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Official Report

JUSTICE COMMITTEE

Tuesday 21 September 2010

Session 3

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JUSTICE COMMITTEE
25th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

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

COMMITTEE SUBSTITUTES

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

*attended

THE FOLLOWING GAVE EVIDENCE:

Ronnie Conway (Association of Personal Injury Lawyers)
Gordon Keyden (Simpson & Marwick Solicitors)
Frank Maguire (Thompsons Solicitors)
Cameron McNaught (Forum of Insurance Lawyers)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 21 September 2010

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

Decisions on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I welcome you all to this meeting of the Justice Committee. In particular, I welcome Mercy Nalusiba, who is an assistant editor of *Hansard* in the Parliament of Uganda. She is visiting our own official report for a few days and has asked to sit in on a committee meeting. We wish her a very successful stay in Scotland.

I remind everyone to switch off mobile phones. We have received no apologies for absence. The new Labour Party substitute, Claire Baker, is not planning to attend on behalf of Bill Butler during items on the Damages (Scotland) Bill but, of course, Mr Butler is in attendance.

We require to take two decisions on taking items of business in private. First, does the committee agree that any consideration of written and oral evidence on the Domestic Abuse (Scotland) Bill at stage 1 should be taken in private at future meetings?

Members *indicated agreement.*

The Convener: Secondly, does the committee agree that its consideration of the legislative competence of the Criminal Sentencing (Equity Fines) (Scotland) Bill and any consideration of a report on the issue should be taken in private at future meetings?

Members *indicated agreement.*

Damages (Scotland) Bill: Stage 1

10:05

The Convener: Our principal business today is item 3, our third evidence session on the Damages (Scotland) Bill, which was introduced by Bill Butler MSP. In his capacity as a member of the Justice Committee, Mr Butler cannot participate in the committee's consideration of the bill, but he can still participate in public items relating to the bill, including asking questions of witnesses.

I welcome today's panel, which comprises Ronnie Conway, Scottish co-ordinator, Association of Personal Injury Lawyers; Frank Maguire, senior partner, Thompsons Solicitors, who I understand has recently been named solicitor of the year 2010; Cameron McNaught, Scottish representative, Forum of Insurance Lawyers; and Gordon Keyden, litigation partner, Simpson & Marwick Solicitors, which I understand has been named litigation firm of the year 2010. The panel is therefore a distinguished one indeed.

We move straight to questioning, which I invite Dave Thompson to open.

Dave Thompson (Highlands and Islands) (SNP): After that introduction, I am feeling a bit daunted.

Good morning, gentlemen. We have already had some evidence on the 25 per cent figure for victims' living expenses. Does the panel think that fixing a figure of 25 per cent represents a significant departure from the fundamental principle that an individual should be compensated only for the loss that is actually suffered, no more and no less, or that it is preferable to the need to do an analysis in every case, which does not necessarily produce accurate results anyway?

Ronnie Conway (Association of Personal Injury Lawyers): Good morning, ladies and gentlemen.

Any calculation of future damages involves an element of what might be described as educated speculation. It has been judicially observed that whatever the courts do, they will get it wrong because, as far as the calculation of future loss is concerned, they will either overcompensate or undercompensate.

The first point to address is whether the 25 per cent deduction, per se, is an appropriate model for the current family architecture, so to speak. I have considered that for the purposes of giving evidence. What we have at the moment is the so-called Brown v Ferguson rule, which comes from a Scottish case in 1990, which imported wholesale what the Court of Appeal said in England in the Harris v Empress Motors Ltd case, which related

to deaths in the 1970s. Therefore, the model that we have relates to 1970s society, which I remember well. I suggest that that model involved the single, Friday-night pay packet, which was in cash and which, in general, was handed over, opened or unopened, to the spouse, as the household manager. That does not at all fit with the current model, in which two wage earners are involved.

There seems to be an idea that that model was fine for those days. It probably was fine for those days, as long as the deceased was the major wage earner, which usually was the case. However, the report by the Scottish Law Commission gives examples of how the value of damages decreases the higher the surviving spouse's income is, and that is simply daft.

I thought about the issue. Even in the 1970s, one model might involve a wage-earning husband on, say, £20,000 per annum with a wife who earned, say, £5,000 per annum in a part-time job. I know that model well because it was the one that I grew up in. Let us imagine that the lower earner—the wife—dies. If you add the wages of £20,000 and £5,000 together, you get £25,000. If you then take away the standard Brown v Ferguson deduction, you are left with £18,500. You then have to subtract the principal wage earner's £20,000, giving a dependency of nil, which is effectively saying that the wife wage earner has contributed nothing to the family finances. I can imagine what my mother would have said to that suggestion. Given the nature of workplace fatalities, we know that that did not arise in practice—it is not an anomaly that the law has had to face up to. The law now has to face up to it.

Secondly, should this discussion simply be about a rebuttable presumption, in the sense of that being the general model? There seems to be a consensus that 25 per cent is about right. However, if there is a rebuttable presumption, the gentlemen on my left, Mr McNaught and Mr Keyden, and those who instruct them will try to rebut it. You may have what appears to be a norm, but in every case, lawyers for claimants will have to carry out investigations, for example into the household finances and the amount that the husband or deceased person spent on themselves. There is no getting away from that.

There is great virtue in certainty. The responses from FOIL and Simpson & Marwick say, "There's no real problem because all these cases have settled anyway." It is true that most of the cases have settled, but the question is whether they have settled on a fair and equitable basis. I suggest, from my experience and that of the APIL members I represent, that the answer is no.

Until the decision in Guilbert, which I think the committee has been made privy to, the Brown v Ferguson line at least provided some indication of which way the courts would go. Cases settle in what lawyers call "the shadow of the law", meaning that 99 per cent of cases never have an official adjudication, but lawyers in those cases decide what should happen on the basis of what they predict the outcome will be. My colleagues on my left, Mr Maguire and I need some matrix or framework with which to work. The case of Guilbert has thrown the law into complete chaos. Whatever the position was before about what people had to do, it is now crystal clear that claimants' lawyers in every case will have to carry out financial investigations at precisely the wrong time.

