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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 28 September 2010

Session 3

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JUSTICE COMMITTEE
26th 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

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

*attended

THE FOLLOWING GAVE EVIDENCE:

Paul Allen (Scottish Government Justice Directorate)
Fergus Ewing (Minister for Community Safety)
Alison Fraser (Scottish Government Legal Directorate)
Syd Smith (Thompsons Solicitors)
Bill Wilson (West of Scotland) (SNP)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 28 September 2010

[The Convener *opened the meeting at 10:03*]

Interests

The Convener (Bill Aitken): Good morning, ladies and gentlemen. In opening the meeting, I remind everyone to switch off their mobile phones. There are no apologies for absence as there is a full turnout. In fact, we have an additional member, to whom agenda item 1 relates. Claire Baker MSP is the newly appointed Labour Party substitute on the committee and is attending in place of Bill Butler MSP for items relating to the Damages (Scotland) Bill. This is her first attendance as a substitute, so I welcome her and invite her to declare any relevant interests.

Claire Baker (Mid Scotland and Fife) (Lab): I have no relevant interests to declare.

The Convener: Thank you.

Decision on Taking Business in Private

10:03

The Convener: Item 2 is a decision on taking business in private. The committee is invited to decide whether to consider an approach paper on the forthcoming double jeopardy bill in private at the next meeting. Is that agreed?

Members *indicated agreement.*

Damages (Scotland) Bill: Stage 1

10:04

The Convener: The principal business of the morning is the Damages (Scotland) Bill. This is the fourth and final evidence session on the bill, which was introduced by Bill Butler MSP. Mr Butler is not permitted to participate in his capacity as a member of the Justice Committee in the committee's consideration of the bill, but he may participate in the public items relating to the bill in his capacity as the member in charge of the bill.

The first panel of witnesses comprises Fergus Ewing MSP, Minister for Community Safety; Paul Allen from the Scottish Government civil law division; and Alison Fraser from the Scottish Government legal directorate. Mr Ewing, I understand that you are happy to proceed straight to questions.

The Minister for Community Safety (Fergus Ewing): Indeed.

The Convener: Thank you. I will open the questioning.

In the course of evidence taking, the committee has been able to see where the issues of contention might arise. One relates to the deduction that is made for the victim's living expenses. We have heard various arguments: that there should be a fixed 25 per cent rule; that the 25 per cent rule should be a rebuttable presumption; and that each case should be decided on its own facts and circumstances. What is the Government's stance on the issue?

Fergus Ewing: Perhaps I could say first that we appreciate Mr Butler's aims in putting forward the bill and we have sought to work with him carefully. As human beings, we all recognise the worth of the task that he is trying to achieve, and we have a job to do on the basis that good intentions do not always make good law.

We did not take over responsibility for the bill for three reasons. First, the Scottish Law Commission said that it was not a major problem. Secondly, we were not aware until April 2009, when Mr Butler asked an oral question about the issue, that there was any element of particular urgency—indeed, evidence on that is still not as clear as we would like. Thirdly, and most important, we believe that much more work is needed, not least—those remarks being by way of introduction to answering your question, convener—on the issue of how we ensure that there is fair compensation to those who are in the hugely difficult and tragic position of having lost a loved one on whom they relied for financial support.

Does the Government agree that there should be a one-size-fits-all 25:75 split between the victim's personal and family expenditure? We conducted a consultation on the issue in July. We received most of the responses by the allotted deadline of 27 August, but there were a few thereafter. Therefore, we were able to share the responses to the consultation only last week. It is fair to say that the answers that we received to our consultation showed a mixed response, but broadly the answer tended to be the negative.

I mention that because it indicates that more work is required on the matters raised in the responses to our consultation paper. More evidence is needed, and more analysis is needed of the evidence that we already have and the evidence that I believe we need yet to receive. As such, we have not reached a conclusion. It would be wrong for anyone to reach a firm conclusion without having received sufficient evidence and, until such time as we have received sufficient evidence, we think that it would be wrong and wholly premature to reach a final conclusion.

There are important questions to which we have to have regard. First, what is the reform attempting to achieve? Is it attempting to speed up the process or to make the process of paying compensation less intrusive? Some of the witnesses have rightly mentioned that point—Mr Garrett referred to his 35 years of experience of dealing with claims. One can understand as a factor the difficulty of asking a widow about the details of her household expenses, but is the aim to avoid that, or is the premise of the bill that the compensation is generally too low and should be increased?

If compensation levels are the target, I think that, before imposing our own blanket provision, as lawmakers we would certainly need more evidence that the deductions that courts are making are inappropriate and leading to undercompensation. I know that Thompsons Solicitors has been helpful in providing a lot of evidence about cases that it has dealt with. I understand from those cases and from Mr Butler's description of that company's work, which we all acknowledge, that 99 per cent of its pursuers would appear to be better off under the proposed system than under the current system. However, we do not have a case-by-case analysis of the Thompsons cases to let us know whether there is any evidence of undercompensation. Without that analysis or further information on that score, are we able to conclude that that is indeed the case?

In one sense, we are dealing with a technical matter. Nevertheless, it is hugely important and I have given the committee our initial principled response to it. I think that I will stop there, convener. There are other technical matters that I might, if asked, go into.

The Convener: You have suggested that a study be carried out to find out whether people have been over or undercompensated. How might the mechanics of that work?

Fergus Ewing: The proposal might usefully be discussed between the committee clerks and my officials, particularly given that we now have two sets of evidence: the evidence that the committee has obtained and will obtain and the evidence that the Scottish Government has obtained through its consultation paper. Each of us has a mutual duty to study all the evidence, and the process of deciding the best way of doing that and seeing whether any gaps in the evidence need to be filled might best be tackled through a meeting, in the first instance, of our officials and then further consideration by each of us. I certainly think that more evidence is required on this matter.

The Convener: At last week's meeting, Thompsons and the Association of Personal Injury Lawyers indicated their opposition to the concept of rebuttable presumption. Does the Government have any views on that?

Fergus Ewing: I will answer that in two ways. First, as a general response, I understand that there has been movement in the position of some of the key witnesses on this matter. At first, the Law Society was against the proposal in Mr Butler's bill but, following the accession to the relevant Law Society committee of Mr Garrett, who has given evidence to the committee, it has changed its position. Although, because of other commitments, I have not yet had the opportunity of studying the consultation responses, I am told that the Faculty of Advocates, too, has changed its position. Mr Allen will correct me if I am wrong, but I believe that it is now in favour of the rebuttable presumption.

Those against the presumption argue that, if the presumption of 25 per cent as the deceased's personal expenditure could be rebutted, it would be challenged by insurers in every case and the very mischief—namely delay and difficulty—that some say Mr Butler's bill would cure would remain. Of course, it could work in another way. Concerns have been expressed about cases involving a breadwinner with a heavily dependent family, perhaps with a large number of children, a former wife to whom maintenance is being paid periodically or an elderly parent who is being cared for at the expense of the person who sadly and tragically loses his life through wrongful death. In those circumstances, the breadwinner might spend far less than 25 per cent of the income on himself. There is merit in having a rebuttable presumption in those cases in that, otherwise, a person who has lived frugally and spent his money

not on himself but on his family—and, indeed, his survivors—would, in effect, be penalised. One can easily make a case that the fixed 25 per cent rule would be unfair to that person.

10:15

Convener, you yourself alluded to the sensitive question of what people choose to spend their money on. Putting it bluntly, I think that a presumption of 25 per cent personal expenditure is likely to be kind to, for example, someone who spends all their money on drink and fags. From my reading of its questioning of previous witnesses, the committee appears to fully appreciate that the problem of fixing the contribution at 25 per cent is that it does not allow for the myriad circumstances that might arise and that might, therefore, create unfairness. There is therefore a clear tension between the assignation of a fixed percentage and the unfairnesses and anomalies that might arise from individual cases.

There is a secondary case to be made for a rebuttable presumption of 25 per cent or something not too far off that figure. No doubt one could consider, delineate and circumscribe the circumstances in which the presumption could be rebutted and on whom the onus would fall, but the difficulty for the Government is that that simply illustrates the complexity of the whole issue and the need to proceed with care, not haste, and to consider all the evidence that has been obtained so far if we are to make law that meets the major test of providing fair compensation, not over or undercompensation. It is a hugely controversial and difficult area.

The Convener: As you have quite correctly pointed out, the issue is difficult and goes to the heart of the bill. Is there any advantage or value in trying to get the best of both worlds and have in some cases the rebuttable presumption and in others—such as the mesothelioma cases that we have dealt with in the past—a fixed percentage?

Fergus Ewing: That suggestion merits full consideration. Such an approach might well be taken in the cases that you mentioned, given that those who suffer from that horrible disease might face a very quick death.

The Parliament has rightly made provision for relatives in such circumstances under the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007, which was introduced by the previous Administration to remove a very serious mischief. However, the twin-track approach that you have proposed could be considered. Mr Allen might be able to shed some light on whether the idea has been looked at.

Paul Allen (Scottish Government Justice Directorate): It is one of the ideas that have emerged from the committee's written and oral evidence. Another option was to have a different percentage according to whether the family in question had children; there would be one figure if only a wife was involved and another if a wife and dependent children were involved.

All those options can be looked at, but it will take a lot of study to figure out whether they work or whether they lead to over or undercompensation. To be honest, because these matters are all private, the Government lacks a lot of the data that it will need to examine the options, which is why the information that Mr Butler has got out of Thompsons has been very helpful. It provides a very good foundation for our work that we would not otherwise have had. Even so, it will still be a complex task to use that information to find out whether 33 per cent, say, fits some cases better than 25 per cent.

The Convener: As this is an important part of our consideration of the bill, I would like the issue to be examined as thoroughly as possible.

Dave Thompson (Highlands and Islands) (SNP): As you know, it has been argued that the advantages of a fixed percentage are certainty, speed, lower costs and so on. Does introducing a rebuttable presumption not negate any such advantages or benefits, given that insurance companies will always attempt to rebut a fixed percentage?

Fergus Ewing: That is one of the major arguments against a rebuttable presumption and for a fixed percentage.

Paragraph 33 of the policy memorandum sets the point out well:

"it is frequently difficult to establish the deceased's current and future income and the extent to which the deceased might have spent on himself as distinct from his relatives."

That is indeed a difficult task. Few of us will keep a journal entry or ledger of our day-to-day expenditure. Life is not like that for the huge majority of people. If we did that, it would make for pretty grisly reading in many cases. To come to the serious point, Mr Butler is admitting in his bill that the first task is to assess income, and

"it is frequently difficult to establish the deceased's current and future income".

That must be done irrespective of whether or not there is an automatic, fixed deduction for personal expenditure. I mention that for the sake of completeness.

The idea that the proposal to have a fixed formula, as opposed to the current system, which approaches the matter by considering previously decided cases, such as those of Brown and Guilbert, and a case going back to the 1970s, on

which the Brown case was allegedly determined, will of necessity result in simplicity and time savings assumes that insurance companies will settle claims with more alacrity than they have done in the past. I will be very interested to see clear evidence that insurance companies will settle claims more quickly in practice, simply because a law provides what appears to be a clearer, more defined process. I will not impugn the motives of insurance companies, but critics say that they take their time in settling cases of all types, even in those in which there is a relative lack of controversy about the key issues in dispute.

However, it can be argued that there would be speed and simplicity under the proposed system, and that case has been made well by Mr Butler and by solicitors—notably Thompsons—in the meetings that I have had. The evidence that we now have, as I understand it and as I am advised—although I have not had the chance to study the evidence directly in full—suggests a slightly more complex picture. Some solicitors take one view and other solicitors take another. I believe that the committee might already have heard conflicting evidence about the process of settling claims and the speed of that process. The extent to which Mr Butler's formula would of necessity speed up the process is a matter where more evidence could and probably should be taken.

Robert Brown (Glasgow) (LD): Is there any evidence, from the Government's consultation, from the Gill review or from elsewhere about the pinchpoints in damages claims? There is the issue of liability, which is often the biggest challenge to getting a settlement, at least in some contentious cases; there is the multiplier, which you have touched on; there is the multiplicand; and there are a whole series of other background matters. Does any of the information that has come out of your inquiries or elsewhere indicate the extent to which the relatively narrow issue of the 25 per cent deduction holds things up?

Fergus Ewing: I have not studied the Gill report with that specific matter in mind, although one of Lord Gill's main conclusions, which we have debated elsewhere, is that the pace of settling civil claims in Scotland is not acceptable. The Government agrees with that.

It could be argued that, no matter what worthy changes we make in the law through the bill, they might not be entirely as effective as they appear on paper because, at the moment, we do not have a civil justice system that provides the opportunity to obtain a remedy, particularly in serious cases, as swiftly as possible.

To take up Robert Brown's point, I will ask my officials to examine the Gill report—a report of between 600 and 700 pages—to see whether it contains any useful evidence for the committee to consider in its deliberations.

As for what the pinchpoints are, it has been fairly clearly demonstrated in the evidence. We have already mentioned some of the main ones. I ask Mr Allen to comment on that latter point.

Paul Allen: The Scottish Law Commission's report concluded that working out personal living expenses was more of a theoretical problem than a real one and that it had not generally been a cause of great difficulty. The committee has heard—as have we—conflicting evidence on that point. Some people, particularly on the defenders' side, have said that that is correct—that the matter of working out those expenses is rarely an issue. From the pursuers' side, we have heard the opposite—that it can be an issue and a pinchpoint.

We heard powerful evidence from Mr Maguire at the previous meeting that there is an inequality of arms between the two sides. We might find that it is not a pinchpoint, because the pursuer gives up. From our position, we are not clear about how often that is the case, but that seems to be the main point in Mr Maguire's evidence—that it is a pinchpoint for pursuers but that that is not evident because people give up; given the situation that they are in, up against a large insurance company when they are grieving or afflicted by a fatal disease, they are not in a position to push it. There might be more to the issue than was set out in the Law Commission's report.

Robert Brown: There is a balance between getting the compensation right and any stress that comes from that. Simpson & Marwick's letter, which is before the committee, gives the example of a younger scaffolder with a number of children, and indicates a situation in which the use of the 25 per cent figure would lead to significant undercompensation.

