OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 17 March 2020

Session 5

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JUSTICE COMMITTEE

11th Meeting 2020, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP)
*John Finnie (Highlands and Islands) (Green)
*James Kelly (Glasgow) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Jill Clark (Scottish Government)
Ash Denham (Minister for Community Safety)
Hamish Goodall (Scottish Government)
Bill Kidd (Glasgow Anniesland) (SNP) (Committee Substitute)
Jo-anne Tinto (Scottish Government)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 17 March 2020

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning, and welcome to the Justice Committee's 11th meeting in 2020. We have received apologies from Liam McArthur and Rona Mackay, and I welcome Bill Kidd as Rona Mackay's substitute.

Agenda item 1 is a decision on whether to take in private item 8, which is on our work programme. Do we agree to take that item in private?

Members *indicated agreement.*

Subordinate Legislation

Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [Draft]

10:00

The Convener: Agenda item 2 is consideration of an affirmative instrument: the draft Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020. I welcome the Minister for Community Safety, Ash Denham, and her Scottish Government officials: Hamish Goodall, from the civil law and legal system division, and Heather McClure, from the legal directorate.

I refer members to paper 1, which is a note by the clerk and includes submissions received from stakeholders, and I invite the minister to make a short opening statement.

The Minister for Community Safety (Ash Denham): Good morning. The regulations will, for the first time, regulate the use of success fee agreements in Scotland. Success fee agreements, particularly damages-based agreements, are sometimes referred to as no-win, no-fee agreements, whereby the client pays nothing if a claim is lost but pays a percentage of damages achieved to the provider of relevant services if the case is won or settled. Success fee agreements can be used as a means of financing a wide range of civil proceedings, but they are most commonly used in personal injury cases. The vast majority of personal injury claims are now financed in that way, rather than through legal aid.

Success fee agreements represent a major contribution to access to justice, particularly for people who may not be eligible for legal aid and may not be able to finance a claim in any other way. Although damages-based agreements, based on a percentage of the damages achieved, have been in use for some time, solicitors have not until now been able to offer such funding to clients. They have been used by claims management companies, some of which are owned by large firms of solicitors. Section 2 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 now permits solicitors to offer such funding, thus increasing competition.

I draw your attention to regulations 2 and 4 in particular. Regulation 2 sets out caps on the success fee that may be charged under such agreements. The purpose of that is to make the cost of litigation more predictable, thus increasing access to justice through a more accessible and affordable means for people to enforce their legal

rights. The levels of those caps on success fee agreements were recommended by Sheriff Principal James Taylor in his review of the expenses and funding of civil litigation in Scotland.

Regulation 2(6) makes it clear that only one success fee may be charged and regulation 4 sets out what must be contained in success fee agreements in Scotland. Regulation will also be provided for solicitors by the professional rules of the Law Society of Scotland and for claims management companies by the Financial Conduct Authority. General consumer protection legislation will also apply—for example, a cooling-off period will apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

The proposed regulations on success fee agreements are intended to be relatively light touch, and the intention is that the regulations will ensure that the potential costs are clear to would-be litigants and that such persons compare agreements that are broadly similar. I recommend the regulations to the committee.

The Convener: Before I ask for questions from members, could you clarify what you said in your opening statement about claims management companies that are composed of solicitors being the only ones that—if I picked you up rightly—operate no-win, no-fee arrangements? Is that strictly true?

Ash Denham: The majority of companies that operate no-win, no-fee arrangements are claims management companies, which are often owned by firms of solicitors. They are the ones that operate damages-based agreements at the moment.

The Convener: Is it your position that no individual firms—

Ash Denham: Solicitors have not until now been able to offer those arrangements.

The Convener: So none of them has up until now.

Ash Denham: That is correct.

The Convener: I invite questions from members.

Liam Kerr (North East Scotland) (Con): Good morning, minister. For full transparency, I declare an interest up front as a solicitor with a current practising certificate in England and Wales and Scotland, and as an employment law specialist who represents people in employment tribunals.

You have previously told Parliament that the Scottish ministers are committed to the principle of people who have sustained life-changing injuries receiving 100 per cent compensation. Given that premise, how do you justify a success fee that takes part of the compensation for future loss and gives it to the solicitor as a bonus?

Ash Denham: I think that you are asking specifically about the issue of success fees coming out of the future loss payment. Sheriff Principal Taylor considered that approach as part of a careful consideration process that went on for about two and a half years. He has advocated the sliding scale approach, primarily for its simplicity.

We know that most cases do not make it to court. It would be quite difficult to separate out the heads of loss—in fact, I do not believe that that is commonly done.

Liam Kerr: But it could be done.

Ash Denham: It could be done, but it is not done at the moment. Of course, 95 per cent of such actions are settled out of court. When that happens, periodical payments are an option. If periodical payments are included in the arrangement, they are automatically excluded from a calculation of the success fee.

