JUSTICE 2 COMMITTEE

Wednesday 27 March 2002
(*Morning*)

Session 1

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JUSTICE 2 COMMITTEE
11th Meeting 2002, Session 1

CONVENER

*Pauline McNeill (Glasgow Kelvin) (Lab)

DEPUTY CONVENER

*Bill Aitken (Glasgow) (Con)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Mr Duncan Hamilton (Highlands and Islands) (SNP)
*George Lyon (Argyll and Bute) (LD)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Des McNulty (Clydebank and Milngavie) (Lab)

WITNESSES

Neil Brailsford (Faculty of Advocates)
Alan Dewar (Faculty of Advocates)
Frank Maguire
Simon Di Rollo (Faculty of Advocates)

CLERK TO THE COMMITTEE

Gillian Baxendine

SENIOR ASSISTANT CLERK

Fiona Groves

ASSISTANT CLERK

Richard Hough

LOCATION

Committee Room 1

Scottish Parliament

Justice 2 Committee

Wednesday 27 March 2002

(*Morning*)

[THE CONVENER *opened the meeting at 09:46*]

Items in Private

The Convener (Pauline McNeill): I formally open the 11th meeting in 2002 of the Justice 2 Committee. As usual, members should turn off their mobile phones if they have not already done so.

I invite members to agree to take three agenda items in private. Item 2 is consideration of lines of questioning for item 4 on petition PE336. Item 3 is consideration of lines of questioning for item 5 on the inquiry into the Crown Office and Procurator Fiscal Service. Item 6 is consideration of possible candidates for the post of adviser for the Criminal Justice (Scotland) Bill. Are members agreed that the committee should discuss those items in private?

Members *indicated agreement*.

09:47

Meeting continued in private.

10:11

Meeting continued in public.

Petition

Asbestos (PE336)

The Convener: I welcome the petitioner, Frank Maguire. Perhaps he will introduce the person next to him.

Frank Maguire: I have with me Harry McCluskey, who is the secretary of Clydeside Action on Asbestos.

The Convener: I welcome him, too, to the Justice 2 Committee.

I thank you for providing the committee with an extensive set of papers, which it has been extremely helpful to have in advance. As you will imagine, we want to ask a number of questions. We have approximately 45 minutes, but we can see how it goes.

The petition raises many issues and, as you may be aware, additional issues have been raised by the Association of Personal Injury Lawyers. This morning, we would like to get a good understanding of the main points, so that we can decide what further information we need. In the main, the members of the committee are lay people, who have had no dealings with civil court procedures, so it would be useful to get on record a detailed understanding of the issues.

I shall begin. What is your impression of the recent appointment of Lord Mackay of Drumadoon to speed up and oversee the procedural aspects of asbestosis cases? It would be useful to have your opinion on whether that has meant progress.

Frank Maguire: The appointment of Lord Mackay to deal with asbestos cases is a welcome development. For the first time, the court has regarded asbestos cases as a category. That is a good thing. The Court of Session, which had thought that it had less than 100 cases, now realises that it has in excess of 500 cases. The exercise is a good development.

Lord Mackay will also bring some consistency to the way in which the cases are dealt with. He will begin to know the issues, so we will not need to reinvent each issue afresh before the judge. Lord Mackay will get a good background to the issues that impact on asbestosis cases, such as the Fairchild decision, the insolvency of Newalls Insulation Co Ltd, the situation with Chester Street Insurance Holdings Ltd and the situation with British Shipbuilders. We have apprised Lord Mackay of those issues by giving him background

papers, one of which—a letter to the Keeper of the Rolls—I have provided to the committee.

Lord Mackay has been picking up cases that have fallen off the present system. He has brought back into the system many cases that had, for whatever reason, fallen off the system after they had been worked on by the court or by the parties. He has put those cases back on track.

Because we deal with 90 per cent of the cases, I have been able to give to Lord Mackay a ready database containing every case. The papers that I have provided for the committee contain an example of what that database contains. We have liaised with the Keeper of the Rolls staff in setting up the database and getting it up and running. The court inputs much of its data into the database and then passes the database back for us to input data that we can provide. That is another very good development.

10:15

However, that is as far as it goes. The root of our problem is still not being addressed, because Lord Mackay is still bound by the rules and the written system of pleadings. For example, if we brought a case of negligence in employment against John Brown Engineering, claiming that the company knew of the danger of asbestos, and sought to obtain a post-mortem report and medical records, the defender could still deny everything and maintain that denial throughout the case. Lord Mackay cannot really do anything about that.

Therefore, even with Lord Mackay's appointment, the matter can only be taken so far. As I have said, we are not tackling the root of the problem. If we were, Lord Mackay might have more powers than he has under the current rules. Indeed, he might not even deal with these cases himself. To illustrate the crisis that we are facing, I should point out that, although we have 500 litigated cases in the Court of Session, I have another 1,000 cases on my books. As we are currently obtaining a maximum of 180 trials a year, it will take us at least 10 years to get through that backlog. Of course, that is a static view; it does not take into account the cases that will come on to my books over those years. For example, five mesothelioma cases were brought to us last week, which is not unusual. The problem is getting bigger, not smaller. That said, I repeat that, although the root of the problem is not being tackled, Lord Mackay's appointment and what he has been doing are extremely welcome developments.

The Convener: The committee takes the petition very seriously and wants to make the maximum amount of progress on it. We agree with your introductory remarks, which were helpful. You said that part of the root of the problem is the written pleadings system. Although I understand the basics of the system, will you give us some more detail about the rule changes that would be required to deal with written pleadings and skeletal defences?

Frank Maguire: Do you want me to give the committee a brief resumé of the problem?

The Convener: That would be helpful, but my question is concerned more with the rule changes that would be needed to improve the written pleadings system.

Frank Maguire: Very briefly, the written pleadings system is the foundation of all civil justice procedures and is fundamental to the determination of whether a case will be heard by a jury or before a judge. A kind of legal industry related to the system picks up and elaborates on various points. However, one of the problems is that, in the face of a detailed written case, defenders can pick off points but still deny everything. For example, the case of Gray v Boyd, details of which I have submitted to the committee, demonstrates that authority from the Inner House of the Court of Session upholds such a position.

We must realise the system's disadvantages. First, there is no admission of fault. There has been a lot of talk about compensation; however, although compensation is helpful, I have noticed with asbestos cases that the person wants an admission of liability. It is most important that someone admits negligence, but we cannot obtain such an admission under the current system.

People who bring asbestos cases also want interim payments which, pending resolution of the full case, would alleviate their suffering and let them conduct their lives while they are ill and, for example, might help a widow with subsistence after the main breadwinner has been lost.

Because the system means that we have to prove so many things, it prevents us from obtaining jury trials. The case becomes too complex for the court to allow it to be brought before a jury. Furthermore, the system uses up all the pursuer's agent's time, because he has to deal with all those issues. In other words, it uses up their time and resources, while the defender knows full well what the real issue is and concentrates on that—there is a diversionary aspect to the case.

That is the problem, but there are ways of dealing with it. The problem is not limited to the Scottish jurisdiction. Things have been done both in England and in the Scottish jurisdiction to stop skeletal defences or denials.

In England, the problem was addressed through the Woolf reforms and the creation of a judicial

management system. Cases are kicked off by brief written pleadings, but then the defendant, with their file, meets the judge and is asked what their problem is. If they give a defence that is spurious or that is not in good faith, they will not get very far with that.

I sat in on a case in Newcastle with one of my colleagues, who is an English solicitor. It was a live mesothelioma case—that is to say, it involved someone who was dying of mesothelioma. The litigants sat down in front of the judge at a very early stage in the case. They had the file, the insurance agent had the file and we had the file. The judge asked what the problem was and got right to the root of the case. It turned out that the only problem related to some aspect of quantification. Everyone agreed that. The judge then set a hearing for the following month. That is an example of a judicial management system in which it is possible to get behind the written charade to the real issues between the parties.

The committee has before it evidence submitted by Paul Motion, who is a solicitor advocate who specialises in commercial cases. It is interesting to see what the Court of Session does in such cases. The background to the establishment of the commercial court is also interesting. The business community was not happy with skeletal defences and long delays in cases. Pressure from the business community led to the institution of the commercial court. It was also thought that companies were taking cases to England because it had a commercial court. They did not want to be subject to archaic Scottish procedures—long delays and skeletal defences—when they could have cases dealt with readily in England.