I want to know more about the intrusive nature of the questions. Does the Government have a view on that? As I said last week, many of the questions that are asked of claimants have to address family relationships, including the quality of the person's relationships with their children and with their spouse. They will cover the degree of any separation that might have taken place. They deal with a range of information relating to financial matters for legal aid and other purposes. It seems that much of what must be asked in relation to the 25 per cent reduction either will have been asked already or will not add an awful lot to what might have been asked in the normal course of events. It can be quite intrusive and extensive in many cases. Does the Government have a view on that point? It is an important issue when it comes to the justification for the bill.

Fergus Ewing: I have already alluded to the fact that the process of giving evidence—in the first instance through providing information to one's own solicitor—as a widow or widower, discussing the detail of household expenditure after one's partner or parent has died, is difficult in itself. There is no doubt about that. It is intrusive. Mr Garrett referred to that in his evidence, and it was useful that he did so.

That said, any process of litigation involves an element of personal strain, intrusion and difficulty for those involved. I do not know that it is possible for any Government to remove that from the process entirely, although we would like the process to be carried out in such a way as to display as much sensitivity as possible.

A fixed formula would plainly have the benefit of largely or totally removing that process, as we recognise, but that carries with it risks that it would not provide a just solution for many people, or at least for some people, and that it could impose an inflexibility that might be the enemy of justice in some cases.

These are very difficult matters on which to arrive at the right answer. I welcome the opportunity to share with the committee some of our views at this stage. I emphasise that, until we gain and glean more evidence on the matters that I have already mentioned and on other matters that we have not yet come to, it would be premature to reach a final conclusion in this task of creating a new law.

10:30

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): My question is on the same point because, as the convener says, it is an important one.

You have obviously read Graeme Garrett's evidence to the committee, as you mentioned him earlier. He told us that he had spent 35 years in the damages business, so it is clear that he brings a lot of experience to the table. He reckoned that although the figure of 25 per cent was not exactly right, it was

"pretty close to the mark."—[*Official Report, Justice Committee*, 7 September 2010; c 3420.]

Mr Garrett also brought us up to date by telling us about live cases. He mentioned that he was a member of the steering committee on the Super Puma helicopter disaster that happened in the North Sea in April 2009. He told us that that involved dealing with families from different backgrounds, with different make-ups, different incomes and different income potentials for the future. He said that his committee was able to reach agreement on a figure of 25 per cent with the solicitors who were acting for the other party. The inference that I took from what he said was that reaching that agreement took away a lot of the stress from families who faced an extremely difficult situation. Although we are all different, for me, that was powerful evidence that if we can come up with a figure that is fair, we should go forward with it.

Fergus Ewing: First, I agree that the removal of the task of proving what the household and personal expenditure of one's deceased partner or loved one was is worthy in itself, but I do not think that it should be promoted to the status of a major priority for informing the way in which we legislate. It is a significant consideration, but not the primary one. The primary one, it seems to me, is to provide fair compensation—not undercompensation, which many of the witnesses who have given evidence have been worried about, but not overcompensation, either. I certainly welcome the fact that the families in the tragedy to which Cathie Craigie refers have been spared the intrusion of having to give such evidence, but I do not think that we should promote the issue to the status of the primary consideration before us.

I think that Mr Garrett's evidence repays a close reading. I noticed that he went further and raised an issue on which we have not consulted, as yet, which is the approach that he said the Westminster Government has taken, whereby 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. In other words, any person who was reliant for the wherewithal of life and financial support on any other person should not be penalised simply because of a lack of a family connection.

I raise that point because it seems to me that it concerns another fundamental matter of principle, on which it appears that Westminster has acted. Perhaps we should consider that issue before we seek to finalise our own legislation on damages, given that it has been raised in evidence. I mention it because specific reference was made to Mr Garrett's evidence.

Cathie Craigie: I am sure that the committee will consider it, given that it has been raised with us, but if we were to put down in legislation that any person who had been supported financially by the deceased could be compensated, where would that end? Many people give to a charity or their church regularly. Where would that end? I am sure that the committee will take the issue seriously, just as we take all evidence seriously.

The Convener: Yes, that has not been lost sight of. As there are no more questions on that important issue, we will move on.

Stewart Maxwell (West of Scotland) (SNP): Good morning, minister. I am glad that you raised

the question of who would be entitled to sue. Paragraph 4.19 of the Government's consultation paper indicated that you were minded to reject the commission's recommendation that forms the basis of section 14, which would restrict further those who could claim for loss of financial support. Does that remain your position? Given that you have raised the issue, will you say what you make of the Law Society's proposal that anyone who can demonstrate a loss of financial support should be able to claim compensation?

Fergus Ewing: We adhere to the position that we set out in the consultation paper. I cite the example of a nephew or niece who, if the bill were enacted, would not have title to sue for any claim arising from the death of their uncle or aunt, even if that uncle or aunt provided for and looked after them. That is just one example. One can imagine tragic circumstances in which that might be and probably is the case for some families in Scotland. The number of such cases is perhaps small, but some children lose their parents through illness or other cause and then a sibling of one of the parents takes on responsibility for looking after the children. The children are in effect brought up by their uncle or auntie, or both. In those circumstances, if a further tragedy arose and the uncle or aunt who was the breadwinner in the family that was looking after the kids was killed through wrongful death, it would be wholly unfair if those children did not have the right to sue. We do not support that provision in the bill.

It is for Mr Butler to speak for himself, but I would be surprised if he were to do other than support the idea that, in that scenario, the children should be able to claim. Perhaps he will argue that that could be amended at stage 2. No doubt he would be right, but it would be rather more difficult to deal with the more fundamental question that I raised in answer to the previous question, to which Mr Maxwell referred. As a society, we would not want children to lose out simply because the person who stands in loco parentis does not have a blood relationship with them or is not a step-parent. If there is a relationship in which children are being looked after by somebody who is outwith the family line in respect of whom a title to sue exists, I for one would find it difficult to argue why it would be fair for them to lose out.

That is simply a statement in principle. No doubt, we would have to consult on those matters. There is a strong case for having a consultation on that or, at the very least, ascertaining the line that Westminster has taken. We have been alerted to the fact that Westminster has taken a different line. Mr Maxwell has outlined an additional area of inquiry that it would be prudent, and perhaps even necessary, to undertake carefully before we legislate. I doubt that there will be several bites at the cherry, and perhaps there should not be in legislating on such a matter. It is our job as a Government and as legislators to try to get it right first time, particularly when important points have been raised in evidence by witnesses whose evidence is born of lengthy experience and which therefore merits serious consideration.

Stewart Maxwell: I realise that you wish to consult on those important and serious matters. Cathie Craigie asked where we draw the line and where the right to claim ends. Is it feasible for the law to draw the line so that only those who had a direct relationship would be able to claim and to exclude some sorts of charitable or third-party donation? So support through one of the charities that allow people to donate a certain amount a month to support a child overseas would be excluded, but direct financial support of a child in the scenario that you identify would be included. Is that technically feasible?

Fergus Ewing: We are moving into an important argument of principle that we have to consider. If a child is being maintained through a charitable institution, by definition, that cannot die, so I am not sure what the scenario is that I am being asked to consider.

Stewart Maxwell: Sorry—I will make it clearer. The point was raised last week that it would become difficult to draw a line. If I donated £20 a month to a charity that said that my money would support a particular child in Africa until that child had finished their schooling, and I was the subject of a wrongful death, would that charity be able to say that it was entitled to that £20 a month because, in effect, it was for that child?

Fergus Ewing: I see. I did not get the point that Mr Maxwell was making, but now that he has explained it, I do. Yes, one could see that in such a case there would not be a strong argument for title to sue. However, some may take the opposite view, which underscores the need for some kind of review, consultation or investigation into the general issues raised by that proposal, which has come from those who have given evidence to the committee.

Stewart Maxwell: I move on slightly, although still in the same area. On 14 September, the committee heard from the Scottish Law Commission that it had not fully considered the impact of section 14 on certain ethnic minority communities and the fact that extended family relationships are more common among families in those communities. Can you imagine a list of relatives that would fairly reflect the circumstances of all people in Scotland, including, of course, minority communities? Is that possible?

Fergus Ewing: That is another area on which we should all obtain more information before we proceed. Unlike this committee, the Scottish

Government did not receive a submission from the Equality and Human Rights Commission, but I understand that the submission that you received did not appear to address the issue of whether different ethnic groups or different family make-ups might be impacted differently by the bill's proposals. I further understand—I hope that I am right in saying—that Mr Brown has been pursuing the issue of whether we may need more information on that score. Certainly it is an area where more information is necessary.

Stewart Maxwell: We have heard a number of arguments relating to relatives in extended families, such as nieces and nephews. You covered that in your previous answers, but there are also policy arguments relating to former spouses and civil partners. I wonder whether there is justification for treating those two categories differently when considering whether they would be entitled to sue.

Fergus Ewing: Some might make the case that there is justification for equiparating the treatment of such people, but I expect that others would stoutly resist such a proposition. However, that is a matter that does not appear to have been fully resolved or even investigated or considered. Therefore it is an issue that I am sure the committee, and indeed the Government, will consider further.

Stewart Maxwell: To summarise our exchange on that area, it seems that the Government wishes to consider it in more detail. Will the Government have time to consult on the matter and come to a firm view on it prior to the bill reaching stage 2 and, in particular, stage 3, or do you envisage some other process that would in effect be extended beyond the bill?

Fergus Ewing: That is a fair question. Mr Butler knows the answer—we have shared it with the committee previously—which is that the Government believes that the three Scottish Law Commission reports on damages for personal injuries might usefully have been dealt with together. We did not say that it was essential that they be dealt with together, but we felt that the three reports—on psychiatric injury, on the time bar and on the issues in the bill—could usefully be considered together and dealt with in one piece of legislation. A pragmatic argument for that view would be that civil law reform often gets crowded out of the parliamentary agenda. However, there is also a more fundamental argument that recognises that although those issues can be considered separately, there are linkages. Dr Richard Simpson alluded to one example of that when he referred to section 4(3)(b) of the bill, which maintains the exclusion of mental harm from eligibility for damages for wrongful death. The maintenance of that exclusion may be right or wrong, but perhaps it would have been useful to consider that in the context of the Scottish Law Commission's "Report on Damages for Psychiatric Injury".

10:45

I refer to that because that was our approach and, indeed, until April 2009, when Mr Butler asked a question and I answered it, we were not aware that there was any perceived or claimed urgency for considering the SLC's legislative recommendations on damages more quickly than the other two reports. Indeed, it was not until this year that there was an indication that there may be evidence to suggest urgency, particularly in mesothelioma cases. That is why we pursued the approach that we have done.

In answer to Mr Maxwell's question about whether there is enough time for the Government to do that work between now and next May, I have to be candid that, although we have huge sympathy for the bill's aims—Mr Butler knows that from the meetings that we have had and the way in which we have dealt with the matter, which I hope has been constructive at all times—I very much doubt whether there would be sufficient time for the Government to deal with the necessary garnering and analysis of evidence, consideration of the issues and drafting of legislation in that time. Therefore, the answer must be that there would not be enough time for the Government to do that.

Stewart Maxwell: That has helped to clarify the Government's position and I understand why that is the case, but I will press you on the SLC reports. You said that it would be preferable—I am not sure whether that was the exact word—to take all three reports together in one bill. Is that still your preferred option and are you saying, in effect, that you would prefer the bill not to proceed on its own or are you saying that it would be all right to proceed with the bill and deal with the other reports later? I am not convinced that I know where you stand on that.

Fergus Ewing: We would ideally prefer to deal with the Scottish Law Commission's three sets of legislative recommendations together. It will not be possible to do that in this parliamentary session. Regardless of whoever forms the next Administration, it may be possible for that to happen reasonably swiftly in the first half of the next parliamentary session.

Should we in the meantime support Mr Butler's bill? That is plainly the task that we have before us. I have indicated in my responses thus far that, for the reason that I have given—the lack of evidence on certain crucial areas—it is impossible rationally to reach any firm conclusion about whether the bill could be supported. I doubt that

we could support it in its current form. Perhaps it could be amended at stage 2, but the more important question is not whether that could be done but what evidence would be necessary for us to be sure that we were answering all the key questions rationally to ensure that our good intentions resulted in a good piece of legislation. That is the task before us, so I hope that that answer is understood.

The Convener: Generally, we would have taken the view that the matters would best have been dealt with comprehensively rather than piecemeal, as has happened. However, we are where we are and we have before us a specific bill that we must deal with accordingly.

Cathie Craigie: Minister, in your written submission to the committee you highlight that the Government's main concern is the proposal in section 7 of the bill to disregard the survivor's income. Why is the Government so concerned about that provision?

Fergus Ewing: I understand from the evidence that has been received so far that that is one of the key issues. Our view is that it would be correct to disregard a surviving partner's income, but only if doing so would result in the surviving partner receiving a level of compensation that, in terms of patrimonial loss, would leave him or her broadly no better or worse off than if the victim had not suffered the fatal injury.

At present we are not clear whether that would be the result; we have received conflicting evidence from our consultees. Some have argued strongly that ignoring the surviving partner's income entirely could result in significant overcompensation that would leave the partner much better off financially than they would have been if the victim had lived. We all agree that overcompensation would not be correct and would be hard to justify, but it seems that without further work there is room for doubt as to whether the proposed reforms would end inappropriate compensation, replace undercompensation with overcompensation or replace appropriate compensation with overcompensation.

While I say all that, I am cognisant that—as has been argued in the evidence and as the policy memorandum and explanatory notes acknowledge—times have changed. The days of the nuclear family are perhaps over, in the sense that there used to be one breadwinner and one other person.

There are myriad different circumstances, so it is difficult to reach a conclusion, but I am very much aware of and alive to the arguments that have been presented by those who favour disregarding the income of the surviving partner. All that I am saying is that the consultation responses indicate that the evidence needs much more consideration by experts before it would be prudent to reach a fixed conclusion.

As is the case with the 25 per cent rule, there are options other than to completely disregard the survivor's income. The matter could be dealt with in other ways, but it is not for me to go into those at this stage, because we currently do not have enough evidence to consider what they may be.

It would be imprudent to proceed on the basis of the current plan without pausing for breath and taking a bit more time to consider those matters.

Cathie Craigie: I am sure that you appreciate the work that the Scottish Law Commission has put in. It is clear that Lord Drummond Young agrees with you, as he said in his evidence to the committee that at present

"the law fails to reflect economic reality in a very large number of cases".—[*Official Report*, *Justice Committee*, 14 September 2010; c 3443.]

