JUSTICE 1 COMMITTEE

Wednesday 29 November 2006

Session 2

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by Astron.

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RIGHTS OF RELATIVES TO DAMAGES (MESOTHELIOMA) (SCOTLAND) BILL: STAGE 1 4089

JUSTICE 1 COMMITTEE
† 46th Meeting 2006, Session 2

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Stewart Stevenson (Banff and Buchan) (SNP)

COMMITTEE MEMBERS

*Marlyn Glen (North East Scotland) (Lab)
*Mr Bruce McFee (West of Scotland) (SNP)
*Margaret Mitchell (Central Scotland) (Con)
*Mrs Mary Mulligan (Linlithgow) (Lab)
*Mike Pringle (Edinburgh South) (LD)

COMMITTEE SUBSTITUTES

Brian Adam (Aberdeen North) (SNP)
Bill Aitken (Glasgow) (Con)
Karen Gillon (Clydesdale) (Lab)
Mr Jim Wallace (Orkney) (LD)

*attended

THE FOLLOWING ALSO ATTENDED

Lorna Brownlee (Scottish Executive Justice Department)
Paul Cackette (Scottish Executive Justice Department)
Bob Cockburn (Scottish Court Service)
Alison Fraser (Scottish Executive Legal and Parliamentary Services)
Anne Hampson (Scottish Executive Justice Department)

CLERK TO THE COMMITTEE

Callum Thomson

SENIOR ASSISTANT CLERKS

Euan Donald
Douglas Wands

ASSISTANT CLERK

Lewis McNaughton

LOCATION

Committee Room 2

† 45th Meeting 2006, Session 2—held in private.

Scottish Parliament

Justice 1 Committee

Wednesday 29 November 2006

[THE CONVENER *opened the meeting at 10:05*]

Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill: Stage 1

The Convener (Pauline McNeill): Good morning and welcome to the 46th meeting in 2006 of the Justice 1 Committee. All members are present, so we have no apologies.

Item 1 is consideration at stage 1 of the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill, which is a new bill. I welcome the officials from the Scottish Executive bill team and Paul Cackette, who is head of the civil justice division of the Scottish Executive Justice Department. Paul will do the rest of the introductions.

Paul Cackette (Scottish Executive Justice Department): Good morning, and thank you for the opportunity to give evidence to the committee. I will ask Lorna Brownlee, who is the leader of the bill team, to make an introductory statement to set out the context of the bill. Lorna is assisted by Anne Hampson, who has also been working within the Justice Department on the bill. On my immediate right is Alison Fraser, who is a solicitor from the office of the solicitor to the Scottish Executive. Alison is the bill team's lawyer and gives legal advice on the bill. On her right is Bob Cockburn, who is the deputy principal clerk of session at the Court of Session. We asked him to be available to answer questions this morning because we are aware that some of the issues that arise from the bill relate to practices in the Court of Session and the way in which actions on mesothelioma are progressed. He can answer questions on court procedures.

Lorna Brownlee (Scottish Executive Justice Department): The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill is unusual in several respects. It is very short, and it was introduced to Parliament quickly, just 14 weeks after the Minister for Parliamentary Business announced that the Executive would introduce a bill on the matter. The bill will affect the small number of people who suffer from mesothelioma and their families.

The context for this unusual bill is that, under the Damages (Scotland) Act 1976, when a person dies as a result of personal injuries, their relatives may be entitled to claim damages for their patrimonial and non-patrimonial loss. Patrimonial damages are awarded for loss of financial support, and non-patrimonial damages are awarded in respect of distress due to the suffering of the injured person before death, grief and sorrow at the death of the injured person and loss of the deceased's society and guidance.

Under section 1(4) of the 1976 act, only relatives who are members of the deceased's immediate family can claim damages for non-patrimonial loss. However, under section 1(2) of the 1976 act, relatives' claims are extinguished if the victim settles their own claim in full before death and the defender's liability has been discharged.

The Damages (Scotland) Act 1993 amended the 1976 act to allow the executor to claim for the sufferer's solatium to the date of death. Solatium is pain and suffering and the expectation of loss of life. Previously, the claim for solatium died with the sufferer. The 1993 act also amended section 1(4) of the 1976 act to replace the previous loss of society award for relatives with the three aspects of claims for non-patrimonial loss that I mentioned.

