JUSTICE COMMITTEE

Tuesday 2 December 2008

Session 3

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CONTENTS

Tuesday 2 December 2008

JUSTICE COMMITTEE
30th Meeting 2008, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

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*Robert Brown (Glasgow) (LD)
*Angela Constance (Livingston) (SNP)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*Paul Martin (Glasgow Springburn) (Lab)
*Stuart McMillan (West of Scotland) (SNP)

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Aileen Campbell (South of Scotland) (SNP)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Dr Richard Simpson (Mid Scotland and Fife) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Fergus Ewing (Minister for Community Safety)

CLERK TO THE COMMITTEE

Douglas Wands

SENIOR ASSISTANT CLERK

Anne Peat

ASSISTANT CLERK

Andrew Proudfoot

LOCATION

Committee Room 6

Scottish Parliament

Justice Committee

Tuesday 2 December 2008

[THE CONVENER *opened the meeting at 10:18*]

Damages (Asbestos-related Conditions) (Scotland) Bill: Stage 2

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that mobile phones are switched off. We have a full turnout, so there are no apologies.

Agenda item 1 is stage 2 consideration of the Damages (Asbestos-related Conditions) (Scotland) Bill. Members should have the marshalled list of amendments and the groupings.

Section 1—Pleural plaques

The Convener: Amendment 1, in the name of Bill Butler, is grouped with amendments 2 to 5.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. Amendments 1 to 5 have been lodged on behalf of Clydeside Action on Asbestos, with the support of the Clydebank Asbestos Group, Unite and people acting for sufferers of pleural plaques. The purpose of amendments 1 and 4 is to achieve no more than what the Scottish Government intends to achieve, but in a clearer, more direct and more economical way and in a way that will not give rise to unnecessary questions that will have to be resolved by a court. Amendments 2, 3 and 5 are consequential on amendments 1 and 4, and would remove unnecessary provisions.

There is absolutely no difference between what the Government intends to do through the bill and the intention of those who represent victims of pleural plaques; the only difference is over how the intention should be achieved. The intention is that victims who have developed pleural plaques as a result of the negligence of some other person should be entitled to recover the same amount of damages as they were able to do before the House of Lords decision in the Rothwell and Johnston case. In effect, that means that, first, victims would be able to return to court in the event of their contracting in future a disease that is caused by asbestos and which constitutes a serious deterioration. That is especially important with regard to malignant diseases such as mesothelioma and/or asbestos-related lung cancer. Secondly, the victims would be entitled to claim damages not only for pleural plaques, but for the anxiety about the risk of contracting such diseases in future. It is essential for the bill to give effect to that intention clearly. However, for reasons that I will explain, there are doubts as to whether it will do so.

I turn to amendment 1. Section 1(1) states:

"pleural plaques are a personal injury which is not negligible."

The explanatory notes state that the intended meaning is that

"pleural plaques are material damage that is not *de minimis* for the purposes of claiming delictual damages."

The trouble is that section 1(1) does not say what the Government says it is intended to mean. As a result, several eminent lawyers have taken the view that it is open to question whether section 1(1) will achieve what the Government intends.

If we are to achieve the intention, the starting point is to ascertain exactly what the crucial question was before the House of Lords in the case of Rothwell and Johnston. Lord Hoffman put his finger on it when he asked, at paragraph 10 of the judgment:

"Are pleural plaques actionable damage?"

Lord Hope of Craighead and Lord Rodger of Earlsferry made statements to the same effect in paragraphs 39 and 90. It is therefore clear that the crucial question in the case was whether pleural plaques are an actionable damage. The House of Lords answered the question in the negative, so the bill must provide clearly that pleural plaques are a personal injury that causes actionable damage.

Unfortunately, section 1(1) does not make it clear that pleural plaques are a personal injury that causes actionable damage for which damages may be recovered. As that is the intention, why not say so clearly? Amendment 1 would achieve that by providing simply that pleural plaques are a personal injury that

"causes actionable damage for the purposes of the law of delict".