Frank Maguire (Thompsons Solicitors): By far the greatest number of fatal cases in Scotland are mesothelioma cases. We have the added element that they are by far also loss of life expectancy cases. I have read with interest all that is said about how the parties in those cases come to an agreement that everyone is happy with. It is as if people were in equal positions whereby they said to each other, "Are you happy? I'm happy. We'll all go home, and that's the settlement." That is not how things occur in reality. There is hidden undercompensation.

Let me explain. What you have in such cases is a defender insurer—a big organisation—and someone who is told that they have mesothelioma. That mesothelioma client's strength is sapping day by day, and they have other difficulties in their lives. The last thing they want is to have to go through with a court action.

10:15

If the defender says to me that there should be a 50 per cent deduction for living expenses and I say that the deduction should be only 25 per cent, how do I vindicate the position? I tell the pursuer that the defender is saying 50 per cent, or that I have got them to go up to 60 per cent, for instance, but that, to get the figure to 75 per cent of earnings, they will have to go to court. The person will say that they do not want to do that—that they cannot do it or are not willing to do it. Therefore, they settle at a figure of 60 per cent of earnings, losing 15 per cent—or whatever percentage was involved, depending on the stance that was adopted.

In a fatal case the focus shifts away from the person dying of mesothelioma towards the widow wondering whether she really wants to go to court to vindicate her position. I am seeing an undersettling of cases, because of the very dynamics of the litigation. The bill would give some certainty with respect to the prejudice to the pursuer in that dynamic of litigation. It would also

give certainty to the defender and the insurers. There would be no arguments about lesser sums.

That is the first point, which I think has to be made—it has been missed in all the submissions so far. That is understandable, however, as the submissions have been based mainly on accident cases.

The second issue is whether a 25 per cent deduction for living expenses is an appropriate figure. The question was canvassed before the Scottish Law Commission. Defenders, insurers and pursuers were all asked about it, and they all thought that 25 per cent was fine. I think that it is an appropriate figure for living expenses.

The inclusion of a rebuttable presumption would simply move the goalposts. It gets away from the idea of arguments about the percentage and takes us on to defenders saying "Well, there is a rebuttable presumption"—and that is before we get on to the criteria that you want to put into the bill for that to happen. That leads to a whole lot of other arguments but then brings us back to the original position, in the cases of my clients, and a dynamic of negotiation that is against their interest. If the defenders say, "There is a rebuttable presumption", the situation will be geared towards the client accepting a lower figure.

For those reasons, I think that there should be certainty. As the Law Commission said—and as I have perhaps illustrated more poignantly—the bill avoids delay. Cases will settle more rapidly under the proposed provisions.

I draw attention to the comments of the Forum of Scottish Claims Managers, which tends to agree with me regarding intrusion in someone's life at a time when they are least able to deal with it. The FSCM recognised, along with us, the intrusions that can be made into people's lives. It agrees that, if there is no rebuttable presumption, there should be a 25 per cent reduction, which is different from the position of the Forum of Insurance Lawyers.

The FSCM says:

"if a 'rebuttable presumption' were to be introduced, there must be full and detailed disclosure of all financial records, evidence of lifestyle and true and accurate documentation to support levels of expenditure.

"The documentation should seek to clearly demonstrate how much income was spent on the deceased themselves and how much was spent on the dependents or for the benefit of the dependents.

"Additionally, precognitions or formal witness statements should form part of the disclosure to enable transparency in interpreting the financial documentation".

That is what the Law Commission proposals try to avoid.

Cameron McNaught (Forum of Insurance Lawyers): Thank you, convener, for the opportunity to come and speak to the committee this morning.

The question was whether a fixed 25 per cent deduction would represent a departure from the idea of compensation trying, albeit imperfectly, to put claimants in the financial position in which they might have been but for the wrongdoer's actions. As we say in the FOIL submission, it would be a departure. The lack of flexibility in a fixed figure would mean that the compensation might be too low in many cases—we are thinking particularly of cases in which there were dependent children and the 25 per cent deduction might not reflect the reality in the household—and, in other cases, it might be higher than the general principle would allow. We gave the example of a retired person without dependent children, who might spend more on their own individual pursuits than would have been the case earlier in their lives. The financial dynamic changes a little at that stage in life.

That is why there should be flexibility in each individual case for claimants to decide whether they would like to go for a fixed percentage. That often happens in negotiations in cases in any event, as witnessed to by the fact that few such cases end up being litigated on that point alone. I am not saying that it does not become part of the argument when cases go through to litigation—it may well do—but that point alone tends not to be the trigger for litigation.

Our overarching position is that it is important to consider each family and each claim on its own and try to get to a proper amount of compensation. In particular, it is important not to undercompensate those with dependent children.

Gordon Keyden (Simpson & Marwick Solicitors): Thank you for the opportunity to give evidence. I stress that Simpson & Marwick may have been named the litigation firm of the year, but we are not named insurance litigation firm of the year. Our position needs to be made clear: we do not come before the committee with, necessarily, a pro-insurance company position on every point. Our position may be consistent with that of the insurance companies in certain respects, but it is not entirely consistent with theirs, as can be seen from our submissions.

The Convener: We note that caveat.

Gordon Keyden: The other problem with giving evidence last is that everybody has said everything already. I will talk—I hope briefly—about the fixed-rate 25 per cent deduction. Mr Conway says that the case of Guilbert has thrown the law into chaos; I respectfully disagree. The case of Guilbert simply stated the position in the

law as it had always been. The committee has a copy of the decision. It is interesting that Lord Kinclaven said in the main part of his decision that

"The main objective ... is to make a fair and reasonable assessment of damages such as will put the claimant back to the same position as he would have been but for the defenders' breach of duty."

I respectfully submit to committee members that that is the starting point.

The problem is that, as soon as we start to adopt a fixed rate, we run the risk of overcompensation or undercompensation. Given his vast experience in mesothelioma cases, Mr Maguire has—rightly—been at pains to stress that some clients in such cases settle for a particular percentage simply because of the circumstances in which they find themselves. I accept that that could be the situation in some cases. However, if the 25 per cent fixed rate is adopted, some undercompensation is inevitable for some categories of claimant, for whom the deduction rate should be less.

