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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 1 February 2011

Session 3

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JUSTICE COMMITTEE
4th Meeting 2011, 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 ALSO ATTENDED:

Fergus Ewing (Minister for Community Safety)

THE FOLLOWING GAVE EVIDENCE:

Richard Brown (City Property (Glasgow) LLP)
Andrew Ferguson (Fife Council and Society of Local Authority Lawyers and Administrators in Scotland)
Bill Miller (City of Edinburgh Council)
Professor Robert Rennie (University of Glasgow)
Iain Strachan (City of Edinburgh Council)
Andy Young (Glasgow City Council)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 1 February 2011

[The Convener *opened the meeting at 10:05*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I open the meeting with the usual request to everyone to ensure that mobile phones are switched off. We have received apologies from Stewart Maxwell, who is ill. Maureen Watt is expected to attend in his place as a committee substitute, but she might be late, as she is flying up to Edinburgh from London this morning.

The first item is a decision on taking business in private. I invite the committee to consider whether to take in private item 6. Does the committee agree to do so?

Members *indicated agreement.*

Long Leases (Scotland) Bill: Stage 1

10:06

The Convener: The second agenda item is our third evidence-taking session on the Long Leases (Scotland) Bill. I welcome our first panel of witnesses, which comprises Iain Strachan, principal solicitor for the City of Edinburgh Council's legal and administrative services, and Bill Miller, from the council's city development department; Richard Brown, managing director of City Property (Glasgow) LLP; Andy Young, head of asset management at Glasgow City Council; and Andrew Ferguson, a solicitor at Fife Council and vice-president of the Society of Local Authority Lawyers and Administrators in Scotland, which, in accordance with the standard acronyms that apply in this building, is known as SOLAR.

We will go straight to questions. In some instances, the questions are directed specifically at one local authority, in which case the other members of the panel need not involve themselves. Bill Butler will open the questioning.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, gentlemen. My questions are directed at the City of Edinburgh Council representatives. Will you place on the record why, in the city council's view, Waverley market is not part of the common good of the city of Edinburgh?

Iain Strachan (City of Edinburgh Council): As the committee no doubt knows, Waverley market was initially used as the city's fruit and vegetable market and, as such, was held on the common good account. Acts of council in 1937 and 1938, being resolutions approved at council meetings, deal with the transfer of the fruit and vegetable market at Waverley market to a covered-in marketplace that was to be constructed at land on Cranston Street and East Market Street.

As has been noted in the press, there have been various responses in connection with the Long Leases (Scotland) Bill. As the council reported to its finance and resources committee in January 2008, the opinion of the council is that the transfer of the fruit and vegetable market in 1938 included the transfer of the common good status that the site held.

The transfer of the location of the market in 1938 was envisaged by the Edinburgh Corporation Order Confirmation Act 1933, which allowed the corporation to alter places at which markets were held and to establish and hold new markets. The act also allowed the corporation to alter and reconstruct Waverley market and to use it for any purpose that the corporation saw fit. If and when

the market was moved to a new location, Waverley market would be freed and discharged of all market rights. Those statutory provisions were specifically referred to in the 1937 and 1938 acts of council to which I referred earlier.

As I understand it, further historical byelaws of the city enabled the corporation to regulate the operation of markets and even to transfer them to alternative sites.

Those provisions taken together demonstrate the special status that market sites had in the city at the time, and that the special status was subject to the powers of the then corporation to move the actual market sites and to use them for alternative purposes.

Our opinion is that all that happened in 1937 and 1938 was that the powers were exercised. The council at the time substituted the East Market Street premises for the Waverley market premises and, with that, the special legal status of the market moved to the alternative East Market Street site. The city council's opinion is that the special status that was transferred included the market's common good status as, at the time, as I understand it, the market should have been held on the common good account. As such, Waverley market ceased to be part of the common good at the time of the transfer.

The council obtained a Queen's counsel's opinion in 2007, which agreed with our view. I know that Mr Wightman referred to correspondence that indicated that the council understood the site to have common good status until the 1980s. I have not seen the correspondence, but although on occasions council officials might have referred to the site as being part of the common good fund, I think that that would have been a confusing and unfortunate mistake.

As commentators acknowledge, common good law is an obscure area of law, which is not widely known. There is not much judicial guidance and even less statutory guidance, all of which makes the identification of common good land extremely difficult. I think that it is fair to say that there was even less awareness of the issue in the past than there is now, and even now there is not a great deal of awareness of it. Council officials should no doubt have been expected to know whether an asset such as the Waverley market was part of the common good, but given what I said it is probably and regrettably the case that people did not have all the facts at their fingertips and were not fully aware of all the issues in all cases.

The principle of the transfer of common good status is reflected in section 75 of the Local Government (Scotland) Act 1973, which provides that if a local authority seeks authority to dispone inalienable common good property the court may require the authority to provide other land in substitution for the land that is to be alienated.

In essence, that is the council's view and the reasons why it is our opinion that Waverley market is not part of the common good. A couple of other points were made previously and in submissions, which I could briefly cover.

Bill Butler: May I interject at that point, Mr Strachan?

Iain Strachan: Of course.

The Convener: You will get a chance to come back in, Mr Strachan.

Bill Butler: Mr Strachan, your account was helpful. The City of Edinburgh Council's position seems to be based on a fair degree of certainty. However, given that many aspects of the area are uncertain, as you said, can you be absolutely certain of your position? Are you depending on counsel's opinion in 2007?

Mr Wightman argued that the Edinburgh Corporation Order Confirmation Act 1933 relieved Waverley market only of its market obligations and not of its common good status. Will you comment on that view?

Iain Strachan: That is his view—

Bill Butler: Has it merit?

Iain Strachan: I suppose that it has some merit; equally, our view has merit. As you see, there is doubt and a lot of greyness—

Bill Butler: Do you mean greyness in the 1930s or in general?

Iain Strachan: I am talking about the attempt to be certain whether the site has common good status. The issue has been looked into in great detail in the council. We took independent advice, which backed up our view, so ultimately that was the view that the council came to. I suppose that we got separate assurance that our view had merit and was correct. Of course, Mr Wightman is entitled to his own view and interpretation of things.

Bill Butler: I think that that is as clear as we are going to be on the issue.

The Convener: Did you want to share more information with the committee, Mr Strachan?

Iain Strachan: I just wanted to give more background for the view that I expressed. Even if the transfer of the actual market did not of itself remove the common good status, the original purpose of the site—its use as a market—disappeared when the market was transferred to the new location. We know for a fact that that change took place; it is also detailed in the

Edinburgh Corporation Order Confirmation Act 1958 and the Edinburgh Corporation Order Confirmation Act 1964, in which Waverley market is included under the definitions of public halls, and as such is capable of being let out and used for such purposes as the corporation sanctions, which I understand is generally recognised as being incompatible with common good status. Further, the 1958 and 1964 confirmation acts make no reference to Waverley market having common good status.

10:15

Moving on a few years, we see that as a result of the Edinburgh Corporation Order Confirmation Act 1967 the markets of Edinburgh cease to form part of the common good. I imagine that at the time it was felt that the need for such markets had dramatically reduced and Parliament evidently felt that such sites no longer merited common good status. Even if we are incorrect in saying that Waverley market's common good status could have been transferred and that, in fact, it retained that status after the new market was established, it does not seem sensible that it should still have retained that status post-1967 when all the other market sites lost it, especially given that there had long since ceased to be a market on that particular site. Those aspects do not seem to sit together very well.

Finally, we need to bear in mind that for a substantial period of time now Waverley market has not had the public use necessary for it to retain its common good status. As such, even if its common good status had been retained, it might well have been lost by virtue of that fact. Indeed, in his evidence to the committee on 18 January, Mr Wightman appears to concede that the loss of common good status through such non-use is also a legal possibility.

Robert Brown (Glasgow) (LD): At the end of the day it is not the committee's job to make a determination on the issue one way or the other, so there is a limit to how far we can go. However, pursuing the matter a little further, I put to you the proposition that certain types of common good land can be inalienable. Such a category is not linked to markets per se, as opposed to general property that is held, but I think that—if I can put it this way—it conveys a kind of property status. Given that none of the other acts that you mentioned seems to refer to common good, it strikes me that, putting to one side prescriptive arguments and so on, common good status cannot really be taken away as a by-blow of something else. Can that argument not be made?

Iain Strachan: That could well be true. There is no point in reiterating either what I have already said or our view on the matter, but on the question whether the site is alienable or inalienable my view would be that, even if the site had retained common good status, any such inalienability would have been lost long ago by virtue of the fact that the use had been provided elsewhere, there had been no public use for a substantial period of time and so on. I am not sure that that answers your question, but the point is that its status had certainly shifted.

Robert Brown: I understand that. Moving the focus of our discussion away from Edinburgh slightly, I wonder whether Mr Ferguson is able to tell us under which circumstances land might lose common good status.

Andrew Ferguson (Fife Council and Society of Local Authority Lawyers and Administrators in Scotland): I appreciate your attempt to move things away from Edinburgh slightly—at least in your questioning, if not in a physical sense.

As in so many areas related to common good, there is no absolutely clear view on the loss of common good status. For example, a side issue of a case involving the golf links at St Andrews, which originally had common good status, related to houses that had been built on the links in the past, and it was suggested that long negative prescription might operate to remove such status. However, I must stress that that was not the rationale for the case itself; it was simply a comment made obiter, as we lawyers say—a comment made in passing by the judge.

There is not an awful lot of judicial guidance on the circumstances in which common good status can be lost, but there are other cases concerning the loss of land's common good status through lack of usage. However, in such cases it has been stressed that the common good status of the land in question cannot be lost simply because, through the burgh council's neglect, it has become impossible for people to use it.

I will give an example of another Fife case in which the long neglect of a piece of land in Kirkcaldy meant that the people of the burgh did not use it any more, but that was held not to mean that the burgh was allowed to use the land for another purpose—in that case, for police stables.

Robert Brown: We are considering the long leases aspect of common good land. Can any of the witnesses give us additional guidance on the extent to which ultra-long leases of common good land and property exist or might exist in Scotland? We have heard about the dispute over Waverley market, and one other case has been mentioned in correspondence. Does Mr Ferguson have an overview of the matter, or does Mr Brown have a Glasgow perspective? To elaborate slightly, there has been a suggestion that the parks in Glasgow would generally be common good property, even if

they are not in the register as such. Will Mr Brown give us an indication of what might have been discovered in the context of the bill?

Richard Brown (City Property (Glasgow) LLP): We have examined the situation in Glasgow and determined that the bill potentially affects two areas of parkland where ultra-long leases are in place. Those areas are deemed to be in the common good account.

Robert Brown: Will you identify which they are, for clarity?

Richard Brown: There are some areas of ground in Pollok park.

Robert Brown: Specifically Pollok park?

Richard Brown: Yes.

Robert Brown: What about more generally across Scotland? Has anything turned up that anybody knows about?

Andrew Ferguson: Because there is little evidence, SOLAR has done a trawl round the local authorities, and the conveyancing working group also considered the bill. Local authorities generally thought that the bill would catch very few instances—the number is extremely small.

Robert Brown: For clarity, what sort of leases of what sort of ground to what sort of people are we talking about in Pollok park?