Broadly speaking, the payments that are made under the various aspects of a damages claim are similar, regardless of whether settlement is made before the sufferer's death or afterwards in relation to claims by the executor and relatives, apart from payments that are made to relatives under section 1(4) of the 1976 act for their non-patrimonial loss. The changes that I have described mean that section 1(4) damages constitute an additional amount—which can be substantial—that is paid to the immediate family only if the sufferer does not settle their claim in full prior to death.

A mesothelioma sufferer therefore faces a dilemma: either they pursue their own damages claim before they die, or they do not, so that their executor and relatives can claim awards that total more than the award of damages to which the sufferer was entitled. About 80 per cent of sufferers are not pursuing their own claims, in order not to disadvantage their families.

The straightforward and specific purpose of the bill is to remove that dilemma for mesothelioma sufferers. It will disapply section 1(2) of the 1976 act so as to allow the immediate family of a mesothelioma sufferer to claim damages for non-patrimonial loss, under section 1(4) of that act, after the sufferer dies, irrespective of whether the deceased has already recovered damages or obtained a settlement.

We carried out a consultation on our proposals. The majority of respondents agreed that the law creates a problem for mesothelioma sufferers and their families in relation to relatives' claims for non-patrimonial loss and that the way to deal with that

is by the proposed amendment to section 1(2) of the 1976 act. The majority of respondents agreed that the bill should be confined to mesothelioma.

In considering the mesothelioma-specific nature of the bill, it is necessary to be clear about what it is and is not designed to do. The purpose of the bill is to remove the dilemma that mesothelioma sufferers face in relation to whether to pursue a damages claim. They face that dilemma because of a unique combination of features relating to mesothelioma. It is almost invariably caused by exposure to asbestos; in the other cases—which probably involve about one in a million people—negligence does not arise. Under current medical science, there is no treatment that will cure anyone with the disease. The average life expectancy of someone who has the disease is 14 months.

For people diagnosed with mesothelioma, the issue of how to handle a compensation claim arises immediately. They know their likely life expectancy and that their disease was caused by exposure to asbestos, and—this is important—under the Fairchild exception they do not need to meet the normal test of causation in civil actions. The causal requirement is satisfied if an employer's wrongful conduct materially increased the risk of the person contracting mesothelioma.

The Executive believes that no other class of personal injury shares those characteristics and, typically, puts the sufferer in a dilemma in relation to relatives' compensation claims. Most mesothelioma sufferers are not pursuing their own claims, in order not to disadvantage their relatives. No one involved in making personal injury claims has told us that any other groups of claimants face that dilemma and are forgoing their own claims in favour of their relatives' claims. We have introduced the bill to address that specific problem.

In our consultation paper, we suggested that ministers might have the power to extend the new provision to apply to other diseases or conditions if necessary. There was a mixed response to that from consultees. If an order-making power were included, it would be restricted to diseases that share the characteristics of mesothelioma. We see no likelihood of such a power being needed in the foreseeable future, and ministers decided that the bill should not contain it.

A crucial reason why the bill is mesothelioma specific and why we do not see a need for an order-making power is that it is intended to remove a problem that the law causes for a particular group of people; it is not intended to encroach into the law itself any more than is necessary to address the identified problem. In other words, the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives' rights are extinguished if the deceased settles their claim in full prior to death.

However, in considering the need to take this action, we have identified areas of the law of damages that should be reviewed. The evolution of the law relating to damages recoverable in respect of a death resulting from personal injury—and to damages recoverable by relatives of an injured person—has resulted in provisions that are complex and which, together with practice and procedures, can have unintended consequences.

Ministers have therefore asked the Scottish Law Commission to undertake a review of the 1976 act and the relevant elements of the Administration of Justice Act 1982, taking into account underlying practices and procedures. The review will consider the position of other personal injury victims and the continuing appropriateness of the exclusion of relatives' rights in section 1(2) of the 1976 act.

10:15

Some respondents to the consultation expressed the view that the change in the law in the bill is not necessary because the problem could be addressed through the greater use of interim awards of damages and sisting of cases until after the death of the person with mesothelioma. We do not consider that that would be a reliable solution for mesothelioma sufferers. If interim awards were to become a useful way to provide some damages due to a mesothelioma sufferer it would require changes in behaviour on the part of pursuers and defenders. That must be the case, because there were only nine awards of interim damages in the year to 31 March 2006. If that approach provided an acceptable solution, people would be using it. Ministers did not feel able to forgo this opportunity to address the problem through a change in the law because of the existence of a little-used procedural mechanism.

