OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 19 September 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 19 September 2017

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JUSTICE COMMITTEE
27th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Brian Castle (Motor Accident Solicitors Society)
Ronnie Conway (Association of Personal Injury Lawyers)
Patrick McGuire (Thompsons Solicitors)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 19 September 2017

[The Convener opened the meeting at 10:00]

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): Good morning and welcome to the Justice Committee's 27th meeting in 2017. No apologies have been received.

Agenda item 1 is our second evidence session on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a Scottish Parliament information centre paper.

It is my pleasure to welcome to the committee Ronnie Conway, who is co-ordinator at the Association of Personal Injury Lawyers; Brian Castle, who is regional co-ordinator Scotland for the Motor Accident Solicitors Society; and Patrick McGuire, who is a partner with Thompsons Solicitors. I thank all the witnesses for their written submissions, which are extremely helpful. We will move straight to questions.

John Finnie (Highlands and Islands) (Green): Good morning, panel, and thank you for your submissions. Will you outline whether damages-based agreements have any advantages over no-win, no-fee arrangements?

Patrick McGuire (Thompsons Solicitors): I am happy to begin answering that question. The reality is that the terms—particularly in the bill—are entirely interchangeable. The bill legalises the type of arrangement that, until now, professional rules and other aspects have prevented solicitors from entering into, whereby, in the event of a case being successful, a specific percentage of damages could be taken as a fee. Until now, solicitors could enter into a specific form of speculative fee agreement that centred on the ability to charge a percentage increase on damages.

The bill seeks to make things simpler for practitioners and—most important—for victims of accidents, injuries and disease so that they can have a clear picture in their mind in deciding whether to take forward a claim and which solicitor to choose to engage in that process. The bill is about providing simplicity and clarity, and for that reason, it will be a good and welcome addition to the law.

Brian Castle (Motor Accident Solicitors Society): At the moment, when a client engages a solicitor on a written speculative fee agreement, the client has no clear understanding of how much they will be charged at the end of the day. Under the rules as they stand, a solicitor can charge up to 100 per cent of the judicial expenses that they recover. Even a solicitor at the outset of a case cannot tell a client what the judicial expenses are likely to be.

Under a damages-based agreement, a client can readily understand that a percentage of damages can be taken as a fee. That gives certainty and, as Paddy McGuire said, makes things simpler. The proposal under the Taylor review was to cap success fees or DBAs to prevent solicitors from taking an inordinate amount of damages from clients.

I think that, as well as the certainty, clients will like the idea that, if a solicitor is fighting their corner and can charge a fee that is based on the amount that is recovered, they will have an interest in fighting for the best deal for their client.

Ronnie Conway (Association of Personal Injury Lawyers): I agree with what my colleagues have said. Taylor looked at the fact that some larger firms of solicitors have a parallel claims management company and that clients are already offered a damages-based agreement. In the main, Taylor found that clients were perfectly happy with that. The existing rules on speculative fees are byzantine and incapable of being understood by the public.

I have no factual basis for saying that there has been abuse, but the rules at present are open to such abuse, and it seems to me that the bill represents a substantial improvement on the current position.

John Finnie: If damages-based agreements were to be introduced, where would that leave the no-win, no-fee arrangement?

Patrick McGuire: A damages-based agreement is just a form of no win, no fee. Simply, it has clarity; the basic building blocks are the same, but the solicitor will act and charge a fee only in the event of success. It is just about what happens in the event of success; under the bill, the success fee will be at a fixed percentage that is clear from the outset. As colleagues have described, there is at the moment a strange and byzantine—I agree with Mr Conway's description—approach to fees uplift.

As I said, this is just a matter of clarification. No win, no fee is a generic term, and damages-based agreements are a form of such arrangements. As I

think Hamish Goodall explained the other week, the bill allows solicitors to engage in old-fashioned speculative fee agreements, if they so choose, but I would be surprised if they did.

John Finnie: Is there confusion about the terminology, or is there just a lack of clarity on my part? The position does not necessarily seem straightforward to the layperson.

Patrick McGuire: Do you mean the terminology in the bill?

John Finnie: Yes.

Patrick McGuire: For the public, the common parlance is "no win, no fee"; when they hear that, they expect to be able to engage a solicitor and be charged a fee only in the event of success. That currently happens, but the rules that govern what a solicitor can charge are in the main not clear.

There is also an unlevel playing field, because claims companies and certain organisations of solicitors who are allied to such companies can engage in the type of arrangement—the damages-based agreement that you are talking about—that is being envisaged for all under the bill. At the moment, only a limited number of organisations can say, "In the event of success, the fee will be X per cent." Most solicitors cannot do that, so all that the bill does is allow everyone to operate in the same way and in a way that is entirely clear to the public. To take your point, Mr Finnie, I think that that is what the public expect and need. They want to know that there will be no charge in the event of the case being unsuccessful, and they want to know—I think—what the charge will be in the event of success. The bill sweeps away the confusion, and the market will balance out and determine things.

Ronnie Conway: I wonder whether part of the answer relates to the regulations, which have still to be made and which will be subject to the affirmative procedure. In its recommendations, the Taylor review—I make it clear that, although I was part of the Taylor reference group, I did not write a single word; Sheriff Principal Taylor is the review's only begetter—set out provisions, which Mr McGuire just highlighted, on clarity for the public. Members of the public will have access to a fixed format of agreement, and I suspect that, within a very short time, the kind of speculative fee agreements that have been used up to now will wither on the vine.

The Convener: One of the points that John Finnie has raised and which Mr McGuire has clarified is that no win, no fee comes in various forms—it is just a generic term. The bill sets out a precise formula.

I will take a supplementary from Stewart Stevenson.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): You must excuse my voice.

Mr Castle has spoken with approbation about the solicitor having a financial interest in the outcome. Is that really a good thing? Historically, a solicitor has, of course, represented their client in court, but they were independent of their client's interests; they were able to provide independent advice, and they had duties to the court.

I accept that the train might well have left the station on the subject, but I wonder whether solicitors having a financial interest of the kind that you describe, which you appear to speak of approvingly, is a good thing in any circumstances.

Brian Castle: I was speaking on behalf of the client. We were talking in the context of looking at damages-based agreements and the potential benefit to a client. The client would see it as a good thing if the solicitor was fighting their corner and had an interest in doing well and securing full and proper compensation for the client.

You are right about the traditional situation. As it stands, the law that prevents solicitors from directly entering into a contingency fee agreement with the client is there because of concerns in the past. Sheriff Principal Taylor's review took account of those concerns, but he recommended that, for the sake of clarity and certainty at the outset of an agreement, a client who was entering into an agreement should know at the outset what the terms of that agreement and the charging regime were.

Stewart Stevenson: Do you—and possibly others—see it as important for the professional standards regime, which is not a matter for Parliament, to be updated to make clear where the boundaries in respect of responsibilities are in the new regime, if Parliament passes the legislation?

Brian Castle: Absolutely. That has to be and remains important. A solicitor will have duties to the court, aside from looking at personal interests, and that has to be reflected in the rules.