Mr Conway says that the consensus is that 25 per cent is about right. Again, I must respectfully disagree. In point of fact, "McEwan & Paton"—the standard textbook on the levels of damages in this jurisdiction—shows that the scale of rates that have been agreed and the percentages that courts have found tend to range from about 15 per cent to as high as 70 or 80 per cent. The range is vast.

Every case has its own facts and circumstances, so I start from the proposition that, although adopting the fixed rate might cure the potential problem of undercompensation, it runs the risk of overcompensation, and some categories of claimant will still be undercompensated.

The other main point that emerges from the submissions and the oral evidence is the suggestion that, in some way or another, adopting the fixed rate would speed the process of resolving claims. Frank Maguire was right to point out that the Forum of Scottish Claims Managers prefers the fixed rate of 25 per cent, because it suggests that that might speed the resolution of claims.

As is inevitable, we tend to be involved once litigation is in place. All that I can say is that, in my experience, the percentage of the deduction is not the issue that slows the process of resolving claims. That is not what we and our opponents argue about. We do not tend to find ourselves locked in mortal combat about it. Guilbert is a unique case, because it is about the only case in the past two decades in which a decision has had to be made about the issue. That in itself proves my point. The deduction percentage does not give rise to litigation or the need for cases to proceed before the court.

As Mr Maguire suggested, the typical deduction in mesothelioma cases is in the region of 40 per cent. I say that from some experience of mesothelioma cases. Our firm certainly does not deal with anything like the number that Mr Maguire's firm deals with, but we have a significant number. In the past three years, we have dealt with approaching 450 such cases. In our experience, a deduction of about 40 per cent is agreed.

It may be that, in a number of those cases, claimants feel pressured into making that sort of decision. However, we are talking about cases that are not settled immediately after the point of death, but, often, some years later. I do not think that it can be simply pressure of circumstance that causes claimants to agree to that level of deduction. In fact, in the case of an elderly deceased with an elderly spouse, it is not unrealistic to think that roughly half of the income that was spent on the deceased was spent on their subsistence.

10:30

The Convener: The panel has anticipated quite a lot of the questions that the committee was going to ask. Have you got the answers that you were looking for, Mr Thompson?

Dave Thompson: Yes, some of them. I would like a wee bit of clarification on a couple of points.

Mr Maguire said that the figure of 25 per cent would give us a more level playing field because of people's reluctance to go to court. However, I would like to focus on the rebuttable presumption. If there was a rebuttable presumption of 25 per cent, how often would those who wished to challenge that presumption not do so? Would it not always be challenged? In some sense, would that not be worse than the current situation?

Frank Maguire: It would certainly always be looked for. A defender does not know the financial circumstances, the make-up of the family or who is dependent on whom. First off, they would want to know whether there was a rebuttable presumption or whether they were stuck with 75 per cent. Whether they got a negative or a positive answer, they would satisfy themselves, but what would have gone on is the investigation and the problem that the Law Commission was trying to avoid. I am talking about the research and the delay in the proceedings—all those things that we were trying to avoid. Those things would not be avoidable if there was a rebuttable presumption.

Dave Thompson: Mr McNaught, would you always challenge such a presumption?

Cameron McNaught: It would depend on the case. Often, if the claimant presents clear information and documentation supporting their case, a client might not inquire much further than that. I think that it is right to say that a rebuttable presumption would always be looked at to some degree, but the level at which it was considered would depend on the quality of information that those representing the claimant were able to provide. To some degree, the overall amount that was at stake or knowledge of previous circumstances might also inform a client's view as to how far they wanted to inquire into the issue. That is certainly our experience.

Dave Thompson: Is it not likely that most people in that situation would not have clear information readily available to them and that some work would need to be done—perhaps considerable work—to get that information? I imagine that the number of cases in which a clear statement could be made would be tiny and that, therefore, in practice, the presumption would be challenged in almost every case.

Cameron McNaught: I agree with what Mr Conway and Mr Maguire say—the timing of the inquiry into such matters could not be worse for those who are affected.

Most families' finances are relatively straightforward in that one can get documents on where the income has come from—there might be a bank account, and perhaps a joint account as well. Things such as recent utility bills can also be used. That arithmetic exercise is not necessarily unduly complicated. I accept that it takes time to carry it out and that questions need to be asked and families will need to provide information, but I am not sure that it is an overly complicated thing to do in many cases. One might often find in certain family situations that the percentage of income that a deceased was spending on themselves was somewhat lower than the proposed fixed percentage.

Dave Thompson: Some witnesses have made the point that retaining the current situation would be better than having a 25 per cent figure as a rebuttable presumption, which would actually make things worse. Does anybody have views on that?

Ronnie Conway: Sorry, Mr Thompson, but will you repeat that?

Dave Thompson: It has been said that keeping the law as it stands would be better than having a 25 per cent figure that was rebuttable.

Ronnie Conway: I listened with interest to what Mr Keyden said about cases in which a 25 per cent figure would result in undercompensation. I personally have never settled a case in which it has been held that the deceased spent less than 25 per cent on himself and I do not know of any of my colleagues in APIL who have ever done that. Mr Keyden says that those cases settle. They do, and one of the reasons why they settle—this is not particularly targeted at mesothelioma cases—is fear of the costs of litigation. If a claimant gets his prediction wrong as to what the court will say, he will be paying costs of £5,000 a day, easily, in the Court of Session. For a four-day proof, that is £20,000, which is a lot of money to gamble with.

With all due respect to the gentlemen on my left, Mr McNaught and Mr Keyden, it is in the interests of the insurance industry to pile uncertainty on uncertainty at every stage of the process. That is why we get defences on liability and arguments about sole fault and contributory negligence. This is probably not the forum for a legal debate with Mr Keyden—

Dave Thompson: On you go.

Ronnie Conway: Practitioners, at least prior to the Guilbert case, had the comfort of the decision by Lord Glennie in Weir v Robertson in which Lord Glennie said that he would like to change the situation as it seemed unfair, but that he was treating the deduction as a rule of law. At least we knew where we were when that was the case. Now, if we listen to my friend Mr Keyden, every case will have to be proved. That is an appalling position in which to put claimants, particularly because, if we get the bet wrong, we will cost those persons £20,000 in expenses—and I do not exaggerate.

