The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 7 September 2010

Session 3

Printed and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by RR Donnelley.

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JUSTICE COMMITTEE
23rd Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
*Dr Richard Simpson (Mid Scotland and Fife) (Lab)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Julia Bateman (UK Law Societies Brussels Office)
Michael Clancy (Law Society of Scotland)
Ian Duncan (Scottish Parliament European Officer)
Graeme Garrett (Law Society of Scotland)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 7 September 2010

[The Convener *opened the meeting at 10:01*]

Subordinate Legislation

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010 (SSI 2010/237)

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2010 (SSI 2010/267)

Grampian Joint Fire and Rescue Board (Specified Equipment) (Scotland) Order 2010 (SSI 2010/252)

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome everybody to the Justice Committee's first meeting in the current term and remind everybody to switch off their mobile phones.

We have received apologies from James Kelly, who is not with us because of family illness. We expect Richard Simpson to attend as his substitute, at some stage.

Agenda item 1 is subordinate legislation. There are three negative instruments for consideration today, the first of which is the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2010, in respect of which I refer members to paper 1. The second instrument is the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment (No 2) Regulations 2010, to which paper 2 refers.

The Subordinate Legislation Committee drew SSI 2010/237 to the attention of Parliament on the ground of defective drafting. As noted in the papers, the Scottish Government acknowledged that and has made the corrections by way of SSI 2010/267. SSI 2010/267 breaches the 21-day rule, but the Subordinate Legislation Committee was content with the explanation that was provided for the breach and the swift correction of the error that had been identified in the original amending regulations.

Members have no comments to make. Are members content to note the first two instruments?

Members *indicated agreement.*

The Convener: The third instrument is the Grampian Joint Fire and Rescue Board (Specified Equipment) (Scotland) Order 2010, to which paper 3 refers. The Subordinate Legislation Committee did not draw any matters to the attention of Parliament. Do members have any comments to make on the order, or are they content to note it?

Robert Brown (Glasgow) (LD): I might have had some comments to make on the order, but I understand that the Grampian fire board, which had a number of issues, has now, in effect, complied with the arrangements with which it was asked to comply. Perhaps that raises the question whether the order is necessary any more, but I suppose that it does not matter that much either way, in the circumstances.

The Convener: I think that it is largely academic and that it is unfortunate that we have reached this stage.

Stewart Maxwell (West of Scotland) (SNP): I agree with Robert Brown. As the convener says, the order may be academic, but the position that Grampian fire board took on the firelink communications system was unfortunate. That led the minister to having to go down this path. The matter should have been resolved long before that. The minister had no choice, and I certainly support his actions in forcing the issue so that firelink is available in the Grampian area. I agree with the convener. The order is probably academic now, but given the history of the issue, it is probably wise to agree to its going through.

Bill Butler (Glasgow Anniesland) (Lab): I agree with my colleagues Robert Brown and Stewart Maxwell. I think that the order is largely academic, but it is better to take a belt-and-braces approach. It is unfortunate that the Government had to lay the order, but I suppose that all's well that ends well. I hope that that will be the case.

The Convener: Indeed. Are members content to note the order?

Members *indicated agreement.*

The Convener: I suspend the meeting briefly while witnesses take their places for the second agenda item.

10:05

Meeting suspended.

10:05

On resuming—

European Commission Work Programme

The Convener: Agenda item 2 is the European Commission work programme. At its meeting on 11 May, the committee agreed to invite the Scottish Parliament's European officer and others to give evidence on the European Commission's work programme for 2010 to 2014. Papers 4, 5 and 6 are listed on the agenda for this item.

I welcome the witnesses: Michael Clancy is director of law reform at the Law Society of Scotland; Julia Bateman is head of the United Kingdom law societies Brussels office; and Ian Duncan is the Scottish Parliament's European officer. I welcome Ms Bateman in particular, as I think that this is the first time she has given evidence. Mr Duncan and Mr Clancy are, of course, well known to us.

Robert Brown: I thought that they were members of the committee, actually.

The Convener: Indeed. It has been commented that Mr Clancy seems to have a season ticket. However, his contributions are always erudite and welcome.

Michael Clancy (Law Society of Scotland): I should have brought my scarf and rattle, convener.

The Convener: I will open the questioning.

Obviously, this is a fairly important session, as we are well aware that the operation of the Treaty of Lisbon will impinge more and more on the work not only of the United Kingdom Parliament, but of the devolved legislatures in general. We will, of course, be involved in the necessary engagement that will have to take place. On engagement with the European Union, what will the consequences be at UK level and at Scotland level of the transfer of police and judicial co-operation to the ordinary legislative procedure, under the Lisbon treaty?

Julia Bateman (UK Law Societies Brussels Office): I thank you for the invitation to give evidence.

As members are aware, the transfer of police and judicial co-operation to the ordinary legislative procedure means a move to qualified majority voting—in other words, the removal of the national veto. To counteract that, the UK Government secured an opt-in for police and judicial co-operation in criminal matters in the same way as for civil and family justice. We believe that that is an important safeguard and procedure by which to be able to examine whether the legislative proposal will be of benefit to the UK and the jurisdictions within it.

The other interesting point is that the European Parliament has full democratic involvement and codecision-making powers on police and judicial co-operation matters, whereas previously the process was consultative. We consider that that improves democratic accountability and scrutiny and that it is an important way for stakeholder organisations and professional organisations such as ours to make their views known in the European Parliament.

I do not know whether Michael Clancy wants to follow up on that.

Michael Clancy: The approach also makes it important for the Justice Committee and the Parliament to be sensitive to what is going on in Brussels. Perhaps there will be further comments on that this morning. At the moment, there is, of course, no Scottish MEP on the European Parliament's Civil Liberties, Justice and Home Affairs Committee or its Legal Affairs Committee, which are the crucial European Parliament committees that consider justice issues. Therefore, the situation is slightly different from what it has been in times gone by, when Neil MacCormick was an MEP. He made a contribution of great substance, of course.

Although personalities can play a role, when there are no Scottish MEPs on a committee, the job of domestic committees in Edinburgh and London becomes more important.

The Convener: Mr Thompson will examine that point further later.

Ian Duncan (Scottish Parliament European Officer): On a pragmatic level, the changes will give this committee and other committees greater transparency on the issues that unfold in Brussels, and there will be more time to consider them. For the first time, with Parliament's involvement, you will be able to see a series of stages or readings. You will have an opportunity—for example, through various visits or briefings from me—to gain an understanding and to engage. Where appropriate, using MEPs who are perhaps not from Scotland but who are nonetheless interested parties, you will have the opportunity to seek to have your views made known. That is important.

A second point is that, because of the various other changes that we will discuss this morning, you will have a platform upon which to make those points, either directly to the Scottish Government or via the Westminster Parliament. That is a new opportunity that has been brought about by the Lisbon treaty.

The Convener: Cathie Craigie will examine some aspects of the opt-in arrangement.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The opt-in has been extended to legislative initiatives in the areas of policing and criminal judicial co-operation in criminal matters. Are there potential consequences that we should be aware of and, if so, what are they?

Michael Clancy: Title V of the treaty states:

"The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States."

The Scottish legal system is one of those "different legal systems" that have to be held in mind.

Protocol 21 states:

"the United Kingdom and Ireland shall not take part in the adoption by the Council of proposed measures"

under title V. The protocol continues:

"The unanimity of the members of the Council, with the exception of the representatives of the governments of the United Kingdom and Ireland, shall be necessary for decisions of the Council which must be adopted unanimously."

That enables the United Kingdom Government to say that we do not want to be involved in something.

The European and External Relations Committee's report on the Lisbon treaty detailed some elements as being extremely important. In particular, one of the report's recommendations was that contact should be established with the national Parliament's committees. That is an important feature for Scotland. It is important to ensure that, when issues are debated that will impact on the Scottish legal system, we have good contact with the national Parliament's committees.

Lord Roper's evidence to the European and External Relations Committee identified that bodies such as the joint ministerial committee on Europe and the justice and home affairs council are extremely important in that regard. That throws up the issue of who represents Scotland at those European councils, particularly the justice and home affairs council. In times gone by, the Solicitor General for Scotland has sometimes attended the justice and home affairs council on behalf of Scotland. However, I am not aware that a justice minister has attended, although I am open to correction on that.

