Tuesday, 29 November 2016

(10.20 am)

Session 1

Welcome by Chair and opening comments

THE CHAIR: Good morning, everybody. My name is Alexis Jay and I'm the chair of the independent inquiry into child sexual abuse. I'm here with the full panel today: Drusilla Sharpling, Ivor Frank and Professor Sir Malcolm Evans.

I just want to say a few words by way of introduction. The seminar has been organised as part of the accountability and reparations investigation, and it is as a result of the response to the inquiry's issues paper on the civil justice system and criminal compensation. Those issues papers were published on 4 August of this year. The consultation formally closed on 29 September, although the inquiry received a small number of submissions after that date. All submissions received have been reviewed and considered by the inquiry. They were received from a range of individuals and organisations, and all responses have been published on the inquiry's website. As we have so much ground to cover over the next two days on the civil justice system alone, we will hold a seminar on matters arising from the criminal compensation issues paper in early 2017.

The panel would like to thank everyone who took time to consider and respond to the issues papers. Without your valuable input, we would not be able to host this seminar. I would also like to thank those individuals who have agreed to take part in the seminar. It is being live streamed over the internet with a short delay, so that the general public can follow the proceedings on a matter of central importance to this investigation. The panel and I are looking forward to open, lively and respectful discussion amongst yourselves in relation to a number of key areas relating to the civil justice system.

It is important to state at the outset that the purpose of this seminar is not to gather evidence in the formal sense. This is a forum where important issues are to be discussed, facilitated by Peter Skelton QC, who is the lead counsel to the accountability and reparations investigation. We have attendees who will bring to the table a wide range of experience and knowledge about the operation of the civil justice system in the area of child sexual abuse litigation. They will be looking at its flaws and weaknesses, as well as those aspects of the system where it can and does work well. They will also bring forward ideas for reform, both modest and potentially radical. The panel

and I will be listening to what you have to say with keen interest, and these discussions will undoubtedly inform the investigation as a whole and should also identify areas for further work.

I thank you for your participation and I will now hand you over to Peter Skelton QC.

Opening comments by Facilitator

MR SKELTON: Good morning, everyone. Thanks very much for coming. It is quite an intimate venue, particularly for the lawyers to be all together in one room. I am facilitating the seminar, by which I mean I am going to try to keep the discussion moving, but really, I and the panel want to hear from you, rather than me, and I won't be asking the conventional QC type questions, ie, there is no cross-examination and no sense you are on the spot, or anything like that. It is a friendly discussion.

I do need to say a little word about housekeeping. Because of the sensitive matters we are dealing with in this inquiry, child sexual abuse, we have got a five-minute delay on the public feed and we have also tried to restrict the use of live media within this hearing chamber, just in case somebody mentions something which is confidential or sensitive to those in the room or outside the room, it allows us a degree of

control over that information. It is not in order to prevent public access to these hearings in any way.

That does mean that those of you who are using electronic devices, which we didn't originally want to be used in the room, we would be grateful if you would not connect them to the internet in any way, if that's okay, but please do use them to record what is being said.

If anything comes up that I consider to be sensitive or anyone else in the room considers to be sensitive, I will pause and ask the chair to address it, because we may need to restrict the use of that information in the public, for reasons which I am sure you all appreciate.

I am going to cover quite a few topics in this first session. We are running a little bit late, as you probably appreciate. It is our first session and we are a little bit behind and I would like to get back on track, ie, finish in about 50 minutes' time.

The things I would like to discuss are: compensation in child abuse cases, the levels of compensation that one is generally looking at; the costs, from your perspective, that are associated with it; and then issues of public funding, such as it is; issues of initial fee arrangements, ie, funding which comes from lawyers and elsewhere; and then overall problems with

access to justice for survivors and victims of child sexual abuse.

I will ask you at the end as well if you can give me a steer, or give the panel a steer, on things we ought to be looking at in terms of gathering data, commissioning original research, in order to better understand the things we are talking about. Broadly speaking, those are the topics to cover. Can I start by asking you to introduce yourselves?

Introductions

MR ENRIGHT: Good morning, Professor and members of the panel. My name is David Enright. I am a partner with Howe & Co solicitors and I represent the Forde Park Group, the Stanhope Castle Group and Survivors of Organised and Institutional Abuse.

MR DANIELS: I'm Luke Daniels, a partner with Irwin Mitchell Solicitors. I head the child abuse litigation team in our Birmingham office, who acts for a number of survivors.

MR GARSDEN: Peter Garsden, I'm head of the abuse department, a partner at Simpson Millar Solicitors. I have been dealing with child abuse cases for the last 20 years and I'm also president of the Association of Child Abuse Lawyers. I have led about 24 group actions into institutional abuse as lead solicitor and our

department at any one time has approximately 700 cases on its books. I'm also involved in the Janner module of this inquiry.

MR SCORER: I'm Richard Scorer, I'm head of the child abuse team at Slater & Gordon and I represent, I think, around 67 core participants in the inquiry.

MR BRIDGE: Good morning, I'm Jonathan Bridge. I'm head of the abuse department at Farleys Solicitors in Manchester. We deal with the full range of child abuse. My particular specialism is probably children whom they fail to remove from Social Services' care when they're suffering abuse.

MR SKELTON: Thank you very much. I should say that our core participants, some of them are attending, but generally speaking, they are not participating, because this is not a formal hearing with the usual examination of witnesses. But as I say, we are publicly being filmed and also there are some in the room, so you are aware.

Open discussion

MR SKELTON: So far as the first topic is concerned, then, compensation. Who wants to give us an idea of the kind of range of compensation, generally speaking, one finds in child sexual abuse cases? Richard?

MR SCORER: It's difficult to generalise, because obviously

every case turns on its own facts and every case will depend on the level of damage suffered. Having said that, as a very broad generalisation, I think in the past people have talked about average awards being in the region of 15,000 and certainly, typically, awards tend to be in the £10,000 to £40,000 range in my experience. It is relatively unusual to see awards significantly above that, and certainly six-figure awards are relatively unusual. That, of course, is primarily because of the difficulty in proving the loss of earnings aspect. Many cases tend to be typically general damages plus counselling costs plus maybe a modest award for disadvantaged in the labour market. But substantial awards for loss of earnings are relatively rare.

MR SKELTON: So the figure you have given is the totality of the compensation, it is not simply general damages, it is everything?

MR SCORER: I'm talking about the totality of the compensation.

MR SKELTON: Most cases fall within that range. Presumably, you do get some that are higher if there is a large loss of earnings?

MR SCORER: Yes. I think in this country the highest awards have probably been 600,000, 700,000, that sort of range,

but those are very unusual.

MR SKELTON: Does everyone agree with that general range?

MR ENRIGHT: I have seen quite a few examples where the damages awarded were far lower, in the very low thousands, £3,000/£4,000, but that often comes as a result of settlement, where the individuals involved feel compelled to settle for very low awards. I'm sure that's the experience of some of my other colleagues and that is something we do need to come on to. Damages is the last stage in the process. Actually getting near a court and getting near a solicitor is the starting point score.

MR GARSDEN: I'm running, probably, one of the largest group actions against Manchester City Council and that's been going on for a number of years. That is institutional abuse.

THE CHAIR: Sorry to interrupt you, but it appears that the feed isn't very loud. Could everyone speak up, please, around the table?

MR GARSDEN: I think I said I'm running one of the largest group actions involving, I think, over the number of years, about 800 claims, and we have conducted some research into the level of damages, and it averages out at I think about £13,700.

Those figures include very low awards, as low as

£1,000, where, frankly, the defendants are offering as a sum of money on an economic basis to figures of between £100,000 and £200,000, but they are rarer than the lower figures.

One of the issues in this group action is that the claimants are from the care system, and, therefore, their putative achievement levels are arguably lower. I have to say that, in my view, the damages generally in these types of cases are abominably low and should be a lot higher. I'm just giving you statistics.

MR SKELTON: One of the things we will be discussing in some of the future seminars over the next couple of days is the assessment of damages process. It is clearly a very important topic that needs to be looked at in detail. I want to get a flavour of the size of damages, but, really, with a view to looking at how the costs' proportionality issue can be examined. Can I ask you about the costs side of things as well? What I am interested in, I think, first of all, is, how much do most of these claims cost and what is the driver to those costs? What are the things that actually cost the money in terms of litigating: experts, court time, et cetera?

MR DANIELS: It is everything. Expert fees are very expensive. Court fees are now £10,000 to issue a claim.

We do have real problems with proportionality. The problem, really, is in terms of litigation risk for these cases -- we are going to come on to the issue of limitation no doubt. Obviously, insurers will make quite low offers initially which are putting claimants significantly at risk.

Insurers are making very low offers initially to be able to put claimants at risk on their case at an early stage. Because we know limitation can be so difficult, claimants are forced into a situation where they have to think very carefully about early low offers.

MR SKELTON: What is the range, in your view, of the kind of costs that claimants will generally incur in litigating a claim?

MR DANIELS: It is going to depend on value and stage of the case where it concludes, but I would have thought the average is probably going to be around £30,000. I don't know if my colleagues agree.

MR SCORER: I would agree with that, and I'd add that Luke mentioned a number of issues which impact on costs and I think it is undeniable that one of those issues is also defendant behaviour or the behaviour of the defendant firm you are dealing with. There is no question that cases against certain firms end up costing more because of defendant behaviour and because they

litigate in a more obstructive and difficult way. So that is an issue.

MR GARSDEN: Another feature is the number of records that are in existence which we have to pore over in fine detail, because the answer to a case can sometimes be a footnote on page 3006 of social care records, and the degree to which records survive can determine the amount of costs involved, which are not within our control.

MR DANIELS: Just getting access to those records can cost quite a lot of money and take a considerable amount of time.

MR SKELTON: You have got your documents that you need to look at. You need to spend time with your clients, taking a proof of evidence, which presumably is fundamental. That takes some time for people to discuss it comfortably with you and to get the evidence into a shape that is disclosable.

Experts? If we are using a figure of, say, £30,000, how much of that is going to be spent dealing with a consultant psychiatrist, having a conference with him or her?

MR BRIDGE: I have had a court recently with an adult psychiatrist and the report cost £10,000.

An adult psychiatrist, jointly instructed, cost £10,000, which is £5,000 to each side. You also quite

often have an independent social work expert. Again, the costs of that could be £5,000 to £10,000, dependent upon the volume of documents that have to be considered.

I think the problem we have as well, as claimant lawyers, is that all of this has to be incurred quite often before you even know if there is a strong case. If you have a standard personal injury claim walks into the office, you tend to know quite early on, if it is a road traffic accident, whether there is likely to be a case.

In our work, you've got to do an awful lot before you get to the point where you know that liability is likely to be established. So there is a lot of front-end costs that are difficult to fund.

MR SKELTON: Do you, as lawyers, pay for reports for your clients in order to find out if they have got a good claim? Is that a cost that you have to bear in order to get things off the ground and take the risk of it --

MR GARSDEN: It can be, if it is not publicly funded.

MR SCORER: I think it is worth drawing a distinction here between, really, the two different categories of abuse cases. There are the cases that are based on vicarious liability of an organisation that's being sued, so negligence doesn't come into that. There is no need to prove or examine issues of systemic negligence --

MR SKELTON: Just because there are those watching who are not familiar with that classic legal term, do you want to explain what that means?
MR SCORER: A case based on vicarious liability is a case that says, "You employed this person who abused me, therefore, you are liable as an organisation for that". A case based on negligence is saying that there was something defective or flawed about the way in which you manage your organisation that led to you displaying a lack of care towards the child.
The two categories of cases that we run are effectively vicarious liability cases and cases based on what we call failure to remove, so allegations that a local authority has failed to protect a child and -- or should have taken that child into care sooner.
In that second category of case, investigative costs are much more expensive because you need evidence from an independent social work expert in order to assess whether the standard of care of the local authority meets the standard required of a reasonable social worker.
MR SKELTON: Is there also an issue of documents in those cases? Is there a greater volume --
MR SCORER: Substantially. And given the volume of records that are now created for children in care, those can be

very substantial. I mean, I have got cases where there are, you know, 50 or 60 lever-arch files of records. I'm sure you have the same.
MR BRIDGE: Yes.
MR DANIELS: But your costing for that will start before you even get the documents, because sometimes local authorities and their representatives will want you to get a court order before you actually get access to those documents, requiring you sometimes to make a pre-action application for disclosure. Sometimes there are valid concerns, because there will be other individuals named who may not be your client. Some sensible insurers and solicitors will have arrangements in place where they will agree undertakings, so that we can only use those documents for the legal case we are looking at, but others will require you to go to court for an order for those. Sometimes that process can take about 12 months, in my experience.
MR GARSDEN: One very problematical area is trying to harmonise the different courts. That can involve a lot of unnecessary cost, where, for example, some records are in the Care Court, other records are in the Crown Court, and with the police, that are absolutely vital and fundamental to our case. But because of data protection reasons, we have enormous difficulty in

accessing them and the costs can rise exponentially because of that, and that's one area where some sort of memorandum of understanding or some clarification could be minimised.
MR SKELTON: Again, that is a very important area which we will be discussing in terms of reforming the existing system.
Before we get on to the merits of the claims and how you assess them, can I just ask about funding? You mentioned public funding. Could you explain, whoever wants to, who has access to public funding in the present day?
MR ENRIGHT: I just wanted to add something to the last topic before we move on, Peter, and that is this, on the issue of proportionality: what the insurance companies who are not here with us now will be pushing for very hard is fixed costs, which they have managed to persuade the world is a great idea in other areas, and that is to argue that there should be a fixed, very low cost for solicitors adopting these kinds of highly complex, very difficult work. What that will do is it will deny people access to quality lawyers, like the gentlemen you see before you now, who know their subject. Because let's be clear about this: the insurance companies are not good players in this. Their job is to protect their

shareholders' money and not to pay out, and they will do anything they can not to pay out.
MR SKELTON: Costs. Public funding, first of all.
MR GARSDEN: In general terms, public funding is very sparingly granted, not only because of the incredibly low means threshold, which means that anybody other than somebody on benefit doesn't qualify, even people who cannot afford civil litigation do not qualify, and that's a cynical system that is designed to save money.
If you compare it to what it used to be -- I mean, I have been qualified now for 30 years, God help me, and I have seen a Legal Aid system that applied to, I think, a third of the population, or it might have been higher than that, be pared back and cut back to a situation where it now applies to very few. Those that have difficulty -- the people who go through abuse cases are generally unable to work, for reasons connected with the abuse, and, therefore, they are from the lower thresholds, income thresholds, and it operates unfairly against them.
We have a sort of poverty gap, where, actually, you can't afford civil litigation, but you also don't qualify for public funding. So that's the means element.
MR SKELTON: Can you just break down in a bit more detail

what is it -- what is the criterion or the level of income which tips the balance in favour of rejection or --

MR GARSDEN: I'm going from memory now. I think the income threshold is £2,700 a year. Am I wrong about that?

MR SCORER: Something like that.

MR GARSDEN: The capital limit also includes, it is important to emphasise, equity in your house. So a Legal Aid Agency will expect you to sell your house to pay for civil litigation, or you don't qualify.

MR SKELTON: How many of you are doing publicly funded claims?

MR DANIELS: We do quite a lot of public funding.

MR SCORER: I don't know about David, but I think all four --

MR SKELTON: What proportion of your claims will be publicly funded?

MR SCORER: Speaking for myself, it effectively depends on the category of case. Going back to my earlier categorisation, the cases that are based around vicarious liability we run under condition fee arrangements, by and large, and the cases that relate to failure to remove, which often -- where our client is often a child and we are often instructed through the official solicitor, those cases, in the main, we run on

Legal Aid, public funding.

MR GARSDEN: In my firm, it is probably 75 to 85 per cent, simply because we act for a lot of care leavers and a lot of prisoners. Other firms may have a different proportion, because of the type of cases they deal with.

MR SKELTON: How much of your time do you have to spend getting that funding sorted out in the early stages?

MR DANIELS: A huge amount of time. There are applications that have to keep going back to the Legal Aid Agency at every point you get to. I have had about probably 15 certificates of Legal Aid issued in the last two months and I think the average amount given initially to a client who wants to investigate is, I think, £1,500, which is to get things started, and that's for you to get your documentation, deal with the initial investigations. Then, at that point, you are expected to complete another application, to go back and explain what you have found and to request perhaps another couple of thousand pounds.

I think in our firm it would be about 50/50 because we deal with a lot of children. Another point I would like to mention is how strict the means test is. I recently was instructed for a 17-year-old lad who wanted to look at allegations of abuse in his past. Because he had gone to get himself a part-time lifeguard

job at the local leisure centre during the summer holidays, doing a couple of hours a week, he fell foul of the means test and was denied Legal Aid.

MR SKELTON: Do you find that, even when you have Legal Aid, you are having to go back to them again and again and again to extend the certification?

MR GARSDEN: Means is only one element of it. The merits of the case are the other half of the conundrum, and persuading the Legal Aid Agency to grant you public funding and that your case has merit requires a huge amount of work. There is nothing based on -- when I first started doing this work, in the late '90s, we had a Legal Aid Agency that wouldn't require an awful lot of detail. They accepted these cases were meritorious and they should have public funding, not only because they were good cases, but also because they were child abuse cases, and there was that element. Conduct of those applications then passed down to the Special Case Unit in Brighton, who, frankly, take nothing on trust and require you to prove everything and are much more bureaucratic and difficult to deal with, frankly, and I think I speak for everybody when I say that.

MR ENRIGHT: Yes.

MR GARSDEN: There is almost -- one of the reasons some ACAL

members don't deal with Legal Aid is because it is so bureaucratic, requires so much effort. The amount of work required to get Legal Aid is almost a third, in my firm, almost a third of the total work that you do, which is disproportionate.

MR SKELTON: Is that billed work?

MR GARSDEN: No, it is irrecoverable work.

MR ENRIGHT: It is irrecoverable cost?

MR GARSDEN: Yes. When you win a case, the loser pays the winner's costs, but the loser will never pay the costs of obtaining public funding. It is a loss.

MR SKELTON: Can I ask you, Jonathan, one of the issues is, do people who have public funding get a different level of legal service than those who are CFA or does it end up being the same by hook or by crook?

MR BRIDGE: No. You have pre-empted something I was about to say, that the Legal Aid will only pay a set hourly rate to experts and there is an increasing number of experts now who simply will not work at Legal Aid rates.

MR GARSDEN: And barristers.

MR BRIDGE: And some counsel as well.

MR SKELTON: Let's leave the barristers out of it.

MR BRIDGE: They can be paid twice as much from the defendant. So we are not on a level playing field and we are struggling sometimes in certain areas of

the country to even find adult and child psychiatrists who will prepare reports at Legal Aid rates.
MR GARSDEN: They have reduced the hourly rate down and down and down and there are now fixed hourly rates payable to experts. They find it -- a lot of them find it uneconomic. They are the core of abuse cases, because they will give us an opinion on not only time delay, which is crucial, but also quantum of damage, and obtaining good-quality experts is a constant problem for us. In the medical field, psychiatrists, psychologists. However, in even shorter supply are social care experts who will comment on the way in which local authorities ran their childcare departments and so it is enormous impediment.
I think the view of the agency is that we should drive down costs and drive down hourly rates, but what that does is restrict access to justice and good quality expert opinion, which is vital in these cases.
MR ENRIGHT: The point Peter has made so ably about the pain of being able to obtain Legal Aid and what's involved in that, the unintended consequence of that is it means that practitioners don't do this area of work. There is a very small pool of people doing that work. Because, why would you? It is so difficult, it is so badly paid, and the work is so complex.

That is part of the ongoing barrier here. It is like there's a hurdle, but it is a hurdle no horse can jump, in most instances, to get funding.
MR SKELTON: Do you think that limitation on the number of people who do that kind of work is actually preventing some people from accessing justice?
MR ENRIGHT: Absolutely, because there will be huge deserts around the UK. Who would you go to over an historic child abuse case? It is a very, very limited pool.
MR SKELTON: Sorry, just to run with this a little bit, do you generally get people from your geographical area as firms or do you get people from all over the country because you have a national reputation?
MR DANIELS: National.
MR SCORER: I think the majority of us who do this work act for clients all over the country. On the advice desert point, it is difficult to say, actually. But I certainly -- we certainly represent clients across the UK and we will travel to see clients, as I'm sure others will, but obviously there are only a relatively small number of us who do this work.
MR GARSDEN: One of the reasons I set up -- helped set up with Richard, in 1997, the Association of Child Abuse Lawyers was to provide good quality representation for these very deserving people. We have a code of conduct

and we have a sort of level of training required and we have a level of membership called panel membership and, if you look at that geographically, there are gaps where there is no solicitor in this area in that part of the country.
MR SKELTON: Can I ask you all to speak up again?
So the merits of claims. I think the first thing I would like, if I may, is a general view of, how many claimants walk through the door and end up being turned away, in terms of the proportion of people you tend to see who may have legitimate claims, they may not, but as far as they are concerned, they have a claim to make. But ultimately, for one reason or another, which we will come on to, you have to say, "I'm sorry, I can't take this on". I will start with you, Jonathan.
MR BRIDGE: I think I'm probably different from others because I have read some of the submissions and we do tend to have a go at most cases that come in the door, even if we are a little bit dubious about the merits. Maybe we shouldn't, because we do end up quite often having to discontinue the cases.
It is difficult, particularly with limitation, whether you do take that risk. But I think we tend to take a high proportion on and then possibly discontinue later, once we have tried.

MR SCORER: I think the enquiries we get, and we get a very large volume of enquiries, we probably take on about one enquiry in eight or nine, something of that order. But, of course, a lot of the cases we have to filter out because there simply isn't a legal basis for a claim. So we look at that first, is there a defendant who can be sued, is there an organisation that may be responsible? We look at those issues obviously first.
MR SKELTON: As opposed to, it is just an individual that an allegation has been made --
MR SCORER: Where an allegation is made against an individual, obviously you have to look at -- if you are going to consider whether there is a possibility of a case, you need to obviously consider whether the individual has means to satisfy a judgment. So that's obviously, you know, a consideration.
But of course, you know, that's the sort of first stage you look at. Then you have to look at the merits of the allegations, are they likely to be true, are they provable, those sorts of issues.
MR SKELTON: Are others around the table more in Richard's sort of 20 per cent -- 10 per cent to 20 per cent proceed and the rest no?
MR GARSDEN: Yes.
MR DANIELS: We would unfortunately send away 75 to

80 per cent of everybody who contacts us.
MR SKELTON: Again, could you just elaborate the reasons why?
MR SCORER: You had better just clarify that answer.
MR DANIELS: I think we turn away about 75 to 80 per cent of people.
MR SKELTON: On the grounds of what?
MR DANIELS: Various factors: limitation, having somebody who is actually there to be able to be sued, as Richard mentioned, financial assets. A lot of the enquiries we get will be about familial abuse where we don't have any information about assets of individuals. Proportionality can be an issue because we have to bear in mind the legal costs involved in pursuing cases. So a wide variety of reasons.
MR SKELTON: Do you tend to do some work to assess who this defendant is, can they be located, have they got assets, have they got insurance, before you take that final decision, or is it usually readily apparent from the start?
MR DANIELS: It is not readily apparent and your client may have a little bit of information. But if you are going to look into somebody's assets, that can be a costly process as well in itself.
MR GARSDEN: Back to Jonathan's point, really, but before

you know whether you can take a case on, you need to do some work. So how do you do that work? Well, either you have public funding and you can sign them up to a legal help forum, which is very few cases, or you take a punt on it. Now, I say there are three categories of case. Category A would be something like something within one of the modules, which is a well-known location. Category C are cases that we simply couldn't take on legally, for a variety of reasons. And then there is a category B type of case, which is worth looking at, and may turn into a winner or may not. Obviously we have to gauge how much work we should do for potentially no recompense. I have great difficulty with this, because all these people deserve good treatment and they deserve respect and they deserve a hearing. They will all be believed by us, I think that is fundamental, but whether or not we can take them forward, and the way in which we tell them we can't is a huge problem for me.
MR SKELTON: Getting on to you, David, getting information out of defendants about insurance or locating the insurer, how much of that is a problem these days?
MR ENRIGHT: If we come on to again -- once again, I am coming backwards. What the gentlemen beside me, and my colleagues beside me, are describing is the chilling

effect. First and foremost, the people who actually come to us are the very tip of the iceberg, because the huge and overwhelming majority of people never come forward, for a whole variety of reasons. So the tip of the iceberg point. They suffer this chilling effect of the changes in legal funding that mean that solicitors have to make financial judgments about whether or not we can bear quite considerable risk of going forward on a case, even a case we think is very deserving, because our businesses simply could not stand the risk.
MR GARSDEN: One of the problems is that, statistically, 80 per cent of abuse takes place with somebody you know and is not institutional. Those are often the problematic cases, where there is maybe no funds to meet the costs of compensation and legal costs. Therefore, what do we do with those types of cases? Well, you know, they are deserving, but can we pursue them?
MR SCORER: I think you were touching on the point, Peter, about insurance.
MR SKELTON: Indeed.
MR SCORER: Certainly, speaking from my experience, there certainly are cases, because of course we deal with historic allegations, or at least part of our work involves historic or non-recent allegations, and therefore we are looking to hold organisations

accountable for things that they did or didn't do, you know, 20 or 30 years ago, and we certainly do come across organisations that are not insured or we can't find the insurer. So there is certainly an issue of that kind. I wouldn't say it is a massive issue in this area, but it is an issue.
MR GARSDEN: In any other area of work, if a case is out of time, claimant solicitors wouldn't take it on, generally, for very good reason. In our area of work, you know, 95 per cent of our cases are out of time. So you have an impediment, which we will talk about -- I know we will talk about limitation, I want to talk about it now, before you even start. That's an extra hurdle.
MR SKELTON: Of what kind of vintage are the allegations for most of you? Obviously there has been, over the last five, ten years, a huge public impetus on child sexual abuse being a major problem nationally in various institutions and that's why this inquiry exists, but that must have led, clearly, to a change in the mitigation landscape for all of you. How old are most of your cases now?
MR SCORER: Very difficult to generalise on that. They cover the full range. I think the oldest case that I have ever settled is one where the abuse was in 1955,

and in fact it is difficult to go back any further than that because the limitation law changed in 1954 and before that it was problematic under the old limitation law. But certainly in my practice they cover the full range of the period since then. So '60s, '70s, '80, but more commonly, certainly in the cases I'm dealing with, probably 1990s now.