Within the Court of Session we have a judicially managed system. Paul Motion's evidence provides the committee with a good illustration of how that works. In paragraph (c) of the section headed "Procedural Advantages of the Commercial Court", he states that judicial intervention

"has the effect of focussing the minds of both parties on the real issues. It is simply not permissible in the Commercial Court to hide behind bare denials of one party's position. Commercial Judges have, (in terms of the rules), almost total discretion over the questions they ask and the procedures they follow ... they consider themselves in no way ring-fenced by what is written in those documents. Commercial Judges ... ask hard questions about documents or their meaning or their effect. Litigants are expected to get to the point."

That is an illustration of what happens in the commercial court.

Lord Coulsfield's report explains why we do not have that procedure. The judges thought that personal injury cases were routine and that such a system would not be necessary. First, not to have cases judicially managed because they are routine is to apply the wrong criterion. There are other important criteria that ought to be applied, such as justice, the fact that a person is dying and the importance to them of the case. Secondly, Lord Coulsfield's comments were made some time ago. Asbestos cases are no longer routine. Because of the insolvency of various insurance companies, the lawyers involved must have a very good knowledge of insurance law—the Policyholders Protection Act 1997 and the Financial Services and Markets Act 2000. They must have a very good knowledge of company law—British Shipbuilders, for example, is denying liability for various companies that existed in the past—and they must have a very good grasp of medical issues, because of the Fairchild decision. They must also have expertise in the usual matters related to asbestos cases, some of which are complicated.

Even if the judiciary's reasons not to have a judicially managed system were good in the past—I do not accept that they were—those reasons no longer apply. What we seek is a model of a judicially managed system, such as the models in the Woolf reforms and in the commercial court. Lord Cullen partly suggested such a model in his review, which took place before Lord Coulsfield's review. Only with a judicially managed system will we get to the real issues, which allows cases to be disposed more speedily. Instead, at present, all matters are in dispute and everything runs to the door of the court.

I can elaborate further on how a judicially managed system would work, but some other points are interesting.

The Convener: May I stop you? I would like you to clarify a matter. In his letter, Paul Motion cites judicial intervention as most important. You, too, advocate a judicially managed system in which judges assess the parties and ascertain whether someone is putting up a spurious defence, which judges can deal with at that point, instead of a framework for what can and cannot be said in written pleadings. You support judicial intervention.

Frank Maguire: At present, we have a hands-off system in which the parties are sent away to operate written pleadings. Now and again, parties come to court to say what they want to happen. I do not think that that system is working.

The Convener: I have the sense that you want to move away from a paper exercise to a more human exercise in which the parties go before a judge who tries to narrow the focus to the points of disagreement. Is that assessment fair?

Frank Maguire: Yes. A denial by defenders that John Brown's was a shipyard would not go far. If

defenders denied that they knew of the danger of asbestos, a pile of documents would say that they did know of the danger. Defenders would have to come up with evidence that they did not know of the danger and I do not think that they could do that. Although a post-mortem report with a histology report might say that mesothelioma was involved, defenders might deny that. They could be asked why they deny that and what their evidence is. The court would have the power to require affidavits and evidence for the judge to decide whether the defenders' position was genuine or sustainable.

The Convener: You said that Lord Mackay could not adopt that approach because he was bound by the rules, so the rules would have to be changed to allow such judicial intervention.

Frank Maguire: The rules would have to change. When I have appeared before Lord Mackay, I have touched on those issues, and Lord Mackay has said that he is bound by the rules; he is right. The rules would have to change. A model of rules exists in the commercial court rules. It would not require much adaptation to translate those rules to personal injury cases.

The Convener: Would you be happy to adopt the framework of the commercial court's rules?

Frank Maguire: Yes. Those rules might need to be examined more closely for commercial aspects of some rules but, in the main, the substance can be readily translated.

Bill Aitken (Glasgow) (Con): You said that 500 cases lie in the cabinets in your office and that another 1,000 are coming. How many cases have been settled?

Frank Maguire: Since when?

Bill Aitken: Since the issue arose.

Frank Maguire: Settlement is reached only when a hearing approaches. I can give the committee a good idea of the number. We have had 180 trials a year but, since the matter came up, only 180 cases may have been settled. However, the situation is a bit worse than that, because many cases that have come up for trial have been postponed because of extraneous factors, such as the cases of Fairchild and of Newalls Insulation. That has aggravated the low turnover of settlement.

Bill Aitken: Is it fair to say that at that rate of lack of progress, even the 500 current cases could wait years for settlement?

Frank Maguire: Yes. For the 500 cases that have reached the finalisation of written pleadings—I say that cautiously, because written pleadings can still be altered after that—we will not have a hearing until February or March 2003.

10:30

Bill Aitken: As you will probably have gathered, I am trying to underline the urgency of the matter. How many of the pursuers in such cases have died during the currency of their actions? I realise that you might not be able to provide that information off the top of your head.

Frank Maguire: Fatal cases make up about 50 or 60 per cent of the total number. That does not include the asbestos cases where the person affected is severely disabled. Since the petition was raised, I have settled only one case in which the person is dying with mesothelioma.

Bill Aitken: Will you advise us of the mechanics of the way in which we could change the system? If, as you have suggested we should, we go down the route of a judicially managed system—which, on the face of it, appears to have considerable merit—could that be done simply or would the process be much more complex? Would it result in our having to initiate legislation?

Frank Maguire: The commercial rules would be promulgated in regard to personal injury cases in exactly the same way—through an act of sederunt by the Lord President. I would be worried if there were to be a long period of consultation. Lord Cullen's report, which took several years, was not implemented. Lord Coulsfield's working group met in 1997 and 1998 and reported in 2000. It is proposed that only bits of that report be implemented. I am worried about having a long period of consultation and mulling over a third exercise, when the matter is extremely urgent.

Stewart Stevenson (Banff and Buchan) (SNP): I congratulate Frank Maguire on doing what I hoped the courts would have done—providing some automation and information that shows the scale of the problem. I find it incredible and astonishing that the courts did not realise that there were 500 cases and that it should take your action to bring that into the public domain. That is deeply disappointing; it represents a serious comment on the way in which the court system works.

In your opinion—this will have to be a personal estimate; it could not be anything else—how much are defenders spending, on average, on defending each case? How much would they spend if the rules were changed and we moved to a system akin to that of the commercial courts?

Frank Maguire: The settling of a case when one runs up to the door of a court always amazes me—the settling of the case even a week before would have saved a lot of money. When a defender settles a case, they have to pay our expenses and their own expenses. If the case is settled on the morning of the hearing, that will cost between £15,000 and £20,000. A judicially

managed system would not incur such large costs. On the morning of a hearing one incurs, possibly, senior counsel's fees, junior counsel's fees, the solicitor's fees, the solicitor's fees in Glasgow and the cost of all the witnesses coming forward, plus all the costs that relate to the pursuer's side. The failure to settle a case on the morning of the hearing results in all that amazing expenditure. One can tell that there is a great deal of expense by multiplying all that out. If the case goes ahead, and a few days' evidence is heard, as has happened, the cost increases almost exponentially—expenses reach £30,000 or £40,000.

The problem is ironic, because under the liquidation of Chester Street Insurance Holdings Ltd, which affects the vast majority of the cases in question, the person will be paid only 90 per cent of their damages. When the liquidator pays a dividend of 5 per cent to the Financial Services Compensation Scheme or to anyone, that is all eaten up by the legal costs for the defence. That results in the ironic situation of the pursuer in effect paying for the legal costs for the defence.

Stewart Stevenson: I have done some quick, back-of-an-envelope calculations. By that reckoning, the money that is being wasted through the existing process, which is being paid, in essence, by the people whose interests you represent—the people whom the committees want to help—is of the order of £3 million to £7 million each year. That money could otherwise be being paid to the victims.

Frank Maguire: It is worse than that. If you take into account the amount of judicial time and administrative staff time that is taken up with dealing with written pleadings, motions and all the associated procedure and the fact that the judges are not available to deal with other cases, the costs go up a great deal.

Stewart Stevenson: So, based on my quick calculations, by the time that the 1,500 cases have been dealt with—and I acknowledge that you suggest that there are many more still to come in—the sum arising from the time that the defenders waste on unnecessary activity could be between £25 million and £40 million?

Frank Maguire: That could be the case.

Bill Aitken: I assume that the vast majority of the cases receive legal aid.

Frank Maguire: No. The legal aid system is restrictive and many clients are not eligible for legal aid. The Scottish Legal Aid Board usually requires corroboration and often, as many of the clients' colleagues have died, that is not available. Many cases are conducted on a no-win, no-fee basis. It is possible to get insurance cover for such cases, but I do not know for how long that will remain the case. The client pays the insurance company a premium, which is not recoverable from the defender, although perhaps it should be included in the judicial expenses.