The Executive has introduced this short bill to address urgently and specifically a problem encountered by mesothelioma sufferers who are choosing not to pursue their own claims so that their family can benefit from larger awards. The bill is the only sure way to address the problem. We have introduced it in the knowledge that a wider look at this area of the law is necessary and is being carried out by the Scottish Law Commission. We think that that two-pronged approach is the correct way to proceed.

The Convener: That was a helpful and succinct summary.

Marlyn Glen (North East Scotland) (Lab): Lorna Brownlee's introduction was detailed and helpful. She has probably answered my question already. I want to know about the development of

the bill, including the implications of the Coulsfield report in the process. Would the witnesses like to add anything to what Lorna Brownlee has said already?

Lorna Brownlee: Part of the background to the bill is the campaigning that has taken place and the representations that have been made—not least to Parliament through Des McNulty MSP.

A feature of the dilemma is that it is now possible that sufferers' own claims are settled more quickly than they used to be as a result of the Coulsfield rules. That is one of a number of factors that come together and contribute to the dilemma. My colleagues may like to say more about Coulsfield.

The Convener: I would like to say something about that before we go any further. Claims are being settled more quickly as a result of the Coulsfield rules, but it was a report by the previous Justice 2 Committee, via Lord Cullen, that agreed a short procedure through Coulsfield. I do not know whether you were aware of that. The previous Justice 2 Committee specifically negotiated on the back of the Coulsfield reforms that mesothelioma sufferers only could apply to the court for a shortened procedure. My understanding is that one of the reasons why sufferers are coming through the queue more quickly is because the procedure is so much shorter.

Bob Cockburn (Scottish Court Service): There are two separate issues. The Coulsfield rules were developed several years ago—Lord Coulsfield received his remit in 1997. The rules are about tackling delays in relation to personal injury claims more generally, and not just mesothelioma cases. Therefore, the reforms of the procedures are actually quite separate from this legislation.

The Convener: Perhaps you are not aware of this, but there are three issues. There is the legislation; there is the Coulsfield report, which started in 1997, although I do not know when it concluded—

Bob Cockburn: In 2003.

The Convener: Mary Mulligan and Margaret Ewing were involved at one point as reporters. Stewart Stevenson was also involved. Because the previous Justice 2 Committee was so busy at the time, it was agreed that Bill Aitken and I would do the negotiations with Lord Cullen. You will know that, at that time, there was a preliminary court that was run by Lord Mackay, with a specific agreement that mesothelioma sufferers could apply for a shortened process via the Coulsfield reforms. That is how that process came about.

Bob Cockburn: That remains the case. It is still possible to seek acceleration of the procedure under the Coulsfield rules.

Stewart Stevenson (Banff and Buchan) (SNP): I seek clarification on an issue that Lorna Brownlee mentioned in her opening remarks. I heard her say that only one in a million cases of mesothelioma is not asbestos derived. According to the briefing that we have from the Scottish Parliament information centre, the Health and Safety Executive states that there is a known exposure to asbestos in 80 per cent of cases. I accept that that may be a different issue. The British Lung Foundation states that more than 90 per cent of cases of mesothelioma derive from asbestos exposure. One in a million is a rather different figure. Is the difference simply because the 80 per cent and 90 per cent figures are about cases in which we know of the exposure, so the point is not that there is no exposure in the other 20 per cent or 10 per cent of cases? Is it the medical view that only one case of mesothelioma in a million involves no exposure to asbestos? The figures from the British Lung Foundation and the Health and Safety Executive may not be in opposition to your figure.

Lorna Brownlee: Those figures relate to the totality of mesothelioma cases. The one in a million figure is one that I noticed on rereading the Fairchild judgment—their lordships used the figure in relation to cases that arise from a cause other than asbestos. I think that the figure means one in a million in the total population.

Stewart Stevenson: Oh. So, for clarification, the prevalence of mesothelioma in its various forms is one per million population.

Lorna Brownlee: No—the prevalence of mesothelioma in the population from a cause other than asbestos is one in a million.

Mr Bruce McFee (West of Scotland) (SNP): So, in Scotland, we could expect there to be five cases of mesothelioma that are not related to asbestos.

Lorna Brownlee: That would be the logical conclusion.

Stewart Stevenson: At the peak rate of 2,500 cases, the five cases that we would expect—using the one in a million figure—that are not related to exposure to asbestos would be a small percentage. I am struggling to do the arithmetic.

Mike Pringle (Edinburgh South) (LD): It is 2.5 per cent.