Robert Brown (Glasgow) (LD): One of the most compelling points that has been made is the one about an intrusive investigation. It is in the Law Commission report and in evidence that we have received. I want to pursue the issue a little. It seems to me that the lawyer who is investigating a case will have to ask—for legal aid purposes and for the purposes of the proof—about job history, the relationship between the deceased and the partner, the extent of the connection with children, particularly adult children, and whether the children are at home and what the degree of affection is. For legal aid purposes, the lawyer will have to ask about all sorts of things to do with housing costs and so on. Does the intrusive nature of the questions that are required for compensation purposes add much to the fairly intrusive questions that are inevitable for other purposes?

The Convener: Before Mr Keyden responds, I ask members of the panel to speak up as much as possible, as we are having slight acoustic difficulties this morning.

Gordon Keyden: I, of course, am on the other side of the divide, so I dare say that I am not as authoritative an expert on the costs and extra work

that are involved in that. All I can say is that those questions are being asked now. It is inevitable that they will be asked, not only to work out what percentage of household expense was attributable to the deceased, but because they relate to the way in which the family lived, which has a direct bearing on the award for grief, bereavement or what I still like to call loss of society—however you care to tag it. The defender or insurer—however you choose to look at them—is already meeting the expense that arises from those questions, either as extrajudicial costs when the case is settled pre-litigation, or as part of judicial costs, when it is settled judicially. I do not see additional cost as the issue. It is certainly not the issue when one compares it with the possibility of undercompensation or overcompensation.

As I understand it, Mr Conway is saying that he never settles a case with less than 25 per cent. If so, why are we fixing the figure at 25 per cent?

Frank Maguire: There are very few such cases with legal aid: most cases—I would say 95 per cent of cases are conducted on a no-win, no-fee basis or with trade union backing. It is not correct to say that we look into the expenses and family finances anyway.

We should also elaborate matters on the expenses side. If the pursuer does not provide information because they do not have it, or if the defender believes that they do not have it, a court order can be sought. Once the order has been issued, the defender can take the pursuer before a commission and ask them to provide their documents. Going through that process adds to the expense.

There are points that I could make in relation to other issues that have been raised. I hope that I have answered your question about whether we examine the expenses anyway.

Robert Brown: I was really asking whether you ask many of these intrusive questions anyway, for other purposes in connection with the claim. You have made an observation on the legal aid position, which is fair enough, but I have suggested that questions are asked about relationship issues, length of cohabitation with partners, the position with children, job history and what might have happened in the future. A lot of intrusive questions have to be asked anyway to arrive at the other information that you need for the loss of society award and other aspects of the compensatory payment.

Ronnie Conway: With respect, there are conventional bands within which loss of society awards are made, so the inquiries that you are describing do not have to be made in that situation. In the current situation, which involves a purely financial exercise, it is perfectly plain that those inquiries must be made in every case, whatever practitioners' views were before the Guilbert case. It would be difficult for members of the committee to prove how much they spent on themselves and how much they contributed to the joint financial partnership, even while they are alive—never mind having to do that for a person who is dead.

The Convener: The witnesses may have anticipated a few of the issues that Nigel Don wishes to raise, but I invite him to proceed anyway.

Nigel Don (North East Scotland) (SNP): The witnesses have produced a few more issues. Good morning, gentlemen. I take Ronnie Conway's last point: my wife and I kept a cash book in our early years, and I know how much it told us, but I certainly do not have that information now. I do not know how on earth you get such numbers in reality.

The Convener: Perhaps that is just as well.

10:45

Nigel Don: Indeed, but let us push on. I think one of the things that I have heard from you, gentlemen, is the distinction between what I will describe as mesothelioma cases and fatal accident cases. If I have picked it up aright, the suggestion is that mesothelioma cases have settled at about 40 per cent, and I wonder whether that is because, by and large, those who suffer from mesothelioma are naturally in the later stages of life anyway. Their children have probably left home and the amount of money that the surviving invalid—if I can describe them in that way—is spending on others will have fallen. I see some nodding heads. Are you in a position to confirm that that is generally the case? Mr Maguire obviously does not agree.

Frank Maguire: I do not, because as I explained to you, we cannot get more than 60 per cent because of the uncertainty and so on, and we cannot challenge that because our clients are in no fit state to challenge anyone in law. Even in a fatal case, our clients are reluctant to go ahead with a proof. We have done only one or two such cases over the years. My point was that people are being undercompensated. I do not accept that the deduction for living expenses should be 40 per cent.

Nigel Don: Right—but I am trying to distinguish between what I think are the different types of cases. Because mesothelioma and other industrial diseases are extended illnesses that take time to incubate—I am using all the wrong words, but you know what I mean—they are likely to strike late in life when it is a fact that personal expenses are likely to be a bit higher.

Can I take you back to the general case of a fatal accident, in which the person is probably within their working life, because that is when fatal accidents occur? We have discussed the fact that the 25 per cent figure cannot be right, but is it more likely to be right in fatal accident cases? In such cases, is there a better case for saying that 25 per cent is a reasonable figure, if we have to have one?

Ronnie Conway: I defer to Mr Maguire on mesothelioma cases because his experience in that area is unrivalled, but what we are trying to do is to compensate for the loss of an income stream that has gone into the joint financial project of the husband and wife, the cohabitant and cohabitee, or the civil partners. As a general point, the idea that, because there are no children around the person will automatically spend more on himself than on joint partnership projects seems to me to be misconceived. In effect, there is a joint standard of living, so to speak, and that is what has to be maintained.

In a fatal accident case, the person dies. In a lost years case, there are similar circumstances but the person is still alive. In that situation, there would be a deduction for living expenses, but we would not put the wife's income—I use "wife" in the sense of "surviving partner"—into calculating what the damages would be. Mr Keyden was right that there is no legal consensus that 25 per cent is the correct figure, but looking at the submissions and the evidence that has been given today, it seems to me that there is an evidential consensus before the committee that 25 per cent is the correct figure. As I said at the beginning, it is always going to be wrong. We accept that.