Richard Brown: We are talking about areas of ground around the edge of the park that were part of the original transaction. Pollok & Corrour Ltd—Nether Pollok Ltd previously—which goes back to the Pollok and Maxwell families, has a lease over such areas including the cricket club. I think that there is also a lease to the police. There are sublets in place below those leases, but they were retained by Pollok & Corrour and were sublet for their original purposes—they were originally the playing fields and whatever. The leases from Glasgow City Council back to Pollok & Corrour are for 999 years.

Robert Brown: So they are not commercial-type leases.

Richard Brown: No. In effect, Pollok park is in the common good, so the leases would be affected by the reversion under the bill.

Robert Brown: There has been a directive from the Scottish Government to councils to try to clarify what land is in the common good. I think that the success of that exercise has been variable across Scotland. Is it fair to say that it is quite tricky to get a clear view of what is common good land and what is not? Indeed, it involves quite a lot of bureaucratic and administrative work to go through ancient titles and find out.

Andrew Ferguson: The short answer is yes. To give you an example, in Fife, we tried to undertake a review of all former burgh titles throughout our land holding. Fife Council is quite a big authority, so we had to comb through several thousand titles and assess them against a variety of criteria. We also carried out a six-month consultation with local communities to try to find out whether they had local historical knowledge. Often, they had knowledge of pieces of ground and their extent or historical extent.

As you say, clarifying what is common good land is a long and bureaucratic process that involves quite a lot of steps. I cannot speak for all the local authorities in Scotland, but it is probably fair to say that different authorities have taken different approaches and are at different stages.

Because it is a requirement under the accounting guidelines, there are now common good asset registers in place that local authorities say are the extent of common good land.

You will have heard from Mr Wightman and others that there is some dispute about whether that is the complete picture. It is probably fair to say that work is on-going in several authorities to try to complete that picture and that it will take months, if not years, before we have anything approaching a complete picture throughout Scotland.

Robert Brown: I presume that, in essence, you have to look at most of, if not all, the titles before 1975 and also some of the ones that have been moved about since then. Is that broadly right?

Andrew Ferguson: It is unlikely that any of the post-1975 titles would be part of the common good. The only possibility is—this scenario was mentioned in previous evidence—that, technically, a district council or a unitary authority may be able deliberately to place something into the common good. I know that there is discussion about that in a couple of cases. However, Fife Council took the view that unless one of those special cases was involved—and we were not aware of any—district council and regional council titles could be disregarded. Obviously, in every former burgh there is a jigsaw of titles, some of which come from the burgh and some of which come from district or regional councils, so there has been a sifting process.

Robert Brown: I presume that the two city councils, Glasgow and Edinburgh, have a substantial number of properties that potentially fall into this category. How comprehensive have been the efforts that you have been able to make? How comprehensive is the end result in your registers?

Bill Miller (City of Edinburgh Council): I can answer that question—I will come back to it. To go

back to your first question, in Edinburgh only two properties fall under the bill, as they are on long leases or ultra-long leases. One of them is—

Robert Brown: Let me interrupt you. We are trying to identify not only long leases. There are two ways of looking at the matter. There is common good ground with long leases. Are you saying that there are only two long leases?

Bill Miller: Generally, in the City of Edinburgh Council, only two leases fall under the terms of the bill; one is common good and the other is Waverley market. As you know from the evidence that you have just heard, Waverley market may or may not be common good.

Robert Brown: What is the other one?

Bill Miller: It is a small piece of land off one of the closes in the High Street; it is part of a development site and was probably part of the close at one time.

I will now answer your other question. Yes, the City of Edinburgh Council has a common good register; it is a database that shows all the property interests that the council has under common good. It covers about 120 interests—not necessarily 120 properties but 120 interests where there is a legal interest in a property—

Robert Brown: The issue is how comprehensive the register is and whether you are satisfied that that is the whole lot.

Bill Miller: I go back to what Mr Ferguson said. Two or three years ago, Mr Wightman wrote to the City of Edinburgh Council—in fact, I understand that he wrote to all councils—and asked for details of the common good. He also sent the council a list of properties that the council did not necessarily have on the common good register, but which he felt were common good. Following that correspondence, the City of Edinburgh Council carried out a very thorough investigation. I thought that the process would be straightforward but I must admit that it was very complicated and time consuming. For some of the properties that he mentioned—particularly in the old town—we had to go back to the charter of King David in the 12th century to find out when we became the owner.

We looked at the properties that Mr Wightman had highlighted and we realised that to investigate the whole of our property register—that database extends to almost 4,000 property interests—would take a very long time at a very high cost. The council agreed through the finance and resources committee that we would look at properties as and when somebody made an inquiry about them rather than do a complete search through every single property and go into every title deed, which would take a long time and would be very costly. It was a cost benefit exercise, and we did not see the full benefit of the process, albeit that we need to know what is common good. The council looks on common good properties in the same way as it looks on non-common good properties—general properties—and we look after them in the same way. They are on the same register and we maintain them in the same way, as if they were local authority properties.

Robert Brown: Will Mr Young comment on the comprehensiveness of the Glasgow register?

10:30

Andy Young (Glasgow City Council): Glasgow City Council has gone through exactly the same process that Mr Miller has described. We, too, have a common good register. Unlike him, I cannot give you the number of entries off the top of my head, unfortunately, but the register contains property as well as other common good assets such as statues, gold chains and so on. Our approach is exactly the same as that of the City of Edinburgh Council. We deal with common good issues when we are developing land, when we receive inquiries about it or when we are looking to build a school or whatever. We go through the title check at that point.

As Mr Miller said, we set out to find out how much it would cost in time and resources to go through all the council's titles. We started in Drumchapel, in the north-west of the city, and the plan was to move south and west across the city. We have been doing that for the past five years but we have covered only six or seven wards to date. Where resources are available we will do that work, but the process is mainly reactive.

Robert Brown: It is a complex and perhaps doubtful process, particularly—dare one say it—given the propensity to lose bits of trams, which has been in the news recently. That is a low blow, is it not?

The Convener: I do not think that we seriously expect an answer to that. Let us move on.

Nigel Don (North East Scotland) (SNP): Good morning, gentlemen. I want to continue the questioning on the current subject, but I will change tack slightly. Before I do that, I want to establish something in my mind and in the committee's mind. In general, we would expect the common good nature of property to be attached to the land—if it is land, rather than a gold chain—rather than to the activity that goes on there. In other words, pace the comments about the market, the bit to which common good attaches is not generally the market but the many tracts of land that we are talking about. I am looking at Mr Ferguson to see whether he agrees with that general statement. Is that the case?

Andrew Ferguson: That is an interesting question, which I could probably take several hours to answer properly. In short, the common good nature of some land arises from its use from time immemorial. Most commonly, it is a town common, a common area or a park that has been used for a recreational purpose, which is what gives it its common good nature. Other common good properties such as buildings—town halls and so on—have been dedicated to a public purpose, which is what gives them their common good nature. The third major category is where the title deeds specifically say that something is going to the common good. The common good nature of assets is a mixture of usage and dedication to a specific public purpose. Whether that means that something stops being common good if that usage stops is an interesting question, but I am not sure that I know the full answer to it.

Nigel Don: Thank you. That has clarified in my mind that the issue is even more complicated than I thought it was when I came here this morning. It has got worse over the past couple of weeks.

On the basis of that comment, do you feel that, as a matter of policy—let us ignore the specifics—it would be sensible to include in the bill an exemption for common good properties?

Andy Young: Despite the fact that only a small number of properties would be covered by it, Glasgow City Council would seek an exemption for common good properties. As Andrew Ferguson said, most of the properties are common good by usage; I am thinking mainly of parks, but also of public buildings. We would not want to see the alienation of that land by reference to a lease that was generated hundreds of years ago, although, in our case, the leases were generated in the 1960s. It would be fairer on the general population to retain those properties within the public domain and the public authority.

Nigel Don: Does everybody share that view?

Bill Miller: The City of Edinburgh Council agrees.

Andrew Ferguson: It is clear from the policy memorandum what the bill is meant to attack. You heard from Mr Wightman that there can be many different reasons why common good properties were given out in lease, and I think that we are agreed that a common good exemption makes sense in that context.

Nigel Don: On the basis that you all seem to be agreed on that, does anybody have any concerns about the human rights aspect, in the sense that an exemption would seem to give councils an advantage over other landowners? Does anyone who wears a legal hat worry about that sort of thing?

The Convener: If you are inhibited from saying, you can just make the point that you would prefer not to answer the question.

Nigel Don: I get the impression, convener, that the witnesses do not want to answer.

Richard Brown: Whether exemption would impact on human rights is an area of law that is certainly outwith my specialism. I would not like to comment on the human rights legislation.

Iain Strachan: To be honest, I have not specifically considered any European convention on human rights implications. I look at the matter from a local authority perspective, in terms of trying to protect the assets of the residents of the city of Edinburgh. Equally, we would not want to find ourselves in a position where there were such issues. I have to confess that it is not an area of law that I know a great deal about, so I cannot really comment.

Nigel Don: That comes as no great surprise. I will extend the question. If we were to make that exemption—let us not worry about the human rights issues—would it mean that, in every case, a council would have to assert that a piece of land was common good in order for an ultra-long lease not to convert? Are you comfortable that you would end up having to take to the court any ultra-long leases that you or tenants found and say that the land is common good land, which would be the implication in making the exemption?

Iain Strachan: In Edinburgh—even if the Waverley market is part of the common good—our assessment is that the bill would affect only two leases, so I would have thought that that is probably reasonable. It does not sound as if the process would be overly onerous for us. There are cost implications, but equally, I guess, we are the guardians of the common good. That is just my personal view.

Nigel Don: Right. There is, however, another side to the issue. When you want to alienate land, the moment a citizen says, “This is common good land”, you will have to go to court to prove that it is not common good before you can go through the alienation.

Iain Strachan: Are you talking about the law as it stands?

Nigel Don: No. Well—you are right; I might be talking about the current law.

However, the point is that, if we include a specific exemption in the bill, we will end up in a position where, if somebody comes along and says that land is common good land, you will have to demonstrate and prove in court that it is not common good before you can alienate it.

Iain Strachan: Yes—but that relates only to long leases in which the tenant's interest might be converted into ownership, so there is an appointed day on which such leases automatically convert unless the tenant exercises the right to say otherwise. Once the act is in force and we know what it requires, we will double check our estate and say, "Right, here are the leases that might be affected. We think that that one is common good and we want to do something about it." By the sound of it, that is not going to be overly onerous for us. We will have to be willing to bear the cost, but I think that we are saying that we will be comfortable with the situation on the basis that there will not be an overly onerous effect on us because we will be talking about few, if any, properties.

Nigel Don: Thank you.

James Kelly (Glasgow Rutherglen) (Lab): When it looked at the conversion of ultra-long leases, the Scottish Law Commission felt that there should not be any exemptions for commercial leases, but the bill has taken a different view, in that any ultra-long lease that involves an annual rent of more than £100 will be exempt. What is the panel's view on the opposing positions of the SLC and the bill in that regard?