Stewart Stevenson: No; it is much less than that—it is one in 500, or 0.2 per cent.

Lorna Brownlee: One important point about cases that are not a result of asbestos is that they

do not arise from negligent conduct on anybody's part.

Stewart Stevenson: I was not going there. I was simply pursuing the medical issue. To be absolutely clear on the record, mesothelioma is almost never—but not never—derived from a cause other than exposure to asbestos.

Lorna Brownlee: Correct.

Stewart Stevenson: That is all that I wanted to know.

Margaret Mitchell (Central Scotland) (Con): It would be helpful to the committee if you gave an outline of any discussions or progress on resolving the issues between the Administrations at Westminster and Holyrood.

Lorna Brownlee: The bill deals with an area of devolved law, but we have of course had discussions with colleagues in England, as they are interested in developments in the law in Scotland. There are no outstanding issues of policy between the Administrations in that respect.

Margaret Mitchell: The question really stems from the debate in the Parliament on 29 June on a legislative consent motion on the Compensation Bill. Are you saying that nothing in United Kingdom legislation will be affected by the bill and that there is nothing further on which we must consult Westminster?

Lorna Brownlee: That legislative consent motion related to the separate issue of joint and several liability. The Parliament decided unanimously that the legislative consent motion was the right way in which to proceed on that. There is no issue outstanding with Whitehall in relation to the matter with which the bill deals.

Margaret Mitchell: So there are no on-going discussions with Westminster about any way in which the bill would impact on reserved powers.

Lorna Brownlee: There are on-going discussions in Whitehall on ministers' general wish to improve the processing of claims from mesothelioma sufferers. For example, the Department for Work and Pensions has work in hand in relation to better handling of claims for benefits. A number of steps are being taken to improve matters for mesothelioma sufferers, but there are no issues outstanding between the Administrations.

Margaret Mitchell: Tom McCabe said:

"Action is proceeding in a joined-up way on a wide front, across the responsibilities of the Scottish and Westminster Administrations."—[*Official Report*, 3 June 2004; c 8998.]

Lorna Brownlee: That comment was made during an earlier debate. The background to that statement may have been health matters—possible treatments and so on.

Mr McFee: I understand that the intention of the Compensation Act 2006, which was considered at Westminster, was to allow an individual who was claiming compensation to claim from one employer, rather than to have to have joint liability admitted. My father was in the shipyards, and it was extremely common for people to work for a number of different companies, depending on the stage that had been reached in building a ship. In those days a person could leave work on a Friday and start work with someone else on a Monday. They could be exposed to asbestos, as my father was, on a number of occasions. Under the 2006 act, people can proceed against just one employer and need not get all the employers to pool their liability. That is very important for mesothelioma sufferers, because it is difficult to get companies that no longer exist to admit liability.

Paul Cackette: There is a particular issue with mesothelioma as opposed to other asbestos-related illnesses, because it is accepted that mesothelioma is a one-exposure disease. A person may be suffering from the disease because of one event, although they may have worked in a number of places over a number of years. Because it is not medically possible to establish exactly when a person contracted the illness, it was extremely difficult—under traditional delict and damages law, impossible—for a pursuer who had a number of employers to prove liability against any of them. That gave rise to the Fairchild exception, which meant that there was no need to prove specifically that one person had caused the harm, when a range of employers were potentially responsible. However, the case of Barker v Corus, which followed that, raised the issue of joint and several liability. As a consequence, the UK Government, supported by a legislative consent motion in the Scottish Parliament, effected the reverse of that decision, to allow the pursuer to proceed and to obtain damages on a joint and several basis.

Mr McFee: So that is the link between the two pieces of legislation.

Paul Cackette: Joint and several liability is the link. The legislative consent motion that was agreed to in June was about that. The bill relates to the same disease but addresses a different problem.

Mr McFee: Indeed, but the issue of joint and several liability was a major hurdle for us to get over before reaching this point.

Paul Cackette: Indeed.

Stewart Stevenson: I want to focus on the response to the Executive consultation from the Association of British Insurers, which suggests

that the alternative process of sisting could be used. In her opening remarks, Lorna Brownlee indicated that there have been only nine examples of that.

Can you tell us about the costs and difficulties involved in a person raising an action and their relatives raising a separate action after their death, compared with those involved in a person raising an action, getting interim damages and sisting the action, which is then continued until after their death—or do we not know about that yet?

