



Justice Committee

Oral evidence: Mesothelioma Claims, HC 1253

Tuesday 13 May 2014

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Written evidence from witnesses:

- [Doug Jewell, Vice-Chair, Asbestos Victims Support Groups Forum UK](#)
- [Helen Buczynsky, Legal Officer, Unison](#)
- [Ian McFall, Thompsons Solicitors](#)
- [Adrian Budgen, Partner and Head of Workplace Illness, Irwin Mitchell LLP](#)
- [James Dalton, Head of Motor and Liability, Association of British Insurers](#)
- [Mike Klaiber, UK Disease Claims Manager, Zurich Insurance PLC](#)
- [Nick Pargeter, Partner, Berrymans Lace Mawer LLP](#)
- [Derek Adamson, DWF](#)

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Members present – **Sir Alan Beith (Chair)**; **Steve Brine**; **John Cryer**; **Nick de Bois**; **Mr Elfyn Llwyd**; **Andy McDonald**; and **John McDonnell**

Questions 1-59

Witnesses: **Doug Jewell**, Vice-Chair, Asbestos Victims Support Groups Forum UK, **Helen Buczynsky**, Legal Officer, Unison, **Ian McFall**, Thompsons Solicitors, and **Adrian Budgen**, Partner and Head of Workplace Illness, **Irwin Mitchell LLP**, (Q 1-25)

Q1 Chair: Welcome to Mr McFall from Thompsons, Mr Budgen from Irwin Mitchell, Mr Jewell from the Asbestos Victims Support Groups Forum, and Ms Buczynsky, the legal officer for Unison. We appreciate your coming to help us. Some of you have come quite a distance to give evidence today and we appreciate it very much.

First, may I ask whether any Committee members have any interests to declare?

Andy McDonald: I should declare that I was formerly in the employ of Thompsons Solicitors—Mr McFall is from Thompsons.

Chair: This important issue affects the constituents of many Members of Parliament, if not most, and we want to look closely and carefully at it. Members will be asking you questions, but do not feel that everyone has to contribute to every question. But if there is a point of disagreement or amplification that you feel you want to add, please indicate to me and I shall try to make sure that we hear everybody's point of view.

Q2 John Cryer: As you probably know, the Government did a cost-benefit analysis for imposing sections 44 and 46 on mesothelioma claimants. They say that the benefit for all claimants will be around £3.6 million. Do you agree with the claims from the cost-benefit analysis, and particularly with that figure?

Ian McFall: The purpose of the cost-benefit analysis was to assess the likely effect of LASPO on mesothelioma claims. I do not think that the cost-benefit analysis was fit for that purpose.

The underlying assumptions in the cost-benefit analysis are unreliable, because it is simply too soon to tell what the likely effects of LASPO will be. I believe that, once LASPO has been given adequate time to bed in, the likely effect on mesothelioma claims will be that the success fee deducted from mesothelioma claimants' compensation will exceed the 10% uplift in general damages, and that most mesothelioma claimants, properly advised, would take out after-the-event insurance so that the net effect, or the likely net effect, of LASPO on mesothelioma claims would be to leave claimants significantly worse off. Ultimately, the cost-benefit analysis is an exercise in premature conjecture, because insufficient time has yet to elapse to assess what the likely effects will be.

Q3 John Cryer: Following on from that, there are also the Jackson reforms. At what point should you make that assessment, not just with LASPO but with the Jackson changes? At what point should there be an assessment of the likely impact of those two changes?

Adrian Budgen: Lord Justice Jackson has said that it is too early to assess the impact of his reforms. He said that earlier this year, and I think we all agree. It is far too early; we have only had a year's worth of experience. If Lord Justice Jackson himself is saying that it is too early, we should be looking at a review over three to five years to assess the full impact.

Q4 John Cryer: That is three to five years from the point at which he made those comments.

Adrian Budgen: Yes.

Q5 John Cryer: Referring to the after-the-event premiums, do any of you feel that the inability to recover the cost of those premiums will be a deterrent, particularly considering that many mesothelioma claimants are elderly?

Doug Jewell: That is exactly right. The people that we see as Forum members, just after they have been diagnosed, are very risk-averse. The first thing that they always ask whenever any legal question comes up is, "What's the risk? Is this going to cost me

anything?” This was borne out in a survey that we did of all the people that we had been to see across the Forum between 2012 and 2014. Over 400 mesothelioma sufferers responded, and none said that this would be a good thing. All said that it would have inhibited them, or would inhibit them, from taking legal action.

Q6 Chair: You make the point that you are dealing with people who are risk-averse and who feel extremely vulnerable. To what extent is the market developing a response to that, with firms of solicitors seeing that degree of vulnerability and trying to create a reasonably safe path for people in that situation by minimising use of success fees and seeking to offer clients minimum risk, bearing in mind that 90% of mesothelioma claims are successful in court?

Doug Jewell: No, 90% are not. My colleagues will answer that question, but our experience is that 90% of cases are not. A lot of cases get dropped before they get to that stage. The best solicitors, in our experience, for non-mesothelioma cases of asbestos-related diseases are doing exactly that—they will not take a success fee from the claimants. But that is not everyone; a lot of lawyers out there, especially as the personal injury market becomes much more competitive, will seek to maximise the money that they can get, and they will not see these sorts of figures as the upper limit. They will see them as the flat rate.

Q7 Chair: There are two ways of responding to competition. One is to put your price up for the cases that you know you can get. The other is to get more cases by keeping your costs down.

Doug Jewell: But that presupposes that somebody who has been diagnosed with mesothelioma is going to sit back and go through a list of different solicitors, comparing the costs and the way that they behave, and then invite them in and argue them down on success fees. In a lot of cases—in more or less all cases—it would not happen. In some cases, we have been to visit people who passed away two or three days later. The thought that they would have time to investigate who would pay success fees, or who would charge them the least on success fees, does not bear any relation to reality.