Iain Strachan: I suppose that there are two elements in that. As we mention in our submission, if we wish to exclude commercial leases—which I understand was the reason behind the inclusion in the bill of the £100 limit—we must honestly recognise that in a number of property transactions, when a landlord grants a long lease they are, in essence, selling or getting rid of their interest. Landlords choose to do it that way because they want the benefits of the law of landlord and tenant and the protections or rights that it provides, which title conditions might not provide.

If, for financial or commercial reasons, the landlord wants a capital receipt up front, they might take a payment—a premium or grassum—up front rather than over the lifetime of the lease and take just a nominal rent for the rest of the lease. In doing so, they will, because of their desire to have the money immediately, probably take a smaller sum than if they had taken an appropriate commercial rent over the lifetime of the lease. Therefore, it seems to me that if an exemption for commercial leases is sought, we should—just to ensure that the full picture is caught—bear in mind situations in which a grassum has been taken up front, as well as those in which a rent of, for example, £1,000 a year is charged.

As far as an exemption for commercial leases in general is concerned, there are, as I say, often good reasons for interests in properties to be disposed of by granting a long lease rather than by disponing the heritable title. Such reasons are to do with the benefits of the law of landlord and tenant. If parties have taken a commercial decision to proceed down that route, that should be recognised and, when certain criteria—such as on level of rent—are met, such leases should be exempted.

James Kelly: Mr Brown, do you want to comment?

Richard Brown: I agree with Iain Strachan's comments. In a number of cases, the use of a long lease can be beneficial to both parties. When such a lease is entered into by a willing landlord and a willing tenant, a commercial agreement is struck between the parties, sometimes to allow a specific use or to enable specific development to take place. Under the bill's provisions, long leases that are of more than 175 years, but which involve a passing rent of more than £100 per annum, will be exempted.

Mr Strachan's point was well made. On a number of occasions, such leases are set up on the basis of an up-front grassum, which is, in effect, a capitalisation of a rental stream. The up-front capital receipt is often lower than the amount that would have been received had rent been taken on a commercial basis, but that might be because the tenant did not want to pay a continuing rental stream or because it was beneficial for the landlord to take a capital receipt at that point.

As far as the exemption for commercial leases is concerned, I would certainly like account to be taken of situations in which an up-front grassum is paid and for it to be possible for that to be treated as being greater than the annual payment. We have one lease in Glasgow that is affected by that, where we took an up-front grassum payment, but the on-going payment is £1 per annum. That was the provision that both parties agreed at the start of the process, which predates the cap of 175 years on leases of this nature.

10:45

James Kelly: You both quoted examples from your council areas. One of the examples that was drawn to our attention in evidence from Brodies LLP was that a number of recent commercial leases would fall within the terms of conversion in the bill. That is because there is a variable rent, which is not caught by the bill. Brodies and others have said that that is not appropriate. Do you agree?

Richard Brown: That is a similar point to one that we have both made. The only difference is that the Brodies case was the example of a passing rent of £1 with an equity share in terms of

tenant income. That is just another way of approaching a long-term commercial lease: the terms can be varied to suit both parties. Whether it is an up-front grassum with a low passing rent or a low passing rent with a continued equity share of the profit of the businesses of the tenant or tenants, I would certainly ask the Justice Committee to consider that as an exemption, because it could have an impact on future commercial transactions.

Iain Strachan: I agree. I took from a previous evidence session that it was recognised that the drafting in the bill as introduced could do with a bit of tweaking to take account of some of the practical issues that Brodies raised.

The Convener: The final question, which is from Cathie Craigie, is exclusively for the City of Edinburgh Council.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Richard Brown and Iain Strachan have addressed some of the points that I wanted to put. However, last week we heard evidence from representatives of the legal profession that it is normal to pay money up front to acquire a tenant's interest in a long lease. What we have been discussing is exactly the same; these are exactly the type of leases that the bill is designed to cover. There is a difference of opinion there. Perhaps the lawyers are representing the other side, rather than the public side. I do not know whether you had an opportunity to read last week's evidence.

Iain Strachan: I saw the comments and I appreciate that Professor Gretton said that the Scottish Law Commission feels that the bill should apply to all leases and there should not be any carve-out of commercial leases, just as the Title Conditions (Scotland) Act 2003 and the Abolition of Feudal Tenure etc (Scotland) Act 2000 did not seek to distinguish between commercial and non-commercial situations.

I do not profess to know anything like as much as George Gretton but, ultimately, if properly advised commercial entities have chosen for good reason to enter into a lease, I question whether that should be changed. In the late 1990s, for a lease of 250 years, landlords could have taken a grassum up front because they sought to have their commercial relationship regulated by the law of landlord and tenant. I recognise that there are rights in the bill for compensation and so on, and certain conditions could become title conditions. For me as a commercial lawyer, perhaps the parties' intentions should just be recognised and left alone. That is all that I would say.

Equally, I recognise that if you are going to introduce a law, why not just introduce it across the board? That has merit. I guess that it is a policy decision.

Cathie Craigie: The City of Edinburgh Council's submission states:

> "There will often be good reason why such properties have been leased and not disponed, particularly if they are valuable, and the parties' decision to deal with the property in that manner should be protected."

Most of us sitting around this table are not lawyers, and the bill is quite technical and difficult to understand. Will you expand on what type of properties and deals we are talking about?

Iain Strachan: A traditional example might be a situation in which we have given someone a development ground lease, let them an area of land and taken a grassum up front, and are going to take a share of the rental income. We would probably try to control what the site is used for or the manner in which it is to be developed, because of the site's location or our interest in it. We would have the reversionary landlord's interest because, ultimately, we feel that it should come back to the city, whether in 200 years or some other time.

Title conditions—which are not really a matter for this discussion, obviously—can be extremely difficult to enforce. Often, a lease gives parties more certainty about what their rights are and what they can and cannot do. Leases generally have rights of irritancy or termination, which can be used by a landlord if a tenant does not comply with its terms. I add that such provision is often carved out of long leases.

To my mind, there are certain situations in which it is useful for long leases or the leasehold structure to be used. As Richard Brown said, there are recent commercial cases in which long leases have been used because it was felt that that structure was the most appropriate. Is there not a reason for that to be recognised? If we are going to carve out commercial leases by the £100 rule, perhaps we should think about the other way in which commercial leases can be set up, which involves, for example, a grassum up front, as opposed to a rent through the lifetime of the lease.

Richard Brown: I agree with what has been said—a lease offers more control. One of the other things to remember is that the length of commercial leases is sometimes dictated by the tenant, in effect. The landlord might wish to grant a shorter long lease but, when the tenant seeks to raise funding, a lending institution insists on a longer term. That is why leases that could have been shorter are extended, for example, from 99 years to 125 or 175 years.

It is important to note that, with commercial leases, the landlord and the tenant have a host of advisers, and that there is an open decision that is taken on the part of both parties, who are aware of what they are getting into. In many cases, the landlord wishes to retain control, through the

landlord and tenant legislation. More important, they wish to be assured that the asset will come back to them at some point in the future. Within some commercial long leases, there will be provisions to the effect that, if the original scheme that was developed is to be extended or changed, there could be a financial uplift for the landlord. By that method, the landlord ensures that, as the development progresses or changes, it protects its position and receives the resultant financial benefit.

Cathie Craigie: At the end of 2010, the Government asked all Scottish local authorities to identify all the ultra-long leases that they had and to respond before the end of January 2011—it was to do with work on common good funds. Have the councils of Glasgow, Edinburgh and Fife responded?

Iain Strachan: The City of Edinburgh Council has responded. As my colleague said, the only area of common good land that we felt would be affected by the bill was an area of ground up by the High Street.

Richard Brown: I would have to double check, but nothing came to me. Glasgow City Council operates a slightly different model, in that it has an arm's-length property company of which I am the managing director, so I am not sure whether the issue has been passed to the council or whether the council has responded directly. I will check up on that.

Andrew Ferguson: Fife Council had three possible sites, of which two were shopping centres, which have the type of commercial lease that we have just been talking about.

Robert Brown: Putting aside common good issues, I want to find out whether, from the councils' point of view, the idea of getting the land or property back at the end of hundreds of years of lease is important. Bearing in mind that that is a pretty limited right, how significant is it to keep property in the public domain? The underlying purpose of the bill is to stop that sort of thing happening and to allow compensation for the property. Is that a significant issue for councils?

Andy Young: For Glasgow City Council, the issue is more about the perception that such assets remain in the control of the council and, in effect, the public, than it is about the reality. That is more where we are coming from, rather than from the aspiration that in 250-odd years we will get the asset back. By definition, getting the asset back is part of the overall control, if that is not too much of a circular argument.

Robert Brown: So, there is not really a substantial benefit, although there are perceived benefits.

Andy Young: Local authorities in some form or other have been here for an awful long time. The authority will get assets back eventually. We have only one commercial long lease, but it is in a very prominent site, so from that focused perspective, the council wishes to control that asset and anticipates its coming back. However, as a general rule, I guess that considering what will happen in 250 or 500 years is about perception rather than expectation, shall we say.

Robert Brown: That is helpful.

The Convener: Gentlemen, we have had a helpful evidence session. The committee is most grateful for your attendance—thank you very much indeed.

10:57

Meeting suspended.

10:59

On resuming—

The Convener: I welcome Professor Robert Rennie, professor of conveyancing at the University of Glasgow. He is sitting in splendid isolation, but that makes him particularly welcome. We will go straight to questioning, which will be opened by Dave Thompson.

Dave Thompson (Highlands and Islands) (SNP): The Scottish Law Commission's survey in 2000 revealed that most long leases were granted for periods of less than 125 years or more than 999 years. The duration of a qualifying lease in the bill is 175 years, which ties in with the approach in the Abolition of Feudal Tenure etc (Scotland) Act 2000. Our witnesses at last week's meeting seemed to be content with 175 years, on the basis of consistency, although Professor Gretton said that, on reflection, he thought that he might have been happier with a qualifying duration of 225 years. What is your view on that?

Professor Robert Rennie (University of Glasgow): I would stick with 175 years, for reasons of consistency. There is little difference between the approaches. I cannot imagine that a change to 225 years would involve many leases that would not otherwise be involved.

Robert Brown: On a more esoteric subject, under section 1(4)(b), leases that are

"operating for the sole purpose of allowing access (including work) to pipes or cables"

will be exempt from the bill. It has been suggested that the provision does not go far enough, because it covers only leases that are granted for the purpose of access and not leases of the underground areas through which pipes and cables run. Is that an issue, or is it a notional

matter about which we should not bother ourselves?

Professor Rennie: I suspect that it is a notional point. In general, we are talking about wayleave agreements with statutory undertakers, which do not normally lease the land through which the pipes run. There is a complicated legal argument about who owns pipes and whether pipes that run through land accede to the land's ownership or remain in the ownership of whoever controls them. I think that that is why there is lease of access to pipes rather than lease of the ground itself, which would suggest that the undertaker did not own the pipes. I am happy with the provision as it is.

Robert Brown: It does not cause a problem with leaving the pipes where they are. No one can take them away, for reasons of land ownership rights.

Professor Rennie: No.