Liam Kerr: Forgive me, but I am not sure whether that answers the question. I will come back to periodical payments.

I will phrase the question in a different way. As I understand it, an injured person’s solicitor already gets paid for the time that they spend on the case and the expenses that they incur. They can then apply for an additional payment of judicial expenses, and I believe that the court usually awards more than 100 per cent of their costs.

If that premise is correct, how do you, as a minister, justify a further payment being taken from the injured person’s compensation award and given to the solicitor as a success fee? Secondly, what evidence is there that a financial incentive is required to get solicitors to take on such cases?

Ash Denham: Sheriff Principal Taylor considered all those points. To address your point about the additional payment, our understanding is that that applies in only a very small number—about 5 per cent—of cases. It is unlikely that a lump sum of less than £0.5 million would include an element of future loss, and when the sum is more than £0.5 million, the fee is restricted to 2.5 per cent.

I will put the issue in context. At the moment, the system is completely unregulated. There are claims management companies out there that we know are charging fees of 25 per cent; indeed, in some cases, fees of up to 33 per cent are being charged. We are simply seeking to regulate that.

I will give the committee an example of how things will work if the regulations are put in place. Let us say that £1 million was awarded as a result of clinical negligence. Currently, a claims

management company might charge a fee of, say, 20 per cent, so in that case the fee would be £200,000. Under the regulations that are in front of the committee, the company would receive a maximum of £72,500. The application of the sliding scale results in a considerable difference.

Liam Kerr: I accept that that is important information, but it is in our papers.

Do you have any evidence that a financial incentive is required to get solicitors to take on cases, especially those involving figures of more than £500,000?

Ash Denham: I understand that Sheriff Principal Taylor considered that and thought that it was a factor, but Hamish Goodall might be able to provide a bit more detail.

Hamish Goodall (Scottish Government): To look at the issue from the point of view of incentivisation is to look at it from the wrong side; we must look at it from the point of view of the client. Unless someone has a lot of money, they will not be able to raise a personal injury action.

At present, the insurance industry has told us that if you suffer a catastrophic personal injury, you will have no difficulty in finding a solicitor or a claims management company to take that claim forward because there will be a big damages payment and therefore the provider of the relevant services will get a big fee. At the other end of the scale, if someone is eligible for legal aid, they will be able to finance their personal injury claim through legal aid, although legal aid financing of such claims now is very rare.

The vast majority of personal injury claims are now being financed by success fee agreements—damages-based agreements. It is about what Sheriff Principal Taylor called the “excluded middle”—people who are not eligible for legal aid, who may not be able to raise an action. They need to have some other means of financing that action, and that is what the success fee agreement provides.

Sheriff Principal Taylor spent two and a half years coming up with the success fee caps and his view is that they represent a fully considered compromise. He had a policy advisory group to advise him, with representatives from the insurance industry, insurance lawyers and pursuer personal injury solicitors. The caps that they came up with are a fully considered compromise; they think that they are fair to everyone. It is intended that not only will the client get the vast majority of the damages that are claimed but the solicitor will get a reasonable return on the risk that they are taking.

You might be interested to know that one firm of solicitors told us that when it was raising a catastrophic personal injury case on behalf of a client, its outlay on the case was £175,000. In order to be able to exercise a person’s legal rights, the solicitor has to get a reasonable return on their outlay.

It is rare—in any jurisdiction in the world—for a pursuer to get 100 per cent of their damages, because they have to pay for their legal advice. Even though you will get your damages from the other side, according to the law, you still have to pay your lawyer. Therefore, you will not get 100 per cent of what you were awarded or what was agreed on in a settlement.

The Convener: I am aware that a lot of the current committee members were not committee members when we looked at the bill that became the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018, and I notice that you have made no reference to the committee’s scrutiny of that bill and the committee’s distinct and firm recommendation that damages for future loss should be protected. Future loss is to cover the expenses that an individual has because of something that has happened—it could be to cover their physical care, their mental care and so on.

The committee was absolutely solid on the point that damages for future loss should be protected. This Scottish statutory instrument says that they are not going to be ring fenced. To quote directly from our stage 1 report on the civil litigation bill,

> “Should damages for future loss not be ring-fenced, then the Committee considers that the court must have the power to make a periodical payment order.”

You have said that periodical payments will be protected, and for good reason, because they are about covering future loss, including lost earnings, to safeguard a person’s wellbeing.

At that time—we are going back to December 2018—the committee also noted that

> “the Scottish Government intends to introduce such a power in its forthcoming Damages Bill. The Committee considers that the provisions of this Bill should not be brought into force until such time as the court has the power to make a periodical payment order.”

That bill is now the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019, but part 2, which gives the power to make those periodical payment orders, has not been brought into force.

It therefore seems to me quite outrageous that we should have before us today an SSI that does not ring fence those future earnings and that the Government has not taken the steps that it easily could—because the legislation is waiting to be brought into force—to protect people through the introduction of periodical payment orders.