10:15

In any event, we should ensure that a system of reporting back from the justice and home affairs council to the committee is put in place, so that after each council at which issues of importance are raised, we can get a sense of the lie of the land on opt-in or opt-out, and of what the impact will be on the Scottish legal system. If the United Kingdom chooses to opt in to something, there might be a requirement to amend Scots law. However, the United Kingdom could choose to opt out of European legislation that Scotland might find attractive. There is the paradox of looking at Europe while we sit in the United Kingdom, which has opted out of something. We may venture to think that the Scottish Parliament might want to mould its law along similar lines, perhaps by initiating legislation of its own that looks like legislation that has been produced in Europe.

Cathie Craigie: My colleagues will go into more detail on how the reporting-back system might operate. Do the other witnesses have anything to add?

Ian Duncan: You might be aware that the Scottish Government has given a commitment to report back on what has happened at councils that it attends. More important is the reporting-back procedure from the joint ministerial committee, which is far less transparent. During the European and External Relations Committee inquiry, the then Minister for Europe gave a commitment that there was no reason why there could not be greater transparency in the discussions. You will be aware that much of the UK line is developed and negotiated in the UK before it ever arrives in Brussels. For the Scottish Government and Parliament to be involved in that, they need to be particularly involved at the joint ministerial committee stage, because that is when many of the decisions for the UK are taken. So, the more transparency there is in relation to those meetings and the greater awareness that the Justice Committee has of them, the more likely it is to scrutinise and to seek to influence.

Nigel Don (North East Scotland) (SNP): I claim ignorance and ask who is involved in the joint ministerial committee.

Ian Duncan: The JMC is chaired by the UK Government and involves the devolved Administrations. It focuses primarily on European affairs. I think that it meets quarterly or so to consider issues on which the ministers seek to take a position. It also exists in a non-meeting format, through regular communication. The ministers attend the meetings—from Scotland, it is usually the minister with responsibility for Europe who goes.

Cathie Craigie: You mentioned that the minister said in evidence to the European and External Relations Committee that the Government is willing to report back on that. Have you identified a current failing in that we do not have a formal mechanism for reporting back?

Ian Duncan: The UK minister said that he saw no problem with reporting back, but that was not the traditional line that had been given by the

Scottish Government for a number of years. The Scottish Government is now trying to work out how it can report back. There will still be restrictions relating to future negotiating positions, which could not be discussed openly. The Scottish and UK Governments are trying to find a modus operandi for that.

Julia Bateman: As you will no doubt be aware, the timing is tight, as there is an eight-week deadline. We considered the issue yesterday and suggested using tools such as the European Commission work programme and the Stockholm action plan, which identify certain dates or timelines. Those are given to change quite a lot but, for the committee and for external organisations, if we knew that within a certain period we could expect a piece of legislation on procedural rights or on trafficking of human beings, that might given us an idea of when something will come up and when the eight-week period might start to run. That could assist everybody in preparing for that period.

The Convener: A very real problem that I can anticipate is that, if something lands on the desks here in the third week in June, just before a lengthy parliamentary recess, there will be no committee facility to deal with the issue until the first week in September at the earliest, unless we call people in for special meetings, which I would be reluctant to do.

Ian Duncan: The European Commission has recognised that problem. It has said that there is a dispensation for national Parliaments, such that the eight-week period will not be deemed to include periods of recess, given the very problem that you have highlighted. I am not clear, however, that that extends to regional Parliaments.

The Convener: My reading of the situation is that the dispensation does not include Parliaments such as this. We have a difficulty there.

Cathie Craigie: The witnesses have anticipated some of the committee's questions—Michael Clancy, in particular, is showing his experience and has been thinking ahead. Do you believe that Scottish interests are being adequately covered by the way in which the opt-in procedures currently operate? Could we improve them beyond what you have been suggesting already this morning?

Michael Clancy: We are human beings, so nothing that we do is perfect, and there is always room for improvement. One thing that I had thought about mentioning when giving evidence to the European and External Relations Committee was COSAC—the Conference of Community and European Affairs Committees of Parliaments of the European Union. It was established in the 1980s, and representatives from all the national Parliaments attend it. The UK has six nominations to COSAC, and they are filled by members from the UK Parliament.

It might be interesting to see whether some space could be built for the Scottish Parliament to be engaged with COSAC, either directly or through the medium of the UK members of COSAC. Gathering together all the European committees of all the national Parliaments provides a considerable influencing force. At the moment, given the United Kingdom's role, the voice of the Scottish Parliament is muted.

Establishing good, solid links with the EU Select Committee of the House of Lords and the European Scrutiny Committee of the House of Commons would also be extremely worth while. You will recollect that two years ago—I think it was—we had an extremely useful visit to Brussels, where members of the Justice Committee met members of the European Union Committee of the House of Lords—Lord Mance being in the chair at that time—and Scottish MEPs and officials. That sort of contact cannot be made periodically; it should be made on a more rolling systematic basis, so that those relationships become even more solid than they are at the moment. That allows the sort of horizon scanning of which Sir David Edward has spoken to become a personal thing.

Intelligence gathering takes place through the Parliament's Brussels office and the UK law societies' joint Brussels office, which publishes the extremely useful "Brussels Agenda", something that I hope members are able to get and take an interest in. All that provides a platform on which to build, although one cannot negate the need to establish relationships with the various committees. As the United Kingdom Parliament goes into its new session today, with the European Scrutiny Committee of the House of Commons meeting for the first time tomorrow, there is no time like the present.

The Convener: There being no other questions on that subject, I will pass to Dave Thompson, who will deal with the subsidiarity protocol and our relationship with it.

Dave Thompson (Highlands and Islands) (SNP): Good morning and thank you for coming along to speak to us today. A number of interesting points have been raised already, and I wish to tease out one or two others. The national Parliaments—the Westminster Parliament and the Scottish Parliament—now have increased involvement in legislative development in the EU, which can only be to our benefit. We have already seen, however, how that throws up potential difficulties for us in Scotland and at the Scottish Parliament. Will you elaborate on the roles of the UK Parliament and the Scottish Parliament, so

that we are clear about those? I wish to pick up on one or two other wee points after that.

Ian Duncan: The Lisbon treaty gave national Parliaments a greater role to allow them, on receipt of a draft piece of legislation, to consider it, apply a subsidiarity test to it and write a reasoned opinion—against it, if a Parliament so decided. If enough national Parliaments were so minded—one third for most issues, but only one quarter for justice—that would cause the Commission to pause and reconsider its position, and then to decide whether it was still of a mind to proceed, in which case it would need to justify its actions.

Within that process is a recognised role for regional Parliaments. It is the first time that regional Parliaments have been recognised in a treaty in that way. It is not a right as such; a statement has been placed on national Parliaments such that they should satisfy themselves that regional Parliaments, where they exist, have been fully involved and engaged in the process and are participating in it. However, that is at the discretion of the national Parliament, rather than being a guaranteed right for regional Parliaments.

The application of the test of subsidiarity is a more formal matter now, but it has always been there. There has always been a question whether European law is being made at the appropriate place and whether it should be made closer to home. The subsidiarity principle has always been part of the determination of EU law. Now we find a structure whereby that consideration can be enacted in such a way as to give greater strength to national Parliaments.

Julia Bateman: In the justice area, subsidiarity concerns such issues as cross-border law enforcement, investigation powers and procedural rights. In the European Union, police authorities and Governments need to work together, with impacts on what are very different legal systems and specific legal traditions. A number of problems can be thrown up. The argument might be made to legislate on something at a European level, but the subsidiarity principle will come in and have an impact on different national legal systems. It is a hugely complicated area, but we should all be aware of it and look out for subsidiarity issues.

Dave Thompson: Is there any other devolved Parliament in Europe with a separate legal system, such as Scotland has within the UK—in Spain, France, Germany or wherever else—or are we unique in that respect?

Julia Bateman: I am happy to be corrected, but my initial view is that Scotland is unique, although the German Länder have strong legislative traditions and independent legal authorities. That model is often used for comparison, and I know that the Scottish Government's office in Brussels has strong links with the Länder, with a lot of exchange of information. Although Scotland is unique, it is possible to seek out similar situations. I am happy to be corrected on that, as I said.

The Convener: Do you wish to correct Ms Bateman, Mr Clancy?

Michael Clancy: I certainly would not venture to correct anyone, convener. The point about the German Länder is important, but of course they operate within a federal system, whereas we do not. That is a significant distinction: ours is a separate legal system within a unitary state. We are not the only legal system within the unitary state of the United Kingdom—with the recent devolution of justice matters to Northern Ireland, one can see the potential for the emergence of different justice issues there, too. Wales is in a slightly different category.