Robert Brown: Professor Gretton thought that section 1(4)(b) is potentially problematic, because it will exempt a type of lease that the law of Scotland does not recognise—that is, a non-exclusive right of possession of another person's land in relation to pipes and cables. What is your view on that?

Professor Rennie: That is a very technical, academic argument. The provision probably reflects how wayleave agreements have been set up in the past. Professor Gretton was right to say that we do not recognise lease of access as such; we recognise leases of land. However, in commercial leases, we find leased rights of access, which pertain to the main body of the lease. I think that the point is an academic rather than a practical one.

Nigel Don: During the past few weeks I have been bemused by wayleaves and the idea that a lease for access might not exist. You said that that is an academic issue, but I have a great deal of respect for academic issues, because they might ultimately matter. Should we be worried about that area of law? I am talking in general; I am not suggesting that we suddenly amend the bill. Is the law on subterranean leases sufficiently confused that we should be worried about it, or is it just an area in which it does not matter that darkness reigns?

Professor Rennie: Some of the agreements are called wayleaves—that is an English term; the Scottish term is servitude. In the Title Conditions (Scotland) Act 2003, special provision was made for servitudes of the nature that we are discussing, because there had been doubt about whether there could be a servitude for an overhanging cable, for example—the 2003 act clarified that there can be such a servitude right. I would have thought that a wayleave agreement was more common than a lease of an access right—I have not seen such a lease.

Nigel Don: Coming back to the basic point, should we be worried about this area of law or would it not be wise even for Parliament to go there?

Professor Rennie: I do not think that it is such a big issue that it warrants in-depth research by the Scottish Law Commission or anyone else.

Robert Brown: It has been suggested that, instead of dealing with this through exemptions, leases could be converted into servitudes. However, according to the Scottish Law Agents Society, the difficulty with that proposal is that there is no benefited land to which the right to enforce the servitude can attach. Is that a problem or does the proposal constitute a possible solution? Does wayleave, which is an expression in English law, have any definite legal standing in Scots law that would cover the matter?

Professor Rennie: Scots law does not recognise servitudes in gross—in other words, a servitude for the benefit of everyone—while English law recognises easements in gross, "easement" being the English term for a servitude. In Scots law, you have to have a benefited property and a servient or burdened property. That can lead to problems with laying pipelines, although the law has coped in that respect. For example, I have done a number of opinions for Scottish Water in cases in which a pipeline starts at a certain point and runs through various properties and the question that arises is what the benefited property is for Scottish Water—after all, it might not be this, that or the other house but a reservoir 100 miles away. Generally speaking, though, you can identify in agreements a benefited property somewhere. It is possible to convert leases into servitudes as long as a benefited property exists, but it must be identified—and that is not always easy.

Robert Brown: Would it be sensible, then, simply to tweak what is meant by a servitude or are such matters best dealt with through exemptions?

Professor Rennie: I suspect that exemption is probably the best approach. It is all very well putting things in bills saying, "This or that will be a servitude," but, at the end of the day, you will still be stuck with your own definition of a servitude. Anything that you put in the bill will have to fit in with existing definitions or you will have to alter the law of servitude.

Robert Brown: If some new technology became available and I wanted, for example, to add to current cables to take a bigger load or to widen a pipe, would that cause problems in practice and how would they be determined?

Could I widen a pipe under my existing rights or would I have to go back to the landlord and say, "Look, I need to widen the pipe. Can we get a new agreement? Obviously, I'll give you more money"?

Professor Rennie: It would very much depend on the agreement. In general, though, these are standard agreements and will, for example, state what is known as a working width. In most cases, they will allow access for improvements, repairs, widening and so on to be carried out, provided, of course, that you do not go outwith the width of the servitude or wayleave area.

Robert Brown: With regard to the original point, is there any need to widen the exemption in section 1(4)(b) to deal with any issues arising from pipes, cables and so on?

Professor Rennie: I do not think so.

Robert Brown: Do you have any views on the Scottish Rural Property and Business Association's suggestion that the scope of the exemption be extended to cover ultra-long leases granting non-exclusive rights of access along private roads?

Professor Rennie: In general, I am against having too many exclusions and exceptions in the bill. The bill has been well thought out over a number of years and the mischief that it is trying to solve is the use of long leases, which, although not as prevalent in Scotland as they have been in England, have nevertheless caused considerable difficulty.

James Kelly: I turn to the issue of commercial leases. You will be aware that the Scottish Law Commission took the view that there should be no exemptions in relation to conversion. The Government has taken a different view; section 1(4) provides that ultra-long leases with an annual rent greater than £100 should be exempt. What is your view on the opposing positions that the Scottish Law Commission and the Government have taken?

Professor Rennie: I agree with the Scottish Law Commission. In addition, a cut-off point of £100 is far too low. Generally, commercial leases of this type begin with a grassum—a lump-sum payment—that reflects the capital value of the land. Many long leases were granted at a time when local authorities were unable to sell without getting consent from the secretary of state, so they opted for a sale by another means by granting a long lease, taking the money up front and charging a nominal rent. One hundred pounds per annum is by no stretch of the imagination a commercial-type rent for a commercial property. I am against any exemptions, but I think that it is crazy to have an exemption level as low as £100.

James Kelly: You have made your position clear. You said that, generally, you are opposed to any exemptions and mentioned the specific example of cases in which grassum or premium payments have been made up front, with a lower rent being fixed. The City of Edinburgh Council has expressed concern about that issue. Do you have any sympathy for its position?

Professor Rennie: The leases were agreed on commercial terms at the start. If a grassum was paid, it will have been set at capital value. If the rent after that is nominal—I regard £100 per annum as nominal—I see no reason why the lease should be exempt from the provisions of the bill.

James Kelly: Do you take a similar position on the example that Brodies has cited to us? It believes that some recent acquisitions in which a variable rent was used would be excluded from the exemption. Do you think that any of the points that Brodies makes are valid?

Professor Rennie: I would need to look at the lease that Brodies is talking about. We cannot pass bills that cater for each lease that happens to be in a particular area or town. If the bill catches something, it catches it. I would need to be convinced that there was an enormous problem across the commercial leasing sector. There is no evidence of that.

The Convener: I would like to draw you a little on that point. If I may paraphrase your evidence, you are clearly of the view that £100 is a pretty derisory figure. Would you like to suggest an amount that might be appropriate?

Professor Rennie: I am against any exclusions from the provisions of the bill.

The Convener: If we do not go down that road, what figure do you suggest?

Professor Rennie: I am not sure that it is right to set a figure. You might want to have a formula, with rent set at X per cent of capital value at the time. Of course, that would mean adding to the bill another schedule and a lot of words to specify that A equals this and B equals that and is divided by C. I am not convinced that there is a wide problem right across the commercial market.

11:15

The Convener: It could be a recipe for difficulty.

Cathie Craigie: That is why £100 is perhaps the right figure, rather than A multiplied by B and so on.

If a local authority agrees to a sum—a grassum—based on the commercial going rate and if it sets a nominal annual rent to keep an interest in the site, whether it is a building or just a piece of ground, is it not reasonable for the local

authority to be able to hold on to that site, in the public interest?

Professor Rennie: I suppose that I am looking at it in more commercial terms. I am saying that the local authority got its money—it got its grassum up front. That sum was equivalent to the price. Therefore, why should it be exempt from a technical piece of legislation that does no more than give the land to the people who paid the value for it at the start? You are asking about the public interest. I am not convinced that such leases were granted for that reason—I think that they were granted because of technical difficulties, with local authorities not being able to sell at the time.

Robert Brown: I am struggling to understand the logic of the argument. There seem to be ancient or long-standing leases for which there is a nominal rental. As we understand it, there are also more modern commercial leases for which, as well as a grassum at the beginning, there is a substantial on-going rental, perhaps with a variable element. I cannot quite see what the mischief is that needs to override the freely arrived-at contract between the parties in the case of such valuable commercial leases that have been set up in a relatively modern arrangement.

Professor Rennie: Would those be leases over 175 years?

Robert Brown: We understand from evidence that some of them have been.

Professor Rennie: I would want to know how many leases fall within that category and have not been coupled with a capital grassum price at the start that reflected the value of the asset. In the case of a long lease over 175 years with 100 years still to run, in circumstances where the rent was commercial—albeit that that would be unusual—there is the question whether a tenant would want to convert their lease or to apply the exemption and contract out because of the enormous capital sum that might have to be paid under the compensation provisions.

Robert Brown: That is an option.

Professor Rennie: That is the other side of that coin.

The Convener: Section 69 makes special provision for the situation that could arise where a renewable lease such as a Blairgowrie lease is not renewed, even though the lease contained a provision with a requirement for it to be renewed annually. Is section 69 unfair to landlords, or is it an appropriate protection for tenants under those leases?

Professor Rennie: I can see an argument from landlords saying that it is unfair. Blairgowrie leases are very much out on their own. I have seen a number of them. They run on 99-year cycles, and the wording is different in different leases—they are not all the same. Some of them will suggest that the lease is automatically renewed; others specifically state that the tenant has to give notice of renewal before the expiry of the lease, but they do not say what will happen if the tenant does not give notice.

Over the years, the identity of landlords changes. In fairness, the terms of Blairgowrie leases were not strictly enforced, and landlords granted renewals irrespective of whether the tenants had given the appropriate notice. I can see an argument that it might be unfair to deprive the landlord of the right to terminate the lease. On the other hand, I can also see an argument that, in practice, that is not the attitude that landlords have taken up to now, so there would be an element of taking advantage. In general, I favour the provision.

The Convener: Thank you. That is fairly straightforward.

Bill Butler: Good morning, professor. Do you think that giving landlords the opportunity to preserve sporting rights as a separate tenement, as is provided for under section 7, is a desirable policy and workable in practice?

Professor Rennie: I had this argument during the abolition of feudal tenure. There was a similar right for a former feudal superior to reserve the sporting rights that had pertained to the superiority title. I argued that, because it was recognised that sporting rights were not a separately owned entity, they could not be a separate tenement. I lost that argument and, under the Abolition of Feudal Tenure etc (Scotland) Act 2000, we have an anomalous notion of sporting rights as a separate tenement. I am using the word “tenement” in the old-fashioned sense of a landed interest, not a tenement in the Edinburgh sense of the word. You must accept that, if we have a separate tenement under the Abolition of Feudal Tenure etc (Scotland) Act 2000 that allows former feudal superiors to reserve sporting rights, we must have a similar right in the Long Leases (Scotland) Bill, which mirrors the 2000 act in a lot of respects. I am, therefore, satisfied with that provision.

Bill Butler: Thank you. As someone who was brought up in a tenement in Maryhill, I am grateful for the definition. I never saw myself as somebody with a landed interest.

The Convener: The thought had not occurred to me, either.

Let us turn to the aspects of the European convention on human rights that the bill may impinge on under a number of headings, such as the qualifying criteria for ultra-long leases, the compensation scheme for landlords, the possibility

of the preservation of landlords' sporting rights and the special treatment of Blairgowrie leases, which we have just dealt with. Is the bill ECHR compliant? Do you want to comment on any aspect of the bill in that respect?