Ian McFall: Your point about marketplace dynamics and competition is apposite, but again it is simply too early to say how those dynamics are going to play out as LASPO beds in. There have been recent high-profile acquisitions and mergers within the claimant solicitor community. There have also been some SRA-publicised insolvencies of claimant personal injury law firms. There are a lot of personal injury practices on the high street under a huge degree of pressure, and there is great uncertainty about how LASPO and the Jackson reforms will impact on their business models. I feel sure that some of those small to medium-sized firms struggling for survival will look to take the maximum success fees, ultimately to the disadvantage of claimants, simply to protect the fragile edifice of their business models.

You make a point as well about the success rate of mesothelioma claims. As far as I am aware, the suggestion that 90% of mesothelioma claims are successful is derived from the Compensation Recovery Unit data. That, I submit, is a statistical fallacy. The Compensation Recovery Unit captures details of claims that are pursued, most to a successful outcome. What the Compensation Recovery Unit does not capture, and is not designed to capture, are

the cases that we see of claimants who have little or no recollection of how, when or where they were exposed to asbestos, or whose evidence is such that there is no realistic prospect of establishing legal liability against any of their former employers or anyone else, and in which ultimately a difficult and reluctant decision on our part is taken not to pursue a claim. The claims that are not pursued, the hardest of all hard cases, do not show up in the CRU statistics. Our historical claims experience, as a national trade union firm, is that the success rates in mesothelioma cases are nowhere near 90%.

Q8 John McDonnell: On the potential assessment of the application of the LASPO and Jackson reforms, the Government state that they believe there is little indication that the LASPO-Jackson reforms are resulting in difficulties overall. APIL say that there is evidence that capping the success fee has created access-to-justice issues in complex cases. What is your experience of the LASPO reforms in non-mesothelioma cases?

Ian McFall: Again, it is too early to tell. Anecdotally, we have seen a fall-off in the intake of non-mesothelioma asbestos claims and all other forms of long-tail occupational disease, with the exception of noise-induced hearing claims—noise-induced deafness—which appear to be increasing, I think somewhat counter-intuitively, but driven I suspect by a claims management company marketing initiative that is resulting in trade union members contacting their trade unions to inquire about pursuing deafness claims. Anecdotally, the number of occupational disease claims is in decline. That may well be an impact of Jackson, but it could also be, as the Chair puts it, a feature of the dynamic, competitive upheaval in the marketplace.

Q9 John McDonnell: This goes to the heart of the matter. Do others have evidence of claimants being deterred?

Helen Buczynsky: We do not have evidence, because it is too early. I am here on behalf of Unison, and a large percentage of our claims are employer liability claims. We see an average turnaround on our claims of 18 to 20 months. That is for our entire cohort of cases, which include straightforward RTA claims as well. You are looking at 540 to 600 days before you see a settlement, and, as I said, that is skewed by some of the easier cases.

Professor Fenn was at a Westminster Forum policy meeting recently, where he talked about EL claims—the ones that are not omitted—and a turnaround time of 600 or 700 days, or maybe even 1,000. We are a large union, and we support thousands of claims every year, and we have not yet seen the effects of LASPO on our multi-track cases. We do not yet have any cogent or robust evidence, because it is simply too early. We have asked our solicitors to gather evidence, but we expect that it will be at least three years from now, if not five. It is not only the LASPO reforms. There are other reforms in the pipeline, such as proportionality and reviewing the guideline hourly rates, which have not even started yet. They will impact on solicitors' base costs and on their success fees. My colleague mentioned Lord Jackson, but Mr Justice Ramsey, who is in charge of the implementation of the Jackson reforms, said that we need at least five years for the reforms to bed down. That was quoted in the *Gazette* recently; he said it at the Modern Claims conference.

Q10 John McDonnell: Insurers and defending lawyers have said that the commencement of the Third Parties (Rights against Insurers) Act 2010 would be a beneficial step, reducing the degree of risk to mesothelioma claimants. Is that accurate?

Adrian Budgen: We agree that it is a positive step. We have been calling for it to be implemented for quite some time, but it does not reduce the risk. It just has the effect of reducing costs, and more significantly for mesothelioma claimants, who have a poor prognosis, it reduces the time. The whole restoration process can now take several months in certain cases, but that is time that people just do not have.

Q11 John McDonnell: We are not looking at all the options that the Government put forward in their consultation paper, but what else do you think could be done to speed up cases?

Adrian Budgen: Swifter production of medical records would be helpful. Some hospitals are slow to produce records, and it can take some months in certain circumstances. We have seen some welcome improvement in the production of Inland Revenue employment histories, which we need in every case, but we have had a retrograde step recently where, in fatal cases, we have not been able to obtain an Inland Revenue employment history without a High Court order. That is the subject of litigation at the moment. It has been a major backward step in fatal mesothelioma cases.

Q12 John McDonnell: What argument have they put up for not delivering the information?

Adrian Budgen: It is to do with data protection, because the person whose employment history it is cannot provide the requisite consent. It is a nonsensical obstruction, and the Liverpool coroner has commenced judicial review proceedings on the basis of it. It is something that the Ministry of Justice is aware of, but it was a significant retrograde step.

Q13 Nick de Bois: In the matter of hospitals and getting medical records, is there a pattern of explanation as to why there is such a delay? What is the delay? Is it three months, five months?

Adrian Budgen: It can be between three and six months in certain cases. There is one local hospital in south Yorkshire—I won't name it—that is particularly bad. Some hospitals say that, if a patient is receiving treatment, they cannot release the records. If someone is getting chemotherapy treatment, for instance, it can go on for several weeks.

Q14 Nick de Bois: That is not the only reason, is it? Is there a pattern of behaviour, or is it just a bureaucratic nightmare of getting lots of authorities and specific approvals from your clients? I am looking for a pattern, because if there is a pattern of behaviour emerging you can challenge it.