10:15

Ash Denham: You make a good point, which I totally take on board. I would make a couple of points in reference to it. First, as I stated before, 95 per cent of personal injury actions—that covers the majority of what we are discussing this morning—do not make it through the court doors. Periodical payments are, therefore, still available as an option in that regard, and those sums of money would obviously not be included in a success fee.

You are also right to say that the periodical payment arrangements were included in the Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019 and that they have not yet been commenced. Of course, that is a matter for the Scottish Civil Justice Council.

The Convener: Could you explain that further?

Ash Denham: It is developing the rules of court. It is working through that on a sequential basis and, unfortunately, it has not given us a timeframe for when it expects to conclude that work.

The Convener: What representation has the Government made, given that it is in a position where it is not approving the ring fencing of those future earnings? Is it acceptable that there has been such a delay? What communication has there been with the Scottish Civil Justice Council?

Hamish Goodall: I am afraid that we are unfamiliar with what steps have been taken in relation to the commencement of that act. It is worth making the point that periodical payment orders can be made only by a court, but only 5 per cent of personal injury actions—

The Convener: You have made that point quite forcefully. However, the point is that you are coming here today to ask us to approve not ring fencing those very important future earnings and it seems that no attempt has been made to find out why there has been delay in implementing part 2 of the 2019 act, which would have solved the problem.

Ash Denham: My understanding of the situation is that the Scottish Civil Justice Council has work pressures and is working through its workload on a sequential basis, and that it has not given us a date for when part 2 of the 2019 act will be commenced.

The Convener: But the Government has not formally written to it to express concern about that.

Ash Denham: The Scottish Civil Justice Council prioritises its own workload, and works through it at its own pace.

The Convener: I remind you that the reason why we are bringing in these measures is to protect people who are involved in that 5 per cent of cases that you mention, who are currently vulnerable. The situation seems unacceptable to me.

John Finnie (Highlands and Islands) (Green): Good morning. The 2018 act was one of the most complex pieces of legislation that I have dealt with in my time in Parliament. We are here not to revisit it, but to deal with some of its consequences.

Minister, I do not know whether you have seen some of the evidence that the committee has received. Thompsons Solicitors says that it fully supports

"both the policy objectives and drafting of Regulations."

I would like you to comment on two specific points. If part of the claim involves the pursuit of a criminal injuries compensation claim, what are the implications of that for solicitors' fees?

Another aspect about which concern has been raised involves circumstances in which a client changes solicitor. How would the fees be divvied up thereafter?

Ash Denham: In a situation in which a client has one solicitor who does some work on the case and then, for whatever reason, the client or the solicitor decides not to proceed with the claim, but, with another provider, the claim goes on to become successful, the regulations ensure that the client will only ever pay one success fee. That is an important principle of this set of regulations.

The cap in respect of criminal injuries is not covered under the regulations. They refer only to civil litigation proceedings.

John Finnie: May I press you on the first point? Where there is a change of solicitor, the suggestion, which does not seem unreasonable, is that each firm receives a fee that is

"proportionate to the amount of work that each contributed to the overall work undertaken to bring the matter to a successful conclusion."

Is the matter adequately covered? Is there a gap in provision?

Hamish Goodall: We understand that, at the moment, it is quite common to include clauses in damages-based agreements whereby if a first provider has concluded that a claim is not going to be successful and withdraws and a second provider or relevant service is successful—and only if they are successful—the client might be liable to the first provider for some of the outlays on the case.

We do not think that that happens very often. If one firm of solicitors thinks that a case is not going to be successful, it is not often that a second firm thinks that the case will be successful.

We are not aware of such provisions causing difficulty at the moment. We consulted on the matter during the winter of 2018-19, and responses were very mixed between people who thought that such an approach should be banned and people who thought that it was fair, because a first provider might well have done a lot of work on a case and thereby contributed to its success, albeit that the success had ultimately been achieved by another provider.

We decided not to put anything on that in the regulations, but of course post-legislative scrutiny of the legislation is due in three years, so if by that time there is evidence that such arrangements are causing difficulty, we can come back and address the matter.

John Finnie: I was going to ask about that, because it will be only in the light of experience of operating the regulations that some of this will become clear. Would the Government be minded to address the issue?

Hamish Goodall: If the evidence is that the provisions are causing difficulty, yes, but as I said, I do not think that such cases often arise.

Liam Kerr: May I address the point that the convener made, perhaps from a slightly different angle?

The success fee applies only when the injured person opts to take compensation as a lump sum. It does not apply, and therefore the compensatory award is not reduced, if it is taken as a periodical payment order. That means that if a solicitor advises their client to take a lump sum award, the solicitor will benefit from the success fee payment. Sheriff Principal Taylor, to whom you referred, minister, told the committee that that created a potential conflict of interests for the solicitor. Are you comfortable with building an inherent conflict of interests into the system? In the context of what the convener said, should the approach be delayed until part 2 of the 2019 act is brought in?