That would achieve the Government's purpose more clearly and directly and in a way that would be understood immediately in any court of law.

I suppose that the Government will argue that the intention is achieved by stating:

"pleural plaques are a personal injury which is not negligible."

I am told that judges use various expressions to describe what is meant by the term "actionable damage". Sometimes, they use the expression "material damage", or they talk about real damage, as distinct from purely minimal damage, or damage that is beyond what could be regarded as

negligible. However, section 1(1) does not refer to damage at all. The words "not negligible" describe the seriousness of the injury, which is a question of fact rather than one of law—the question of law is whether the personal injury causes damage that is actionable.

Another problem with the drafting of section 1 is that it does not make it clear that pleural plaques are an actionable personal injury for which damages can be recovered under the law of delict. Delict is the name given to the common law under which damages can be recovered for negligence or some other breach of duty. Section 1(2) says that damages are recoverable, but it does not mention the basis on which that can happen. The section could be read as imposing strict liability without any fault or breach of duty at all, which of course is not the intention. Section 1(4) attempts to restrict the width, but again, it does not mention that it is talking about delictual liability. It could be referring to another kind of liability, such as liability under a contract of employment. Members will remember that, at stage 1, the committee was concerned that the bill could have an effect, intended or otherwise, on other areas of law. Amendment 1 would make it clear that the provision applies only for the purposes of the law of delict.

There is an even more fundamental problem with section 1. As I said, the intention is that victims who have developed pleural plaques as a result of the negligence of some other person should be entitled to recover the same amount of damages as they were able to do before the House of Lords decision in the Rothwell and Johnston case, including damages for anxiety about the risk of contracting a more serious disease from asbestos in the future. That is achieved through amendment 1, I contend.

If the bill says that pleural plaques are an

"actionable damage for the purposes of the law of delict",

it would automatically follow that a victim who has developed pleural plaques in consequence of the wrongful act or omission of another person would be able to recover damages from that other person, not only in respect of pleural plaques but in respect of any other damage that follows from the wrongful act or omission, such as the risk of developing a more serious asbestos injury, and any related anxiety.

In his opinion on the Rothwell and Johnston appeal, Lord Rodger stated:

"Of course, if the plaques were an actionable injury, the risk that they might eventually result in a harmful condition would be an element in any claim. So, too, would the related anxiety."

Section 1 is silent on that. In my view, it is therefore extremely doubtful whether that result would be achieved under the bill.

I should make it clear that I am absolutely not saying that the Government's intention would not be secured by section 1. My point is simply that its wording gives rise to unnecessary doubts or questions, which will have to be argued over in court. In relation to such a matter, it is desirable that the Parliament should not pass legislation that gives rise to such doubts. The position ought to be made clear—as it is, I contend, by amendment 1.

The purpose of amendment 2 is to leave out subsections (2) to (4) of section 1. The subsections are unnecessary in consequence of amendment 1. As has already been explained, it would follow automatically from amendment 1 that a victim who has developed pleural plaques in consequence of the wrongful act or omission of another person would be able to recover damages from that other person. That achieves the purpose of subsections (2) and (4) in a clearer, more straightforward and more economical way. Subsections (2) and (4) can therefore be deleted, as they are unnecessary.

I contend that subsection (3) is also unnecessary. It is drafted on the mistaken assumption that the bill is reversing or abolishing an existing rule of common law: that pleural plaques do not constitute actionable damage. However, there is no such rule, and that is therefore not what is happening under the bill. This is an extremely important legal point, I have been advised. There is no authoritative judgment in Scots law that pleural plaques do not constitute actionable damage. The English decision in the Rothwell and Johnston case has created uncertainty, however. The bill removes any uncertainty created by that case, and it clarifies what the law is. That is the aim of the bill, and it is achieved by section 1(1), as amended, and by section 4(2), which makes it clear that the provision is retrospective. Section 1(3) is simply unnecessary.