Nigel Don: I think we know that.

Ronnie Conway: There is an element of arbitrariness in it, but is it about right? I think the answer is yes.

Nigel Don: Mr Keyden, do you want to comment?

Gordon Keyden: Ronnie Conway's last point is a fair one. He started the discussion this morning by saying that the courts are doing their best to get it as right as they can, but the system will never be perfect. It will not be perfect even with a fixed rate. However, to go back to your original question, Mr Don asked whether it is likely that the rate of expenses will be lower in a fatal accident case than in a disease death. I think the honest answer is probably yes, but it depends on the individual case.

Take someone who dies very young—say, for the sake of argument, a 21-year-old who is married but has no children. Is it fair to say that he would account for 25 per cent of the expense of that family's income? I do not know the answer to that. No one does. No one knows what case might be coming round the corner or what the individual circumstances are going to be. Part of the problem of fixing on a rate rather than looking at the situation in reality is that one runs the risk of overcompensating or undercompensating. Although looking at each situation as it comes up might be more difficult in some cases than in others, it would be preferable to simply assuming that the fixed rate is the correct answer.

Nigel Don: The question that we would like an answer to is whether there is any reason to believe that there is any equity in such matters. Mr Maguire has, as one would have expected, put the other side eloquently and, faced with a family on one side and the insurance world on the other, I really have to wonder about that.

I do not mind saying that there is some baggage left over from pleural plaques. Let me quote from APIL's submission, which says that

"Insurers want to be able to pay correct levels of compensation"

to claimants

"through a straightforward process that is efficient while meeting the needs of claimants."

However, is history on their side? Do I really believe that that is what they are about or are they seeking to give out the minimum they think they can get away with?

Gordon Keyden: As I said at the outset, I am not aligning myself with the insurance industry. However, the fact is that fortunately another organisation in this jurisdiction—the courts—will ensure that any insurers who do not behave properly are held to account and, as you have seen, the judges' submission says that the rate should not be fixed at 25 per cent because that is not fair.

Nigel Don: I entirely accept that arithmetic; indeed, I think that the committee understands that position. However, I am still concerned about the balance of arms. Very few of us want to go to court—actually, only foolish people want to—and, in any case, very few cases will get to court because of the risks that Mr Conway has highlighted. It is not surprising that there is not much litigation and therefore it is not surprising that insurers probably have the upper hand.

Gordon Keyden: From experience, I have to say that if you had asked that question 15 years ago I honestly would have found it difficult to disagree with you. However, the situation now is different because—regrettably—the insurance industry has taken the view that it would rather not pay people like me to represent it when it gets into litigation. I suppose that in giving this evidence I am like a turkey voting for an early Christmas. I

want the law in this area to be clarified so that we get the best end result, even though it might not be the best end result for my pocket. The insurance industry will say that it does not want prolongation of claims because it simply means that it has to spend extra.

Nigel Don: Does anyone else wish to comment on that exchange?

Frank Maguire: I do not wish to insult my friend, because I am going home with him. I have to say, however, that I detected a distinction being drawn between mesothelioma and other fatal cases. There is a distinction, as I have already explained, but I point out that in the mesothelioma cases the people involved range from 79-year-olds to men and women in their 50s and 40s, who are still generating income and therefore would be subject to the same kind of considerations that apply to fatal accident cases. I just want to ensure that there is no misunderstanding that I was stating that there is a distinction between the 60 per cents or 75 per cents in that equation.

Nigel Don: I am with you. Thank you.

The Convener: When we deal with legislation, certain matters crystallise and, given that this is one of the major features in the bill, we have understandably taken quite a long time over it.

We move on to the question of right to sue in these days when we no longer have the nuclear family.

Stewart Maxwell (West of Scotland) (SNP): That is a pretty straightforward issue, but before I come to it, I have one small question on the 25 per cent rule. Mr Conway stated—I think Mr Keyden also raised the point—that he had never settled a claim at less than 25 per cent. Can you explain why you think that 25 per cent is the correct fixed figure, given that all the claims that you have settled must have been settled at 25 per cent or higher?

Ronnie Conway: You are talking about what the deceased spent on himself. I understood Mr Keyden as saying that there will be special cases in which the deceased spent even less than that—perhaps 10 per cent—on himself, which would result in an increase in damages.

I have never suggested that in negotiation, and I think I am on certain ground in saying that if I had ever suggested it, people would worry about my sanity. I am not sure whether I have fully understood your question, Mr Maxwell; I hope that answers it.

Stewart Maxwell: To be honest, I do not think that it does. If we say—as we heard in evidence last week—that 25 per cent is about the average figure in claims, and you say that you have never settled a case at less than 25 per cent, it seems odd that you support a fixed figure of 25 per cent. The logical extension is that the cases you have settled would have been settled at 25 per cent or higher, so why is 25 per cent the correct figure?

Ronnie Conway: I did not say that; perhaps I have not made myself entirely clear on the issue. I think that 25 per cent is the right figure, and that there has been undercompensation in the past for the reasons that I have explained: fear of intrusion, fear of litigation, fear of litigation costs and the belief, following the decision in Brown v Ferguson, that there was a fixed tariff.

From the cases in which I have been involved, and from discussions with colleagues in APIL about their cases, the figure tends to be in the range of 25 per cent to 33 per cent to 35 per cent. If you are asking me how much I think people spend on themselves, I would say 25 per cent.

Stewart Maxwell: That clarifies the matter. Thank you.

Section 14 of the bill provides a definitive list of who would be entitled to sue for loss of financial support. Would the panel care to comment on that? The list clearly excludes certain relatives; there has been some discussion about nephews and nieces and non-relatives who are financially supported. Do you accept that the current law excludes certain people from being able to sue? Do you agree—if not, please explain why—that it may be different, but equally valid, to construct the list at section 14 as it stands in the current law?

Ronnie Conway: APIL's position is that restricting the right to sue for loss of support to the immediate family is unduly restrictive, and that the right should be extended to relatives who are receiving support at the date of death. My APIL colleagues and I disagree with the proposal that title to sue for loss of support should be restricted to the immediate family. I do not think that it will apply in a lot of cases, but it would be relatively quick and easy to fix in the bill. The examples that are given, such as a nephew or niece who is being supported, seem compelling enough that we should make provision for them.