Ash Denham: You might be conflating several issues there. In the event of a settlement of more than £1 million, the solicitor will be required to obtain either the approval of the court, in the case of an award, or a report from an independent actuary, in the case of a settlement, certifying that it is in the best interests of the pursuer that the damages should be paid by way of a lump sum rather than by periodical payment, before the solicitor will be entitled to be paid a success fee from the future loss element of an award of damages. That approach is built in to address the issue that you raised.

Liam Kerr: I am not sure that I followed that, minister—but forgive me, I am slightly deaf in one ear today, so I might not have heard you correctly. Is there not a risk that, as Sheriff Principal Taylor identified, we are building an inherent conflict of interests into the system for the solicitor who is advising on whether to take a lump sum payment, which will yield a success fee, or a periodical payment order, which will not?

Ash Denham: Indeed. That is why Sheriff Principal Taylor advised that the solicitor will be required to get a report from an independent actuary to make sure that the lump sum is in the interests of the pursuer and that a periodical payment would not be better. That should go some way to address the member's concerns.

Liam Kerr: It does, potentially. I will ask the second part of that question again. As the convener suggested, is there not merit in delaying what we have before us today? I heard the representations from Hamish Goodall about the fact that you appear to be beholden to another agency. Would it not be better to delay the regulations until part 2 of the 2019 act is brought in?

Ash Denham: I am looking at it in the wider context. If claims management companies, and their fees, are currently completely unregulated, it is better to approve the regulations, so that they may be regulated. The caps on fees will be enacted and the amounts that solicitors or claims management companies receive will be subject to the caps. The system will be transparent and simple for everyone to understand, and some success fees will be brought down to a more reasonable amount.

Liam Kerr: Thank you.

Hamish Goodall: I will add to that. At the moment, there are two problems with civil litigation. The first is that people fear what they will have to pay their solicitor to pursue their case. The other problem is that they fear what they might have to pay the other side if they lose the case. Part 1 of the 2018 act, on success fee agreements, addresses the first problem. Success fee agreements—and the caps thereon—make what people will have to pay their solicitor to pursue their case predictable. Part 2 of the 2019 act, which is waiting for rules of court from the Scottish Civil Justice Council, will provide for qualified one-way costs shifting. That means that, even if a person loses their personal injury action, they will not be liable for the costs of the other side: the other side is likely to be a large, well-resourced insurance company, whereas the person is Joe Public.

James Kelly (Glasgow) (Lab): I will follow John Finnie's line of questioning in relation to the Thompsons submission on success fees. It looks as though there is an inconsistency in approach in relation to success fees for criminal injuries compensation. Where a success fee applies, the

solicitor's fees can be recovered only from part of the client's damages, whereas, in all other personal injury cases, part of the solicitor's fees can be recovered from the compensator.

Ash Denham: The legislation is concerned only with civil litigation and has nothing to do with criminal injuries compensation, so it is not the appropriate place to make provision regarding criminal injuries compensation.

Hamish Goodall: Sheriff Principal Taylor did not consider criminal injuries compensation in his report. The convener will recall that it was never raised during the six evidence sessions on the bill.

The Convener: The bill referred to civil litigation, so the claims are all civil.

Minister, you said that, if we approve the SSI, some success fees might be brought down to a more reasonable amount. However, because the rules of court have not been produced by the Civil Justice Council—it has delayed them—if a lump sum is paid, future earnings are vulnerable. If solicitors take their fee out of those future earnings, and they advise their client to take a lump sum, there is a potential conflict of interests.

Would you consider going away and looking at the instrument again? It does not have to be approved until 29 March. It seems reasonable for you to go back to the Civil Justice Council to find out the reason for the delay, because it is in a position to enact the legislation. That would allow the court to make periodical payment orders and to protect those valuable future earnings for vulnerable people, who need to be assured that the full amount can be put to the intended purpose.

I ask you to delay the regulations for a week, and to go back and look at them. The committee could then look at them again and decide. At least we would then have the reassurance of knowing that absolutely everything had been done to get what should be happening, with arrangements under part 2 of the 2019 act brought in to allow periodical payments and, crucially, to protect future earnings.

10:30

Ash Denham: I understand what you are saying, and I can see that you are very concerned about the issue. I reiterate that the concerns that the committee has raised are applicable to only around 5 per cent of cases, which is a very small number. It is also important to make it clear that the Scottish Civil Justice Council is not accountable to the Scottish ministers. Obviously, Sheriff Principal Taylor and his policy advisory group looked into the matter over a number of years, and those on both sides of the argument were involved. There is a fully considered compromise on the fees, and implementing the cap will be very beneficial. This is an access to justice issue.

The Convener: The committee scrutinised everything that was done under Sheriff Principal Taylor's recommendations. I remind you that there was a considerable delay from when he first made the recommendations to our getting anywhere near looking at them.