MR GARSDEN: I have to say, institutional abuse is most popular between the '60s -- sorry, "popular" is the wrong word. Common.

MR SKELTON: The 1960s, it was most common within institutions, in your experience?

MR GARSDEN: What I meant was, institutions were more common in those periods of time, forgive me, and therefore institutional abuse that we deal with tends to be early '60s to mid '80s. In the mid '80s, foster care became much more common. That has its own legal problems.

MR SCORER: The majority of the sort of large-scale children's -- traditional old-style children's homes closed in the mid to late '80s.

MR GARSDEN: And the prevalence of this type of allegation only really started to arise in the early to mid 1990s, and, therefore, commonly, the claimants tend to be between the ages of 35 and 50, not only for that reason but also because they generally find it very hard to

deal with abuse when they're younger and the triggering effect of events in childhood and having your own children mean that that is often when they decide to do something about it in later life.

So I would say, average time between us meeting the client and the abuse, 20 to 30 years. Would that be fair?

MR SKELTON: So you are dealing with people in early middle age, for the most part?

MR GARSDEN: We are, anyway. Would that be true?

MR DANIELS: We see the full range, as Richard has explained, right up to abuse perpetrated in the last 12 months. We see absolutely everything.

MR SKELTON: I was going to ask you, do you actually get many clients who are children coming in, either by themselves or with support from somewhere?

MR SCORER: We certainly do, but quite a lot of those are the type of cases I referred to earlier, where it is a child who has come into care and there is some allegation that the local authority failed to act fast enough to take them into care. So a lot of those instructions come via the official solicitor. But there are other young people who approach us either directly or through young people's advocates.

CORE PARTICIPANT: Can I just make a point, the average

reporting time for sexual abuse to counsellors and support services is somewhere around 10 years anyway, so the likelihood of many coming forward before then is very, very small.

MR ENRIGHT: That is Mr Nigel O'Mara from Survivors of Organised and Institutional Abuse.

MR SKELTON: I have to continue this discussion for a moment, but can I come back to you? Can I ask you, Richard, while we are focusing on the issue of the merits of claims, because you gave a statistic of turning down a very large proportion of claims. What are you looking for to take on a claim with public funding or with a conditional fee arrangement? What is the -- criminal convictions might be one thing, corroborative evidence, presumably, evidence that might support the allegation.

MR SCORER: Yes, you look at the merits of the allegation, is the allegation one that is likely to be true, is it provable? That is an issue you look at. You look at, you know, whether there is a defendant who can be sued, whether there is a solvent defendant, and you look at limitation. Of course, limitation raises a whole host of different issues about whether it is possible to have a fair trial and whether the claimant is likely to be -- the putative claimant is likely to be criticised for

delay in coming forward.

MR GARSDEN: In terms of proportionality, you look at the degree of harm caused to the claimant, but you have to assume, actually, that if this has taken place, then they have been harmed, even if they don't necessarily tell you so. But that is objective visits to psychiatric hospitals and degrees of harm.

MR SKELTON: I need to ask the lady at the back if she has a question.

MR ENRIGHT: Karen Gray.

CORE PARTICIPANT: If we can quickly go back to the time lapse between the abuse and the reporting, most victims actually report early on. It is just nobody listens to the child when they are trying to say, "This person is hurting me".

MR BRIDGE: I think an additional problem, when you are looking at the case to start with, when you are looking at time periods as well as experts, a lot of the work we do requires an independent social work expert. If the abuse took place 30 or 40 years ago, you need a social worker who was in practice then, probably quite senior, who has gone on to become an expert, but you just can't find an expert who now will probably be in their 70s or 80s to come and tell what the standard practice was 30 or 40 years ago. So unfortunately, with a lot of

the failure-to-remove cases now, we do have to turn them down because the experts aren't available to tell you what the standard of social work practice should have been back then.
MR SKELTON: The other expert pool is the psychiatric expert. To what extent is the inability to get that kind of evidence a problem, or is the reality that people are just booked up and you need to get things in their diaries?
MR DANIELS: I don't think that is a problem. It is not a problem that would influence us taking on a case, but there is a very small pool of experts in that area.
MR SCORER: A small pool with an increasingly long waiting list and they are becoming increasingly expensive, as I think Jonathan alluded to earlier.
MR GARSDEN: Because of the time delay problems and the need for expedition, we have to get on with these cases quickly, more quickly than we would otherwise do.
MR SKELTON: The word "proportionality" has come up a lot. I have mentioned it and some of you have done. Could someone explain what it means and why it is a problem for you or for the claimants?
MR GARSDEN: Simply whether the likely costs of -- legal costs of running the case are proportionate or valued by the amount of damages or compensation that you might get

out of it. It is sometimes done arithmetically. We try to avoid an arithmetical comparison, but the Legal Aid Agency are very, very interested in that.
MR SKELTON: So for those of who you who are doing publicly-funded work, proportionality is a compulsory component of the process of getting funding?
MR DANIELS: And it remains so during the entire process. You have to keep reporting back on that. I have had cases which have had Legal Aid Agency funding cancelled, perhaps halfway through, because the costs, through whatever reason, have become disproportionate.
MR SKELTON: I don't want to put you on the spot. Can any of you explain the criteria for proportionality? What are they looking for in terms of the merits of the claim, its value and its costs in order to continue public funding, leaving aside the means tested side.
MR BRIDGE: I think they just ask for a three-stage assessment at each stage: what the costs are to date, what the anticipated costs are to settlement, and what the costs are to trial. Then you have to predict the damages and they just do a --
MR SCORER: They have a matrix that they apply, a set of ratios that they apply, ratios between costs and damages, that have to be met in order for the case to continue to attract public funding.

MR SKELTON: In reality, if you have a case -- you gave quite a big range at the start. Say a case that's worth £10,000. What happens when the costs reach £10,000 on a publicly funded case and start to climb?
MR SCORER: If it fails to satisfy the relevant matrix, the relevant ratio, that's required in order for funding to continue, then funding will be withdrawn and your only option at that stage would be to represent the client under a conditional fee arrangement.
MR GARSDEN: They have an unpublished ratio of 1.1:1, which is a bit bizarre. So, in other words, if your compensation is only going to be £2,000, you can only spend £2,000 worth of public money on the case. The problem with that is, when you come close to trial, because what all survivors of abuse want is their day in court, to be believed and listened to, and that of course is the most expensive part of the civil process and that is very often when Legal Aid pull the plug and say, "You can't go to trial", and that causes huge psychological problems for our clients who feel that is authority working against them and stopping their right to be heard.
MR SKELTON: Do you, at that point, have a choice about converting into a different funding arrangement, ie, a conditional fee arrangement?

MR SCORER: We would. If the case obviously had merits, and presumably it would have merits if we were pursuing it under a public funding certificate -- I mean, that's the only basis on which we would be pursuing it -- and if the public funding was withdrawn because it failed the relevant ratio, then we would represent the client under a conditional fee arrangement.
MR DANIELS: But there are issues with those. When you move on to a conditional fee agreement, that is less advantageous to a client, there are costs consequences that need to be deducted from their damages. So if you take out insurance premium to protect a client against losing the case, that would need to be deducted from their damages. So in fact, there is a deduction from the claimants' damages when they are under a conditional fee agreement.
MR GARSDEN: There is a success fee.
MR ENRIGHT: You also have to give the client -- it is not so much our choice, it is the client's choice, because you have a professional duty to warn them that, if you lose, the consequences may be catastrophic for that person, insofar as a contrary cost order can be made against them.
MR SCORER: But abuse cases are personal injury cases, they have the benefit of one-way cost shifting, with one or

two exceptions.
MR SKELTON: There are quite a few points. We have got past 11 o'clock now. There are a few things I really want to elicit from you. One of them is, a lot of what you have talked about is very legalistic, to do with the funding arrangements, quite complicated even for those of us who work in the area, about public funding, how to get it, how long you are going to keep it for. The same with the conditional fee arrangements.
How much of that can your clients take in? And can I ask you a second issue, which is to do with the merits? We talked about the merits of the claim. Is the reality that merits really means the prospect of succeeding in a court as opposed to whether or not you have actually been abused, which can be a very different question? Can I ask one of you, first of all, to address the former question, which is about how much your clients comprehend about this complex funding structure?
MR BRIDGE: I don't think many solicitors properly understand the funding structure. Explaining a conditional fee agreement and the way the success fee works, the way it attaches to past loss rather than future loss, it is hugely complex. When you are trying to -- sometimes these clients are talking to us as the

first people they have ever approached about what they have been through as children. The last thing they want is us trying to explain funding arrangements, complex funding arrangements, to them. So I think it is hugely difficult for them to understand.
MR SKELTON: Is that generally your experience, all of you?
MR SCORER: Yes. I find that in the course of a case I probably have to explain and reexplain the funding arrangements maybe three or four times to clients because they are quite complex.
MR GARSDEN: You have to bear in mind that a lot of our clients have learning difficulties which -- not all of them, obviously, very widely, but some of them do have problems and those problems are exacerbated by the condition from which they suffer as a result of the abuse. So they generally distrust authority because they have been abused in childhood and, therefore, trust of us as legal representatives is an issue, and we sometimes get merged -- when things go wrong and there are funding issues and not being able to take them to trial, it can create conflict for us, as legal representatives.
MR SKELTON: Is there an issue about you having to tell your clients that you may be taking a percentage, some of you, of their actual damages, because that's the new

regime? Do you have to have that conversation, some of you? And how do you explain that in a way which sounds like you're not a cynical lawyer?
MR GARSDEN: I generally explain that the cost of taking the case to trial can be anything between £50,000 and £100,000 and that's a risk that we have to take on over a two- or three-year period, and, therefore, if we take that amount of financial risk, we have to mitigate that by being entitled to some sort of premium if we lose and, unfortunately, we can't get that from the other side because of the way the law is, so we have to take it out of damages, but we guarantee that that will not be more than 25 per cent. It could well be a lot less, depending on the amount of work done. That's what I generally say.
MR SKELTON: Could someone mention the degree to which "after the event" insurance is still required now? I think you mentioned qualified one-way cost shifting, which is yet another complex arrangement.
MR SCORER: Yes. Obviously the law on that changed in April 2013, and so obviously any cases that predate that, that were incepted prior to that, would be under the old rules and there would be a risk of adverse costs, so "after the event" insurance would be required for that purpose.

For cases incepted after that date, "after the event" insurance is really there not to protect against adverse cost risks, because that has gone. "After the event" insurance is largely there for what we call part 36 risk; in other words, the risk of failing to beat at court, or failing to beat through the litigation process, an offer which has been made by the defendant. So it is insurance against that risk that we have ATE for.
MR SKELTON: If you have an offer that is a good offer which you are likely to not beat, then you have to tell the client, "You need to take it, otherwise you may lose your funding".
MR SCORER: Yes.
MR SKELTON: If you have an offer you think you are going to beat -- you can never be certain, of course -- you need to insure against that risk.
MR SCORER: Correct.
MR SKELTON: Who pays for that?
MR SCORER: Well, the client pays. It is generally a relatively modest sum, £40 or £50.
MR GARSDEN: But only at the end. There is no premium payable during the case.
MR ENRIGHT: Money is clearly a factor, it is certainly something -- it is a form of vindication. But, as Peter

said, for a lot of people, they want acknowledgement and they want an apology, which can only -- which is very often refused by the defendant, where they will make a monetary offer but refuse to offer the apology, and that is what people want. They want a vindication. Then you have to say, "Will I take the risk -- risk it all to go to court to try and get someone to say, I was abused and to apologise to me, or do I take the filthy lucre?", as it were.

MR SKELTON: The litigation process, the civil justice system, is geared towards providing a financial remedy, ie, compensation. It is not geared towards the kind of things you are talking about, which is vindication and apologies.

MR ENRIGHT: Yes.

MR GARSDEN: There are often problems with them accepting money for what happened, for the most obvious of reasons, and what they want is an acknowledgement of truth, to be believed, and for somebody to say they are sorry that the institution, for example, has let them down. That is what they really want. Though they should be getting the compensation as well.

MR SKELTON: The second question I asked was about the merits and your clients' understanding that the legal merits of the claim may not be the same as whether or

not they are being believed by you or whether or not what actually happened happened. How do you square that with them and explain it to them?

MR SCORER: I think it is often quite a difficult thing to explain. Obviously the question of whether somebody was abused is relevant to the merits of the case. That is central to the merits of the case. But that is only the first part of it. The difficulty is in trying to explain to a client, you know, "Yes, you were abused. The evidence shows that you were abused. But you haven't got a claim for legal reasons, you haven't got a claim because of the law on limitation, or you haven't got a claim because there isn't a solvent defendant we can sue". So all of those issues are very difficult. People, understandably, come to us with an expectation that if they have been abused, the legal system will recognise that and provide some recompense for it and that often isn't the case.

MR GARSDEN: We have a big problem -- I mean, that it is the worst part of the thing, telling somebody that we can't help them and, when we say that, they often come to the conclusion that we don't believe them or that we are in cahoots with the defendant and the whole thing is a setup. Whereas actually we are saying, because the case is so old and because we can't find corroborative

support, that's why we can't proceed. But that is often very difficult and it causes -- it does cause conflict.

MR BRIDGE: I always say at the outset of any case to the client, whatever the outcome of the civil litigation, it is not in any way a reflection on what they have been through, but it is still very hard 6 or 12 months later when you have to tell them you can't continue with the case, because they do take that as being, "I'm not believed by my own solicitor".

MR DANIELS: I think it also comes back to the speed of the entire process because, if somebody can get that advice at an early stage and be told that, it is much better than having to wait 12 months, 18 months, to have to fight to get documents and look through things. I think it all comes back to the process, really.

MR GARSDEN: The problem is, the red mist comes up. That's the problem. They are told that, but when it comes to the point, it is like replication of the abuse, I'm afraid.

MR SKELTON: That rejection.

MR GARSDEN: Yes. That sort of abuse of power, which is what happened in the first place.

MR SKELTON: David, you made the point earlier that perhaps a fraction of people actually walk through the solicitors' office doors to come and initiate

litigation, or at least to talk about it. What is stopping those people from taking that very first step of even making contact?

MR ENRIGHT: Mr O'Mara acknowledged that there is plenty of evidence out there that people will normally only report within sort of 10 to 15 years. I think we have mentioned in our submissions, for many people, they feel they somehow deserve the abuse, horrifically, that they were abused by people who were supposed to protect them and love them, they felt that somehow they had done something wrong and, therefore, it is their own fault. That takes many, many years to overcome, if it is ever overcome.

Another element of it, of course, is simply, "The system is too complex for me" or "The system is not for me". That puts a huge number of people off.

MR SCORER: I think there is an additional factor, which is actually quite important, which is that people fear loss of anonymity, and there is a lot of misunderstanding about the law and anonymity. People think that if you go through a legal process, a civil legal process, you would be at risk of losing your anonymity. Obviously that isn't the case and we can take action at the start of the case to reinforce the protection of anonymity. But there is a lot of, I think, misconception out there

that that is a risk that you take if you go through a legal process.
MR ENRIGHT: Peter, I just make one last point on that, and that is, when someone has been sexually abused, they don't want to talk about it. They don't want to talk about it again and again and again with this solicitor, that solicitor, that barrister, that judge. To keep reliving it, keep talking again and again about something you wish had never happened.
MR SKELTON: Do you also feel there are people who may just simply be unaware that courts can provide --
MR GARSDEN: Undoubtedly.
MR DANIELS: I speak to many professionals who I'm amazed haven't given signposting advice to clients: police, other solicitors who are working in other areas. I think there is a genuine lack of understanding actually, bizarrely, about what the civil process can achieve. Some people are signposted to the Criminal Injuries Compensation Authority and the possibility of a civil claim is never mentioned to them by the police or the court support services.
MR GARSDEN: One of the common impediments is parents being alive. There are many, many reasons why, but I find, over and over again, clients will only make -- do something about their abuse when their parents have died

because they fear the effect upon the parents if they do make disclosure.
MR SKELTON: We have run over our timeframe. I would just like to get some final thoughts from you on the challenges going forward of the next five or ten years, and the kind of things that you think we ought to be looking at in terms of overcoming those challenges. Can I just briefly ask you, very briefly, to mention it?
MR BRIDGE: I think the one thing I would say is fixed costs. I think that is potentially a massive, massive cloud on the horizon for all abuse victims. If fixed costs come in for claims up to £250,000, as has been suggested, I think we will all find it very difficult to carry on representing victims.
MR SCORER: I completely agree with that. I think we have talked about some of the difficulties in the system at the moment, but those would be as nothing compared with the implications of a fixed-costs regime. I think that would effectively render most of these cases unviable.
MR GARSDEN: I think a protocol as to the way in which these cases are conducted to ensure -- good behaviour is one of the things we are going to be talking about and a more generous public funding system.
MR SKELTON: An official protocol that is part of the civil rules of the court, effectively.

MR GARSDEN: Yes. We are working on that independently of this with Master McCloud.
MR SKELTON: Yes.
MR GARSDEN: I have a first draft here.
MR SKELTON: Thank you.
MR DANIELS: For me, Legal Aid limits. I mentioned how small they can be, specifically at investigation stage. Fixed costs. I would agree with everything that my colleagues on the panel have said. Also, I would come back to what I talked about in terms of disclosure of documents and just echoing what Peter has said, about the need for more cooperation about that so that can be done more quickly.
MR GARSDEN: And better voluntary agency support for our clients when they are going through the process. Where they don't have a next friend or a relative to keep them on track. We have a huge problems with clients who start enthusiastically but go walk-about because they can't face it. That's because they don't have the voluntary sector support if they don't have their own family to help them through.
MR ENRIGHT: One of the things that this inquiry may achieve is a shift in perception, that child abuse is a matter of urgent national importance. It is in a society's best interest that child abuse is recognised and, where

it has happened, it is acknowledged, apologised for and compensated. So rather than thinking of this as just a monetary system, if we can shift in society and say, "This is a terrible ill. We must facilitate ways that we can uncover it and try to put things right".
MR SKELTON: Thank you very much. I should emphasise, from the inquiry's perspective, I have asked you to summarise a few points. There are more points you have made in your issues paper response which we are very grateful for and there may be other points that arise both for those around the table, or watching, or in the room, and the inquiry will, of course, be interested in listening to those.
From my perspective, I think we should end there, but I'm very happy for any further questions.
MR SHARPLING: Mr Garsden answered the question I intended to ask about those with special needs. Thank you for that.
MR FRANK: I wonder if I could just ask two questions? One is, can you give us an idea of how many claimant lawyers relating to the issue of child sexual abuse you're aware of in England and Wales? Just numbers?
MR GARSDEN: ACAL membership is 85.
MR SCORER: Something of that size. But the majority -- but I think probably only a minority of those are doing this

work as a sort of full-time specialist --
MR SKELTON: 25 people, not firms?
MR SCORER: People.
MR GARSDEN: People, and they include some experts and some barristers, so they are not all solicitors. Of those, there's about 13 panel members.
MR SCORER: So probably about 13 or 14 lawyers nationally who are doing this work as a sort of single specialist --
MR GARSDEN: As a specialist department. There will be others in that department. Maybe more lawyers, but those are members.
MR SKELTON: Thank you.
(11.21 am)
(A short break)
(11.54 am)
Session 2
Welcome by Chair and opening comments
THE CHAIR: Good morning again. It is only just morning. For the benefit of the new arrivals to the seminar, I am going to repeat what I said at the start of the first session.
I want to welcome you to this first seminar of the independent inquiry into child sexual abuse. I'm Alexis Jay, and I am the chair. My colleague panel

members here are Drusilla Sharpling, Ivor Frank and Professor Sir Malcolm Evans.
This particular seminar is as a result of the responses to the inquiry's issues papers on the civil justice system and criminal compensation. Those issues papers were published on 4 August of this year. The consultation formally closed on 29 September, although the inquiry received a small number of submissions after that date.
All submissions received have been reviewed and considered by the inquiry. They were received from a wide range of individuals and organisations, and have been published on the inquiry's website.
As we have a lot of ground to cover over the next two days on the civil justice system alone, we will hold a seminar on matters arising from the criminal compensation issues papers early in 2017.
The panel and I would like to thank everyone who took time to consider and respond to the issues papers. Without your valuable input, we would not be able to host this seminar. I would also like to thank those individuals who have agreed to take part. It is being live streamed over the internet, with a short delay so that the general public can follow the proceedings on a matter of central importance to this investigation.

The panel and I are looking forward to open, lively and respectful discussion amongst yourselves in relation to a number of key issues relating to the civil justice system.
It is important to state at the outset that the purpose of this seminar is not to gather evidence in the formal sense. This is a forum where important issues are to be discussed, facilitated by Peter Skelton QC, who is lead counsel to the accountability and reparations investigation.
We have attendees who will bring to the table a wide range of experience and knowledge about the operation of the civil justice system in the area of child sexual abuse litigation. We will be looking at its flaws and weaknesses, as well as the areas where it can and does work well.
We will also bring forward ideas for reform, both modest and potentially radical. The panel and I will be listening to what you have to say with keen interest. These discussions will undoubtedly inform the investigation as a whole and should also identify areas for further work.
Now, I should say that we had a bit of a problem with sound earlier on. We have some additional microphones, but I would ask everyone around the table

here please to speak up.
Thank you for your participation, and I now hand you over to Peter Skelton QC.
Opening comments by Facilitator
MR SKELTON: Thank you very much for coming. We are running a little bit late, as you will appreciate. Thank you for your patience sitting here waiting for us to start. There are four broad topics I would like to discuss with each of you in this session: insurance generally, what is available, how much does it cost, who has it; the role of insurers in the civil litigation process, which can be varied; the value of claims, from your perspective; and costs, the vexed issue of costs, the claimants' costs, the defendants' costs.
Before getting into the detail of the topics, can I just say a few words about evidence gathering and the investigation. The inquiry investigation is concerned to receive all views from anyone that has a significant opinion or information about accountability and reparation, not just those around the table today. Those who are listening to the live feed or seeing it online, those who read the transcript, and those who are present in the room are welcome to provide their views in due course. Those of you who are in the room, the best way for you to do that is to contact the solicitor,

Mr Regis, who is sat at the table with me, and provide your views to him, because the focus of today is to hear from those who are sat at the table who have expertise and experience in this area and so the panel can move forward with its investigation in the future. But, as I say, we are anxious to capture all views but I am also anxious that we maintain and get as much evidence out of our participants today as possible.