There are lots of sub-national Parliaments—lots of regional Parliaments—in Europe, but not very many serve a legal system that is reinforced by a treaty within a unitary state, such as we have.

10:30

Dave Thompson: That leads on to an issue that was touched on earlier: how we protect our position and deal with situations. I was interested in the comment that we in Scotland might think that it was a good idea to opt into something that the UK had chosen not to opt into. I do not remember which witness said that we could develop our law along such lines. That seems a fairly cumbersome way of operating. Do you have views on our setting up an opt-in mechanism whereby we could—without going through the complete law-making process again—opt into something that we felt would benefit Scotland? Do you have ideas on how we could streamline our ability to pick up on initiatives that we think would be good for Scotland but which the UK does not think would be good for the UK?

Michael Clancy: As I mentioned the issue, I might as well pick it up and explore it. Creating a new legislative mechanism is not the way to go. We have established legislative mechanisms for dealing with European law. The implementation of European law such as directives is pretty well set—we know how that works, what that looks like and what the outturn is. Whether an act of Parliament or a statutory instrument is used, it gets to the point and the law becomes effective here. We should not go about re-engineering the legislative process, which is there for good reasons—to ensure democratic accountability and proper implementation throughout the European Union and to ensure that parliamentarians know

what they are doing when they implement a piece of European legislation.

The idea that I floated in an amorphous and ill-defined way would apply if the United Kingdom Government decided not to opt into some good proposal and implement it for the United Kingdom—I cannot speculate on what that might be, but I will pick the green paper on authentic acts, which is mentioned in our submission. Authentic acts in Europe are documents that are signed by notaries public and which have effective power to execute what they say. In effect, they bypass the courts. Such documents work in the framework of the overarching law of the jurisdiction in which they exist, so the committee must bear it in mind that what I will say cannot be divorced from that.

The United Kingdom might choose not to opt into authentic acts legislation because, for example, it thought that the law of England could deal with the issue better through the common law or the courts. However, Scotland might think, "What can we do to approximate our system more to a system in which the documents that are signed as notarial instruments by notaries public have that effective power?" That would clearly be within devolved competence, because notaries public in Scotland are within devolved competence, and such a measure might create efficiency gains, for example. However, we should not reinvent the wheel for that. We have a good system of law making. Ideas can percolate from all over the globe through the prism of MSPs thinking about them. People get briefings from various bodies and all MSPs have the opportunity to introduce two members' bills in the life of a parliamentary session. One can envisage that a good idea, wherever it emanated from—it might emanate from the European Commission—might be taken up by an MSP who wanted to make a difference.

The Convener: I suspect that such a situation would not be without its tensions.

Michael Clancy: I suspect that you are right.

Ian Duncan: I will add some background. Great disagreement between Scotland and England is rare in such areas, primarily because of how the laws are deliberated on before they become public. Quite strong communication takes place between London and Edinburgh to ensure that laws are sensitive to the respective legal jurisdictions. The EU is very aware of Scotland's unique legal system and often questions the UK Government to ensure that a measure has been considered in the light of the Scottish legal jurisdiction. Issues might arise, but I suspect that there will be far fewer than we might expect given the nature of the situation.

Robert Brown: I have a query about language. The phrase "regional Parliaments" jarred around the committee table as being not altogether applicable, to say the least, to the Scottish Parliament's position. Might we have some thinking about a more appropriate phrase, as part of our involvement with all this law? I am not sure whether the phrase apples all that well even to the Länder or to the Spanish provincial bodies, whatever they are called. The phrase "regional Parliament" certainly does not express the reality of the Scottish Parliament's position. A bit of thinking about language might not go amiss.

Michael Clancy: Article 2 of the protocol on subsidiarity to the Lisbon treaty talks about taking into account

"the regional and local dimension".

I do not think that using the phrase "local Parliament" would be any better.

Robert Brown: No—it would be worse.

Michael Clancy: When one is dealing with at least 27 languages, there must be some translation capability.

Robert Brown: I appreciate the general overarching point, although even that might be affected by slightly more comprehensive thinking. Language can translate badly. In this instance, the language used does not represent the reality of the position.

Julia Bateman: As we said in reply to Dave Thompson's question, Scotland's situation is unique. The reference to the German Länder was made in the context of looking for comparisons or for jurisdictions in larger member states that have a high profile or are very active in Brussels. I was by no means saying that the Scottish Parliament is equivalent to institutions in the Länder; I was just trying to think about other member states that have several different representative bodies in them.

Stewart Maxwell: I was not going to raise the issue, but I will discuss it now that it has been raised. I support Robert Brown's comments not from a nationalist point of view but from the point of view of accuracy. Scotland is a nation; the UK is not a nation—it is a state. The UK is a kingdom and a state but not a nation. We are a nation. Calling us a regional Parliament and them a national Parliament is factually inaccurate.

How the language that is used translates into other languages is neither here nor there. My concern is about how we describe the Scottish Parliament and the UK Parliament in English. I would prefer terminology that was a little more accurate. To be frank, it is demeaning and inaccurate to call the Scottish Parliament a regional Parliament.

The Convener: Mr Duncan, will you tell us of a Euro compromise that will keep everybody happy?

Ian Duncan: My only comment is that the Lisbon treaty was careful and did not mention Parliaments—it referred only to issues that emanate from regions and local areas. The treaty was diplomatic about not tackling the question, because of the issues that have unfolded here today.

The Convener: We now turn to the Charter of Fundamental Rights of the European Union.

Robert Brown: I want to get a feel for the interrelation between the European convention on human rights and the charter of fundamental rights and their different jurisdictions. I think that I am right in saying that the EU charter of fundamental rights has been incorporated into EU law—as opposed to Scots law, one imagines—through the Lisbon treaty. Under the Belgian presidency, there is also discussion of the accession by the EU—as opposed to the UK—to the ECHR. Can someone perhaps take us through what all that means? What implications will all of that have?

Julia Bateman: The charter of fundamental rights was initially signed in 2000 as a political statement—rather than a legislative text—but the charter was then incorporated into the Lisbon treaty so it now has binding legal effect. However, the view has been that, in relation to the European convention on human rights and the legal systems within the UK, there is very little impact from the charter's incorporation into the Lisbon treaty. The UK secured a protocol to the treaty that states that the charter of fundamental rights has no effect in relation to the legal systems within the UK. From our perspective, the charter is a political statement that has then become incorporated into the Lisbon treaty—

Robert Brown: Let me just interrupt you. Does that mean that the charter remains a political statement and has no legal implications?

Julia Bateman: The charter is legally binding in the sense that it is now in the Lisbon treaty and is referred to as a justification or reason for legislating. In terms of improvements or developments, we do not think that the charter has much effect, although there is a specific Scottish angle to the issue.

Michael Clancy: The protocol to which Julia Bateman referred specifically states:

> "The Charter does not extend the ability of the Court of Justice of the European Union ... to find that the laws, regulations or administrative provisions ... of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."

In effect, the jurisdiction of the European Court of Justice is excluded from dealing with matters relating to the United Kingdom. That means that we have a position in which the charter is essentially a political statement.

That said, that protocol might change in the future, so we need to be sure about what the relationship is between the ECHR and the charter of fundamental rights. We do not want there to be any potential inconsistency between the two. We do not want the situation to arise in future whereby the European Court of Human Rights makes a decision on the ECHR that produces slightly different results from a decision made by the European Court of Justice on the charter of fundamental rights in relation to an issue that is in the same area.

Robert Brown: I think that I understand that. On the consequences of that change for Scotland, basically no one in Scotland could sue under the European charter of fundamental rights or use the charter as an argument before the courts.

Michael Clancy: One could probably use the charter in an argument, but one could not sue on the basis of the charter.

Robert Brown: Therefore, the charter could be used only as a political argument for change or to bring pressure. It operates at that level.

Julia Bateman: The incorporation of the charter does not introduce any new rights and obligations, but it could be relied on either to introduce legislation or for the purposes of interpretation. As Michael Clancy said, the most interesting thing will be the relationship between the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.

Robert Brown: My follow-up question is on a slightly different issue. The Lisbon treaty provides for the possibility of the creation of a European public prosecutor if all member states agree to that. I cannot see how that would fit with existing national frameworks, such as the Lord Advocate and so on. Can we perhaps be given some insight into what the implications might be if the EU went for such an arrangement?

10:45

Michael Clancy: The Law Society does not agree with the creation of a European public prosecutor. We believe that issues relating to the prosecution of crime should rest—as is currently the case under section 48 of the Scotland Act 1998—with the Lord Advocate, who has sole discretion to prosecute serious crime. We want to ensure that the position of the Lord Advocate remains inviolate.