Although more protection may be provided, there is nothing like the protection that should come from the solution that the committee recommended when it produced its stage 1 report all the way back in December 2017. Such protection would allay the committee's fears. The Scottish Civil Justice Council is not accountable to the Scottish Government, but I do not think that quantifying the number as only 5 per cent of cases—the number may be only 5 per cent, but individuals need the money—is a legitimate argument for not going back, double checking and seeing whether there is a reasonable explanation for why the rules of court cannot be brought into force sooner rather than later. Again, I ask you to reflect on that.

Are there any other comments?

Liam Kerr: I have a small point of clarification. The minister said that the concerns apply to only 5 per cent of cases and that that is a very small number. I see that that is 5 per cent against 95 per cent, but can the minister put any flesh on the numbers? How many cases make up that 5 per cent? How many cases are we talking about? What is the financial value of that 5 per cent? Is that information available?

Ash Denham: I am not sure that it is available. Does Hamish Goodall have anything on that?

Hamish Goodall: No, I do not. However, it is a fact that, currently, in 95 per cent of cases, personal periodical payment orders are available if the parties agree to them. At the moment, a court does not have the power to impose a periodical payment order. That is the change that was made in the 2019 act. There can be periodical payment orders at the moment, and apparently the national health service is very keen on paying out damages by that method.

Basically, Sheriff Principal Taylor did not differentiate between lump sum payments for past loss and for future loss. He thought that the system should be as straightforward as possible so, if the money were paid in a lump sum, it would be liable to the calculation of the success fee. He pointed out that settlements are very often made at the door of the court and that, if they are made, they will be broad-brush settlements and the parties will almost certainly not distinguish

between past loss and future loss. If we were to change that situation, there might be satellite litigation between the solicitor and the client because, if there could not be a success fee on future loss and there was a settlement at the door of the court, there might be an argument between the client and the solicitor about which bits should be liable to the success fee.

Sheriff Principal Taylor's rationale was that it is much more straightforward to make the entire lump sum liable to the success fee. However, in cases that are worth more than £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary that it is in the best interests of the pursuer that the damages should be paid by way of a lump sum, rather than as periodical payments. That is in sections 6(4) to 6(8) of the 2018 act.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I am not sure, convener, whether you are proposing that we put off making a decision today or go to a vote, but if the minister remains minded to move her motion, I will be happy to vote for it. I feel reassured by what she has said; it is an issue of access to justice.

You have articulated the concerns very well, convener, as has Liam Kerr. I am pretty sure that they will be taken on board. We have already heard that post-legislative scrutiny is built into the legislation.

In my view, this is an access to justice issue. We have already heard that there have been delays; we should go ahead and make sure that the vast majority of people get what they should.

The Convener: As committee members have no further views to offer—I think that we have exhausted our discussion—we will move to item 3, which is formal consideration of motion S5M-21029. The Delegated Powers and Law Reform Committee has considered and reported on the instrument, and has no comments. The motion will be moved, with an opportunity for formal debate if necessary.

Motion moved,

That the Justice Committee recommends that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] be approved.—[*Ash Denham*].

The Convener: Do members have any questions or comments?

John Finnie: I do not know how many people around the table were involved in this very complicated legislation, and I do not think that the intention of the minister's proposal is to revisit its merits—we are where we are.

I raised two concerns, and I am happy that they will be picked up subsequently. I will repeat the quotation that I read out earlier:

"Thompsons Solicitors fully support both the policy objectives and drafting of Regulations."

In addition, the Law Society of Scotland made a four-line submission, the last two lines of which say that:

"The regulations produced are designed to provide clarity to the profession and protect the public interest."

I am content that we vote on the motion today.

The Convener: I thank Mr Finnie for that comment.

Before we move on, can the minister confirm for me that, for the 95 per cent of cases that do not come to court, periodical payments are very unlikely to be used in settlements?

Ash Denham: No; I think that periodical payments would be more likely to be used in settlements.

The Convener: What is the basis for that?

Hamish Goodall: It just has to be agreed between—

Ash Denham: Is it correct that the officials are not allowed to speak at this point?

The Convener: Yes; that is correct.

Ash Denham: My understanding is that the most appropriate type of settlement is a matter of agreement between the parties.

The Convener: No other member wishes to speak.

I am sufficiently concerned that, rather than the instrument helping to improve the situation to safeguard future earnings, the checks and balances are not there. I asked the minister whether she would consider a delay; she indicated that she will not. In those circumstances, I say with regret that I will vote against the motion.

The question is, that motion S5M-21029 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Allan, Alasdair (Na h-Eileanan an Iar) (SNP)
Finnie, John (Highlands and Islands) (Green)
Kelly, James (Glasgow) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Robison, Shona (Dundee City East) (SNP)

Against

Kerr, Liam (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)

The Convener: The result of the division is: For 6, Against, 2, Abstentions 0.