10:30

Paul Cackette: On costs, if the bill is passed, it could result in two court actions rather than one, depending on how the litigants conduct the litigation. One set of proceedings would be to resolve the dilemma, which the victim may wish to do before he or she dies. Then, because the solatium related to death would be finalised only on death, the relatives would raise a separate action. Therefore, one possible outcome is that there would be two sets of litigation, with all the consequences that that would have.

It depends to a certain extent on how the pursuers, the defenders and their insurers react to the change in legislation. In order to minimise the risk of double litigation they might move in future to greater use of interim damages, but it is hard for us to say. I know that you will take evidence next week from those who deal with such cases in practice. They may be better placed to advise you on the situation. As Lorna Brownlee said, our experience is that interim damages are rarely used in the cases that are proceeded with in the person's lifetime. For whatever reason, interim damages are not considered an acceptable way to resolve the dilemma.

Stewart Stevenson: In any event, is it correct to say that the bill in no way removes any currently available approach, such as raising an action while the person is alive, sisting it and then continuing the action after their death? The bill merely creates an additional option for which there is, in my humble opinion, a strong case.

Paul Cackette: Yes. Rules are in place that allow such an approach to be taken and nothing in the bill would stop that option being pursued if that is what the parties chose to do.

Mr McFee: Stewart Stevenson is probably driving at the so-called solution put forward by the insurance industry, which was that, rather than find themselves in the dilemma that people who are suffering from mesothelioma are currently in, someone could begin a case and sist it. Stewart Stevenson's question was about the cost to the court system if people pursued that route rather than the option that is before us in the bill.

Stewart Stevenson: I was asking about the costs to all parties.

Paul Cackette: If the process was agreed by the parties, a payment of interim damages was made and the court was willing to agree to the sist, I think that there would not be additional legal costs—certainly, the cost would not be as much as it would be if a separate action proceeded.

An issue that arises with sisting—I am not aware whether it has been tested with the courts yet—is that in recent years the courts have generally tended to be more reluctant to agree sists without good cause being shown, in order to ensure that cases are managed properly. Timetabling to get resolution as quickly as possible, in accordance with chapter 43 of the Court of Session rules, has tended to mean that courts are even more reluctant to agree sists. That is the context and the situation that is developing in cases of this nature. A sist is a possible option, but it is for courts to decide; a court may or may not grant a sist, whatever the parties ask for.

Mr McFee: Is it your view that sisting might be a cumbersome way of addressing the problem?

Paul Cackette: I am not sure that I would go so far as to say that it is cumbersome. It is a way of proceeding. I do not know whether Bob Cockburn has any views on the way in which sisting is used in the context of the Coulsfield rules. I am not sure that I would say that it is cumbersome, but judges, who are sensibly driven by the rules to keep programmes on schedule, have not tended to encourage sisting.

Bob Cockburn: It is a difficult question for us to answer, because essentially it is for the court to decide whether to grant a sist. It is certainly an option, but a lengthy sist is inconsistent in some ways with the ethos of the Coulsfield reforms, which is all about setting the end point right at the start of litigation and working towards that end point. If a sist was granted and took the proceedings beyond the end point that the court had set for the case, that might become a problem for the court. It is a matter for judicial discretion.

Mr McFee: It would at best introduce a degree of uncertainty into the process, in that you could not second-guess what the decision of the court would be in any particular case.

Bob Cockburn: Yes. That is fair.

Paul Cackette: That is the risk that arises.

Mr McFee: The Forum of Insurance Lawyers, in its response to the Scottish Executive's consultation, argued that the consultation was predicated on an incorrect premise. The forum said that the victim does not, by accepting any damages, prevent his family from claiming for non-patrimonial loss. How do you respond to that?

Paul Cackette: There are a number of aspects to that. To a certain extent, our response is the answer that Lorna Brownlee gave earlier. The proof of the pudding is in the eating: interim damages are not used to any significant extent at present and, if they were a good way forward, we might expect them to be used a little bit more.

In theory at least, interim damages are potentially difficult for the court to address because, to make an award of interim damages, it would have to accept that a payment ought to be made even though the case was not yet proven. The case would not have got to a proof and, as anyone who is involved in litigation is aware, even the most watertight case is not guaranteed to succeed, so the court would have quite a difficult task.

The other dimension is that, if defenders were willing to agree to make interim damages payments, there would be no need for the court to consider the case. The parties could agree interim damages between them, the payment could be made without troubling the judge and then the matter could be resolved later. If a judge ends up being asked to make an interim award, it is because the defender objects to it; if the defender did not object, the parties would just agree damages between them.