Robert Brown: If the EU made further moves forward on that, what would the implications be?

What are the society's concerns about having a European prosecutor?

Michael Clancy: There could be confusion over who would mount a prosecution. For example, on a certain given set of facts, the Lord Advocate might decide not to prosecute whereas the European public prosecutor might decide to prosecute. That could produce difficult situations for citizens and for their advisers, who might find it difficult to decide what kind of advice they should give.

Dave Thompson: I want to follow up on that. Mr Clancy's answer assumes that, if there was a European public prosecutor, there would still be a prosecutor in Scotland. However, it might well be that the system would have only one prosecutor, which would get rid of our system, so the problem that has been outlined would not arise. That raises all sorts of other questions about how we in Scotland could protect ourselves if Europe wanted to move down that road. We would need to rely on Westminster not agreeing to the proposal.

Michael Clancy: My recollection is that the foundation of the idea of establishing a European public prosecutor was to defend the EU's interest, so the prosecutor's remit would be limited to issues such as fraud in EU finances. However, I agree that, if there was a suggestion that the European public prosecutor would cover a much wider range of issues, any such proposal would require a lot of scrutiny. A deal of persuasion would be needed to unseat the Lord Advocate from her chair.

The Convener: Perhaps Mr Duncan can provide us with some reassurance on whether there is any unanimity of view—which I think is unlikely—about that in Europe. Such a thing is not going to happen.

Ian Duncan: You have taken the words right out of my mouth. Such matters are not subject to qualified majority voting plus codecision but require unanimity. The UK Government has been very clear that it would not support such a proposal in any form whatever, so unanimity would not be possible. Whether or not Europe moves from the current proposal to some new concept that might be introduced at a later date, at the moment such a proposal would not make great progress.

The Convener: So we are talking in a vacuum. At this point, let us move on to current EU legislative initiatives.

Stewart Maxwell: I want to ask about current EU initiatives in the areas of police and judicial co-operation in criminal matters and of judicial co-operation in civil matters. Which proposals are at a stage at which the Justice Committee could have a significant influence?

Julia Bateman: In our written submission, we have tried to highlight a few of the priority areas. In the criminal law field, we think that the package of proposals on procedural rights—including the letter of rights, the right to interpretation and translation, the right to access to a lawyer and the right to legal aid and legal advice, on which the Commission is due to legislate next—is a priority for the Law Society of Scotland and for the Justice Committee. We believe that those initiatives are much needed to provide a counterbalance to the security-focused initiatives and the extension to police investigation powers that have been introduced to date. I flag up the letter of rights, which will ensure that information is given to suspects and defendants about their right to access to a lawyer. We believe that that is a very important proposal.

We are very keen to have an awareness of and a focus on the civil justice areas of succession and matrimonial property law. Michael Clancy also referred to authentic acts. The issue goes to the heart of the legal system in Scotland as a separate legal system; it affects many people, your constituents and our clients included. If the UK decides to opt in, there could be major changes ahead. In any event, if we were to have a divorce or succession system for EU member states as a group and separate systems for Scotland, England and Wales and Northern Ireland, it would be important that we were aware of any changes outwith the UK. The areas that I flag up for the committee are family law and succession and, in the criminal law field, procedural rights.

In the civil and commercial sphere, there is a major project that is looking at reform of EU contract law. The interesting angle is that that will not be an opt-in piece of legislation; it falls within the legal basis of the internal market. Major reform of how businesses deal with one another and how contracts are set up, business to consumer, could be ahead. The reform is at the green paper, early consultation stage. I urge the committee to put the issue on its agenda because we think that it is very important for Scots law, the legal system in Scotland and businesses and consumers—indeed, for the citizens of Scotland.

Ian Duncan: In discussing such issues with a committee that has a heavy work programme, I am always conscious of the problem of exactly how the committee will find time to engage in a way that will do justice to the issues in question. That said, the committee may wish to consider a few green papers that will appear over the next few years. Next year, we will have a green paper on minimum procedural rights of suspects and accused persons and another on detention, both of which may be of interest. There will also be a green paper on the free circulation of documents.

The committee may want to get in with the bricks on those green papers.

Importantly for the committee, two aspects have to be borne in mind: those of seeking to influence things and of having greater occasion to apply the subsidiarity test. As we discussed earlier, under the Lisbon treaty, the committee may be called on to look at more mature areas that require its attention. The green paper stage gives the committee an opportunity to get in and wield influence if it is so minded.

Stewart Maxwell: Julia Bateman spoke of areas that the Law Society set out in its submission. It is clear to the committee why some, including the rights of accused, are a priority for our consideration. The proposed letter of rights was mentioned. How will that operate and why is it necessary?

Julia Bateman: It has been 10 years since the last major development in EU law on the police and investigative authorities, whether that be the European arrest warrant, the European evidence warrant or related confiscation and asset recovery. The Law Society supports measures to improve law enforcement across borders and crime fighting in the European Union, but we are concerned that some legislation does not take account of the role of the individual in proceedings. We need to ensure that procedural guarantees are protected. I refer not to the situation in Scotland but to that in cases abroad. In cross-border cases, individuals who face criminal proceedings in another member state should have access to information on their rights in their own language, be that information on access to a lawyer or on detention rights.

At this stage, it is proposed that the letter of rights be drafted in all 23 official EU languages. A number of other languages will no doubt be involved, but that is the current situation. For example, an individual who faces proceedings in Greece will be given the opportunity to understand those proceedings by way of the interpretation and translation rules and the simple tool of the letter of rights. Individuals who face criminal proceedings in foreign countries may not understand the case against them. That is a major procedural concern for the Law Society. The letter of rights is a simple tool that will be effective in supporting such people and those who advise them.

Stewart Maxwell: From the Law Society's submission, I understand that the letter will not replace basic existing rights.

Julia Bateman: Absolutely. It will neither replace basic existing rights nor change those that exist in different jurisdictions. It is a tool to inform individuals of their rights in each national system.

Ian Duncan: When the European Commission wrote the paper, it highlighted a number of examples of people who had been arrested, tried and imprisoned and yet who had no idea why. In certain parts of the EU, justice is not quite as fair as we would like it to be.

Stewart Maxwell: The law of succession was mentioned earlier, as was family law. It is widely perceived that the UK Government and the Scottish Government are cautious about taking on those areas of law. Is that cautious approach justified?

Julia Bateman: In family and succession law, the cautious approach is the right one. The instruments in question are designed not to reform national law or deal with estates on the domestic front but to look at certain areas. I refer to questions such as what the jurisdiction and applicable law are, which court will be used and which law will be chosen. The concept of choosing which law to use in a proceeding is alien to our legal cultures. We do not support that concept; we think that the law of the country is the most appropriate, cost effective and simple choice to make. The Law Society is concerned that major changes in that respect may be introduced. The cautious approach is important in that regard. On the other hand, the 2.2 million British citizens who live abroad could benefit from a simplified system. We are therefore trying to look at the practical application of the proposed change. As I said, we support the cautious approach. At this stage, the UK as a member state has not opted in.

Stewart Maxwell: I find it difficult to envisage how this will operate. How will the choice of which law to use be agreed to? I understand the point about the rights of Britons who live abroad. That said, far from the proposed change introducing a simple way of operating, it will make things more complex.

Michael Clancy: Private international law is complex—it just is. As people's family and property arrangements become increasingly complex, it becomes increasingly difficult to devise the proper law that should be applied in the circumstances. That issue confronts courts today. The 2.2 million cohort whom Julia Bateman spoke about are not getting any younger. It is not beyond the bounds of possibility to imagine that mortality will be knocking at their doors very shortly. People who bought a timeshare in Torremolinos or a villa in Tuscany a few years ago will now be looking to find out the taxation implications of transferring their property on death or while they are still alive.

The issue is confronting people now. I am talking not only about people from the United Kingdom who have settled in Europe but people from other European countries who have settled in the UK. For example, someone from Italy may have a house in the Western Isles, a property in Barga and another in Spain. If that person were to

die in Scotland, the Scottish courts would become involved. The question arises, which court would be the appropriate jurisdiction? The current rules of private international law create difficult circumstances anyway. As some point, we will have to think about simplification, although perhaps not the simplification that the European Commission has floated in the green papers on succession and matrimonial property that we have already looked at.

Ian Duncan: It is also useful to remember that your predecessor committee responded to the European Commission on succession and wills and divorce and broadly supported the cautious approach of the UK Government.