The evidence that has been received suggests that when two people buy a home or set up as a couple—whatever the make-up of that couple may be—they make commitments in relation to the way in which they live their life and the income that both of them have. It seems that there are strong reasons to disregard the survivor's income.

You raised the possibility of other options—you mentioned the 25 per cent rule—that might involve disregarding part of the income. How can it be right to talk about disregarding part of that income when it is considered not to be right to set figures for a deceased person's expenditure?

Fergus Ewing: Our position is that we are considering whether it is right to disregard entirely the income of surviving partners, and we have received conflicting responses from our consultees that need to be considered further. We are obviously looking forward to the committee's deliberations on the issue.

The question involves very difficult issues, and a number of complex arguments can be applied. If, for example, a husband dies leaving a wife who had been carrying out a job, would she be able to carry out that job in future or would she have to give it up because she needs to look after the children? The arrangements prior to the loss of her husband may have to be changed; it is a hugely complex situation.

Instinctively, we all want the best result for someone who finds themselves in that tragic position, but as a Parliament that passes law, we have a duty to look carefully at the evidence that comes from experts. If it is conflicting evidence, that makes our task much more difficult, as I am sure all committee members would agree. My advice at this stage is that we need to spend more

time looking carefully at the range of conflicting evidence before it would be correct to come to a conclusion.

Stewart Maxwell: Perhaps I misunderstood what was said, but could you explain the idea that there would be overcompensation if the surviving partner's income was disregarded? It seems to me that, irrespective of the surviving partner's income, the loss is the loss of income from the person who was the subject of a wrongful death. If they die and there is a case to be sued to replace that income because it was a wrongful death, it seems to me that the income of the surviving partner is irrelevant. Whether they earn nothing or £100,000 a year, the loss is the same, and it is the loss of the deceased's income. Why is there an argument that people would be overcompensated if the income was disregarded or partially disregarded?

Fergus Ewing: That is a perfectly legitimate view and, as I have already said, one with which we have a great deal of sympathy, but conflicting views have been expressed by those who provided evidence to the consultation that concluded recently. What I am saying is that, before the Government reaches a final policy view on the matter, out of respect to those who have taken the trouble to submit serious responses, we should—and everyone should—give careful consideration to those arguments.

It is also accepted that the existing legal process is one that has been criticised by many. I read the evidence that the committee has taken thus far and I have considerable sympathy with it, but that does not detract from our task as legislators, which is to ensure that we provide a fair and just result. I accept that there is a strong basic sense of what is right behind what Mr Maxwell says, and that that view is shared by many who have given evidence.

I do not know whether Alison Fraser from the legal directorate would like to give a more lawyerly answer than I can muster.

Alison Fraser (Scottish Government Legal Directorate): I do not have anything particular to add to the minister's response. I do not know whether Paul Allen has anything to add.

Paul Allen: We have generally accepted that there are significant concerns about the established Brown v Ferguson approach to the issue. Whether it is right to move wholly from that position to a position of completely disregarding the surviving spouse's income is something that we are still looking at, because we have had conflicting evidence from respondents. I think that we copied to the committee our analysis of those responses. The majority thought that the change would lead to overcompensation and that the surviving spouse would be financially better off than they would have been had the death not occurred.

Although we need to read into that and find out why it might happen, we need to recognise the views of everyone on that side of the argument, from the judges of the Court of Session to the insurance industry. This is one of the few issues that united that industry. It was split on quite a few issues, but it was united on this one. Fife Council and various other consultees also argued that the change would lead to overcompensation. We are not sure that that is true, but we need to look into the matter to ensure that it does not happen, because the idea that someone will be better off with their partner dead than alive is just not one that we would feel comfortable with.

The Convener: I can imagine some difficult scenarios arising from that.

Stewart Maxwell: I am sorry, convener. It may well be that I am just failing to understand, but why would it result in overcompensation? I am not asking for the Government's view. You said that there is a difference of opinion on the matter. If a wrongful death occurs and there is a loss of income but that income is replaced, why is that not just compensation? Why is it overcompensation?

Paul Allen: If the law's aim is to try to put a person back in the position that they would otherwise have been in, the line that opponents of the proposal take is that, given the practicality of pooled income in most families, ignoring the surviving spouse's contribution to the family income could lead to overcompensation. A couple of consultees have given examples of the mechanics of how that might happen, which we could go into in more depth. That is the view that is taken; we have not decided whether that is right or wrong.

11:00

Stewart Maxwell: I do not want to labour the point, but I still fail to understand the position—perhaps the committee could be given worked examples to explain it. Whether the income is pooled or whether spouses have separate bank accounts—whatever is done—if income is lost and the result of a case is to replace that income to the family group, that is compensation—not overcompensation. That would replace the lost income and put the family back in the same position. I fail to understand the argument that that is somehow overcompensation. Perhaps I need to look at that more.

Cathie Craigie: I want to be clear about the Government's position. You do not oppose the disregard, but you are concerned that some in the industry have raised issues in their consultation responses.

Fergus Ewing: Yes.

Cathie Craigie: As Stewart Maxwell suggested, perhaps we could have some of that information before we complete our stage 1 report.

Fergus Ewing: As I said, we have not reached a conclusion because we have received conflicting evidence, which is fairly hot off the press—the ink is not exactly still wet on the page, but it has only recently dried. We will have to consider that evidence more carefully.

Insurance companies have put the arguments. They have a job to do and they must provide appropriate compensation. We are dealing with tragedies—with the loss of human life. Some would argue that the assignation of a sum of money for the loss of life can never really be done fairly—how do we compensate for the loss of life? We are dealing with hugely sensitive issues.

To answer Mr Maxwell's point, I will try to speak for some of the consultees and not for the Government. My understanding—if it is wrong, we will come back to the committee—is that some have argued that significant overcompensation could leave someone much better off financially in terms of the income and finances return than they would have been if the victim had lived. That is a hard conclusion to reach, and we have not reached it, but I desire not to be seen to be fudging or not answering the question.

Assigning a sum of money to provide proper compensation in tragic circumstances is a difficult and sensitive task. It is proper to recognise that the insurance industry has a legitimate point of view, which we need to take into account if we are to pass proper laws, not least because all in society pay insurance premiums. We must consider the whole picture when we pass legislation, which includes the insurance companies' reasonable views.

I hope that I have made a reasonable stab at the issue, but I undertake to write to the committee and to see whether we can provide more information, as members have raised the question a few times.

Robert Brown: I suggest that the issue is being treated a little simplistically. The claimant is not given the whole of the deceased person's lost income. Sums of money are deducted from that to reflect in one form or another the whole family situation, of which the family's expenditure and income must be part. The issue is where we end up on the deduction from the original income of £100 or £200 a week or whatever that went to the family and which was lost after the victim's death.

Fergus Ewing: That is a fair comment and is a reasonable point, but it does not—

Robert Brown: It does not help.

Fergus Ewing: It does not take us to a conclusion. Mr Allen mentioned Brown v Ferguson. The Scottish Law Commission describes one concern about the Brown v Ferguson approach as being that it acts as a straitjacket. Some respondents believed that no straitjacket exists. That was illustrated by the Guilbert case and the comments of the Court of Session judges, which have been remarked on, that the Brown v Ferguson approach is not absolutely binding but the SLC's recommendations would introduce a binding approach. We are not sure that that concern is right, but we need to be sure that it is wrong.

Robert Brown: I move to the provision in section 7(1)(e) that the multiplier applied by the court should run from the date of the interlocutor, not the date of the incident or the date of the death. Does the Government agree with that proposal? In particular, does the minister accept on behalf of the Government the evidence, which seemed persuasive to me, that the matters that might be taken off the period between the death and the court order were de minimis—the chance that the deceased might have died anyway—and that, although there is an issue, it is so insignificant as to make little practical difference in reality?

Fergus Ewing: In our consultation paper, we indicated that we were minded to accept the innovation that the multiplier should be attached to the date of proof, rather than the date of death. One reason for doing so is that it is possible, as a matter of fact, to demonstrate the actual loss and expense from the date of death to the date of proof. Having said that, in most cases there will not be a proof, so there will be a notional diet relating to actual loss; in other words, it is possible to calculate the actual loss from the date of death until the date of settlement. In the consultation paper, we felt minded to accept the innovation, partly because of that rationale.

On the other hand, there is no doubt that those who have argued otherwise have a point, in terms of cold logic. It is argued that, if there are four years between the date of death and the date of settlement, actuarially the person might have been expected to pass away before the expiry of the four-year period—especially if they were older rather than younger—so some allowance should be made for that fact in the computation of the compensation.

I am no expert on the subject—I recall that Mr Brown may have some expertise in it—but my brief perusal of the evidence indicates that the Ogden tables are designed to calculate the reduction in the amount that should be paid for the period between the date of death and the date of settlement or proof to reflect the fact of diminished

life expectancy. In cold logic, there is a case for that. I am not sure quite how significant the issue is; it may be de minimis. For someone who is 20 or 30, it is likely to be of no consequence; it may arise only if someone is much older, in which case the payments will be much smaller anyway. Although this is not the major point at issue—it is not as important as the other points that we have identified—we and the courts must consider it. We cannot neglect the matter, which merits further investigation before we reach a conclusion.

Robert Brown: The issue seems to be relatively straightforward. If I have understood it correctly, the argument is that the Ogden tables are not very accurate when they are applied to the period in question and that the matter is de minimis, in any event. Has the Government taken advice on the issue—which, as the minister points out, is a relatively actuarial point—with a view to allowing it to reach a conclusion? The issue has been around from the beginning and seems relatively self-contained and straightforward. With respect, I would have expected the minister to be able to give us a slightly clearer answer than he has given this morning.

Fergus Ewing: I cannot give a clear answer because—as I have indicated several times—we have only just received the responses. Surely Mr Brown would expect any minister to study carefully responses to a consultation exercise—not to do so would be a clear derogation of any minister's duty to consultees. If we did not consider consultees' responses in that way, we might find that consultation exercises were not treated with the seriousness that they merit and that people were not inclined to submit their views. I am afraid that I do not agree with the member on that point, although I agree that this is not the major issue. We want to reflect on it further, but we will be able to reach a conclusion on it.

I undertake to come back to the committee after we have reflected further on the matter, when we may be able to provide a clearer position on it. We stated in the consultation paper that we were minded to accept this innovation, so we have already indicated a position in principle. We simply wish to show respect to those who have taken the trouble to submit their views and to ensure that we are absolutely correct in the matter.

The Convener: Will there be an early conclusion on that?

Fergus Ewing: Yes.

Robert Brown: On a technical matter, the point has been made that most cases do not involve a court interlocutor—they are settled by agreement. Am I right in saying that the date for which that agreement would normally aim would be the date of the agreement rather than the date of a court interlocutor? Is that likely to be the approach that would be taken in negotiation? Can anyone clarify that point?

Fergus Ewing: We will clarify that point in our written response, as it is a technical one.

Robert Brown: I have a further question on the provision in section 4 on psychiatric issues. The minister is aware, from last week's evidence session, that the Law Commission has written a separate report on psychiatric injury and that, in an ideal world, the matter would be dealt with separately. We also heard last week that there is a degree of inconsistency in the current legal decisions on the matter. The committee would like some guidance from the Government on how it would prefer the matter to be approached. Should we fiddle about with a relatively minor amendment to the law at this point? Should we accept the current inconsistency and legislate separately on psychiatric issues later? If so, how do we deal with the interim position that emerges whereby there is uncertainty on psychiatric injury?

Fergus Ewing: Mr Butler's bill takes the traditional view that, if a wrongful death leads to mental injury to someone who is entitled to claim losses, that is regarded as not compensatable. It is extremely difficult to judge whether that is right or wrong. There are different views pertaining to that—indeed, we have already heard some of them. I understand that the bill would not absolutely prevent damages from being paid for a mental illness that arose as a reaction. Nevertheless, it appears that, contrary to the approach in the case of Gillies v Lynch, such damages could not be awarded under the heading of grief and sorrow. That may mean that people who suffered mental illness in consequence of relatives' wrongful deaths would be able to claim damages only if they could establish that the defender owed them a duty of care, and that would not be an easy hurdle to overcome in many cases.

Making a defender liable in relation to a mental illness or psychiatric injury suffered by a person for whom they had no duty of care would be a significant step. I understand why Mr Butler's bill declines to take that step. Equally, however, one could argue for the injustice of someone whose loved one has been wrongfully killed and who, through no fault of their own, then has their life blighted by a mental illness not being able to claim compensation for that illness and its consequences from the person or company that is acknowledged as being responsible for causing the death. These are very difficult issues, which is another reason why we feel that more time and consideration should properly be given to study of them.

Robert Brown: Nonetheless, were the committee to take the view that the bill should go ahead, in broad terms, could the Government give us some guidance on how it would prefer this particular aspect to be dealt with? Should it be left out altogether, should there be an interim solution of some kind—either the one that is in the bill or another one—or does the Government have another view on the matter?

Fergus Ewing: That is a very serious question, on which I would prefer to take advice than give you an off-the-cuff answer. With your permission, convener, we will take that one to avizandum.

The Convener: Well, please bring it back somewhat more quickly than matters normally return from that particular locus.

11:15

Nigel Don (North East Scotland) (SNP): Good morning, minister. I was listening carefully to what you said about the duty of care in relation to compensation for mental injury. I do not know whether I picked you up correctly, but I thought you said that you thought that the duty of care owed to somebody not to kill them would be different from the duty of care to the victim's dependants, who might suffer some mental illness as a result of the victim's death. Obviously that is conceptually different, because the injury is different, but is the duty of care different?

Fergus Ewing: I feel as if I am now sitting an examination in civil law.

Nigel Don: Yes, forgive me. I think you are.

Fergus Ewing: That is an experience for which I feel underprepared and to which I feel considerably ill-suited. However, it is a serious question, so I will ask Alison Fraser from the legal directorate to answer it.

Alison Fraser: I will try my best. Where the victim is killed, if the person representing the relatives can establish that the defender owed them a duty of care, that the death was reasonably foreseeable and that negligence occurred, that is a far more direct causal connection. If, say, the son of the deceased suffered a mental illness as a result of his father's being killed, he would have to establish that the defender owed him a duty of care because it was reasonably foreseeable that if the defender was negligent and the father was killed, the son would suffer a mental illness. That scenario is almost one degree removed.