Adrian Budgen: We produce signed authorities very readily. It is the administration and production of records; some medical records offices in various hospitals seem to react quickly and others very slowly. Certain hospitals are particularly bad. If it is several months, that is time that mesothelioma sufferers just do not have. It is essential information; we have to obtain medical records in every case.

Q15 John McDonnell: Moving on quickly, the Joint Union committee in their written evidence has drawn attention to the position of non-employees—schoolchildren, for example. Obviously, this brings in the issue of public liability rather than employers'

insurance liability. What are the main points of distinction in the claims process between these cases and the occupation-related cases? What will be the implications for these cases of bringing sections 44 and 46 into force?

Helen Buczynsky: What we are tending to see now is a rise in mesothelioma claims in less traditional areas. We are particularly worried in Unison about asbestos in schools, something that has been linked to the JUAC response. We have seen the number of teachers exposed to asbestos diseases go up by 300% in 20 years, and the number of pupil claims coming through is obviously increasing as well. These are much more difficult claims, because they are to do with low exposure, and it is much more difficult to trace the history of that exposure and to gather witness evidence. Tracing the insurers is also extremely hard. There has been a shift in the risk profiling of these cases that adds to the chance of the success fee being higher.

We also know that, in general, pupils in academies and free schools will not be insured against this risk, as it is a public liability risk and is not mandatory. I am glad to say that the Department for Education has recently acknowledged that, and is talking about an insurance package being put in place for free schools and academies. Unfortunately, it is still not compulsory. The new mesothelioma scheme will be only for untraced insurers, whereas this is a class of claimants who will face uninsured defendants. Professor Peto, at a recent Education Select Committee meeting, talked about there being 200 to 300 pupil cases a year arising from asbestos in schools, so it is a significant issue.

Q16 John McDonnell: There is a real gap in coverage with regard to the insurance of certain sections.

Helen Buczynsky: Yes.

Q17 Mr Llwyd: There are of course personal injury cases involving serious and catastrophic injuries that require lifelong care and where there is reduced life expectancy, but LASPO exemptions do not apply. There are also cases of asbestos-induced lung cancer, in which claimants may face more complexity and more hurdles than in a mesothelioma case. Why is this condition so different? Why are these cases so different?

Adrian Budgen: Mesothelioma is uniformly fatal, so if you have a diagnosis of mesothelioma you have a very bleak prognosis. Survival from the time of diagnosis is an average of about eight months. It is uniformly fatal. We have argued strongly for LASPO not to apply to other serious injury claimants, but the reality is that the Government made an exemption for mesothelioma sufferers pending a review. Mesothelioma sufferers are unique in that it is a complex disease and very painful, and it is stubbornly resistant to treatment. You have a group of people who are particularly vulnerable.

There are also reluctant claimants. In my experience, people who have worked hard and have generally not applied for benefits are not rushing to make a claim, but they recognise if they have dependants that they need to provide for them. That is a big driver, but they are reluctant claimants. Any indication that they will have to pay costs out of their damages will deter a lot of people.

Ian McFall: May I put it this way? Complexity is often a question of degree. If you compare mesothelioma cases with road traffic accident rear-end shunt whiplash cases, all mesothelioma cases are complex. If you compare just within the group of mesothelioma cases, some are relatively straightforward—cases against a single employer shipyard

defendant whose insurers are known and have been sued up hill and down dale for the last 20 years—but there are also extremely complex mesothelioma cases in which there are disputes about whether the level of exposure gives rise to breach of duty, or whether causation can be established. These are issues that have been subject to repeated challenges by the insurance industry in the appeal courts over the last decade or more.

The cohort of cases that Helen Buczynsky was referring to—the low-level, intermittent, transient exposure cases such as the exposure of pupils or teachers in schools, or exposure in local government or public service employment—are the cases of the future. We are seeing fewer strong, low-risk mesothelioma cases from traditional heavy engineering industry such as shipyards, factories and power stations, and an increasing number and proportion of low-level exposure cases, which are difficult and inherently high-risk.

That is one analysis of complexity. Another equally valid analysis is the complexity of the claimants' predicament—their vulnerable, emotional state—and the need for claimant lawyers and claimant support groups such as trade unions and the asbestos victims forum to acquire the specialist knowledge, expertise and skill to deal sensitively with the vulnerability of the claimants' predicament. That is the basis on which Parliament decided that mesothelioma claims should be exempt from the introduction of sections 44 and 46 until a review had been carried out.

Q18 Mr Llwyd: I accept what you say, Mr McFall, about the Compensation Recovery Unit figures. I fully understand what you say, but is it possible for you to tell us the actual success rate? What is the success rate in relation to the mesothelioma cases that you take up?

Ian McFall: In aggregate?

Mr Llwyd: Yes.

Ian McFall: It is in the region of 50%. If we break it down into different categories, there are cases involving employment for decades in traditional heavy engineering industries, with known established patterns of negligent asbestos exposure. Those cases are far more likely to succeed, and therefore have a higher success rate; but I prevail on the Committee to take into account in your analysis of the review of section 48 that there is an increasing number and proportion of difficult high-risk cases. We are seeing a shift in the dynamics of the risk profile.

Q19 Mr Llwyd: You explain that, of course, with the low exposure cases and so on.

Ian McFall: The prospect of success, or the risk factor, is a moveable feast. It is currently in transition.

Q20 Chair: If you apply the same principle to medical negligence cases, you will discover a huge shadow of cases that somebody may have discussed with a solicitor but which are so weak and so difficult to prove that they do not proceed further. That is not unique to mesothelioma, is it?

Ian McFall: No. I should add to the list of cases that do not feature in the Compensation Recovery Unit's statistics those in which, understandably, a claimant or their family have been to a law firm and been advised that there is no prospect of pursuing a claim, and who then seek a second opinion from another law firm. Thompsons receives a significant

number of second advice inquiries, in which very often the claimant has been properly advised on the first occasion by another experienced law firm.

Q21 Mr Llwyd: I accept what Mr Budgen said about the uniqueness of the condition, and therefore the cases, but overall how would the success rate compare with that of any other industrial injury cases? Is it possible to say?