Can I ask you just to introduce yourselves, just for the record? Shall we start at this end, with Mr Luck?

Introductions

MR LUCK: Yes, Rod Luck from Municipal Mutual Insurance.

MR BONEHILL: Good morning, I am David Bonehill, UK claims director for Ecclesiastical Insurance Group.

MR LATTER: Good morning, I am John Latter and I work for Zurich Insurance in the UK.

MS HANDYSIDE: I am Philippa Handyside. I work for the Association of British Insurers, the ABI, which is a trade association representing insurance and long-term savings companies operating in the United Kingdom.

MR NICOLSON: Good morning. I am Mark Nicolson. I work in insurance at the London Borough of Lambeth.

MS MACKENZIE: I am Carolyn Mackenzie. I work for RSA Insurance Company.

Open discussion

MR SKELTON: First, a basic topic. Bear in mind, obviously we have received your responses and I have read them and the panel has read them, but those who are watching either in the room or online will not necessarily know all of the intricacies of your professional lives in terms of the specialist insurance and insurers that are in this area. Could someone introduce for us the types of insurance that cover child sexual abuse and are relevant in the litigation context?

MS HANDYSIDE: Perhaps if I take that one. The type of insurance that most often has a role to play in providing compensation to victims and survivors of child abuse is public liability insurance, and that provides an indemnity for organisations for any legal liabilities that would arise to members of the public whilst they are operating their business or their activities. That includes things like someone who trips on the premises or something, but it has also come to include, through developments in the law, child abuse claims.

There are some child abuse claims which are -- some abuse claims, I should say, which fall under an employer's liability policy, which would reimburse them for claims as an employer from employees, but it is mostly public liability insurance.

That can operate in a number of ways, because some organisations don't buy public liability insurance and it can -- there can be an uninsured element, where organisations take the first amount of any claims and they pay for those themselves, or there can be a limit to the claims that will be reimbursed by the insurer, and that is all negotiated in policy terms between organisations like schools, charities, local authorities, and they decide -- make their own commercial decisions about the extent to which they need public liability insurance.

MR BONEHILL: I think it is just worth saying on that that the insurance contract provides no protection whatsoever for the perpetrator of abuse. I think we need to make that quite clear. We provide protection to the institutions, to our policyholders, where they may have a legal liability attaching to them.

MR LATTER: Attaching to that, we also have an obligation to defend allegations made against those organisations, so we have an obligation to the policyholder to investigate claims and to, where appropriate, mount defences on their behalf.

MR SKELTON: That's written into the policy, the obligation?

MR LATTER: That's basically insurance practice. There are instances that Philippa talked about earlier where an

organisation will self-insure, and it is -- on that basis, we might just handle the claims within their deductible. So similar to your personal liability car insurance where you have a voluntary excess, you are responsible for the financial obligations there. It will be that organisations take differing levels of deductible, self-insured retention. We may then provide risk transfer above that and, where we operate self-insured retention, they may ask us to claims handle on their behalf for a fee.

MR SKELTON: There are a few things you have said which I will have to explore in more detail. The first is, who has insurance and who doesn't have insurance? Who are the self-insured and who are the uninsured?

MR NICOLSON: If I may respond to that, it is fairly mixed. In my authority, for example, we do purchase insurance and public liabilities, and insurance that we would purchase. However, for some of these claims we are looking at, they go back decades, so we have to look at the insurance that was in place at that time. For us, unfortunately, that means sometimes there is no insurance for some of the earlier periods. So we simply become self-insured for the purposes of dealing with these claims. In a way, we are acting in the same capacity as insurers when dealing with those claims.

We also, for some of the earlier years, do have insurance, but the limit of indemnity available to us is quite low by today's standards. Of course, we are settling these claims today at today's costs. The insurance was never really designed when it was implemented back in those days -- it didn't envisage the type of claims settlements we are seeing today.

We also take insurance out now with a high deductible. Sometimes that is just because it is cost effective for us as an organisation. It is actually prohibitive to take insurance out with a very low excess on the policy. So I would say, certainly for my own organisation, the vast majority of the types of claims we are discussing here are self-insured and come out of public funds.

MR SKELTON: When you say "high deductible", which is analogous to the excess imposed on car insurance and the like, what do you mean by that in terms of figure?

MR NICOLSON: For us, it's half a million pounds per claim.

MR SKELTON: Also, for the insurance itself, you said there might be a limit to the amount the insurer is prepared to pay under the contract. Is that, again, per claim or is that -- if you have a group of claims, do you rapidly start to hit that limit?

MR NICOLSON: It's a group of claims. So an incident or

event would erode that particular limit we have in relation to the earlier years policy.

MR SKELTON: Might it already have gone in previous litigation and then --

MR NICOLSON: For us, it certainly has in some of the earlier years. We have exhausted the indemnity that is available to us. The period before that, there is just no insurance or we are unable to provide evidence of insurance for some of the earlier years.

MR SKELTON: Without betraying any confidences, how much roughly does a public liability insurance cost for a council of your size?

MR NICOLSON: It very much depends on the risk profile of the organisation and the types of risks that you buy insurance for along with deductible. But it is not untypical for it to be in the region of certainly 400,000, 500,000 for a liability insurance policy for a year.

MR SKELTON: Those of you who are insurers, is that roughly the kind of figure you're looking at for a large organisation like a county council?

MR LUCK: As we are not insuring and haven't done for over 20 years, I can't really comment on that.

MR BONEHILL: I think it is a full spectrum, Peter, in terms of what is the risk, what's the risk profile, as has

already been mentioned. Once you understand the risk, you can then suitably price for it. That will vary from the large corporations down to private companies. So you do have, you know, really, the full spectrum.

I would also say that the contracts between the organisations and the insurer, it is a private contract taken out voluntarily, so it is not compulsory insurance. I think that is very different to, as you will know, employers' liability that is compulsory.

MR SKELTON: The uninsured. Perhaps you are not experts in the uninsured, you're experts in the insured. The charitable sector, presumably, a large charity, may struggle to pay a premium of the kind we have had mentioned. Do you have to negotiate better rates for them or do you find some of them simply can't get insurance from large organisations like yourselves?

MR LATTER: I'm not aware of anyone not being able to purchase insurance. There is a range of insurers out there. It is a competitive market. I'm not aware -- I'm not saying that that isn't the case, but I'm not aware of any, Peter, that can't buy insurance.

MS MACKENZIE: I would add to that it is quite common, for example, for brokers to run schemes where charities, youth groups, other groups, might obtain their insurances through a scheme that's run by a broker.

MR SKELTON: Understood.

MS MACKENZIE: That broker would be an expert in that field and negotiate on their behalf.

MR SKELTON: In answer to an earlier question, Philippa, you mentioned public liability insurance is for a range of adverse events, for want of a better phrase. Do you have any idea what percentage child sexual abuse occupies within that range, just to get an idea of the payouts that are actually involved in this kind of claim?

MR BONEHILL: For our organisation, it's about .4, 0.4, of all claims we receive in a given year, and around 5.5 per cent of public liability claims relate to physical sexual abuse.

MR LATTER: I don't have an exact number for you, but it would be a very small proportion of the overall public liability claims we see, but we are a very large composite insurer that has risks that sit outside of this arena as well. So it's probably not fair to compare volumes, because we see an awful lot of business, but we do know that the numbers remain relatively small, but we have seen an increase over recent years.

MR LUCK: Conversely to that, because we are dealing with claims against historic policies, practically all of our

public liability claims now are historic child abuse cases.
MR SKELTON: So you see a disproportionate number by definition.
MR LUCK: Yes. It is purely the nature of our position.
MR SKELTON: In terms of the percentage, what are the other main drivers for insurance payouts on a public liability basis?
MR BONEHILL: It is the full range of accidents, to be honest. Slips and trips is very common and probably is a large proportion of those public liability claims.
MR SKELTON: For the most part, it is personal injury work.
MR BONEHILL: It is personal injury, yes.
MR SKELTON: Is that your experience as well?
MR NICOLSON: Yes. It is mainly highways -- we, for example, deal with pot hole claims, trips and slips, housing, housing land, because we are a housing authority. But we also have a wide range of other types of liability, even down to, for us in London, tree roots cause a liability nuisance issue for us. So it is quite a wide range of liability claims that we deal with. I would add for us as well, that it is less than 1 per cent that relate to abuse claims. However, I think that percentage is slightly changing in terms of an increase in numbers.

MR SKELTON: How has it changed over the last -- the last 10 years have seen a huge focus in the public eye on child sexual abuse and a growth in the litigation associated with that. How has that affected your books, as insurers?
MR LATTER: We, as I said just a moment ago, we have seen an increase in the number of claims being brought against our policyholders that are reported to us. I would say it is very difficult, Peter, because the data that we capture is not exact. So I will give you an indication: we would say between '14 and '15, we have seen a 50 per cent uplift based upon our '14 number. However, that is based on a very small number. So while 50 per cent sounds a big step, the actual numbers still remain relatively small.
MR SKELTON: Do others have a view on that in terms of the changes? I know you can't predict the future in this area, but whether or not it is going to stay at this sort of level or whether you anticipate at some point it will start to dip back down again?
MR NICOLSON: I think the other factor that impacts it is where there has been a criminal conviction. So where an abuser has been convicted, we often then see an influx of claims following that.
MS MACKENZIE: I think it is common for claims to be brought

possibly 30 years after the abuse has occurred. So one can see that there would still be a continuation of claims coming through over a period of time.
MR BONEHILL: From our organisation, yes, we are seeing an increase, not at the sort of levels that others may have seen, and I think the question is around the future -- your question was about the future, and I guess the question is around new types of abuse that may be emerging, technological types of abuse. We are not seeing that yet, but that is an area of focus.
MR LATTER: I think the other thing, Peter, is when more victims of child sexual abuse come forward. We can't predict that with any certainty. We have seen in the press this week around the football. We wouldn't maybe have foreseen that happening. So it is impossible for us to determine that, because we don't know what level of abuse took place, but, as we see different areas develop, we may see an increase, but it is impossible to determine.
MR SKELTON: Perhaps this is a question for you. That difficulty in predicting the future, is it likely to cause any fundamental problems for you in terms of providing insurance and premiums? Perhaps I will ask you, Philippa, first?
MS HANDYSIDE: I think there is a regulatory regime in the

UK that requires insurers to hold capital against their potential liabilities, and that is very much designed in ensuring that, where claims are made, there are resources to pay them.
So adequacy of insurers and insurers being able to pay is a very, very low risk in the UK. So no UK insurers were touched by the 2008 financial crisis in the sense that some other financial institutions were. So the Prudential Regulation Authority really manages the adequacy of funds to pay future claims and a future increase in claims.
MR LATTER: I think an important distinction is, what we are seeing is that the payment of these claims is being made against historical policies, not current unwritten policies. So what may happen as we go forward, depending upon the frequency and the severity of these claims, is underwriting organisations may need to change their approach to underwriting these risks, they may need to apply larger deductibles, they may change their pricing, and then it is for organisations such as Mark's to determine whether they self-insure or they buy commercial insurance to cover their risks, and that may -- you may see a change in the face of insurance that's provided as we go forward.
MR SKELTON: We did hear from the claimant stakeholders, or

some of them earlier today, and I think they gave a similar figure of 20 to 30 years for some of these claims, although some went back to the 1950s, in fact. Those of you who didn't mention the dates, is it your experience that it is, generally speaking, a sort of 20- to 30-year timelag between allegations of abuse and litigation?

MR LUCK: Yes, indeed. MMI, having ceased underwriting in 1993, is clearly now only receiving claims which are at least 20-plus years old, and many of them do go back with the allegations into the '80s, the '70s and the '60s. So I think the statistics are that the average age of a claimant at the moment is 43. So, yes, we are seeing constant historic claims against old policies, yes.

MR SKELTON: The policy obviously is the major document. It sets out the limits of insurance and when it may or may not apply. To what extent does it deal with the role of the insurer in the litigation process? Does that vary, for example, if you have got a higher deductible, you may have less of a role and it may be the organisation itself who is effectively insuring itself up to that point. Who would like to explain?

MR BONEHILL: I just make the point, Peter, that not all policies have deductible. In fact, the majority don't.

The majority of policies certainly that we handle, then we deal with the claims ground up in their entirety.

MR LATTER: That is different from Zurich's perspective. We have a lot of self insurance. Mark, would you want to offer an opinion there?

MR NICOLSON: Certainly for my own organisation, because it is a high deductible that we carry, it is public funds. Therefore, there is more of an interest in us having a say in how those claims are actually handled. We actually have an agreement with our insurers whereby claims handling is delegated to the organisation up to a certain level within the deductible.

MR SKELTON: What is the role of the claims handler as opposed to the solicitor? What do they do?

MR NICOLSON: The claims handler, from our perspective, and we would -- for claims like this, we would appoint our own legal handler to deal with the claim. So we would work with the solicitor in terms of how that claim is dealt with. We would also then work with the insurers as well. Because we carry such high deductibles, we have autonomous claims handling, but we would usually appoint legal representation, particularly where claims are litigated.

MR SKELTON: One of the things I'm interested in is, does the insurer take a role in investigating what happened,

getting the documents?

MR LATTER: I think that depends. For instance, you will see policyholders within our portfolio that have large deductibles, but they have never been involved in child sexual abuse previously and they may come to us and say, "Look, we need support here, we don't know the process, we don't understand the process, can you help guide us through that?", and they will give us the right to help them by claims managing within our organisation. Others see a high frequency of claims, they have an organisation set up to manage those claims, and they will deal with it quite comfortably in-house.

So I think there is a spectrum, depending upon the needs of the individual policyholder.

MR SKELTON: Is that the experience of others?

MS MACKENZIE: Yes.

MR LUCK: Yes, definitely. Without a doubt.

MR BONEHILL: We have a different business model. First of all, the policy -- I think it is the same for most of us -- allows us to take full conduct of any claims, so the accountability for the claims handling philosophy sits well and truly with me and my team in our organisation, not with our policyholders. That sometimes is misunderstood, I think.

We will then investigate the allegations that come

to us, we will do that ourselves, either with our own staff or through our lawyers, and then we make the decisions on liability and quantum. So we have full conduct of the claim from start to finish.

MR SKELTON: You have given different views about your respective roles. From the perspective of someone actually buying insurance, will they come to you because they want you to take that role, ie, if they have a claim, they want it just given to someone else to investigate, and do they come to you if they are prepared to take a different role and prepared to pay a different premium?

MR LATTER: A point of clarification: I actually agree with David, we do have a risk within our portfolio with very low or no deductible, and we would do exactly the same as Ecclesiastical, so there is no difference between us there. But we do have a large portfolio that is self-insured.

I think you have to look at it from the point of view of kind of what risk you're managing and remember, you know, a lot of these risks were underwritten on this basis before anybody knew that child sexual abuse was going on.

So it kind of -- it may be that the risk transfer mechanism that the organisation purchased, if they were

faced with the same issues today, they maybe would have bought a different model and said to the insurer, "We want you to take the risk round-up here, we are willing to pay for that because you will then take on handling the claim", but it was probably done with a lack of knowledge, I guess, when they purchased the insurance, is what I'm trying to say.
MR SKELTON: What I'm trying to understand is how consistent or inconsistent the different types of insurance are, and it is the same public liability insurance, but in fact, how it converts in practice to the approach to litigation, it sounds like it is pretty variable.
MS HANDYSIDE: I think you are right when it is a very varied market for public liability insurance, and there will be large, sophisticated organisations who run children's services who have always been aware of a number of the risks that that carries, and there might be small, local charities with a very different understanding. So the desire for help or self-management can vary greatly, just as the kind of cover sought can vary.
MR SKELTON: That's, broadly speaking, a positive feature which reflects different needs of the insured, as opposed to being just an inconsistency of the market that's historical.

MR LATTER: Correct. It is about risk appetite and some organisations would like to manage their own exposures through self-handling. That's their choice as a sophisticated policyholder.
MR SKELTON: A counterpoint to David's view about, if you have a claim, if your insured notifies you of a claim, what then happens in terms of your involvement going forward in the litigation process after that point?
MR LATTER: The starting point -- I might ask others to chip in -- is that, actually, when we are informed that a claim has been made against our policyholder, really, all of the evidence, all of the facts, sit with the policyholder. So our first step would be to reach out to the policyholder and say, "We need to gather evidence", there is a process of gathering evidence, so we would need to determine, could we have access to records, could we have access to documents, could we find witnesses that can give evidence in these cases?
So it is -- the initial step is to go back to the policyholder and try to work out a way forward in terms of evidence gathering. That would be our initial first step.
MS MACKENZIE: I think it would be common as well, not speaking for others but certainly for us, that it would be a very small group of people in the insurance company

who would deal with these cases. In our case, we made the decision about seven years ago to delegate that handling to a firm of specialist lawyers with oversight. So it is one or two people in RSA and a small group in the specialist firm who handle these cases, because they are very sensitive cases, obviously, and they have got the expertise to handle that portfolio for us. I don't know if that's --
MR BONEHILL: So it does range. We have specialist claims handlers. We have a team who specialise in this area. We don't delegate any -- give delegated authority to any third party firm. We use them to support us in a supportive way, but the decision making sits with our specialist team.
MR LATTER: Our model echoes the same.
MR SKELTON: Does that feature as a legal cost, that work you do in-house?
MR BONEHILL: No, it is a claims handling cost, so it's not part --
MR SKELTON: It is hidden from the court's view, in terms of the amount of work?
MR BONEHILL: Yes.
MR SKELTON: The reason I ask is there is a big emphasis, of course, on proportionality, which we will come on to, but if some of the costs from your perspective are, in

fact, hidden costs, because you have done work in-house, whether that is a fair representation of the actual amount of work which you have had to do as insurers and insureds --
MR BONEHILL: That will be a hidden cost. What won't be a hidden cost is where we have to utilise the support of third parties, such as lawyers, in the process. But you're absolutely right, the claims handling cost is hidden.
MR SKELTON: I presume that must mean that your legal costs tend to be less than those who don't do as much work?
MR BONEHILL: Inevitably, yes.
MR NICOLSON: There would also be a cost associated with the insured, because the bulk of the initial investigatory work, the collection of evidence and documents, would fall down to that insured organisation.
MR SKELTON: Are there any other aspects of the role of insurers in the litigation process which the inquiry ought to understand? We have heard about claims handling, we have heard that it is a variable involvement, but in terms of, for example, instructing whether or not to settle a claim, what involvement will you have in that process?
MR LUCK: If we are actually the people handling it, or it is handled by our claims handlers using lawyers, then

the decisions are usually down to the insurers, ie, ourselves or our claims handlers, to agree on advice to settle and at what level. But there is, with most of these cases, a lot of regular negotiation and interaction with our insureds or our former insureds.
MR SKELTON: When you say "negotiation", there is a sort of tentative implication there might be some tension within that discussion. Do you sometimes have the position where your insured may take a different view of the litigation, either want to fight it or, indeed, want to settle it, than you do as the person backing it?
MR LUCK: Usually, the liaison is there such that any sort of tension is already clarified before you actually go to the table perhaps to discuss with the claimant solicitors. So whilst that can arise, it's not usually something which would hold up the handling of the claim.
MR SKELTON: Do any others have a view on that?
MR BONEHILL: My view is, as I have said before, the decision rests solely with us. Yes, we collaborate, of course we do, with our policyholders, but the decision sits with us. We are not influenced by what others may say.
MR SKELTON: Have you found that that's led to some difficulties in some cases?
MR BONEHILL: Not particularly. I think the point Rod makes

is a good one: as we're investigating these allegations, we are working very closely with our policyholders, so we are on a journey together, so there shouldn't be any surprises when it comes to, you know, the final decisions on liability.
MR SKELTON: In terms of the value of claims, again, we heard from the claimants -- they called us earlier today -- that most claims are of relatively modest value, somewhere between about £15,000 up to, say, £50,000. Generally, quite a low range in the personal injury market. Is that your experience from your perspective?
MR LATTER: I would issue some caution around the data. Certainly, from our perspective, if you look at the amount of claims that we settled in any 12-month period, they are relatively low numbers, so when we are talking about average and ranges, they can spike and dip dramatically. If you have a very expensive claim that settles in one year, your average will naturally go up that year, because you don't have a large number of claims that settle.
We recognise averages very, very carefully. There are some figures that you can use, but I would caution that they are not precise. There may be something, as an industry, through the ABI we can look at in terms of,

is there a way we can coordinate data to give to the inquiry that would take away that cautionary note, saying, actually, we have got a much broader spread of data now, we are able to give you more exact averages than one insurance company with a very discrete portfolio. So maybe there is something there, but, again, Peter, a caution that the systems that these claims are processed against are quite archaic. They were probably never set up to code child sexual abuse because it wasn't in contemplation when the risk was underwritten. So getting to the data would be quite troubling, but there is certainly something we could do to try to look to do that.
MR SKELTON: I think that is something we would be interested in. It is probably not something we can bottom out now, but if others were amenable to capturing that kind of data, then that is -- broadly speaking, is there a bell curve of claims and toward the range I mentioned? So you would have some outlier claims that are worth £250,000-plus and you will have some that are worth only a few thousand pounds, but most might be within that bracket of under 50.
MS HANDYSIDE: All I would caution against is that you have four insurance companies here and there are more that operate in the market, and they all, as you have already

heard, have some quite different portfolios and quite different businesses, and so I think it would be really good to undertake a data-gathering exercise, and I heard from the session this morning, concerns at the level of damages for pain and suffering, loss of amenity, are inadequate, and we would really welcome the opportunity to participate with the inquiry in assisting and gathering data so that you can look at those figures and work out patterns and averages.
MS MACKENZIE: I absolutely support that. The one thing I can contribute now, looking at how many cases we have in a year that might settle for a six-figure sum, it is probably about 10 cases a year for us.
MR SKELTON: Out of ...?
MS MACKENZIE: That's a good question. It is probably, in a year, that might represent 10 per cent. But I would need to check that and --
MR SKELTON: So the majority are considerably lower, generally speaking?
MR LATTER: Yes.
MR SKELTON: Costs. The same question, in effect: firstly, do you capture those from costs or do you have an idea anecdotally, rather than in terms of the specifics, of the kind of costs that you see paying to claimants if they are successful?

MR LATTER: It is all part -- because of the lack of sophistication in the systems, it is kind of all part of the same ball of wax, so it is difficult for us to absolutely accurately split that up. But we have got a fix on costs in terms of the percentage of the overall settlement from a claimant perspective. But, again, I caution the data isn't precise. But we would estimate based upon our portfolio that it's around 40 per cent of the overall settlement gets paid to a claimant solicitor and our own solicitors around about 20 per cent.

MS HANDYSIDE: I think there's talk about proportionality in this area and the relationship between the legal fees on both sides and the amount of compensation. Certainly in the inquiry's work I think that is an important area of focus and investigation. I think it is important to say that the insurance industry dealing with these claims welcomes claimants who have access to good, experienced expert lawyers in the area. That helps victims and survivors understand the process and gets them the help they need.

It is also helpful for defendants and insurers in terms of having a process and engagement that represents the realities of the civil justice system.

So these are very difficult cases with difficult issues around evidence, and so we understand that costs

can be high.

I think, you know, as in all areas of endeavour, there are differences of approach of solicitors' firms who represent claimants, and, you know, a sort of consistent approach to costs analysis and assessment in the courts would go a long way towards ensuring that appropriate levels were maintained.

MR LUCK: I think the diversity of the nature of the claims you are dealing with here, it is very difficult to come out at what would be a standard sort of figure for costs on either side. Small value claims can be just as labour intensive and expensive to settle.

I think in the vast majority of cases, claimant costs are settled through negotiation. There are cases where they're considered excessive, and assessment is used, and we do see cases where substantial reductions are made. But it is a very much a case-by-case matter.

MR NICOLSON: I would agree. Certainly from our experience, we see quite substantial variations in terms of costs, and it is not unusual for us to agree a settlement and then be faced with a claimant's legal bill of almost the same amount, in some of the smaller cases, and we do challenge those and have those reduced.

I think John mentioned the figure on average around 40 per cent for claimant's costs and 20 per cent for our

costs but that kind of resonates with us. As Rod says, it is one extreme to another depending upon the different type of claim.