The difficulty for the court with awarding interim damages lies not only in having to make an interim award where liability is not admitted, but in having to do it in the face of the defender saying that they do not agree with an award.

Mr McFee: That is interesting.

Mrs Mary Mulligan (Linlithgow) (Lab): In her opening statement, Lorna Brownlee referred to the Executive's decision not to include a power to extend the bill's provisions to any other conditions. I ask her to say a little more about the basis for that decision.

Lorna Brownlee: Ministers wished there to be no doubt about the situations that might give rise to the use of such a power. Such situations would be similar to the situation in which people with mesothelioma find themselves. We took the view that if any condition was going to emerge that arose from negligence, and on which the medical consensus as to cause and outcome would be as it is with mesothelioma, we would already know about it, because such things take a long time to develop.

On reflection and in the light of consultation, we felt that it would be difficult to make a case to the Parliament for such a power and to set out for you clear criteria for its use if we did not have a clear view of the need for it. We also felt that there was a risk that, if we allowed for the bill's coverage to be extended, concerns about that power might divert attention from the bill's purpose. Without a clear need for such a power, we did not consider it sensible to provide a diversion from the bill's main purpose, which was to address a specific, identified problem.

Mrs Mulligan: I notice from the consultation that seven parties agreed that you should have the power. Did any of them mention anything that they thought could be encompassed within it at some point in the future?

Lorna Brownlee: Yes. Some parties mentioned asbestos-related lung cancer as a possible addition, which we considered because it was raised with us. However, as you might know, asbestos-related lung cancer is clinically indistinguishable from other lung cancers and probably about 3 per cent of lung cancers are attributable to asbestos inhalation. That puts asbestos-related lung cancer sufferers in a very different position from mesothelioma sufferers in relation to damages claims.

Also, although asbestos-related lung cancer was mentioned as something that might be added, we were not told that people who suffer from it are forgoing making their own claims. The purpose of the bill is to address the dilemma that mesothelioma sufferers face.

We agree that lung cancer is a distressing and horrible condition that is caused in some cases by asbestos inhalation, but in the context of the bill we do not think that it is in the same category as mesothelioma.

Mrs Mulligan: Do people with asbestos-related lung cancer go through the same procedure to claim damages?

Lorna Brownlee: I refer to the point that Paul Cackette made earlier. Next week's witnesses might be more able to answer your question. When we examined the cases that were settled in court over a period of 35 years, we found that lung cancer was mentioned in 58 cases. However, in all but two cases it was mentioned as a possible increased risk for people who had been exposed to asbestos. There were only two cases in which the person had actually contracted asbestos-related lung cancer.

Mrs Mulligan: You said that, if conditions to which the bill could be extended were going to emerge, you would know about them because of the time that they take to develop. However, we all know that things can change. If a condition developed that fell into the same category as mesothelioma, would further legislation be required, or is there another way of dealing with that?

Lorna Brownlee: At the moment, the bill is specifically on mesothelioma.

Mrs Mulligan: So if there was another condition, you would need to introduce another bill.

Lorna Brownlee: That is correct.

Mike Pringle: The bill will not apply to people who have already settled, but it will apply to cases that are currently going through the courts. If somebody's case starts to go through the courts today and they settle before the bill becomes law, will they have the right to claim retrospectively? Why did you decide that retrospective claims should not be allowed? In future, people will have the right to make claims, but a lot of people have already settled. They might think that the bill is unfair to them.

Paul Cackette: The answer to your first question is no. If someone settles before the bill becomes law, they will not be able to enjoy the benefit of the changes. There is a difference between cases that have been settled and cases that might be settled between now and the legislation coming into force. In the case of the latter, we expect that parties will not want to settle because they will know that the bill is going through the Parliament. If they are properly advised, people who are caught in that dilemma should be able to protect their position.

On your second question, there is a balance to be struck between the way in which such changes are progressed, worthwhile though we believe them to be, and the impact on general damages law. A matter that concerns us in general is the fact that the current damages legislation proceeds on an important principle of certainty. When damages claims are settled, they are settled. The concept of opening up a settled damages claim at some point in future gives rise to a range of risks for pursuers as well as defenders. The principle is important, and I emphasise that it cuts both ways. The matter does not arise in the bill, but if it had been drafted differently, it could have allowed settled claims to be reopened. We think that that is a dangerous line to go down.