Ian McFall: If I may, I shall stick to the area in which I specialise, which is asbestos-related disease, and comment on the success rates in non-mesothelioma asbestos cases, which, of course, are not subject to the section 48 exemption. We still receive a significant number of inquiries from people diagnosed with asbestos-related pleural plaques, and I am sure that the Committee will be aware that the right to compensation was ended by a House of Lords decision in 2007. The prospects of success in those cases are zero. In other asbestos diseases, such as pleural thickening, asbestosis and lung cancer, there are inherent difficulties of liability and causation. On average, the success rate in a basket of cases is, on aggregate, around or just below 50%.

Q22 Andy McDonald: I turn the panel's attention to the section 48 review. LASPO came into effect on 1 April 2013, the consultation was launched in July that year, and we had the announcement on 4 December that it was to come into play. What is your understanding of the purpose of the Government consultation carried out between July and October 2013?

Ian McFall: The purpose of the Ministry of Justice consultation was to implement the policy objective, which I believe was tacitly agreed behind closed doors between the Government and the insurance industry. The ultimate aim of that agreement was to introduce a package of civil reforms, or reforms to the civil litigation process.

The introduction of a claims portal, a pre-action protocol and fixed costs were ostensibly presented as measures that would speed up the compensation claims process, but the real agenda and the actual outcome if that package of measures had been introduced would have been to deliver significant financial savings to the insurance industry through reducing the transaction costs of mesothelioma claims. I think the Ministry of Justice consultation was an intrinsic link between the agreement struck by the ABI and the Government to fund the Mesothelioma Bill and the package of measures proposed in the Ministry of Justice reforms.

If I may, I will quote briefly from an ABI briefing note published at the time of the introduction of the Mesothelioma Bill, a Bill to provide a compensation fund to deal with employers liability cases in which the employer no longer existed and the insurer could not be traced. The ABI briefing note states: "The insurance industry has worked closely with Government over the past two years to construct a package of measures". It goes on to say that the Mesothelioma Bill "will also create a payment scheme for those who cannot find an insurer against which to make a claim...The payment scheme will be funded by a levy on all insurers". It then says: "The Ministry of Justice will soon be consulting on changes to the legal process for mesothelioma claims," the pre-action protocol, the portal and fixed recoverable costs. It concludes: "These civil justice reforms...are an intrinsic part of the package that is being taken forward." That, I think, illustrates what the real purpose of the Ministry of Justice consultation was.

Q23 Andy McDonald: May I take you back to the consultation, and to specifics? It was explicit, wasn't it, that there was a gathering of evidence against the application of

success fees or changes in respect of success fees and ATE premiums? What evidence was to be gathered? What was done during that consultation? Are you aware of what happened to gather information about those areas?

Helen Buczynsky: I do not think that it was made clear. The consultation paper was about a package of reforms to do with fixed costs and changing procedure. The question on the section 8 review was right at the very end; it was an adjunct to question 15. It did not refer to the likely effect on mesothelioma cases, as was promised in Parliament when the exemption was put in place. It did not ask about distinguishing mesothelioma cases; all it asked was whether you agreed that it should be lifted in light of the package of reforms that, in fact, never went through. Again, it is too early to have any evidence. We do not have any evidence of the likely impact of LASPO.

This was not a proper review. It could be seen as a whitewash, which we were promised it would not be, because it is not evidence-based. We simply do not have the information. The claimant stakeholders did not supply any information about the impact on mesothelioma sufferers, because we did not have it. Parliament clearly made a decision, and it is one that we think should be upheld until that evidence can be gathered. That is what mesothelioma claimants deserve. They do not deserve any less than that—for it to be taken away within a year of the LASPO reforms, and for that announcement to be made.

Doug Jewell: May I echo that? If there was a proper review, with evidence before it, and then exemption was to be ended, we as support groups would disagree, as would the people that we go to see, but at least it would be seen that they had been given the chance to put their views forward. At the moment, if this goes forward, not only will a wrong decision be made but there will be a deep sense of injustice.

If you read the debates at the end of the legal aid Bill, the review that was envisaged after Lord Alton tabled his amendment was not a question at the end of a consultation, as part of a package; that question definitely says “in the light of”—as everybody has said—the other two pillars. Those pillars are now gone, but in recent days Lord Alton told us that he does not consider the situation to have changed. We need a proper review before we can provide evidence as to what the impact will be.

Q24 Andy McDonald: If there is to be a meaningful review, what evidence is going to be gathered? You have already given some indication of time scale, but what evidence will be gathered and over what sort of time scale will that be helpful if, as you say, it is far too early now?

Ian McFall: The time scale, I would submit, is three to five years from the date on which LASPO was implemented on 1 April last year. As for what evidence should be collated and considered when looking at the likely effect on mesothelioma claims, it is exactly the sort of question that this Committee has been putting to us today. Bring us back, by all means, in three or four years, when a sufficient body of evidence has been established, and ask the same questions. If the Committee, or Parliament, concludes then that a proper review has been conducted and the evidence indicates that the LASPO exemption should be lifted, we would accept at the very least that due process has been done—but not now. This is premature; it is conjecture, and there is simply no reliable body of objective evidence on which to base a decision about the likely effect of LASPO on mesothelioma claims.

Q25 John McDonnell: Can you be clear, Mr McFall, about what you said earlier, so that I am absolutely clear? You are saying that your understanding, or your interpretation, is that there has been a deal between the Government and the insurance industry that, in return for payment for the Mesothelioma Bill costs, there would be lifting of the exemption with regard to LASPO.

Ian McFall: Others will form their own conclusions, but that is precisely how I see it.

Chair: You might want, for the record, to let us have a copy of the words that you read out from the briefing note, to complete your evidence.

Thank you very much indeed. We are grateful to you all for giving evidence this morning. We now have a further group of witnesses, who may be able to throw further light on the matter.