John Finnie: Is anyone on the panel aware of examples of clients being required to pay two separate fees from an award of damages—one to a claims management company and one to their solicitor?

Ronnie Conway: I am not aware of any such examples.

Brian Castle: Likewise, I am not aware of any.

Patrick McGuire: Not to my personal knowledge.

John Finnie: The phrase "access to justice" is much used. Will the provisions enhance access to justice?

Patrick McGuire: I have absolutely no doubt that the provisions that are in the bill will enhance access to justice. That includes the provisions that cover group litigation, which we might come on to talk about. The entire purpose of part 2 and qualified one-way costs shifting under Sheriff Principal Taylor's recommendations was to enhance access to justice. We have all expressed some concerns about the drafting of the bill and how it could be improved. There is no doubt in my mind that, if we assume that Sheriff Principal Taylor's recommendations are reflected fully in the bill, it will improve access to justice. Equally important, it will also do what Sheriff Principal Taylor said was his prime focus and what I see as the mischief of the bill, which is redressing the imbalance in the asymmetrical relationship, which Sheriff Principal Taylor spoke about, between pursuers of personal injury claims and the extremely large, powerful and wealthy insurers that count their profits in billions of pounds.

Ronnie Conway: APIL strongly supports the bill's aims and has been waiting on such legislation since the Taylor report was issued in 2013. In world jurisprudence, the most widely cited article is "Why The 'Haves' Come Out Ahead", which Marc Galanter wrote in 1974. His critical point is that litigants can be divided into two categories. On the one side, we have the one-shotter, and on the other side, we have the repeat player.

If my car is rear ended by someone else, I am a one-shotter. If I have to get involved in litigation or a dispute with the person who banged into me, I am dealing not with a one-shotter but with a repeat player. That covers not just personal injury cases but cases of landlords and tenants and of private utilities and so on against individuals.

The repeat players have distinct advantages: they are resource rich, have easy and well-established conduits to blue-chip lawyers and can decide what cases to settle and what cases to take to the Supreme Court. We know from the Parliament's experience of the asbestos wars that they are perfectly capable of doing that. Critically—and this is the point about the bill—they have no real financial or emotional involvement in the dispute.

10:15

The Convener: We will cover that in more depth. You have taken quite some time to explain that point. The issue is complex and the one-shotters can come in various forms; we hope to tease that out.

Before we move on, I will ask about the possibility of two separate success fees from an award of damages. You all said that you were not aware of that happening, but it would not be impossible under the bill. Is that correct? I am talking about a situation where a claims management company charges a fee and the solicitor to whom it referred the case also charges a fee.

Patrick McGuire: I have not considered that in respect of the bill's wording and I apologise for that. Given what has been said and the fact that there is a requirement for secondary legislation under part 1, the issue might need to be addressed at that point.

Ronnie Conway: Convener, you are correct that that is a possibility. APIL's hope is that claims management companies will wither on the vine—there is no real need for them and they are a kind of dating agency that no one needs. Once clarity has been introduced into the system, people should go straight to a solicitor, who will charge a single fee.

The Convener: So there is nothing in the bill to stop two fees being charged. Does that need to be looked at?

Brian Castle: To repeat my colleague's comment, if there is a concern that that is a possibility, it can be addressed through secondary legislation on fee charging.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I will follow on from Mr Finnie's line of questioning but focus on the pursuers side of things. How can the future care needs of pursuers who have suffered significant injury be managed if some of their damages award goes towards paying a solicitor's success fee?

Ronnie Conway: I think that you are looking at section 6. Taylor adopted an evidence-based approach to the matter. If you do not mind, convener, I will refer to section 6.

The Convener: Go ahead.

Ronnie Conway: If you are talking about care costs, you are probably talking about cases that are worth more than £2 million. Once the proposed damages bill comes into play, in cases against institutions such as the national health service, the Motor Insurers Bureau or regulated insurance companies, the expectation is that periodical allowances will be put in place. In that event, Taylor excluded the possibility of any success fee being calculated on the future amount. In cases that are worth more than £1 million, under section 6(5), the norm will be that there will be no calculation of a future success fee.

The bill has to envisage two possibilities. The first is one in which there is an adjudication, so the court resolves matters. If it is a choice between a lump-sum payment and a periodical allowance, the judge will have to be satisfied about the future

element being paid as a lump sum. In cases where damages are obtained by settlement, the pursuer's lawyer will have to instruct an independent actuary, who will have to certify that the future element should be paid as a lump sum rather than periodical payments. Therefore, once the legislation on periodical payments is introduced, the expectation is that there will be periodical payments rather than lump sums.

If all of that falls by the wayside and we end up with a lump sum, Taylor's suggestion is that the amount of success fees should be a once-and-for-all 2.5 per cent on damages of more than £500,000. In his report, he uses an example in which there is a future loss element and the amount that is recovered is £1 million. He says that, in such a case, the maximum success fee should be 20 per cent for the first £100,000, 10 per cent for the next £400,000 and 2.5 per cent for all the amount after that. From a practitioner's perspective, that additional amount is the most difficult, involved and disputatious element of the litigation. There are constant disputes about life expectancy in particular, as well as about amounts and levels of care. I agree with Taylor that a single success fee of 2.5 per cent for damages of more than £500,000 supplies sufficient incentive to keep going without overrewarding the lawyers involved.

Rona Mackay: How do you feel about the argument that Scotland should follow England and Wales in protecting the future loss element of a claim from forming part of the success fee calculation?

Brian Castle: Taylor considered that in some detail. He considered the possibility of restricting a success fee to past damages only and decided that the better position would be to allow solicitors to charge a limited success fee on future damages. I think that the rationale was largely that, as Ronnie Conway said, the bulk of the work in these big-value cases goes into the claim for future damages and continued care costs. Those are hotly disputed and the vast majority of the solicitor's time examining such cases would be focused on calculating and putting forward the future element. Taylor did not want to discourage solicitors from doing that work or from doing it properly.

The secondary point that Taylor recognised is that, anecdotally, it has been suggested that, if solicitors were to be allowed to charge a fee only on past losses, there might be an incentive to drag a case out for as long as possible so that more of the compensation would be treated as past losses. That is clearly not in the client's best interests. We want to get to full and appropriate compensation as quickly as possible and we want the legislative framework to encourage that.

Patrick McGuire: The overall purpose is to achieve a fair balance with appropriate safeguards for the victim. Sheriff Principal Taylor spent a great deal of time looking at that, and the recommendations in his report, as reflected in the bill—subject of course to the issue of section 4, which requires secondary legislation to set the parameters of the sliding scale of fees, as my colleagues have spoken about—strike the balance appropriately. Solicitors will be paid fairly for the extremely hard work that is put into these extremely trying and difficult high-value cases, but in a way that means that the victim is properly protected. The bill just strikes that balance correctly.

Another difference with England and Wales is that the fees there are 25 per cent of damages and Sheriff Principal Taylor's recommendations are for less than that, so not everything that happens in England and Wales will necessarily find its way up here. The bill strikes the right balance.