That is part of the reason why the bill is prospective in its application. There is always a presumption in favour of not enacting retrospective legislation unless good cause is shown. We can certainly see the argument for cause in this case, but the difficulty is that allowing legislation to be applied retrospectively would cut across the principle and benefits of certainty in relation to actions that were settled on the basis of the law as it stood at the time.

10:45

Mike Pringle: Okay.

Mr McFee: I want to be absolutely clear about this. There is a degree of retrospection in the bill, but it is absolutely minuscule. If somebody settles before the act comes into force, they will not have the protection that it affords. Therefore, people who might be considering settling at the moment would be well advised not to reach final settlement before the bill comes into force.

Paul Cackette: Yes.

Alison Fraser (Scottish Executive Legal and Parliamentary Services): I am sure that the witnesses for next week's meeting will be able to tell you what they are doing about that, given that they will be dealing with on-going claims.

Mr McFee: I understand. I just wanted the message to be absolutely clear that the degree of retrospection is not terribly large, which means that somebody who settles next week will not be afforded the protection of the bill. I want to ensure that people in that position know that that is the position.

The Convener: I think that you said that many pursuers are delaying settlement in any case, because they know that that will benefit their families. I suppose that they will continue to do that, so that they can get the benefit of the bill.

Paul Cackette: They are delaying settlement for slightly different reasons. There will not be an impact on the 80 per cent who have resolved the dilemma in their own minds by delaying their cases anyway. The issue that has been raised comes into play only for those who decide that they want to proceed with their own claims.

The Convener: It is fair to say that, given the Coulsfield reforms to speed up the system, on the back of the work of the previous Justice 2 Committee, there are more living pursuers in the system than there would have been previously. Under the pre-Coulsfield system many pursuers were not alive by the time their claims came to court, which is why we needed to speed up the system. Is it fair to say that because we have speeded up the system, more pursuers now have the difficult decision to make whether to pursue their own claim?

Paul Cackette: That is a fair point. Over the years, the courts have generally become more generous in the level of payments that they award in relation to relatives' solatium. The consequence of that is that, in purely financial terms, the dilemma for pursuers is greater, because by waiting they acquire more compensation. All those factors have to be considered together, but your basic hypothesis is correct.

Stewart Stevenson: I draw to your attention what the Parliament did under advice from Government advisers in relation to the Agricultural Holdings (Scotland) Act 2003. I refer to the backdating of the crossover from limited

partnerships to short limited duration tenancies. In essence, it was concluded that it was proper to backdate to the point at which the policy intention was published. In a parallel way, do you think that it would be appropriate to backdate provisions in the bill to the date of its introduction, which is 27 September 2006?

The Convener: In addition, I am aware that the provisions of the Leasehold Casualties (Scotland) Act 2003 came into force on the day that the bill was published, although I do not know what mechanism was used—perhaps there was a particular reason for that. That act is one of those gems, which I would be amazed if anyone other than Adam Ingram and I remembered.

Paul Cackette: I can speak only about the Agricultural Holdings (Scotland) Bill, which I worked on in a previous existence. I am aware of the backdating provisions that Stewart Stevenson mentioned, which were included because of the particular circumstances. As I recall, there were concerns that, in the period between the time of the Executive making people aware of its proposals and the time of royal assent, all sorts of behaviours would be undertaken that would circumvent—

Stewart Stevenson: Would the word "shenanigans" be appropriate?

Paul Cackette: It would not be for me to use such a word.

Stewart Stevenson: I think that Ross Finnie has used language that was not even as moderate as that.

Paul Cackette: Yes. It was a valid point and a reasonable observation.

As I say, I cannot speak about the Leasehold Casualties (Scotland) Bill, but with the Agricultural Holdings (Scotland) Bill there was a concern that the provisions of the bill could be circumvented by the activities of landlords after they became aware of what was coming down the tracks. They could have entered into leasehold arrangements in order to avoid the consequences of the bill once it was enacted.

Mr McFee made points about this earlier, but I am not sure that the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill will give similar opportunities to people who wish to avoid the consequences of the bill. Perhaps those who are involved in dealing with the litigation would be better placed to advise the committee.

The Agricultural Holdings (Scotland) Bill was very difficult to draft. When you consider retrospective legislation, you have to put yourself in the shoes of people eight or 10 months before. It was extraordinarily difficult to ensure that we did not make a mistake and change historical fact.

Stewart Stevenson: A principle of the Agricultural Holdings (Scotland) Act 2003 was that it was not inequitable to make the date on which the act came into force the date on which the intentions behind it were published.