Nigel Don: Mr Ewing did indeed pass some exams once upon a time—it was a long time ago. The fundamental issue is foreseeability.

Alison Fraser: I think so.

Nigel Don: We are back with the Wagon Mound and all that. Thank you.

James Kelly (Glasgow Rutherglen) (Lab): Good morning, minister. On the financial implications of the bill, councils made a couple of submissions to the Finance Committee and the Scottish Government expressing concern about the potential additional damages costs for which they would be liable. The counter to that is that if councils set up the correct insurance, they would be able to cover themselves. However, even in such cases, some of the excesses and premiums can be quite high. The councils are clearly concerned about their potential exposure to costs, which would put them under pressure, particularly when budgets will be under much pressure and greater scrutiny in the coming financial period. Do you have any comments on any of those issues?

Fergus Ewing: Which councils are we talking about?

James Kelly: Fife Council and North Lanarkshire Council.

Fergus Ewing: I am not sure that I have those submissions in front of me. I gather that Mr Allen has genned up on this, so I ask him to answer.

The Convener: Mr Allen, will you pick up that buck and offer a solution?

Paul Allen: We sent our consultation paper to every local authority in Scotland and to the Convention of Scottish Local Authorities. We got responses from Fife Council and North Lanarkshire Council—I think that they were the only two local authorities that responded. They both raised concerns about the financial implications for them. I imagine that those implications would be mirrored in several other councils across Scotland, and I am not sure why the other councils have not responded. Fife and North Lanarkshire obviously feel that there could be extra cost for them. Whether that cost would be significant, I am not entirely sure, but the councils seem to be sufficiently exercised about it to have raised the matter.

The Convener: Mr Kelly asked about the Government's position with regard to the statements by the two councils.

Paul Allen: I think that the councils have raised legitimate points. They think that the excesses could impact on the amount that they have to pay. The premiums that they have with insurance companies appear to have quite high excesses, so the councils will have to pay out of their own funds before the insurance companies would pay. I think that the councils were worried that their premiums to insurance companies might also be increased, which is another issue that has been raised more generally.

James Kelly: Those are the issues that the councils raised. Has the Scottish Government considered them and the impact on councils' funding, particularly in the coming period?

Paul Allen: As the minister mentioned, we completed our assessment of the responses only about a week ago. We are aware of them, but we have not gone into any detail in considering how much validity they have and how we will address them.

James Kelly: Convener, perhaps I could ask the Government and appropriate officials to review the councils' submissions and reply to the committee with their considerations.

The Convener: That would be an appropriate way forward.

Fergus Ewing: We will do that. We are concerned that we should have information that is as accurate and complete as possible regarding the impact of any legislation on the public purse. That includes the impact on local authorities. We have noted the work in the financial memorandum, which postulates eight fatal cases at a cost of £270,000 per annum, although the footnote states:

"A large proportion of this sum will fall to be met by the local authorities' insurers".

To be fair, Mr Butler has encompassed that point in his bill in principle.

The Government has a duty to be reasonably satisfied that any estimate is as accurate as we can ascertain using our best endeavours. It might be that we will come to the committee to say that, because we have had only a minimal response, we do not feel confident that we could so ascertain. However, without prejudging the issue, we will study the papers and come back to you on the local authority matter, and on general financial issues.

For example, although I believe that Mr Butler provided supplementary information when he gave evidence to the Finance Committee recently, I have not studied it, so I am not sure whether allowance has been made for cases in the health service. There could be loss of life in the health service, perhaps through medical negligence—hopefully very rarely—which could lead to costs to the health service. We will come back to the committee and the Finance Committee on that. We are not quite sure whether that factor has been considered.

James Kelly: It would be useful if you came back to us on those issues and the implications for Scottish Government spending departments.

Linked to that, the statement of funding policy in the financial memorandum makes the point that, when legislation is passed by a devolved body, and there are financial implications for the United Kingdom Government, any additional funding that results would require to be met from the devolved body, unless other arrangements have been made. Building on the minister's example of the health service, if there were implications for the Ministry of Defence, the additional funding that required to be met by the Ministry of Defence as a result of legislation passed by the Scottish Parliament would have to come from the Scottish Government. Has any clarification been sought from the UK Government about other arrangements that could be made?

Fergus Ewing: The short answer is no. The statement of funding policy says:

"where decisions taken by any devolved administration or bodies under their jurisdiction have financial implications for departments or agencies of the UK Government ... the body whose decision leads to the additional cost will meet that cost."

In other words, if we pass legislation that costs the Department for Business, Innovation and Skills a lot of money, that cost might, ultimately, be passed on to us. We have not yet received from the UK Government any indication that it will attempt to pass on to us the cost of its historic liabilities, effectively removing something that we estimate tentatively at £0.5 million per year from our budget, and we would certainly argue against any attempt so to do.

James Kelly: What do you mean by "historic liabilities"?

Fergus Ewing: I was referring to the fact that many of these cases might be the responsibility of British Shipbuilders, for which the UK Government would have accepted implied responsibility. Because those cases—in particular, the mesothelioma cases—relate to negligence in the past, it could be said that those are, if you like, contingent liabilities caused by negligence in the past for which UK bodies are responsible.

That is a top-of-my-head response, and we will look at the *Official Report* to see whether any clarification is required. After all, these issues are very important and our finance colleagues might also want to examine them. In any case, in response to Mr Kelly's question, I think that that is the main thrust behind the phrase "historic liabilities".

James Kelly: Do the liabilities relate to future events or to claims that have already been settled? Have you sought clarification from the UK Government on the matter?

Fergus Ewing: One does not seek a response on a question until it ceases to be a hypothesis. At the moment, no law has been passed, so it would be premature to seek such clarification—or, at least, expect it to be provided. That said, we would

stoutly resist any attempt by the UK Government to make the Scottish Government pay for the cost of its historic liabilities. I do not know whether the committee has decided to seek evidence from the UK Government on the matter—it will be up to the committee to decide whether that is appropriate—but if the committee were to feel that the Government should do so and were to so advise us after discussion, we would obviously take the suggestion very seriously and consider it very carefully.

James Kelly: For the sake of accuracy, I point out that the Finance Committee's report on the financial memorandum says:

"the Scottish Government confirmed that it was seeking clarification from the UK Government."

I am not trying to be awkward; I am simply trying to find out whether clarification is being sought. I accept that you might have to take the matter away and check it out.

Fergus Ewing: As I said, we are happy to look at that and come back to the committee. I certainly have not signed off any letter to that effect, but I will clarify the issue for the committee.

Robert Brown: On a related point, a supplementary letter that arrived this morning from Simpson & Marwick suggests that there might be an impact on forum shopping and says that at the moment, even without the bill, loss of society claims are significantly higher in Scotland than in England and that, if the bill's provisions on spouse's income and so on were to go ahead, there would be even more significant differences between Scotland and England.

Does the Scottish Government have any information on the current extent of forum shopping and does it have any fears over Simpson & Marwick's suggestion about forum shopping in the future? The issue is not unimportant, because it feeds into Mr Kelly's point about the UK Government's liabilities and contingent liabilities and the fact that organisations such as Marks & Spencer and John Lewis have places of business in Scotland and England and could therefore be sued in either place.

Fergus Ewing: We do not have any evidence with us about forum shopping. In any case, we cannot have any evidence on the specific question whether the bill, if it became law, would lead to that—we can have only views. That said, I am aware that Simpson & Marwick has professional experience in this area and acknowledge that it has raised a serious issue that we would consider carefully alongside the others that have been mentioned. After all, if forum shopping were to happen on a serious scale it would have implications that we would want to have considered. With your permission, convener, we will see whether we can offer any further information on the matter and, if so, we will pass it on in writing to the committee.

The Convener: Again, that would be helpful.

We have had a long session. Does Bill Butler, who will give evidence next, wish to raise any points?

Bill Butler (Glasgow Anniesland) (Lab): Not at this stage, convener.

The Convener: I am sure that all the points that you have in mind will be more than adequately covered in your evidence.

I thank the minister and his officials for their attendance and exceptionally useful evidence. We await replies to certain matters that remain outstanding at their earliest convenience.

I suspend the meeting for a few minutes.

11:30

Meeting suspended.

11:37

On resuming—

The Convener: The second panel this morning is Bill Butler MSP; and Syd Smith, who is a senior partner, and Laura Blane, who is a partner, of Thompsons Solicitors Scotland. I anticipate that Mr Butler will speak to the policy matters and will get assistance from his two colleagues in respect of some statistics and studies that have been carried out. I invite Mr Butler to make a short opening statement.

Bill Butler: Thank you, convener. Good morning, colleagues.

I thank the committee for the opportunity to speak to it about my bill. As the convener says, I have with me, as supporting witnesses, Ms Laura Blane and Mr Syd Smith, both of Thompsons Solicitors Scotland. Thompsons specialises in personal injury cases, among which are, tragically, cases involving fatal injuries. Those range from disasters such as Piper Alpha through to medical accidents such as hepatitis C and Clostridium difficile, industrial accidents, road traffic accidents, railway accidents, shipping accidents and industrial diseases. In view of Thompsons' role in such cases, it has assisted me in preparing the bill and the accompanying documents, including the financial memorandum and the additional paper that was forwarded to the clerks of the Justice Committee and the Finance Committee on 6 September, entitled "Revised Financial Effects of Damages (Scotland) Bill 2010".

I introduced the Damages (Scotland) Bill, plus the accompanying documents, in the Scottish Parliament on 1 June 2010. The bill's purpose is to implement the recommendations of the Scottish Law Commission's "Report on Damages for Wrongful Death", which was published in September 2008. In Scots law, when an individual suffers an injury or contracts a disease as a result of the actions or omissions of another person or as a result of the acts or omissions of a legal entity such as a company, damages can be claimed from the wrongdoer.

The law makes specific provision for cases of personal injury that result in premature death, whether that death is immediate or more protracted. The Damages (Scotland) Act 1976 is the main piece of legislation that addresses damages for wrongful death. The Scottish Law Commission concluded in its report that, although

"there is general satisfaction with the existing law and ... there is little support for radical reform",

there is general acceptance that the 1976 act

"has become over-complex and, indeed, contains inaccuracies as a consequence of the numerous amendments made to it."

Accordingly, the Law Commission's major recommendation was

"that the 1976 Act should be repealed and replaced by new legislation which will restate the current law with greater clarity and accuracy."

Appendix 2 to the policy memorandum contains a complete list of the commission's recommendations. Members will observe that most of them recommend the continuation of the existing law. Indeed, the commission recommends that only five substantive changes to the existing law be made.

The first of the two most significant amendments concerns the deductions that require to be made when calculating the financial loss of a person dying from personal injuries through the fault of another, in order to take account of that person's living expenses. The commission recommended that there should be a standard deduction of 25 per cent of the victim's net income to take account of living expenses.

The second amendment concerns the financial loss that is suffered by any dependent relative of such a person who has died, in order to take account of the deceased's living expenses and the dependant's own income. The commission recommended that there should be a standard deduction of 25 per cent of the deceased's net income to take account of such living expenses and that no deduction should be made for the income of the widow or widower or dependent children. The introduction of those provisions would simplify and modernise Scots law on damages.

Reform is needed urgently because of the nature of the cases and the number of people who are affected. Hundreds of people in Scotland are wrongful death victims or become ill with fatal work-related diseases every year. On average, 30 people die every year in Scotland in workplace accidents. In 2008, 272 people died on Scottish roads. Between 1 January 2009 and 20 April 2010, 210 people with mesothelioma and 58 people with asbestos-related lung cancer sought assistance from Clydeside Action on Asbestos. In numerous other fatal accidents that were unrelated to work or road traffic accidents, the deceased person was the victim of another's negligence.

Most such deaths become claims and then court actions. Year on year, they add to the volume of wrongful death cases in which claims are made. It is accepted that wrongful death cases are among the most difficult and anxious cases with which personal injury practitioners deal. Such cases tend to be hard fought by insurers and defenders, which can mean that they take longer to resolve.

As well as dealing with their bereavement, families have the practical burden of financial hardship to shoulder, and the unknown and often daunting legal process to face. If the reforms in my bill can reduce the uncertainty and delays to which families and victims are subjected, the Scottish Parliament will meet a need that has perhaps been understood only by victims and those who assist them.

Neither the financial memorandum to the bill, nor the additional paper, nor the recent Scottish Government consultation paper on the Law Commission's report anticipate that the number of cases that are brought for damages for wrongful death will increase as a result of the bill. The bill will create no new category of wrongful death case. Like the Scottish Government, I anticipate that there will be an increase in the level of damages that are awarded for loss of financial support in cases in which the surviving spouse, civil partner or cohabitant has his or her own income. The Scottish Government anticipates that the proposed change will be particularly beneficial for survivors who are relatively high earners—I can but agree and do not demur.

The financial memorandum suggests that savings will be associated with the enhanced legal clarity that is anticipated as a result of the bill. Indeed, a number of respondents to my consultation saw potential savings associated with enhanced legal clarity or suggested for the same reason that the proposals would be cost neutral. However, I accept that other respondents were more cautious. The Association of British Insurers

and the Forum of Insurance Lawyers suggested a need for further financial assessment of the proposals' impact, while the Forum of Scottish Claims Managers thought that costs associated with the bill would be passed on to consumers in various ways.

I am grateful for the committee's indulgence and I will do my best to answer members' questions.

11:45

Claire Baker: I will start with questions on the assessment of the victim's reasonable living expenses and the proposed 25 per cent rule. Will Bill Butler respond to the minister's points this morning? It is clear that the Government is not convinced on the need for the 25 per cent fixed rule. The minister raised the concern that it could lead to over or undercompensation, and said that there was a risk that it would not provide a just solution for everyone who wanted to pursue a claim. I understand that last week the committee considered whether the fixed rule would avoid intrusive inquiries into family life, as such inquiries would have to be undertaken if there were other aspects of claims, such as claims for non-patrimonial loss. Will Bill Butler respond to the arguments that have been put against the need for a fixed 25 per cent rule?

Bill Butler: I thank the member for that very important question.