Motion agreed to,

That the Justice Committee recommends that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 [draft] be approved.

The Convener: Is the committee content to delegate to me the publication of a short factual report on our deliberations?

Members *indicated agreement.*

The Convener: I thank the minister for attending today. I suspend the meeting briefly, for a change of witnesses.

10:39

Meeting suspended.

10:42

On resuming—

Police Pensions (Amendment) (Scotland) Regulations 2020 (SSI 2020/33)

The Convener: Agenda item 4 is consideration of a negative instrument. I refer members to paper 2, which is a note by the clerk. Do members have any comments on the Scottish statutory instrument?

John Finnie: I refer members to my entry in the register of members' interests. I am the recipient of a police pension. Although I do not believe that any of the instrument's provisions will have any implications for me, it is important to put that on the record.

The Convener: That is duly noted.

As there are no other questions or comments, are members content not to make any recommendations to the Parliament on the SSI?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

10:43

The Convener: Our next item of business is a report back on the meeting of the Justice Sub-Committee on Policing that took place on 12 March 2020. I refer members to paper 3, which is a note by the clerk. I invite John Finnie to give the report.

John Finnie: As you say, convener, the sub-committee met on 12 March, when it held an evidence session on policing the United Nations Framework Convention on Climate Change 26th conference of the parties climate summit, which is also known as COP26. The conference is to take place from 9 to 20 November this year at the Scottish Event Campus in Glasgow.

Assistant Chief Constable Bernie Higgins and James Gray, from Police Scotland, provided comprehensive details of the planning and preparations for policing the conference. ACC Higgins provided reassurance that progress had been made on three key areas—funding, governance and risk—which had previously been highlighted to the chief constable as concerns.

Police Scotland is working on the principle of no financial detriment to the service, which has been accepted by Peter Hill, the chief executive of COP26. The United Kingdom Government has confirmed that it will provide marginal cost recovery, which includes the cost of mutual aid from other UK police forces and associated costs, such as accommodation costs.

10:45

The most recent cost estimate for policing the event is £180 million, which is a reduction from the initial indicative cost of £250 million. That will be reviewed on an on-going basis and is subject to independent verification by the Metropolitan Police Service.

ACC Higgins outlined the governance arrangements that are in place and gave an assurance that police unions and staff associations are included in the planning process. There is contingency planning for risks, including the potential risk of the spread of the coronavirus.

ACC Higgins outlined the scale of the event and a number of the challenges. On the issue of peaceful protest, he confirmed that Police Scotland does not classify climate change protesters as a terrorist threat; they are simply classified as climate change protesters.

COP26 is one of the largest conferences ever to be held in Scotland. Therefore, the sub-committee will continue to keep the policing aspects under review.

The Convener: Thank you for that report. As members have no comments, we will move on.

Defamation and Malicious Publication (Scotland) Bill

10:45

The Convener: The next agenda item is an evidence session on the newly introduced Defamation and Malicious Publication (Scotland) Bill. It is an opportunity for us to find out more about the purpose of the bill, which we will scrutinise over the coming weeks. From the Scottish Government's bill team, I welcome Jill Clark, head of the private law unit, and Jo-anne Tinto, a solicitor in the legal directorate.

I refer members to paper 4, which is a paper by the clerk, and paper 5, which is a private paper. I invite Jill or Jo-anne to give us an overview of the bill.

Jill Clark (Scottish Government): The committee is probably aware of the background to the bill, because you have taken evidence from the Scottish Law Commission. The bill emanates from a Scottish Law Commission report that was published in 2017. That was in response to the fact that, following the commission's call for evidence on its ninth programme of law reform, quite a few people suggested that defamation is an area of law that is ripe for reform.

The rationale for reform is that, although defamation litigation has not been particularly common in Scotland in recent years, societal changes such as the increased use of internet communication mean that there is more scope than ever for speedy and potentially unfair damage to reputation.

The commission's 2017 report proposes changes to the law that are generally in line with changes that were made in England and Wales following the commencement of the Defamation Act 2013. One proposal was to introduce a requirement that a right to bring defamation proceedings accrues only if the publication of a statement is to a third party and the publication has caused serious harm. The report also proposed putting on a statutory footing the principle that was laid down by the case of Derbyshire County Council v Times Newspapers Ltd that a public authority has no right at common law to bring proceedings for defamation. The report also proposed putting the common-law defences of veritas and fair statement on a statutory footing; replacing the common law of verbal injury with three statutory provisions on malicious publication; and changing the three-year limitation period to a one-year period.

The Scottish Government carried out its own consultation following the publication of the 2017

report. As a result of that consultation, three additional issues have been included in the bill: a definition of defamation; tightening up on the narrowing of editorial activity; and a provision to allow parties extra time to engage in alternative dispute resolution within the new limitation period.

The Convener: Thank you—that is helpful. The committee was keen to have legislation on the issue. We felt that there was a need for that to deal with issues relating to investigative journalism and online publication. For a number of reasons, we felt that Scotland was lagging behind and that it was time to look at the issue, so we are pleased to see the bill.