Amendment 2 will ensure that the legitimate expectations of people who suffer from pleural plaques are being preserved in Scotland. In other words, the bill will support the human rights of those who suffer from pleural plaques.

The purpose of amendment 3 is to leave out the words

"For the avoidance of doubt".

at the beginning of section 2(1). Those words are unnecessary, and their omission will help to bring section 2 into line with section 1.

In the explanatory notes, the Government states:

"In subsection (1) the phrase 'for the avoidance of doubt' is used because there is, in fact, no authoritative decision to the effect that asymptomatic pleural thickening and asbestosis are not actionable."

However, the position is the same with pleural plaques. As I have said, there is no authoritative court case that establishes, as a matter of Scots law, that pleural plaques are not an actionable personal injury. Accordingly, the position is the same with both the conditions that I have just cited, and they should therefore be treated in the same way. Victims of asbestosis and pleural thickening also have a legitimate expectation, which is secured and clarified by the bill.

The purpose of amendment 4 is to bring the wording of section 2(1) into line with section 1, as amended by amendment 1. Amendment 4 makes it clear that an asbestos-related

"condition mentioned in subsection (2) … is a personal injury which … causes actionable damage for the purposes of the law of delict".

Amendment 4 has been lodged for the same reasons that apply to amendment 1.

10:30

The purpose of amendment 5 is to leave out subsections (3) and (4) of section 2, as they are unnecessary. It will bring section 2 into line with section 1. In the explanatory notes, the Government states:

"Subsections (3) and (4) provide that a person suffering from pleural thickening or asbestosis need only prove symptoms, or the likelihood of symptoms developing, if they wish that matter to be reflected in the amount of damages awarded."

That would be the position at common law in any event, and I would argue that it is unnecessary to provide for that in the bill.

I have tried to explain fully why I consider that the amendments in the group will achieve no more than what the Scottish Government and all of us intend to achieve, although in a clearer, more direct and more economical way, and in a way that will not give rise to unnecessary questions that will have to be resolved by a court. For those reasons, I hope that the amendments will prove acceptable to the committee.

I move amendment 1.

The Convener: Thank you, Mr Butler. This is a complex matter, and you explained your position exceptionally clearly.

Bill Butler: With a lot of help, convener.

The Convener: I am grateful nonetheless.

Robert Brown (Glasgow) (LD): As they say in the courts, I adopt the reasoning of my good friend, Mr Butler. I will add one or two further comments. The point about clarifying, rather than changing, the law is extremely important, and it is supported by the wording that the Government has used both in the bill's long title and in the explanatory notes.

Paragraph 5 of the explanatory notes states:

"The purpose of the Bill is to ensure that the HoL Judgment does not have effect in Scotland and that people with pleural plaques caused by wrongful exposure to asbestos can raise an action for damages."

It is not about changing the law; it is about ensuring that there is an understanding of what the law is.

I turn to the slightly different point about the phrasing of the amendments. The long title of the bill is:

"An Act of the Scottish Parliament to provide that certain asbestos-related conditions are actionable personal injuries; and for connected purposes."

The long title bears a greater resemblance to the wording that is used by Bill Butler in his amendments than it does to the Government's slightly more contorted phrasing, dare I say it, in the text of the bill. The proposed phrasing in Bill Butler's amendments is more economic. Personally, I think that it is more elegant, and that it bears more relationship to the normal phraseology that was adopted in the House of Lords judgment and which appears in the normal concepts of law that apply in this area.

Amendment 1 limits the changes that are effected by the bill to the law of delict. I should explain that actions may be brought under different headings—under the law of contract, for example. There is nothing in the House of Lords judgment that we need to deal with in that context. Adopting the proposed phrasing in the amendment does the minimum necessary to limit the provisions and fit them into the concept of delict.

The committee was concerned that the bill should not drive a coach and horses through the normal concepts that operate in this area of law. The amendments seem to provide a more elegant and satisfactory phrasing. They do away with the need to focus on issues of causation. Bill Butler said that, if we are not careful, there could at least be a suggestion that a strict liability interpretation might be put on the Government's current wording.