MR SKELTON: A point raised in the earlier session is some claims will cost a lot to investigate: you have to get social work experts, you may have to get a psychiatric expert, as a claimant you have to pay your issue fee, which could be up to £10,000, and you may have a lot of documents, some of them stretching back years, and the social care documents may be voluminous, running into many, many files.

Do you recognise -- I think this is the point you were making, Rod -- that actually some claims, which may be only worth £5,000, may actually require a lot of legal work and expenditure? What I'm trying to isolate is the difference between legitimate work from your perspective and where it starts to spill into illegitimate work from your perspective?

MR LATTER: Actually, I think there is a lot of fixation around fixed costs in this area. Zurich would take a slightly different view, that, actually, if we look at the process and we mend the process by making reform to the current process where required, that actually that will bring proportionality by a natural consequence, because, if you streamline the process, you make each

side accountable for their actions, you will bring efficiency to the current process.

So we think absolutely focus on that to bring the costs down, not just by fixing costs, because these claims are very unique, each one needs to be treated slightly differently.

I think the other area is, we would welcome, perhaps, when we can't agree on costs with the claimants, access to expert cost judges in this area that will hear those disputes. So it doesn't involve the claimant, the survivor, it involves the dispute between the claimant's solicitor and the insurance company.

MR SKELTON: Breaking some of that down, fixed costs, first of all, on the face of it, could give certainty and limits which are valuable from your perspective, but on the other side could lead to an immediate unfairness if you can't actually investigate the claim with experts, by looking at documents. Is that accepted, generally speaking, or do you think actually, never mind that, there ought to be certainty of limits?

MR BONEHILL: I think there needs to be an element of fairness in the whole process and the victim/survivors need to be supported by specialist lawyers, and that -- you know, we accept -- certainly from our -- that comes

at a cost. I'm not sure fixed costs is the way forward for these types of claims. It is also worth just noting that, although there may be a dispute on costs between the insurance company and the firm, that does not prevent the claim being settled. So it is a completely separate negotiation to the primary claim.

MS HANDYSIDE: Where costs really start to escalate is when litigation begins. So court fees for lodging a claim have recently increased, and that must put a lot of pressure on claimants and their representatives.

The more that can be done to establish what the real issues are in a claim and what a victim and survivor most wants out of the process before litigation is embarked upon, that has got to be to the benefit of all involved, and it is why we -- I noticed it was -- there was a great deal of support in the responses to your issues paper for a pre-action protocol, where, before litigation starts, you aim to get the parties together, have a cards-on-the-table approach, so that everybody knows where they stand on the big issues, like limitation and vicarious liability before anyone has to spend any money on civil litigation. I think that would be a universal improvement to the current civil litigation process.

MR NICOLSON: Just to answer that, I think any review needs

to look at avoidability in the process. Certainly when we are dealing with some claimants' lawyers, there was an element of work that's undertaken that is avoidable if we could just reach some sort of a sensible agreement from the outset. These are often in cases where we have actually admitted liability, but there is a very defensive response comes back. Of course, that just adds time, adds cost, to the whole process.

MR SKELTON: Going back to John's point about saving legal costs, which are a huge proportion of the insurer's payout, where can the savings most readily be made without damaging the claimant's ability to litigate his or her case fairly?

MR LATTER: For me, I think we have talked about previously -- we need access to documents and information and witnesses as quickly as possible. So we will encourage the pre-action protocol to really look at frontloading the process, so that we absolutely get those documents, so there is immediate transparency for both sides of the allegations that sit around these claims and how we can get to a liability decision as quickly as possible.

I think the answer is, you hold both sides accountable for putting the victim at the heart of the claim and making sure that you prosecute that claim

as quickly as possible on behalf of your client or, if you are defending someone, you make sure that you produce your response in a timely fashion so that the victim's solicitor can respond to that.

So make this a victim-led process, to make sure the information is available, and speed it up and make both sides accountable for making that happen. That has to be the way forward. And naturally costs will reduce as you streamline the process.

MR NICOLSON: I think also it is about looking at the actual number of documents that are required, because quite often there is a significant volume of documents that we have to then go through and provide, and is it strictly necessary that all of the information within that bundle of documents is actually required or can we narrow it down to specifics that can be provided? Because a large part of certainly the costs and the time from the defendant organisation is in obtaining and reviewing documents.

MR SKELTON: Do you recognise the point -- it was made earlier by Mr Garsden on behalf of ACAL -- that it can sometimes be that one document that provides you, as a claimant, with the evidence to proceed with your claim, and the problem with that is that you need to find it, and sometimes --

MR LUCK: I think that's exactly right. Until we have actually reviewed all the documentation, we don't know exactly what is within that documentation. So that can be a problem.

MR SKELTON: We have heard about cost savings, about particularly the pre-action idea of getting a protocol and having agreed terms for providing documents and so on. Where do you see costs being effectively wasted or where costs are excessive from your perspective, from the claimants' side, if at all?

MR LATTER: It is difficult to generalise because there are -- it depends on the claimant law firm you are dealing with. We feel that those firms that have experience in this field are very aware of the process that one needs to go through to prosecute a claim. We tend to work better with those firms in terms of limiting the document disclosure or limiting the issues and we find that their awareness of the process allows us to move forward much more quickly, where others maybe take a little bit longer to arrive at the same place.

It is very difficult to generalise because I think it does depend on which claimant firm you are dealing with. What we would see from a pre-action protocol is to say, actually, we can work with the claimant solicitors in terms of defining what should be in the

pre-action protocol and agreeing, when things fall potentially outside of that, allowing some flexibility. My understanding through Master McCloud is there are already steps afoot between the claimant solicitors and defendant solicitors to look at that and we would encourage this inquiry to engage with Master McCloud to see whether she can provide that umbrella to move that work forward and potentially push it to the CJC and ask them to put their stamp on it and encourage defendants' and claimants' solicitors to make this very much a victim-led process and to really focus on the issues, accepting that there are times when there needs to be an extensive review of the documents, as Rod said. That is why we are not going towards fixed costs but an improved process.

MS MACKENZIE: To add to that point, I think the point of the protocol as well, with that engagement between the parties, you can agree through each phase, "We are going to be reviewing these documents, it is likely to take this period of time", and that kind of understanding between the parties of the process you are going through. I think the difficulty on occasion is that nothing happens on the case for six, nine months and you're not getting any response as to next steps, and that might be because there is a very rigorous review of

documents going on, but that kind of lack of transparency in the process probably doesn't help with the overall cost and time spent. So I think the protocol would give that greater transparency and it would be clear the steps that were being taken and whether those steps were actually necessary.

MR SKELTON: We are getting close to the limit, but the countervailing point might be that, actually, for some victims and survivors, maintaining an expeditious engagement in the legal process is, in itself, quite difficult.

MS MACKENZIE: Yes.

MR SKELTON: They are not often like clients who are keen to crack on. They need to take their time. They may disappear for a while. They may come back in. The difficulty, I suppose, with what you are saying, keeping the pressure on, is it could penalise those who can't handle it.

MS MACKENZIE: It doesn't have to be keeping the pressure on, it is more about transparency. So if that is the case and there needs to be a period of time taken, you know, before someone is ready to come back and proceed, then I think that's okay.

MR SKELTON: You need to know that.

MS MACKENZIE: Understanding that, that that is what the

victim/survivor needs in that case, I think that is key.

MR LATTER: To balance the point, there may be victims who want to get through the process very quickly, receive an apology and move on with their lives. So I think as Carolyn said, you need a balance between the two. That's why I say it has to be victim led and an appreciation of that.

MR SKELTON: For those of you who have been involved with industrial disease claims, have the protocols that were brought in for that area of litigation, which is huge and persistent now for many, many years, have they led to the kind of improvements that one might hope would occur with a protocol for sexual injury cases?

MR LUCK: I think certainly they have because it has enabled better production of documentation, better presented claims, which does enable easier handling. I think that is the opportunity for these abuse claims to go down a similar route, not necessarily based on any existing protocols, because it warrants its own consideration, but, as John said, if you can actually get better disclosure, better claims presented, from the outset, I don't think you can have a situation where you can expect to reduce the costs and the documentation reviews across all claims, but you may actually reduce the number of claims where that work is required.

MR SKELTON: Thank you. We have heard a lot about pre-action protocols. I should say that is one of the things we will be looking at specifically tomorrow, I anticipate, when we look at reforming the civil justice system as well as the more radical option, which we haven't discussed, which is getting rid of it and replacing it with a scheme. From my perspective, that was very helpful. I don't know whether the panel would like to ask any supplementary questions?

THE CHAIR: Yes, one. I'm not sure if it is going to be covered tomorrow, Peter, but can you give an indication of what the criteria are that you apply to this when you settle claims to the level of payment to be made?

MR LATTER: So how do we agree a settlement value?

THE CHAIR: Yes.

MR LATTER: We will traditionally be led by the judiciary, so England and Wales are based upon case law, and settlements will be publicised. You also have the judicial guidelines around damages. So we would tend to follow the pattern of previous settlements based around the facts in any individual case. If that is unsuccessful, then the case will go to the judiciary and they will set the level of damages as appropriate.

MR NICOLSON: In effect, it is like a tariff with various levels and bands. So there is a tariff at a lower level

and an upper level. It would very much depend upon the nature and extent of the injuries that have been sustained.
THE CHAIR: Does it include frequency?
MR NICOLSON: Yes, it would include frequency and the nature of the injury that's occurred.
MS HANDYSIDE: Is that something you're talking about internally that you have?
MR NICOLSON: No, sorry, the Judicial Studies Board Guide, that has bands within the guide.
MR SKELTON: Are there those out of the table area who would like to ask anything finally before we close the session.
CORE PARTICIPANT: I would like to ask, we had a lot of figures about people who were coming forward whose initial claims were dismissed, as it were, or not able to go forward for various reasons. Of those ones that you do take forward, could I ask how many are successful on an average percentage?
MR LUCK: The difficulty on that is that the statistics -- we simply don't have it to hand. There is nothing within our systems which would really produce a factual answer, I'm afraid.
MR SKELTON: Is that something where we could try to interrogate the data in due course?

MR LATTER: As part of the data trawl that we could conduct through the ABI, we could certainly look at that. The problem we have, as an organisation, is we didn't really start to record child sexual abuse in this more granular way until about 2013. So the historical part that's already taken place, Peter, will be difficult to go back and capture.
MR SKELTON: Roughly, do more cases settle with a payment of damages than not?
MR BONEHILL: Certainly from our side, that is very much the case. A high percentage we settle with a payment. I think that is reflected in some of the litigation rates we have, which are very low.
MS HANDYSIDE: I think the gentleman was -- in the first session this morning, there was talk about, from the claimants' representatives, legal representatives, about not taking cases on. I think it would be really helpful if the inquiry had a better understanding -- I don't think that understanding exists at the moment -- about when and why claims fall away so the ABI and the insurers here can assist in, insofar as their records allow and examine their records to try to establish percentages of settled cases.
MR LATTER: We may not know why they are discontinued. It may be an issue between the client and the claimant's

solicitor.
MR LUCK: The number.
MR FRANK: Two things. One is, we have seen some evidence from the claimants' point of view that one difficulty they have is actually establishing whether there is insurance, who holds it and what its values may be.
One suggestion could be that there ought to be a register of insurance that may answer to claims of this kind. Have you got anything to suggest about how that can be done, whether it should be done, and who should do it, if it should?
MS MACKENZIE: So in employer's liability there is precedent for that, and we have something, ELTO, which might have been mentioned already which is the Employers' Liability Tracing Office. The same thing doesn't exist for public liability. I have to say, in our experience, where I think, quite a long time ago, organisations understood the need to retain employers' liability documentation around their insurance, that probably hasn't been understood as well with public liability. So undoubtedly, I think there are gaps in what people have retained and their ability to demonstrate what covers they have -- to trace what covers they had. So something similar in public liability I think is something certainly worth considering.

MS HANDYSIDE: So there is a precedent for it, if you like. I think there are questions about how comprehensive it would be and how much further it would actually take things, in the sense that, if there are difficulties in individual circumstances establishing what the insurance position was, whether there was insurance and what form it took, that exact problem might be faced in furnishing a register of policies, but it's certainly something to not rule out as a helpful tool.
MR FRANK: Again, if I might just take as an example, for the BBC, which you had part of the primary cover for, along with several other companies, it might be difficult for a claimant to know which company to look to in terms of any insurance cover. If there were a register, the claimant's solicitor would have an easier task and it would save costs upfront in doing the research on that issue.
MS MACKENZIE: Correct, yes, that's right. I think where an organisation can trace an insurer for a period, that insurer can then facilitate the process of identifying other insurances in other periods. But I do agree with you, yes, it would be easier.
MS HANDYSIDE: And I think with restructurings, various restructurings of local authority, care systems, there are additional difficulties in that area, and that is

perhaps something that could be mapped out.
MR FRANK: Thank you. A separate subject, if I may: can you tell us anything at all about the prevalence of a sexual molestation exclusion clause which, as I understand it, has become more prevalent since the allegations in relation to Jimmy Savile.
MR LATTER: I'm not aware of that in our organisation.
MR BONEHILL: We certainly don't do that.
MR FRANK: If you do learn anything, perhaps you will let us know.
CORE PARTICIPANT: Two words that keep coming up, one is "evidence", the other one is "witnesses". If I get attacked in the street, there's witnesses. How do I get the witnesses? Very rare you will find a witness.
MR SKELTON: This is a point about dealing with the merits of the claim when it comes to the court process.
CORE PARTICIPANT: Being told that I can't do it because I've got no witnesses.
MS HANDYSIDE: I think the gentleman highlights a really important point about how very difficult these cases are, because of the context in which they took place, and of course he is right that that is one of the difficulties for claimants in bringing cases, and particularly when they're historic cases, you're reliant on memories from many, many years ago from anyone that

can shed any light on the events in question.
MR SKELTON: Thank you very much. We will take a slightly shorter lunch because we are still a little behind, I'm afraid, so about 45 minutes.
(12.54 pm)
(The short adjournment)
(1.47 pm)
Session 3
Welcome by Chair and opening comments
THE CHAIR: Good afternoon. I appreciate that nearly everyone here now has been here all day so far, but just for the sake of those who may be listening, I want to welcome everyone again to the first seminar of the independent inquiry into child sexual abuse and again to introduce my colleagues here, Drusilla Sharpling, Ivor Frank and Professor Sir Malcolm Evans.
I won't repeat what I have said this morning, twice, but just to say that this will be included when the transcript is uploaded onto the inquiry website, and just to confirm, of course, what I said then, that the panel and I are looking forward to further open, lively and respectful discussion amongst yourselves in a number of key areas relating to the civil justice systems.
I will now hand you over to Peter Skelton QC, the

leader counsel for the accountability and reparations investigation.
Opening comments by Facilitator
MR SKELTON: This session is the first one where we have brought together claimant and defendant stakeholders, which is, I hope, going to generate some useful discussions. The main topic is limitation and how that affects civil justice access to justice and indeed the process itself.
There are four broad things I would like to elicit: the importance of limitation now, as in the present day. Historically, of course, we know it has been a feature of litigation, satellite litigation, for decades, many, many years. The first question, really, is how important is it for a claimant now starting to litigate?
I would like to know the defendants' perspective on it, its value, whether or not it is used as a shield or a sword, and the claimants' perspective likewise, whether it is seen to be a barrier for legitimate claims or a fair way in which the courts can now actually assess whether claims should proceed on the ground of fairness.
We will touch upon at the end, if we may, issues of reform, although, as you are probably all aware, reform is very much on the table for tomorrow's seminars, not

for today, but I think it will be helpful to have a few ideas about potential reform to the limitation law today, just to inform tomorrow's discussions.
Can I start by asking you to introduce yourselves? I know most of you -- perhaps all but one, in fact, have been here before, but if you could introduce yourselves again, that would be great, thank you.
Introductions
MR LUCK: Rod Luck, Municipal Mutual Insurance.
MR GARSDEN: Peter Garsden of Simpson & Millar and president of the Association of Child Abuse Lawyers.
MR BRIDGE: Jonathan Bridge, partner from Farleys Solicitors' abuse department.
MS JEFFERSON: Paula Jefferson, a partner from BLM.
MS HANDYSIDE: Philippa Handyside, I work for the Association of British Insurers, the ABI, which is a trade association representing insurance companies and long-term savings companies in the UK.
MR SCORER: Richard Scorer, Slater & Gordon, lawyers.
MR LATTER: John Latter, I work for Zurich Insurance Company in the UK.
MR ENRIGHT: David Enright, I'm a partner with Howe & Co solicitors, representing the Forde Park survivors, the Stanhope Castle survivors and Survivors of Organised Institutional Abuse.

MR SKELTON: Thank you. Can I ask you all to speak up again? I know it is quite tempting, in this relatively informal format, to speak at a conversational level, but we do need to amplify a little bit, if we could.

Open discussion

MR SKELTON: Can I ask, first of all, I am going to put it to you, Peter, the importance of limitation, because I know you have been involved with, historically, many cases over the years that have involved limitation issues. Where are we now in terms of its importance for claimants?

MR GARSDEN: It is the fundamental fighting ground in most of these cases. I think, from a defendant's point of view, there is something somewhat unattractive about suggesting that the allegations are untrue. I think it is probably far more appealing for them to say that the case is out of time and it is not possible to have a fair trial. So generally speaking, if we win on limitation, time delay, then the case often settles.

Generally speaking, in my experience, defendants will raise the issue of limitation in every case. In some cases, we even have a situation where liability is conceded but limitation is defended, which is perhaps a less attractive position.

It is used as a bargaining tool sometimes to argue

that a case should be settled at a nuisance value -- and when I say "a nuisance value", that is usually between £1,000 and £2,500.

The subject of limitation, without going into too much detail, is intimately tied in with the case itself, for the simple reason that, often, when a child is abused, after the abuse, he or she having been groomed, he is silenced with threats, sometimes, not infrequently, of violence to himself and members of his family. That threat, as well as the spell that the abuser weaves over the child, inevitably keeps him silent for many years.

There are examples of the child trying to complain about it and not being believed, which only reinforces his or her belief that it wasn't worth complaining in the first instance.

When we take instructions from individuals many years later, they often cite that as a reason for remaining silent, as well as the obvious issues of shame and embarrassment.

Therefore, to try limitation, or to defend on the basis of limitation, is to not only take a technical point, but also to criticise the silence of the individual, which is all tied in with the sequelae of abuse and the psychological profile of the claimant.

That is why in some jurisdictions it has been abolished for sexual abuse cases, which are, I think, in a different category to physical abuse cases by the nature of the shame and embarrassment attached to the abuse itself, and why in other jurisdictions there has been a model of good practice, that limitation should only be tried sparingly in exceptional cases, whereas -- certainly that is the case in Australia. Whereas in England, it is routinely tried in every case, in my experience, or in most cases.

MR SKELTON: Thank you. You covered a lot of ground there. Quite a few of the things, I am going to pick up later. But the key point from my question is, it is still very important, notwithstanding that some of the major cases on limitation were heard now some years ago, it is still a major issue for claimants' solicitors.

MR GARSDEN: It is.

MR SKELTON: So far as defendants are concerned, you have heard from the claimants' side that it is still a major issue. I have to say, from some of the responses in the issues papers, I didn't see it as being quite so square and centre. Paula, do you have a view on that?

MS JEFFERSON: Limitation is raised in all cases, in that it is raised in the letter of the claim. So for understandable reasons, when a letter of claim is

received, the claimant solicitors will say -- will raise the issue of limitation, because they are rightly concerned to ensure that they don't do anything that will prejudice their client's ability to proceed with the claim.

So limitation is flagged in all cases for that reason. But from my experience, in reality, it is rarely an argument that is sustained. It is something that, in investigating a case, will be considered and will be dealt with very quickly.

MR SKELTON: I didn't set the scene for limitation. For those that don't understand it -- I will be corrected by the experts around the table -- limitation is a way in which parliament has decided to protect defendants from stale claims that are of a certain vintage. So the general rule is that a claimant has three years from his or her abuse to initiate a claim and, after that, it is subject to the court's discretion and there are particular criteria which the court must apply when exercising its discretion. But you can't guarantee you are going to succeed on that, you have to wait for the trial judge to take a view. Broadly speaking, that is the position.

MS JEFFERSON: Yes. That assumes that all cases go to trial, and, in reality, very few do.

MS HANDYSIDE: Can I add one really important qualification: the three years doesn't start to run until the victim or survivor reaches the age of 18, so it is not three years from the date of abuse.
MR SCORER: Can I just make an observation on what Paula has just said? I think it is fair to say that I think Paula and those she represents have generally taken a reasonable stance on limitation. That is not a universal stance taken by defendant insurers. Some of them, or those who represent them, do fight the limitation issue very hard. It may not be amongst those in this room, but that is the reality, that there are defendants who fight this issue and fight it on a highly technical level. It is extremely frustrating and difficult for claimants, of course, who want to have a sense that the substantive allegations that they are making are being addressed, and what they get is a legal response that says, you know, "We are taking a point on time limits".
So whilst I think Paula is correct in characterising her own approach to it and that of those she represents, I don't think that is a universal position.
MR SKELTON: Do you see the law, as it stands, as having been clarified on limitation and now what you are dealing with is, how strong is the defence on limitation

and what view is the judge going to take on it, rather than a technical point of limitation?
MR SCORER: Well, of course -- I have been dealing with abuse cases for 20 years, and in that period -- of course, much of that period there was satellite litigation in relation to limitation. There is no question that, since 2008, with the decision in the Hoare case, that the law has been clarified to a considerable extent. So the parameters of the law are now fairly clear, but it is not always straightforward as to how they will be applied in individual cases.
MR GARSDEN: But the law is certainly a legal contradiction. I mean, whilst it is clear, it's been twisted and manipulated to produce some sort of justice for claimants, frankly. It is not in a satisfactory state.
MR SKELTON: What do you mean by that precisely? What's been manipulated? By the judges, in order to favour claimants, do you mean?
MR GARSDEN: I think there was a recognition in Hoare that victims of sexual abuse have this psychological element that prevents them from coming forward until a later date. The law was twisted so that, although we are meant to be suing an assault, the time limit for assault, which is six years, is largely redundant.
MR SKELTON: And it is a fixed time limit without discretion

to extend.
MR GARSDEN: Indeed, because although we are suing an assault, it is regarded as negligence and the time limit, date of knowledge has gone out of the window, that's deemed to be when the offence takes place, and we are down to section 33 discretion, which is the way it is judged.
I'm not saying that that is a wrongful or bad interpretation of the law, but it has been twisted to produce a certain result away from what the Limitation Act intended, to the extent that you can't really bring the argument now, because it is an objective test, that the claimant wasn't aware of his right to bring a claim, because it is an objective test and date of knowledge passes at the time of the offence. So date of knowledge has gone out the window. The section that deals with assault on the limitation of six years has really gone out the window, and we are down to one section, which is section 33.
So the law has been twisted. The case of Stubbings v Webb decided that personal injury includes intentional assault, whereas, until Hoare, it didn't and you had a crazy situation where you could bring a claim against an institution in negligence but you couldn't bring a claim against an abuser until the law changed in

2008.
MR SCORER: I think I would add to that, and I think it is quite an important point, that what Peter is really alluding to is the fact that the interpretation of the law and the way the law has been applied has been very dependent over the years on the court's interpretation of it at any given time, and those of us who have done this for, as Peter and I have, the best part of 20 years, we have seen the court's interpretation of the Limitation Act in these kinds of cases change in many different ways. That is, again, very difficult for claimants, if you advised a claimant in 2006, you know, and then you're advising them three years later and giving them wholly different advice.
MR SKELTON: David, I think you have been waiting, and then we will get to more defendants.
MR ENRIGHT: For the very good reasons we heard this morning from Karen Gray and Nigel O'Mara, it is like an accepted fact that the limitation in child sexual abuse cases is just inappropriate for the offence, because you have a limitation in certain circumstances where we all know the majority of people will not report within that timescale. Yes, there has been movement in relation to how limitation is interpreted by the courts, but that is only known to sort of a select few, and we have heard,

as a result of your question, Mr Frank, this morning, how few practitioners there are in this field.