How was it determined that the limitation period in which action can be brought will move to one year from three years?

Jill Clark: At the moment, the limitation period is three years and the court has the discretion to extend that if there are good reasons for doing so.

The recommendation to move to one year was in the Scottish Law Commission's report. It was based on the fact that three years is quite a long time for a defamation claim to manifest itself because if a person has been defamed or harmed by that defamation, that would probably come to light fairly quickly. Moving to one year was more consistent with other jurisdictions. We are following the Scottish Law Commission's recommendation.

Dr Alasdair Allan (Na h-Eileanan an Iar) (SNP): The bill aims to introduce new remedies to reflect the fact that in the past there have perhaps not been as many remedies available in Scotland as there have been in England. Can you say a bit more about what is intended?

Jill Clark: Currently, in Scots law, the usual remedy is damages. You can get compensation if you have been defamed and, to an extent, that is it. The bill brings Scots law more into line with other jurisdictions and increases the number of remedies that are available. The bill allows an individual to order the defender to publish a summary of the court's judgment. It allows a settlement statement to be read out in open court and it enables the court to order the operator of a website to remove a defamatory statement and an author, editor or publisher to stop distributing it. Those are all remedies that some people might find more useful than money because they will make it clear that the defamatory statement was incorrect—it sorts that out.

In addition, the bill contains another remedy: the offer to make amends. It restates the law about the offer to make amends, which is something that can happen before you get to legal proceedings. Somebody could hold their hands up and say, "Okay, I should not have written what I wrote about you, so let me say sorry and make it better with a statement." That would take the issue out of the legal forum. The bill strengthens that remedy by making it clear that an offer to make amends is deemed to have been rejected if it is not accepted within a reasonable period of time. You cannot just leave the issue hanging; you have to get on with it and conclude the matter. The bill improves the range of remedies that are available.

Shona Robison (Dundee City East) (SNP): I have a couple of points to raise. The costs involved can be prohibitive for many people who want to take action. Defamation in the internet age is a huge issue. If someone felt that a post that had been put up about them was defamatory, it would be very costly for them to pursue that. It might have been helpful to introduce a take-down procedure as a way of enabling someone to pursue the issue and have the statement removed, or at least to require the poster to provide their contact details or agree to the post being taken down, without huge costs necessarily being involved.

As I understand it, the bill does not do that. It would be helpful to hear a little about why that is. I know that a UK-wide review is coming, but there is no timeframe for that. It seems that the bill provides an opportunity to strengthen the law considerably more than is being proposed. What is the thinking here?

Jill Clark: We have followed the Scottish Law Commission's reasoning and it did not include a take-down procedure in its report either. We have not replicated the take-down procedure because it has the potential to contribute to the removal of legitimate postings. In our view, that would create an incentive for internet intermediaries to stop requiring personal details when users are registered. We think that that is an undesirable outcome, which is not proportionate or balanced.

We understand that the take-down procedure is not used very much and is not very effective down south. There are avenues for people to pursue someone who defames them on the internet and in print. We did not think that the procedure was a proportionate response and we did not have any evidence that it was working. That is why it was not included in the bill.

Shona Robison: You said that there are other avenues but, as I said earlier, they are costly to pursue. If someone does not have the financial means—and everything else that goes with pursuing a defamation case—other avenues need to be open for that person to pursue someone. Does the bill provide that?

Jill Clark: There are other remedies—for example, there is the making of amends. The person could contact someone who has said

something about them and say that they do not agree with it, and it could be settled out of court. The situation does not always have to go to court. We did not think that the UK bill sorted the problem that it was meant to sort, and that is why we have not replicated it.

Shona Robison: Do you have any figures for England? Is Wales in the same position as England? Do you know how many cases have been pursued?

Jill Clark: No.

Shona Robison: Do they have a take-down procedure?

Jill Clark: Yes.

Shona Robison: It would be helpful to have those figures.

Jill Clark: We can see whether we can find some.

The Convener: That would be very helpful.

Jo-anne Tinto (Scottish Government): The main thrust of the bill is to balance the right to reputation and the right to freedom of expression. Using the take-down notification service would obviously be a hindrance to freedom of expression and would not necessarily be done in an open forum. It means that an internet service provider could be asked, without open discussion, to take down somebody's freedom of expression when perhaps it is legitimate. An ISP would have to make that decision. If someone says, "I have been defamed," would that be the correct and appropriate way to do that? The bill tries to go towards the freedom of expression side of things. To reiterate what Jill Clark said, the take-down notice is used very rarely because the process, which involves contacting an ISP to get them to take something down, is quite cumbersome.

Shona Robison: Do you not see that the flipside of that is that someone could claim the right to freedom of expression after saying something untruthful and defamatory about someone else, in the full knowledge that the cost of their doing something about it would be prohibitive? So, they will keep doing it—surely that cannot be right.