Professor Rennie: In my view, the bill is ECHR compliant—it is Strasbourg-proof. This type of bill is not uncommon in European jurisdictions. Indeed, there have already been challenges to legislation of a similar type in Austria and in England. As you will probably know, the leasehold system of tenure is far more developed in England than here, largely because Edward I abolished feudal subinfeudation in about 1292 because the barons were too powerful by virtue of their own subfeus. In England and Wales, leasehold title proliferated as a means of controlling land whereas, up here, we controlled land through the feudal system.

In England, the passing of the Leasehold Reform Act 1967 allowed tenants to buy out their leases, which caused a great furore in Mayfair and Belgravia, where all the freeholds were owned by the Duke of Westminster, whose family motto was "Never sell a freehold". The United Kingdom was taken to the European Court of Human Rights on the basis that the act was a breach of article 1 of protocol 1 of the convention, which concerns the property human right. The United Kingdom won on the basis that a legislature retains in the general public interest the right to do things in the public interest, even if that means interfering with a private contract. The same happened in the case of Mellacher v Austria, after Austria had changed the rent rules, which in effect reduced commercially agreed rents that were known to be at the proper market value at the time. Therefore, such legislation is not in my view likely to suffer challenge. There were no challenges when the Abolition of Feudal Tenure etc (Scotland) Bill was passed.

Cathie Craigie: As I am sure you are aware, the Scottish Law Commission and the Scottish Government considered whether there should be a separate conversion scheme for the remaining residential ground leases that do not fall into the conversion scheme. The SLC and the Government concluded that they would not pursue the issue any further or include such a measure in the bill. Do you have a view on whether it is desirable to give protection to tenants under residential ground leases that do not qualify under the conversion scheme?

Professor Rennie: No.

Cathie Craigie: That was a quick answer.

The Convener: You cannot be clearer than that.

We have one final question, from Nigel Don.

Nigel Don: Professor Rennie, I draw your attention to the written submission from Peterhead Port Authority, which I hope you have seen and which makes the point that part of the south breakwater at the port is leased on a very long term for a nominal—and probably not collected—rent. The authority says that the principal purpose of the breakwater is weather protection, which is necessary for the operation of the port. It states that the lease is not one

"in relation to which the lease conditions and other relevant obligations could properly be converted to real burdens."

Do you believe that that might be the case? If so, is that an exception that we should consider? I heard your comments about general exceptions, but that issue might be an individual exception.

Professor Rennie: I have not seen the lease, so one is taking at face value the comment that none of the conditions in the lease can be converted. There is provision in the bill for the conversion of leasehold conditions into real burdens where the landlord has adjoining interests in the land to protect. Is Peterhead Port Authority saying that it does not have in its ownership any surrounding land to which it could reallot the enforcement rights? That seems odd to me.

Nigel Don: It seems odd, but I simply quoted the submission. You challenge the assertion on proximity grounds.

Professor Rennie: Yes. If the port authority owns one bit and has leased another bit and it wants to control the activity in that second bit to which the leasehold conditions apply, it will reallot those and say, "We will now enforce those conditions as real burdens, and this is the benefited property." That has happened with feudal tenure. The submission states simply that the conditions are not appropriate for conversion, so I would certainly want to delve into that. I mean no harm to Peterhead, but the problem seems to arise only in Peterhead and nowhere else, and we do not in my view legislate for one-off things. If we did, we would get into having a schedule of exempt bodies, which could be port authorities, local authorities, the Scottish ministers, conservation bodies and so on. Where would we stop?

The Convener: As there are no more questions, I thank Professor Rennie for attending and for providing his evidence in an understandable and frequently amusing form. That was very much appreciated.

11:29

Meeting suspended.

11:36

On resuming—

Damages (Scotland) Bill: Stage 2

The Convener: We turn to item 3, which is the Damages (Scotland) Bill. Today is the only planned day of stage 2 proceedings of the bill, and there are 17 amendments in six groups.

I welcome Bill Butler MSP, who has moved from his usual position as the deputy convener and my right-hand man to take another seat, as he is now attending the meeting in his capacity as the member in charge of the bill. I welcome Claire Baker MSP, who is substituting for Bill Butler as a member of the committee for this item only. I also welcome Maureen Watt MSP, who is substituting for Stewart Maxwell, who is unwell. Finally, I welcome the Minister for Community Safety, Fergus Ewing MSP. Mr Ewing is accompanied by Scottish Government officials and Mr Butler is accompanied by representatives of Thompsons Solicitors, who have no locus to speak during the proceedings but are welcome nonetheless. We do not expect any other MSPs to attend.

Members should have their copy of the bill, the marshalled list and the groupings of amendments for consideration. We will proceed to go through the various amendments seriatim.

Before section 1

The Convener: Group 1 is on the principle to apply to an award of damages. Amendment 14, in the name of Robert Brown, is the only amendment in the group.

Robert Brown: I congratulate Bill Butler on his persistence in taking forward the bill and his co-operation with other members of the committee in doing so.

Amendment 14 is not intended to do much more than to state a principle. A number of provisions in the bill define how damages are to be calculated and move things along a bit, but it is important to show that our aim in dealing with damages more quickly and more efficiently is to achieve the basic principle of restoring victims to the position that they were in—as far as money can do that—before the accident, incident or wrongful act occurred. I am interested to hear Mr Butler's view and the minister's view on whether it would help to state at the start of the bill that that principle continues to be the law.

Against that background, I move amendment 14.

The Convener: I will make a brief comment in passing. The thought process behind the amendment is praiseworthy, but I would have thought that what it seeks could be regarded as inherent in the bill. However, I will listen to the arguments.

James Kelly: My view is similar to yours, convener. I do not necessarily disagree with Robert Brown, but I am not persuaded of the need for the amendment, because the principle that it outlines is covered more specifically throughout the bill.

The Minister for Community Safety (Fergus Ewing): First of all, I should say that, following my undertaking to Parliament in the stage 1 debate on the bill, I have had extremely helpful discussions with Mr Butler about today's business and most of the amendments that are before us.

On amendment 14, in the name of Mr Brown, I see the attraction of restating what we all agree is the basic principle of the law of delict. If the committee will indulge me, I point out that the formulation appears to have its origins in Lord Blackburn's judgment in the case of Livingstone v Rawyards Coal Company in 1880, which refers to

"that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

Although that general statement of principle appears to have stood the test of time, I do not think that this bill is the place for setting out general principles for the law of delict as a whole, given that it deals with only a tiny proportion of personal injury claims.

This will be the fourth time that the Scottish Parliament has amended the law on damages, the previous occasions being the Family Law (Scotland) Act 2006, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 and the Damages (Asbestos-related Conditions) (Scotland) Act 2009. Each of those acts deals with a small area of the law of damages and none of them—indeed, not even those introduced when Mr Brown was Deputy Minister for Education and Young People—includes any generic statements of principles such as that suggested in the amendment. The central thrust of the bill is to move away from calculating actual damages towards a fixed formula. There are good reasons for such a move but, of course, it departs from the principles set out in the amendment and, as with most statements of general principle, there are already important exceptions that have been developed through the common law, including the body of law relating to the duty on those who have suffered injury to mitigate their own loss and to the remoteness of damages.

To illustrate the point, I draw the committee's attention to section 10 of the Administration of

Justice Act 1982, which relates to payments to an injured person that are not to be taken into account in the quantification of damages. Paragraph (a) thereof applies to contractual pensions.

Let us take, for example, an employee who suffers an accident at work at the age of 55, as a result of which he is left unable to work again. But for his injury, he would have worked to the age of 60. However, as a result of his incapacity, his employers terminate his employment. Under the occupational pension scheme, he is immediately eligible for a pension that is paid at the rate of 30 per cent of his previous income. As a result of section 10 of the 1982 act, the pension has to be left out of account when damages are quantified. The injured man will therefore receive damages for loss of earnings equivalent to 100 per cent of his net income for five years, even though his actual loss is only 70 per cent of that figure.

I am not suggesting that Robert Brown's amendment is inconsistent with section 10 of the 1982 act—it seems likely that that section would prevail—but the fact that the proposed provision is made subject only to the ensuing provision of the bill, not to revisions of other acts or any established common-law exceptions to the general rule, seems to create the scope for unintended consequences, which is a possibility that cannot be excluded in the short time that is available.

For all those reasons, I ask the committee to reject amendment 14.

Bill Butler: I thank Robert Brown and the minister for their kind words and, indeed, thank Robert Brown for lodging amendment 14 and thereby giving us a chance to debate and discuss the principle.

The principle to which Robert Brown refers has been applied in common law by our courts for many years in decisions on how much should be awarded to the victim of a wrongful act. However, in its "Report on Damages for Wrongful Death", the Scottish Law Commission has recognised that damages for wrongful death have reached the point

"where the current law no longer reflects the realities, in particular the economic realities, of contemporary family structures in Scotland."

It said that

"the law has become anachronistic and ... over-complex"

and that legislation is needed to provide "greater clarity and accuracy".

We cannot put people in fatal cases back into the position in which they would have been had the wrongful act not occurred. However, the bill seeks to reform the present law and meet the commission's criticisms. Given that we are doing so not through common law but through an act of the Scottish Parliament, I do not think that it is helpful for the bill to refer to common-law principles.

I will spell out my concerns about the Government's amendment to section 7(1)(b) and about common law being given a place in the interpretation of the proposed legislation later in the proceedings.

Robert Brown's amendment 14 seems to be saying that although we are setting out what we now want the courts to do, they still have to have regard to the common law. The same danger therefore arises that the common law could be given a place in interpreting the bill by the back door. With respect, I do not think that Mr Brown's amendment adds anything to the bill and, although I know that it is not his intention, it could undermine how the bill is interpreted by the courts. Given that, I respectfully request that Robert Brown withdraws amendment 14. If he presses it, I ask committee members to vote against it.

11:45

Robert Brown: The discussion has been useful, and it has been particularly helpful to have the minister state on the record that the common-law principles will still underlie these matters. I am slightly bothered by some of Bill Butler's comments, because the common law will continue in existing law and practice to influence the way in which the law is applied and set the framework, subject to the changes that will be made by the bill. I do not altogether accept Bill Butler's comments.

However, I accept the potential for unintended consequences, and that it is not always helpful to set out principles. Against that background, I ask the committee to allow me to withdraw amendment 14, given the minister's statement about the way in which the matter will be approached more generally.

Amendment 14, by agreement, withdrawn.

Section 1—Damages to injured person whose expectation of life is diminished

The Convener: Amendment 1, in the name of the minister, is grouped with amendment 7.

Fergus Ewing: The committee's stage 1 report concluded:

"If a rebuttable presumption could be drafted in such a way that it provides flexibility only when it is needed, without undermining the benefits of a fixed deduction in the majority of cases, it might still offer the best way forward."

Amendments 1 and 7 introduce general flexibility to depart from the fixed formula, but they require a very high test to be reached. The case

cannot just be a special case; it must be a truly exceptional case in which the application of the standard formula would lead to manifest and material unfairness. Under that approach, the result of applying the standard percentage would have to be manifestly unfair. In other words, it would have to be evidently and obviously unfair.

The concept of manifest unfairness is already familiar to the courts in the context of the test that must be applied to an appeal before an appeal court will interfere with the discretionary decision that was taken by the judge at first instance. In that context, it is taken to mean that the hurdle that is to be overcome by an appellant is a high one, and the appeal court will not interfere simply because it would have arrived at a different decision on the same facts.