If you are a quite well educated abuse survivor and you do a little bit of research yourself before considering, "Should I do anything?", one of the first things you will come across, of course, is there is a limitation, and you will think, "Well, that's me ruled out". So it is, again, that kind of chilling effect, it is a limitation standard we know shouldn't be there, it is not used in other jurisdictions, there are -- if we took away limitation, it wouldn't lead to a flood of unmeritorious claims because the courts have the power to order significant sanctions against dishonest claims. So there is no real downside to removing a limitation, certainly not for survivors, and I do not think it would be particularly onerous to defendants.

MR SKELTON: Let's, again, park that issue, because that has fed us straight to the "should it be reformed" point.

MR BRIDGE: Can I just add to what David said and carrying on from what was said this morning, probably the major consideration for a claimant solicitor, when deciding to take a case on, is limitation. So it is not just the defendant's attitude once you send the letter of claim. Quite often the cases aren't even getting to that stage because claimant lawyers are still interested in getting

paid, it is still a business, and old cases, quite often you will reject, purely because of the limitation, particularly the failure to remove cases where you have a client in their 40s or 50s, alleging Social Service negligence 30 years ago and you can't find an independent social work expert with the requisite knowledge to report on that case.

MR SKELTON: So it is a gateway problem, in fact, to get the claim started. What other factors beyond getting an expert who can comment on an old claim are a problem for you? How do you predict where the court is going to go ultimately on exercising its discretion? What are the factors that you think really bear upon that issue?

MR BRIDGE: The issues that are commonly raised by defendants are witnesses who are no longer available. You may have social workers, who were involved in the case 30 years ago, who are no longer working with the council, or even alive. Obviously, on our side, if there is a conviction, it helps enormously, but it's possibly lack of documents, if the Social Services records have, for some reason, gone missing. These are the issues that you are asking your clients about, if they have the knowledge of that, when they first come to see you, but limitation is -- the older it gets, the less likely we are to take these cases on, with the

limitation as it presently stands.

MS HANDYSIDE: I think Paula is right, that limitation is to the fore in claims for historic child abuse for obvious reasons, and I think that to call it a technical defence is not realistic, because what limitation is about is about ensuring that there is a fair way of assessing the allegations that have been made and whether the evidence is there for the process of validation.

So limitation, our information from the insurers that are members of the ABI, is that limitation is pursued as a positive defence in a very small number of cases, and there are very few cases that go to trial each year on limitation.

MR SKELTON: But is it used to press solicitors or claimant -- their clients into taking a lower level of damages? In other words, it is still used as a sword even if, ultimately, you are not going to wield it at trial.

MS HANDYSIDE: In recent years -- if you are a victim or survivor who is bringing a claim, I can see that having limitation as a live issue is another barrier that you face in seeking compensation and redress, but in discussions about settlement, the run of case law on limitation and the factors about when cases will be allowed to continue are reasonably well understood by

claimant representatives and defendant representatives in this area, and so there are the very difficult cases around the edges, and those are the ones that sometimes find their way to court, but there's a large degree of commonality about whether limitation is a point that's going to cause trouble in a case --

MR SKELTON: Peter made the point, though, that liability can be admitted, but it is still pursued. Now, limitation is not just about when you initiate your claim, it is also about how fast you pursue it once you have gone to see your solicitor. So presumably there can be a residual limitation defence, even at that late stage, which has nothing to do with the reasons people didn't go and see someone.

MS HANDYSIDE: Of course there are two big issues in these claims. One is the circumstances of the abuse and liability; and the other is, what is the harm and the loss arising out of that liability.

So many cases, that is the really thorny issue that's being addressed. So because liability is clear and established, it wouldn't necessarily mean that there is agreement about what the appropriate compensation was in a particular case. So a case where liability has been admitted is not necessarily complete.

MR LATTER: Peter, could I just make a point? David said

that if limitation is upheld, it means that the claimant is dishonest. That is not true. I want to put that on the record. It means that --

MR ENRIGHT: You must have misheard me. I said if limitation was removed, there wouldn't be a flood of claims because dishonest claims would be very heavily penalised by the courts.

MR LATTER: I think dishonesty is a completely separate issue. If you are talking about fraud, then I think we would all agree that fraudulent claims shouldn't be pursued. If a claim is struck out for limitation, it doesn't mean the claim is fraudulent, it means that the court, on balance, doesn't believe a fair trial can take place.

I think that is our concern, that the only area that we would have any concerns, and that's demonstrated by the amount of claims that we actually take to trial on limitation in Zurich, is incredibly small, because -- I hope I follow in Richard's group of insurers that actually do take a view that limitation generally falls away and we use it very, very sparingly, and I think it is only when we have concerns around prejudice to the policyholder or access to a fair trial that we would even consider running a limitation case to trial, because the law is well established, there is no value

in us running a limitation argument that is doomed to fail, and we, as Zurich, wouldn't use it as a technical argument to negotiate settlement.

MR SKELTON: Can I ask Rod to chip in? Rod, you have been very quiet so far. You are the other insurer around the table. Do you have a view to add to that?

MR LUCK: I would think and hope that our position is very similar to John's. The organisations are connected in certain ways. As Philippa said, at the outset of claims, limitation in response to the letter of claim is very likely to be raised. We are often very open to agreeing moratoriums on limitation whilst the claim is investigated and, again, at the end of the day, I would say it is just a very few number of cases where limitation is pursued to trial, and particularly in cases where perhaps liability has been admitted.

I can't say there's not a case like that. I can't recall one offhand. But each of these cases has a large number of separate factors, and in any negotiation, limitation may be an outstanding issue which is taken into account on certain cases amongst very many other matters of that particular case.

MR SKELTON: Is it, though, sometimes used from the outset, even in the knowledge that ultimately you are not going to push it in front of the judge? In other words, it is

used to put some pressure on the claimant and then withdrawn, or is it the case that in fact you have to just plead it at the start of a case and then see if, in fact, it's got any substance to it?

MR LUCK: I think it is general practice and it is necessary that in the response to the letter of claim where limitation is there, which, given the description we have had about how limitation runs, will be in most cases. But following on from that, we do move on, on cases where they're appropriate to settle, to the settlement process without going back to limitation. So I don't think it can be said that it is always used as a sword to use in negotiations.

MR LATTER: Peter, what we have seen in our portfolio is that the gap between abuse and notification is growing, and that's very understandable. So we are not questioning that.

But 50 per cent of the claims that are now notified to Zurich, the abuse took place longer than 10 years ago. That is understandable, because of the profile of the offences.

But that puts us in a difficult position, and, therefore, limitation, in many cases, has to be a consideration and, as Rod quite rightly says, during investigation, those issues fall away and we move to

settlement as quickly as possible.

MR SKELTON: Richard and then David.

MR SCORER: I wanted to slightly challenge the characterisation of the law that Philippa and John have sort of presented, because, of course, the question of whether it is possible to have a fair trial, that is one part of the test that the courts apply and, for my part, I accept that it is reasonable for that test to be part of the mix. But the courts are not solely looking at that. The test is not: can we have a fair trial? The test is whether it is fair, in all the circumstances, for the trial to take place.

So the courts don't only look at fairness of trial and whether that is possible, they also look at delay by the claimant and whether they consider that the claimant is guilty of some culpable delay, which is an extremely subjective issue, which, in my experience, different judges interpret in different ways, which adds to the uncertainty around the application of the law.

I personally accept that, even if limitation -- even if the time bar were abolished, as is likely to happen in Scotland, the question of whether you can have a fair trial is still something that has to be considered by the courts, for Human Rights Act reasons and other reasons.

One of the difficulties with the present law is that that is not the test. The test is also whether the claimant has been guilty of some delay, and that's a highly subjective judgment.
MR SKELTON: There are two aspects of the fairness argument, then. One is, is it inherently possible and fair to try this case, to come to a positive finding that abuse has taken place; and the second is, is it fair to have a trial at all, in circumstances where it's taking a long time to come to court --
MR SCORER: Correct.
MR SKELTON: -- and you have not acted quickly. Does that latter bit put a claimant under quite a lot of personal pressure not just to explain why he couldn't disclose his abuse, but why he has acted slowly or ...?
MR SCORER: It certainly puts a claimant under pressure to explain the reasons for delay. They clearly have to do that. But it also puts claimants under pressure to embark on proceedings more quickly. And sometimes, if defendants -- I'm not suggesting that the defendants in this room would do this, but there are certain defendant insurers, and those who represent them, who refuse limitation moratoriums. Again, in those circumstances, claimants are forced to issue proceedings perhaps sooner than they would otherwise have done.

MR ENRIGHT: The insurers would be failing in their duty to their clients if they didn't take limitation. It is there and they are going to use it. But very helpfully, from John from Zurich, we have statistical information saying that 50 per cent of the claims received are over 10 years old. So what we know as a fact is the limitation as it stands does not fit the crime and has to be changed based on the statistics. We know also, from what Jonathan has said and from what we know, that there is a chilling effect of limitation from before you see a solicitor, from when you first see a solicitor and throughout the whole claim. It has been gotten rid of in other jurisdictions. The only way to deal with this is to remove it or seriously weaken it. Otherwise, you would be failing in your duty if you didn't raise it with your clients.
MR GARSDEN: I think it is interesting to look at what they did in -- it is either Victoria or New South Wales in Australia, where they abolished limitation in sexual abuse cases. Whilst they did that, there is a procedure called the strike-out procedure, whereby in exceptional cases, and they are exceptional cases, which are very, very old and it is impossible to have a fair trial, it is possible for the defendants in those cases to apply for a strike-out.

So abolishing it doesn't actually take away the rights of the defendant to deal with appropriate cases, but it stops them running it technically as a way of beating down the claimant routinely, which is certainly my experience. I accept what the defendant insurers say around the table, but that is certainly not reflective of practice in my firm.
MR LATTER: If you remove limitation, which is an option for the inquiry to recommend, and we accept that and we understand the issues there are for claimants, the concern is that it will create some kind of vacuum because there has to be something to follow along. In an area where we have pretty much settled law, we have a judiciary that understands how to apply discretion, maybe not perfectly, but can be encouraged to do it in certain ways, the question is, if we remove limitation, what replaces it, and would that potentially result in further satellite litigation, until everybody gets comfortable with the new regime? That is a concern.
I don't know whether that would ultimately come to pass, but you are taking away something that is known and replacing it with something else.
MR SKELTON: One of the things the insurers have not mentioned is the certainty point, the sort of open-endedness. Is that because you are, in this area

of your insurance, expecting cases to be so old that in fact you can't really -- limitation, in the conventional sense, wouldn't normally apply? These cases are going to go back to the 1950s. I think June '54 is the oldest case you could possibly bring under limitation. So, in fact, the idea of certainty from limitation isn't really such a big deal.
MR LATTER: I think it will come back to the points around, you know, we use it sparingly because it is there as a protection where we believe our policyholder has been prejudiced or may not be able to have a fair trial, accepting Richard's point earlier around the subjectivity.
That is why its use in terms of trials for limitation have fallen in number over recent years. When we raise limitation arguments, in many cases the claimant is represented by an expert claimant solicitor who understands the law around limitation and can advise that client that, "Actually, the limitation argument in many cases falls away, so you should feel confident to proceed with your claim". That is the legal advice they should seek from their representatives.
MR SKELTON: Paula, can I ask you, we have used the term "fairness" -- or the words "fair" and "fairness" have been used quite a lot. What does it actually mean when

it comes to assessing whether a claim can fairly proceed? What are the factors the judge is going to look at and what are you looking at as you advise your clients?

MS JEFFERSON: We are looking at the perspective of -- if I am looking at a letter of claim, I will be looking to see -- you are looking at what is stated to have happened and when it happened and how, on behalf of the organisation against whom the claim is made, what is the link there, and those are the sorts of issues that you are looking at.

One of the points I wanted to raise, which we haven't touched on, and I think, Peter, you mentioned in passing this morning, was around the number of victims who have been abused not in connection with any organisation, and we get in limitation this slightly bizarre position where, actually, the most successful arguments on limitation in recent trials have been raised by those people who are accused of abuse, as opposed to the organisation that has been involved.

So when we are looking at all of these issues, we are looking at the whole picture.

The reality is that the law, from a defendant's perspective, on a vicarious liability is relatively settled and in the majority of cases it is easy to make

a pretty quick decision and to confirm that to the claimants and to their solicitors the limitation will not be an issue.

Another factor that comes out, which is slightly to one side, but is relevant to limitation, is where there is then a significant claim for interest on the damages, which then goes back 20, 30, 40 years, and the fact that there has been an admission of limitation can then be used to increase that interest claimed on damages.

It is a side issue, but it is something that, when we talk about wholesale removing limitation now, I can see many benefits for many people of doing that, but equally, we are, as John has said, in a position where, actually, the law is fairly stable, and to change things on a wholesale basis is potentially going to result in -- we only need to look at Scotland and the changes they have made to their draft bill, particularly linked into the human rights, and we don't need a lot of litigation around that.

MR SCORER: But, Paula, we, of course, already -- if the time bar was abolished, as it is likely to be in Scotland, and the test becomes, is it possible to have a fair trial, the reality is, we already have quite a lot of court decisions on what constitutes fairness of trial, because it is already part of the existing test.

It is just not the whole test. But it is already part of the existing test that the court has to apply. So there is already material and decisions that the courts can draw on.

So I think it is not justified to say that we then necessarily end up with a lot of satellite litigation about the meaning of "fair trial".

MR GARSDEN: The arguments on limitation are actually tied in with the arguments about the case. There have been a number of attempts over the years to have limitation tried as a preliminary issue in an effort to try and save costs. It is recognised, however, that that is not possible, because it is all tied in with -- perhaps the case I was elucidating earlier, if you have an argument on limitation, you are punishing the claimant twice.

The important thing to understand -- I've forgotten what I was going to say. That's my age.

MR SKELTON: We will never know, Peter.

MR GARSDEN: It will come back to me.

MR SKELTON: I would like to understand the spectrum of how fairness is decided. At one end, you might have an institution which has detailed records. You have a claimant who is going to give coherent evidence, they can remember exactly what happened. That may be corroborated by witnesses, and possibly you still have

an abuser and you may be able to call that abuser to give evidence. So you have the full panoply of evidence you would expect to go before the court.

At the other end, presumably, you have a dead abuser, an institution with very few records and a claimant who is under pressure to provide an account about something that happened when he or she was a very small person. Presumably, you have everything in between.

How do you, as a claimant solicitor, take a judgment about whether you have enough to be able to make good your claim to the judge that it can be fairly tried?

MR GARSDEN: I have remembered what I was going to say. Because the limitation argument -- I will answer your question.

The limitation argument is tied in with the quality of the claimant's evidence. So if you take away the limitation bar, you still have a claimant who has to establish his case in evidence. So you don't actually take away the case. All you do is take away a technical defence.

In other words, if the claimant -- this is answering your question -- is an unreliable witness and is confused about how the abuse took place, that may make you less confident about whether you are going to win

both on limitation and on liability. However, if there are 25 other witnesses who are also abused by the same person in an institution in remarkably similar ways, you have a much stronger case and you are much more comfortable about going to trial.

My argument is, if you take away technicality, you don't take away anything from the defendants, because you concentrate on what the case is really about, which is whether the abuse took place, not whether the claimant has delayed for psychological reasons. That is what I was going to say.

MR SCORER: I think, Peter, it is quite difficult to answer your question. What you are saying is, there is a spectrum of cases and you have described the two ends of the spectrum, and then you have got cases in the middle. You might have, for example, a dead abuser but where the allegation was put to them before they died. You can have those sorts of situations.

It is difficult to generalise, because what we have to do, as solicitors, is look at the individual facts on an individual case and come to a view. There is an area of uncertainty around that and it is absolute uncertainty of the litigation.

MR SKELTON: One of the factors is you have to listen to your own client and whether or not he or she is able to

give evidence and withstand the forensic process, which is presumably no fault of their own, if they can't, but that is a factor.

MR GARSDEN: It is going to be a much stronger case if the claimant has given evidence in a criminal trial a year ago and gotten a conviction than if there has been no criminal trial, yet in cases like that, defendant -- I have got a case like that where limitation is being tried as a defence and used as a method of trying to extract a lower settlement.

MR SKELTON: Do you get claims where the judge doesn't say, "I can't fairly determine this". They say, "I have heard all the evidence and I can't make a finding on this", which is a slightly different argument. It may be subtly different, but it is a finding that has started to be made by the courts recently.

MR SCORER: That hasn't personally happened in a case I have dealt with, but I'm aware it has happened, there have been decisions of that kind.

MS HANDYSIDE: I'm going backwards slightly, but the factors that are taken into account and that are set out in the Limitation Act, they do include the conduct of the claimant. They include the conduct of the defendant too. I mean, what it requires there to be consideration of is all the circumstances of the case, including those

things, including what's happened to the cogency of evidence.

So under the current system, a judge, who is the sort of individual who would be trying these cases and understanding what the evidential difficulties were, it's their consideration of all the circumstances of the case.

There is a degree of rationality about that, in that they know the problems they are going to face fairly trying a case that's, on the face of it, long out of time.

Habitually, these cases are allowed to continue and the discretion is exercised, and I want to come back to the point that this is a contested issue in a very small number of claims.

MR SKELTON: The idea of the judge testing fairness is part and parcel of the judge assessing whether or not the abuse has taken place. It is part and parcel of that assessment. Is it your experience generally that the people -- I will start with the claimants -- who walk through the door, whom you see, have been abused, or how many cases do you have to say -- or how many cases do you think, "This isn't necessarily the reality, and I am going to have to turn you down on that basis"?

The reason I ask that question is one of

the considerations the panel have to have of it is doing away with limitation, partly to protect what are genuinely legitimate claims. Is that the case?

MR GARSDEN: In the last 20 years, I think I can confidently say that -- I'm not saying it has never happened, but if somebody has had the courage to come into our office and tell us that they were abused, how can I possibly gainsay what they say, nor should I do so anyway. Nobody comes into our office and says, "Excuse me, I have heard you can claim compensation. Would you mind making up a story for me?" Nobody ever says that. They often -- you can often tell from their body language whether -- well, you can't often -- you can't always because sometimes they dissociate, of course, and tell you what happened to them in a way that displays no emotion, but often we have grown men crying in our office, in the way that you have seen recently on the television in relation to footballers. That is a common occurrence for us.

So it is manifestly obvious that what they say happened, happened to them, unless -- well, it just is. You can generally tell, but even if you can't tell from body language, it is not for us to decide on the veracity of allegations. That is a matter for the courts.

MR SKELTON: Aren't there some claims when they may say, "I was abused at this secondary school", and on investigation they weren't at that school? Do you not get a case like that, where you can't corroborate?
MR GARSDEN: I'd say that you do get cases -- I'm just trying to think of cases. I can't remember a case similar to what you say.
Sometimes they say they were at the school and the register doesn't show that they were there, but that doesn't necessarily mean they didn't go. That may mean the register was incorrect. You sometimes get people who talk about abuse at institutions where the defendants say that the abuser had retired, where, on subsequent investigation, you find out that although they'd retired, they visited the institution again because they know the teachers.
So it's impossible to be specific, but that's certainly not my experience. I have to throw it around the room.
MR SKELTON: Can I ask all the claimant solicitors that, and I would like to get it from the defendants' perspective, if I may.
MR SCORER: If the question is, what proportion of the cases that we see are either false allegations, deliberately false, or mistaken in some way, I think the proportion

is small: very small in the case of deliberately false allegations; mistaken, probably a slightly higher number, but still a small proportion of what we see.
MR ENRIGHT: My experience of that -- we are not judges, it is not for us to judge, but what my absolute consistent experience is, people who talk to me about child sexual abuse always minimise the level of abuse and very often grossly minimise the abuse suffered, and it is only by the ability, over many years, to study the person, to ask the additional questions, that you begin to get a true flavour of the abuse. That is the interesting thing about child sexual abuse, they hugely underreport.
MR GARSDEN: The standard training device is, "Tell me about your last consensual, intimate sexual experience?", in a group, and then the trainer says, "I'm sorry, I was only joking", as an illustration of how difficult it is to talk about it to a complete stranger. And you often get sequential disclosure, sometimes less to start, then, when they get to know you better, more and more comes out. Often it takes until the expert meeting for the full disclosure to come, and that's quite common.
MR ENRIGHT: Just to admit it to themselves, just to admit it to themselves, is a hugely difficult thing, often.
MR SKELTON: Before we move on to the defendants' side, for those of you who litigate in this area, do you also

litigate in other areas of personal injury? Can you compare it to -- I mean, notoriously, whiplash, of course, is an area that has attracted a lot of attention because of fraudulent claims or arguably fraudulent claims. Can you compare your own experiences with other areas of personal injury work where that might be more of a legitimate concern?
MR SCORER: I did practise as a general personal injury practitioner for some years and I would say that the level of dishonesty, to the extent that there is any in this area, is lower than in other areas of personal injury cases.
MR BRIDGE: I think it is a wholly different area of work. I did personal injury work back in the day. The clients in personal injury work are constantly chasing you, they are obsessed by the values of the claim. None of those factors seem to be relevant to abuse victims. They never ask about what the claims are worth. They are more interested in proving that the abuse happened and getting some closure as to what they have been through.
We have to chase them. They are very difficult clients to deal with. We have to constantly be back at them to try to persuade them to give you more information or answer requests for forms of authority. They are reluctant litigants.

MR GARSDEN: Very true.
MR SKELTON: From the defendants' side, not only answering that question, but also there is obviously a concern that if one takes that at face value, then you wouldn't contest claims, but in doing that, you would be incentivising fraudulent claims which may not at present exist. So I can see a long-term problem with it. From your perspective, does that accord across the insurance market with public liability insurance?
MR LATTER: I'd broaden that to motor insurance as well as public liability and any other insurance. I think the first filter for claims is the people around this room. They have a professional standard. So they are not going to take a claim that they know is fraudulent, that is just a fact. No solicitor will prosecute a known fraudulent claim. So what we see has already been through a filter in terms of fraudulent claims. Unlike in the motor arena and other liability arenas, we do not -- it is absolutely clear, we do not see the level of fraud that you would anticipate around whiplash or slips and trips on highways and other such claims. Because of our obligations to our regulator, the FCA, we are obliged to do what we can to eliminate financial crime.
In the area of child sexual abuse, there are very,

very few cases that we would say actually are fraudulent. It just -- I agree with these gentlemen.
MR GARSDEN: Why on earth would you make something up if it was going to be, "I was sexually abused as a child"? If you are going to make something up, I just don't think you will choose this subject. I may be wrong. Maybe I'm naive. But if so, I have been naive for the last 20 years. Because not only do they have to give a statement in great detail to us, and that's not easy, talking about the sort of things that they have to talk about, but also we have a look at their records, number two, and, number three, we send them to a psychologist or psychiatrist, who is an expert in this area and will sometimes do psychometric tests, and evaluate the veracity of their testimony against the other known documentation.
MR SKELTON: Can I continue with the defendant perspective, Peter, and come back to that?
MR LUCK: Yes. From our position, of course, we don't meet with the claimants, and our approach is that all claims that come in are dealt with in exactly the same way. There is no consideration about whether or not a claim may be fraudulent at that stage.
One of our areas of concern is that often letters of claim are not as detailed as we would like, and then,

when we do an investigation, you may come across discrepancies in the evidence about when an abuser may have been at the institution, and it doesn't tie in with the claimant, and we do accept that some of these claimants were, unfortunately, in and out of institutions, so that is not an immediate issue that means the claim is not genuine.
There are other factors which then come through in the investigations. It is only as the claim progresses and you get more information that you may think, well, maybe not all the claim is genuine, or part of it is exaggerated, but they are very, very few and far between, those cases, and most of them are then settled on the basis of, you know, what is an appropriate level of compensation. But I would say that there are certainly a number of claims which are not pursued but we do not know, really, why they haven't been pursued. It may be because we have raised a defence on liability or there may be other factors into that.
MR SKELTON: The reason I am asking these questions is, is it a legitimate thing to take into account, that in this area of litigation, as Peter has said, claimants don't make up the claims? The question really is then quantification. It doesn't necessarily mean you have to admit liability, but you may not push back on the facts

of the abuse in the same way as you might with a road traffic accident. Is that a legitimate thing to put to an insurer, or are you just going to have to defend it in any way you can?
MR LUCK: I think if we are defending these claims, we have to be certain that we have got a proper defence to it, because, ultimately, claims will litigate and, if they go to trial, any gaps in our defence would clearly become apparent very, very quickly. Practice and procedures would, I'm sure, be under degrees of criticism.
So, you know, where we are taking issues on claims, it is only where we feel that the evidence is very, very much there to substantiate the issues that we raise.
MR GARSDEN: One of the controversial defences used in these types of cases is something called false memory syndrome. I don't know if the panel is familiar with that. But that is something thrown out of the -- into the air often by defendants' experts when it's suggested that memories are either misconceived or implanted into claimants' memories by a process of inappropriate counselling. It is just worth mentioning that.
MR SCORER: Although, to be clear, Peter, the numbers of cases that involve any allegation of recovered memory are very, very small. Very small.