Examination of Witnesses

Witnesses: **James Dalton**, Head of Motor and Liability Insurance, Association of British Insurers, **Mike Klaiber**, UK Disease Claims Manager, Zurich Insurance plc, **Nick Pargeter**, Partner, Berrymans Lace Mawer, LLP, and **Derek Adamson**, Partner, DWF LLP, gave evidence.

Q26 Chair: Good morning, gentlemen, and welcome. Thank you for coming to give evidence to us this morning. We have Mr Pargeter from Berrymans Lace Mawer; we have Mr Adamson from DWF; we have Mr Dalton, who is head of motor and liability at the Association of British Insurers; and we have Mr Klaiber, who is the UK disease claims manager for Zurich Insurance plc.

It might be convenient, because it will be fresh in your mind, to ask if any of you, particularly Mr Dalton, want to comment on what has just been said about the understanding between the industry and the Government. You were in the room throughout that exchange, Mr Dalton, weren't you?

James Dalton: Yes, I was. I shall certainly look at the briefing note again, but I do not have a copy with me. The ABI and the insurance industry worked closely with the Government over a long time, because we recognised the horrific nature of mesothelioma as a condition and, indeed, the fact that there are a number of untraced mesothelioma claims each year. Unfortunately, those people did not get any compensation, and we have worked closely with the Government to develop a framework, which has now been implemented through the Mesothelioma Act 2014, under which those people will now get the help and support that they need and deserve.

Q27 Chair: Were you seeking to reassure your members that the obligation they were going to face through the levy would, to some extent, be offset by the other changes that the Government were going to make?

James Dalton: It is important to recognise that the process of getting compensation to mesothelioma claimants is too slow, for the reasons you have just heard in terms of the horrific and very short life expectancy that these people have. The process is too slow and

too expensive, and we would like to see the claims that need to be paid being paid much more quickly. That means making sure that things like the pre-action protocols and portals are put in place.

If this is some sort of dirty deal that the insurance industry did with the Government, those things have not been implemented, and we want them to be implemented. The Government consulted on them, and they were not implemented.

Q28 Chair: Your written evidence on this supports the Government's original wish to bring sections 44 and 46 into force, but do you recognise the vulnerability of the mesothelioma victims for whom the prospect of a success fee is intimidating? They are at a difficult time in terms of making a decision, and it is a pretty frightening thing to put in front of them, isn't it?

James Dalton: Part of the conversation that did not just happen was asking claimant lawyers why they charge success fees at the level that they do.

Q29 Chair: A question that I put in the previous session.

James Dalton: At the end of the day, it is an arrangement between the mesothelioma claimant and their lawyer. The level of success fee is entirely a matter between those two parties. Do I think that they are too high? Absolutely I think that they are too high, but that is a conversation for the previous panel, who would need to justify why they are charging mesothelioma claimants such extortionate amounts of money.

Derek Adamson: The other point is that nobody could help but be moved by the descriptions of vulnerability, especially by Mr Jewell, the Victims Support person, but, for the most part, these victims are represented by very experienced firms of solicitors who are well used to dealing with these situations and are able to provide the support, along with the support groups. One does not detract at all from the vulnerability of the person who has just been diagnosed with mesothelioma, but there is support. The two solicitors on the previous panel are both from firms of solicitors that are very experienced in this work, and it is their job to try to help them.

Nick Pargeter: What makes me uncomfortable as a lawyer is that there seems to be an assumption on the claimants' side that the interests of the lawyers and the victims are the same, and I do not think that is right here, because we are dealing with a balancing act between a success fee, which is a profit fee for the lawyer, and an increase in damages. These are two separate things.

Q30 Chair: Various of you have views about what the appropriate level of success fee should be. The ABI say that it does not need to be more than 11%. Can you explain the justification for that?

James Dalton: As I was explaining earlier, despite what you heard in the previous session, these claims are horrific, and they are in some cases complex. But because of the legal framework we have in place in terms of joint and several liability, and in terms of the Compensation Act, they are not incredibly complex claims to proceed with against a particular defendant, and the defendants are often known, so a success fee at that level is rewarding the solicitor for doing work that is not terribly complex. In our view, the solicitor's success fee should be reduced for that reason.

Q31 Chair: What about the after-the-event insurance market? Has there been a general effect from the LASPO reforms, not just in mesothelioma cases but in occupational diseases generally, on the use and cost of after-the-event insurance?

Derek Adamson: The use of after-the-event insurance generally was thought not likely to be needed in the new age. We recognise that the ATE aspect is just one of a package of reforms, and I shall come back to that in a moment. Essentially, if ATE cover is needed, the contention on the other side is that it is needed for the risk of the cost disbursements of the claimant law firm and, secondly, the risk of a liability for costs—an adverse costs order—if the defendant should make an effective part 36 offer. Is the Committee familiar with the part 36 process?

We would say that in practice with mesothelioma claims, setting to one side the question of cases that never reach the CRU, the reality is that the vast majority of cases that are pursued are successful. That is not to say that they are all successful, but the vast majority are. The number of cases that end up being a battle in court over quantum of damages, which is where a part 36 offer for a specific sum of money would be relevant, is vanishingly small. I have worked in this field for 35 years, and I can barely think of a trial where quantum in a mesothelioma case had not been agreed. That is because, in the main, the claimants are represented by experienced lawyers, as are the defendants, and they come to agreements. That is what happens. We say that, in general, the need for ATE cover is extremely limited. The cost of it will be limited. We have not had provided to us by the other side details of the premiums that are being asked for in the new age, so we cannot help with that, but the fact of the matter is that ATE cover, if needed, is needed for a very limited range of liability for costs, and the costs should not be anything like the costs prior to the introduction of LASPO.

Q32 Andy McDonald: Are claimants in a stronger or weaker position if they do not have after-the-event insurance, in terms of their negotiating power with the defendant? Are they in a stronger or a weaker position?