11:00

The Convener: As there are no more questions on that issue, we move to the final question, which comes from Nigel Don.

Nigel Don: It might be more than one question. Thank you for your input, which has given us—or certainly me—a great deal to think about. I refer back to paragraphs 114 and 115 of the European and External Relations Committee's report, which said that the Justice Committee should give further consideration to the issues. That was the European and External Relations Committee quietly passing the baton. I am looking for a little bit of help on what we should actually do.

First, Mr Duncan suggested that we should look at the green papers, which makes a great deal of sense. Are you in a position to ensure that we have access to them? Are there so many that somebody needs to think about them before we get them, or is it just a matter of having the right pipeline?

Ian Duncan: Curiously enough, that would be my job. That is what you pay me for. When people ask what I am up to, I usually say that I am the eyes and ears of the Scottish Parliament. It is my job to ensure that you know in plenty of time what is happening. The publication of green papers is a stage in the process, but thinking often goes on within EU institutions before then that leads to more progress and material thereafter. I tend to use the Commission's work programme, which is published annually and sets out the material that is coming up. Thereafter, depending on instruction from the committees of the Scottish Parliament, I actively engage with that and ensure that each committee has enough information so that, at any point, it can decide to engage more actively with the process.

As an example, some green papers will come out in 2011. If the Justice Committee recommended in its legacy paper for its successors that certain issues should be pursued with vigour, that would become part of my work programme. My task would be to ensure that full information was available to the new committee so that it could hit the ground running. It is important to note that committees have the greatest influence at the earliest stage of the process. The more progress there has been in the legislative sequence, the less able you are—the less able anyone is, in fact—to have substantial influence. I am at your disposal.

Dave Thompson: Given that there is now no Scottish MEP on certain European committees, would it help you to do your job and help us to do ours if we formed a link with MEPs from elsewhere in the UK who are on those committees? We could work closely with them if they were willing to take on that role.

Ian Duncan: I usually assess who on each of the given committees are the best people to gain as contacts. I now have a network of contacts on all the committees. Where there is a given issue, a rapporteur is usually appointed and they are responsible for drafting the Parliament's position. I usually seek an early meeting with that individual so that I am at least aware of who they are and what they are up to. I report that information back when appropriate.

I am always willing to be guided by the experience, networks and links that you have in Europe. I am happy to take any of those on board. I am also grateful to the Scottish MEPs, who are always willing to tell me the best person to talk to on a committee through their own informal networks. I am usually quite happy to receive their instruction, too. That information is invaluable when an issue is live and a committee wants far more information far more frequently.

Nigel Don: Can I follow up on the process? I think that at some stage or other this morning, you have all said that the lines of communication are quite good and that the European Parliament and the Commission understand that the Scottish legal system is different. However, there is a bit that worries me. Forgive me if I am going off at a tangent, but I will come back. My experience is that when sheep farming is discussed in Europe, most MEPs think about a small flock of sheep on a patch of green grass that looks rather like a football field on a sunny day. They simply do not understand wet, windy hill farming in Scotland. That is a frustration for those who deal with farming issues. Clearly, legal systems are slightly different in concept. To what extent are we right to be concerned that Europeans might not understand Scottish law, or is that just something that worries a few of us and really should not?

Michael Clancy: That is quite a difficult question to answer. Many people do not understand Scottish law. I do not understand

Scottish law, so why would I expect someone in Germany, Spain or Italy to understand it? In fact, they might understand it much better. The only sentence about Scots law in René David's book on comparative legal systems is, "Le droit écossais est très différent du droit anglais." That is it in a nutshell. That might be the way in which some learned commentators in Europe look upon the Scots legal system. However, René David's attitude, as a significant French scholar, is tempered by the fact that there are organisations, such as the Law Society of Scotland, the Scottish Government and the Scottish Parliament, that make it well known that there is such a thing as the Scottish legal system, that it is in some respects very different from the English legal system, and that in other respects it is similar to some continental legal systems.

The common Roman law foundation gives a sort of currency that we can use in continental European legal systems. Although we all march slightly further away each year from the jus commune—common law—of Europe that our civil law systems exemplified, phraseologies and concepts can be the same. It is sometimes not as difficult to explain some things to continental lawyers as it is to explain them to lawyers in a common-law system such as that of England and Wales. Succession is a case in point. We have a system of legal shares and so does France, so we can talk about and share the concept, whereas in England and Wales the legal share concept does not have the same resonance.

Nigel Don poses a difficult question when he asks how we can get across an understanding of Scots law. All that we can do is to do what we are doing at the moment and more of it, to ensure that the specific character and the distinctiveness of the Scottish legal system and legislative arrangements are well known. It is incumbent on us all to do that.

Julia Bateman: I agree with Michael Clancy. Whether an official who drafts a piece of legislation understands the number of different legal systems in the EU is questionable. However, there is an understanding and an awareness that Scots law and the Scottish legal system form a separate jurisdiction. The main, important message is that when legislation is developed there is no single UK legal system—there is no British law. The joint UK Law Societies Brussels office ensures that we are represented as three different jurisdictions and three different legal systems.

On Ian Duncan's comments about green papers, if the committee felt able to choose a list of priority green papers and examined them, when legislation came up that was relevant to an opt-in question or the subsidiarity protocol, the committee would already have formulated its position, taken evidence and had input. If you engage with the green papers at an early stage—heavy workload permitting—your views, advice and influence will go into the Commission and the European Parliament at that stage and you will have done the work before the short time period comes up. As Ian Duncan said, the green paper stage is critical.

Ian Duncan: To return to your sheep farming analogy, the same is true of almost every single piece of legislation that develops in the EU: there will always be very distinct national, sub-national, regional and local components to its determination. The important thing is that those who represent you in the negotiations understand each of those aspects—in a sense, the law that will affect you is in the hands of those whom you elect directly or the officials who work for them, negotiate in Brussels or come to a UK position in London—so that what arrives is sensitive to all the aspects and micro-differences that affect a country or national jurisdiction. The EU is at its best when the civil servants from the member states work collectively to try to create a mosaic that deals with all the different aspects of the continent, which is no easy task.

The Convener: There being no other questions, I thank you very much indeed, not only for your excellent responses to the searching questions that my colleagues posed but for the exceptionally useful papers that you produced. Thank you very much for your attendance.

11:10

Meeting suspended.

11:19

On resuming—

Decisions on Taking Business in Private

The Convener: I turn briefly to some administrative items. Item 3 is a decision on taking business in private. Does the committee agree to take its consideration of candidates for the post of budget adviser in private at its next meeting?

Members *indicated agreement.*

The Convener: Item 4 is another decision on taking business in private. Does the committee agree to take item 7, which is consideration of written evidence received on the Damages (Scotland) Bill, item 8, which is consideration of the main themes arising from today's oral evidence on that bill, and any consideration of the main themes arising from later written and oral evidence on the bill, in private at future meetings?

Members *indicated agreement.*

Members' Bills (Witness Expenses)

11:20

The Convener: Item 5 is members' bills and witness expenses. I invite the committee to delegate to me, as convener, responsibility for arranging to pay any witness expenses arising from the scrutiny of the Damages (Scotland) Bill, the Domestic Abuse (Scotland) Bill, the Commissioner for Victims and Witnesses (Scotland) Bill and the Criminal Sentencing (Equity Fines) (Scotland) Bill. Does the committee agree?

Members *indicated agreement.*

The Convener: I assure members that I will not be paying those expenses personally.

Damages (Scotland) Bill: Stage 1

11:21

The Convener: Item 6 is the first evidence session on the Damages (Scotland) Bill, which was introduced by Bill Butler MSP. As previously advised, under standing orders rule 9.13A.2, Mr Butler, as the member in charge of the bill, may not participate in his capacity as a member of the Justice Committee in any of the committee's considerations of the bill. Mr Butler is, of course, still permitted—as any MSP is—to attend this and any other public meeting, and he is particularly welcome to do so.

Members should have the written submissions that the committee has received so far, and a summary of that evidence produced by the clerks, which is paper J/S3/10/23/8. In addition, the clerks have put on members' desks two additional papers from Thompsons Solicitors, which arrived yesterday. All those documents are available on the committee's web pages.

I welcome today's witness: Graeme Garrett, of the obligations sub-committee at the Law Society of Scotland. I thank Mr Garrett for coming to give evidence to us today; we are greatly appreciative. We will move straight to questioning, which, as agreed, will be opened by Dave Thompson.

Dave Thompson: Good morning, Mr Garrett, and thank you for coming to speak to us today.