Let me say in beginning this question session that I realise fully that the Government has to be very cautious, as do members, because we are charged as members of the Scottish Parliament with ensuring that any legislation that we consider is resilient and durable and does not have unintended consequences. I do not have an argument with the minister in the sense that we will fall out over his evidence. He has to be cautious, and because of his and the Government's caution on this issue and others a body of correspondence will flow to the committee.

That said, I believe that the fixed 25 per cent rule on the victim's living expenses is right. That does not mean to say that we are dealing with an exact science. As many witnesses have referred to, there is always an element of arbitrariness—that is difficult to say, but I think I got it out. Lord Drummond Young, Mr Garrett and others said that it is difficult to calculate individuals' living expenses and one has to take a broad approach.

Some people might think that 25 per cent is a low figure but, when one looks into elements of the overall household expenditure that cease on someone's death, according to many witnesses it is pretty close to the mark. Mr Garrett of the Law Society gave this example. He was involved in the case following the Super Puma helicopter disaster in the North Sea in 2009, and he said that despite differing circumstances—ages, surviving spouses, incomes and so on—

"we were able to reach agreement on a 25 per cent reduction without any difficulty".—[*Official Report*, *Justice Committee*, 7 September 2010; c 3420.]

The 25 per cent fixed rule will do a number of things. It will speed up the process. It will not entirely avoid the intrusive aspect—to say that would overstate the case in my bill, which is really the Scottish Law Commission's bill from one of the appendices to its report—but it will minimise the intrusive questioning, especially at a time when the feelings of people who have recently been bereaved are very jagged, if I may put it that way.

Let me quote Lord Drummond Young:

"In practice, settlement negotiations start on the basis that the deceased spent 25 per cent on himself and the rest on ... the family".—[*Official Report*, *Justice Committee*, 14 September; c 3442.]

That takes me back to a comment by Mr Garrett, although he was not the only one to say this—the parameters are not wide. If the parameters were wide, the 25 per cent figure and the broad-brush approach might not be correct, but they are not wide. That has been argued by no less than Lord Drummond Young, Mr Garrett, Mr Maguire, Mr Conway and many others.

I realise that Claire Baker did not refer to the difficulty that the Court of Session judges had with the proposal, but I will pick up on that anyway, if I may. Again, I pray in aid no less a person than Lord Drummond Young, who was right when he said that the flaw in the Court of Session judges' view is that they think that all of the remaining figure goes on general household expenses, but it does not—it breaks down into expenditure on the spouse and the children and the general household expenses. Lord Drummond Young says that no figure can be exact but "We"—that is, the Scottish Law Commission—

"thought that a degree of arbitrariness seemed a worthwhile price for getting rid of the need for an intrusive and upsetting investigation of household expenditure."—[*Official Report*, *Justice Committee*, 14 September 2010; c 3442.]

The 25 per cent rule would be a good reform, for the reasons that I have begun to outline. I know that the Government and members must be cautious, and that is correct when considering legislative reform. However, there comes a point when the evidence that the committee has taken, the consultation for the Scottish Law Commission report, my consultation and the Government's consultation have to be considered and assessed and a judgment has to be made. Of course there will be opposing sides. Of course the minister was right that, largely, those in the insurance industry—the defenders—are agin a lot of the reform and that personal insurance lawyers and

trade unions are for it. However, it comes down to the judgment of the committee and the Parliament as to what is the just cause and the just reform.

Claire Baker: I was going to ask about the minister's stressing of a lack of evidence, but your comments about the committee being responsible for making a judgment perhaps answer that. However, I am happy to hear further views on that if you have more to say.

Has any consideration been given to alternatives to a 25 per cent fixed rate? There was discussion this morning about whether there could be a variable rate, with perhaps a different rate for those who have no dependents. Have you considered that proposal?

Bill Butler: I listened carefully to that. It was hinted at in last week's evidence session, although I cannot remember by whom—it might have been the representative of Simpson & Marwick. I do not agree with that, because we are dealing with a loss of income, and a loss of income is a loss of income. I hesitate to say this, and I know that it was not said in this way, but to separate out deserving and undeserving cases would be wholly to miss the point. If there has been a loss of income, the case is deserving, whether it be mesothelioma victims, road traffic accident victims or those who die because of industrial disease, Clostridium difficile or hepatitis C. I do not accept the premise; it would be the wrong way to go.

There was a second point, but I have forgotten it.

Claire Baker: The minister stressed the lack of evidence.

Bill Butler: Ah yes. I do not think that there is a lack of evidence. I do not mean that further investigation would not prove helpful to the committee, to me as the member in charge of the bill and to the Parliament. However, there is a body of evidence, which has been gathered through the Scottish Law Commission's report and the consultation that the committee told me to undertake because, quite rightly, you did not accept my statement of reasons about a year and a half ago.

The Convener: That was not what you said at the time. [*Laughter*.]

Bill Butler: You are right but, on reflection, I realised the committee's wisdom.

It is a serious point. My consultation has helped, as has the Scottish Government consultation, for which I commend it. I do not have a problem with the Government's consultation, but I do have difficulties with the minister seeming to say again and again—although not on everything—that the Government cannot come to a definitive view because it needs to hold more consultation or to ask someone else. There comes a point when it is necessary to cut to the chase and recognise that there is a body of evidence.

Initially, at this stage of the process, it will be up to the convener and other committee members to come to a judgment when you draft your stage 1 report and then, if the bill gets through stage 1, it will be up to the Parliament to come to various judgments. I agree that there are areas in which amendment may be necessary, but now is the time to act on behalf of the many people who are waiting.

As far as mesothelioma is concerned, there are 347 such cases. We are talking about people who are dying, and that is not the total number of people who are dying from mesothelioma—it is the number of cases that Thompsons has; I believe that Thompsons has about 90 per cent of the cases. [*Interruption*.] I beg your pardon—that figure includes cases of families of people who are deceased. There is a mixture.

That would be my approach, Ms Baker.

Cathie Craigie: Good morning, Mr Butler. You have demonstrated that you are never a man to hold a grudge.

Bill Butler: That is true—I can answer that.

Cathie Craigie: I know that. You have confirmed it this morning.

I want to push you on an issue that Douglas Russell of Simpson & Marwick Solicitors has raised in a letter to the committee. He is concerned that

"there is a serious risk of under compensation."

My colleague Robert Brown raised the matter with the minister. Mr Russell highlighted the case of a 37-year-old married scaffolder with six children who falls to his death in an industrial accident. The argument that that man spends 25 per cent of his income just does not stand up. The proportion of his income that he spends could reasonably be calculated to be as low as 15 per cent. How would you answer that? I know that the law cannot cover every case, but how would you respond to the point that Simpson & Marwick has raised with us?

Bill Butler: It is an important point, but I tend to think that such cases would be very rare. By far the largest number of people who are undercompensated are those who settle because they feel that they need to take a settlement. That is especially true of mesothelioma sufferers. They settle and are undercompensated because they feel that they must take the offer, as it is all that they can do. I am saying clearly to the committee that it will always be possible to pick an example—as Simpson & Marwick has done—that proves that in rare cases there may be undercompensation,

but I believe that the 25 per cent rule would result in certainty, which is much to be desired.

12:00

Cathie Craigie: Simpson & Marwick argues that having a rebuttable presumption would be one way of dealing with this concern. You have read and listened to the evidence that we have received in that regard. If a rebuttable presumption were included, would it take us forward?

Bill Butler: No, it would take us backward. The case in the Simpson & Marwick submission is almost a theoretical one. My reading of the evidence and my understanding of what I am told by people who practise in this area every day suggests that undercompensation is happening right now, especially in cases of mesothelioma.

The answer to the question of whether the 25 per cent should be subject to a rebuttable presumption is definitely no. Introducing a rebuttable presumption would completely undermine what the bill seeks to do. It would, plainly and simply, be a wrecking amendment, although that would certainly not be the intention of anyone who was thinking of amending the bill in that way.

Insurers and/or defenders would plead the rebuttable presumption in every case and use it as an excuse to make even more intrusive investigations into families' economic situations than happen at the moment. I will again pray in aid Lord Drummond Young, who said that the problem with a rebuttable presumption was that

"it would still be necessary to perform the upsetting and difficult exercise of going through the household accounts—the family expenditure—with the surviving spouse or another member of the family. In one sense, things would be worse than they are at present. Currently, the exercise is done at the outset of proceedings through sitting down with the family's solicitor. If there is a rebuttable presumption, in many cases the exercise would be performed at a later stage rather than at that stage, under pressure of demands for information from the defender".

In essence, if a rebuttable presumption were introduced, there would be a greater likelihood of upset than there is under the present system. In the words of Lord Drummond Young:

"a rebuttable presumption of that nature would not be a particularly good solution."—[*Official Report*, *Justice Committee*, 14 September 2010; c 3444.]

That is an admirable example of understatement. He never said a truer word.

Stewart Maxwell: If we assume that household expenditure follows the normal distribution curve and that you are correct in saying that 25 per cent is in the middle of that curve and therefore covers most people, some people will be undercompensated and some will be overcompensated. Is it right that, even though those cases might be small in number—you have described the case in the Simpson & Marwick submission as "hypothetical", which I do not accept—the loss that is suffered should be ignored just because the people involved do not have a personal expenditure of around 25 per cent? Although I accept that it might be an efficient approach, and that it might even be sympathetic to families in difficult circumstances, is it just?

Bill Butler: I would say that there is always a degree of arbitrariness. There is no doubt about that and I concede that. However, that has been conceded by every witness on both sides of this argument. I simply say to colleagues that the situation at the moment is in need of reform and that the reform that I propose would deal with the vast majority of cases in a just way. For example, it is right to ally the 25 per cent rule to the issue of disregarding a spouse's income because the ruling in the 1990 Brown v Ferguson case is unfair and outdated. If we are talking about justice, I will quote Lord Drummond Young again, if I may. He said:

"In what might be called an old-fashioned family ... the Brown v Ferguson ruling produces a ... fair ... result, but it is now much more common to find that both spouses work ... In effect, to maintain the household at the existing level the survivor needs his or her own income as well as the deceased's income, which is what is represented in the award of damages."—[*Official Report*, *Justice Committee*, 14 September 2010; c 3443.]

I know that committee members are concerned to ensure that any reforms that come before the committee are seen to be just, that they will not have any unintended consequences, and that they are, as far as humanly possible, progressive—that they will make things better, and will reform, not deform, the situation. I think that, although it is a broad-brush approach, the fixed 25 per cent rule with the disregard of the spouse's income mirrors the vast majority of cases out there, reflects modern reality and will clear up much of the confusion about the extant 1976 act to which many witnesses have referred in previous evidence sessions.

Stewart Maxwell: Can I take it from that answer that you think that, on balance, the better option is that a fixed figure of 25 per cent should come in, and that, as we discussed at the beginning, in the normal distribution curve, there would be winners and losers? In other words, if your model was implemented, there would be people who would be undercompensated and there would be people who would be overcompensated. I think that you said that you believe that that is a price worth paying for the gain that there would be from the efficiency of the approach and the sympathy towards individuals in difficult circumstances.

Bill Butler: If I gave that impression, I did not seek to do so. What I am trying to say is that, by and large, the fixed 25 per cent rule for the victim's living expenses taken with the disregard of the spouse's income will, in the vast majority of cases, reflect reality, and the compensation that is awarded will be fair and equitable. The incomes of the majority of those affected will be pretty modest. Let me put it this way. I recollect that colleagues have asked in previous evidence sessions whether the bill will advantage wealthier families. The verb "advantage" is the wrong one to use. The approach recognises that some people are wealthier than others. It necessarily follows that the family of someone on a high income will receive larger damages than the family of someone on a low income. By and large, though, the people we are talking about are not highly paid. Many of them work in industry or in areas in which there is a greater propensity for a dangerous situation to arise. Some of them can be retired, but they are largely people of modest income and right now what is happening—especially, I would argue, in mesothelioma cases, but not only in those—is undercompensation. People settle because they simply cannot take any more. I am arguing that the 25 per cent rule and the disregard will lead to swifter, clearer and fairer compensation.

Stewart Maxwell: But you accept that cases at either end of the normal distribution curve will either lose out or gain under your model.

Bill Butler: The starting point in most negotiations is about 25 per cent. The bill follows the Scottish Law Commission report, which suggested that, as far as you can have accuracy in such matters, 25 per cent pretty accurately reflects reality. As Mr Conway, I think, pointed out, if the parameters were very divergent—say, 25 per cent and 50 per cent—there would be a case to say that 50 per cent was far too rough and ready and broad-brush. However, that is not really the case, because the figure varies little between 25 and 30 per cent. What the Scottish Law Commission and Lord Drummond Young argued for and what the bill that I am in charge of represents is a reflection of reality and the fact that, at the moment, there is undercompensation, which the bill seeks to redress. That is what I am contending and arguing but, of course, it is up to members to decide. The judgment is yours, colleagues.

Robert Brown: I would like to pursue the issue with Mr Butler, because I am finding it difficult to accept his basic proposition that the pursuer is a standard sort of person. Earlier, the minister told us that the measures would cover not only mesothelioma cases but road traffic accidents, medical negligence cases, industrial accidents and so on. It might well be that, with mesothelioma cases, the vast majority of pursuers tend to be rather more elderly with grown-up children. However, having been involved in a number of these cases over the years, I have dealt with scaffolders, road traffic accidents and medical negligence cases covering a variety of different ages and family compositions. With respect, Simpson & Marwick's example of a 37-year-old scaffolder with six children is by no means out of the realm of the normal—although I admit that the six children might be slightly higher than the average number. If Simpson & Marwick is right in suggesting that the actual deduction might be as low as 15 per cent, there is clearly an element of undercompensation in a case that is not necessarily unique but might be reflected in many road traffic accidents and medical negligence cases and so on. Does the member not accept that?

Bill Butler: I will give a brief answer, and then call on the experiential assistance of either Ms Blane or Mr Smith.

I accept that Mr Brown has a range of experience and expertise that I do not have, but I have been told that in reality insurers will not agree to a 15 per cent discount. If we look at the evidence from last week, Ronnie Conway from APIL commented that it is usually people from more ordinary backgrounds who are involved in fatal cases. That is certainly his experience. He argues that we do not find high earners working in factories or on oil platforms or the like, and that ordinary folk also tend to drive smaller, older cars that do not perform as well as larger ones. Perhaps I am wrong, but my belief from the information that I have gathered is that the 25 per cent figure will capture the large majority of cases, that it will do so in a way that deals with the undercompensation that I argue exists in many cases, and that it will provide a fairer outcome that is worth having. Perhaps I could bring in Mr Smith or Ms Blane.