MR GARSDEN: There is certainly one defendant psychiatrist who uses it in most of the reports that we see. That's my experience.
MR SCORER: If it is the person I think you are referring to, that is a different argument. That is an argument effectively saying that any memory is compromised or potentially wrong, which is a slightly different argument. I don't think the courts would take that argument seriously.
MR GARSDEN: It is that, but the false memory syndrome argument is also used. I take your point.
MR SKELTON: I would like to get Paula's views on that issue I asked before, and then I think we ought to try to talk briefly about some ideas for reform and then a few last questions in the next five minutes.
MS JEFFERSON: In terms of what was said, in terms of people coming forward who may have made up the story entirely, I agree with what's been said here, I can't think of a case that I have been involved in where we have thought that that was the case.
One of the challenges that we do have is where someone makes allegations, there has not been a criminal investigation or conviction, and the individual against whom the allegations are made is still alive and is saying, "I did not do this", and then, on behalf of

the organisation, we are almost stuck in the middle. So you have a claimant who has come forward, no doubt, as you have said, after a lot of thought and time, and you have someone who says, "I just didn't do this", and we have had some situations where it has been that the person who has been named has been incorrectly remembered, and that can be a difficult situation as to the position that you are in, in terms of the organisation. So that is one reason why things may become more sort of challenging, and it is not that the memory is false or that the abuse didn't happen, but the recollection is either the wrong organisation or the wrong person and the responsibility for that organisation.

There are also issues around documentation, so, as you said, someone's name might not appear on a register, someone might have been in prison, their allegations are against the prison warden and it doesn't look like they were there at the same time, and on behalf of that organisation, we will ask the question of the claimant's solicitors to say, "Can you provide us with the evidence to answer this question?", and then things go quiet, and we never know the reason why we don't hear any more.

So back to -- I know there has been talk earlier on today of looking at statistics and reasons why some

claims succeed and some don't, and I think this is something that we need to look at a bit more, and this is really information that you have that, from a defendant's side, we don't. But there is a difficulty where you have got someone who says, "I didn't do it", and we are into the wrong person being identified.

MR SKELTON: Thank you. Briefly, I will start with you, David, on principal idea for reform of this area. On limitation specifically, we are going to come on in other seminars to other areas of potential reform.

MR ENRIGHT: I will. I just wanted to say if anyone wanted to know what this inquiry is about and whether it has made progress, we have heard it today, and we have the insurers acknowledging openly -- and I'm sure the survivors take huge comfort from it -- that survivors do not make up allegations of abuse. I think that is a huge thing.

In terms of reform, we make no bones about it, my clients make no bones about it, that limitation should be removed. It does not serve any purpose whatsoever.

The court fees --

MR SKELTON: Just on limitation at the moment, that's all.

MR ENRIGHT: Limitation must simply be removed.

MR SKELTON: That is a nice simple reform from you.

MR LATTER: Our view is that the framework around limitation

works as it currently is. I think we use it at Zurich sparingly. I do accept Richard's point that that may not be consistent across the market. I can't comment on that because I don't know the behaviours of other insurers or defenders.

I go back to something the previous chair of this inquiry said at the very beginning:

"A balance which must be struck between encouraging the reporting of child sexual abuse and protecting the rights of the accused."

I think where we have serious concerns around the evidence and the access to a fair trial, limitation is the appropriate tool to use, and ask the courts, these experts, the judiciary, to apply their discretion and to determine whether such a case should proceed.

I think, if we do have reform to remove limitation, one word of caution is I worry about what will come in the space and whether we will see litigation sit around that that will actually delay the settlement of claims and maybe it is better to work and change what we have got rather than completely discard it.

MR SCORER: I think abolish the time limit entirely. The current three-year time limit is wrong and inappropriate in this area of law. It doesn't fit this area of law. It is unfair on claimants. So abolish that entirely.

But, as has been done in Canada and Australia and indeed it is proposed for Scotland, in combination with abolishing the time limit, retain a provision that enables defendants to argue in certain cases that it's no longer possible to have a fair trial. So that facility would be there for defendants. But the three-year time limit goes.

MS HANDYSIDE: I think one of the issues that's been identified is the sort of deterrent effect of limitation arguments, and I wonder if -- we spoke about what could be achieved by pre-action protocol, and it strikes me that early clarification of the arguments and the evidence on limitation is a really good target for that process, so that it is clear whether that argument is going to be a live one, so that everybody knows what arguments -- whether there is going to be a limitation in the case going forward.

MS JEFFERSON: I agree. I think the protocol is the time when you can resolve this issue fairly quickly and you can build in cost penalties for a failure to do so.

MR BRIDGE: Notwithstanding what's been said today, we are still, on a daily basis, facing limitations arguments from defendants. The RE v GE judgment was greeted with glee by a lot of the defendants we deal with. That not only talked about the claimant's failure to bring the

claim sooner, but then the failure to progress the claim as it went along with the solicitor's involvement. So it is a real issue. It is preventing abuse victims bringing the claim even before they get to the stage of a letter of claim and I think limitation should go and it would free up access to justice for a lot of victims.

MR GARSDEN: I agree with Richard. However, I fear, if you did abolish limitation, that what has been said is that you would fill it with something nastier in a vacuum. That's what claimant lawyers of my organisation fear. What you could have, if you don't abolish limitation, is the model litigation policy, which I have alluded to in my document, whereby -- and as has been said by insurers -- limitation is only used sparingly. That would be something everybody would have to sign up to, so you'd still give something to defendants but take away the barrier.

MR LUCK: Yes, limitation, as I have said, is used in cases where it is considered appropriate. It is right that defendants also have an entitlement to fairness and a fair hearing. It is perhaps not for, perhaps, insurers and certainly not an insolvent insured to say, yes, limitation should be waived or removed, but if that were to be the decision and the outcome of the inquiry, then MMI would accept that and would not oppose it, but

as matters stand at the moment, we do think it is used sparingly and only when totally appropriate.

MR SKELTON: Can I just say, I think this idea, there is a bit of a disconnect here at the moment between "sparing use" and "routine use", which I think we are going to have to get to the bottom of rather than -- we have very helpfully received a lot of evidence on it today, but with respect, of course, it is anecdotal, based on your own personal experiences. I think perhaps outside of this room we will have to discuss how we might capture more reliable data on that issue to see if it is really the case.

MR GARSDEN: If it is of any assistance to you, in putting forward the ACAL paper, that was the product of a meeting of some of the most frequent litigators in this area, and what we say is reflective of what comes from our association, as well as what we individually say. Is that fair to say?

MR SCORER: I think that's absolutely right. Whilst I welcome what we have heard from insurers in this meeting today, I don't think it is entirely reflective of the practice that we see from insurers across the board, unfortunately.

MS HANDYSIDE: I think one of the distinctions might be, in correspondence before litigation, it is routinely raised

as a question. I think once you get into litigation, it is used very sparingly. So I think that might be --

MR SKELTON: Thank you.

MR LATTER: I think the other thing to think about is when people remove the arguments. Do they just leave them in the case to run or do people, when they get actually evidence that the claims will proceed, drop the limitation argument?

MR GARSDEN: I think there may be a distinction between instructions to legal representatives and what we hear as claimant lawyers.

MR SCORER: The implication of what Philippa just said is that limitation is not being pleaded as a defence in pleadings and that is simply not the case.

MS HANDYSIDE: Sorry, I didn't say that.

MR SKELTON: There is a great eagerness, I feel, to carry on talking about the subject. We have pretty much run out of time. What I do need to say is, tomorrow we are exploring reform in more detail. We are going to touch on pre-action protocols and any other types of reform that can be initiated. So I think it will come up again.

Insofar as we don't manage to get to the bottom of this subject tomorrow, which I anticipate is going to be the case, then further evidence I think is going to be

helpful in due course on this. I don't want anyone to feel in the room that we have curtailed a legitimate and very helpful and fruitful discussion, because we haven't. We have just started it. Thank you.

I am going to ask if anyone in the room has any questions. Then I will turn to the panel, if that is okay.

CORE PARTICIPANT: I have a few things down here, but this gentleman here, the comment he made earlier on, I think I'll just point that one out.

MR SKELTON: What was his comment about?

CORE PARTICIPANT: About me being guilty. He made a statement simply about that, because we didn't report it, we are guilty of not reporting it.

MR SKELTON: No, I think the remark was that the courts sometimes take a critical view of people who don't report early on and go and see their solicitors. It is not that they are guilty --

CORE PARTICIPANT: That was his word, though.

MR SKELTON: I'm not sure who you are referring to.

CORE PARTICIPANT: This gentleman here, Mr Scorer.

MR SKELTON: Richard, do you want to clarify that one, because I don't remember --

MR SCORER: Sorry, I'm not entirely clear what --

CORE PARTICIPANT: One of the things you said is about

the time limitations and all that.
MR SCORER: What I'm saying is I think claimants are unfairly criticised by the courts for delay in coming forward with the allegation. I think that is wrong. I don't think they should be criticised.
CORE PARTICIPANT: I thought you said something like they were guilty for not coming forward.
MR SCORER: They are criticised by the courts for that, and I'm saying they shouldn't be.
CORE PARTICIPANT: Penalised by the courts.
MR SCORER: Penalised by the courts, and they shouldn't be, is my view.
MR SKELTON: To be fair, the debate was, in fact, at the moment, the courts are critical of claimants for not coming forward and there has been a debate about whether or not that should change by abolishing limitation.
CORE PARTICIPANT: I did want to say a lot more, but I will give the gentleman his due about what he said after that. I appreciate him saying that as well, that the limitation should be abolished.
MR SKELTON: Just two more questions. I'm afraid we have to keep it quite tight because we have run out of time.
CORE PARTICIPANT: Can I make a quick point: the police are also very against survivors who don't come forward early on. They take a very negative view of it and they

do not cooperate with the survivor. For example, Calderdale police force, they do not like dealing with survivors of historic abuse, and refuse, in some cases, to actually go and speak with the survivors.
MR SKELTON: Thank you for raising that point. You, sir, last point.
CORE PARTICIPANT: The issue about false memory syndrome is something that I, as a counsellor, think about quite a lot. What we do find is sometimes that people will not then start taking counselling, will not start on their recovery, until after the court case has been finished, because of fear of it interfering with the duties and process. We have to take very different approaches to counselling than the ones we would normally take in this situation. I think the panel needs to be aware of that and how that affects survivors.
MR SKELTON: Thank you.
MR FRANK: I just want to understand this. In relation to the suggestion -- I'm not sure it is entirely agreed -- that limitation may be raised at an early stage but will -- I think it's been suggested -- almost invariably fall away, or very often will fall away. Clearly, if you are a claimant solicitor or representative, there is a cost in dealing with the issue of limitation at the

outset and, from what I have understood so far, resources available at the beginning of cases are pretty limited.
Is there something to be said for not having a limitation issue if it is going to fall away pretty routinely anyway, as a way of saving costs on both sides?
MR LATTER: I think it goes back to what Peter Garsden said, in that you are going to have to get to the facts in the case anyway, in terms of whether they apply to the liability or limitation argument. So you are going to need to do that work. That is why, in the earlier session, we weren't pushing for fixed costs, because we absolutely agree that early investigation and ascertation of the facts is critical to the claim, regardless of the limitation on liabilities.
So we don't want to discourage that. That is why we were, you know, being very forceful on fixed costs, because we think there are other ways of delivering proportionality.
MR SCORER: But I think you make a really important point. The costs in any case are determined by the number of issues that are in dispute. If you take away one area that is in dispute and it is no longer an issue, then costs -- cases will cost less to run.

MR LATTER: But what we are saying is that, because we are unsure at the beginning of a case whether limitation is an argument that we will take forward, we have to plead it, and as a consequence of that, we are not asking for a limitation on the costs in that. That will eventually come out of our resources when we settle the claim. So I would rather spend the money there in the investigation to get to the facts, rather than waive limitation.
MR GARSDEN: I think my answer to your question would be that, if there was no limitation argument, I would be more persuaded to have a different type of medical report, costing not as much money, than if limitation was an argument, when I would insist on having quite an expensive psychiatric report, because there are ways of assessing quantum without an expensive psychiatric report, but not if you have limitation, because the expert is absolutely fundamental to a judgment on whether a psychological element of the client's personality has contributed to the delay and, without it, you lose your case.
MR SKELTON: A whole new area of interesting debate there. I don't know whether we have got time.
MS SHARPLING: I will leave it, then, and save it for tomorrow.

MR SKELTON: Thank you very much to all those who have given information today. We will convene at 3.10 pm.

(2.56 pm)

(A short break)

(3.15 pm)

Session 4

Opening comments by Facilitator

MR SKELTON: Our last session today is really about other issues which are significant in the context of the civil litigation system. Obviously, that opens the door perhaps to a variety of potential views and issues. I would like to focus on those which you all think personally, from your own practice and experience, are the most significant ones. They will, for example, include the very nature of the adversarial system, and that's the first thing I am going to ask you about, but they may also include things we have discussed earlier about getting hold of documents, witness evidence, and then of course legal issues, not just limitation, which we have just had a session on, but also issues of consent, vicarious liability, non-delegable duties and other issues, possibly even forward looking about where the law may be going, what are the next areas of dispute.

I think almost everyone in the room has introduced

themselves to the panel. Can I ask just those who are new to the table to introduce themselves and then get straight in?

Introductions

MS STOREY: Hello. I am Tracey Storey from Irwin Mitchell. I head up the child abuse team.

MR GILLESPIE: Alastair Gillespie, Hill Dickinson.

Open discussion

MR SKELTON: Thank you. Can we start by discussing the nature of the adversarial system? There are two aspects of that I want to explore. The first is, what is the inherently adversarial nature, by which I mean, in what way does the civil justice system automatically set claimants against defendants, whether it is cross-examination, the use of experts, that kind of thing and, secondly, behaviour and conduct, which may not necessarily be inherent to the system, but may be brought to bear within it. I am going to ask Richard first.

MR SCORER: The civil litigation system we have in this country is adversarial by its very nature, and that's reflected in the way that the court process is set up, it is one side pitted against another.

In abuse litigation, it is probably pretty rare for single joint experts to be appointed, so generally both

sides have their own medical expert. So that is one aspect of the adversarial process. And of course, if cases go to trial, that is, in itself, an adversarial process.

MR SKELTON: So you have an independent judge but the judge is not, himself or herself, initiating the investigation. They are dependent on the claimant to bring his or her case before the court and dependent on the defendant to raise whatever defences it sees fit in response to that case. So the litigation is run by the claimant and run by the defendants and the judge is simply adjudicating, and the classic test for evidence is in cross-examination and the test is on the balance of probabilities. So the judge needs to decide, is there a greater than 50 per cent chance that this allegation is true or not? Broadly speaking, that is the system we are dealing with.

MR SCORER: Yes, although on the last point, I would add the rider that I think some judges, in circumstances where there hasn't been a conviction and they are having to make a finding of abuse, will in reality apply a slightly higher standard of proof because they are concerned they are effectively making a finding of criminal liability. So I think there is a tendency on the part of some judges to do that.

MR SKELTON: In the civil courts, even though that is not the law?

MR SCORER: In the civil courts, yes, even though that is not the law, I think the reality is some judges will be concerned that if they are making a finding that somebody is criminally liable, they will look to a higher standard of proof.

MR SKELTON: Is that others' experience? I have not heard that before, the judiciary applying the wrong standards in practice?

MS STOREY: I think the test is, the more serious the allegation is being made, the more proof there needs to be brought to bear. So I think the case law tends to demonstrate that if you are making an allegation of a very serious sexual assault, you have got -- the weight of evidence has to be with you, so I think that is the test that's applied in the civil courts.

MR GARSDEN: I think there's an element -- I agree. However, I think there is an element of punishment administered by the civil courts as well. I can remember the judgment in the very first Frank Beck, Leicestershire County Council case where the judge clearly said that because, in the same way as a criminal judge, the defendants had made the claimant give evidence and be cross-examined on whether the abuse took

place, he was going to bear that in mind and award higher damages than he would otherwise do.
MR SKELTON: Was that the -- we may come on to the term "aggravated damages", which are sometimes awarded by the court specifically to reflect the defendants' conduct, either at the time of the events or subsequently, and indeed in part of the litigation. Did that reflect the judge's views of the litigation explicitly as aggravated damages or was it just something he said was informing his views?
MR GARSDEN: The law on aggravated damages in 1996 was a lot different from what it is now. It would have probably been termed aggravated damages now or exemplary damages, but it wasn't then, it was simply said that because the claimants, who were very badly damaged by Frank Beck, if you know any of the circumstances of the case, and the way in which they were regressed, had been made to give evidence and clearly damaged by giving evidence. He would therefore take that into account in assessing what the damages were. I think they got sort of £80,000 and £50,000 each, which was a lot of money in 1996.
MR SKELTON: Thank you. Just a little bit more, perhaps, Jonathan, on the adversarial system. For you, could you identify the key problems which an adversarial system creates, specifically for these types of claim, the

child sexual abuse claim.
MR BRIDGE: I think we have already touched on the problem with experts. The difficulty with experts, there is obviously a move within the courts to encourage joint instruction of experts and that's happened in most personal injury litigation. The difficulty with this area of law is the experts aren't just looking at quantum, they aren't just looking at the value. We mentioned before about limitation. Quite often, the experts are having to look at limitation and, without wanting to go back over old ground, that might help if that is removed in encouraging defendants to agree joint instructions in the future. There is also causation problems. We invariably find with abuse victims there can be other factors that may have contributed to their ongoing problems and, again, it means that the expert evidence is very contentious and I think that is one of the biggest problems at the minute in the adversarial system, is this difference between experts, not only medico-legal experts but also independent social work experts. You do tend to get quite polarised views at the moment and it does make progression of these claims very difficult.
MR GARSDEN: I want to say something about the adversarial system. It has been said that the adversarial system is

wrong in this area of work for victims of abuse. However, if you look at the psychology of abuse, it's the psychology of the powerful triumphing over the powerless. There is something about the adversarial system that redresses the power back to the claimant over the powerful, who is deemed to be the other side, and, to a certain extent, because the claimant has his own team who is sticking up for him, there is something quite appealing about that which makes it better almost than an inquisitorial system where one person with all the power pulls all the strings. There is a greater likelihood that the claimant will think that they're being overpowered by that type of system.
MR SKELTON: Tracey, can I ask you, one of the things that has been mentioned as far as experts, which I think we need to come on to in detail, is cross-examination, because that is one of the principal ways by which the common law adversarial system tests evidence. To what extent does that put off people who have had these sorts of experiences from wanting to pursue them either through the door of their solicitor's office or ultimately to trial?
MS STOREY: I don't think necessarily people understand what kind of pressure they will be placed under by the litigation process when they first come to see us, and

a lot of people will want the truth to be out, they want to say what's happened to them, be acknowledged, and there are all those very important reasons for coming forward in the first place. But I don't think they necessarily appreciate what cross-examination can be like.
For those clients of mine who have gone to trial, they will describe the experience as reliving the abuse in full. So I think, generally speaking, and I think this is across civil litigation, people do underestimate how stressful and traumatic trial can be. That said, I agree with what Peter said about when you make a decision to seek civil justice, you are taking control and you are taking back power and there is a restorative healing effect of making that choice and, for once, having people on your side to put forward your choice.
I think there has to be a recognition that people who have suffered serious sexual abuse in the past and have carried it around with them for years are going to find it extremely difficult to give evidence.
I have had experiences where a client has disclosed more serious abuse very close to trial after being my client for many years, but disclosing abuse is a process, not an event and, from the court system's point of view, it looks as though she sort of made up

bits closer to trial as we have gone on, but it doesn't actually reflect the complexity, the psychological complexity, of getting that evidence out. So I think we let down survivors when we expect them to fit into these neat civil procedure categories, and I don't think there is enough flexibility in our system to allow that process to come out. So it is very common, for example, for us to take statements from people at the outset of their cases and to find that their evidence evolves as they become trusting and understanding of what we are doing.

So I think cross-examination, there needs to be special measures in place for people.

MR SKELTON: Special measures is something I was going to ask about. I would like to capture the defendant perspective on this first issue of cross-examination, how claimants give their evidence. Obviously, in the criminal courts, there is an idea of special measures and getting the best evidence from a victim in that case in the court may not necessarily involve the classic cross-examination, ie, the really pointed questions designed to trip you up, confuse you, elicit a different answer from what's already been given, those sorts of things, but something designed to get the best evidence. From the defendant perspective, is that something that

you welcome or does that undermine your access to justice?

MR LUCK: I don't think it undermines the access to justice. I would say that the number of cases that actually go to trial, in my experience, is very, very few. You know, most cases are dealt with prior to trial. Clearly, a number have litigation commence within them, but only, again, a small number of those go as far as the actual trial.

We do gather what evidence is available as early as possible, and certainly, if we are aware of a criminal trial, we have, or will have, representation there to listen to the evidence, that's taken on board, and we have experience of cases where, immediately after such evidence, we have moved to settle a tranche of claims.

So I appreciate the trauma involved in someone going to a civil trial, where there is this cross-examination, but I'm not sure how often it is actually taking place.

MR SKELTON: Two points in response, I suppose. One is, it might disincentivise people to get to the trial point, so the very fact they are facing this cauldron of criticism, as they see it, may disincentivise them. But, second, will it actually compromise your ability to defend claims if cross-examination, for example, that type of examination process, were taken away and

replaced with something more inquisitorial?

MR LUCK: I suppose that, again, we are looking at an alternative which -- I'm not sure exactly how that would pan out or what it would really mean.

Clearly, the set process of a trial is that you have cross-examination, and I would hope that any such cases are dealt with appropriately. But, clearly, that can be traumatic. I can't deny that.

To remove that option potentially could result in an unfairness to defendants, but an alternative out there may be possible to consider.

MR SKELTON: Do any others have a view on that particular issue before we move on to experts?

MR GILLESPIE: In relation to the process generally, and the fact it's been referred to as adversarial, but, as Peter says, there is an element of each side having specialist representation, having their own opportunity to examine the evidence, rather than an inquisitorial system, I think it is very important that, where appropriate, and where you are able to do so, you challenge parts of an individual's evidence.

In my experience, that is very, very rarely actually the fact of the allegations of abuse themselves. In my experience, acting for insurers of organisations who face claims essentially on vicarious liability grounds,

we are not acting for the alleged assailants, we are not acting for those who are alleged to have committed these terrible acts. Unless those individuals provide us with a statement and are actually willing to attend court and deny the allegations that have been put forward, then actually there is no evidence to put forward to counteract those allegations of assault.

MR SKELTON: You don't have a positive case to put forward.

MR GILLESPIE: You don't have a positive case to put forward.

Another aspect of cross-examination, though, is not just a question of whether the claim should succeed in terms of the assaults having been proved, but actually what is the true and fair value of that claim as well, and that means that cross-examination has to extend not just to the circumstances in which assaults may have occurred, but also has to take into account other life events, areas where, for example, the medical experts disagree, in order that the court can actually reach a fully informed view of what a true and fair value of the claim is.

MR SKELTON: Thank you. Experts. Paula, can I ask you about experts --

MR GARSDEN: Sorry, can I just come back on two points on the adversarial process? I think the adversarial

process -- I appreciate we are dealing with institutional views, but where the abuser represents himself, I think that's where the adversarial process can come seriously unstuck and, these days, we are having more and more cases against unrepresented defendants, and they really are a law unto themselves.

The other point I would say is that, in the civil process, because somebody's liberty is not at risk, I think you tend to get from defendant counsel a gentler approach than perhaps you would do in the criminal courts. My experience of cross-examination by defendants' counsel is that it is -- whilst we need to move to special measures and courts aren't as good as they should be, it is not generally as much of a problem as it would be in the criminal courts.