Stewart Maxwell: Before we move on, I want to clarify that. You referred to relatives who are receiving support. Is that all relatives? Where do you draw the line?

Ronnie Conway: It is the relatives in the current list. I have read Mr Garrett's evidence—as I understand it, he thinks that anyone who is receiving support should be able to sue. APIL does not agree with that line; we think that support should be restricted to relatives in the current list.

11:00

Stewart Maxwell: We will come on to that.

Frank Maguire: I add that it is somewhat contradictory that, although the Law Commission has recognised the difference in socioeconomics with regard to the family, it does not recognise it in the context of people who might experience loss of support. Away back in the 70s, you would have the nuclear family, the immediate family and then there would be loss of support. Nowadays, the family may extend in all directions, so I think that the legislation should be consistent, recognise today's social changes and allow people who are relatives—all relatives, in respect of the list—to claim for loss of support. Our society is so varied in terms of culture and ethnicity that we have to be careful that we do not exclude people who have different structures from ourselves.

Cameron McNaught: I find myself broadly agreeing with Mr Conway and Mr Maguire. FOIL's view is similar in that we are not keen to see any restriction on the group of people who are entitled to claim. Those within the existing categories, with all the different categories of family members, are a group who should reasonably be entitled to claim. We would not be in favour of restricting it further.

Stewart Maxwell: Does Mr Keyden have anything to add?

Gordon Keyden: I will just say—in the words of the judges—that I concur with my learned friends.

Stewart Maxwell: Thank you for that succinct response.

The Convener: Can I just follow up one point? Is not there surely a danger in that if we word the provision too loosely the definition could become so wide that difficulties arise? For example, what about a business partner, where there is a degree of dependency? How do we get round that problem?

Gordon Keyden: I think that we would do so simply by restricting the provision to the categories that are currently entitled to claim.

Frank Maguire: In respect of business partnerships, we already deal with that question, because one cannot claim for the share of the business. For example, in a husband and wife situation, that is already excluded and we deal with that problem already.

Stewart Maxwell: So, the panel roughly agrees that it is in favour of the current position rather than the position as in section 14 of the bill. The Law Society has argued that the right to sue for loss of support should not be restricted at all; it should be open to anybody who can prove a loss of financial support. Can you comment on that? That seems to be an entirely reasonable position. Why should it be restricted to relatives and not be available to people who are losing financial support?

Ronnie Conway: It seems to me that the bill, in so far as wrongful death is concerned, is looking at what you might call relationship losses. You start off with the family—I use the word in the loosest terms—as being the model for whom damages should be paid. In theory, where do you draw the line? If Mr Maguire makes donations to, for example, Oxfam or the Scottish Catholic International Aid Fund, why should they not be able to sue on his death? It seems to me that a line has to be drawn somewhere. You must reduce or minimise the anomalies in the law, but—

Stewart Maxwell: I suggest that there is a fairly clear distinction between donations to organisations and supporting an individual.

Say I had someone—I do not—who was not a relative but a very close friend whom I had grown up with over the past 40 years, and their son required financial support, perhaps to support them through university or for a course, but my friend could not provide it. If, because of our close friendship, I stepped in and supported their child, then I was unfortunate enough to be in a fatal accident, my friend's son would not be entitled to sue for the loss of that financial support because they would not be a blood relative or a relative through marriage, even though the relationship was like that between an uncle and their nephew or niece. Why should they be excluded from suing for that financial support?

Ronnie Conway: When you articulate the case in that fashion, you might well be right. It is a matter for the committee to decide where the line has to be drawn. There might be practical difficulties of proof and so on. The law has to erect a framework, so to speak, at some point. It is a matter for the committee at the end of the day, but I have to say that such cases would be extremely rare.

Stewart Maxwell: I accept that. Does any other member of the panel wish to comment?

Frank Maguire: It is entirely a matter of policy. You have to decide what you think is desirable. On the practical side, there would be proof problems. Having said that, I have never really come across someone in that category.

Gordon Keyden: I agree with Mr Maguire. It is ultimately a matter of policy, but I just wonder whether the rarity of the situation is sufficient effectively to ignore the way in which the law has approached these matters over the years, which is to do with remoteness and what one can reasonably anticipate will be the loss resulting from a death or an accident. The court has taken the view that remoteness considerations would

exclude that type of claim. There might be a reason for that.

Dave Thompson: There are examples of people sponsoring a child. A lot of people commit themselves to sponsoring a child from a very young age, such as 2 or 3, up to 18. I suppose that we also need to take that example into account.

Frank Maguire: Where do you stop? People sponsor children in Africa. You have to know where your limits are, but they are difficult to define.

Robert Brown: Mr Maguire mentioned ethnic minority groups and families, where the family structure might be different—it might involve mothers-in-law and other members of the family. We heard last week that the Scottish Law Commission had not really considered that, which was quite surprising. Do the panel members have any views on that, particularly with regard to whether the current list covers people whom you anticipate would be obvious members of the family in minority groupings?

Frank Maguire: If we take the definition to mean immediate family, we immediately exclude in-laws and various other people. If we take a broader definition, we might encapsulate other relatives who should be included in a loss-of-support scenario but whom we—I say "we" because none of us here is from an ethnic minority—would not include in our structures. I suggest that it would be helpful to consult the Equality and Human Rights Commission to see what it says and to see whether we are attending to and dealing fairly with a particular sector of our society. I cannot given an immediate answer, but I flag up the problem and the potential oversight.

Robert Brown: In more complicated situations where there are a number of dependent people, would you lose anything by not extending the list, because somebody else in the family grouping perhaps would be in that loss-of-support situation anyway? Is there a problem, or is it in fact just theoretical?

Ronnie Conway: That point is well made because, as I understand the legislation, the dependency is to be stated as 75 per cent. If you extend the list to include the child who is being sponsored or the extended family, that eats into the 75 per cent. The question for the committee and Parliament is a policy question. It seems to me that up till now, the family model has been the driver of policy. For what it is worth, I think that that is the proper way to approach matters.

Robert Brown: Does anyone else have any comments?