Paul Cackette: Indeed—and I certainly accept that the principle is not unprecedented.

Mr McFee: We should perhaps ask others about this. It may be that no one comes into that category.

Paul Cackette: A final point that I would like to make is about certainty. It would be possible to allow for the reopening of cases that were settled between the date of introduction and the date of royal assent. We should not forget that there are serious policy reasons why breaking the principle of certainty of settlement in damages cases is a bad idea.

Mr McFee: That would, of course, be the reason that we would want to allow retrospective provision—not to introduce uncertainty, but to make the provision available to people in the category, if there are any.

The Convener: Under the bill, if a pursuer has settled a claim, the family can, on the death of the pursuer, go back to court a second time and make claims under other heads. The family cannot do that at the moment—unless, of course, the person delays their claim. Will the bill result in increased settlements from the defender?

Anne Hampson (Scottish Executive Justice Department): We estimated that it would cost about £1.1 million, rising to £1.5 million, for the defenders to pay. We have to remember that 85 per cent of cases at the minute are being settled by relatives after the death of the pursuer, so it is only in the other 15 per cent of cases that increased costs will arise.

The Convener: So that £1.1 million to £1.5 million is for the 15 per cent of cases that are not being settled in that way.

Anne Hampson: That is correct.

The Convener: The panel said earlier that the evidence was that the trends of settlement in relation to solatium were increasing.

Paul Cackette: That is my understanding. To a certain extent, my evidence is anecdotal—it comes from speaking to personal injury lawyers—but the rates have been increasing over the years.

The Convener: Is it also correct to say that the trend is also changing with regard to solatium settlements to sons and daughters?

Paul Cackette: As I understand it, the trend for claims both by widows and by sons and daughters has changed consistently.

The Convener: Will demand for the bill's provisions eventually fade out? I realise that the SPICe briefing sets out some statistics on the matter, but I would like to get your response to the question on the record.

Lorna Brownlee: Are you asking whether demand will fade away after the number of mesothelioma deaths reaches a peak?

The Convener: Yes.

Lorna Brownlee: That is the logical conclusion, but it will take quite a long time to reach that point.

The Convener: What are your predicted timescales for that?

Lorna Brownlee: I am sure that the HSE would want me to stress that any projections should be treated with caution, but according to current projections the peak will be reached somewhere between 2011 and 2015, after which deaths will gradually decline.

The Convener: Obviously we will hear from other witnesses on this bill, but do you have any feeling for the strength of opposition to this amendment to the 1976 act?

Lorna Brownlee: You will have seen the responses that we have received and, obviously, the submissions that you have received to your own call for evidence. The main points that have been raised with us, including the possible use of interim damages and the possibility of extending the provisions, have already been discussed this morning. One can certainly gauge from the responses the strength of feeling on this matter. It might be fair to say that, having seen what we have done in light of their responses, one or two of the respondents to your call for evidence have tempered their original comments. In any case, you have also seen SPICe's summary of the responses.

The Convener: If we stick to the timetable, I see no reason why we cannot reach stages 2 and 3 before February or March. How long does it take for legislation to receive royal assent? A couple of months?

Paul Cackette: Under the Scotland Act 1998, four weeks must elapse after stage 3 before royal assent can be given. In general, if all goes well, royal assent is given four, five or six weeks after stage 3.

The Convener: And the provisions would come into force the very next day.

Paul Cackette: They would come into force seven days later.

The Convener: Do members have any other questions? I do not believe it; it is only 11 o'clock and we seem to have run out of questions. Stewart Stevenson predicted as much.

Margaret Mitchell: The Forum of Scottish Claims Managers has expressed concern about double accounting with regard to claims for wages and solatium and has suggested that, as the existing law is problematic, section 1(2) of the 1976 act be disapplied. Have those concerns been met?

Lorna Brownlee: There is no element of double accounting, because we are not disapplying section 1(3) of the 1976 act, which relates to patrimonial damages to relatives. Double accounting would happen if that were disapplied, as the victim's settlement takes account of the support payment that they will have received.

Margaret Mitchell: That is helpful.

The Convener: Your clear and succinct evidence has helped our scrutiny of the bill. I thank you for appearing before the committee. We will raise various issues with our other witnesses at next week's meeting.

I remind members that our next meeting is on Tuesday 5 December, at which the committee will further consider its draft report on its inquiry into the Scottish Criminal Record Office.

Meeting closed at 10:59.

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