purvis:

In your presentation, you talked about the cost of access to justice and the potential pressures on the courts system arising from the introduction of the Bill. Surely that is a matter for the Department of Justice?

Ms Wylie:

Indeed, it is a matter for the Department of Justice. I know that the buzz words are "ensuring access to justice for all", but I agree that that is a matter for the Department of Justice, and probably not for this Committee. Nevertheless, the decision may impinge on another Department's position.

Ms Purvis:

Nonetheless, in introducing the Bill, it is up to us to ensure that people have access to justice. Whether the Court Service can cope with that, including the bill for legal aid, is certainly not something that we consider when we go through clause-by-clause scrutiny, although I know that the Department of Justice may look at it. However, if we were to look at every Bill in terms of its financial considerations and the stresses and strains that it will cause elsewhere, we would probably not bring legislation through the Assembly at all.

Ms Wylie:

I appreciate that. I do not mean this as a trite statement, but are we dealing with people who are seeking access to justice on the basis of an Act that declares that the condition that they have, which medical people have decided is benign and asymptomatic, is now a personal injury and, because liability is generally not in dispute, it is more or less a slam dunk for compensation?

I thoroughly accept that you may have constituents who have symptoms and, clearly, everything will turn on a case-by-case basis. Rather than a windfall for insurance companies or lawyers, as people may say, we may end up with a windfall for the worried well. In other words, people who are worried but who are physically well and asymptomatic.

Ms Purvis:

Why not then have a compensation programme similar to the one that they have introduced in England and Wales? That would cut out the pressure on the court system and the legal aid bill.

Ms Wylie:

Again, that is clearly a matter for the public purse and the Executive. I am subject to correction, but I believe that the scheme in England and Wales applies only to cases that had more or less reached a standstill in agreement and had been put to one side pending the decision in the House of Lords. The scheme does not apply to new cases. Therefore, a finite amount of time is involved, and there is a cap on expenditure. However, given that the legacy of asbestos and asbestos-related diseases is still very much with us and probably will be with us for at least the next 10 years, you are looking at something that could be very open-ended.

Ms Purvis:

It seems a very unfair system in which some people are recognised as having an injury and others are not.

The Chairperson:

Amanda, you mentioned employers who do not have insurance. Surely, all employers have to have some sort of liability insurance?

Ms Wylie:

To clarify, employers' liability (EL) insurance is compulsory, but some insurers may have a large excess on that policy, should that be £50,000 or £250,000. Effectively, up to that limit, employers are self insured. Historically, most cases, particularly those in relation to pleural plaques before the Johnston case, came under a decision in which Mr Justice Girvan was quoted, whereby damages were awarded of £11,000 plus £7,500 for psychiatric illness. That would fall within the excess of the company, and so would come off the company's bottom line. Anything over a certain limit would refer to the insurance company. I am sorry if I did not make that clear.

The Chairperson:

Thank you very much. Those are all the questions that we have. If we need clarity on anything, can we write to you?

Ms Wylie:

Certainly, I would be delighted to help.

Mr McLaughlin:

Will you get back to us on the asymptomatic conditions?

Ms Wylie:

Yes. Thank you.