Nick Pargeter: It does not really make a lot of difference. The liability for disbursements will be roughly £2,500. In the grand scheme of things, that is a relatively minor factor. We are talking about after-the-event insurance to cover the victim's disbursements if the claim fails. We know from the NIESR data that average disbursements come to about £5,000. That includes counsel's fees—counsel tend to be on a conditional fee agreement, and no win, no fee as well—so we are talking about after-the-event insurance to cover the risk of a liability to pay £2,500 in the event, shall we say a 20% chance, of a claim being unsuccessful. I do not want to diminish it, but it is not a vast amount of money.

Q33 Andy McDonald: I have practised for 35 years, and I do not recognise what you are saying.

Nick Pargeter: This is a new funding arrangement. It is a completely different funding arrangement and neither of us will be familiar with it.

Q34 Andy McDonald: ATEs have been around and given strength to people's position; they have given them the assurance that they can pursue their case.

Nick Pargeter: It is to cover the defendant's costs, but that has completely gone now with qualified one-way costs—

Andy McDonald: It is to cover—

Chair: Let the witness answer the question.

Nick Pargeter: What is proposed under LASPO is a completely different arrangement for the funding of costs in civil litigation. One aspect of LASPO is that, generally speaking, a claimant will not have a liability to pay defence costs if the claim fails. That is largely why ATE insurance was taken out in the past.

Q35 Chair: My original question was about the incidence and use of it. Do you agree with the previous group of witnesses, most of whom felt that, on most matters, it is too soon for us to have much clear evidence?

Derek Adamson: There is some evidence that I read about in a survey done by some solicitors in Liverpool. It suggested that a fair number of ATE policies are still being taken out, but we have to put this in the context of cost and recoverability, and whether it is probable that recoverability is also more than covered, like the success fees, by the 10% increase in general damages.

The point is that Lord Justice Jackson's reforms established a whole new scheme, as Mr Pargeter has just said. It was a package of reforms. It is dangerous to look at each of them in isolation because they are a package. The package included qualified one-way costs shifting, what should happen to ATE cover, a 10% increase in general damages and, fourthly, the non-recoverability of success fees. Those four things have to be taken together and considered together. It is dangerous to focus on one single item to the detriment of the others.

Q36 John Cryer: Following on from those questions, I think you said, Mr Dalton, that success fees are too high. That implies that victims of mesothelioma should shop around for cheaper fees. Considering that from the point of the disease appearing to death is about eight months, possibly slightly longer, how realistic is it to expect people to shop around for a cheaper source of legal representation?

James Dalton: As Mr Adamson indicated earlier, there are a small number of very professional claimant law firms that progress this type of case for mesothelioma victims. I would like to see those firms working with the asbestos victims support forums to negotiate success fees, so that the mesothelioma claimants themselves do not have to do it. If the support groups can sit down and work with their claimant legal teams and have a discussion about what a reasonable success fee looks like, that could then be a framework for all mesothelioma claimants in future.

Mike Klaiber: Awareness of mesothelioma has increased considerably in recent years. It is probably a credit to the asbestos victims support groups, but there is a mechanism of referral from medical specialists and nursing agencies through the asbestos victims support groups to the panel of specialists—the claimant lawyers that we have been talking about. I endorse the point that, generally, claimants are well represented by these firms.

Nick Pargeter: I want to make a comment about the success fee that we have at the moment for mesothelioma claims, which is 27.5%. That success fee was set following a consultation undertaken by the Department for Constitutional Affairs and the Civil Justice Council in 2005. They instructed Professor Fenn, and I think a Mr Hickman, to look at the risk of asbestos claims. They looked at pre-claim failures, which Mr McFall was talking about earlier, and they assessed the risk at 27.5% for all asbestos claims, including mesothelioma.

I would say that mesothelioma claims represent a smaller risk than other asbestos diseases. The point is that there is no reason why a similar exercise could not be done in future, looking at the risk of failure in mesothelioma claims and, for the purposes of the claimant lawyer and the retainer that a claimant lawyer has over the claimant, setting a success fee that reflects the average risk, across the board, for mesothelioma claims. That would avoid the need for a mesothelioma claimant to consider the level of success fee, which the victim does not have to do at the moment because it is fixed.

Mike Klaiber: It is worth adding that the success fee was predicated on the basis of compensation for the claimant lawyer in cases that failed. As part of that consultation process, as Mr Pargeter says, all asbestos-related claims were set at 27.5%.

Chair: I am sorry, I missed the last bit.

Mike Klaiber: All asbestos claims were set at a success fee of 27.5%, but it has to be borne in mind that other disease claims, such as stress and RSI, were set at 100%, and all other diseases, notably deafness and vibration claims, were set at 62.5%. It has to be taken as relative. I certainly agree that mesothelioma claims have a uniqueness about them; they are special, but special rules have developed in this area to ease the burden of proving liability, reinforcing the point that 27.5%, which was set nearly 10 years ago, is probably not appropriate at this time.

Derek Adamson: In this respect, and adding to that, in the Sienkiewicz and Willmore cases, where there was a low-level dosage of exposure, Lord Brown remarked that, from the defendant's standpoint, liability was a lost cause—that is a Supreme Court judge saying that. That has to be taken into account in terms of the success fee argument.

Q37 John Cryer: If you take away the ability to claim the success fee, to claim back the ATE premium, which we have already talked about, will that not act as a deterrent? We are talking largely about elderly victims who perhaps have eight to 10 months to live. Don't you think that removing those two elements will in any way be a deterrent?

Derek Adamson: There is no evidence that it has been.

Q38 John Cryer: That is because the system does not exist now as it will do.

Derek Adamson: That is true, yes. I take the point.

Nick Pargeter: It is more inconvenient, certainly.

Q39 John Cryer: Do you mean that the new system is more inconvenient?

Nick Pargeter: The new system would be more inconvenient, yes, because the success fee is not fixed. I accept that.