12:15

Syd Smith (Thompsons Solicitors): I do not have quite the same number of years in law as Graeme Garrett has. I have been practising in personal injury for only about 28 years, but I have yet to come across an insurer who would agree to a 15 per cent discount. I am certain that, in the hypothetical example that Douglas Russell of Simpson & Marwick has provided, if I was arguing for 25 per cent and he was arguing for 15 per cent, we would be off to a hearing in the Court of Session and we would probably end up with a judgment halfway between the two, if we were lucky.

In reality, I do not think that that sort of case happens. Insurers will always hold out for

significantly larger discounts than 25 per cent and the process of negotiation tends to favour them. There was some discussion about that at the committee's meeting a couple of weeks ago, when I think level playing fields were mentioned. Insurers have time, but many of the people for whom we act do not. Following traumatic fatal accidents, a common refrain that I hear from my clients is that they cannot get on with their lives until the case is settled. They feel as if their lives are on hold, so there is a lot of stress and pressure on them to get the case settled. They want to get it out of the way so that they can move on. That militates against arguing for every single last thing in their favour.

We produced a supplementary written submission in which we concentrate on the effect that the bill would have on the multiplicands. The minister referred to that issue briefly this morning. If we look at the way in which the numbers pan out at the moment—they are taken from real cases—we can see the multiplicands that the present system is producing, given the dynamics of the negotiations. At best, we get about half the level of the domestic income as it was before death, and we often get significantly less than that. The evidence is there, and in my view it demonstrates that there is undercompensation at present. The 25 per cent figure would get rid of that.

You should not be swayed by hypothetical cases, and certainly not ones that come from the other side of the divide. It seems to me that it is only insurers and defenders who are making the argument about undercompensation, which is curious.

Robert Brown: I think that people will accept that we will still have a range of different sorts of situations. I am not obsessed by one side of the argument or the other. My difficulty is that it seems to me that the Simpson & Marwick example is within the realm of reasonable probability. I accept that the negotiation process itself is affected by the court rulings and the legislation. I suppose that what I am getting at is whether the 25 per cent rule has hit the nail on the head in such a way that it will not leave the distribution curve that Stewart Maxwell mentioned with not just the just odd hard case but a significant number of cases falling outwith a just settlement. That is the question that bothers me.

Bill Butler: I accept that both Robert Brown and Stewart Maxwell have made important points. They made the same important point in their own ways. All that I would say is that the fixed 25 per cent rule to determine the victim's living expenses is not a panacea. I cannot guarantee—nor can anyone—that there will not be rare hard cases. I am simply putting before colleagues and the Justice Committee my belief, which is backed up by a significant body of evidence, that that rule and the disregard will lead to a fairer, better system.

I do not mean to be in any way obstructive. That is only my judgment and the judgment of individuals such as Lord Drummond Young, Mr Garrett, Mr Ronnie Conway and Frank Maguire—it is not the judgment of others, who take the contrary view. Although I do not agree with the contrary view, I have taken it into consideration and have respect for people who hold it. Nevertheless, I prefer the view that I put to the committee today. In summary, colleagues, it is a matter of judgment for the committee.

The Convener: We are in danger of repetition.

James Kelly: I will pick up on something that Syd Smith said in evidence to the Finance Committee. We are all interested in fair compensation, and Mr Butler and others have stated that they feel that the figure of 25 per cent will provide fair compensation. There will be winners and losers, but they feel that that is the fairest figure. I am interested in the evidence base for that figure of 25 per cent. Mr Smith told the Finance Committee that it had been referred to by judges as a good cross-check or rule of thumb. Picking up on the point that Robert Brown made about the distribution curve, is there any evidence to show how many cases will fall either side of the 25 per cent figure to demonstrate that that figure will provide fair compensation in a range of cases?

Syd Smith: The best evidence that we can provide at the moment is the tables that are set out in the supplementary financial memorandum. They show that, even if the Brown v Ferguson approach were applied to the joint family income in each of those cases, the result would be a multiplicand that was less than the formula would realise. That is the point that I was trying to make earlier. In reality, we are falling short in relation to the 25 per cent discount. I think that that is happening because of the dynamics of the negotiation process—people are being worn down and want to settle.

I do not know of any other statistical evidence that is out there. I fall back on what other witnesses have said. Ronnie Conway of APIL made the point that, when a broad assessment of living expenses is carried out, practitioners generally find that a 25 per cent discount is about right, although there will be cases in which the amount is a wee bit less or a wee bit more. He also made the point that we will never get the figure absolutely right—it has to be an arbitrary, broad decision. Beyond that, I cannot give you any evidential basis for setting the figure at 25 per cent.

Bill Butler: I recognise the concerns that there is a risk of overcompensation and that the families of higher earners will receive some sort of windfall. I hope that the issue of the higher earners' windfall has been set to one side, although overcompensation remains a concern. However, as Mr Syd Smith said, the tables that Thompsons has provided and on which the illustrative calculations are based show that in most cases the victim's income is modest—as is the spouse's income. The highest earner in the whole sample was paid £48,000, which is a reasonable sum but not riches beyond the dreams of avarice. In a few cases, the surviving spouse's income is larger than that of the deceased, which has the effect of bringing the multiplicand down to a very small proportion of household income. In fact, in almost all cases, the multiplicand is substantially less than the annual household income; in almost all fatal mesothelioma cases and in two fatal accident cases, it is zero. In my view, that cannot be a fair and equitable result. It is not justice, but it is what is happening under the shadow of the present system.

I do not wish to cast aspersions, but I suspect—I am not a mind reader, so I may be wrong—that Mr Don and others would have been reluctant to listen to the original financial memorandum, which was based on only eight cases. Thompsons worked on more than 600 cases over the summer to enable us to submit a revised memorandum, because I wanted to present to committee members and the Parliament generally a detailed, significant sample on which a much more objective judgment could be based. I am grateful to Thompsons for its work.

The Convener: Ms Craigie has indicated that her question has been answered.

Stewart Maxwell: There seems to be fairly limited support for section 14 as drafted. Does Mr Butler accept that the policy that lies behind the section may need a rethink? Will he comment on the Law Society's proposal, which was discussed this morning, that anyone who can prove that they were financially supported by the deceased should be able to make a claim?

Bill Butler: Mr Maxwell raises some important issues. I will take the last question first. I do not agree with the Law Society that anyone should be able to make a claim. We must draw the line somewhere. However, I know that the restriction of the right to claim to certain categories of relative has excited some controversy and that there are a variety of opinions against it.

Mr Garrett, the Law Society representative, said that, in essence, anyone should be able to claim. I do not agree. However, if the bill gets to stage 2, I am minded to consider carefully the SLC's recommendation that the list of categories be amended. Mr Frank Maguire said:

"Nowadays, the family may extend in all directions, so I think that the legislation should be consistent, recognise today's social changes and allow people who are relatives—all relatives, in respect of the list—to claim for loss of support."

I accept that point.

Mr Ronnie Conway of APIL was certain that he was correct in saying:

"My APIL colleagues and I disagree with the proposal that title to sue for loss of support should be restricted to the immediate family ... support should be restricted to relatives in the current list."—[*Official Report, Justice Committee*, 21 September 2010; c 3491, 3490.]

12:30

I take the point that we have to look again at Mr Maxwell's example of the niece or nephew. His point was well made. I am open to continuing dialogue and discussion in respect of the point that Mr Maxwell and Mr Maguire made, which Mr Ronnie Conway echoed. However, I do not accept the Law Society's view, as expressed by Mr Garrett, because what it suggested is a step too far. I accept that the SLC's intention was good when it suggested its change. In fact, Lord Drummond Young said that it

"would bring the law on loss of support into line with the law on who can sue for loss of society or—as some might put it—grief and companionship. The proposed change would involve a reduction in the numbers available. We thought that the existing law was too wide in modern circumstances. In so far as former spouses in particular are concerned, one of the policies in recent years has been to bring about a clean break on divorce."—[*Official Report, Justice Committee*, 14 September 2010; c 3444.]

Having heard the evidence and considered it carefully, I think that that is my view. I am open to that.

Stewart Maxwell: That is very helpful. I want to pursue why you would oppose the proposal that others—non-relatives—could sue for loss. You accept the example of a nephew or niece. What is the difference between supporting a very close friend's child—we have heard various examples this morning and previously of what we are talking about—and supporting somebody who is a relative, such as a nephew or niece?

Bill Butler: You are right, and others have been right, to say that the categories of relative who are entitled to claim for financial support under the bill are too restrictive. I am open to dialogue and discussion and amendments if we reach stage 2. The reason why I gave the example of a nephew or niece is that it was referred to in previous evidence from you and other colleagues on the committee. I believe—and Ms Blane can nod in

the affirmative—that Thompsons Solicitors has a case involving that type of situation.

Such cases as you describe are likely to be few and far between. I think that Mr Maxwell was right to say that it would seem unjust to exclude nephews and nieces and perhaps some others—I am not going to take it under advisement, but I am willing to listen. My recollection is that when Mr Maxwell made that point, Lord Drummond Young seemed to accept it, which, in my view, adds to the point; it certainly does not detract from it.

A variety of views have been expressed about this issue and concerns have been raised. I am open to further discussion. I am not shutting my mind to what has been suggested, but—I echo the minister, but only in this respect—I am not going to be definitive about it at this stage.

Cathie Craigie: Mr Butler, you believe that the survivor's income should be disregarded entirely.

Bill Butler: Yes.

Cathie Craigie: The Faculty of Advocates suggests that instead of what is currently proposed in section 7 of the bill, only a percentage of the survivor's income should be disregarded and it gives the example of 25 per cent. What do you make of that suggestion?

Bill Butler: I simply disagree with it, with great respect. If my memory serves me correctly, the faculty changed its view in that respect, which it has every right to do. I am sure that members will recall the gentleman from the Faculty of Advocates who gave evidence to the committee, although his name escapes me—

The Convener: Mr Milligan.

Bill Butler: I am obliged to you, convener.

Mr Milligan said—I am paraphrasing here, but I do not think that I am misleading the committee; I would not do that—that the decision on changing the faculty's position was taken on a very fine balance. It is only my impression, but he did not strike me as someone who would, as the faculty's representative, say that the faculty would go to the barricades on that issue, if I might put it in that way.

It is an important question, but I simply disagree with the Faculty of Advocates, and agree with Lord Drummond Young, the Law Society of Scotland, Mr Conway, Mr Maguire and many others who have submitted written evidence in that regard.

Cathie Craigie: I take it that you agree with Lord Drummond Young's view that the law as it currently stands does not reflect reality in a large number of cases. He said in his evidence that, in modern society, people take on mortgages and all the commitments for a family household based on their two incomes.

Bill Butler: I could not agree more with your recapitulation of what Lord Drummond Young said. He described the current provision under the Damages (Scotland) Act 1976 as a rather old-fashioned concept.

Mr Conway and Lord Drummond Young both use the phrase "pin money". That is not the situation these days; if both partners are working, there is a joint income. That point has been well made by others and I agree with it.

Dave Thompson: Section 7 of the bill, which deals with multipliers, provides for future loss only to be taken into account, whereas the multiplier currently runs from the date of death rather than the date of proof. One difficulty that has been flagged up to us is that there can be several years between the date of death and the date of proof, and that using the multipliers from the date of proof only can lead to inaccurate compensation over that period. What do you make of that line of argument?

Bill Butler: I will have a shy at that question and then bring in Mr Smith.

I agree with the Government that reform is needed in that area. The situation at present is that the multiplier runs from the date of death rather than the date of proof; that is illogical in relation to the Ogden tables, which Mr Ogden QC produced to bring some certainty to a very inexact science.

I will quote Lord Drummond Young again. He said:

"The third area in which we recommend ... change is the date from which future loss of support is calculated. At present, the loss of the deceased's support tends to be calculated from the date of death to the date on which he would normally, on an actuarial basis, have ceased work or died. A deduction is then made for the period prior to proof."

However, he then made the key point that

"that is not correct actuarially. The correct method is to treat the loss to the date of proof as past loss and to calculate the future losses from the date of proof. That method is recognised in the Ogden tables".—[*Official Report, Justice Committee*, 14 September 2010; c 3443-4.]

The distinguished personal injury lawyer Frank Maguire, who is the solicitor of the year—the convener congratulated him on that last week—agreed. As a practitioner, he said:

"There is inconsistency between the two methods of calculation"

in accident cases and fatal cases. One

"would expect that in both cases the multiplier would start at the date of proof, when in fact it starts from the date of proof for an accident case but from the date of death for a fatal case. The Ogden actuarial tables say that it should be the same, because you are dealing with a future loss and future uncertainties."

Mr Maguire concluded by saying that the Law Commission and therefore the bill try to bring about consistency

"with accident cases, make the situation logical with the future loss idea, cater for the possibility of someone dying during the period and allow interest to accumulate up to the date of proof."—[*Official Report, Justice Committee*, 21 September 2010; c 3499-500.]

I could not have put it better, which is why I quoted Mr Maguire and Lord Drummond Young. Perhaps Mr Smith wants to add something.

Syd Smith: After that, I do not want to add anything.

The Convener: A solicitor is not often stunned into silence.

Dave Thompson: How would you deal with cases that are settled out of court and have no date of proof?

Bill Butler: Mr Smith will lend me a hand on that.

Syd Smith: Such cases would be settled in the shadow of the court—a previous witness used that expression. We would simply apply the Ogden table for futurity from the date of the settlement.

Robert Brown: I will return to the psychiatric business—the grief and companionship award to which section 4 refers. As everybody accepts, the law has an element of uncertainty at the moment, because of conflicting decisions. The bill has one method of dealing with that. In an ideal world, all the issues would be legislated on together, to sort them out in one go.

The issue is complex and one does not like to fiddle with it without good evidence. What are the possible solutions to the problem? Should we do anything now? Should we leave out the bill's provision and wait until another bill is introduced? Should we settle for the basis in your bill, although it is unsatisfactory? What is the interim solution?

Bill Butler: Mr Brown is right to say that the issue is complicated, not simply because of the medical expertise that is required but because of the two cases—or exemplars, if I may call them such—that adopt opposing approaches.