Because the proposed phrasing does not change the law, but rather clarifies it, we avoid the need to get into complex issues around retrospection, which is always a complicated issue for Parliament. Parliament does not like legislating

retrospectively, and I think that the amendments avoid that difficulty.

The issue is not one of principle, as has already been said. Nobody is arguing—on the Government side or on our side—about the direction of travel. The issue is a technical one of phraseology, and of ensuring that the objective that we share is met in the most satisfactory way and in a way that leads to the fewest possible subsequent arguments about what the law might mean or what Parliament might have intended.

I turn to a slightly different point on the quantification of damages. I made a number of noises at an earlier stage about whether issues would arise with the way in which judges approached the quantification of damages in these cases. I am satisfied that that is not an appropriate issue on which to lodge amendments; nevertheless, I would be grateful for further reassurance from the minister that the matter has been thought about and that it is not the Government's intention that the wording in the bill should change in any way the rules that ordinarily apply and the way in which judges have hitherto quantified damages.

The Convener: Minister, the debate is not about the intent of the bill. Everybody is satisfied that we have, to use a legal phrase, consensus ad idem on the intent of the bill. However, it is important that certain issues are made sufficiently clear so that we can see where we are going, bearing in mind the potential for future proceedings. It would be useful if, in responding to the comments that have been made, you could tell the committee whether you would consider taking legal advice from the Lord Advocate in the event of Mr Butler's amendments not being agreed to for one reason or another.

The Minister for Community Safety (Fergus Ewing): I am extremely grateful to Bill Butler and Robert Brown for setting out clearly the arguments for the amendments. I believe that all MSPs share the common objective of providing Parliament, at stage 3, with a bill that restores the right of legal action to those who, through negligence or breach of duty on the part of their employer, were wrongfully exposed to asbestos, as a result of which they have suffered scarring of the pleura—the membranes surrounding the lungs. We all share that common purpose. In that respect, today's debate, perhaps unusually for Parliament, is not at all adversarial. I am tempted to call it a discussion or a conversation—or even a national conversation.

The Convener: Do not push it too far, minister.

Fergus Ewing: The keyword is non-adversarial. We are all trying to achieve the same objective.

I will depart from my original intention in the light of what I have heard and will explain a bit of the background that led us to adopt the approach that we have taken. That might help members and those—some of whom may be here—who have legal expertise and a close interest in the topic, who may want to reflect on we will say today about how we intend to proceed to stage 3.

Officials have been working closely with Frank Maguire—who is in the public gallery—on the bill since November 2007. On 13 August, he advised my officials that he and colleagues had concerns as to whether the bill, as introduced, would meet the policy intent. He had obtained the opinion of senior counsel on the matter, which was submitted for consideration. Subsequently, officials met Mr Maguire, Professor Joe Thomson and Iain Jamieson on 20 August 2008. At that meeting, Mr Maguire and his colleagues focused on whether section 1(1) should read "personal injury causing material damage" rather than

"personal injury which is not negligible".

Following that meeting, officials wrote to Mr Maguire, advising him that our aim is to ensure that the bill's provisions achieve our objectives as securely as possible.

Following consideration of the issues, officials wrote again to Mr Maguire, on 7 November, explaining why we had reached the view that the suggested amendments to the bill were not necessary and informing him that officials would be happy to discuss the issues further with him should he continue to have reservations. In his reply of 25 November, Mr Maguire suggested a different way forward that did not use the terms "not negligible" or "material damage". He asked for consideration to be given to the amendment of section 1(1) so that it would read:

"Asbestos-related pleural plaques are a personal injury which causes actionable damage for the purposes of the law of delict".

That is what the amendments that we have before us today would do.

I mention all that because I want to make two points clear: the legal friends of the Parliament have been in dialogue with the legal friends of the bill in seeking to implement the objectives that we all share; and the amendments that are before us today emerged from the process in a slightly different form from that which was originally discussed. The amendments emerged in their current form for the first time only last week, which paves the way for further discussions, to which I will turn later.