Bill Aitken: If the case is settled at the door of the court, surely the fact that such expenditure has been incurred should be reflected in the amount of the settlement. Obviously, in such a circumstance, the case would not have gone to court, but would it be appropriate to claim the amount of the pursuer's expenses?

Frank Maguire: The pursuer's expenses are claimed, but only in a tabulated and restricted form. It is not possible to cover the pursuer's full expenses and you are not allowed to claim for insurance expenses. Furthermore, because it is normal for cases to be settled on a Tuesday morning in that manner—that is simply the system—you cannot claim for expenses for all the bother that has been caused.

In England, the insurance premiums and success fees are recoverable. If a defender defends a case up to the hilt, thereby causing expense, they must meet the cost not only of the outlays in the case but of the premium that the person has paid to an insurance company, thus minimising the expense for the client.

I should mention that some cases that I deal with are trade-union assisted. Money may come from three sources: legal aid, although only in a few cases; insurance companies; and trade unions.

Bill Aitken: I might be being naive, but I would be grateful for an explanation. We know that a lot of the problems have been caused by the fact that the Iron Trades Insurance Co and its successors are in liquidation. Supposing that a magic wand were waved and all the cases were settled next week, where would the money come from?

Frank Maguire: The matter of the money owed by Chester Street Insurance Holdings when it went into liquidation has now been resolved. Last week, the Secretary of State for Scotland informed me that the people concerned will receive cheques for the money that they are due. Ninety per cent of that money will come from the financial services compensation scheme, apart from money for the gap that exists for the time between January and December 2001, which will come from the Association of British Insurers. I met representatives of the ABI and the FSCS, who told me that the cheques would be paid immediately. I am grateful to the Secretary of State for Scotland for her intervention in the matter.

The Convener: I welcome to the committee Des McNulty, who has a strong interest in this matter. Would you like to ask a question, Des?

Des McNulty (Clydebank and Milngavie) (Lab): I am grateful to the Justice 2 Committee for dealing with this petition with the seriousness that it deserves. There are two important dimensions to the matter. Frank Maguire has talked about the legal dimension. The other dimension is the human one, which is concerned with the impact on people of the lengthy process. If we fictionalised this, no one would believe it. I am thinking of Jarndyce v Jarndyce—the single case of legal obfuscation—in Charles Dickens's famous book. Frank Maguire is telling us that many people and their families are stuck in the same legal trap.

I have two questions about the legal process. First, does the method of handling such cases in England deliver the money to people significantly quicker than in Scotland? Is there a possibility that Scottish claimants could be disadvantaged because the circumstances keep changing and because of delays in the Scottish courts?

Secondly, by how much could the process be speeded up, given a change in the rules? If there were a change in the rules, how long would it take to deal with the outstanding cases of which you are aware? You have given us an indication of the present rate of dealing with cases. If there were a favourable change in the rules, how much would the process be speeded up and where are the fault lines?

Frank Maguire: There is a lack of parity between a Scottish claimant and an English claimant. There is a faster track in England and we have a very slow track, which means that they are resolving cases faster than we are. The case in Newcastle that I cited is an example of the discrepancy between the two jurisdictions. There are also issues such as the Fairchild judgment, which are germane to both England and Scotland and which delay cases.

Lord Coulsfield proposed a hearing in 12 months' time, but the commercial court, as can be seen from Paul Motion's letter, has suggested hearings within six months or even 12 weeks. There is more that we can do. One idea might be to prioritise some asbestos cases. All the cases are important and urgent, but there are some cases for which hearings might be prioritised, such as those where someone is dying of mesothelioma or a widow is waiting on damages because someone has died of mesothelioma. For example, for the live mesothelioma cases, a judicially managed system should aim to have a hearing within two or three months because the person has only 12 to 14 months to live and they need that money early on in their condition.

The system would be judicially managed and there would be an initial period of six months during which the ground rules would be set—in other words, the attitude of the court would be made known. Therefore if someone came forward with a case saying that John Brown's were not negligent and got short shrift, there would be no point coming back and trying to say that again. The initial period would be difficult, but after that things would get easier and we would begin to get to the real issues.

The time scale can be speeded up greatly, but a few things need to be added into that. As Lord Coulsfield mentioned, it is ironic that the court is on vacation for two and half months during the summer. A lot could be done in that time. I mentioned the commercial court recommendations of 12 weeks to six months. There are three judges dealing with commercial cases. I have not checked, but I wonder whether there are the same number of commercial cases as asbestos cases.

Lord Mackay is doing everything that he can to get to grips with the cases. It was not Lord Mackay's problem that the cases were not identified. Lord Mackay and the system need more resources, such as additional judges earmarked for asbestos cases and, most important, back-up staff for the court. The court is doing everything it can with the case management and the data system, but it needs back-up, including information technology back-up.

10:45

We must address the problems that have to be dealt with. Let us get the system going. If the system is not working, we should alter it and ensure that all those problems are dealt with. The first thing is to ensure that a judicially managed system is in place. Ancillary matters, such as the two-and-a-half-month vacation, must be dealt with and there must be targets for hearings in urgent cases. There must also be IT back-up, the seeds of which are in the database that I have given to the Court of Session. We also have a judge who is becoming well acquainted with the specific cases and who needs judicial assistance and staff support.

Des McNulty: I am grateful for that clarification, but I have one further question. I understand that Lord Coulsfield and his colleagues are concerned that moving over to a new procedure might encompass a series of different kinds of cases. In other words, there might be difficulty in separating out asbestos cases from other cases, which it could be argued might benefit from a similar procedure. How could we identify asbestos cases, and on what basis could they be taken forward in the special fast-track procedure that you propose?

Frank Maguire: We have already done that exercise, as we have now identified all the asbestos cases in the Court of Session. That is the database that I have given to the court. That

database involves other agents as well as Clydeside Action on Asbestos. The court now has a full record of all the cases to do with asbestos, the type of condition in question, the defenders involved, the defenders' agents and what stage each procedure is at. We already have all the information and all the asbestos cases are identified. Whenever we commence a new action, it is detailed as an asbestos case on the front of the writ, so any new actions are immediately entered into the database. There is no problem with identifying asbestos cases.

In regard to other cases, I would not like to hold up a very urgent problem to find out whether there are any other cases that are similarly urgent. We have identified that point. If we get ahead with the system that I propose for asbestos cases, that would break the ground and move forward so that the system could be translated across to other categories of cases. I do not want to hold up asbestos cases because there may be other cases. We have identified asbestos cases and have already proposed a system for dealing with them. We can now go ahead with asbestos cases, which have particular problems.

Stewart Stevenson: I have a very quick question, which my rage at your previous answer made me forget. What is the average pay-out when cases are settled?

Frank Maguire: For a mesothelioma case, if the person is alive, we are getting something like £100,000 to £120,000. If there is a financial loss, particularly for a younger pursuer, who might be 40-odd or early 50s, the figure might hit £250,000 for a mesothelioma case. If the person dies, there will be additional claims for the widow and children. Another irony is that it is of no financial advantage to the insurers to let a pursuer die, because the case just gets bigger for them. I never understand why the insurers do not fall over themselves trying to settle a live mesothelioma case with me, and instead let the person die. That can increase the claim by as much as £50,000 to £60,000.

Lady Paton recently awarded £40,000 to someone who had severe asbestosis. There are also what are known pleural plaque cases, where there is evidence of asbestos in the lungs. Although it may not be causing any disability, there is at least a risk of getting one of the more serious conditions. For such cases, there might be awards of £5,000 with a reservation to come back or £10,000 with no such reservation.

Having said that, Clydeside Action on Asbestos and the Clydebank Asbestos Group are not happy with that level of awards, because the present system denies cases a jury trial. The group would like to find out what a jury would make of someone who is dying of mesothelioma. That might reflect more accurately the values of society and what society thinks that the award for someone who is dying of mesothelioma should be.

Stewart Stevenson: Are you saying that we could have an asbestosis case in which £40,000 is paid out to the victim and the legal costs also approach that figure?

Frank Maguire: The legal costs will exceed that figure.

Stewart Stevenson: So the potential exists that more money is going to the lawyers who defend such cases than to the victims.

Frank Maguire: I think that there are more legal expenses anyway. The case that Lady Paton heard lasted for five days. No one is disputing that the defender should have defended it. They said that it was not asbestosis and it was, but we are not saying that they should not have done that. The total expenses for that five-day case—the pursuer's expenses, the defender's expenses and counsel's expenses—will exceed £40,000, not counting the judicial time and the administrative staff time that was necessary to deal with the case.

Stewart Stevenson: If the Parliament cannot help to solve the problem, we fail real people.