Mr Frank Maguire said:

"there is still a lacuna in the law. We do not know what the Parliament will do in the next session or when it will get round to the Law Commission's paper on psychiatric injury",

which I remind colleagues was issued in 2004. He continued:

"Perhaps the gap has to be filled pro tem and, if so, I would prefer any such move to include rather than exclude the mental health aspect."—[*Official Report, Justice Committee*, 21 September 2010; c 3504.]

However, another witness—Mr Cameron McNaught—made a comment with which I agree. He said:

"I agree with Mr Keyden that the preference is to consider psychiatric injury in its totality, rather than to pick one particular aspect of that whole rather complicated area of damages to deal with in the bill."—[*Official Report*, *Justice Committee*, 21 September 2010; c 3504.]

It is another matter on which further discussion and exploration are needed, and I am more than willing to engage in that with colleagues. However, at the moment, I tend towards excluding issues and not attempting to deal with so complicated a range in the bill, although I am not in thrall to that approach.

12:45

I emphasise to Mr Brown and other colleagues that I am more than willing to discuss the issue because it is complicated. I have taken advice from people with expertise in it, which I will put on record. They have told me that it is an extremely complicated area of personal injury law—the Law Commission has produced a separate report on it because it recognises that. I have also been informed that it is hedged round with policy considerations.

For example, victims who have suffered psychiatric damage are categorised into primary or secondary victims. A primary victim—a passenger in a car in which the driver and other passengers are killed in a crash—is entitled to claim for psychiatric damage, but secondary victims are subject to all sorts of other considerations, such as whether they witnessed the accident, enjoyed close ties of love and affection with the person killed in it and believed themselves to be at risk of death.

As the law stands, we have to navigate through a complicated maze and perhaps the bill is not, to mix metaphors, the vehicle to navigate that maze.

Robert Brown: Does it follow from that that you would be susceptible to removing section 4(3)(b) from the bill because it takes a certain limiting view of when claims for psychiatric damage might be made, albeit that there would be an uncertainty if we did that and left it to be sorted out by a bill on the Law Commission's recommendations later on?

Bill Butler: I would be susceptible in that I would listen to the argument if such an amendment were proposed. I will not go to the barricades on the matter—it is too complicated—but, at the moment, I retreat to the comfort of the bill as drafted, which basically excludes claims for psychiatric damage. However, I assure Mr Brown and other colleagues that I am more than willing to have further discussion and debate on the matter. It is a complicated area of law.

The Convener: Indeed. The final questions, which concern finance, will be from James Kelly.

James Kelly: The source of much of the information for the financial memorandum is Thompsons.

Bill Butler: Yes.

James Kelly: Is that a credible source? Some people have said that, because the information has come from only one source, there might not be a wide enough range of data.

Bill Butler: It is a credible source, and I will tell the committee why. Thompsons, as I mentioned earlier, undertook a great deal of work on the finances over the summer. More than 600 cases form the basis of the revised financial memorandum. It is credible not only because of the hard work and the number of cases, but because Thompsons deals with 60 per cent of wrongful death cases in Scotland—I believe that it deals with more than 90 per cent of mesothelioma cases. That is what we would call statistically significant.

Mr FitzPatrick asked me the same question at the Finance Committee. I gave him the same answer and also said—one really should not quote oneself, so I might get this wrong—that Thompsons' experience is statistically significant and not out of kilter with that of other such firms in other parts of Scotland, mainly the north-east. In fact, it mirrors the situation throughout the country.

I submit to colleagues that there is a large body of evidence and that it is as objective as one can be on the matter.

The Convener: The only point being, however, that although Thompsons is clearly the pre-eminent firm in Scotland in dealing with such matters, it invariably acts for the pursuer, not for the defender. From that point of view, the figures perhaps come with a little bit of a health warning.

Bill Butler: I really do not think so. The figures would come with a health warning only if they were overegging the pudding, and I do not think that they are. The figures are objective and they are detailed. They are statistically significant.

I respect those on the other side of the argument, although I do not agree with them. I am proposing a series of sensible, overdue reforms, backed up by significant evidence and data. In the end, there is a difference of opinion between various of those who have made submissions. That is not surprising, as there are different interests at play. Like all committee members, I am sure, I have in mind the interests of those who have suffered through wrongful death. The reforms that are contained in the Damages (Scotland) Bill seek to alleviate their suffering in some way, although one can never compensate for the loss of a loved one.

In the end it is a matter of judgment and that, convener and colleagues, is a matter for yourselves.

James Kelly: Regarding the calculation of total damages as covered in the financial memorandum, Thompsons has criticised the use of an average multiplier to arrive at the figure. If we accept Thompsons' criticisms—albeit we have the raw data to which Mr Smith referred earlier—does that not lead to reservations about the total damages figure in the financial memorandum?

Bill Butler: I would argue not. In its response, the Scottish Government picks up on what is suggested in paragraph 8.3 of the revised financial effects document. The Government discusses the contention that

"estimating the average percentage increase in damages '*is irrelevant, and could be misleading*'."

The response goes on to point out that we have only provided information—that is, Thompsons have provided information, which I have in turn provided to the committee—

"about the potential impact of the Bill on the multiplicand in individual cases, but says relatively little about the overall financial implications."

The reality, however, is that we have only examined in detail the effect of the bill on the multiplicands simply because it is the main reform that the bill would introduce if it were to be enacted. In other words, it is about the manner in which the multiplicands—or the average annual loss—are calculated.

As Mr Kelly will know much better than me, multipliers depend entirely on the facts and circumstances of each case, including the age of the deceased, whether or not he or she kept good health and when their normal retirement age would have been. The multiplier will therefore vary considerably between cases.

I believe that this is the right approach. Rather than trying to fix upon an increase in the value of the average fatal case, it would probably be necessary, in a statistical exercise, to examine various groupings of cases. That would be quite an onerous statistical exercise, however.

The effect of the eventual act will be to increase damages for wrongful death. Reference has already been made in the course of other evidence to the fact that, at the moment, such cases are generally undercompensated, because of the present way of doing things. The bill aims to redress that injustice. That is the source from which the bill and its proposed reforms spring.

James Kelly: Earlier, we discussed with the minister the concerns of local councils. In particular, Fife Council and North Lanarkshire Council submitted evidence on the potential increases in total costs. Although councils might be able to limit their exposure through insurance policies, there would be excessive policy premiums in some cases, so the bill could result in additional costs to councils. Do you have any view on those concerns, as raised by Fife and North Lanarkshire Councils?

Bill Butler: I recollect Fife Council's concerns, although my recollection is that North Lanarkshire Council did not really express concerns in that way.

Staying with Fife Council's concerns and the points that you have made about having proper insurance, I would say that councils will do that. Only 3 to 4 per cent of cases—on Thompsons' books, certainly—relate to councils. The figure is such that the concerns of Fife Council—I will not say that the council is overegging the pudding—are not very convincing. I do not think that there will be a huge additional burden on councils, especially in this economic situation. One would not wish that to be the case. I will be frank: the council's concerns are exaggerated and misplaced.

The Convener: This has been a long morning, with more to follow, I am afraid, but I invite Mr Butler to make some concluding remarks if he wishes to do so.

Bill Butler: I thank all committee members and committee staff for the work that they have put into this part of the stage 1 process. There is much work still to be done and I thank members in anticipation of that work—I know that it will be done rigorously.

I will echo what I said at the start. I think that there is need for reform. I am more than willing to discuss the reforms with the Government and with any member, at any time and at any place. There comes a point, however, when a judgment has to be made. I believe that there is significant, substantial evidence upon which members can properly exercise that judgment. I thank you all.

The Convener: The committee thanks you, Mr Butler, for the clarity and candour of your evidence. We also thank Ms Blane and Mr Smith for their attendance.

12:58

Meeting suspended.

13:01

On resuming—

Criminal Sentencing (Equity Fines) (Scotland) Bill

The Convener: Item 4 is the Criminal Sentencing (Equity Fines) (Scotland) Bill. At its meeting on 4 September, the committee agreed to invite Bill Wilson MSP to give oral evidence on the legislative competence of his bill. I welcome him and Eric Swanepoel, who is a researcher with the Scottish National Party. I apologise for keeping you waiting, Mr Wilson. As you have probably gathered, the committee has been dealing with an exceptionally complex matter this morning. I understand that you are happy to proceed straight to questions, of which we have only a few. You should be able to get the crux of your arguments across to us in responding.

Bill Wilson (West of Scotland) (SNP): Before we continue, I point out that Eric Swanepoel is not a member of the Scottish National Party.

The Convener: That will be noted in the *Official Report*. However, he is assisting you today and is welcome to do so.

The Presiding Officer's view is that the bill seeks to legislate on issues of company law that are reserved to the UK Parliament and which are, therefore, outwith the legislative competence of the Scottish Parliament. The Scotland Act 1998 provides that the

"creation, operation, regulation and dissolution of types of business association"

is a reserved topic. Companies are included within that; thus, the question of legislative competence appears to turn on whether the bill seeks to deal with the "operation" or "regulation" of companies. What is your view of that analysis?

Bill Wilson: I do not think that my proposals would affect the

"creation, operation, regulation and dissolution"

of companies any more than the levying of a financial penalty on a company would affect the

"creation, operation, regulation and dissolution"

of a company. The fact that a company might be affected by an act of the Scottish Parliament does not automatically make it a reserved matter. For example, the Smoking, Health and Social Care (Scotland) Act 2005 ensures that a company cannot operate in a certain manner. Similarly, banning cigarettes at the point of sale ensures that a company must alter its operation, but that does not make it a reserved matter.

The purpose of my proposal is to deal specifically with sentencing, not with the regulation of companies. I cite the example of salmon farming, in which the licensing of salmon cages directly impinges on the Crown Estate's ability to manage the foreshore, which is a reserved matter. It was decided that that could go ahead because the purpose was to license salmon farming rather than to regulate the management of the Crown's terrain. The purpose of my bill is to introduce a new penalty, not to oblige a company to be regulated in a particular manner.

The Convener: You will be aware of the case law on the matter, the most recent of which seems to be against you. There is case law dating way back, including some from what has been euphemistically described as the dominions, but there was also a case in 1990. Are you aware of that?

Bill Wilson: No. Can you fill me in, please? I want to be sure that we are thinking of the same thing.

The Convener: The practice has always been to relate to what is called the pith and substance of the issue. A legislative competence assessment requires to bear that in mind. The most recent case appears to be Martin v HM Advocate in 2010, in which Lord Hope of Craighead in his judgment applied a very restricted view of what might be competent in that respect. Have you had a look at that case?

Bill Wilson: No, I have not. I would need a description of exactly what the circumstance was before I could give an answer on that case.

The Convener: Basically, it is a fairly recent case that went to the House of Lords in 2010. The ability to make legislation of the type that you propose is particularly narrow. The Scottish Parliament information centre has produced a document for us in which the case is dealt with at some length. Have you not had the opportunity to see it?

Bill Wilson: I have seen a SPICe document that was produced for me; I am not sure that I have seen a SPICe document that was produced for the committee.

The Convener: The clerk has drawn my attention to the fact that it is a private paper.

Bill Wilson: In that case, I have not seen it. I make the point that the Scotland Act 1998 specifies that the conditions should be read as narrowly as possible so as to permit competence. Section 101 clearly states:

"Such a provision is to be read as narrowly as is required for it to be within competence".

Given that the bill is specifically on sentencing and that sentencing is not reserved, I cannot see why it would be regarded as dealing with a reserved matter. Indeed, as the committee is aware, the recent sentencing review in England and Wales did not cover Scotland, but included issues of company criminality. Does that mean that Scotland has no way of modifying sentencing at all? If the issue is reserved under the Scotland Act 1998 but sentencing reviews in England and Wales do not cover it, in effect we have a black hole. Surely that cannot be the situation.

The Convener: So that you are not at a disadvantage, I will quote from Lord Hope's judgment, which states:

"If the substance of the legislation is within express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object e.g. to promote the health of the inhabitants",—

which deals with the smoking ban argument—

"but may seek to achieve that object by invalid methods, e.g. a direct prohibition on any trade with a foreign country."

That is another example. Do you have any comments on that?

Bill Wilson: I repeat that the bill would not make any prohibition or regulation upon a company. Nothing in the bill says that a company must do anything, other than pay a fine, but of course a company can already be obliged to pay a financial penalty. For instance, if we wished to modify the financial penalties on a company, nobody would argue that that is a reserved issue. We accept that the Scottish Government can order financial penalties if it wishes to do so. Logically, the bill will do exactly the same. It says, "You must pay a penalty; the penalty is shares and not money." However, that is not regulation of the company.

The Convener: That might be a thin argument. The company would have to issue shares as you say, but that is obviously a financial consideration or penalty.

Bill Wilson: Yes, but let us say—speaking hypothetically—that companies can be fined for a particular offence and £500,000 is the maximum fine. Would we then say that the Scottish Parliament cannot increase the maximum fine from £500,000 to £1 million? That would also be levying a cost upon a company, and the company would then have to respond to that financial penalty. As far as I am aware, no one argues that we cannot modify financial penalties. If we can modify financial penalties, there is no obvious reason why we cannot introduce a new penalty. It is exactly the same requirement.

Nigel Don: We have got to the nub of the issue. You made an argument along those lines in your letter to the committee of 17 August. That means that your proposal wrecks—if it does—purely and simply because just below the waterline is the fact that the shares have to be issued in the context of companies legislation, which is reserved.

Bill Wilson: That comes back to my original point. We would be using company legislation to issue the shares; we would not be modifying that legislation in any way, shape or form.

In the same manner, if we tell the Crown Estate that we intend to license its ability to fix salmon farms to the foreshore, we are altering its ability to manage, but that is not the purpose of the measure. It goes back to the pith and content, which is a penalty, not an attempt at regulation. [*Interruption*.] Eric Swanepoel tells me that I mean the pith and substance—I am sure that Bill Aitken, too, would have corrected me.

We are using the law, not changing it—there is nothing to say that we cannot use an existing law. Eric Swanepoel has pointed out to me that, arguably, the bill would lessen the impact on companies. If a £1 million financial penalty is imposed on a company, it will have to modify its behaviour. There is nothing unique in what I am proposing, in terms of what it would do to a company.