Rona Mackay: I take it from what you have said that you dispute the view that the success fee calculation rewards the solicitor to an extent that is not justified by the amount of work that is carried out, which is what my colleague Stewart Stevenson said?

Patrick McGuire: Yes, I dispute that. I think that the balance is correct.

Rona Mackay: Does the additional fee that is available in the current legal expenses system sufficiently reward solicitors when dealing with exceptionally complex cases?

Ronnie Conway: Taylor recommended that the additional fee regime be retained. In my practical experience, how the judge deals with applications for additional fees depends on the particular golf course you are playing on.

Rona Mackay: Could you give us an idea of what the level might be, because I do not have a clue about that?

Ronnie Conway: The additional fee relates to judicial expenses only. I am speaking from memory, but there are a number of separate heads, which include value to the client, complexity, novelty of the issues determined and the number of documents. If you want an additional fee, you have to say that the case goes above and beyond the normal run-of-the-mill litigation. On balance, Taylor came to the conclusion that what we have is the best system. As I said, it appears to me that there is not a great deal of consistency throughout Scotland in the application of additional fees, but I am not really sure how that can be addressed.

Looking at the recommendations on the auditors of court, I noticed that, under the new regime, the auditor of the Court of Session will be obliged to issue guidance as to how matters of expenses are to be dealt with. The additional fee regime might benefit from guidance from the auditor of the Court of Session.

Rona Mackay: It sounds as if it might. Is it not at odds with a damages-based system to also have an additional fee?

Patrick McGuire: It is not necessarily at odds with the system. As Mr Conway said, the simple fact is that Sheriff Principal Taylor and his group, who of course are the ones with great knowledge of how the system currently works in practice, considered the issue in detail. It is probably a case of putting the cart before the horse, because Sheriff Principal Taylor's overall view was that we need to introduce damages-based agreements, in the way that he recommended, to improve access to justice, and that that will rebalance the asymmetrical relationship. That was his primary objective, and his primary method of achieving that is the form of damages-based agreements that the bill contains.

As Mr Conway pointed out, the current regime of additional fees is quite opaque, byzantine and difficult to judge. To suggest that that is the solution to future damages misses the point. The proper way of addressing the issue that you raise, Ms Mackay, is for the Scottish Civil Justice Council, at the point when the damages-based agreements come in, to look at the big picture and decide whether it means that additional fees need to be changed. That is one for the Scottish Civil Justice Council down the line; it is not for us to second-guess how it is all going to work and put something into primary or secondary legislation that will frustrate the entire purpose of Sheriff Principal Taylor's recommendations.

10:30

Brian Castle: An additional fee is entirely at the discretion of the trial judge or the court. You would have to argue that your case was in some way exceptional or outwith the norm to persuade the judge to award an additional fee. At the outset of a case, if you had a view that the case was worth £200,000 or £2 million, there is no guarantee that the size of the damages or the settlement would result in a guaranteed additional fee. In many cases, applications are made for additional fees but are refused by the trial judge or the court on the basis that there was nothing outwith the norm.

Rona Mackay: How often is an additional fee applied for?

Brian Castle: I am not sure that we would have the numbers—

Rona Mackay: Just very approximate.

Brian Castle: You have to persuade the court that you have an exceptional case that falls outwith the norm. You have to make submissions to the trial judge under certain guidelines or heads—for example the undue complexity of the case or the extensive efforts that you have made to settle the case—but the court would award an additional fee only where it thought that the case was in some way exceptional.

Rona Mackay: You are saying that it is rarely used at the moment.

Brian Castle: Yes. It would be the exception rather than the norm, that is for sure.

Ronnie Conway: I wonder whether I can assist, simply from a practitioner perspective. Additional fees are very rarely used in the sheriff court. I suspect that they are used a bit more frequently in the Court of Session, where there is a level of complexity, but in the sheriff court, I think that I have made an application on about four or five occasions in the past 10 years.

Liam Kerr (North East Scotland) (Con): I will go back to the basic premise for the bill, if I may, and the issue of access to justice. Mr Conway, you said in your submission that cases are not being brought or there is routine undersettlement. Mr Castle, you said that people were

"prevented or dissuaded ... because of ... costs implications".

This is a very important point. Are you aware of any research that shows how many claims are not being made or progressed, broken down by what those claims are and why they are not being made or progressed?

Brian Castle: There have been studies. I cannot put my hands on the references at the moment, but I would be happy to submit them following the meeting. A number of studies have said that—even now in Scotland and the rest of the United Kingdom—statistically speaking, a majority of people who would, on the face of it, have a valid claim for damages decide not to pursue that claim. There are various rationales for that, which the studies look at to a degree. One of those must be a concern that, in advancing a claim, they are putting themselves at significant risk of adverse expenses if they do not prove their case. However, it is difficult to give you first-hand evidence because, by the very nature of the situation, those clients are not coming to me, as a practitioner, to seek advice.

The Convener: If you gave us the details of the studies later, that would be very helpful.

Brian Castle: I am happy to do that.

Liam Kerr: If you would not mind because, although I suspect that you are right, I am concerned that the fundamental premise behind the bill, which is that costs are preventing access to justice, may be groundless. It may not be, but we need some data, because I understand that there has been a significant increase in personal insurance claims in the past six years in Scotland, which would tend to suggest that it is not to do with cost.

Perhaps I will move on. Is there a concern—

Ronnie Conway: Can I comment on that point?

Liam Kerr: Yes, of course.

Ronnie Conway: It is impossible to have empirical data, Mr Kerr, as you can imagine. One study that Mr Castle may have been referring to is by a well-known legal researcher called Hazel Genn. The study is called "Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law". However, it is of some antiquity. It was in the early 2000s that Hazel Genn interviewed potential litigants and so on.

In so far as the bill is concerned, it is important to remember that it deals with litigated cases. We know that, in Scotland, there has been an increase in claims registered with the compensation recovery unit. However, that increase is from a very low base. The figures that we have looked at and which can be made available to you show that, in England, 926,000 claims were registered last year. That is 1,652 claims for every 100,000 persons in the population. In Scotland, the figure was 973 claims for every 100,000 persons, so we are still considerably lower than England. The concern always is that compensation culture is shorthand for some kind of cheats' charter or fraud. It seems to me that there are no figures anywhere to decide that argument one way or another.

What QOCS addresses—I should have explained that the CRU statistics relate to all claims registered—

Liam Kerr: Mr Conway, forgive me for interrupting—it is just that I know that we are coming on to QOCS later, so perhaps we can pick that up in a second, if you would not mind.

Ronnie Conway: Okay.

Patrick McGuire: Mr Kerr's question was premised on—and the suggestion is that the bill ought to be premised on—a need to increase the number of claims. The suggestion is that whether there is a need will be judged on that basis, so if there is an increase in claims, there is no problem with access to justice.