MR SCORER: It is worth mentioning, just on the first point Peter raised, that certainly on the claimants' side we have seen much more of a tendency over the past sort of two or three years, or I certainly have, for defendants, institutional defendants, to bring the alleged abuser or the convicted abuser into the claim as a party to the claim. So not that we would be suing the abuser, but that the defendant would bring them in to seek some recovery from them, so they're brought into the claim and they then have a role in the proceedings which

previously they didn't have.

MR SKELTON: So they are brought in at the time the proceedings are running as opposed to afterwards, which of course defendants --

MR SCORER: Correct. My increasing experience, and to the extent that -- I am assuming it is a deliberate policy by defendant insurers to do that now.

MS JEFFERSON: I think it is fair to say that different insurers would take different approaches. So certainly I think most would look -- if there is any possibility of recovery from the individual who, at the end of the day, it was their choice to act as they did and to abuse the victim, if they have any assets, then an insurer or an uninsured organisation will look to see if it is possible to recover.

But my experience is more that they will be brought -- that that will be a recovery action that is dealt with separately, after the underlying claim has been solved.

MR NICOLSON: That's certainly my experience. In relation to a public authority as a defendant, we would -- we actually have a duty to undertake a recovery wherever possible. However, that is usually done after the civil litigation has concluded. I have certainly not seen a case where we have undertaken any recoveries whilst

the civil litigation is ongoing.

MR SCORER: There have been some extreme examples where, although the claim is against an organisation, the perpetrator is a member of the claimant's family, so allegations of negligence against the institutional defendant, and in those circumstances it can be exceptionally distressing for the perpetrator to be brought into the proceedings.

MR SKELTON: David, where do you --

MR BONEHILL: I would just echo the comments that have been made. We would not bring a perpetrator into proceedings. It is a separate action that we take once the main action has been settled. I think the point to make there is, as has already been said, that we will seek to recover monies from a perpetrator where they have the assets. Absolutely we will. We don't make any apologies for that.

MR SKELTON: Do you need to seek the claimant's assistance to have your separate proceedings against the alleged abuser?

MS JEFFERSON: We would always seek to make it clear to the claimant that that is what is happening. If someone refuses, shall we say, to cooperate, and it got to a stage where it was necessary to make an actual litigated claim against them, then, yes, we would always

want to engage the claimant's legal advisers to explain to them the implications about release of redacted information.

My experience is that I have not had anyone who has ever said, "No, we don't want you to pursue that person who did this to me". We are very happy to provide you with whatever support, but we try to minimise that, and, in the majority of cases, we are able to resolve without litigating.

MR SKELTON: Thank you. The issue of experts. I'm afraid I am going to focus back on you immediately, Paula, just to get the discussion going.

At the moment, the classic adversarial position is that each party is entitled to their own expert evidence subject to the leave of the court, and that will routinely involve, in these sorts of cases, a psychiatrist or a psychologist and may in some cases have other expertise involved, like social work experts.

The obvious advantage of that is you get your own expert that you can give instructions to, you can meet that expert in consultation, and you can involve them throughout the case. The disadvantage, of course, is that it creates costs, and it doubles up the number of experts involved in each case. Could you discuss some of those issues?

MS JEFFERSON: Yes. I think probably everyone would agree that one problem we have around experts is there just are not very many experts in this area and that is a major challenge for everybody, whatever side of the table that you are sitting at.

What we find quite often is that, from a defendant point of view, we are willing to consider a joint expert, but actually from a claimant point of view, and at the stage of the letter of claim, it will say, "We do not consider that this is a case which is suitable for joint expert evidence". I can understand, for some of the reasons that Jonathan mentioned earlier about looking at issues around causation or limitation, having the ability to be able to ask questions, particularly for the claimant, and for the individual to understand what the expert is saying, it makes it more difficult if there is a joint report.

MR SKELTON: Can I ask, first of all, to break down a bit of your answer, what exact expertise do you require? For example, a consultant psychiatrist with a specialism in sexual abuse claims of children?

MS JEFFERSON: Yes.

MR SKELTON: When you say there are few experts, are there few specialist doctors in that field or are there few specialist doctors in that field who are prepared to

become experts for court purposes?

MS JEFFERSON: I would say it is a fairly narrow field and then it is made narrower by those who want to take on the work to become experts, either because they are not interested in that area because they are interested elsewhere or they're just too busy. It is a challenge.

A midway from the sort of -- there is the joint experts or there is each party having their own report, which obviously then has the challenges you have mentioned of costs, of delay, and for the individual of having to tell their story on two occasions, is getting to the stage of some sort of agreement where the claimant will obtain their own report and then disclose it, rather than -- the adversarial nature of a lot of personal injury litigation is, "I will only show you my report if you show me your report", and that is not helpful.

So here where, I think, certainly working with a number of the people around this table, we would be in a position where we would say, "Well, you get your report from your expert to whom you can ask your questions, but then you show us your report", and we will endeavour, and in the majority of cases be able to, either put questions to that expert or to have a sensible discussion with the solicitors without the

need for a second report. Sometimes, a second report is necessary, but I think we are moving away from that being the norm.

MR SKELTON: Alastair, do you take that sort of approach, or do you favour having your own expert?

MR GILLESPIE: We endorse that approach that Paula has just set out and in the vast majority of cases that is sufficient to see an end to the matter. Very often, for example, where there are convictions, liability is not in dispute, the parties can focus upon quantum and causation as the only issues that they actually need to resolve. If the claimant obtains a report which, to all intents and purposes, looks appropriate from our perspective, in terms of being able to assess the value of the claim, then it can easily be resolved.

You mentioned getting a report being the norm. On our side, we do not take that step lightly at all. In the last seven years, we have resolved over 450 claims and we only obtained 39 medical reports on survivors in that time, which is 7/8 per cent.

MR GARSDEN: I think in the early days of my time in this type of work, in the late 1990s, the key criteria was that this was a new and developing area of both medical science and the law, and that it was therefore highly unlikely that experts would have common views on

prognosis and medical science, and that, therefore, it was appropriate to have our own experts, because it was unlikely to have commonality.

I think we have moved on from that, in that, you know, obviously 2016, it is 20 years ago since I started doing this work, so I think there is more likely for there to be commonality, but I'm not sure that we have reached the stage, and it would be a matter for, I think, medical experts to say where there is consensual agreement over the development of medical science such that it would be appropriate to have a jointly appointed medical expert. That was the first point.

The second point was that certainly in the Manchester City Council cases that I am dealing with, the practice differs widely from what you have said. In my experience of dealing with you, generally we produce a medical report. If it is going to be a high-value case, the defendants will routinely get their own report and in a number of cases I have had to refuse permission because the claimant is, frankly, too badly damaged to be seen by a second expert and that's backed up by my own expert. So it can be a damaging process.

MR GILLESPIE: I can only speak for my own experience on that point of view, but certainly, bearing in mind the

consequences in relation to the impact it will have upon the survivor, the inevitable addition in cost which ultimately we will have to bear as well, it is a significant decision for us to take. But we only take it in those cases where there is such a range of opinion and complexity that the claim itself and the nature of the claim and the merits of the claim justify that step being taken.

MR GARSDEN: I know, and I agree.

MR SKELTON: Is it the complexity or partly the value, which I think is the point you are mentioning. Actually, it is worth you exploring the psychiatric consequences in more detail in the higher value claims because you are going to save some money if you get a report that's supportive of a defence?

MR GILLESPIE: It's not so much getting a report in support of the defence and saving money. It is actually, what is the true and fair value of this claim? What is the damage flowing from the assault or assaults, terrible as they were, for which acts that individual should be compensated by the insurers of the organisation, as opposed to other very traumatic life events where an individual -- maybe they have been abused elsewhere, unfortunately, maybe they have had traumatic bereavements or their parents split up when they were

very young, all sorts of different factors in their emotional background that impact upon the overall individual, the overall personality, and it's giving true and fair weight to that individual to actually have those matters investigated.

MR SKELTON: Just exploring that a little bit further, if I may, you I think described fewer than 10 per cent of cases over the last few years.

MR GILLESPIE: Yes.

MR SKELTON: Why in those 10 per cent of cases? What was it about your own assessment prior to getting expert evidence that made you think you needed it?

MR GILLESPIE: I have to make a sweeping generalisation in terms of actually picking out specific cases, but generally they will be cases typically where the expert instructed by the claimant solicitors will provide a report that suggests that pretty much anything and everything that has been visited upon this individual is as a result of the abuse, as opposed to other factors in their life and, as a result of that, it turns into a significant special damage claim which, actually, we don't think is a true representation of the causation position.

MR BONEHILL: I wonder if I could just take this back a step? The inquiry will be aware of the guiding

principles that Ecclesiastical issued in June of this year and in those guiding principles we talk about joint experts, and that's an area where we have changed, if I'm honest, our behaviours, we have reached out to try to get, with claimant lawyers, agreement to instructing one expert and, in our letter of response to a claim we get now, we put in a paragraph on that very point, "Can we reach agreement on a joint expert?"

With one or two exceptions, it is always declined. There are a couple of firms of lawyers that will reach out and we work well with them and that happens, but as a general statement, that is declined.

I think -- there are complexities here, but I think some of it is around behaviours and whether we can shift some of those behaviours for the benefit of the victim and survivor, and we have to make that step change, because if we allow the current status to remain, there's only one person that suffers in all of this.

MR NICOLSON: I would echo that behaviour. From our perspective, that is one of the most common issues that we have, the instruction of joint experts. Quite often, we are open and willing to explore the appointment of a joint expert. The response we get back is, "No". No further discussion. We would like to open the door for further discussion around what the issues are, but quite

often that door is well and truly closed on us.

MR LUCK: Our experience is very, very similar to what has been said. There are a number of cases which are settled without medical experts' reports, and we do look at that primarily. Other cases, yes, we do see experts' reports provided by the claimants, and they are perfectly acceptable. But some reports, unfortunately, are not, and we then are in the realms of having to get our own report.

We would not be averse to, if there were maybe an agreed panel of experts, and those experts had to follow certain aspects which they must report on, because certainly, on occasion, we find that the claimant's report, the expert has not forensically examined the information from what has been told by the claimant to what is in the records, we have seen cases where the expert has not even looked at the claimant's records and has later commented, "If I did, it wouldn't change my opinion", which clearly is unsatisfactory, and I don't think that any of the defendants here and the claimants here would be averse to a situation where you knew you were getting immediately a one-off, balanced report from an expert.

MS STOREY: I think we have --

MR SKELTON: Hang on, Richard has been waiting.

MR SCORER: On this point about single joint experts, it is sort of, on the face of it, something that looks tempting to say, "We ought to have single joint experts". We, as claimant lawyers, certainly don't want to put our clients through any more medical examinations or medical interviews than is necessary. But we operate in an adversarial system. Our responsibility is firstly to prove the allegations and then to maximise our client's claim. With a single joint expert, we don't have the same freedom of privileged communication as Jonathan said earlier.

In a sense, if we go down the joint expert route, in the context of an adversarial system, we are potentially disadvantaging ourselves and our client in that approach.

MR GARSDEN: I think there are some experts that are known to be used all the time by defendants and, in my experience, when you get asked to choose a joint expert, the defendant list is made up of those whom they instruct regularly, with whom there is likely to be --

MR BONEHILL: You're absolutely right, but it works both ways.

MR GILLESPIE: I think you will find it is on your side as well.

MR BONEHILL: There are certain experts who will only do

work for claimants or defendants.

MS STOREY: It comes back to Jonathan's point about polarisation of experts. We sometimes get stopped at the joint selection of an expert, let alone the joint instruction, which are two different things. But bearing in mind Paula's point about, you know, having a look at the claimant's report before deciding whether to incur expense yourselves, I think claimant lawyers are aware of that approach and tend to sort of try and get a report that's going to cover off all the issues properly and appropriately, and to avoid a second assessment of the survivor, if possible.

There are many cases where we have collaborated, there have been group actions where we have collaborated successfully and devised a panel of experts, and it's been to good effect.

There's been cases involving -- I think there is a particular dearth of experts in learning disability, and so we have often collaborated to find the right expert to do a report on somebody with a learning disability and the impact of abuse upon them.

So I think we can do it where it is right, but I think it comes back to, you know, our psychiatric evidence is going to cover off limitation, causation, quantum and all sorts of issues, and we wouldn't be

serving our clients properly if we didn't do that appropriately and properly.

MR LUCK: I don't disagree with that. All I am saying is, is there an opportunity here, and we are never going to come up with dealing with these claims with solutions that will cover every claim because of the multitude of aspects in different cases.

But if there is an opportunity whereby, in a further tranche of cases, joint experts can be used, potentially with arrangements that both sides are able to put their questions to the expert and, ultimately, if a claimant or a defendant still feel unhappy, could go to the court to get authority to get their own further report, that may actually take out another 10, 20 per cent of cases. I don't know.

MR SKELTON: Can I ask, is the use of single joint experts compulsorily feasible if at present (a) there is a small pool of experts and (b) they have become polarised because of the history of their previous practice? Can the existing pool can converted into neutral --

MR SCORER: It is difficult to see how it would be practically feasible at this point, I think.

MR GARSDEN: I think there are cases where instruction of a joint expert is more likely than other cases. Those would be cases where, for example, there's a concession.

If we took out limitation and it was going to be a quantum only case, there's far more likelihood -- if a defendant came forward at a very early stage -- and they don't always do this. If the defendant insurer came forward and said, "We want to settle this case. Can we instruct a joint expert?", I think we would be far more amenable than if it was an all weapons fired, fight on everything.

MR BONEHILL: Most cases are not like that. This is where I disagree with you. The majority of cases, certainly from my experience, we don't have those types of issues around limitation, for example, which keeps coming up time and time again and, therefore, what is the barrier to preventing us instructing a joint expert?

MR GARSDEN: In that situation, it probably wouldn't be.

MR SCORER: When you say -- obviously we covered off limitation in the earlier session, but when you say, you know, defendants don't run limitation arguments, you may think, from your point of view, that you're not really running them, but you are telling us that you are running them. That's the reality of it. So it is a live issue in the case.

If a defendant were to say, you know, "We are telling you that we are not running a limitation argument. We are conceding that", then that is

a different matter. But that's not the reality of how these cases are run.
MS STOREY: We have a professional duty to explore the causation links to put our clients' cases as best we can, and I think we can only do that with interrogation of the expert so that we really understand whether there is a case linking the lost earnings with the damage that's been caused.
But I think another thing is that part 35 of the Civil Procedure Rules allows us to ask questions of experts, and I don't think we all do that as much as we could do. That could save a second examination. So when we serve our reports upon defendants, there is no reason why questions can't be put to our experts, and that may well save some attritional costs later on and some personal cost.
MR BONEHILL: I agree entirely with that. I think it feels as though we are moving in that direction, albeit quite slowly. I still don't fully understand, then, why that expert can't be agreed before you instruct them, and we seek some commonality, some common ground, between us before you appoint that expert, bearing in mind both parties can ask the questions of the expert.
MR NICOLSON: I think part of the issue is, we are having this conversation around this table. This kind of

conversation needs to happen as part of the process, and it doesn't at the moment. Quite often, we want to have the conversation, but we are just met with silence at the other end. I think it is very important that we are able to have the conversation. It may be an adversarial process, but just defendant and claimant lawyers talking over the matter is what is actually required and, unfortunately, that isn't --
MS JEFFERSON: I think this is what Master McCloud will be covering.
MR SKELTON: You very neatly transfer us onto other issues. I'm interested in the early stages of litigation, of what are the barriers to bringing a successful claim or defending a claim successfully from your perspectives and how could they be ameliorated, made better. Paula, in terms of the early stages?
MS JEFFERSON: The early stages is around openness and transparency and providing as much information as possible. So I fully accept that when an initial letter of claim is being sent, there may be some uncertainty as to whether it's being sent to the right organisation and, from a claimant's perspective, they don't want all of their personal details being revealed to what may be the wrong organisation or it may take some time to get.
But once that has been acknowledged, whether that be

by an organisation that says, "We are looking for our insurance. These are our insurers. We weren't insured", then at that stage, if as much information as possible can be provided, and often I find that, you know, I will send an email to Tracey or to Richard to say, "Have you got your client's police statement?", and they will say yes and send it straight across to me.
I think this is where with the protocol, the more information that can be provided at the outset, then the more, from the defendant's point of view, it makes it easier for us to investigate and to respond quickly.
MR GARSDEN: Disclosure does work both ways, though.
MS JEFFERSON: Indeed.
MR BRIDGE: The biggest problem I have dealing with particularly the local authorities is that they hold the information that we need to prove the claim, and there is a real reluctance on them to release that information. I'm talking particularly about Social Services records. I appreciate that they contain a lot of sensitive information, quite often about third parties, but the case I think Peter was involved with, Dunn v Durham, gives very good guidelines as to how this information should be shared, and it isn't being, and regularly with the historic failure-to-remove cases we are waiting years for disclosure of these records.

MR SKELTON: Do you find there is a variation, then? Like Paula says, you may have a relationship with certain local authorities or their lawyers and with others you may not, in which case you're back to square one.
MR BRIDGE: My local council is Lancashire County Council and they are fantastic. We have an agreement with them and, every single case we send to them, we get a fantastic response and we do get the records within a reasonable amount of time. Some of the London Boroughs -- and I'm not having a go at Mark here -- they are notorious for just ignoring the requests and then agreeing to send records and not sending records and obviously causing huge distress to the victims, as they are waiting just to get to this first stage where we can evaluate the claim by going through these records and seeing what information is in there and just raising obstacles that needn't be there.
MR GARSDEN: I undertake a separate campaign called the Access to Records Campaign with members of Barnardo's, Care Leavers Association, CoramBAAF, over the problems there are in relation to disclosure of social care records. And fortunately, in litigation, because of my case in Durham v Dunn, we are in the privileged position of having greater weight to getting unredacted records, but even so, there is substantial fighting ground over

the Data Protection Act and whether we should be getting unredacted or redacted records and that persists with the police, as I think I have already said, and that can cause huge problems. I often think that there is a complete, you know -- there's an industry of people beavering away with black felt pens, crossing out thousands and thousands of bits of paper, which hinders the process. That's one of the things that --

MR SCORER: I think really what this illustrates, and looking ahead to the way the process needs to be reformed, is that, yes, we need protocols for dealing with all this, but they need to be enforceable. There need to be sanctions for not supplying with them. Most of the people in this room, probably all of the people in this room, are people who would probably comply with any voluntary protocol that was there, but there are plenty of people who won't. So enforceability is key if we are going to have viable protocols in this area.

MR GARSDEN: Having spoken to Information Commissioner's Office and records, people in councils all over the country, they fear being prosecuted by the Information Commissioner's Office, and that's why they take a cautious approach. One of the things I have suggested is a change to the legislation whereby records officers will be given a statutory defence if they have looked at

the records genuinely and decided what to release, and I think that's another issue, but it does come into litigation.

MS STOREY: I think what Paula said about sending off the police statement, and it is wonderful when you have got the whole police file and you can do that, but increasingly, I have noticed that police investigations are getting longer and longer, and so, once your client has secured a conviction, sometimes there are ongoing criminal proceedings which mean that we can't access that information, and so we then have to take our client through a more detailed disclosure exercise, having already just done it with the police in the criminal proceedings. So that sort of duplicating efforts generally, I think.

MR NICOLSON: Just a point on the disclosure issue, is that where we are looking at one claimant's set of records, that's probably not a problem. From a local authority that is faced with dozens of requests, it is a huge resource implication. It is not that we are not willing to disclose, it is just the sheer process of having to locate the files, often from archives, often to then have someone go through them to bundle them up. Of course, with the influx of claims that we are getting in and requests, that process is becoming more and more

resource intensive.

MR SKELTON: What about the issue raised about data protection, which, just to summarise, I think is really the release of sensitive personal data not just about the person who is alleging the abuse, but about other people they may have been in care with, for example, or indeed about the people who were caring for them who may have no relevance whatsoever to the situation? How do you deal with that? Do you have a set protocol for it or is it done on an ad hoc basis?

MR NICOLSON: There are very clear protocols in place. One of the ways is for individuals to put in a subject access request, and that will then be sent, a redacted copy of the information in the file that's available to them. Of course, as part of the civil litigation process, we then move into disclosure and unredacted copies of the files, but I think the guidance that's in place is pretty standard and the Information Commissioner's guidance is very --

MR GARSDEN: The result of our round tables around the country is actually quite at odds with that. The practice of how records are redacted or not varies hugely around the country. We conducted, I think, about seven or eight round tables at different local authorities on an ad hoc basis. I wish it was so. At

the end of the session, I produced an imaginary set of facts and said, "How would you deal with this redaction?", and there were arguments in the room as to how it should be. It really is very differing --

MR NICOLSON: Open to interpretation.

MR GARSDEN: Very much so. That's part of the problem. That's what causes the delay. Because we had records officers arguing with other records officers as to how you would disclose one piece of information. That went on for 10 minutes, I promise you.

MR SKELTON: How long does the process of disclosure routinely take?

MR GARSDEN: It can take years. It is meant to happen in 40 days. But they all say that you can't comply with that time limit. Under the new Data Protection Act it is going to become even tighter. It is changing to a month. But it is impractical.

MR SKELTON: From a defendant's perspective -- I ask you, Rod -- what other difficulties do you have in the early stages in terms of investigating a claim which has the kind of difficulties which could be overcome with better procedures?

MR LUCK: I think, again, it differs from claim to claim. If you have got a series of claims involving vicarious liability against employees and you have already

investigated, then further claims are often dealt with very, very quickly. When you are more in the realms of dealing with negligence claims in respect of failure to remove, particularly going back to the '60s and '70s, then you are up against the fact that records may be very, very difficult to locate; you don't have experts available, or very few of them, who were practising during those periods, because you need people who were of a sufficient level of experience at that time, which means it is likely they are long since retired.

We have already talked about protocols, and I think that this openness and upfront information following certain procedures at the outset is the best first stage for these particular claims. There will then always be difficulties in contacting witnesses on particular cases, and you have to take individual cases as appropriate.

MR SKELTON: I would like to move on, please, if I may, to legal issues. The Supreme Court, as everyone is aware, relatively recently had two cases on vicarious liability which has clarified the law to a large extent on that issue, which has previously been a major issue in personal injury litigation. To what extent is vicarious liability still an issue from the defendant perspective? Paula, do you have a view on that?

MS JEFFERSON: I think, in the majority of cases, it is relatively straightforward, but as with any area of law, there are certain grey areas around the outside.

So, for example, the issue of when does someone -- if they are in a role that is more than them just attending at a certain location for certain office hours and then going home and doing something totally different, but where they have a role that involves them in a much wider sense, that it is with them all the time, where does that role stop, if at all, and where do things that happen entirely in their home life or their family life separate?

So around vicarious liability, I think for the majority of situations it is fairly settled. There will always be one or two grey areas around the outside.

MR SKELTON: Is that a legal grey area or a grey area of applying the existing law?

MS JEFFERSON: Well, it is a bit of both, really. So you look at the existing law and say, "Would this apply in this case on a strict legal analysis?" There are other issues about whether or not, having reached your conclusion on that legal analysis, whether in that case you decide that you want to look at that issue.

But I think, generally, vicarious liability is settled but there will always be grey areas that have to

be looked at.

MR GILLESPIE: I don't think we are at the stage, nor do I think it would be appropriate for us to be at the stage, where an employer is responsible for each and every act of an employee no matter in what circumstances those acts took place. I ran a case last year on the issue of vicarious liability when it was held that the employer was not responsible for the actions of the employee, and, as I say, I don't think we should ever get -- it wouldn't be appropriate to get to that end point. As Paula says, there are grey areas, there are different scenarios, occurring all the time, but I do think there will still be attempts to widen the boundaries of vicarious liability still further, possibly in the realm of independent contractors who at the moment, because of a contract for services, are not regarded as being someone for whom an employer who engaged them can be vicariously liable. But we will see whether the case comes that might mean that is tested.

MR SKELTON: I don't want to get into too much legalistic terminology, but would joint liability be an issue, where you are not liable as an employer or someone akin to an employer, but someone jointly doing a task?

MR GILLESPIE: There is also a doctrine of dual vicarious liability, so by extension, in the right circumstances,

the court may consider that could arise as well, yes.

MR GARSDEN: There are big issues around people like gardeners, caretakers, dining room stewards, and so on. The peripheral jobs in an institution are causes of huge debate. So is the gardener a gardening teacher or is he a gardener? Was he employed to look after children or not? The fact it was recognised he will come into contact with children, does that impose a liability on the defendant or not? Did the abuse take place on the premises or at home? Usually, it takes place at home. Was he then being an employee or actually on his own time? As I say, he/she ...