It has been suggested that the fixed 25 per cent rule in the bill that relates to the deceased's living expenses would violate the fundamental principle of the law of damages that a person who makes a claim should be compensated only for the loss that they have actually suffered, no more or no less. Can you elaborate on the Law Society's position on that?

Graeme Garrett (Law Society of Scotland): Yes, indeed. I must stress that I have spent 35 years trying to work out people's living expenses, and I am not sure that I have managed to do it in any given case to this day. It is an extremely difficult exercise to calculate what someone's individual living expenses were. As the committee will appreciate, most couples do not live their lives in the expectation that they will face litigation, and so they do not keep the type of detailed accounts that would allow one to arrive at an arithmetical figure.

In any given case, one has to take a broad-brush approach and make a number of assumptions. I do not believe that one can ever be confident in any case where settlement is achieved that one has arrived at the correct arithmetical figure. The exercise is extremely complex and difficult, and I say that as someone who has tried and failed on many occasions to come up with what I would regard as an accurate figure.

The other point that it is important to understand is that the 25 per cent figure represents the part of the deceased's income that was spent entirely on his upkeep. If one takes a normal husband and wife, many items of household expenditure do not cease when one of them dies—for example, the mortgage payment is not reduced to reflect the fact that only one person is paying it, nor is the council tax or insurance. Only a relatively small part of the total income can be said to be no longer required on the death of a spouse. At first sight, 25 per cent may seem a low figure, but when one does the exercise of looking into the elements of the overall household expenditure that cease, it is pretty close to the mark.

Dave Thompson: What would you say to the argument that the proposal could lead to wealthier people ending up with better settlements than poorer people?

Graeme Garrett: I think that that reflects the reality of the situation. With wealthier people, we are talking about larger amounts of money. A wealthy couple will always have a bigger damages claim if one of them dies; that simply reflects the fact that they had a higher earning capacity.

Dave Thompson: Is there not an argument that using the figure of 25 per cent could disproportionately favour the wealthy and take away from people at the lower end of the income scale?

Graeme Garrett: I do not think that it would take away from those at the lower end, although it probably would give more to those at the upper end. My impression is that, at present, 25 per cent tends very much to be the starting figure.

Coincidentally, I am a member of a steering committee on the Super Puma helicopter disaster in the North Sea in April 2009, when 14 people were killed. That committee represents eight highly diverse families. The people who were killed were of different ages, the earning positions of the surviving spouses were very different and their children were of different ages. In our discussions with the London solicitors who represented the helicopter operator, we were able to reach agreement on a 25 per cent reduction without any difficulty at all. That reflects the reality of such cases at present. Very few of them come to court and, in general, no difficulty is experienced in agreeing a figure of 25 per cent or thereabouts.

Dave Thompson: Am I right in saying that you would claim that having a fixed figure of 25 per cent would have the advantages of speeding things up and meaning that people would not be

subjected to an intrusive inquiry on those extremely personal matters at a highly sensitive time?

Graeme Garrett: That is correct. In addition, I question the effectiveness of much of the investigation process that takes place. As I said at the outset, it is necessary to make a large number of assumptions, so the process is not arithmetically precise, even if one devotes large amounts of time to it. In the society's view, anything that cut through that and introduced an element of certainty would be welcome.

Dave Thompson: I believe that the society has changed its position. Will you elaborate a little on why it did that and pick up on the point about the 25 per cent being fixed rather than a rebuttable presumption?

Graeme Garrett: Let me deal with the first issue. I joined the obligations law sub-committee relatively recently, after the society had submitted its initial response on the bill. At that time, there was no personal injury practitioner on the obligations sub-committee. I believe that the initial response was drafted by Dr Ross Anderson, who is an academic at the University of Glasgow. Although he is an extremely competent and able man, he did not have any experience of this field of law. When I came in, I was asked to take over the reins of the submissions. The matter was debated earlier this month in the obligations sub-committee, and the response that you now have represents the current thinking.

11:30

Stewart Maxwell: I want to ask about the second point that was raised. Why do you support a fixed rule rather than a presumption? I think that you said in one of your earlier answers that the 25 per cent figure is accurate in most cases or generally speaking. I accept that, but your answers tended to suggest that there would be cases in which 25 per cent would not be accurate.

Graeme Garrett: The Law Society sees merit in introducing certainty in order to cut to an early settlement and to try to keep cases out of court. When we introduce a rebuttable presumption, defenders, being defenders, will try to rebut it. On some occasions they may be successful in their efforts, but often all that will happen is that, in having a rebuttable presumption, you will reintroduce by one door the arguments that you thought you had got rid of through another. In practice, you would still face the argument if there were a rebuttable presumption.

Stewart Maxwell: I understand what you are saying and the reasons for introducing a rule, but is it acceptable that both sides would be refused the right to challenge the fixed figure based on the individual circumstances of the case?

Graeme Garrett: If the parameters for the deductions at which the cases are being settled were wide, one could see that a rule might create unfairness, but the deductions tend to be at or about the 25 per cent mark. There was a court decision by Lord Kinclaven in which he took a figure of 30 per cent, but that case is noteworthy because it is exceptional. We are not talking about major differences or parameters of 25 to 50 per cent; we are talking about relatively small figures in an area in which we can never be precise anyway, because the information is often lacking.

Robert Brown: I want to explore the issue a little further. It is fair to say that the obligations sub-committee of the Law Society has one view of the matter, and the evidence that we have before us has divided views—with an insurance perspective to the fore among those who take a different view from you.

The compositions of families are varied. They can range from no children to a number of children of different ages, and there can be circumstances in which a wife and a cohabitee are both in existence at the same time. Indeed, there could perhaps be several ex-wives and a number of children from previous relationships. However, is the point that the circumstances of human life in modern Scotland are pretty varied not an argument for saying that, whatever the normal rule may be and the advantage of a starting point, it would not do justice in all the varied cases?

Graeme Garrett: The 25 per cent rule will not arrive at a precise arithmetical approach in all cases, but I am not convinced that we are arriving at a precise arithmetical approach in cases anyway, because we are having to make fairly broad assumptions.

Robert Brown: I accept entirely what you say about the difficulties in some cases, and I guess that, if it was a matter of a few percent either way, there would be some advantages in having a fixed position without any great injustice. However, in your experience from negotiations that you have been involved in or have heard about—I appreciate that there are not many reported cases on this issue—how wide is the variation that is argued and agreed?

Graeme Garrett: The parameters tend to be 25 to 30 per cent. In the case of Guilbert, Lord Kinclaven came up with a curious position in which he allowed a 30 per cent reduction up to the date of retiral that then increased to 35 per cent after retiral. That was a very unusual case on its facts because—this is perhaps a reflection of the generosity of the French pension scheme—the income of Mr Guilbert, who was a French national,

would increase rather than decrease on retiral. That is not a situation that I have ever encountered in practice and it is not one that I expect to encounter before I retire: it was highly unusual. I think that the parameters are 25 to 30 per cent.

Robert Brown: Does that not make the point that there are cases—however unusual they may be—in which individual circumstances must be considered and in which a moderately substantial difference from the figure is justifiable, according to what you tell us?

Graeme Garrett: Yes, although I keep returning to the point that we do not start with a precise percentage anyway. Considerable fudging goes on in negotiations and in trying to arrive at a figure.

Robert Brown: On whether there is a mischief to resolve, you say that most people proceed on the basis that 25 per cent is the rule of thumb to begin with at least. Given that, does an issue exist? Will time be saved? Is there a problem with the process?

Graeme Garrett: The problem would be the intrusiveness of the inquiries at a time when people are particularly vulnerable. Having to sit down with a newly bereaved widow or widower and start picking through the grocery and household bills is not a pleasant task. If that exercise produced significant differences, it might be worth while but, from my experience, I am not convinced that it would be worth while.

Robert Brown: Has the obligations sub-committee conducted any research into that?

Graeme Garrett: No.

Robert Brown: You have talked about your experience, but have you looked around seriously at other practitioners' experience?

Graeme Garrett: I am a member of the Association of Personal Injury Lawyers. From talking to other members of that organisation, I know that their experience broadly mirrors mine.

Dave Thompson: On speeding up the process, can you say what time might be saved? Would cost savings be made and would the cost of lawyers be reduced? That is always attractive to me, anyway. How significant would such savings be?

Graeme Garrett: That would—obviously—vary with the case. In higher income brackets, people tend to lead more complex lives and to have more financial commitments, so more time is spent on the task. Even in an average case, we might well spend four or five hours on investigating the situation, because people are rarely able to produce everything that we ask for at the first request. We often have to go back to them to chase up missing bits of information. Often, we must recognise that the information simply is not there and we must make the best stab at it that we can.