Perhaps there should be a deeper and greater purpose for the bill. Improving access to justice is a good thing—full stop. That is what I would say is at the heart of the bill. It is not about looking at raw case numbers and taking a view; it is about what we, as a society, say we ought to be doing. Improving access to justice is certainly a good thing and that is what is at the heart of the bill.

More than that, of course, we know from the recent decision of the Supreme Court in relation to employment tribunal fees—the Unison case—that not only is it a good thing that society should encourage access to justice, there is an absolute legal obligation on this Parliament as much as on any other Parliament to improve access to justice. That is what the bill does and it does it very well indeed.

The Convener: We do not dispute that, Mr McGuire, but at the heart of the bill is cost and money—it is very much addressing that issue. I think that that is the point that Liam Kerr was making.

Liam Kerr: I want to pick up on a point that Rona Mackay was talking about. When you look at the award end, is there a danger that the courts might inflate future loss awards to ensure that the funds that have been given for care, for example, will not be eroded by fees or costs? Is there a possibility of award inflation?

Patrick McGuire: I think that this question came up at the previous committee meeting and eventually, we got to the answer. I will give an absolutely black-and-white, no-holds-barred answer—no, I do not think that there is any prospect of the judiciary somehow deciding to work around the years and years of precedents that set the parameters of damages. There is a very clear basis on which judges look at cases and make awards and they will continue to follow those precedents. I think that the prospect of them taking it upon themselves to increase damages in some sort of noblesse oblige fashion is negligible.

Liam Kerr: Could you help me with something, Mr McGuire? It is a long time since I practised in England, so I might be wrong on this, but, when England and Wales did what they did, did the judicial college there not increase awards by 10 per cent?

Brian Castle: I can help you with that. Historically, when a claimant in England was pursuing a damages claim and took out after-the-event insurance, the insurance premium and the uplift in terms of the fee agreement or the speculative element of the fee were recoverable from the insurers on success. As part of the regime in England, where they decided that they were no longer comfortable with having the insurers pay for the success fee and the insurance premium, the quid pro quo was an instruction to

the judiciary to increase damages by 10 per cent to balance that out.

In Scotland, we have never been able to recover an insurance premium if the client has taken out after-the-event insurance. As Mr McGuire said, there are well-founded principles for how to calculate a damages claim that are used day in and day out by the bench in Scotland. The bench is not going to depart from that and I suspect that, if it did, there would readily be appeals. Therefore, like Mr McGuire, I do not see any prospect of damages awards being increased, which some of the submissions have suggested might happen. I think that that is a smokescreen; it simply is not going to happen.

Ronnie Conway: I say to Mr Kerr that the tender-hearted judge or sheriff is not a creature that I recognise. Judges and sheriffs have taken a judicial oath to uphold the law and to follow practice and precedent. They will not be adding a little extra to the damages.

The Convener: Mr Conway, I do not think that you answered the first question about how pursuers who have suffered significant injury can properly manage their future care needs if some of their damages go to pay solicitors or anyone else. You mentioned periodical payments being omitted from the agreement but, inevitably, somebody will fall through the net. How do people meet their costs if some of the amount that has been attributed for them to look after themselves—that is, an amount that has been deemed appropriate for that purpose—has to be paid to solicitors? Perhaps some of the other panel members would like to answer that first, Mr Conway, because you have already had a shot at it.

Patrick McGuire: I have made my view on that clear. It comes down to a question of balance, with the appropriate safeguards. I think that that balance has been properly struck. I have certain views politically and in an industrial sense about where the argument is coming from. I have seen that argument being made by the insurance lobby and I am happy to share my views on that now, because it ties into another recent development south of the border that will no doubt come before the committee soon in relation to the discount rate, as it is called.

I can deal with the issue now or we can move on—it is up to you—but the bottom line is that that particular line has been promulgated by the insurance industry as part of its attack on the bill, and I simply do not accept it as a legitimate argument.

The Convener: I think that we are talking about the issue not from the perspective of the insurance companies but from the perspective of a client who has had a severe personal injury and has been given a certain amount of money to enable them to look after themselves but who is not getting that full payment.

Patrick McGuire: Absolutely. I am happy to explain my point. The argument about concern for the victim comes from the insurance lobby. That is the same lobby that recently decided that it was going to stand up against a decision of the United Kingdom Government to increase what is called the discount rate. The discount rate applies to the most serious levels of claims, which involve people who have had life-altering injuries and receive damages that have to see them through the rest of their lives.

The discount rate recognises that, if someone gets money now, they are expected to invest it, which will give some form of return over the years. It says that, to be fair to the insurance industry, some discount should be given—hence the term “discount rate”—because the money has been paid now.

Until now, the discount rate has overlooked the incredibly low levels of interest and inflation that there have been in the UK. The Lord Chancellor made recommendations that the discount had to be reduced. That is exactly the point that the convener makes—that people should get as much as possible in damages.

By reducing the discount rate, the money that insurers pay is increased. The insurance industry decided that it was completely inappropriate that they should be paying more money. The insurance industry went to war and the UK Government backed off. That shows what is really behind the apparent concern for victims from the insurance lobby.

10:45

The Convener: I want to stop you there. My question is from someone who is going to court, is not familiar with things and has a huge injury. I am not talking about the insurance lobby; I am talking about an individual in court who is awarded so much money to look after themselves for years to come and they are not getting the full amount. That is what they understand when they are in court.

Please leave the insurance lobby out of it and answer that point specifically.

Patrick McGuire: I answered that question before and I will answer it again. It comes down to what is a fair balance between the solicitor being paid fairly for the extremely pressured work involved in the most high-value cases and safeguards to ensure that the victims do not have to pay too much. We are talking about victims—victims of the most serious accidents.

The bill as currently drafted strikes a fair balance with appropriate safeguards.

The Convener: I will take Mr Castle, and then we will move on.

Brian Castle: I do not have much to add. It is a concern that the committee is right to consider. The Taylor review looked at the issue, and, in contrast to the position in England, Taylor decided that—looking in the round and making a balanced decision as to the best interests of the client, and the overall purpose in securing proper access to justice—he would permit a charge on future damages but rein it right back.

The Convener: I know that Liam McArthur has a supplementary. I have a quick question first. How often do those on the panel advise the client not to proceed with the case because it would be uneconomical?

Patrick McGuire: It is a pity that Dave Moxham cannot be here. As a trade union solicitor at Thompsons, I find that we regularly have to advise our trade union institutional clients on whether they can support a case and, in doing that, we have to look at the prospects of success. Hard decisions regularly have to be made, which—I go back to what Sheriff Principal Taylor said about the asymmetrical relationship—shows that such an imbalance exists not only in relation to individual one-shotters but in relation to the power and financial resources of the organisations that support victims, including trade unions. Such decisions are a regular part of what we do.

The Convener: So there is perhaps some empirical evidence to be had.

Patrick McGuire: Indeed.

Brian Castle: Such things will happen on occasion.

I would like to go back to one of Mr Kerr's questions about the evidence base for why clients would not pursue a claim, and whether the introduction of QOCS would help.