Nigel Don: In principle, I accept that point absolutely. It will be a great deal easier for a company to issue £1 million-worth of shares to a market, assuming that it is possible to sell those shares. That begs a few questions about private companies, rights of pre-emption and all sorts of things. The point is—we have had this discussion elsewhere—that all of those matters come under companies legislation. That is the issue that is lurking just below the waterline.

I will try to talk you through a case of which you may be aware: Regina (Hume and others) v Londonderry Justices, of 1972. Does that ring any bells?

Bill Wilson: Vaguely, but I do not have my notes with me. Will you talk me through it?

Nigel Don: I will. The Parliament of Northern Ireland decided that it would like to give the security forces, on which it drew widely, the power to break up assemblies of people. However, it was only a power—there was no duty. That is what I find interesting about the case. The legislature tried to give the Army, among others, a power to break up assemblies. When the case came before, I presume, the Privy Council, the court judged that the legislature was going too far, because it had no right to do that. It was probably obvious that it had no right to tell the Army what to do—that it could not tell an Army officer that his or her duty was to do X or Y. I am interested in the fact that legislation that simply gave it the power to do something was also struck down.

Bill Wilson: You seem to be arguing that the legislation was struck down because the Army could not be given the power that it conferred.

Nigel Don: I am drawing the conclusion that, if the ruling in the case was and still is correct, the Scottish Parliament cannot do what you want us to do until Westminster has given us the power to do that.

Bill Wilson: I do not agree. In one case, the issue was whether the Army could have a power or duty to act under civil law to disperse individuals. In the other, we are arguing about whether the court can have the power to issue a penalty. The court has the power to do that; we are debating the kind of penalties that it can issue. Are we saying that we cannot introduce new sentencing of any form in any court? That is what it comes down to.

Nigel Don: It does not.

Bill Wilson: If the Parliament has the power to modify sentencing and to introduce new penalties, it already has the power that we seek.

Nigel Don: The power to issue penalties is not in dispute. With respect, the issue just below the waterline that will wreck the bill is shares—nothing else.

Bill Wilson: I do not accept that. It comes down to whether the court has the power to issue a penalty. It does. There is nothing in the Scotland Act 1998 that says that we cannot use existing law. Company law exists—we are not modifying it. If you read section 101 of the 1998 act as narrowly as possible—as you have been told you should do—surely all that I am doing is extending a new power of sentencing to the court. I am not modifying or touching any existing law.

Nigel Don: Forgive me, but that is exactly where Regina (Hume and others) v Londonderry Justices comes into play. The Army was there and the soldiers' feet were on the ground. The legislature did not give them a duty or demand that they do something—it simply gave them a power to do something. However, the court of appeal—I am not sure whether it was the House of Lords or the Privy Council—decided that it could not do that.

Bill Wilson: The ability to disperse individuals was a fundamentally new power to permit the military to act as a civil authority to disperse individuals. That is a far-reaching power that is very different from giving courts that already have the power to issue a penalty against a company a new type of sentence. That is simply giving courts a new sentence that they already have the power

to apply. It is not the same as creating a new power.

15:15

Nigel Don: Do you not accept that giving the Scottish courts the power to change at least the level of shareholding of a company is going beyond the powers of the Scottish Parliament?

Bill Wilson: No, of course not. The reserved matters are reserved in the sense that we cannot modify or alter the reserved law. If we are not altering the reserved law, the situation does not exist.

We are using the existing laws. We are not changing them; we are simply introducing a new sentencing. If you are right, we are potentially in the situation in which no one can modify the sentences of Scottish courts. It is not being done in the sentencing review in England and Wales. If Scotland cannot do it, who can modify the sentencing in Scotland? Are we saying that it is stuck in its present position ad infinitum?

Nigel Don: I actually agree with you. We will not agree on the bill, but my reading is that Westminster has to say, "Yes, you may do this" and then we have to decide subsequently in legislation to do it. That is a constitutional and legal nonsense, but nonetheless that is where I think we are.

Robert Brown: I want to go back to the Scotland Act 1998, where the issue starts. The act states that the reserved competence is the

"creation, operation, regulation and dissolution of types of business association."

Surely, altering the share capital, for whatever purpose, would affect the operation and regulation of a company and is therefore reserved.

Bill Wilson: It would do so no more than would imposing a financial penalty on a company. If we hit a company with a £1 million penalty—sadly, corporate companies do not usually get those penalties, even when they kill people in substantial numbers or cause major environmental damage—the company would almost certainly have to modify some of its behaviour to meet it. The bill would not modify a company in any way that would be different from a financial penalty.

Robert Brown: Is not there a distinction between a direct order of the court that requires certain things to happen and a more general order, such as a fine, that can have certain implications but over which the company has entire control on how to meet it—in other words, its actions are not a matter for legislation? There is a real difference between fining a company, which can pay in any way it wants, and ordering specifically a change in the share ownership of the company.

Bill Wilson: I do not see the difference; I see them both as the same thing. We are saying to the company that it will pay a penalty, whether it is a financial or share penalty. It will be up to the company to choose how to meet the penalty—it might buy back shares or it may issue new shares.

Robert Brown: I accept that point entirely, but that brings us back to the restriction to a reserved issue of the operation and regulation of companies. It is manifest that, whatever else it does, an order of the court that alters the share capital affects the operation and regulation of a company, and it is therefore forbidden by the Scotland Act 1998.

Bill Wilson: No, it does not. First, the issue of the shares may not have any effect on the company's operation. It will certainly have an effect on the shareholders' value, which is the intention of the fine, but it does not necessarily affect the operation. If we hit a company with a large financial penalty, it may have to sell off various assets—that would affect the operation. A share penalty will not necessarily affect the operation. As for the regulation, the share penalty does not regulate company behaviour any more than a financial penalty regulates company behaviour.

Robert Brown: With great respect, it does—it regulates the share composition of the company. I do not see how much closer we can get to regulating the operation of the company.

Bill Wilson: That is not a regulation of the company; it is an alteration of a shareholding. It does not regulate the company's ability to operate or behave. It does not touch any of those things.

Robert Brown: Would you accept that you are trying to restrict the wording of the Scotland Act 1998? I understand why you are doing it, but we are not in a position to make our own interpretations of these things—we have to follow the common English meaning of the words. Regulation of a company manifestly includes the memorandum and articles and share structure. There are probably definitions in the Companies Act 2006 to that effect, too.

Bill Wilson: First, that is not clearly stated, so I do not think that it "manifestly includes" it. Secondly, let me repeat that section 101(2) of the Scotland Act 1998 states:

"Such a provision is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly."

The Scotland Act 1998 specifically states that we should seek not to put something outside

competence and should read the act of incompetence "as narrowly as" possible.

In that light, I say again that if you read regulation of a company to mean the regulation of its behaviour and activities as it operates as a company—what it sells, where it sets up, where it does or does not have business headquarters—that would not be affected by a share issue. It might, arguably, be affected by a financial issue. If a company were hit with a large enough penalty, a chunk of it might have to be sold. That would be regulation.

I cannot see how you can say that the ability to alter the financial penalties on a company, perhaps to make them extremely punitive, which might force a large section of the company to be sold, is not regulation, whereas forcing it to sell shares, which would not have that effect—it would have a different kind of effect—is regulation.

Robert Brown: Would you take the same view if an order were made to wind up the company or to do something of that sort?

Bill Wilson: That is precisely my point. That would be regulation, which is clearly prohibited. One cannot order a company to be wound up.

Robert Brown: That is just one example.

Bill Wilson: One cannot order a company to be wound up, but the issuing of shares would not result in a company's being wound up: a company could exist whether or not the shares were sold. The issuing of shares is less likely to affect the company's operating capital and therefore less likely to affect its operation. From the point of view of operation and regulation, my proposal is less likely to have an impact than would a financial penalty. Its purpose is to try to alter the behaviour of companies by directly affecting the value of shares, thereby discouraging people from buying shares in companies that break the law. As far as the operation and regulation of a company is concerned, I think that a requirement to issue shares would potentially have less—certainly no greater—impact than a financial penalty.

James Kelly: You must accept that your policy objective is to ensure that public limited companies adequately invest in measures to ensure that they comply with the law. Do you accept that in order to do that, as others have pointed out, you are using the justice framework under the Scottish Parliament's devolved powers to achieve an outcome that might involve restructuring share capital, which clearly comes under the remit of the Companies Act 2006?

Bill Wilson: Again, I would say no. Your argument is that to impose the proposed penalty on a company is an attempt to modify its behaviour, but any penalty, from jailing the heads of the company to hitting them with a financial penalty or an equity fine is, I presume, a penalty that is intended to change their behaviour in the long term. That applies to any penalty, whatever it is, so that per se cannot be a reason for saying that the bill would modify the regulation of companies.

As far as the rest of your question is concerned, can you give me the second part of it again, just to ensure that I understood it correctly?

James Kelly: Essentially, you are trying to ensure that companies invest correctly. As part of that, you want to give certain powers to impose fines, which could result in the reorganisation of share ownership. In my opinion, that would normally come under the remit of the Companies Act 2006, but because such matters are reserved, you are trying to do it through the vehicle of the justice portfolio under the devolved powers of the Scottish Parliament.

Bill Wilson: The imposition of a heavy fine might affect shares; it may or may not cause shares to be sold.

I still think that it comes down to the fundamental issue that for my bill to be said to deal with a reserved matter, I would have to be modifying reserved law. Nothing in my proposal would modify reserved law; reserved law would not be touched. There would be no change to the Companies Act 2006, as there is no proposal to modify it. If you read the bill as narrowly as possible, there is nothing in it that would alter a single aspect of reserved law.

James Kelly: Do you accept that the way in which shares are organised within companies comes under the remit of the Companies Act 2006? You must accept that—it is a given.

Bill Wilson: The point is that section 101 of the Scotland Act 1998 says that proposed provisions should be read as narrowly as possible. The whole point of the bill—the pith and substance of the bill—is to introduce a new penalty, not to modify company law. Company law would not be modified in any way, shape or form. If you read what the bill proposes as narrowly as possible, it would not modify company law; it would not touch company law. It may use company law, but the Scottish Parliament has passed lots of different acts, for example to do with smoking and point of sale, that you could argue clearly affect a company's ability to take certain actions and which therefore use company law. The use of company law, per se, is not reserved. It is only the modification of company law that is reserved and I am not seeking to modify it.

James Kelly: Surely the implication is that if the bill were to be passed, the logical follow-on would be a need to amend the Companies Act 2006 to

deal with the consequential issues of the reorganisation of share ownership.

Bill Wilson: No, I do not think that we would need to amend the Companies Act 2006. That is why I want to allow companies to issue the shares as they see fit. All the court will say is that a company will issue a certain quantity of shares and sell them by a certain date. No modification of company law would be involved, and I am quite confident that there would be no need for modification of company law. In that sense, we are not touching reserved law. That is my point; the bill does not touch reserved law.

Robert Brown: What about companies that trade in Scotland and England, or companies that are registered in England? Are we not getting into a very complex area, to say the least, if the bill seeks to alter the share structures of companies that are in that situation?

Bill Wilson: I will make two points on that. First, companies can be penalised whether they operate out of England, the United States or anywhere else. That is the simple truth. The penalty can be financial or otherwise. Secondly, even if the situation were incredibly complex, it is not relevant to the discussion about whether the bill covers a reserved matter. You might decide, "This is too complicated to do, so we don't want to do it", but I hope that you will accept that it is not relevant to the question whether it is or is not a reserved matter.

We could say, for example, that we would apply the provision only to companies that are registered in Scotland, which would remove the complexity. I am not suggesting that you want to do that, and I am not suggesting that I would like to do that. I am simply making the point that it does not affect the reserved matter issue.

The Convener: Would you like to say anything else?

Bill Wilson: The bill offers Scotland an opportunity to implement a new form of sentencing and a chance to set Scotland up as an example of an ethical country that is working and pushing for ethical businesses. I do not believe that the bill would affect reserved law. It does not touch company law; it simply uses it. There is precedent in other Scottish Parliament legislation that does exactly the same. I would like the committee to reconsider.

If the committee does decide that the bill touches on reserved matters, it will have to ask who has the ruling, and who can alter the Scottish law on sentencing. We cannot be in a situation in which neither the Scottish Parliament nor the Westminster Parliament can modify certain aspects of sentencing. That is not satisfactory.

Finally, I thank the committee for giving me its time.

The Convener: Thank you for your attendance, and I also thank Mr Swanepoel for coming. The committee will make a determination in due course.

13:27

Meeting suspended.

13:28

On resuming—

Subordinate Legislation

Knife Dealer's Licence (Miscellaneous) (Scotland) Order 2010 (SSI 2010/311)

The Convener: Item 5 is subordinate legislation. We have to consider one negative instrument today. Members will see that the Subordinate Legislation Committee has drawn two matters to the Parliament's attention. The first is that part of the order breached the 21-day rule, although the Subordinate Legislation Committee accepted the explanation that the Government provided.

The second matter that has been drawn to the Parliament's attention is that the meaning of articles 2(2)(b) and 2(3)(b) could be clearer in relation to the extent to which persons are to be treated as qualified to teach archery and water sports. The Subordinate Legislation Committee observed that clarity is important because only qualified persons will be exempt from the requirement to hold a licence. Do members have any comments?

Bill Butler: I think that I am right in saying that the issue came up and was discussed at stage 3 of the Criminal Justice and Licensing (Scotland) Bill. This is a sensible piece of subordinate legislation that deals with an unintended consequence of the act. It is a superb piece of secondary legislation.

13:30

Nigel Don: The order seems to be absolutely necessary; we spoke about the matter at the time. I share the Subordinate Legislation Committee's concerns about the words "qualified to teach", but I also have to respect the Government's response that there is no obvious way of improving on it. It is just one of those situations where we have to acknowledge that, as and when it comes before a court, the court will have to do what it is good at and make a judgment.

Stewart Maxwell: I agree with my two colleagues, but we have to take the reasonable person approach. Most of us have a commonsense view of who is qualified to teach. Although I understand where the Subordinate Legislation Committee is coming from, to go down the road of trying to define it all would be to end up destroying what we are trying to do here.

The Convener: Are we content to note the instrument?

Members *indicated agreement.*

The Convener: The committee will now move into private session for the remaining agenda items.

13:30

Meeting continued in private until 13:41.

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