The Convener: From what you have told the committee this morning and in correspondence, it is shocking that the issue has not been resolved yet, particularly when the commercial court provides a model—which you cite—that could be adapted. Do you have any views on why resolution has taken so long and why there has not been a stronger response to the shocking problem?

Frank Maguire: I do not think that the courts realise that the problem exists. That is obvious from their thinking that they have fewer than 100 cases. I think that the judiciary is—dare I say it—reluctant to get involved in judicial management. That certainly does not apply to all the judiciary, but there might be some resistance. It is interesting that Lord Coulsfield's report, which was a case of lawyers trying to identify problems with civil justice, did not deal with skeletal defences at all. It did not deal with the cases; it did not deal with the issue. It did not identify skeletal defences as a problem.

The Convener: Had you been raising the issue of skeletal defences in written pleadings at that time?

Frank Maguire: The working party on Court of Session procedure includes defenders' lawyers, pursuers' lawyers and judges. We therefore end up with the lowest common denominator. Although we complain about skeletal defences, the working party disagrees with us. Skeletal defences were

not deal with in Lord Coulsfield's report. The report did not agree with judicial management either, as I said earlier, because the working party thought that personal injury cases were routine. We are not getting anywhere with Lord Coulsfield's report.

The Convener: I realise that we have not touched on a number of issues that you are also concerned about. I will flick through a few of them and let you respond in the limited time that we have left. You make strong representations in the petition about the unavailability of judges and being unable to get a jury trial, which you feel is important. What are the rules on getting a jury trial? How is a decision made on who gets one and who does not?

Frank Maguire: The court will consider the written case and not look beyond that. If it sees, for example, a written case for a road traffic accident in which car A bumps into car B and a person ends up badly injured, it will consider that to be a straightforward case that a jury can understand in terms of liability—whether the driver was exercising reasonable care when they went into the back of the van in front.

When the court considers an asbestos case on the written pleadings, it sees a long document about events that happened many years ago concerning asbestos and the level and circumstances of exposure to asbestos. It also sees narrated in the document a long history of HM inspectorate reports and various other reports that show why the inspectorate should have known about the problem. It then sees shipbuilding and ship repairing regulations, asbestos industry regulations and statutory provisions under the Factories Act 1961. It also sees a big part on the quantification of the case.

On the basis of that, because all the issues are still live, as it were, the court would say that a jury cannot understand how the statute is applied and cannot understand level of exposure to asbestos. Our problem is that, notwithstanding the fact that the defenders will not defend on that basis, the matter depends on the written pleadings. If there is a special cause—in other words, if the matter is complex—there cannot be a jury. The decision on whether to have a jury is made on the basis of the written case. We are saying that that question should be decided on the basis of the real issues, not on that of the stated issues in the written case. Does that answer your point about juries?

The Convener: So you are saying that we would have to sort out the system first.

Frank Maguire: Yes.

The Convener: There would then be a focus for the dispute, and you would expect that more decisions to have jury trials would then be taken.

Frank Maguire: Yes. When we translate the commercial rules into personal injury cases, that will make a difference. Commercial cases do not have jury trials and probably do not want them, whereas personal injury cases would demand jury trials. There would have to be some mechanism in the rules to allow someone to get a jury trial.

The Convener: What evidence do you have that jury trials might give a better settlement?

Frank Maguire: I have the evidence of the court itself. There was a recent judgment on a jury case that awarded four times the award that the injured person would have been given by a judge. As members will see from the petition, I have mentioned various cases where the Inner House of the Court of Session, the court of appeal, has itself recognised that a jury would give a higher award. It would certainly give a higher award for pain and suffering, which would be the most personal aspect, and the one that would echo most with a jury. A jury might not do so, however, when it came to financial losses and complicated actuarial calculations. All that we are asking for is to have the option to have a jury. Not every case will go to a jury.

The Convener: We have received a letter from the Association of Personal Injury Lawyers—APIL. It has written to us on the back of your petition on a number of occasions about the Prescription and Limitation (Scotland) Act 1973. Is that legislation related to the issue covered in your petition, and do you think it important to address its provisions?

Frank Maguire: I think that it is. One of defenders' main defences is on the basis of time bar. Defenders are always looking for complainers' medical records and examining our clients to find out their condition and the date when they knew about it. It is three years from that date when they must commence proceedings.

APIL highlights the very strict interpretation on the lack of discretion. Discretion can be exercised, but the courts are effectively exercising discretion in a very narrow way. For example, there was a case, Little v East Ayrshire Council, of a man who simply thought that he had gone deaf and did not suspect that it had anything to do with his job. The court held that he should have found out whether his deafness was caused by his work. That indicates a strict interpretation.

Sometimes people in asbestos cases are told that they have pleural plaques. Often their doctor may say, "Look, it's nothing to worry about. Nothing's going to happen because of it," and the person just goes away. Defenders might come along and fasten on to the fact that the person has pleural plaques and say, "You knew you had an asbestos condition more than three years ago. You should have commenced proceedings

earlier." That interpretation causes a problem in delaying cases.

The requirements on the pursuer regarding their condition are so strict that, if those are compared with the requirements that are allowed for delays in court, there seems to be a bit of a double standard, which I find somewhat ironic. In support of what APIL has said, I would say that the time bar is an important issue, and has perhaps been applied too strictly by the courts.

The Convener: Do you have a view on pursuers' offers?

Frank Maguire: Yes, I am worried that pursuers' offers are viewed as being the answer. They are not, because the pursuer also wants an admission of liability. Pursuers' offers are based on what a judge would award—and that again begs the question of what the award would be if there was a jury. I do not think that pursuers' offers should be seen as an answer, but they may be a useful tool. For example, in a live mesothelioma case, I might say that, for the interest of the client and with their agreement, we will settle a case at £120,000. If the defenders did not settle that case at that figure, a penalty would be attached to that.

However, having regard to the costs that would be run up anyway and their being willing to settle a fatal case, I do not think that a penalty and expenses would be much of a deterrent on pursuers' offers. Nonetheless, I would agree with pursuers' offers being put on to statute, provided that there was a good penalty to it, although that is not the answer.

11:00

Bill Aitken: Might there be some merit in initiating some of these actions in the sheriff court, bearing in mind the fact that there is a high settlement rate and the fact that the cases do not go to trial? That might be a more expeditious way of dealing with them.

Frank Maguire: Professor Hennessey suggested that, but I do not think that that would be the case. As I said, one of the great advantages is the fact that we have brought all the cases together before judges who are becoming specialists—especially Lord Mackay—in what we are dealing with.

The issues have been identified and there is a case management and IT system to back up the claims. If we allowed the cases to go to every sheriff court in the land, they would be dissipated. They would be handled in Dingwall, the Borders, Glasgow, Oban and everywhere. It would be difficult to control the cases, as not every sheriff—through no fault of theirs—would have the experience that many Court of Session judges have. The number of personal injury cases in sheriff courts is small compared to the number of such cases in the Court of Session.

The sheriff courts deal with family cases and criminal cases, among other things, and it would be questionable whether they would be able to grasp the issues. Would they be able to liaise on the issues? Would they know what one another was doing with regard to certain issues? I would be against the idea of dealing with the cases in the sheriff courts, because that would destroy what we have already got, which is a great deal.

The other thing—which is fundamental—that is missing from the sheriff courts is the juries. There are no jury trials in the sheriff courts. We would be giving up completely the idea of having a jury trial. Also, the appeal system is different. An appeal against a sheriff court judgment has to go to a sheriff principal, then to the Inner House. An appeal would take longer than it does in the Court of Session. Clydeside Action on Asbestos wants the cases to be dealt with in the Court of Session. We have achieved much and we can push the cases further forward in getting a commercial-type procedure in place, in getting jury trials in the Court of Session and in having a consistent approach from specialised judges in the Court of Session who liaise with one another and discuss matters.

The Convener: We must conclude on the last issue that you will want to tell the committee about: the impact of the Fairchild decision and the pending appeal. If there are any other issues that you would like to mention in concluding, you may do so. I assure you that this will not be the last word on the issue.

Frank Maguire: We have dealt with the procedures and acknowledged that they might not be assisting the progress of cases. The Fairchild case is paralysing all the cases. The plaintiff in that case was exposed to asbestos from more than one source, as happens in most cases. The court in England ruled that, because it could not be proved which fibre caused the injury—that is, the court could not identify who was culpable—the case could not succeed against anyone. That was a surprise judgment in the High Court in England. We thought that the House of Lords authority on it was quite clear, but the Court of Appeal has upheld that judgment.