The result of applying the standard percentage would also have to be materially unfair. The degree of unfairness, therefore, must be material. It is implicit that the fact that a defender might end up paying a bit more in damages to relatives than the actual amount of support does not necessarily justify a departure from the standard percentage.

Finally, the court can substitute a different percentage only if it is satisfied that it is necessary to do so to avoid

"a manifestly and materially unfair result".

Amendment 1 will introduce that test in section 1, in the context of claims that are brought by victims of injury or disease whose expectation of life has been diminished. Amendment 7 will have the corresponding effect to amendment 1 in relation to claims that are brought by relatives for loss of the financial support that would have been provided by the deceased. It will therefore allow the court to substitute a different percentage from that which is specified in section 7(1)(a)—[*Interruption*.]—but only if it is satisfied that it is necessary to do so to avoid

"a manifestly and materially unfair result".

I move amendment 1.

The Convener: I think that someone has a mobile phone switched on. Please check that all phones are switched off.

Bill Butler: In supporting the minister's amendments 1 and 7, I state for the record that I have accepted the need for a workable compromise on this important matter. I have accepted the committee's advice, as outlined at paragraph 107 of its stage 1 report, that

"putting the 25% deduction"

for the victim's living expenses

"into statute, but as a rebuttable presumption ... may be the only way of allowing the courts enough flexibility to deal fairly with the genuinely unusual case. If a rebuttable presumption could be drafted in such a way that it provides flexibility only when it is needed, without undermining the benefits of a fixed deduction in the majority of cases, it might still offer the best way forward. The Committee therefore urges Mr Butler and the Scottish Government to engage constructively in consideration of this question."

We have engaged so constructively that one would think that my note is almost the same as the minister's, but there has been no collusion in that regard, although there has been co-operation. Our constructive engagement began after the stage 1 debate on 15 December, and productive discussions have taken place over a number of meetings.

To be frank, I am still apprehensive about proceeding in the fashion proposed by the committee, but I have accepted the committee's main concern that everything possible must be done with regard to "the genuinely unusual case" to avoid an inappropriate level of compensation.

I agree that the minister's amendment 1 places the onus on those who wish to challenge the normal 25 per cent deduction as "manifestly and materially unfair" to make the argument as to why their client's case is "genuinely unusual".

The minister will recall that we discussed an amendment that would set out a shortlist of specifically enumerated exceptions. On balance, I feel that the Government's approach is clearer and avoids the difficulties of setting down a list of exceptions in statute, which I will not go into, as members know about them.

On that basis, I urge members to support amendments 1 and 7—amendment 7 being the obverse, in that it refers to the loss of financial support and the 75 per cent figure.

Fergus Ewing: I am happy to rest on my opening remarks. I confirm that Mr Butler is correct: we have had positive and constructive engagement, following the committee's recommendation in its report that we do so. I am pleased that we have reached what appears to be the best approach and the most sensible outcome.

Amendment 1 agreed to.

Section 1, as amended, agreed to.

Sections 2 and 3 agreed to.

Section 4—Sums of damages payable to relatives

The Convener: Group 3 is on the rights of relatives and related definitions. Amendment 2, in the name of the minister, is grouped with amendments 4 and 8 to 11.

Fergus Ewing: Amendments 2, 4 and 8 to 11 relate to the rights of relatives to claim damages as a result of wrongful death. Currently, under the

Damages (Scotland) Act 1976, the categories of relatives in fatal claims who are entitled to claim damages for loss of financial support differ from the categories of those who are entitled to claim damages for grief, sorrow and loss of society. Damages for loss of financial support may be claimed by any relative as defined in the 1976 act, while damages for non-patrimonial loss may be claimed only by members of the deceased's immediate family.

Under the bill, the only relatives who are entitled to claim damages for either loss of support or non-patrimonial loss are those who are currently classed as the immediate family. The committee agreed in its stage 1 report with the majority of witnesses that that proposal would unfairly remove the existing right of certain relatives other than those who are defined as immediate family to claim for damages if they could show that they were supported by the victim. Amendments 2, 4 and 8 to 11 revert the position to that under the 1976 act.

I move amendment 2.

Bill Butler: Amendments 2, 4 and 8 to 11 will return the list of those who are entitled to claim compensation to the list that is contained in schedule 1 to the 1976 act. As members will recall, I agreed during the stage 1 debate to reconsider this matter. I agree that the list of those who are entitled to compensation has been drawn too narrowly. I refer specifically to the example of the nephew or niece, which many members brought up—I particularly recall Mr Maxwell bringing it up.

I also stated that I felt that enlarging the list of those who are entitled to claim so that it was very wide would, as some witnesses appeared to argue, be inappropriate. That concurs with the committee's view as expressed in paragraph 190 of its stage 1 report—I will not quote it entirely. Amendments 2, 4 and 8 to 11, which will return us to the list that is contained in the 1976 act, strike the right balance and the right chord. I ask members of the committee to support them.

The Convener: Mr Ewing, do you wish simply to adopt your previous arguments?

Fergus Ewing: I do, convener.

Amendment 2 agreed to.

The Convener: We come to group 4, which is on section 4(2)(b) awards: name and application to cases of mental disorder. Amendment 3, in the name of the minister, is grouped with amendments 5 and 12.

Fergus Ewing: Amendments 3, 5 and 12 relate to relatives' claims for non-patrimonial loss under section 4. Section 4(3)(a) provides that an award of damages under section 4(2)(b) is to be known as a "grief and companionship award". At stage 1, the committee concluded that it was preferable not to fix a name for the award in statute, given the doubts expressed by witnesses and the clear lack of consensus about the proposed name of the award.

Section 4(3)(b) provides that an award of damages under section 4(2)(b) is not to be made in respect of any mental disorder suffered by a relative in consequence of the death of the deceased. The committee considered the proposed exclusion of mental disorder at stage 1. It concluded that it would not be appropriate for the Parliament to make a decision on whether mental disorder should be excluded as there is currently conflicting case law on this point, as well as conflicting opinion among stakeholders.

The Scottish Government plans to carry out a consultation exercise on the broad area of damages for psychiatric injury, therefore any determination might be more appropriately left to a decision of the inner house or the outcome of the consultation. Amendment 3 therefore will delete section 4(3). Amendment 5 will delete section 4(5)—it is consequential on amendment 3. Amendment 12 will alter section 14(3) by substituting for "grief and companionship award" a reference to an award under section 4(2)(b). That is also consequential on amendment 3.

I move amendment 3.

Robert Brown: I support the general thrust of the amendments, particularly the change of name and the putting to one side of the mental health element.

On amendment 12, is it necessary to have such a reference at all? One would have thought that what was being talked about was manifest. Whatever our doubts about the name, references to awards under section 4(2)(b) do not altogether add clarity to obscurity, if I may say so. Might it have been better to delete section 14(3)?

The Convener: Mr Butler and the minister will both have an opportunity to deal with that aspect. I invite Mr Butler to answer Robert Brown's questions.

Bill Butler: I will try to do so, convener. All the amendments in the group are worthy of support. I think that I see where Robert Brown is coming from, but I do not share his concern. Amendment 12 ties in with amendment 3—I do not see it as a great deal more than a tidying-up amendment. The amendments do what the committee urged us to do by taking out the idea of a grief and companionship award, because it was not felt that that was the way to go. The committee stated in paragraph 123 of its stage 1 report that we should retain

"the established approach of not fixing a name in statute".

I agree that that is correct.

The deletion of references to "mental disorder" is appropriate. I do not think that anyone disagreed that the provisions in question were in danger of widening the scope of the bill, or that psychiatric damage and mental disorder are issues that deserve a separate bill and should not be tacked on to the Damages (Scotland) Bill.

Amendments 3, 5 and 12, in the name of the minister, address the concerns of the committee and witnesses on both issues. I urge members to support them.

12:00

The Convener: Minister, I invite you to wind up the debate and deal with Mr Brown's points—you might well adopt the arguments that Mr Butler advanced.

Fergus Ewing: I think that there is broad agreement that the description of an award that is made under section 4(2)(b) as a "grief and companionship award" is inappropriate, given the evidence that the committee received from a wide variety of sources. Mr Brown asked whether amendment 12, which would delete that phrase and replace it with

"an award under paragraph (b) of section 4(2)",

is necessary. We will consider the matter again, in case we have overlooked anything, but it appears to us that it is necessary to be clear what award we are talking about—that is, an award under section 4(2)(b)—for the purposes of interpretation of the statute and previous law. In other words, it is necessary for the sake of accuracy and clarity to have a clear statement of what the award is, and rather than give the award a descriptive title we would refer to it by its numerical reference in the statute. We think that the approach is necessary and sensible, but we will double check the matter before stage 3, and if other points occur to us we will write to the committee.

The Convener: That would be appropriate.

Amendment 3 agreed to.

Amendments 4 and 5 moved—[Fergus Ewing]—and agreed to.

Section 4, as amended, agreed to.

Sections 5 and 6 agreed to.

Section 7—Assessment of compensation for loss of support

The Convener: Amendment 6, in the name of the minister, is grouped with amendment 15.

Fergus Ewing: Excuse me for a second, convener. I think that my papers are in slightly the wrong order.

The Convener: We can suspend the meeting briefly—

Fergus Ewing: It is okay, convener. I have found the papers; they were incorrectly numbered.

Amendment 6 would remove the stipulation in section 7(1)(b) that, in the context of claims made by relatives for loss of support,

"a relative's income is to be disregarded".

Amendment 15, in Mr Butler's name, would reintroduce the requirement later in the section. I should point out that it would be nonsense to reject amendment 6 but support amendment 15, because that would mean that the requirement was included twice. However, drafting issues in amendment 15 are such that the amendment would not deliver what I understand to be its aim.

The Government agrees that a relative's income should be disregarded, except when that would lead to a manifestly and materially unfair result. In the limited circumstances that we are considering, a court should be able to have regard to a relative's income in determining the appropriate percentage to be substituted. That is what the bill will deliver if amendment 6 is agreed to and amendment 15 is disagreed to.

The issue is complex and I hope that the committee will bear with me while I give a detailed explanation.

Section 7(1)(b) appears to have been included in the bill to discontinue the use of what has become known as the Brown v Ferguson formula. Under that approach, the court looks at the combined net income of the deceased and the surviving spouse and determines what part of the combined total was spent on supporting the surviving spouse and children. The net income of the surviving spouse is deducted from the total to arrive at the level of financial support that the deceased provided to his family. That figure is then used as the multiplicand in the assessment of damages. The Government shares the view that that approach should be discontinued, but the bill will achieve that in the absence of section 7(1)(b). If amendment 6 is not agreed to, the continued presence of section 7(1)(b) could have adverse consequences.

The effect of section 7 will be that whenever a deceased is survived by a spouse, civil partner, cohabiting partner or dependent child, those relatives and any more remote relatives who are entitled to claim will share between them damages for loss of financial support that are calculated on the basis that they were being supported at the rate of 75 per cent of the deceased's net income.