Mike Klaiber: While there are special features about mesothelioma claims, if it is deemed that the current LASPO provisions do not prevent access to justice in all other cases, there are equally severe situations with catastrophic injuries and imminent death that would also apply to those cases.

Q40 John Cryer: I have one more question. A comment made by Unison in their written evidence is: “Defendant/insurer delay is a standard tactic, to keep hold of funds and put pressure on the claimant to abandon their case or accept a low settlement offer.” Would you give us your reaction to that claim?

Derek Adamson: We believe that there is no merit in that argument at all. There is no financial incentive for insurance companies to delay settlement of any claim. By definition, it is almost axiomatic that the longer a case goes on the more expensive it becomes. As legal suppliers, Mr Pargeter and I, and others, face key performance indicators that are linked to the speed of settlement of cases. We are measured against each other, according to how quickly we can deal with claims in an efficient and competent way, so we do not see any commercial advantage in delaying settlements. If the case can be concluded quickly, the legal costs are less. Moreover, the reserves for those cases can be disposed of, and the financial position is clear.

Nick Pargeter: May I put this in a slightly different way? When you are acting on one side, it is difficult to know exactly what is happening on the other side of the fence. My friends on the claimant side who are doing claimant work have difficulty in getting medical records and the like, and that causes delay on the claimant’s side. There are data to say that there is too much delay on the claimant’s side, but what people on the claimant’s side do not see is that on the defendant’s side there is quite a tricky job getting the funding in place. It may be a question of, “Here’s a claim. Pay up straight away,” but it is not as simple as that. You may have several employers; each employer may have several insurers, and some insurers may give you instructions straight away and some may not. Some may be difficult, and you are sometimes reluctant to make a concession on liability unless all the contributing insurers have given instructions to you.

You may ask why it is taking so long for an insurer, or a solicitor working for an insurer, to deal with this, that or the other. It is because, under the surface, we are sometimes paddling furiously, trying to get the funding in place to deal with it. Similarly, I confess that I sometimes do not understand the claimant’s side—“What are you waiting for? Why aren’t you pushing this case quicker?” I often see that, but I am not here to judge one way or the other. I believe strongly that there is a pre-litigation failure in pushing these cases forward.

I am not casting blame on one side or the other. Too many cases go to litigation; there seems to be a failure in exchanging evidence and settling cases pre-litigation. We know that roughly 50% of cases go to litigation, and that 99% of them settle. Why are they not settling pre-litigation? I am not saying that is one side’s fault or the other side’s fault. I am saying that it is exceptionally important that someone looks closely at this failure for mesothelioma victims pre-litigation, because there is a failure at the moment, and there is nothing to address that.

Q41 Chair: Talking of delay, but a different one, do you understand why the Government have not brought into force the Third Parties (Rights against Insurers) Act 2010?

Mike Klaiber: I am not sure that we are aware why it has not been brought into force. We certainly support the comments of the previous panel that it would be a good thing. The ABI responded to consultation from the MOJ in 2009, and we were supportive. It is non-contentious, and it would remove the need for a claimant to restore a dissolved company to the register for the purpose of suing. I do not think it adds much, one way or the other, to the risk or otherwise of presenting a claim, but its implementation would certainly improve the speed with which those claims were progressed. The only caveat that the ABI has presented is to ensure that defendants preserve a right to pursue a claim against a co-defendant should the need arise, but we would certainly support fully the implementation of the new Act.

Q42 Mr Llwyd: You all argue, if anything, that these cases are less complex and less risky from the perspective of the claimant than other personal injury cases, including some caused by exposure to asbestos. As you know, that is certainly not the message that comes across from claimants and their representatives. Could you briefly explain the basis of your view?

Nick Pargeter: There are two simple points. Legally speaking, mesothelioma is caused by asbestos. It is as simple as that, so you do not have to consider other causes. Asbestosis is a fibrosis of the lung that can be caused by many things, and cancer can be caused by many things, but with mesothelioma there is no issue: it is caused by asbestos. That is the first point. The second thing with mesothelioma is that because of joint and several liability you do not have to pursue all culpable exposers; you just have to find one party who is responsible for any bit of the exposure and you get home 100%. Those are two clear reasons why, for a claimant lawyer, mesothelioma is much easier to pursue.

Q43 Mr Llwyd: Doesn't that gloss over the fact that there is a small matter of culpability, liability and negligence?

Nick Pargeter: Negligence has to be proved.

Q44 Mr Llwyd: Exactly, and that is often a big job, isn't it? Otherwise, the law of tort would not exist.

Nick Pargeter: We live in a system that provides compensation only where legal culpability has been established. I accept that entirely. In some cases—with mesothelioma, I submit that they are relatively rare—it is difficult for the claimant to prove that the employer has been negligent, because the exposure is so low. Given the knowledge of asbestos risks at the time, the court will not assume that that employer had sufficient knowledge to have avoided the risk. I accept that harsh judgments have to be made.

Mike Klaiber: With mesothelioma, a special show cause court has been developed by Master Whitaker, which effectively reverses the burden of proof in mesothelioma cases, something that does not apply to other sorts of case. A defendant has to show good reason why they should not be liable, something that does not apply to any other sort of case.

Derek Adamson: That occurs right at the outset of the litigation.

Q45 Mr Llwyd: One other thing that occurs to me, having listened to the previous panel, is the apparent increase in the number of claimants to low-level exposure. That cohort of cases is going to be more difficult, I guess, than what I might call the fairly obvious one Mr Pargeter referred to, if I can put it that way.

Nick Pargeter: Yes, I think that is fair.

Q46 Mr Llwyd: If you bring those into the mix, it is not straightforward and simple, is it?

Nick Pargeter: Some on the periphery are tricky cases, but I would say that they represent about 10%.

Mike Klaiber: In establishing causation, medical experts will readily accept, if there is evidence of asbestos exposure, that that will be the cause of the mesothelioma. At least the medical causation element is rarely in dispute.