Costs vary, but we are talking about potentially thousands of pounds rather than hundreds of pounds. As for the timescale, the issue does not cause many cases to be litigated—that is reflected in the very small number of reported decisions. However, some haggling occurs with insurers. The time before a final figure is agreed could vary from weeks to months and occasionally years.

The Convener: Is the Guilbert case reported? Can you give me the reference?

Graeme Garrett: I can give you the citation—it is Jean Francois Guilbert v Allianz Insurance [2009] CSOH 10. The decision was by Lord Kinclaven.

Cathie Craigie: I turn to the proposal in the bill to restrict the categories of relative who can claim for loss of the victim's financial support. On page 3 of its submission, the Law Society states that it has "major concerns" with that measure. Why does the society oppose it? What was the rationale for the changes along those lines that were proposed for England and Wales in the draft Civil Law Reform Bill?

Graeme Garrett: The society opposes the recommendation because it seems unnecessary and unfair. The society recognises that, in practice, a member of the immediate family will make the claim in virtually every case in which there is a claim for financial loss. That is the norm, but a small number of cases fall outwith that. The obvious example is a nephew or niece who is supported by an uncle. That relationship would fall outwith the "immediate family" category, which would mean that, in the event of the uncle's wrongful death, a niece or nephew whom he was financially supporting would have no remedy.

The fact that a situation may not arise often does not seem to the society to be a good reason for removing the remedy. There are many rights that do not arise often in practice but nobody suggests that they should be taken away. In fact, the society would go further and endorse the approach that the Westminster Government has taken, which is that any person who was, as a matter of fact, being financially supported by someone, ought to have the right to claim in the event of that person's wrongful death.

Cathie Craigie: One of the Scottish Law Commission's arguments against that proposal was a fear that there was a danger of including business, not domestic, relationships. How do you respond to that argument?

Graeme Garrett: That would be a matter for the parliamentary draftsmen. It does not seem to the society that it would be too difficult to draw a distinction between personal support and business support. The matter could easily be interpreted by judges if the need arose.

Cathie Craigie: Is it the obligations sub-committee's view that, although it would affect a small number of people, the bill could be improved if your proposal was included?

Graeme Garrett: Yes.

The Convener: The Law Society appears to take the view laid down in the judgment of Brown v Ferguson, which is a 1990 case, with regard to the 75 per cent rule. Critics say that the rule violates the fundamental principle that an individual should be compensated only for the loss that he or she has suffered. What is your answer to that?

Graeme Garrett: The 75 per cent rule is a necessary corollary of taking a 25 per cent reduction so, if we accept one, we have to accept the other, otherwise we would be left with a gap. Therefore, what I said in relation to the 25 per cent reduction for own upkeep must imply that 75 per cent of the victim's income should be the loss of financial dependency element.

The Convener: Yes. One is a corollary of the other. That is a totally logical position.

Another criticism that has been made of the bill is that completely disregarding the income of the person making the claim could result in overcompensation in some instances. How do you respond to that argument?

11:45

Graeme Garrett: I would respond by saying that the Brown v Ferguson ruling has probably led to, and continues to lead to, undercompensation. Its approach might have been valid at a time when society was composed of nuclear families that had one main breadwinner and someone—generally the wife—who earned some pin money, but that no longer reflects society as I see it. That does not reflect the realities of my clients' lives when they come to me in the event of the death of a loved one. We are now in a society in which, increasingly, couples have, if not equal, something approaching equal earning capacity. The Brown v Ferguson approach does such families a considerable disservice. We are starting off not from a position in which people currently receive fair compensation and what is proposed would give them a bonus, but from a position in which people are currently being undercompensated. The proposals would redress that element of undercompensation.

The Convener: Playing devil's advocate for just a moment, I might suggest that, notwithstanding the old story that hard cases make bad law, in some instances there could be a complete imbalance in the household income in respect of one partner or another. If tragic circumstances occur and one partner seeks compensation, the 75 per cent calculation might not be apposite. Could it be argued that the 75 per cent calculation should be accepted unless cause is shown as to why that would be unfair?

Graeme Garrett: That is certainly a valid argument, but the Law Society did not support it for the reasons that I gave in relation to the 25 per cent reduction. Where a rebuttable presumption is introduced, people will try to rebut it. That would take away the element of certainty and would eat into the savings in legal costs that a fixed presumption would provide.

Cathie Craigie: As an experienced lawyer in dealing with such matters, can you confirm whether, as I imagine is the case, the majority of people who make claims are on modest incomes? Am I right in thinking that they are not high up the income scale?

Graeme Garrett: Yes indeed. I do not have the statistics, but I am sure that they would show that people in certain social classes are more likely to be killed because of the types of job that they do and because of a variety of other reasons. For example, such people might drive older cars, which are less safe than larger modern cars, so they are more likely to be killed in the event of a road accident. The Scottish Law Commission report makes much of the distortion in the higher-income family units, but those are very much the rarity. The norm is that we are acting on behalf of people who are at or about average earnings in the very great majority of cases.

Cathie Craigie: Thanks for clarifying that.

Nigel Don: I just want to challenge the notion that the 75 per cent is an automatic corollary of the 25 per cent. I am not disputing the arithmetic—I have the right number of fingers and toes—but some people, albeit not many these days, save a sizeable fraction of their income, which would be a very different kind of expenditure. Equally, some people might make significant charitable gifts, which would be included in the 75 per cent but would not routinely have been available to the other party. Does that not negate the presumption? Equally, other commitments, such as under a previous divorce, could form a significant fraction of that 75 per cent. I raise all those points just to challenge the idea. Can you explain why I am wrong?

Graeme Garrett: Let me pick up that last point about the financial provision on divorce. Both the

report and the bill make it clear that the 25 per cent figure for the person's own upkeep applies only in relation to the spouse, cohabitee or dependent children. Both the report and the bill make it clear that, where the person was supporting other relatives, such support must be deducted from the 75 per cent balance—it is not included in the 25 per cent reduction. That would have the effect of reducing the 75 per cent figure.

Dave Thompson: I have one question about the income of the relatives. If the deceased person were a pensioner in a pension scheme in which the partner would gain the equivalent of a quarter or a half of the pension on the death of the other party, would that sort of payment be included?

Graeme Garrett: Yes, it would form part of a claim for loss of pension rights. It would not form part of the claim for loss of financial support, but would be dealt with as a separate pension loss, from pensionable age until normal life expectancy.

Robert Brown: I have a question about the multiplier for which section 7 provides. The provision is that the multiplier for loss of support will run from the date of the court order, not from the date of the death. I want to get some background on the thinking on that issue. In a sense, the date of the court interlocutor is an irrelevance to the factual position—surely the key point is the death of the person. Why is it better to identify the date of the court interlocutor as a dividing point from which the multiplier would start to be used?

Graeme Garrett: I can put on my Ogden tables working party hat here, because I am a member of the Ogden committee. The traditional approach has been heavily criticised by Ogden. I am not an actuary, but the Ogden committee is made up of a mixture of lawyers from both sides of the divide—claimant lawyers and defendant lawyers—and actuaries. There is unanimity on the committee that, actuarially, the traditional approach makes no sense, because it discounts the losses that have arisen between date of death and date of settlement. The Ogden tables discount for two reasons—for mortality and for early receipt of compensation. There has been no early receipt of compensation in relation to the past element.

Take the example of a case that is settled four years after the death. The approach in a non-fatal case would be to take a multiplier of four years to the annual multiplicand. As you know, that does not happen in fatal cases—we take a figure from the Ogden tables that discounts the figure of four years to something in the order of 3.8 years. Actuarially, that makes no sense, as the money was not received early and there was no further risk of mortality, because the person was already dead. There is some undercompensation because the past element is discounted, which should not happen.

Robert Brown: I understand the point that payment has not been received, which is fairly straightforward. However, surely the argument is not so much that the person is already dead as that, had the events that caused the death not happened, there was a risk in actuarial terms that something else might have happened in the meantime. It is probably fairly marginal and may not have a significant effect.

Graeme Garrett: The point is that it is more than marginal—it is almost so small as to be unmeasurable. If you apply a discount for mortality to a 30-year-old who, it is anticipated, will live into his 80s, and that discount appears in the Ogden tables, you are measuring the risk that the person will die at some stage before he reaches age 85 or 87. However, where you are talking about a much shorter period, between the fatal accident and the date of settlement, the risk in actuarial terms of somebody who is 30 dying before he reaches 34 is infinitesimal.