The judgment is now before the House of Lords for its decision. The Court of Appeal judgment was that the lower court was right and that it was a matter for legislation. We are worried that the House of Lords will reach the same conclusion as the Court of Appeal, which would mean that no asbestos case would succeed. We are also worried that, no matter what it says, the House of Lords will not settle the issue. There was clear House of Lords authority on the point for many

years that the defence somehow managed to get round, and that authority would be dependent on the facts before it.

In other words, the House of Lords can draw the principle only out of the facts that are before it. The House of Lords may first of all come up with a judgment that upholds that of the lower court—which would be a disaster and would necessitate legislation anyway—but it may come up with a mixed bag. There may be a confusing judgment or a judgment to which someone can latch on for other cases. In years to come, someone else may find on different facts another way around things.

I have put a draft bill before the committee that I have somewhat pretentiously called the civil liability (asbestos) (Scotland) bill. It is short and would cure the problem. It says what the law and the House of Lords have always said. If someone materially increases the risk of something happening that relates to asbestos, that person is liable. In other words, if an employer such as John Brown's of Clydebank exposed someone to asbestos and Yarrows Shipbuilders also did, both would have increased the risk of the person getting mesothelioma and would therefore be liable for damages. We do not have to get into esoteric and artificial questions about which fibre caused what—those are impossible to answer.

To reassure asbestos victims, I ask the committee to consider urgently the draft bill and get it passed at some stage. It should be passed in case the House of Lords does not come up with a satisfactory judgment. The Irish jurisdiction has a similar act that is based on similar principles, which is interesting. Only the Scottish Parliament can deal with the matter—it is not reserved. It relates to causation in Scots law. The draft bill readily deals with the problem once and for all and we will not be left to deal with another set of circumstances next year.

There is another case at Liverpool county court in England on pleural plaques, which will be appealed up through the system. The contention is that one cannot even establish that pleural plaques were caused by the defender where there is more than one source. Even if the House of Lords judgment overturns the Court of Appeal judgment, there will be another approach from defenders. They will say, "He is liable. I am not." However, we should simply say, "If you materially increase the risk, you will be liable and that is the end of the matter." We will then get down to what the law has always been.

Is that a fair explanation, convener? Lawyers can sometimes be somewhat technical.

The Convener: Yes. We have to stop there. You have been clear and your evidence on a complex matter is extremely helpful. I thank both witnesses for their input and evidence.

Frank Maguire: On behalf of Clydeside Action on Asbestos, I thank the committee for giving its time to consider the issue. That is appreciated.

The Convener: I will allow a few minutes for the committee to dwell on the evidence. I am sure that members will agree that we should determine urgently whether we wish to take the matter further. We have dealt with it for some months and the more that we hear about it, the more shocking it becomes that there has not been a stronger response.

I welcome many of the approaches, particularly the introduction of the procedure under Lord Mackay, but it seems that there is still a piecemeal approach. I do not think that there has been a proper explanation of why the model of the commercial court cannot simply be used and imposed for cases that seem to be extremely urgent.

The note that members received from the clerks sets out a range of options. It is open to the committee to decide whether it wants to progress with any of those options or to do something else.

As members have heard, a number of complex issues have arisen. There is the response to the Fairchild ruling and the potential for legislation; the matter of the Prescription and Limitation (Scotland) Act 1973 on time barring; and what we have heard from Frank Maguire this morning on the urgent matters that have to be dealt with—in particular, in relation to written pleadings.

I feel that we should demand action as soon as possible. We have various options. We could ask for a meeting with the Minister for Justice. We have agreed to call the Lord President to discuss this issue and get a response to what we have heard today. Urgent action to address the issue is needed.

Bill Aitken: Clearly we must act because there is very real injustice here, which cannot be allowed to continue. However, a dual approach may be necessary, and I do not feel in a position to make a determination on that today. The implications of the Fairchild ruling are far-reaching and have the potential to be extremely damaging to litigants both north and south of the border. We have to consider how those implications could be eased by means of legislation. However, I am not satisfied that what Mr Maguire has presented today is the overall answer. We have to legislate on a much wider basis. Mr Maguire's suggestions would go some way towards resolving the problems of asbestosis sufferers, but the issue goes far wider. Protection would have to be provided for other litigants too.

I will wish to research further, but I am attracted

to the idea of recommending that the Lord President consider an act of sederunt to tighten up the procedures considerably. I cannot make any recommendations to the committee today on how we should proceed, but I am clear in my mind that we have to do something. The situation cannot continue. It reflects very badly on our legal set-up that the issue has gone on for so long, with so many people undoubtedly suffering through a lack of action from our courts.

The Convener: We have the option of putting this matter on the agenda of our next meeting and, before that meeting, having a note prepared containing a summary of what we have heard today.

Stewart Stevenson: It would be useful to have the Lord President come and talk to us on this subject and for us to examine the ways in which he might be able to make progress, including an act of sederunt if that would be an appropriate way of bringing the efficiency and effectiveness of commercial court procedures to personal injury cases.

We should make it clear that, if the Executive cannot find a way of dealing with personal injury cases in general, we are not at this stage ruling out the option of proceeding solely and quickly on the basis of a bill such as the one that Frank Maguire has proposed. I say that partly to ensure that we maintain pressure on this issue, but partly also because I am genuinely prepared to push this issue on behalf of victims of asbestosis if that is the only way forward.

The Convener: I am sure that there will be a committee solution to this.

Scott Barrie (Dunfermline West) (Lab): I agree almost entirely with everything that Stewart Stevenson said. It is now almost 10 months since we first considered this petition. It is not that we have not been doing anything, but we keep going round and round. Everyone acknowledges that this is a serious problem, but we are struggling to find the most appropriate solution. We must apply the maximum pressure possible—whether on the Lord President or on the Executive, I am not entirely sure—but I feel that the twin-track approach that Bill Aitken and Stewart Stevenson suggested is exactly the way to proceed. Otherwise, we might sit for a further 10 months trying to work out the best solution. We have taken a considerable amount of evidence on this subject and it is about time that we began to act more proactively.

11:15

George Lyon (Argyll and Bute) (LD): I associate myself with what other members have said. Scott Barrie made an important point, but we have not yet grasped the solution that is required to make progress on the issue. We need to hear evidence from the Lord President and the Executive's justice department about possible solutions.

However, the committee has a huge work load. I am not sure whether the decision has been taken about which committee is to take on the Criminal Justice (Scotland) Bill, but I understand that the bill might come to us. If that is the case, I am concerned that, in 10 months' time, we may still be saying that something must be done about petition PE336, but that we will not have reached a conclusion.

I support option A in the clerk's paper, which is to appoint reporters to pursue the matter more quickly. If we rely on committee time, the issue might drag on into the summer. I support the appointment of reporters, who would undertake intensive work over a two-week period, after which we could take further evidence.

The Convener: We have to conclude. It has been helpful to hear members' views on the subject. Scott Barrie rightly said that we have worked on the matter for 10 months. We have done so and two reporters have worked with the clerks to pull together the extensive note that we have in front of us, which enables us to focus on the issues for action.

We are clear that, as a committee, we want to take action. George Lyon rightly pointed out that the committee has a heavy work load—that has always been the case. Although we have a heavy agenda, it is a measure of the importance of the subject matter of petition PE336, and the urgency with which we wished to deal with the petition, that we agreed to fit it into our agenda.

Based on what members have said, I propose that we adopt the concept of a twin-track approach. We will draw up a narrow focus for points of action, which will include suggestions from members, including George Lyon, about calling in the Minister for Justice and the Lord President. We will look at the *Official Report* to see what the petitioner has said about what needs to be done. At our next meeting, we will allocate about 15 minutes to decide how we wish to proceed. Are we agreed?

Members *indicated agreement*.

Crown Office and Procurator Fiscal Service

The Convener: Item 5 is the committee's inquiry into the Crown Office and Procurator Fiscal Service. This morning, we will hear evidence from the Faculty of Advocates. I welcome Neil Brailsford QC, Alan Dewar QC and Simon Di Rollo QC. Thank you for the paper that you submitted, which has been very helpful in addressing some of the issues. I apologise for keeping you waiting, but I hope that it gave you an opportunity to hear the discussion. In view of the time, we will go straight to questions. At the end of the session, we can deal with issues that you feel have not been covered.

Stewart Stevenson: You are probably aware of the committee's discussions and of the questioning that took place in our last evidence-taking session. One issue about which I am uncertain and unclear is the claim that is made by advocate deputes to a special form of independence that is denied to the procurators fiscal. What are your views on the subject? So far, witnesses have failed to show us the practical difference that that independence—if it exists and if it is justified—makes and how it manifests itself in the way that things actually work. Lay people, such as myself, do not see it as yet.