That is the result of section 7(1)(d), in which it is provided that the 75 per cent is to be taken to have been spent by the deceased in supporting his relatives. It is difficult to see how that could be interpreted in a way that would allow the courts to do anything other than use that as the measure of damages. In other words, it is no longer open to argue that the Brown v Ferguson formula is of any relevance. Quite simply, section 7(1)(b) is not needed for that purpose.

As we have seen, the effect of amendment 7 is that the court would be allowed to substitute a different percentage for the 75 per cent that is specified in section 7(1)(a), but only when it was satisfied that it was necessary to do so to avoid

"a manifestly and materially unfair result".

As I have already explained, that is a high hurdle. The effect of section 7(1)(b) and what I understand to be the intent behind Mr Butler's amendment 15 is that the court would not be able to take the relative's income into account here, regardless of the impact that that exclusion might have. There seems to be no logic in excluding that particular factor from consideration. I take the view that it is important that the courts should be allowed to take all the circumstances into account, including the surviving spouse's income, in considering whether application of the figure of 75 per cent would give rise to

"a manifestly and materially unfair result".

It might help to consider the impact that that choice might have. The examples that the Forum of Scottish Claims Managers provided in its submission to the committee suggest that when the victim had a greater income than the surviving partner, the increase in the amount of compensation payable under the bill would be relatively small, but that when the surviving partner's income was, say, double that of the victim, the amount of compensation payable could be as much as three times greater than it would have been before the introduction of the bill. It is such cases, particularly when the surviving partner's income is substantial, that drive the very large potential cost figures that the FSCM gave the committee. I am not saying that such increases in compensation are automatically unfair, but allowing the courts to consider the issue may tackle the most manifest cases of overcompensation that the use of a fixed formula may introduce.

Amendment 6 has been lodged on the basis that, in practice, the only situations in which a court would be allowed to have regard to the income of the surviving spouse would be in deciding whether, in the circumstances of the case, the application of the standard 75 per cent would bring about a manifestly and materially unfair result; and in those cases in which it would bring about a manifestly and materially unfair result, in deciding what percentage should be used instead.

I also mentioned issues around the drafting of amendment 15, which I think make it unlikely to deliver what I believe to be Mr Butler's intentions. The effect of amendment 15 would not be to prevent the court from taking a relative's income into account in deciding whether the fixed formula would deliver a manifestly and materially unfair result. Instead, it would prevent the court from taking the relative's income into account in determining what the correct alternative percentage might be. Therefore, I respectfully ask Mr Butler not to move amendment 15, and I hope that the committee will support amendment 6.

I move amendment 6.

James Kelly: The issue at stake is that a relative's income should be disregarded in the calculation of a claim. In the evidence that the committee took there was strong support from a number of sources for a relative's income to be disregarded. The bill provides certainty in the calculation, which is what victims and the courts are looking for. To take out section 7(1)(b) could create confusion in the calculations, and we should not do that.

The minister said that the provision for disregarding a relative's income would not apply where the judgment was that that would be manifestly unfair. I am not convinced that the amendment would deliver that effect. I oppose the minister's amendment 6 and support Bill Butler's amendment 15.

Robert Brown: This is a complex issue and I am not entirely certain that I have followed all the ramifications. I am inclined to support the minister. As the minister said, it is difficult to see that in the normal case where the 75 per cent rule is applied a relative's income would come into the matter—I do not see how that provision can be interpreted in that way. If there is any doubt about that, the minister's statement on the record would assist interpretation of that aspect.

Another situation arises, which is how you divide the compensation between the relatives when you have a number of relatives with a claim. That issue might not be unimportant. For the sake of argument, you might have a situation in which parties were separated and in which the children of the relationship, who had been living with the deceased, were going to stay with the deceased's mother. The needs of the children would be assessed in that context, against a limited pot. Unless I am misreading the situation, in that circumstance it would be relevant to consider the surviving spouse or partner's income. The minister

rightly says that that income should be taken into account in such a situation.

I accept that I am digging into the issue a bit, but it seems to me, subject to any further comments, that the minister's view on this is probably right.

Cathie Craigie: I will speak strongly against amendment 6. If I recall rightly, the evidence that the committee heard strongly supported the disregard of the relative or spouse's income. I am sure that one witness said that this is about modernising the law according to the way in which we live our lives. People who are out working now are not out working for pin money. The income of the relative or spouse is calculated according to the way in which that family lives and the responsibilities that the relative or spouse takes on, such as mortgages.

If we were to agree to amendment 6, we would be going against the views of the people we heard from who work in the field and against all the work that has been done to prove that the disregard is the right way to go. The spouse or partner should not be penalised any more because of the loss of support and, in some cases, loss of life.

12:15

The Convener: As has already been said, this is the obverse of a principle that has already been established, following an earlier section of the bill. There is unanimity of purpose on the issue. Everyone is anxious and determined to ensure that fairness applies. Cathie Craigie is correct to say that evidence was received on the disregard, but there may be other issues.

Mr Butler, who will have the opportunity to speak shortly, is slightly concerned about the impact of the Brown v Ferguson judgment. I understand the direction of that concern. However, given that the legal principle has already been established, I do not think that there will be a difficulty, as extending the judgment would clearly fly in the face of what I consider to be the unanimous view of the committee and in due course, no doubt, the Parliament.

As the minister suggested, there are probably some technical difficulties with amendment 15. I know that Mr Butler would not wish to prejudice in any respect the undoubted benefits of the bill by inserting a provision that could be open to challenge at a later date. At this stage, unless I hear persuasive evidence to the contrary, I am minded to support amendment 6 and to reject amendment 15.

Bill Butler: As I said earlier, since the bill was last before the committee, a great deal of further work has been done on a constructive and consensual basis. The end result is that I have been able up to this point to agree to all the Scottish Government's amendments, with no exceptions. I differ from it only on the question of the disregard of a surviving spouse's income. I am pleased to say that there is no dispute between the Government, the committee and me on the point of principle with regard to the exception; I am grateful to the minister for stating that clearly today. The question for the committee is how best to put the principle into practice.

I suggest that, when the bill process is finished, we want an act whose terms are absolutely clear. We do not want the courts to have to refer to debates in the Parliament to work out what was intended. As far as is humanly possible, we must have certainty and avoid any unintended consequence.

I understand that the Government has lodged amendment 6 because it does not think that it is necessary to spell out to the court that the surviving spouse's income is to be disregarded, as section 7(1)(a) instructs the court only to take into account 75 per cent of the deceased's annual income when calculating how much is to be awarded by way of loss of support.

We have heard in evidence that loss of support is the financial award that is made to the deceased's dependent relatives. It is made up of several constituent parts. We were referred to a number of cases, especially the formula that was followed in Brown v Ferguson. Broadly speaking, in that formula the court will add together the deceased's net income and the surviving spouse's net income, deduct the percentage for the deceased's living expenses and go on to deduct the surviving spouse's income to reach a multiplicand. An appropriate multiplier is applied to the multiplicand, and the resulting figure is the loss of support.

My serious concern about the Government's amendment is that in section 7(1)(e) reference is made to

"any multiplier applied by the court".

The section goes on to instruct the court to apply the multiplier

"from the date of the interlocutor awarding damages".

The date from which the multiplier is to run is new and a departure from common law, but courts will still need to look to common law to determine what the multiplier should be. The danger is that a judge looking at that provision and realising that he will have to refer to common law to set the multiplier may take the view that he should also look to common law with regard to any other constituent part of loss of support that is not specifically mentioned in the bill. I suspect that

specifically for that reason the Scottish Law Commission left in its specimen bill the words

"a relative's income is to be disregarded".

Without that paragraph, we are left with a general reference in section 7(1) to "loss of support" and then specific references to how much is to be deducted in respect of the deceased's living expenses and the date from which the multiplier is to be applied. If the loss of support was the same as the multiplicand, I would have no difficulty in accepting the Government's amendment, but I have been advised that the loss of support is not the same as the multiplicand. The multiplicand is only one element of the loss of support, and we should not run the risk of leaving the judges scratching their heads and wondering what to do about only part of what is to happen having been spelled out.

As I have already said, there is no difference in principle between my position and that of the Government, colleagues or the Parliament. We all want to end up with a law that requires the court to disregard the surviving spouse's income. In view of the fact that part of section 7 still leaves it to the court's discretion to apply the common law in relation to fixing a multiplier, there is no harm whatsoever in leaving in section 7(1)(b). I would prefer it to be left alone.

I lodged amendment 15 in case the Government's amendment 6 is accepted. In effect, the bill instructs judges to do something different from what has happened before and we should make it clear to them that that is what the Parliament intends to happen. It is likely that some litigation will be directed towards the interpretation of the phrase "manifestly and materially unfair", which we have already agreed to at stage 2. The court will have to make a decision in considering whether or not to apply a different percentage in respect of the discount for living expenses. I remain concerned that there will have to be a string of legal cases to determine what those words mean before the law becomes completely settled in the area. I have accepted that a workable compromise is needed on the matter, but I am still apprehensive that we would run the risk of fuelling further arguments in the courts about the surviving spouse's disregard if we deleted section 7(1)(b), as the minister suggests, through amendment 6.

That said, I have listened carefully to what the minister and colleagues around the committee table have said and I would not wish—although this is not a decision for me—a vote to take place that would divide us where we have been united heretofore. I accept that there may be drafting issues with my amendment 15. I listened carefully to what the minister said and, if that amendment would not have the intended effect, it is otiose and functionless.

I make a direct plea to the minister to withdraw amendment 6. It is obvious that he would win the vote if he pressed the matter, but I want the constructive approach that has been taken to continue. I make it clear that I have no intention of moving amendment 15, even if he presses amendment 6. We have a little time between the end of stage 2 and stage 3 to come up with an approach that we could all agree on and which would be as fixed and certain as is humanly possible. I make a plea to the minister, but that does not mean that, if he refuses to accept that plea, I will go off in a huff, to use the Glaswegian expression; I certainly will not. I am making a serious plea, not to avoid losing a vote, which I certainly would, but to avoid making an error and to give us a little more time so that we can come up with something at stage 3 that we can all get behind. I make the plea through you, convener, that the minister give us some indication in that regard in his summing up.

The Convener: Thank you, Mr Butler. Minister, I invite you to wind up, bearing in mind what Mr Butler said.

Fergus Ewing: I have listened closely to the arguments and I thank all members for their contribution, especially Mr Butler. I fully accept that, as I said in my opening remarks, these are not entirely straightforward arguments. They are a mixture of technical drafting considerations and of substantive issues. Having heard members' arguments, I remain very clearly of the opinion that our amendment 6 and the argument justifying its existence are correct. The effect of amendment 6 is to delete a provision that is not required and is unfortunately confusing. The formula in section 7(1)(a) already provides for the amount available to support the relatives to be 75 per cent. It is clearly implicit in that section that no further calculation is to be made to disregard a relative's income; in other words, that position is already incorporated in section 7(1)(a), together with a reading of the remainder of section 7.

It is important to bear two things in mind. I want to put on the record this and a few other matters that I hope will be of benefit and provide reassurances in addition to what I have already said. First, it is envisaged that cases where the courts are satisfied that 75 per cent would result in manifest and material unfairness will be very much the exception. I believe that I said that earlier in the debate on amendments 7 and 1.