Jo-anne Tinto: That is part of the balancing process; it is quite a difficult balance.

Jill Clark: That is the position now.

Shona Robison: Yes—that is why I asked whether a take-down procedure would help to at least give remedy to someone who is not in a financial position to go to court. I understand about freedom of expression, but if someone is saying something about someone else that is blatantly defamatory, I assume that we agree that freedom of speech does not extend to someone saying whatever they want about someone because they know that there will be no consequences. The take-down procedure would at least provide a mechanism to someone who does not have the financial means to go to court. We will have to pursue that, but it would be helpful if you could provide some of the information from England and Wales.

Jill Clark: One of the remedies is that the court can be asked to get someone to stop circulating something or to remove it via that process.

Shona Robison: But the person would have to pay for that.

Jill Clark: It would not be like going to a court case; it would mean applying to the court for an interdict.

Shona Robison: But they would have to employ a lawyer to do that.

Jill Clark: Probably, yes. We take your point and will try to find out more about that.

James Kelly: I very much agree with the points that Shona Robison made and I want to pursue the same issue.

Let me tackle the question from a slightly different perspective. We have all seen the growth of the internet age and social media; although it is a fantastic platform for information and the exchange of opinions, one of the downsides is the extension of the ability for people to make defamatory statements without any proper recourse being available. We are seeing an extension of the platform being used for defamatory statements, and you made the argument about the requirement for a balance between freedom of expression and people not making defamatory statements. You seem to be saying that the bill is more in favour of freedom of expression. My concern is that the evidence shows that the internet is being used to allow people to make defamatory statements without proper recourse and the bill needs to contain a proper mechanism that will restrict those defamatory statements.

11:00

Jill Clark: The provisions in the bill would apply equally to things that are said on a website or the internet as they would to things that are said in print. The same balances are there in the bill. Other avenues might also be open to people. You might not be being defamed on a website but if somebody is targeting you with hate correspondence or that kind of thing, there are other legal avenues for addressing that.

James Kelly: Has any assessment been made of the number of cases or potential cases on the internet? How will what is being proposed reduce the number of incidents?

Jill Clark: There is very little data on defamation cases. We know some of the numbers. The Scottish Parliament information centre briefing includes some numbers of cases that get to court but we do not know about the cases that never get to court or which have gone off-grid. Very little data is available.

James Kelly: The real issue is the number of cases that do not get to court. Even a cursory glance shows that this is a major issue and I think that the committee will return to it.

John Finnie: James Kelly largely covered the point that I was going to raise. There are remedies short of going to court to get individuals to remove defamatory statements—I speak from personal experience. However, they are costly.

Is there any background on the availability of appropriate legal advice? Not every lawyer is prepared to provide the appropriate advice. Internet law seems to be viewed as a bit of a specialism.

Jill Clark: It is a specialism. Because we do not have a lot of cases, it has been difficult to build up availability in Scotland. However, the committee heard from some of the specialist defamation solicitors when they came to your round-table discussion. They are out there. Some of them implied that they will give people advice quite freely, at least initially, so it is there. The Law Society can point people in the direction of solicitors who have the necessary expertise.

John Finnie: The question of libel tourism has also been referred to. Is the bill likely to have any implications for that?

Jill Clark: I do not think that there is any libel tourism in Scotland. It is not seen as an attractive jurisdiction in which to take a defamation case. There was an issue in England and Wales and the Defamation Act 2013 was an attempt to address that.

If we go in line with what is more or less happening in England and Wales and make the other changes, I do not expect that to open us up to libel tourism. We are certainly not aware that there is any at the moment.

Dr Allan: My question is almost the mirror image of that point about libel tourism, and I am just asking it out of interest. If a Scot defames a Scot online and the defence that it is on a server somewhere in South America is not available, I presume that some thought has been given to how the law can be enforced when people use that kind of spurious excuse.

Jill Clark: At the moment, a newspaper could be printed in England but purchased in Scotland, so if your defamation happens here, you can raise your action here. Jo-anne Tinto might be better placed to say something about that.

Jo-anne Tinto: That feeds into what we were saying about the take-down notices. Even if there is a judgment here in Scotland, getting a server in South America to take down that material will be difficult. However, we are not looking to go beyond the borders here. People can raise defamation cases here not only if they live here and the defamation has occurred here but if they live in Europe, for example. The difficulty is that we are living in an international world with the internet, which works across borders, and it makes things a bit more complicated when we are trying to legislate for something that cuts across that.

The Convener: As there are no more comments or questions for the bill team, I thank you both for attending. We look forward to dealing with the bill and scrutinising it in due course.

That concludes the public part of today's meeting. Our next meeting will be on Tuesday 24 March, when we will continue our consideration of the Defamation and Malicious Publication (Scotland) Bill. We move into private session.

11:06

Meeting continued in private until 11:47.

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