Gordon Keyden: No.

Cameron McNaught: I agree with Mr Conway.

Robert Brown: I will move on to a slightly different issue. The background to divorce action is what tends to be known as the clean-break arrangement, and I want to ask about its application in relation to damages. In some instances, former spouses and partners who have a dependency are hanging about. Is there a lack of consistency or a policy implication in how the clean-break approach would apply to damages, or should the case just be taken on the basis that the person falls within the category of those who can make a claim?

Ronnie Conway: Let me tease that out into a factual situation. As you have correctly stated, Mr Brown, most divorces proceed on the basis of a clean break—namely, a capital payment is made at the time of the divorce and there are no other claims thereafter—but in some situations continuing payments are made. I am not an expert in family law, but my initial reaction is that such a claim would continue to be a claim on the estate. Therefore, if there were a decree of divorce with a continuing income payment, the divorced spouse would be protected in that way, but it would not be a relationship claim in the way in which I would describe the architecture of the bill.

Robert Brown: I guess that the issue is whether it should be claimable for against the insurance company—the defenders in this instance.

Ronnie Conway: I am not sure.

Frank Maguire: I know nothing about family law.

Gordon Keyden: In effect, it would be claimable. The estate would be making the claim and, if there were a claim against the estate, it would have to claim on behalf of the divorced or separated partner. I hasten to add that I am not an expert in family law either, but it seems to me that that would be the position. Interestingly, I cannot think of a fatal claim that I have dealt with, at least in recent times, in which the situation arose, but one can see how it could.

Robert Brown: The Law Commission talked about achieving consistency in patrimonial and non-patrimonial loss by drawing the rules together. It seemed to me to be a tidying-up operation with no vast rationale behind it, but I wonder what the panel's view is on that.

Ronnie Conway: It is certainly neat and tidy, but the question is whether it achieves what we think ought to be the policy for 21st century Scotland. I think that everyone on the panel says that the answer to that is no.

Robert Brown: Thank you.

The Convener: We now turn to the question of the application of the 75 per cent figure in the support of relatives. I note that some of the arguments will have been canvassed already in respect of the 25 per cent deduction, so perhaps the panel could bear that in mind when replying to Cathie Craigie.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Thank you convener, and good morning gentlemen. I too extend my congratulations to Frank Maguire and Gordon Keyden on their awards, which I know are very much deserved. I say to the other two panelists—stick in and maybe you will get an award too. [*Laughter*.]

Section 7 of the bill provides that the courts are required to assume that 75 per cent of the victim's income was used to support their relatives—the victim's spouse, civil partner or cohabitant, and dependent child. In their written evidence, the judges of the Court of Session argued that the Brown v Ferguson formula, which the provision in the bill is based on, was a guide and not a fixed rule of law, as was suggested by the Law Commission, and that the proposed change in section 7 would remove the existing flexibility in the system. What do the panelists make of the Court of Session judges' view?

Ronnie Conway: In so far as flexibility is concerned?

Cathie Craigie: Yes. They argue that if section 7 were agreed to, there would be less flexibility.

Ronnie Conway: They are absolutely right; there would be less flexibility. For the reasons that I have given already, flexibility in this area of law has not been productive of justice to claimants.

At the risk of repetition, because many of the points have already been dealt with in the discussion on the 25 per cent figure, let me say that the situation just now is chaotic. Some of my members took the view that they did not need to bother about providing the information that Frank Maguire spoke about because they could rely on the rule of thumb. The authority for that was not just what they thought, but what Lord Glennie said. He wanted to change the award in the Weir v Robertson case, but said that he could not do so because, sanctioned by time-honoured authority, the Scottish courts had said that that is the rule. However, according to Lord Kinclaven, that is not the rule. In my view, flexibility in the area is not a virtue.

11:15

Cameron McNaught: I certainly agree with the judges that an element of flexibility would be removed. That is the other side of the coin that we discussed earlier. If one percentage is changed, by definition, the corresponding percentage will be affected.

I want to pick up on something that Mr Brown said earlier. Many intrusive inquiries have to be undertaken to look at the totality in these cases, and inquiries into financial matters perhaps would not take that too much further. There is a possibility of curing the problem of undercompensation on the one hand and overcompensation on the other. I would not necessarily describe having to look at those issues as chaotic.

Frank Maguire: If one of us was fatally injured in an accident, a lawyer would say that the figure could be 50, 60, 66, 75 or 80 per cent. That is the uncertainty that would be faced, and that is what the judges endorse, but I think that they are wrong. Where a person has been injured and their family is waiting for support, they want to know what their damages will be. People will want the fixed sum of 75 per cent, which would be fine. That way, the court's costs and time and the cost of the lawyer would be done away with, and the surviving widow would get on with her life. The judges' reversal has created uncertainty and has not helped matters—indeed, they have made matters worse. It is now in the hands of Parliament to inject some certainty, given the recent case authorities, for all concerned.

Gordon Keyden: The picture that has been presented to members from what has been said is that legions of lawyers are in one way or another facing one another in Parliament house day in, day out and are never able to agree the correct level of dependency. However, I cannot stress how far removed from reality that is. Things simply do not happen in that way.

I go back to the fact that if you go to the books to try to find an authority on the proposition and guidance from precedent on the percentage of income that should be deducted and the percentage that should be applied to support a family, you will struggle to find it, as there have not been many precedents over the past 30 years. As I said earlier, the Guilbert case was exceptional. I certainly do not see the situation at the moment as being chaotic, and I do not see cases being lined up to go to court week in, week out to determine that issue or most other issues connected with fatal cases, because such cases are, by and large, settled in the existing system. To some extent, that is because there is flexibility, which enables compromise around the reality of the situation. To a large extent, the judgment on the reality of the situation is in the hands of the claimants, because they are the ones with the information. If the information is produced and produced early, there is no reason why it should be a problem.

Cathie Craigie: On calculating relatives' loss of financial support, the Simpson & Marwick submission seems to argue for a fixed figure of 60 per cent. Given the response that you have just made, why would you want a fixed rate of any percentage?