Secondly, even when such cases arise, section 7 will continue to apply. While the court can set percentages other than 75 and 25 per cent, damages would still be assessed on the basis of a percentage of the deceased's income. That is the

point that I believe the convener made in relation to Brown v Ferguson. It would not be possible for the court to apply the Brown v Ferguson method of basing support on a percentage of the combined income and deducting the income of the surviving spouse. It is true that in those exceptional circumstances it would be open to the court to factor in the income of the surviving spouse when deciding what percentage to apply—I think that that is correct.

As has been evidenced to the committee, where the income of the surviving spouse is very substantial indeed, it could risk producing unfairness if the court were not to be permitted to consider that at all. So, in those unusual cases—I think that we all know that they will be unusual—it is appropriate that the court can deal with situations where the income of the surviving spouse is exceptionally high, in order to prevent giving rise to manifest unfairness.

I wanted to restate those general arguments, which Mr Butler and I have discussed in the extensive meetings that we have had since stage 1. Those matters have been thoroughly discussed between us and that is to the benefit of this morning's proceedings, because it has allowed this debate to focus on the remaining issue of substance between us. I want to and will continue to work with Mr Butler—I hereby undertake to do so—in exactly the same way as we have done since stage 1. We will be happy to meet and discuss this issue with him further should he so wish, but it is my view that amendment 6 is necessary and correct. I hope that the committee will support it. If the committee does so, I undertake that we will continue to listen to any further representations and respond to reasonable arguments, particularly from Mr Butler but, of course, from any other member and from any interested observer outwith today's proceedings. We will listen carefully and respond if it is felt that the course that we have urged the committee to take this morning is anything less than the correct approach.

I hope that my response is acceptable to Mr Butler. I did not think for a moment that he would flounce off in a huff and I am sure that we will continue our constructive engagement if the committee decides to support amendment 6 and reject amendment 15—although I understand that amendment 15 will not be moved. I urge the committee to support amendment 6. No doubt before stage 3 we will have an opportunity to give further consideration to the matter, with Mr Butler.

12:30

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Aitken, Bill (Glasgow) (Con)
Brown, Robert (Glasgow) (LD)
Don , Nigel (North East Scotland) (SNP)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)

Against

Baker, Claire (Mid Scotland and Fife) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Kelly, James (Glasgow Rutherglen) (Lab)

The Convener: The result of the division is: For 5, Against 3, Abstentions 0.

Amendment 6 agreed to.

Amendment 15 not moved.

Amendment 7 moved—[Fergus Ewing]—and agreed to.

Section 7, as amended, agreed to.

Sections 8 to 13 agreed to.

Section 14—Interpretation

Amendments 8 to 12 moved—[Fergus Ewing]—and agreed to.

Section 14, as amended, agreed to.

Section 15 agreed to.

Schedule 1 agreed to.

Section 16 agreed to.

Schedule 2 agreed to.

Section 17 agreed to.

Section 18—Transitional provision etc

The Convener: Amendment 16, in the name of Robert Brown, is grouped with amendments 17 and 13. If amendment 17 is agreed to, I cannot call amendment 13, on the ground of pre-emption.

Robert Brown: In its report, the Subordinate Legislation Committee noted that wide Henry VIII powers appear to be contained in section 18. In particular, section 18(4) provides:

"An order under subsection (1), if it includes provision amending or repealing an enactment contained in an Act, is not made unless a draft of the statutory instrument containing the order has been—

(a) laid before, and

(b) approved by resolution of,

the Parliament."

The point is that the provision allows for subordinate legislation to appeal or amend primary legislation, which is not the general direction of travel that we should be taking.

Amendment 13, in the name of the minister, would clarify the position to a degree but would simply replace the reference to an order that includes provision that amends or repeals an enactment contained in an act with the phrase

"A statutory instrument containing an order under subsection (1) which adds to, replaces or omits any part of the text of an Act (including this Act)".

That does not change the substance of the issue and, if anything, it goes further than the provision that it would replace.

I am prepared to listen to the arguments, but it seems that the principal issue is why there needs to be provision to amend or repeal primary legislation, including the act that results from the bill, rather than provision for subordinate legislation that would implement bits and pieces of the act. Provision to amend or repeal primary legislation is not frequently made.

I move amendment 16.

Fergus Ewing: The practical effect of amendments 16 and 17, in the name of Robert Brown, would be that orders that the Scottish ministers made under section 18(1) would be subject to the negative procedure. The affirmative procedure is more appropriate for orders that involve amending or repealing any parts of primary legislation, including the act that results from the bill. I understand why the Subordinate Legislation Committee, as a matter of general principle, requires Henry VIII powers to be justified. As I said in my formal response to the Justice Committee's report, I think that such powers are justified in this instance.

I turn to amendment 13. Section 18 provides Scottish ministers with the power to make

"incidental, supplemental, consequential, transitional, transitory or saving"

provisions by secondary legislation. More specifically, section 18(4) provides that, if such provisions amend or repeal primary legislation, the instrument must be subject to the affirmative procedure. The Subordinate Legislation Committee was critical of section 18(4), commenting that the power to modify primary legislation through an ancillary order should be stated expressly rather than indirectly. Incidentally, that was stated in paragraph 192 on page 38 of the Justice Committee's report, which encompassed the Subordinate Legislation Committee's recommendation in that regard.

Amendment 13 addresses that point, taking up the Subordinate Legislation Committee's invitation by introducing a more explicit reference to the power to add to, replace or omit the text of an act, and by making it clear that the power may be exercised in relation to the act that results from the bill.

The committee also had concerns about ancillary powers being capable of modifying primary legislation. Any new body of law can give rise to a need for a range of ancillary provisions, and it might be appropriate for them to extend to modifying primary legislation, including the act that results from the bill. That is particularly so where, as in this case, the bill covers complex reform mechanisms. It could be that the provisions, once enacted and tested, will prove problematic. If that were to be the case, given the importance and sensitivity of the issues, it would be essential to move quickly to take remedial action. The power will ensure that that is possible.

Additionally, without the power, in order to deal with a matter that was clearly within the scope and policy intentions of the bill, it would be necessary to return to the Parliament to make changes by primary legislation. That would not be an effective use of either the Parliament's or the Scottish Government's resources.

Accordingly, I commend amendment 13 and, with respect to Mr Brown, invite the committee to reject amendments 16 and 17.

The Convener: Thank you. There being no contributions from committee members, I call Mr Butler.

Bill Butler: I entirely agree with amendment 13, and especially with the latter part of the minister's explanation of why it is the correct amendment. He said that provisions might prove problematic as the legislation plays itself out. Amendment 13 represents a way of dealing with a problem that arises swiftly, expeditiously and with the appropriate level of parliamentary scrutiny. I believe that use of the affirmative procedure is more appropriate. Amendment 13 deals concisely and succinctly with the concerns that the Subordinate Legislation Committee raised and, although Robert Brown lodged amendments 16 and 17 with the best intentions, amendment 13 is by far the more preferable way of proceeding. I urge colleagues to go for amendment 13.

Robert Brown: As the minister pointed out, the Subordinate Legislation Committee had two concerns about the matter. Amendment 13 endeavours to deal with the first concern, and I have no particular difficulty with that. My principal issue is the other part of that committee's comments, which were about the necessity for the provision to amend primary legislation in this way. I have not heard much by way of justification of that, except in general terms. I do not know whether this is the case, but it might have been necessary to amend the Damages (Scotland) Act 1976 through subordinate legislation because of

the same sort of issue. If so, that would give us a hint, given that an act that has been on the statute book for some time, even with the best intentions, has had to be modified in that way.

I point out that the power is not just about transitional provisions but about incidental, supplemental, consequential and saving provisions, so it is a wide power. I will remain opposed to the giving of the power unless the minister or indeed the sponsor of the bill can give more substantial grounds than they have given so far. Against that background, I will persist with amendment 16.

The Convener: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Brown, Robert (Glasgow) (LD)

Against

Aitken, Bill (Glasgow) (Con)
Baker, Claire (Mid Scotland and Fife) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Don, Nigel (North East Scotland) (SNP)
Kelly, James (Glasgow Rutherglen) (Lab)
Thompson, Dave (Highlands and Islands) (SNP)
Watt, Maureen (North East Scotland) (SNP)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 16 disagreed to.

Amendment 17 not moved.

Amendment 13 moved—[Fergus Ewing]—and agreed to.

Section 18, as amended, agreed to.

Section 19 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. I congratulate members on their lucid contributions. I also congratulate Mr Butler and the minister on the way in which they have conducted negotiations over the bill, which has been an exemplar of how discussions should be conducted for the good of people who find themselves in the unfortunate position of being bereaved following an accident.

12:41

Meeting suspended.

12:43

On resuming—

Subordinate Legislation

Civil Legal Aid (Scotland) Amendment Regulations 2010 (SSI 2010/461)

Advice and Assistance (Scotland) Amendment Regulations 2010 (SSI 2010/462)

The Convener: At its meeting last week, the committee agreed to write to the Scottish Government to seek further information on the instruments. I direct members to paper 3 for the Cabinet Secretary for Justice's response to the committee's request. As members have no comments, are they content to note the instruments?

Members *indicated agreement.*

Community Payback Orders (Prescribed Persons for Consultation) (Scotland) Regulations 2011 (SSI 2011/1)

The Convener: Under item 5, we have three further negative instruments for consideration.

On SSI 2011/1, I refer members to paper 4, which shows that the Subordinate Legislation Committee drew the Parliament's attention to the use of the expression "one or more" in regulation 2(e) to 2(g). That committee considered that that appeared to represent an unusual or unexpected use of the powers that the parent statute conferred. Do members have comments?

Robert Brown: The Subordinate Legislation Committee is right, because the obligation to consult community councils in an area is not particularly onerous. Most, if not all, community councils have e-mail addresses and so on; the regulations do not really lay matters down.

It is not worth objecting to the regulations on that basis but, if other members agree, perhaps the Government should note our comments for future interpretation and for how it carries the regulations into practice.

The Convener: I see your argument precisely. That view has merit, but it would not be worth while objecting to the regulations. Is anyone otherwise minded?

Dave Thompson: I am happy with the regulations. The Government's response refers to the northern community justice authority, which has many community councils in its area. Giving local authorities discretion does not prevent them

from contacting all community councils, if they wish.

The Convener: We note that point, too. Are members content to note the regulations?

Members *indicated agreement.*

Restriction of Liberty Order and Restricted Movement Requirement (Scotland) Regulations 2011 (SSI 2011/3)

The Convener: I refer members to paper 5. The Subordinate Legislation Committee drew no matters to the Parliament's attention in relation to the regulations. As members have no comments, are we content to note the regulations?

Members *indicated agreement.*

Disposal of Court Records (Scotland) Amendment Regulations 2011 (Draft)

The Convener: I refer members to paper 6. The regulations form a draft negative instrument, which may be made 40 days after being laid, unless the Parliament resolves in that period that it should not be made. The Subordinate Legislation Committee drew no matters to the Parliament's attention in relation to the regulations. As members have no comments, are they content to note the regulations?

Members *indicated agreement.*

12:46

Meeting continued in private until 13:00.

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