The solicitors in Scotland who are members of MASS will certainly have numerous examples of cases in which a client has started the process of claiming damages and has an offer that the solicitor tells them is inadequate and inappropriately low. Depending on the funding arrangements, the client may say that he hears what the solicitor has said about being entitled to a greater award of compensation but, because of that funding regime, he is not prepared to advance with the risk of a significant adverse costs award in the end.

The Convener: You might actually advise them not to pursue the claim, in some circumstances.

Brian Castle: Yes, in some cases. You have to balance the risk. If we are talking about a black-and-white case in which there is absolute certainty, that is fine. Unfortunately, however, and particularly with litigation, there are seldom certain or black-and-white cases.

The Convener: Please be brief, Mr Conway.

Ronnie Conway: There is no problem with stonewall certainties—we would take such cases on, and we would advise our clients to do so.

Two particular cases resonate with me—

The Convener: I do not think that we have time to go into that kind of detail. Can you give us an idea of how often you would advise people not to proceed, because to do so would be uneconomic?

Ronnie Conway: In the past couple of years, I advised against proceeding in one case in which there had been a fatality. It was an arguable case—a 50-per-center. I have also abandoned a case on day 1, because it was clear that, if the case lost, the costs would overwhelm the pursuer.

The Convener: So there have been two occasions over a certain period.

Ronnie Conway: That does not take into account the cases that do not get started.

The Convener: That is what I am looking at: the cases that do not get started because it would be uneconomic to take them on.

Ronnie Conway: In our daily round, probably about one case in four or five does not get off the ground, because, for various reasons, the prospects are not good enough.

The Convener: Thank you. Liam McArthur has a supplementary; he will then pursue his line of questioning.

Liam McArthur (Orkney Islands) (LD): Going back to Liam Kerr's line of questioning, you will have seen the evidence that we took from the bill team a couple of weeks ago. Figures from the Department for Work and Pensions were quoted that suggest that between 2008 and 2011 personal injury claims rose by 23 per cent south of the border and 7 per cent in Scotland. Indeed, I think that Sheriff Principal Taylor alluded to a compensation culture south of the border that was not reflected north of the border.

However, between 2011 and 2016, there has been a 16 per cent increase in PI claims in Scotland, while the figure for the UK has fallen dramatically to 4 per cent. Although I take Mr McGuire's point about the bill's general principles, those of us who are charged with the responsibility of scrutinising legislation need to understand its basis and the case that is being made for it. We will be hearing from Sheriff Principal Taylor next

month. Although that will be helpful, it appears that the picture has changed quite dramatically since the publication of his report, and it is reasonable for us to seek an understanding of what the trends tell us about what is happening and about disincentives or obstacles in relation to access to justice. I would therefore welcome your comments on that.

Brian Castle: You are right, Mr McArthur. Looking at the CRU figures, which have to be the best guess with regard to the number of personal injury claimants, I think that it is true to say that there has been a percentage increase in claims since Taylor carried out his review.

Liam McArthur: It would be interesting to hear your understanding of the rationale behind that. What has driven it?

Brian Castle: There is an element of clients being more aware of their rights and more willing to assert them, even over such a short period of time. However, you have to put the figures in context. You might say that there has been a 17 per cent rise or whatever, but if you look at the most recent CRU figures alongside the figures in England and Wales—indeed, Mr Conway mentioned figures earlier—you will see that we are still talking about 1,650 people in every 100,000 making a claim in England, while the claims ratio in Scotland is still under 1,000 per 100,000. In fact, the figure is 970 per 100,000. The suggestion that we have something progressing towards full access to justice is not necessarily borne out by those figures, and if we look at the ratio of claimants per 100,000 of the population, we see that we are still some way behind our neighbours in England and Wales.

As I have said, there are empirical studies that say that a majority of people with a valid claim still choose, for whatever reason, not to assert their rights to pursue it.

The main driver of the bill, which is to increase access to justice for valid claimants and allow an increasing proportion of them to assert their rights and get the full and proper compensation to which they are entitled, is good. As a society, we should promulgate it.

Liam McArthur: That is helpful. I have a couple of other questions but they are more related to QOCS, so I will bring them up when we turn to that later.

There seems to be confusion among some of the stakeholders from whom we have heard about liability for paying for actuarial advice, which the bill requires in certain instances. The Government bill team insisted that it would fall to the pursuer's solicitor. Is that your understanding? Even if it is, would the bill benefit from further clarity about precisely where that liability lies?

Ronnie Conway: Certainly, it is my understanding, and it is what Taylor wanted. I thought that it would be covered by section 6(2), which says:

> "The agreement must provide that … the relevant legal services … (including outlays incurred in providing the services)"

are to be paid for by the provider. Whether that could be spelled out in block capitals would be a matter for the committee, but that is certainly how people expect the legislation to turn out.

Liam McArthur: So you do not see that as a problem.

Another issue that has been raised is the suggestion that the pursuer would take the actuarial advice absent his or her solicitor, which seems slightly strange. I would welcome your guidance on whether that is a reasonable stance for the bill to take and what the rationale for it is.

Ronnie Conway: A success fee will be paid only if a lump sum is agreed. Taylor was concerned about the written advice saying one thing and a nod and a wink to the client saying something different. That is why he tried to build in protection for the client that the actuarial advice should be completely independent of the instructing solicitor.

Liam McArthur: So you do not see a problem in enforcing such an arrangement.

Brian Castle: It needs to be clarified. A number of MASS Scotland members were concerned that, if the arrangements fell on the pursuer and the pursuer's firm, that would be another additional cost in the equation. Presumably, it would be a recoverable cost at the end of the day because if it is an essential step in the process, it ought to be treated as a recoverable cost on success, as other outlays would be.

The other slight concern that MASS members in Scotland had, which may or may not be shared by my colleagues on the panel, was the suggestion that the actuary was the final determinant of which road we would go down. In the context of a court action, the framework is that all parties would get an opportunity to feed in their wishes and hopes, there would be an actuarial report and the judge would decide what was in the best interests of all and what the outcome would be. However, the framework proposes that, if a case of value is settled before it gets to court proceedings, an actuary will take a view and that will be the end of the matter.

There has to be some mechanism for an individual client's wishes and circumstances to be taken into account. There absolutely have to be safeguards as well because, if the matter is driven by the solicitor, it will be suggested that self-

interest is driving it because the solicitor wants to charge a success fee for the future element of the damages if it is paid as a lump sum. The MASS membership is slightly worried that there might be a number of reasons to advise an individual client that they would be slightly better off if they took a periodical payment rather than a one-off lump sum, but the client might say, "No—I prefer to do it this way." In those circumstances, there must be a mechanism in which some cognisance is taken of their interests. Quite how we arrange that will have to be a matter for further consideration and, presumably, secondary legislation.

11:00

Ronnie Conway: I say to Brian Castle that there is no reason why that cannot happen. A success fee is chargeable on the future element if the client insists that he wants a lump sum. If you like, the protection is trying to force clients away from lump sums and preventing solicitors from getting a success fee if the advice is otherwise.