Robert Brown: So we should concentrate on the lack of early payment as being the crucial reason for the distinction between before the settlement and after it. For obvious reasons, in actuarial terms that does not sound as I understood it.

Graeme Garrett: Yes indeed.

Robert Brown: I have a question about the change of wording in section 4 from "solatium" to "grief and companionship award". I can understand the argument for using the more understandable expression, but putting aside the mental health aspect for the moment, is there a risk that it will cause greater uncertainty to what is an established legal category when it does not give someone great practical advantages?

Graeme Garrett: Practitioners of my vintage still refer to the award by its previous name of "loss of society", so we have not caught up with legislation of 10 years ago. However, everybody understands what we are measuring. I do not think that it is a significant risk.

Robert Brown: In effect you are redefining it—you are calling it something different and it is a new category that I think is, by definition, unrelated to the earlier ones. Does that create potential unintended consequences?

Graeme Garrett: I do not think so. Although I did not refresh my memory of the current legislation before I came today, I think that it refers to "companionship" and "guidance", so the concepts are pretty well recognised and understood.

Robert Brown: My colleague, Dr Simpson, wants to pursue the mental health aspect.

Dr Richard Simpson (Mid Scotland and Fife) (Lab): First of all, distinguishing normal grief from abnormal grief must be difficult for the courts to do. Secondly, I am trying to grasp why a mental disorder that is a direct consequence of another person's dying should not be compensated.

I offer an example. Many psychotic illnesses can be in abeyance, but relapses associated with major stress can occur. Of course, the death of a spouse would be a major stressor. It could cause considerable difficulty for the individual who is left in that their income could be temporarily or permanently damaged by the fatal accident. Why is that excluded, or is it treated under a different section? It appears that under section 4 an award

"is not to be made in respect of mental disorder caused by A's death."

That seems to be somewhat unfair, particularly if it affects the income of the surviving spouse and their family.

Graeme Garrett: It restates the existing law, which draws a distinction between mental illness suffered as part of a bereavement process and mental illness suffered by a relative who witnesses the death of a relative. The proposal is that that will not change. For example, if there is a car accident in which husband and wife are involved and one of them witnesses the death of the other and suffers a psychiatric reaction, they would continue to be able to make their own claim, rather than a fatal claim, from having witnessed the death of a loved one. The traditional approach has been not to compensate for psychiatric illness arising from bereavement per se, although the fact that a relative develops a psychiatric illness might be compensated because it might be a measure of the degree of grief that that relative suffered. They are being compensated, but only indirectly. There will be no award for the psychiatric illness as such, but it might put them higher up the compensation scale in relation to bereavement damages.

Dr Simpson: The bill says that an award

"is not to be made in respect of mental disorder caused by A's death."

If one has an abnormal grief reaction, it would be classified as a mental disorder under section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003. However, such a reaction would be excluded.

Graeme Garrett: It would be excluded. That is the traditional approach.

Dr Simpson: I think that the Mental Welfare Commission for Scotland has raised the issue. I am not a member of the Justice Committee, but I draw members' attention to the fact that there is a significant problem that needs to be looked at in questioning other witnesses.

The Convener: Yes—that is a valid point.

There being no other points on that issue, I call Nigel Don.

12:00

Nigel Don: Thank you, convener. Mr Garrett, I would like to consider the level of damages that will come about as a result of the bill. Everyone has suggested that the net result will be an increase in the level, or at least an increase in the average level, and that it will probably make the largest difference at the highest level.

Graeme Garrett: Yes.

Nigel Don: I appreciate that policy belongs on our side of the table, but does that make sense to you as a matter of policy? Do you believe that the current system is giving the wrong answer?

Graeme Garrett: The current system is giving undervalued damages, which is why the Scottish Law Commission made its recommendations. It is important to remember that the commission's report was not solely the work of the law commissioners. They had an advisory panel of practising lawyers from both sides of the argument—pursuers and defenders—and my understanding is that there was general agreement on the recommendations that the commission made. Among practitioners, there is a recognition that Brown v Ferguson has increasingly had unwanted consequences as society has changed.

Nigel Don: I am privy to some numbers. We have only just had access to them, but if I read them aright, their implication is that the differences that we might see as a result of the bill are of the order of thousands of pounds. None of them gets into five figures and, with a few exceptions, we are talking about amounts under £5,000. I do not wish to trivialise the matter or upset anybody, but is it really worth it? Are we making life complicated for what are, in the grand scheme of things, relatively small sums of money, or are these issues which we really should be worrying about and teasing out the detail on?

Graeme Garrett: The approach in Brown v Ferguson will become increasingly irrelevant to the way in which people in Scotland live their lives. That is a worry in that, in practice, it is becoming increasingly difficult to explain to clients why we have to go through a formula that concentrates not on the lost income but on the remaining income, which was there before the death and which is still there. Clients have great difficulty in understanding that. They regard it as unfair, and in many cases I can sympathise with that view.

Nigel Don: Right—so this is all about fairness. It is not about anybody's view of what £5,000 adds up to. That is absolutely right. I have no trouble at all with that. However, I ask you to put that—

Graeme Garrett: May I add a comment? We have to balance against a potential small increase in the damages that are awarded the savings that might be made in legal expenses through speed of settlement and the settling of cases without recourse to litigation. Litigation is an expensive process that takes up valuable resources, so if it can be avoided by sensible measures, there are definitely savings to be made.

Nigel Don: Thank you. That is precisely the point that I was going to come to. We could take whatever view we like about whether sums of £5,000 or less are real sums of money. I am sure that, to many people, they are real sums of money, so I do not have a difficulty with that. What kind of legal costs are we looking at? If we simplify the system and take out significant amounts of legal effort, what savings will we see on cases?

Graeme Garrett: How long is a piece of string? It depends on individual circumstances, but the savings would be into four figures. A rough figure would perhaps be £1,000 or £2,000. The amount would be in that area, although it could be more if the issue was the main sticking point in a settlement. Such cases can go on for months or even years before a settlement is achieved, so in some cases the measures in the bill would result in substantially higher savings.

Nigel Don: So if the average figure is less than £2,000—I am looking at Mr Butler because I am sure that he has a far better grasp of this than I have—that could easily be swallowed up in legal costs, anyway.

Graeme Garrett: Yes.

Nigel Don: Thank you.

Robert Brown: I will go back to the 25 per cent issue that we talked about earlier, if I may. I have had a chance to look through the evidence that we received this morning from the judges of the Court of Session. That evidence says that the judges are not terribly much in favour of the 25 per cent rule, but they point out that, with both parties having a financial lifestyle that might be different to what it was in the past, one party might undertake obligations such as a big loan for a car, a house or a holiday, and that could distort the traditional methods of calculating the figure. Is there not some validity in that point?

Graeme Garrett: There might be in a small number of cases. As I indicated earlier, most couples who are involved in a fatal accident have pretty simple lifestyles, although we can always think of exceptions that will distort the general rule. Will they arise frequently in practice? They will not, according to my experience.

The Convener: It is quite easy to envisage such a situation, however. For example, take a normal household in which the husband might spend more money on goods than does the wife. Let us suppose that he smokes 20 cigarettes a day, which would probably cost £2,000 a year, and spends £1,000 a year on drink, which is not excessive nowadays. That is a total of £3,000. If his wife does not indulge in such pleasures, then the savings in the household bills will be considerable.

Graeme Garrett: Yes. Obviously, that depends upon income. We would also need to know what percentage of the total household income that £3,000 represented. Some people might indulge to a much greater extent than that, but it would still not take their upkeep beyond the 25 per cent figure.

If I can repeat myself, it is important to say that most items of household expenditure do not cease when one partner dies. It is really only things such as food, immediate travelling expenses or pleasure expenses that cease. A person's income would have to be pretty low to get that figure above 25 per cent.

The Convener: Yes, and in many cases, the saving would purely be on food because the partner who is left still requires to live in the house and has other living expenses.

Graeme Garrett: Indeed.

The Convener: Mr Butler, you have been taking careful notes. Are there any questions that you would like to put to the witness?

Bill Butler: No. I am content indeed with the responses that I have heard from Mr Garrett, and I am grateful to colleagues for their interrogation of the witness.

The Convener: As no one has any further questions for Mr Garrett, I thank you for your attendance this morning. It has been extremely useful.

Graeme Garrett: Thank you.

12:08

Meeting continued in private until 12:25.

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