MR SKELTON: To ask the same question I asked of Paula, is that a difficulty with applying the existing principles, which are fairly simple, or is it a problem really of fitting those principles -- is it a problem with the law inherently, with the principles themselves being wrong and not fit for purpose?

MR GARSDEN: It depends on whether you want work for lawyers, I suppose. If you want work for lawyers, then there is going to be a grey area.

The existing principles of the close connection test established in Lister v Hesley Hall Limited has recently arguably been doubted in a case called Mohamud or arguably not.

I think the law is still in a state of flux and, if you look to Canada, there are lots of cases on whether somebody is in their own time or whether they are not. I don't want to go into foster carers and the responsibility for them, but that is another huge area of difficulty which will, with time, become more of an area of difficulty because we have moved out of institutions into foster care and that definitely needs clarifying, and it isn't clarified. Arguably, Woodland v Essex clarified that, but it hasn't been.

MR NICOLSON: That's the non-delegable duty --

MR GARSDEN: The non-delegable duty of care. We won't go into legal niceties, but I'm a foster carer, personally, and I'm insured, but insurance for foster carers only came in relatively recently and, with older cases, it's a huge problem, and there's something wrong about the law when it says that if you were put in an institution then, if you were abused, there will be liability, but, however, if a local authority, same money, put you in foster care, there won't be any liability because of the relationship --

MR SKELTON: There is a case going before the Supreme Court --

MR GARSDEN: Yes, which we know about and we will eagerly await the judgment in that. I'm just trying to

illustrate how unsettled the law actually is in this area, rather than it being well established. In certain cases, yes, it is, whereas previously it wasn't. If you are a care worker, yes, it is clear.

MR SKELTON: Does that affect a significant volume of your client base, these points of legal uncertainty?

MR GARSDEN: I can think of a number of my cases.

MR BONEHILL: Yes.

MR BRIDGE: I had a three-day trial last year on vicarious liability so it is an issue that's live.

MR SCORER: It is certainly a live issue. I broadly agree with the way Peter and Paula have characterised it. It is a more settled issue than it was but it remains live. I have a case going in the Court of Appeal in January which on your point about dual vicarious liability, the principle of dual vicarious liability has been established, but the way in which that's applied I think will still be contested in some cases.

MS STOREY: I think when you explain to a potential client that, had they been abused by a key worker in a children's home as opposed to their foster father, they would have a case, they are confused and upset by that distinction. It just doesn't seem right. You know, they regard the local authority as a corporate parent and they had no choice about where they were put.

As we put more children into foster care, we need the answers.

MR SKELTON: What other issues are there? One issue I think has certainly attracted some attention is the consent issue, that young adults in particular may be able to consent to some form of sexual contact with other people, and that doesn't constitute abuse. Is that an issue for your claims and to what extent is that going to be resolved in the near future? Can I ask you, Alastair, about consent?

MR GILLESPIE: I understand why you ask that, because it is a very -- perhaps an unusual word to use in the context of these claims. I should say immediately that it is, to our experience, something that only arises in very, very exceptional circumstances, and in very exceptional fact-specific scenarios as well.

Over the thousands of cases that we have dealt with, there are probably only four or five cases where we have even contemplated raising it as an issue. We do have a case involving it which is being considered by the Court of Appeal next February. But reading the facts of that case -- I won't trouble you with them now -- they are extremely unusual. I would hope, when you read those, it will be readily understood why that issue might arise in those specific circumstances. But, as

I say, it is not an issue that generally will arise in any way, shape or form in the vast majority of claims.

MR SKELTON: Does that ring a bell, Richard, from your perspective?

MR SCORER: It is my case, so, yes, it does. I think whereas Alastair has characterised it that it is an issue which some defendants raise not in a large number of cases but it certainly is happening, I think there's probably a variation between different defendants in terms of their behaviour around this, and their readiness and willingness to raise that as an issue. But it is certainly cropping up.

MR SKELTON: I know you are sitting very close to Alastair, but you used the word "behaviour", which on one view is a slightly loaded word. From one perspective, it could be a legitimate legal argument that needs clarification by the court on the basis of very particular facts. On the other side, it could be something which doesn't have to be taken as a legal issue, it is optional to take legal defences. Are you trying to say there may be certain defendants who will opt to take those sorts of points and others won't?

MR SCORER: That is precisely what I'm saying, or that's been my experience on it. I don't know whether that is shared by others, but that's been my experience.

I wasn't using it in a loaded way. It is simply a descriptor of the way defendants behave.
MR GARSDEN: I think it is more of a problem with the CICA, frankly, than it is with defendants. Not that I'm letting them off the hook, but there is a famous CICA case which involved one of the children's homes I was involved in, where a 14-year-old boy was deemed to have consented to buggery by the CICA, which was one of the most bizarre decisions --
MR SCORER: I know we're not here to discuss the CICA, but the CICA are running that very argument in a child sexual exploitation case at the current time. So Peter is right, it is much more of a CICA --
MR SKELTON: Is there a mismatch even with the criminal law about consent as well in a different way from the CICA, a different approach where there is a statutory rape, for example, of someone who could ordinarily consent to have sexual relations with someone, can't be taken to be consenting because that person may be in a position of responsibility. How do all these things match up?
MR GARSDEN: You would have thought they would, wouldn't you, but I don't think they do. I think it is one law in a criminal case and another form of practice for the CICA. I think this is one of the points about whether or not there should be a redress scheme for these types

of cases.
If you look at the CICA and the differing practice that it adopts because it is government money -- perhaps that's controversial -- I think that sort of approach would not necessarily be adopted by a defendant firm of insurers in civil litigation. I don't think it would. But they can tell you themselves.
MR SKELTON: Before moving on to the final issue, which is really about the settlement process, can I just understand a bit more about this point about different defendants taking different approaches. Again, some defendants may see themselves as the vanguard of legal claims, taking the legal points, and that's legitimate. Others may say, "Well, we don't want to take these legal points, we are prepared to take a more practical view of litigation".
MR BONEHILL: It is a practical view and to us it is an ethical view as well. We will never allege consent for anybody under the age of 16. We have made that very clear in our guiding principles. That is an ethical stance, and I think it is absolutely the right thing to be doing.
Where the victim/survivor is over that age, then we have a proper robust process in place whereby those decisions are discussed at a very senior level within

the organisation before any authority is given. So the reality is that the processes are robust in terms of looking at the specific cases and the evidence that's available for those cases, and then a decision is made on a case-by-case basis. But, again, they are very few and far between and that's how it should be, in my view.
MR SKELTON: Does anyone dissent from that?
MR LUCK: Not at all. It is very, very rare, but it is utilised and considered in appropriate cases.
MR SKELTON: Is there a difference with the self-insured defendant to these sorts of issues in terms of their approach to things as opposed to someone with an insurance company backing them?
MR NICOLSON: No, I don't think there is. I think certainly for my own organisation, we would take a very ethical view. I could never see us using that kind of an argument going forward. It's not been an issue for us up until now either.
MR SKELTON: Thank you. Turning then to the final issue -- again, I'm afraid we have about 10 minutes to go -- alternative dispute resolution and settlement, and settlement early on, particularly, saving legal costs and limiting the effect on the claimants and indeed the defendant institutions of long litigation.
Can I ask someone just to open and express a view

about what are the factors that allow you to get to the point of early settlement and what are the obstacles? Paula?
MS JEFFERSON: The more information that we are provided with at an early stage, then certainly with those organisations and insurers that I'm advising, we will look to see if there is a possibility of making an early offer. That as much comes from the experience that we have all had over many years and the comments that are regularly made that it's not in the interests of any party, whether it be the claimant or the defendant, for there to be delay.
If we can make an early offer and if that offer is acceptable to the claimant without the need for them to have medical evidence and that is their choice, then that is, I think, successful for everybody.
I appreciate that there are, however, some people who (a) prefer to have an expert report or their legal advisers feel that it is really necessary, and they can't advise them on a settlement. But I think what is important is, if you have got the information and you are able to make an offer, then it is appropriate, from a defendant's point of view, to make that offer, it is then up to the claimant and their legal advisers whether or not they feel able to accept it at that stage.

I don't think there should be criticism, as I think came through in some of the submissions, that this was somehow done by defendants as a way of just trying to, as it were, brush things under the carpet and deal with things quickly. It is not. It is done in a genuine way to try to answer the criticism that's been made over many years that for some reason defendants delay.
MR SKELTON: Before I ask some of the claimant lawyers to respond to that, what about the position that early offers are made at a very low level, which puts pressure on the claimant and his lawyers in a case which may not be worth that much money and where there are funding issues to take that offer and leave?
MS JEFFERSON: Well, I would say that the offers are made at what is a realistic level based upon the evidence that we have been provided with.
MR SKELTON: Do you find, then, that your early offer you tend to stick with rather than getting closer to trial when pressure is put back on the defendant and you end up having to make a greater offer?
MS JEFFERSON: It will vary, and I can think of some situations where we have, unfortunately, made an early offer, we have had a settlement meeting at which that offer has been made, it's not been accepted and a week prior to trial I have had a letter from the claimant

solicitor saying, "Actually, my client is going to accept the offer that you made a year ago". That is not really in anybody's interest whatsoever.

The evidence will change, and the reason -- if you make an early offer, it is going to be based upon what limited information is available. The reason it is probably not accepted is that the claimant and their solicitors feel that more information should be provided, probably a medical report, and that is likely to end up in a higher offer because then you get more information which makes you think, well, maybe there is more information to justify this claim.
MR SKELTON: From your perspective, does that occur?
MS JEFFERSON: Yes. We will make offers in the hope that that is the right thing for the claimant, if they want to settle that claim now.

From a defendant's point of view, the way the compensation system works at the moment, that is the main thing that we can do, but we will also try to explore what else it is that a claimant will want. So if they want an apology, a meeting, the plaque removed from the school wall that commemorates the teacher, whatever it is, it's about engaging across from both sides of the table to find that out. But if you can't resolve things at an early stage, you continue to work

together until you get to a stage where you can settle.
MR GILLESPIE: I think it is important to emphasise as well that we talk about part 36 offers from our side. It is open to either side to make a part 36 offer at any time they wish to do so. I'm regularly met with part 36 offers from claimant lawyers at a time when virtually nothing has been disclosed. There has been a set of allegations and, with the same correspondence or very shortly afterwards, an offer is put forward as well. So at that stage I have the benefit of absolutely no information whatsoever apart from a set of allegations put forward by an individual and their solicitors.
MR SKELTON: To be clear on the terminology, part 36 is an offer that's made, a monetary offer that's made, of settlement that is an open offer until it is formally withdrawn and which, if it is not accepted and then you fail to beat it at trial, then there is a costs penalty although I think it is right to say the costs penalty are probably worse for defendants than claimants.
MR GILLESPIE: That's right. It is standard practice within personal injury litigation generally.
MR SCORER: As we said earlier, litigation is stressful for our clients and we don't want to prolong the litigation any longer than is necessary. I think we always, certainly in my practice and I think it would be true of

other claimant lawyers here, welcome the opportunity to discuss and try to settle cases at an early stage, obviously consistent with our obligations to investigate the case properly and ensure that the proper evidence has been obtained. We have certainly been able to do that with Ecclesiastical and those representing them. I think that is a model of better practice than -- I don't want to sound as if I'm obsessing again about differences in defendant behaviour, but there are variations in defendant behaviour around this. There is no question. And, you know, some defendants and their insurers will not approach it with the same willingness to reach early settlement.
MR SKELTON: What effect does that have, in terms of the -- obviously, it means you carry on litigating. Does it mean ultimately -- because we have heard most cases don't go to trial. So ultimately terms are reached?
MR SCORER: It means, actually, in some cases, that a case that you could settle relatively early on in the proceedings ends up being settled much later and at much greater expense, and of course at a psychic cost for the claimant as well because they have to go through that very stressful process.
MR GARSDEN: I think in terms of attitudes to litigation, the traditional attitude of a defendant I think is to

say to the claimant, "Look, you prove your case, you let us have what you have got and we will have a look at it". Whereas in fact, investigation can be done by the defendants, and I know is, to look at their own records to see whether from their own evidence, I don't know, there are cases where the records show that the abuser was actually investigated many years ago and we don't always know that.

If the defendants come to us and say at a very early stage, "We have looked at this case. We think it is one we want to settle. You get hold of some evidence and we will settle it on the best possible terms", that's the best possible approach to us and the most convivial one. Often what happens is, we write a letter of claim, the defendants say they are going to investigate. We don't hear anything. We then collect our evidence. We get a medical report and we make an offer with the medical report and then there is a war of offers.

It's the early behaviour of the defendants of a convivial and settling nature that is less likely to produce an adversarial and a more cooperative approach, if that makes any sense.

MR SCORER: It is also right to say that in some cases, and this applies to Ecclesiastical where there have been these early settlement discussions, as Paula said, other

issues can be incorporated into that, like an apology, for example.

MR SKELTON: I was going to ask about that. How much can it be brought into play in the early settlement meetings, I mean very early on in particular, an apology or an admission of liability, for example? Do those tend to feature in those settlements early on?

MS STOREY: I think a lot of defendants who have been doing this work for a long time now will ask those questions outright at the outset. We will ask our clients what they want as well. I think when I first meet somebody, it would be, "What do you hope to achieve out of this process?" and try to find out to what extent that can be matched by what is achievable. I think, on the whole, we are asked those questions, and it's then a question of working out what's possible in any given fact.

But the reality is that these aren't straightforward personal injury cases. These aren't a broken leg in an agreed set of circumstances, 16 weeks off work, a bit of physiotherapy and you're back to normal. This is an analysis of something that happened a long time ago in a lot of cases, where it's had a lifelong effect, and it's been with that person causing them damage over a long time. So, first of all, we have to work out what we are arguing about, what's the subject matter, what

happened. Is it more than was told to the police? Are our clients still disclosing the events that happened? Were they only able to say a certain bit to the police? Is it still coming out? Are we still learning about what actually happened here? So it is a process of disclosure. It doesn't sit comfortably with the system, as it were. Once we establish what actually happened, then we have to look at somebody's life, and people are complicated and our clients aren't a homogenous group of people. They are all different. Lots of other things have happened to them too.

Whilst I accept that Paula has made, in good faith, some of these early offers, I think that to quantify the cases properly, we do need that analysis of causation which comes from psychiatric evidence and a real understanding of that person's condition and what they can expect in future. If we can build in some rehab into this process, make sure that somebody can get access to some services and it is a matter of record what mental health services are like at the moment. If we can build rehab into civil justice, we will be doing a good service, I think.

MR BRIDGE: Following on from what Tracey said, I'm finding a real willingness from defendants to engage in joint settlement meetings pre-issue. I think they are an

incredibly effective way of dealing with these claims. Claimants love them because they feel they have spent a whole day talking through the issues. The defendants have come along. Sometimes a representative from the council will be there, who will offer a personal apology, and they actually see justice being done and they go away from that meeting happy, not just with the settlement, they have avoided litigation, and I'm finding, where we are getting early settlement offers the defendants are not averse to agreeing to leave that settlement offer open until we get a medical and then coming along and talking about it at a JSM and rather than mediation or ADR, I think JSMs at the minute are a really effective way of dealing with these cases at an early stage.

MR GILLESPIE: You will find that as a consensus from our side as well. They are extremely effective. If we can build into a pre-action protocol the necessary steps to ensure JSMs take place on a properly informed basis I think you will see them being even more effective.

MR BONEHILL: Your point about apologies, it is a great opportunity to actually bring somebody senior from the organisation, from the institution, to give a personal, meaningful apology, which is invaluable.

MR GARSDEN: What about the Compensation Act point, about

what sort of protection is given to an apology that doesn't affect future litigation? Is that a problem --
MR GILLESPIE: The Compensation Act -- without wishing to get too technical -- doesn't, at the moment, cover admissions in the context of vicarious liability but a legislative change could address that.
MR SKELTON: That is something we are going to discuss at another seminar. But thank you for dangling that. We are going to have to draw to a close because we are right up against the deadline.
There may be some issues that could get raised from those who are sitting and listening.
CORE PARTICIPANT: Just really a point of information. I take on board and am very cognisant of the concerns the solicitors have raised about joint experts and the difficulties, but it is worth actually pointing out, of course, that in certain complex proceedings, such as in family proceedings, the courts are actually directing parties to appoint joint experts.
CORE PARTICIPANT: Brian Dewar(?), who is a senior social worker.
CORE PARTICIPANT: Hi, Liz Davis. I just wanted to say that the national archives contain an enormous amount of material relevant to individual claims and class actions and of course cannot be accessed, so I think that is

a very important issue for this inquiry.
I also am very busy representing a number of survivors trying to get access to files. I just think it is the most cruel process ever. It used to be a highly skilled social work task. Certainly over my career, it is now you just meet an administrator who hands you an envelope and the survivors quite often just cannot face opening it. I have known some who have not opened their envelopes over years, so obviously that has to be thought of in terms of delay. So the process is absolutely appalling and must change.
MR SKELTON: Thank you.
THE CHAIR: A couple of quick -- one question about vicarious --
CORE PARTICIPANT: What the lady said then, in red, just today alone, I have been talking to my solicitor, and there are still things I need to disclose and still things I need to say and I need to get out, but I also need help in doing it. There's some things I want to say. I can't. It's hard to explain to you, but there are things. Thank you for saying that.
THE CHAIR: Just a couple of quick questions. In respect of vicarious liability, a question for the insurers, really, about the circumstances where abuse has been committed peer on peer, if you like, by one child or

a young person on another, where staff members of an institution have been aware of this, and have either chosen to ignore it or actively encouraged it. In these circumstances, what is the attitude of insurers?
MR LUCK: I think, first of all, you are looking at that from a negligence point of view, but then you are clearly raising the point that it was either an action or non-action by the staff member.
We don't see very many of these cases, but I think we would look at the individual circumstances and, if it is quite clear that this was known, and certainly if encouraged, that those are the types of cases that we would be accepting and be looking to make settlements on.
THE CHAIR: Thank you. My second question was about the independent experts. Are they accredited, and if they aren't, should they be?
MR GARSDEN: Most of the experts -- I'm in charge of monitoring and recruiting experts at my firm. We look for either substantial experience or a membership of the expert witnesses register, and either route is good enough, but experience is key. That would be my view.
Just on the point you raised about pupil/pupil abuse, certainly one of the first group actions I ever dealt with in 1996, there was certainly evidence that

abusers were recruiting -- were abusing boys and, when they went higher up the school, they were being used as adjutants, and made to abuse other boys and used as protection for them as abusers. There wasn't much doubt about that.
MS STOREY: I think the psychiatric experts, there is so much subjectivity that we, in an adversarial system, can use to either side's advantage. So for one person, it could be that a lot flows from the abuse, it does disrupt the career and, for another person, it was always going to be that way. There is such a wide range of opinion that can come out of the same set of circumstances, so it is very subjective, and that comes back to the polarisation, and accreditation might be useful. It might be looking at the family courts and what they do.
MR SCORER: The key thing, and you are absolutely right, Tracey, is that experts reporting these cases, whichever side they are reporting for, should know what child abuse is about. They should be experts on that. That is where I think the issue of accreditation comes in and is important.
MR GARSDEN: The Legal Aid Agency, as part of their audit process, insist that we have some sort of recruitment process for experts. I think that's probably --

MR SCORER: But it is not a formal accreditation process.
MR GARSDEN: No.
MS SHARPLING: Coming back to the adversarial system for a moment, Mr Garsden, you mentioned earlier, you alluded to some of the challenges with your clients who may have special needs, particularly those with learning difficulties. I would just be interested in anybody's understanding of whether those with special needs face particular challenges in the civil justice system?
MR GARSDEN: Well, they do. I will give you an anecdotal example. Many, many years ago I was asked to try to represent victims of abuse who had special needs and learning disabilities in a residential setting, and one of the reasons the case never got off the ground was that we couldn't find somebody to act as an interface and support worker for these individuals who had enough funding to help them through the civil litigation process, despite the best efforts of a social worker, and that is a problem, finding somebody who can help someone with learning disabilities through the civil litigation process and act as their next friend. There is the official solicitor, of course, whom Richard has mentioned, but that is a problem.
MR SCORER: There is some work being done at the moment through the Advocate's Gateway around special measures

for vulnerable and child witnesses within the civil justice system, which mirrors, obviously, things that have been done within the criminal justice system, but like everything we have talked about today, the more it can be formalised, the better.
MR GARSDEN: Definitely a very valid point.
MR FRANK: Thank you for that. It is a question I was going to ask, whether we could have a view about how soon, if at all, we should be adopting for the civil process the same protections that the criminal process provides, particularly with the advocates' tool kits and so forth, which are, it seems to me, pretty much optional at the moment, and so the experience of the victim/survivor very much depends on the lottery of whether or not the particular judge in a civil case is actually going to bother with the ground rules here and so forth. So I would be interested to see if there was a consensus across both claimants and defendants in terms of improving the journey of the victim and survivor through the process. I know it is not every case that goes to trial, but when it does, whether or not that can be improved. I would be interested to hear further submissions on that at some point, not necessarily this evening.
I have a list of questions here. I am not going to

ask them all. But one general question, if I may: we have heard on a number of instances where the experience of the victim and survivor in terms of their journey through the system may well depend on the particular policy of the particular defendant in relation to claims and defences, and I'm just wondering whether you have any suggestions as to how we can make that more consistent so that we don't have some claimants facing the consent defence and some claimants facing a limitation defence and others being spared that. I wonder if there is a suggestion that --
MR GARSDEN: I think the Ecclesiastical Insurance Company, I have to give them credit for their pre-existing model litigation policy which I have referred to in my paper, which I have read and commend very highly. I think they deserve a lot of credit for that. That sort of experience we could develop to a national model litigation policy, which would run alongside the protocol, which I think we are, as claimant lawyers and defendant lawyers, hoping to develop with Master McCloud, and she's made gestures to us and that's running in parallel to what this -- what IICSA is doing as well.
MR SCORER: The route Master McCloud is looking to pursue, which mirrors, I think, some of the experience of

dealing with asbestos litigation in the courts, does include the possibility of that being enforceable through the courts.
MR GARSDEN: Yes. The model litigation policy, which I have seen in Australia and was heartened to read, and the existing one, I think there's certainly movement.
MS STOREY: I think at the moment we, as claimant lawyers, tend to warn our clients, you know, it could be this, prepare for the worst, hope for the best, but these are some of the defences, some of the complicating features of this litigation, so be prepared, and you feel a deep professional obligation to make sure they're aware of what they're getting into, and then you can give them more advice when you know who your defendant is, who is representing that defendant and you know what kind of approach they are likely to take. So it is -- but I imagine, from a survivor's point of view, being told that anything could happen is probably quite disturbing.
MR GARSDEN: I think the problem is not those around this table, but those not around this table, that we need to provide this policy for. I'm absolutely convinced those around this table are very experienced and ethical in the way they approach things and that is why you have heard what you have heard. If we had a model litigation policy and an abuse protocol, then that would cover

anybody who enters this field of litigation that you could point to as a model of good policy.
MS STOREY: That is absolutely right when we sue perpetrators who go to criminal defence lawyers who have no experience of the civil justice system and write letters to us that we are obliged to show our clients that cause them further trauma. So it's not the people necessarily here, but it's, "Here is the protocol. This is how we want to do it".
MR GARSDEN: That's exactly who I was thinking of.
MR SKELTON: Our third seminar tomorrow, which you have neatly brought us onto, is the form of the existing system where these precise things will be discussed in more detail.
Can I just say about tomorrow, we have a 10.00 am start. We will first be discussing compensation, broadly speaking. We have another seminar on the idea of accountability and reparation, what it means beyond compensation, which is something that has been raised today. Then reform of the existing system and then the idea of more radical reform in our final session and whether or not that is viable. So many of the things that you have raised very helpfully today, thank you very much, from my perspective.
THE CHAIR: Thank you. I have very little to add to what

Peter has said. Thank you to everyone for their contribution, not just around the table but from the floor as well. It has been extremely helpful. It has opened up so many issues that are at the centre of what the inquiry hopes to do, so we look forward to taking it even further tomorrow. Thank you.
(4.43 pm)
(The hearing was adjourned until Wednesday, 30 November 2016 at 10.00 am)

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