Mairi Gougeon (Angus North and Mearns) (SNP): I have some questions about QOCS. Looking at such matters is not my day-to-day job, but I am sure that the panel sees a full variety of cases. One thing that has struck me is that—as I understand it—Sheriff Principal Taylor gave the justification of the David and Goliath scenario for the pursuer and the defenders in the vast majority of cases that panel members would see. However, my point is about the other cases. From looking at the surface, I say that it would strike me as being unfair if I, as an individual, were taken to court by someone, the court found in my favour and not in favour of the pursuer, but I then had to pay the pursuer's legal fees. I would like to hear panel members' views on whether that is a realistic example, or what other examples they can give us to illustrate the scenario.

Patrick McGuire: Sheriff Principal Taylor took that view because in the vast majority of cases an insurer will act for the defender. The scenario in which any of us, or any of our colleagues in the profession, would bring a personal injury claim against an ordinary person is virtually impossible. It is very unlikely because we have to be conscious of the fact that if we are successful, our clients must be able to get the money to which the court says they are entitled. We could not do that and bring a claim against an ordinary member of the public except in a case such as the one that was discussed at the committee's meeting on 5 September, about a half-billionaire. We might contemplate it in such circumstances, but in no others. Therefore, I take Mairi Gougeon's point, but it is so unlikely that there would probably be a danger that the old adage about hard cases making bad law would bleed into the process. Sheriff Principal Taylor got it right.

Mairi Gougeon: I am interested to hear whether anyone else has examples of cases that are not quite that David and Goliath scenario.

Ronnie Conway: I read about the billionaire cyclist example; it is not completely daft, if I may say so. I cannot remember who came up with it. That probably also illustrates the ubiquity of insurance: almost all such people would be insured, one way or another.

The only other example that I can think of is a case in which someone says that I assaulted them but I say that that person assaulted me. Mairi Gougeon is right to say that if QOCS comes in, I would lose the benefit of getting costs back from the person who is suing me. I would be able to raise a separate claim for my own damages. However, I have to say that we are in the realm of completely fanciful examples. To be frank, it seems to me that we should be legislating not about those but about the litigation landscape as it is.

Mairi Gougeon: I thank panel members for those examples. As I said, in looking at the issue on the surface, that was the one thing that jumped out at me. That is why it is important to hear what is actually happening and whether the way in which the situation has been portrayed to us is realistic.

If we consider QOCS together with the introduction of damages-based agreements, what do panel members think the bill will do to the level of claims, and will it also give rise to more spurious claims because it takes all the risk away from the pursuer?

Patrick McGuire: It is very difficult to say how many more cases there will be. I expect that there will be an increase. In many ways, that is the purpose of the approach.

Will there be an increase in spurious claims? I am glad that we are staying away from the term "compensation culture" this week, which I bitterly oppose. I do not think that the bill will lead to an increase in spurious claims. Hamish Goodall addressed that matter quite well in the meeting he had with the committee. The protection is—if I dare say it—us and our colleagues in the profession, because even though the claimant will not at the end of the day lose out and be required to pay legal fees to the other side, we will not pursue spurious claims, because we have a duty to the court, as was said earlier. We always have had, and always will have, that duty, which we take very seriously. Also, we always have had, and always will have, a duty to our profession, which we also take seriously.

More than that—or perhaps less than that—there is a financial imperative. Although the claimant will not lose out, we most certainly would if a claim were spurious, because we would have wasted our money and our time. Running a spurious case might involve court fees, expert fees, fees for reports and so on, which we would simply lose. We are too busy trying to pursue meritorious claims as we run our businesses to waste time on frivolous ones.

At the previous meeting on the matter, there was a question asked about whether claims management companies and/or after-the-event insurers might incentivise and even pay solicitors to run spurious cases. I am happy to respond to that now—and I will try to be polite. That is just not how claims management companies operate. They do not pay solicitors anything; they never have done and they will not. It is not a realistic scenario. Similarly, there is no after-the-event insurance company out there that would pay a solicitor to run a frivolous case in such circumstances, and it would not make financial sense for an insurer to do so. Insurers are a betting shop, in effect, and I do not see how they would ever win in such a scenario. They would constantly be paying out, so that is not a realistic scenario, either.

Mairi Gougeon: Okay.

Brian Castle: Concern was expressed in some of the submissions about an increase in fraudulent claims—that there is a fraudster's charter. I do not see that as a realistic scenario, for a number of reasons. Solicitors have no interest whatever in having any truck with fraudulent claims, which do not benefit pursuers' solicitors in the least.

Of course, there are safeguards in the bill: QOCS would fly off in a case that was evidently fraudulent, and expenses would be paid. There are also provisions for making awards against legal representatives—there is that protection, if someone is running a wholly spurious and fanciful claim. I do not regard the bill as an open invitation to a huge number of spurious and fanciful claims, given the protections, and given that reputable solicitors have no interest in running such cases, because they would only lose money on them.

Mairi Gougeon: Do you think that there are enough safeguards in the bill to prevent an increase in spurious claims?

Brian Castle: Yes.

Patrick McGuire: Yes.

Ronnie Conway: Yes. May I answer somewhat obliquely by recommending the APIL campaign, can the spam, which wants cold calling and nuisance texts to be banned? If there is an engine for fraud in this process, it is the texts that people get that tell them that they are entitled to £3,000 if they have been in an accident, and so on. Such a ban was in the UK Conservative Party manifesto. I understand that the issue is being considered in the House of Lords, in the context of the Financial Guidance and Claims Bill.

A ban would be a simple measure. There are a lot of people out there in Wongaland who live from pay cheque to pay cheque. They get a phone call or text saying, "You've been in an accident, and you must have some kind of injury." Of course, the firm has got the person's mobile number from a repair garage that is paid a referral fee for the number. It must be very tempting for people who are told that it will be easy—

The Convener: We get the picture, Mr Conway. We are pressed for time, so if you could be succinct with your answers, that would be much appreciated.

Ronnie Conway: Can the spam is the answer to a cheat's charter.

Liam Kerr: Very briefly, the justification that Mairi Gougeon has put up for QOCS is the David and Goliath situation. What about the situation in which the pursuer is fully backed by, for example, a trade union? Effectively, that is Goliath versus Goliath. The arms have been equalised. Should QOCS not disapply?

Patrick McGuire: As I said earlier, Mr Kerr, that is not a Goliath versus Goliath situation. Sheriff Principal Taylor took evidence widely and recognised that point. There is a financial imbalance between an insurance company that counts its profits in billions and a trade union that has a fiduciary duty to use its members' dues fairly and appropriately. It is not the same thing.

Liam Kerr: If there were equality of arms—if there were an uninsured defendant, for example—should QOCS disapply?

Patrick McGuire: That goes back to Ms Gougeon's point—I apologise for my pronunciation. The prospect of there ever being a claim brought against an uninsured person is negligible.