Neil Brailsford (Faculty of Advocates): We have read the *Official Report* of at least part of the committee's previous evidence-taking sessions and we have seen what Derek Batchelor said. He clearly attempted to set out some of the background to the independence of Crown counsel. I understand that it is a difficult concept and we have given thought to the dialogue that took place about that.

The first point, in a sense, is a reiteration of what Derek Batchelor said, although I will try to avoid repeating what he said. Crown counsel are independent; they are not employees. The Lord Advocate appoints them and, as a concomitant of that, he can remove them whenever he wants to. Of course that does not happen very often, but our understanding is that advocate deputes have been asked to leave in the past, for whatever reason.

Procurators fiscal are employees. I am not impugning procurators fiscal in the slightest; they are very able people who are doing their job and no one has any criticism of them in that regard. However, they are part of a career structure and the difficulties that that career structure presents them are part of their concern. We are concerned that the career structure puts certain pressures on them. If procurators fiscal were appointed Crown counsel, there is no doubt that they would either remain in the Procurator Fiscal Service or go back to the service after a period of time. Members will appreciate the fact that Crown counsel usually serve for about three years, give or take.

We think that there is a possible perception that procurators fiscal might be concerned—even subconsciously—with their prospects for promotion within the Procurator Fiscal Service. There is the perception that that might impinge on the decisions that they would have to make as Crown counsel.

As the committee knows, Crown counsel have to mark cases. Members can imagine, at least at perception level, the possibility of difficulty if a procurator fiscal, Crown counsel, advocate depute were to receive papers from a very senior regional fiscal who had marked a case and made a recommendation. One can see the possibility that the Crown counsel who is going back into the Procurator Fiscal Service might be perceived as wishing not to go against the wishes of the recommendation or view of that very senior fiscal.

Stewart Stevenson: How do you respond to the point that the fiscals are independent by right of their having a direct commission? Given what you have just said, the advocate depute could be in fear of being dismissed by the Lord Advocate. I see those two points as somewhat balanced. The fiscal is part of a broader legal profession and has a variety of career opportunities within and outwith the fiscal service. Coupled with the direct commission that fiscals hold, that ought to prevent difficulties applying in practice. The direct commission, which is similar to the advocate deputes' direct commission, could make people in the broader community see procurators fiscal as just as independent. How do you respond to that, if it is a fair point?

Neil Brailsford: It is a perfectly fair point and I accept the fact that the procurators fiscal and Mr Richard Stott made it to the committee very forcefully. I accept the fact that procurators fiscal hold a commission and are meant to be independent—they exercise independent judgment. However—I stress the point about perception—they are part of a career system and there might be some difficulties with the perception of that.

The second point is the fair comment that procurators fiscal are part of a broader legal profession and have opportunities within the fiscal service. That is undoubtedly true and whether that is good or bad does not really matter—it is entirely neutral. Procurators fiscal fulfil different functions at different times in their careers. Sometimes they have a managerial function and sometimes they appear in court; they do a variety of jobs. That is part of the career structure. I do not think that it is either pro or against the proposition.

Simon Di Rollo (Faculty of Advocates): It is important to appreciate that an institution like the Procurator Fiscal Service creates a way of thinking and a particular mindset—there is no question about that. My experience as an advocate depute reviewing decisions on whether or not to prosecute demonstrated to me that those decisions had been taken as a result of a mindset. For example, there was a general mindset that tended to put health and safety cases into the summary court, when it was generally felt by Crown counsel that they should be prosecuted under solemn procedure at a more serious level. Road traffic cases, such as causing death by dangerous driving, were the same. Decision making in relation to prosecution constantly requires to be looked at with a fresh mind. If such independent review is removed from the system, something very important will be taken away. I realise that it is difficult to express, but I feel strongly that there is a danger of not realising the importance of that check in relation to decision making.

Richard Stott made it perfectly clear that he did not want somebody reviewing his decisions. I suggest that it is a good thing that somebody reviews decisions. It means that, at the end of the day, the decisions are the right ones, by and large, although obviously mistakes are made. The decision-making process is improved, because decisions have to be looked at with a fresh and independent mind.

Alan Dewar (Faculty of Advocates): I would like to take up that point, because I was struck by some of Stewart Stevenson's questioning in particular. At one stage of the dialogue that Stewart Stevenson had with Derek Batchelor, Stewart Stevenson made the point—with which Derek Batchelor did not agree—that to his way of thinking the difference between independence from the point of view of an advocate and from that of a fiscal was paper thin. Derek Batchelor did not accept that for one minute. I suggest that he was right not to do so.

I will try to illustrate that point by referring to Richard Stott's evidence. I am not here to do Richard Stott down—none of us is. I have also been an advocate depute in my time, and I overlapped slightly with Richard Stott when he was one of the permanent staff in the Crown Office. I have the highest regard for him, but he himself recognised—in particular in response to Duncan Hamilton's questions—that from time to time he came under pressure from certain agencies, such as the police, the Health and Safety Executive, HM Customs and Excise, and so on.

There is a significant difference between the roles. Fiscals have a different role. They are in daily contact with outside agencies that report to them and therefore are liable to come under the sort of influence that advocate deputes simply do not, because advocate deputes do not meet those agencies in that way. In fact, the only time that they will meet those agencies head to head in any shape or form is when they come to prosecute a particular trial.

As I read Mr Stott's evidence, the only reassurance that he was able to give to indicate that he saw himself as independent was that you were to rely on his integrity. I have no desire to question his integrity—he is a man of high integrity. However, can we be satisfied that every fiscal in the service is of that ilk? Can we be satisfied that on every occasion even a man of the highest integrity, such as Mr Stott, will take the right decision?

Mr Hamilton's and Mr Aitken's questions were very well taken. They raised concerns about whether the integrity of fiscals was a sufficient guarantee. Advocate deputes—who are not part of a career structure, who do not have an axe to grind and are involved in cases for only a limited period—are much more likely not be influenced, even subconsciously, by factors such as those that have been mentioned.

11:30

Although the independence of Crown counsel is a difficult concept, it is not a paper-thin concept; it has existed for a very long time. Although many elements of the prosecution system may be criticised, the role played by advocate deputes is not one of those. In this case we should apply the principle, "If it ain't broke, don't fix it".

Mr Duncan Hamilton (Highlands and Islands) (SNP): I am very pleased that Mr Dewar picked up on the issue that I raised last week, as it was the most concerning aspect of the evidence that we heard.

Can you help the committee to understand the advantages of the independent role that you advocate? Your written submission makes four points that I would like you to expand on. Mr Di Rollo has already mentioned the first of those, which is made on page 4 of the submission. You say that an independent view is taken on the marking of cases that is occasionally different from the view taken by the fiscal. Of what proportion of cases is that true? I understand that, even if the advocate depute confirms the fiscal's opinion, it is advantageous for an independent view to be taken on the marking of cases, but how often do the advocate depute's and the fiscal's conclusions differ?

Neil Brailsford: I take it that the member is asking in what percentage of cases the advocate

depute disagrees with the marking of the fiscal. That is very difficult to assess. As the committee has heard, advocate deputes usually work in pairs, but marking their own cases. They work for a week at a time. For that reason, we do not know the overall figure for the percentage of cases in which advocate deputes disagree with the marking of the fiscal. I would say that it is very low—less than 5 per cent, and probably 1 or 2 per cent. However, I stress that those can be very important decisions.

We looked into this issue, because we know that the committee is interested in actual examples. I understand why—it is easier to understand things with the help of a concrete example. We have found one that Mr Di Rollo can tell you about rather better than I can, because he was involved. It relates to a murder case that was subsequently prosecuted to conviction, but in which the fiscal's original recommendation was not to proceed.

Simon Di Rollo: That is all that needs to be said. Such cases crop up regularly. I do not agree with the proposition that advocate deputes disagree with fiscals' marking in 1 or 2 per cent of cases; I think that the figure is rather higher. Decisions are being—or ought to be—questioned rather more often than that.

In the murder case to which Neil Brailsford referred, the recommendation not to proceed was made by a very senior fiscal. After considering the case, Crown counsel decided that the case should proceed, resulting in a conviction. I am not saying that the recommendation was wrong, but the decision that was made was much better because fresh consideration was given to the case. The decision that was made was the right decision, because the case was independently reviewed by someone who was detached from it and who had an opportunity to consider the evidence. That person decided that there was enough evidence to proceed with the case and that it should proceed. That is what we will lose if we remove the tier of independent decision making from the process.

Alan Dewar: I do not disagree with anything that has been said, but I share Simon Di Rollo's view that the percentage of cases in which there is disagreement between the advocate depute and the fiscal is probably higher than 1 or 2 per cent. However, it is very difficult to put a figure on that. I do not think that an analysis has ever been done of the matter.