We do not think that the amendments, although they are well intentioned, will achieve the aims that we all share. Our belief is based on several specific reasons, which I will outline as briefly as

possible. In some respects, the amendments introduce weaknesses that may, unintentionally, defeat the objectives of the bill. My remarks on amendment 1 also apply to amendment 4, which is identical. Amendment 1 has, essentially, two effects. The first is to replace the concept of

"a personal injury which is not negligible"

with the concept of something that "causes actionable damage". The second is to specify that the provisions are

"for the purposes of the law of delict".

Both those effects cause me concern for reasons that I will now explain.

I see the attraction of the idea that there should be an express reference to the law of delict; however, it is unnecessary. The *Official Report* already shows that the law of delict is our primary purpose. More important, such an idea could be unhelpful. Defenders may use it to argue that the legislation's scope had been narrowed so that it applied only to delictual matters, not to associated areas of law, and to frustrate the claims that we all want to facilitate. I know that that is not the intention of those who drafted the amendment, but I fear that that may be its effect. That is the clear legal advice that I have received. I therefore suggest that we pause to reflect before going down that route.

One would be hard pressed to find, in all the statutes that relate to the law of delict, any precedent for a provision of that nature. I have a list of such statutes, which I will not read out now but which I will make available to those who are interested. That will prove my point that the wording in the amendment is not a formulation that one finds in the existing laws that relate to these matters.

Our assessment of the phrase "actionable damage" is that such terminology would be no improvement on the current wording. We settled on the term "not negligible" only after very detailed consideration of all the possible alternatives, of which there were a number. For example, we considered "de minimis" but decided that, with respect to our learned friends, we did not want to introduce too much Latin into our legislation. Other alternative terms that we considered were "material" and "not significant". We settled on the phrase "not negligible" in large part because it reflects the language that has been used by the courts in the relevant cases. Notably, the phrase "not negligible" was used in the Rothwell and Johnston case as well as in the Cartledge case.

10:45

We also settled on the phrase because, on close examination, the alternatives might not be as effective as they may first appear to be. We have particular reservations about the potential effect of the alternative that is suggested in amendments 1 and 4. If we consider the judgments in the case of Johnston, it is clear that, when considering whether pleural plaques were actionable, the judges used the phrases "actionable damage" and "actionable injury" interchangeably. In that context, actionable damage is synonymous with actionable injury. If amendment 1 was agreed to, the bill would read:

"pleural plaques are a personal injury which causes actionable damage".

That is the same as saying, "Pleural plaques are a personal injury which causes actionable personal injury." Bill Butler suggests that we introduce the concept of actionable damage, but the amendment would create a tautology. For the sake of clarity, I repeat that it would lead to the law saying, "Pleural plaques are a personal injury which causes actionable personal injury." That is a form of tautology—or a way of saying the same thing twice. It is a circular definition.

We cannot accept the formulation in amendments 1 and 4 because it would risk creating confusion and uncertainty where we all wish there to be clarity. For those reasons, I conclude that amendments 1 and 4 are undesirable. The same is true of the slightly different versions that some members might know were suggested by the Law Society of Scotland. Its versions are not before us today, but I state that for the record, in case we or others outwith the Parliament consider the issues again.

As I said, we all share the same objectives. I cannot give a commitment on the outcome, but with the committee's agreement, I intend to seek further, early discussions before stage 3 with the stakeholders, notably the Law Society of Scotland and Thompsons. My officials have already been in touch with Michael Clancy and Frank Maguire to suggest such discussions. We might yet find a formulation that satisfies their concerns without risking the mischief that we fear might arise from the current versions of the amendments, which I have spelled out as clearly as I can today. I explained our thinking at greater length than usual for reasons that I hope I made clear—indeed, they are self-evident.