An example that makes the point is dog-bite cases, which echoes what Mr Conway said. There are individuals who are insured through home or pet insurance. When someone is injured by a dog and there is insurance, we would look to see whether there was a proper claim. If there was, we could take it forward. There are plenty of people who do not have that type of insurance so, in that circumstance, we would not and could not take a claim forward. QOCS is not going to change that.

The Convener: We still have quite a lot to cover. Liam, please be very brief.

Liam McArthur: I have a couple of very brief questions.

The Convener: It needs to be just one.

Liam McArthur: I will bundle them together, convener.

The Convener: If you could.

Liam McArthur: Mr Conway talked about the need to look at

"the litigation landscape as it is."

You will be aware of the information that I asked the bill team for the other day, which was the proportion of cases in which the defence will seek its legal costs from the pursuer in the event of a successful defence. I am to interested to hear whether you know that figure.

Can you also shed light on the Government's point in the financial memorandum, that

"Defenders will have to balance the cost of going to court with the risk of losing a case. For example, if expenses in a case exceed the expected payout, insurers may settle rather than go to court even if they consider it likely that they will be successful in the case."

The financial memorandum then goes on to say that

"Pursuers are unlikely to raise actions with little prospect of success".

It is difficult to square those two statements. Can you square them for us?

Ronnie Conway: On QOCS, the civil judicial statistics on cases raised show no increase over the past five or six years—there has probably been a decrease. Those are the cases to which QOCS will apply. The CRU figures are the whole balloon, so to speak, and it is only the litigated cases to which QOCS will apply.

If you are asking whether there will be situations in which insurers will make an economic decision to settle a case rather than run it, that happens at present; there are nuisance-value offers and settlements. In significant cases, such a decision is not made.

Liam McArthur: Will there be more of those as a result of the provisions in the bill?

Ronnie Conway: It is impossible to know—

The Convener: Please be succinct, Mr Conway.

Ronnie Conway: It is impossible to know exactly. There is no doubt that there will be more cases raised.

Patrick McGuire: I can try to square the circle, if that will assist. The two quotations are referring to two different parts of the claims process. There is the compulsory pre-action protocol that a claim must go through before a court action is raised, which was spoken about at the committee's meeting on 5 September, and there is the litigation itself.

My reading of the two quotations is that the first relates to the compulsory pre-action protocol through which the parties may settle before going to court. The second relates to a solicitor advising the claimant pursuer to proceed to raise a court action when there is little prospect of success. That is how the circle is squared. We would continue, with the advent of QOCS, not to raise frivolous cases. In terms of the cost to the insurance industry—

11:15

Liam McArthur: I am grateful to you for shedding light on the Government's financial memorandum. Witnesses were not able to do that on 5 September. Is it your expectation that there will be a higher proportion of cases through that pre-action protocol that will settle in the terms that are set out in paragraph 59 of the financial memorandum?

Patrick McGuire: That comes back to some of the questions earlier. It is impossible to tell. The question is whether we are looking at it through the wrong end of the telescope. Some of the challenges to the bill and the entire notion behind it are that all additional claims are frivolous, bad and arising from a compensation culture—I use the term disparagingly—that does not exist. I utterly challenge that view.

If there are more claims, the vast majority are likely to be meritorious. If they increase, that is a good thing. That is what the bill is there to do and that is what we should encourage. It goes back to my point about the primary purpose being to improve access to justice.

The Convener: I know from the recent submissions that there are concerns about the tests in the bill which would determine where QOCS protection is lost. Would you outline some of those concerns and let us know if you have any specific suggestions about how the test could be improved, and the consequences if those concerns are not addressed?

Who would like to start?

Ronnie Conway: I am happy to start. It is not just about cases which are not taken, although there are meritorious cases in the middle which are not.

The expenses rule as presently advised—

The Convener: Could you please speak directly to the three tests—fraudulent behaviour,

reasonableness and abuse of process. We are running out of time, Mr Conway.

Ronnie Conway: I have to make this point.

The Convener: Please do it briefly.

Ronnie Conway: I will. The expenses rule bleeds into every part of the litigation process. At every part of the process is the spectre of an adverse award of expenses, bankruptcy and ruination for the pursuer. In a high-value case, there is a 50 per cent chance of winning and a 50 per cent chance of losing. A low-ball tender comes in. What advice—

The Convener: We have got the picture. We understand what is at stake. Would you cut to the chase, Mr Conway?

Ronnie Conway: If we can turn to—

The Convener: Perhaps someone else could answer if you would like to reflect on your notes.

Patrick McGuire: Having read all three of our submissions and the submissions from the Scottish Trades Union Congress and others, I can say that the concerns relate to the current drafting of section 8(4)(a), which says:

"makes a fraudulent representation in connection with the proceedings,"

and section 8(4)(c), which says:

"otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process."

Although the concerns are phrased slightly differently, they are the same in relation to both tests. They are all about certainty. The entire purpose of Sheriff Principal Taylor's recommendations is the need for certainty. All the trade unions would say that the current drafting does not provide that certainty. It is an open invitation to challenges and to what is called satellite litigation.

Both section 8(4)(a) and section 8(4)(c) need to be tightened. The problem with "a fraudulent representation" is that that could be a single comment that is entirely peripheral to the centre point or significant material part of the claim. The equivalent test in the English rules that have been in place since 2013 is that the entire claim must be fundamentally dishonest. That is the level that we have to get at to reach the very high bar—to refer to Sheriff Principal Taylor—that is required.

In our submission, we suggest that it has to be something that is not peripheral but at the heart of the claim. For alternative forms of words, there are greater minds than mine when it comes to drafting. It could be something that indicates that the entire claim or a material aspect of it is fraudulent. There has to be material proportionality.

Everyone who commented on section 8(4)(c) makes the point that Sheriff Principal Taylor recommended that QOCS should be removed if the Wednesbury test of reasonableness is met. I do not need to go over that as it was in every submission and was canvassed at length at the committee meeting on 5 September. Our submission states that the current drafting does not meet that test. There is a suggestion that the words at the end of the section 8(4)(c)—

"amounts to an abuse of process"—

may be the saving grace, as they suggest that there must be not only unreasonable conduct but an abuse of process, which takes the test to the Wednesbury level.

That may be the case, but we all want to avoid hours upon hours of satellite litigation. The subsection could be framed more tightly, and to make things simpler for everyone it ought to be. A statutory definition of "unreasonable conduct" ought to be in the bill and should be the Wednesbury test verbatim.

The Convener: Thank you. That is comprehensive. Are the other members of the panel happy with that explanation or do they have anything to add?

Ronnie Conway: In the APIL submission, the suggested phraseology regarding "fraudulent representation" is on pages 4 and 5.

The Convener: Thank you. Do you have anything to add, Mr Castle?

Brian Castle: I am happy.

Mary Fee (West Scotland) (Lab): I will be very brief. I want to direct my questions to Mr McGuire, in the absence of Dave Moxham from the STUC.

Will you give the committee some assistance on the issue of unions? I would like a bit of detail on the impact that unions paying court fees up front currently has on the union and its members.