I caution against viewing this issue in statistical terms. I suggest that the system itself is a good one because, when procurators fiscal and precognition officers—who are not lawyers—prepare such reports for consideration by Crown counsel, they benefit from knowing that their thinking will be reviewed by someone else. High-quality decision making is much more likely to be achieved at first instance level—when the report is being researched, written and submitted—even though Crown counsel may not agree with the recommendation at the end of the day. Examining the statistics is one way of looking at the problem, but it is by no means the whole story.

Mr Hamilton: Page 2 of your additional submission states:

"The benefit of such independent scrutiny cannot be over-emphasised".

You go on to say that Scotland has avoided the miscarriages of justice that have occurred in England because of the independent scrutiny. Will you speak a little more about that, so that we can understand the seriousness of the issue?

Simon Di Rollo: The point that we were trying to make is that Scotland has not had the same public scandals that have occurred in England, such as the Birmingham six, the Guildford four and other high-profile cases of clear miscarriages of justice. One reason that the Scottish system has not been victim to such problems is the role of independents and the level at which they exercise that role. The police, too, are conscious of the fact that their actions will be carefully scrutinised not only by the procurator fiscal, but by the deputes of the Lord Advocate, who is the minister responsible. That whole position is a safeguard against miscarriages of justice.

Mr Hamilton: The submission also cites negotiated pleas as another advantage of the independence of the advocate deputes. You say that the complainer benefits from having that independent advice, especially in sensitive cases. Can you unpack that a bit more?

Neil Brailsford: It is simply that, because the advocate depute is wholly independent, the advocate depute can take any decision that he or she wants in any case—with the exception of murder and rape cases, for which the consent of a law officer must be obtained.

From my personal experience as an advocate depute, I can say that the advocate depute examines a case objectively and sometimes takes hard decisions. The hardest decision is the decision not to proceed with a case. That decision might need to be taken on qualitative factors, not simply on the quantity of evidence. One looks at the evidence that one has. It sometimes happens that, although there is technically enough evidence, it is of such poor quality that one appreciates that proceeding with the prosecution would not further the public interest. I believe that it is easier to take such decisions if one can do so from a wholly independent standpoint.

Alan Dewar: There are highly sensitive cases, in which there are several serious charges—such as a mixture of assaults, possibly including sexual

assault—which may have a number of victims. If the accused person is prepared to tender a plea to some or one of the charges, the victims of the other charges to which a guilty plea is not taken might feel aggrieved that they have not been vindicated. It is difficult to reach a view on such delicate cases, but we feel that it is more likely that we will get that difficult balance right if such cases are dealt with by someone who is truly one step removed from the system and who is there only for a limited period.

I want to emphasise the point about the mindset that can arise. As has been indicated, those who come from the bar to serve as advocate deputes tend to serve about three years—sometimes a little more, sometimes a little less. Towards the end of my own three-year period—I served a little more than three years—I was aware of being rather more prosecution-minded than I had been at the outset. The danger of such a mindset is that you tend to see things in a more blinkered way and to think of the person in the dock as being guilty before the case is finished. One has to guard constantly against that. As a result, the fact that one serves as an advocate depute for a limited period is an additional advantage that confers either independence or something closely related to it. Anyone from the fiscal service who came into the Crown Office would have been in the system for a long time; because they were prosecuting in the High Court, would still be in it; and indeed, would know that, in all likelihood, they would be returning to it. As a result, there is the danger of having a subconsciously blinkered attitude when prosecuting cases.

Neil Brailsford: It is worth stressing that the purpose of prosecution in the public interest is not to get a conviction, but to put before a judge in summary cases or before a jury all the relevant facts, persuasively and to the best of one's ability. It is then a matter for the judge or jury to decide.

The Convener: I do not think that that is the public's perception.

Neil Brailsford: No, but the point is worth mentioning.

George Lyon: I completely accept your arguments for the institutional independence of the advocate service. However, should everyone from the fiscal service be precluded from becoming an advocate for that three-year period, because of the perception or reality that they are tarred by being part of the fiscal service's career structure? That is what you seem to be saying.

Neil Brailsford: At the start of your question, you mentioned joining the Faculty of Advocates. Any procurator fiscal can resign from the Procurator Fiscal Service any time and, providing that they have the qualifications—which they would obviously have—become a member of the Faculty of Advocates. There is no difficulty with that; it is one of the career options open to procurators fiscal. However, through no fault of an individual, the fact that they are an employee of the Procurator Fiscal Service gives rise to the possible perception of a lack of independence.

George Lyon: As I do not have a legal background, will you explain how one becomes an advocate?

Neil Brailsford: Do you mean an advocate or an advocate depute?

George Lyon: An advocate depute.

Neil Brailsford: Becoming an advocate depute is entirely at the gift—if that is the right word—of the Lord Advocate of the day. As none of us has been Lord Advocate, we do not know how the decision is made, but presumably he consults the Solicitor General. I would not be surprised if they also had a word with some of the senior judges, the Dean of Faculty and other senior colleagues. However, I do not know that specifically. The Lord Advocate decides the depute who will exercise his role and have all his powers when in court. Given that the Scottish bar is and always has been a fairly small body and that there is a limited number of courts, the Lord Advocate is likely to know a person's abilities. Historically, people have not been asked to become advocate deputes until they have become very experienced advocates.

Simon Di Rollo: Such people have usually been at the bar for a minimum of eight to 10 years, depending on their previous experience before coming to the bar. If they have practised as a solicitor or been a member of the Procurator Fiscal Service for an extensive period, that might cut down the length of time. However, the amount of time is usually considerable. Certainly people must have cut the mustard in practice for the Lord Advocate to ask them to become advocate deputes. To be asked is obviously regarded as a privilege and, until relatively recently, most people have been happy to accept.

Alan Dewar: If the committee is concerned that we are putting up some false barrier with respect to people from the fiscal service becoming advocate deputes, I want to say that that is not the case. As the committee heard last time round, several people have been members of the fiscal service, have chosen to leave the service, become admitted to the Faculty of Advocates and have been appointed advocate deputes—indeed Mr Batchelor fell into that category as did Johanna Johnston, who also gave evidence to the committee.

11:45

The question relates to another concern about career structure, which in turn is related to the perceived lack of morale in the fiscal service. The Pryce review of planning, allocation and management of resources in the Crown Office and Procurator Fiscal Service—not that I pretend to have read the whole document—highlights a certain degree of disappointment in procurators fiscal that, as things stand, they are not allowed to progress to advocate deputes within the system. The recommendation is that that matter should be considered further.

The fact that someone within the fiscal service cannot progress to become an advocate depute is not something that ought to weigh heavily in a consideration of the whole system. We are talking about whether we have a good prosecution system in the public interest, not whether it would please procurators fiscal to become part of that system at the higher echelons. I am not trying to make a cheap point, but the procurators fiscal knew that that was the situation when they entered the service. If people within the system are dissatisfied that, as matters stand, they cannot become advocate deputes, there is nothing to prevent them from leaving the service and following the route that we have suggested. There is no artificial barrier.

The Convener: We are not dealing with individual procurators fiscal, but there is a public interest in the whole inquiry and we must ask whether the public are being failed because we are not keeping experienced procurators fiscal. We are trying to get to the bottom of that. The Crown Office would welcome such a mindset, because it would suggest that we have a store of experience that we do not have currently. That experience is fundamental to a quality prosecution service.

I am listening carefully to what you and Crown counsel have said, but I do not understand about the issue of independence. I put the question to Crown counsel last week and I was not satisfied with the answer. Why is independence an issue for the High Court, but not an issue for the sheriff court?

Simon Di Rollo: It is an issue throughout the whole system.

The Convener: Do you see the distinction that I am making? We have procurators fiscal prosecuting in the sheriff court, although they do not prosecute in the High Court—why not? Surely the issue of independence is crucial in sheriff courts? How do the two sit together?

Simon Di Rollo: Solemn cases have the benefit of independent decision making in the sheriff courts. In all sheriff and jury cases, Crown counsel has been involved in the decision-making process. That is where the independence is.

The Convener: Can I stop you there? Are you saying that the approach to independence is the same as for High Court cases?

Alan Dewar: No, that is not what is being said. Mr Batchelor referred to "institutional independence" when he gave evidence. The way in which that works—

The Convener: I am sorry to interrupt, but I understand what you are saying about how it works. The point that I do not understand and on which I would like an answer is the difference between the High Court and the sheriff court. Are you saying that there are differences? The independence issue is not the same, is it?