Q47 Andy McDonald: Has the Government's consultation asked a single question about whether sections 44 and 46 should be brought into force? That question was apparently predicated on the introduction of the other reforms to the mesothelioma claims process contained in the consultation document. Do you accept that critics of the decision feel that they have not been given an opportunity to put forward their overall views about the likely effects of bringing sections 44 and 46 into force for meso claims?

James Dalton: There are two points to make on that. The first is that this is currently before the courts; it is the subject of a judicial review proceeding. The second is that, as far as I am aware, every person who has given evidence to you today responded to question 15, which would indicate to me that people realised that this was a question that was being asked.

Q48 Andy McDonald: Would you not agree that it would have been better to review sections 44 and 46 separately, rather than it being part of a wider consultation exercise? Should it not have focused on that to the exclusion of all else?

James Dalton: That is not really a question that I can comment on. It was clearly a decision that the Ministry of Justice made—that it was an appropriate way to seek the views of all stakeholders about a whole range of reforms, including the review required by LASPO.

Q49 Andy McDonald: The Government and the Secretary of State, in reaching their decision, were particularly mindful of whether there was anything that distinguished mesothelioma claims from other claims. Would you not agree that the section 48 review should have asked consultees to give their views on that point, about the particularities of mesothelioma claims? It did not ask that.

James Dalton: For the reasons we have articulated already, particularly Mr Klaiber, the particularities and specificities of mesothelioma as a condition are well known, and the particular legal framework that exists for mesothelioma claims is obviously already well known by the Ministry of Justice.

Q50 Andy McDonald: Do you accept that some of the special attentions that are paid to mesothelioma claims, in terms of first-instance consideration, are simply a reflection of the urgency of these cases—that they are special and different? The very fact that somebody who has been given this diagnosis will be dead within the year, more often than not, does mark them out for separate and distinct treatment.

James Dalton: Absolutely. That is why there is a whole range of specific legal frameworks to deal with mesothelioma claims. The Compensation Act and the show cause hearings that we have just been talking about are frameworks established by the courts, and law passed by Parliament, and they give specific treatment for the very reasons that you have articulated.

Q51 Andy McDonald: Finally, on the complexity of the cases, we have heard a lot about the cause of mesothelioma; we know what it is, and that perhaps simplifies matters to some extent, but is it always so straightforward when we are dealing with loss of services claims and other special damages heads of claim? Are they always straightforward and simple to resolve, or are there particular complexities in mesothelioma cases that need to be considered?

Derek Adamson: I do not think that there are complexities in the quantum element that are any different from other cases. If you took a catastrophic injury case, and you had complex care evidence on both sides, the claimant in that case may have very difficult decisions to take—for example, if a part 36 offer is made.

There was questioning about catastrophic injury cases before, but in that respect I believe that there is no distinction. The evaluation issues are there, and there is a fairly defined bracket for general damages, and there are the care elements and the loss of services, but those are consistent with most fatal accident cases.

Q52 Chair: In the previous session, and also in written evidence, we had some discussion about non-occupational cases—for example, school pupils. How will they be affected by bringing in sections 44 and 46, and are there any other factors relevant to that point that you want to mention?

Mike Klaiber: I gave evidence in the employers liability policy trigger trial in 2008. As part of my evidence, I obtained some data from the CRU on EL and public liability claims. If I am permitted to give some figures, in the year 2002-03 there were 863 EL claims compared with 14 PL claims. Over a range of six years, until the year ending in 2008, there were 1,806 EL claims compared with 58 PL claims, rising from 1.5% to 3%. I accept that 2007-08 is now six years ago, so the data is now a little out of date, but it gives the proportionality between EL and PL claims. I am certainly not aware, within my own company or in the market, that there has been a significant rise in the number of PL cases. They are still considered to be the small minority of claims.

Derek Adamson: There is another factor. The EL tracing of insurance issue has been dealt with by the new Mesothelioma Act, but with the public liability policies that would operate to respond to these claims you do not go back to the date of exposure for the policy that is triggered. The law is unclear, but essentially you go back 10 years. The

policy history is not as difficult, because the policy that will apply will have been in existence 10 years before, because that was the date of injury.

Q53 John McDonnell: May I go back to the original question put to you, Mr Dalton, by the Chair, but which you failed to answer? It is the allegation that there is a link between the insurance industry's agreement to fund the Mesothelioma Act's costs and the LASPO exemption. Already, we have seen that a public statement has been put out that the insurance industry did see this as a package, so on the nature of the discussions between the Government and the insurance industry, are you aware that these issues were on the same agenda during those discussions? Are you aware of a discussion about some informal or formal agreement of payment for the Mesothelioma Act and the exemption from LASPO in return?

James Dalton: As I said in answer to the earlier question, what we said clearly to the Government as part of our discussions in relation to the establishment of an untraced scheme for mesothelioma payments was that on the costs and delay of getting compensation to people—whether traced or untraced—the delay is too big and the costs are too high, and that as part of a broad package of measures, including the introduction of an untraced scheme, the Government should look at that.

Q54 John McDonnell: You are going to have to stand for election. With responses like that, you should become a politician. May I be clear? It is a specific question. In those discussions, was there a link between the payment for the Mesothelioma Bill costs and the lifting of the exemption?

James Dalton: There was a discussion about the framework and the package that would be delivered as part—

Q55 John McDonnell: Those two elements were within that package?

James Dalton: There were lots of elements within it.

Q56 John McDonnell: Those two elements were within that package?

James Dalton: There was a discussion about the costs and delay of mesothelioma claims—

Q57 John McDonnell: Were those two elements within the package as discussed?

James Dalton: I do not know whether I can be any clearer.

Q58 John McDonnell: I think you can. You can say yes or no.

James Dalton: There was a whole range of discussions over a long period between the ABI and the Government—

Q59 John McDonnell: In which these two issues came up?

James Dalton: The legal framework for mesothelioma claimants in particular was discussed, yes.

John McDonnell: I think we'll take that as a yes.

Chair: Thank you very much indeed for your evidence. We are very grateful to you.