Amendments 2 and 5 are consequential on amendments 1 and 4. We believe that the provisions that they seek to remove are integral to the bill. For example, in section 1, subsections (2) to (4) convey the clear message that pleural plaques are actionable within the framework of the law of delict. We are particularly concerned about the proposed removal of subsection (3) because it is a specific instruction to the court not to apply the common law reasoning that was applied in the

case of Johnston. We believe that that is crucial if we are to achieve the policy intention.

I add a comment to respond directly to what Bill Butler and Robert Brown said about the status, import or effect of the case of Johnston. It is correct to say that a House of Lords decision is not binding on the Scottish courts, but I think we all know that it is highly persuasive. There is little or no doubt that the Scottish courts would follow Johnston, which would therefore become the law. Indeed, that clear expectation led to the introduction of the bill.

I have not read the case report, but I understand that there has been a Scottish case, Wright v Stoddard International, in which the Scottish courts appear to have accepted the reasoning in Johnston. The remarks in Wright were not, to use a Latin phrase, obiter dicta, which means that they were not the main element or ratio of the case but a judicial aside. Nonetheless, that case shows that the Scottish courts would apply Johnston. There is not much doubt about that. However, Bill Butler and Robert Brown are correct to say that it needs to be understood that the House of Lords ruling is highly persuasive but not binding.

Finally, I turn to the revision of section 2 that is proposed in amendment 3. Section 2 was drafted to reflect the fact that the Johnston judgment dealt only with pleural plaques and made no direct reference to other symptomless asbestos-related conditions. Although it could be argued that a court would come to similar conclusions on those conditions, that has not been tested, hence the inclusion of the phrase

"For the avoidance of doubt".

We adopted that approach in order to clarify the existing law. Amendment 3 is unlikely to be unduly problematic, but leaving out that phrase could create the inference that symptomless pleural thickening and asbestosis are not actionable. None of us would want that inference to be drawn from the bill. That is why our advice has been that it is important to leave in the phrase

"For the avoidance of doubt".

One might say, "When in doubt, spell it out". That is my favourite phrase, although I do not know whether I have persuaded my advisers to adopt it. Through the approach that we have taken, we are attempting to "spell it out" to ensure that those two other conditions are not affected in the way that I mentioned.

In conclusion, I hope that members appreciate that the Government's worries about the amendments arise solely from our desire, which all members share, to get the matter right and ensure that appropriate redress is as certain as possible. On the basis of the Government's willingness to look again at the drafting in discussion with stakeholders, I respectfully ask Bill Butler to withdraw amendment 1 and not to move the other amendments in the group.

Bill Butler: I thank the minister for his full explanation of the Government's doubts and concerns about the amendments.

We all have the same aim. The Government and the entire Parliament want a bill that meets the policy intent as stated. If I may pun as the minister did, that is our commission, and it is one to which we all subscribe. It is essential that what we do today and at stage 3 gives clear effect to the bill's provisions. The minister acknowledged that I lodged my amendments to try to give a clearer, more direct and more economical understanding of the bill's intent. However, he clearly signalled some areas in which there are fine points of law that need further discussion, and I am not qualified to contest those.

Happily, the minister has been able to give the committee today an undertaking not only that the opinion of the Lord Advocate will be sought and duly considered but that there will be fruitful discussions between the Government and interested parties—or, as the minister said, that the Government will seek discussions with stakeholders before stage 3. He said that there has been dialogue with the friends of the bill. In the Parliament, we are all friends of the bill, and I believe that the same is true of the population of Scotland.

On that basis, given the clear undertakings that the minister gave on the record today, and given the fact that I do not pretend to have the necessary qualifications to be able to deal with the legal nuances that the minister has outlined, I am prepared to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.

Amendment 2 not moved.

Section 1 agreed to.

Section 2—Pleural thickening and asbestosis

Amendments 3 to 5 not moved.

Section 2 agreed to.

Sections 3 to 5 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I thank the minister and those who participated in the debate for the spirit in which the bill has been debated.

10:56

Meeting continued in private until 12:15.

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