I will roll my questions into one, because that might make things easier. Do unions currently recover fees from members? Could there ever be a situation in which unions would consider referring members to no-win, no-fee solicitors?

In their submissions, the STUC and Thompsons have said that the bill should expressly state that section 10 does not apply to trade unions.

Patrick McGuire: Thank you for that lengthy question.

I have neither the hair nor the beard to stand in the stead of Dave Moxham, but I will do my best to answer on his behalf.

Perhaps we can deal with some of the simpler questions quickly. Section 10 should not apply to

trade unions. It is perfectly clear from Sheriff Principal Taylor's recommendations and from the Scottish Government's response that it is intended to apply only to litigation venture capitalists—I guess that that would be the term—and not to trade unions.

I return to the point about the clarity of drafting. There is an argument that, as currently drafted, section 10 does not apply to trade unions, because of the words:

"but has a financial interest in".

There is an argument that trade unions do not have such a financial interest. Let us not, however, invite satellite litigation. Let us have a clear black-and-white interpretation section.

Here is an even easier answer. Trade unions would never take court fees from their members. Trade union members always receive 100 per cent of their damages. Trade unions would also never refer their members to a claims company. The forefathers of the trade union movement would turn in their graves at that prospect. The answer is an unequivocal no.

We have to find a system that recognises that it is not Goliath versus Goliath. Trade unions are under more and more financial pressure these days because of the sweeping and aggressive changes in law south of the border, many of which are specifically aimed at trade union finances. It is becoming more and more difficult to operate.

Court fees place an additional financial burden on trade unions—it is that plain and simple. The current model of court fees is described in the submissions from Thompsons and the STUC as a pay-as-you-go model. As soon as a person wants to go to court, they have to get their cheque book out and pay for different stages of the process. If and when a trade union client is successful, that money comes back, but the model represents a significant—I use that word deliberately—cash-flow strain on trade unions when they can least do with that problem.

With regard to the recent decision by the Supreme Court that relates to employment tribunal fees, it is interesting that those fees were roundly accepted as inappropriate and an absolute barrier to access to justice, and so they were. Court fees have been an overlooked barrier, but that barrier is absolute and real and is becoming more so as trade union finances become more strained. Thompsons and the STUC propose a simple remodelling—no more, no less—with no reduction in the overall income to the Scottish Government or the civil justice fund. Our model is simply a different way to pay court fees. A move from a pay-as-you-go model to a model of deferred payment at the end would treat court fees in exactly the same way as defenders' costs are treated in the bill. Because the bill deals with access to justice, and especially because of the Supreme Court judgment, the bill is a perfect opportunity to make that change.

Mary Fee: That was very helpful. Thank you.

The Convener: I should say that Dave Moxham, deputy general secretary of the STUC, was due to appear but has been unable to due to ill health. Thank you for answering on his behalf. We move to our final set of questions.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): Good morning, panel. Could there be consequences of formal regulation of claims management companies not being introduced as part of the bill? A few of you have already touched on this important area, but I seek your thoughts and would like to get clarity on it.

Patrick McGuire: Your final words—"as part of the bill"—caused me to hesitate. There is an absolute need to regulate claims management companies, but there is an even greater need at this moment for the bill to be progressed. I would not want one to derail or put on hold the other. If regulating the companies will take place a year down the line and the bill comes into force in the meantime, so be it.

Ben Macpherson: However, just for clarity, do you think that it would be more beneficial if regulation could be introduced in tandem with the bill being passed?

Patrick McGuire: If that could happen right now, that would be a better scenario, but I do not see how the parliamentary timetable could permit that. However, that is not for me to say.

Ben Macpherson: Does anyone else have anything to say on that question? It is quite important. Mr Conway touched on the matter.

Ronnie Conway: I agree with Mr McGuire, but I understand that the matter is to be reviewed in this place in the next few months. In an ideal world, regulation would be introduced at the same time as the bill is passed, but we have already waited since 2013 for this legislation, so I would ask the Parliament to please get on with it. We will deal with the claims management companies as and when.

Ben Macpherson: Your clear view is that we should proceed and take action as quickly as possible.

Definition is important, as was touched on earlier. Do panel members consider that the definition of "relevant legal services" in section 1(2) is wide enough to catch the no-win, no-fee arrangements of claims management companies?

Patrick McGuire: The definition ought to be wide enough, but I go back to my comments about

the need for clarity and the need to avoid satellite legislation. The sensible thing would be to have some form of interpretation section to confirm that it is wide enough. It certainly ought to capture those claims management company arrangements.

Ben Macpherson: However, you would say that a specific tightening of the definition, to use your earlier phraseology, would be advantageous.

Patrick McGuire: A tightening would be helpful.

11:30

Ronnie Conway: We would never like to predict ways in which people might worm their way through legislation, but it seems to me that the phrases "subject of civil proceedings" in section 1(2)(a) and

"in relation to which such proceedings are in contemplation"

in section 1(2)(b) would clearly attract claims management company activities.

Ben Macpherson: Therefore, there is a slight divergence on that point.

Patrick McGuire: I am very cautious, because Thompsons and the trade union movement are part of a wider organisation and movement. The amount of satellite litigation that we have seen over the years because of bills that are exactly like this one makes me extremely cautious. My preferred route would be for a one-liner to be added at stage 2 or, indeed, at stage 3 to put the definition beyond doubt.

The Convener: That concludes our line of questioning, so I thank the panel members for attending. That was a very worthwhile session.

Justice Sub-Committee on Policing (Report Back)

11:31

The Convener: Agenda item 2 is a report on the Justice Sub-Committee on Policing, with feedback from the convener, Mary Fee, on its meeting of 14 September 2017. I refer members to paper 3, which is a note by the clerk.

Mary Fee: On 14 September, the Justice Sub-Committee on Policing took evidence on Police Scotland's internal complaints procedures from Iain Livingstone, deputy chief constable designate of Police Scotland, and Nicola Marchant, deputy chair of the Scottish Police Authority.

The sub-committee was pleased to hear that Police Scotland has shifted its focus from process to people, to ensure that police officers and staff are better supported and have more confidence in Police Scotland's complaints procedures. For the first time, the procedures include a whistleblowing policy and a wellbeing initiative that aims to support staff to deal with a wide range of issues, whether personal, procedural or related to conduct.

The sub-committee looks forward to hearing more detail on how those will impact on supporting officers and staff to help them feel confident that the issues that they raise will be dealt with effectively and confidentially.

The sub-committee's next meeting is scheduled for Thursday 28 September, when it will take evidence from the Cabinet Secretary for Justice on governance of the Scottish Police Authority. I am happy to answer any questions from members.

The Convener: As there are no questions from members, I say that we were pleased that the focus has moved from process to people. We will see whether that is actually realised—that will be the test.

Mary Fee: Yes, that will be the test.

The Convener: Thank you for that report. Our next meeting will take place on Tuesday 26 September 2017, when we will continue to take evidence on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill.

11:32

Meeting continued in private until 12:29.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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