Alan Dewar: I want to deal with that issue, but to answer the question properly, one must recognise the way in which the system operates from the beginning. Anyone appearing at first instance, when charged in a serious criminal matter, appears in the sheriff court on petition. That is the case whether the person is then prosecuted in the sheriff court or the High Court. That is the beginning of the prosecution process.

In every case in which a person has appeared on petition in the sheriff court, there is an obligation on the Procurator Fiscal Service to report the case to the Crown Office. That case is then marked by Crown counsel and may well go back and be prosecuted in the sheriff court, either with or without a jury. Institutional independence is part of the marking process, whether the case is then prosecuted in the High Court or in the sheriff court.

The Convener: I understand. Why could the same not happen for prosecution in the High Court?

Neil Brailsford: It does happen. Every serious case starts with a petition being presented.

Simon Di Rollo: If I understand her correctly, the convener is asking why the fiscal cannot prosecute in the High Court in the same way.

The Convener: You make the decision. Why can they not prosecute?

Simon Di Rollo: You are getting away from the issue of independence and moving on to the issue of presentational ability.

The Convener: I am just trying to understand your argument about why procurators could not prosecute in the High Court. I am listening to what you are saying about independence. You will know that we have heard people ask why the same advocate depute who marks the case does not prosecute it. We have been told that that is impossible. Given what you have said, why is it

impossible for others, such as experienced, professional fiscals, to prosecute in the High Court?

Neil Brailsford: The answer is that that could happen. However, as we have said in our written submission, we maintain that there are advantages in having a Crown counsel or advocate depute do it.

Simon Di Rollo: With respect, at the level that we are talking about—the High Court—I suggest that the best people available for the job, in the public interest, are to be found in the Faculty of Advocates. That is my evidence. You can either accept it or not, but I suggest to you that that is the situation as regards presentation.

Alan Dewar: Perhaps I can describe the situation slightly more graphically. If you found yourself accused and being prosecuted in the High Court for a serious crime, you would probably want to be represented by someone like Donald Findlay or Gordon Jackson, to pick two obvious examples. [*Laughter.*]

The Convener: Now, now.

Alan Dewar: Members may have their own preferences, but the fact is that you would want to be defended by an experienced High Court practitioner. I asked members to put themselves in the defendant's shoes, but let us look at the matter in a slightly more detached way, from the point of view of the public interest. Would you prefer serious criminals, or anyone appearing in the High Court, to be prosecuted by a Donald Findlay equivalent—if there is such a thing—or by someone who regularly prosecutes cases to do with routine assaults, drunk driving and so on?

We are talking about the aspect of equality of arms. Moving away from independence for a moment, we are here to say that experience and skill must also come into the matter. In addition to the point about independence, we are saying that there ought to be equality of arms. If the best people are defending in the High Court, the best people should also be prosecuting.

The Convener: We are listening to what you are saying, but only yesterday we were listening to procurators fiscal, who say that they, too, could be the best people for the job. Some of the more senior fiscals have a lot of experience in prosecution.

Simon Di Rollo: Many of them have not been in court for a considerable length of time, which is a big problem with the way in which things are organised. I can appreciate why it must be difficult for you to understand, as you are hearing competing views. Some of the things that have been said in the debate are not correct. It is not correct to say that able advocates who have been defence practitioners do not make excellent advocate deputes, or that able practitioners in civil cases do not make excellent advocate deputes, because they do.

The Lord Advocate or whoever is responsible for choosing an advocate depute must do so with care. They must consider whether the person has the experience and the ability to do the job. That is all that matters for the public interest. There are people in the Faculty of Advocates who are of the calibre that is required and they should be available to do the job on behalf of the public.

Neil Brailsford: An objective point that could be made—indeed, the convener made it—is that, although there are many experienced people in the Procurator Fiscal Service, the career structure means that they do not spend all their time prosecuting but do a variety of jobs. For example, they might prosecute for a while before going into management. Advocates are specialist pleaders. By the time we are appointed an advocate depute, we have spent a long time in court, handling evidential matters daily.

The Convener: I am afraid that we will have to close down the discussion, as we are running out of time. That is unfortunate, because the discussion that we are having is good. I will allow our witnesses to make some brief points before they go.

George Lyon: Before we move on, I would like to ask for a brief point of clarification. Simon Di Rollo mentioned his involvement in cases in the sheriff court. What triggers the involvement of Crown counsel in the review of a case? Is it the seriousness of the case?

Alan Dewar: The trigger is simple. All cases involving someone who appears on petition at the beginning of the process are reported to the Crown Office. The cases are then marked, or reviewed, by Crown counsel. A large part of the marking process is the decision about whether a prosecution, if there is to be one, should be in the sheriff court or the High Court. Any case that the Crown counsel has decided should be prosecuted before a sheriff and jury goes back to the local procurator fiscal's office to be dealt with by the procurator fiscal. However, before it gets to that stage, there is the element of independence that I described.

The Convener: The last question will be asked by Bill Aitken. In replying, it would be helpful if the witnesses could raise any points that they feel should have been mentioned. I apologise for the fact that we have run out of time. This has been an interesting discussion and perhaps we can continue it another time, if we can find a suitable slot.

Bill Aitken: It is evident that the criminal justice

system in Scotland is under tremendous pressure—that is not in dispute. That has resulted in suggestions—I will put it no more strongly than that—that there should be a diminution of the 110-day rule. Does the Faculty of Advocates have a view on that?

Neil Brailsford: We have no formal view on whether the 110-day period should be shortened. We have not considered the matter. We have a way of making representations to the committees and the Parliament and the matter has not come up in that process.

Alan Dewar: That is entirely accurate: there is no current view on the matter. Lord Bonomy asked the Faculty of Advocates to make a submission to his review of many matters relating to the prosecution process in the High Court, including the issue that Bill Aitken asks about. A small sub-committee, of which I am a member, has been set up and views will be formed on that and many other issues.

Bill Aitken: We look forward with interest to hearing those views.

The Convener: Are there any additional points that the witnesses would like to mention?

Simon Di Rollo: One point about precognition must not be lost sight of. Having read the *Official Reports* of previous meetings, I want to stress that one should not focus on presentation to the exclusion of preparation. The major problem with the justice system relates to preparation rather than presentation. The precognition of cases is a skilled task that requires a great deal of legal experience. I do not have that experience, as I am not a solicitor and have not carried out work in that regard.

When we discuss matters such as who is the best person to present cases, the importance of precognition should not be lost sight of. Precognition should be done well by properly qualified people.

Alan Dewar: I crave the convener's indulgence to raise one final matter. It follows on from what Mr Aitken said, but in a slightly different way. Mr Aitken was referring to a large degree of stress within the procurator fiscal system. Last week, an article in *Scotland on Sunday* referred to a Crown Office report on stress levels. I understand that the report, which I have not seen, was an internal document. The suggestion in the article was that one in 10 "prosecution lawyers"—that was the term that was used—suffer from symptoms that are akin to those of clinical depression and that two thirds of staff in the Procurator Fiscal Service suffer from stress.

Against that background, I must ask a serious question. Does the committee want to add to the stress in the system by giving procurators fiscal the additional responsibility of prosecuting in the High Court? I suggest that now is not the time to do that.

12:00

The Convener: I am afraid that we must end our evidence-taking session there. I am absolutely sure that the basis of our inquiry is not—

Stewart Stevenson: I will make one brief point. It is quite important.

The Convener: If you let me finish, I will let you make your point.

Stewart Stevenson: Sorry.

The Convener: I do not want witnesses to insult the committee in any way by suggesting that we do not know where we are going with the inquiry. We are examining a service that is underfunded and which should have proper career structures—other people agree with us on that. We are holding a debate about the best way forward for the service. We will take all the evidence into account. I will give Stewart Stevenson the last word, if he makes it brief.

Stewart Stevenson: Because I am named in the *Scotland on Sunday* article, I want to make it clear that the issues that are referred to are in the Jonathan Pryce report—in annex E. That report is in the public domain.

Alan Dewar: There might be another document, but I am not sure.

Stewart Stevenson: There is another document. What has been discussed in the public domain comes from public sources. It is important that I make that point. I have not drawn on anything that is confidential.

Alan Dewar: Absolutely. I did not intend to insult the committee in any way. I draw the matter to members' attention, in so far as it is not already at the front of the committee's mind, as a serious point. In a situation in which there is a high degree of stress, the matter ought to be at least a consideration in deciding whether the responsibilities of fiscals should be increased.

The Convener: I thank you for your evidence. The discussion has been interesting. I assure you that everything that you have said this morning will be considered seriously in the course of our inquiry. Thank you very much for appearing.

We agreed that we would deal with item 6 in private. That should take us four or five minutes.

12:02

Meeting continued in private until 12:15.

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