Gordon Keyden: We were saying that if one looks at the percentages in cases where agreement is reached—I stress that this is really in mesothelioma cases, not necessarily accident claims—one sees a 60:40 split, so if one wants to fix the percentage it should not be 75:25. We are saying that the loss of financial support is more likely to be 60 per cent if we are talking about mesothelioma cases, but that might not be the right figure in a different type of fatal claim.

Cathie Craigie: What about the point that, as Mr Maguire and Mr Conway argued on the 25 per cent and the 75 per cent, the vast majority of relatives want certainty? They want something to happen in a short period of time, rather than for the case to go on and on with one lawyer arguing against the other—I assume that they do that with the client's best interests in mind, but the client often would not think that. Is certainty more important for the vast majority of people whom you represent who find themselves having to claim?

Gordon Keyden: It is nice to have certainty in every aspect of life, but a problem arises if we sacrifice equity and proper compensation for the principle of certainty. Of course certainty would be preferable, but no two cases are the same; the facts and circumstances differ. It would be very nice for the families of certain victims of fatal accidents to have that certainty: it would favour them because their percentage would be higher—and they would get a windfall from the 25 per cent deduction—but there would be others for whom it was different and for whom there would be undercompensation.

Give the courts and the system flexibility. The system works. It is not chaotic—at least, my perception is that it is not chaotic.

Cathie Craigie: I hear from constituents and lobby groups who come to the Parliament to make representations on the issue that the system does not work now. Many people see an opportunity in the bill to make it work more fairly and make it support and represent the needs of the majority of the people with whom it deals.

Gordon Keyden: You tell me that that is the feedback from your constituents and I have to accept that. My question is, what are they talking about when they talk about fairness? We are talking about loss of financial support, but other aspects of fatal claims are far more contentious in my experience. Ronnie Conway said that what is paid by way of compensation for grief and sorrow is a tariff, but it is not a tariff at all; there is scope for views about how low or high it should be. Is the unfairness really to do with loss of support as opposed to other elements of fatal claims? I do not know.

Cathie Craigie: For clarity and to inform the decisions that the committee will have to make when it produces its stage 1 report, does Simpson & Marwick favour a figure of 60 per cent or no fixed figure?

Gordon Keyden: I think, ultimately, we would favour no figure; we certainly do not favour a figure of 75 per cent.

Frank Maguire: Mr Keyden mentioned the word "chaos", but I do not think that I used it—

The Convener: Mr Conway did.

Ronnie Conway: I did.

Frank Maguire: My point was that there is vast uncertainty and when there is vast uncertainty, in my experience, that nearly always favours the insurer or the defender, which, as I said earlier, normally leads to undercompensation. It leads to an artificial 60:40 divide. I am saying that we must get out of that situation by injecting certainty and coming to a reasonable figure for living expenses, which would be 25 per cent.

Ronnie Conway: I read Mr Milligan's evidence to the committee. His initial position was that there should be an element of "wriggle room". When he was pressed by the committee to think of an example, he came up with that of someone whose hobby was flying a plane. We are talking about a proportion. If I may say so, it seems to me that anyone who has the hobby of flying a plane will be in a household of extremely high earners. That is where the element of fairness comes in. Someone who earns £25,000 a year will not have a private plane at Cumbernauld airport. The family unit, whether it involves cohab or civil partnership, is a joint financial enterprise. That is the point that I would like to make. Adopting the proportion of 25 per cent appears to me to be reasonable.

The Convener: I heard what you said about the 25 per cent deduction and the fact that the majority did not view a rebuttable presumption as being the way forward. Do you wish to adopt the same argument in this respect, or is there any significant change of view?

Ronnie Conway: The argument is the same.

The Convener: Fine.

I now suspend the meeting briefly.

11:27

Meeting suspended.

11:35

On resuming—

The Convener: Questioning will be continued by Robert Brown.

Robert Brown: I will ask about the approach to multipliers in section 7, in which the multiplier runs from the date of the judgment rather than from the date of death. We have had evidence that the actuarial implication of section 7 is relatively minor, because the chance of someone dying in the period between the incident and the court award is actuarially relatively insignificant; therefore the proper approach is to take account of the uncertainties of the future, not the relatively minor uncertainties of the past. Will you comment on that, Mr Maguire?

Ronnie Conway: I agree entirely. Sorry, Mr Maguire.

Frank Maguire: Thank you. Perhaps I can compare accident cases and fatal injury cases. What happens is that the calculation is done up to the date of the proof—that is the past losses for earnings and so on. Interest would then be calculated on top of that. You would then apply a multiplier. The problem about the future is that it is uncertain. There are two things in the multiplier: one is capital growth, because you will receive that money early and the other is the uncertainties built into the multiplier because you may die. There may also be other issues, such as whether you would have been earning anyway. So there is a clear split between the past and the future.

With a fatal case, you have the same considerations, in the sense that you have the idea that the person may have worked up until the date of proof and you have all the past losses. The losses would be past, so you would then have the same exercise of looking at what would have happened in terms of the futurity, as it is called.

There is inconsistency between the two methods of calculation, in that you would expect that in both cases the multiplier would start at the date of proof, when in fact it starts from the date of proof for an accident case but from the date of death for a fatal case. The Ogden actuarial tables say that it should be the same, because you are dealing with a future loss and future uncertainties. The only difference, which you have to take into account, is the possibility that that person may have died over the four months, six months or year up to the date of the proof—the chances are infinitesimally small but the Ogden tables have a calculation for that. The Ogden tables are very logical and—apart from this part, which has not been decided—are now accepted by the courts. The Law Commission is trying to make fatal injury cases consistent with accident cases, make the situation logical with the future loss idea, cater for the possibility of someone dying during the period and allow interest to accumulate up to the date of proof.

Robert Brown: That sounded logical when we heard it last week, but I wonder whether Mr Keyden and Mr McNaught have any contrary arguments?

Cameron McNaught: The one difference is that in the accident case, with the live pursuer, the uncertainty is removed because the person is physically there at proof. Those risks that were there over the one year or two years—whatever the period might be—are as a matter of fact removed.

Robert Brown: Is the risk that the pursuer might have died sooner at all actuarially significant? What is the percentage? Is it less than 1 per cent?

Cameron McNaught: I have no expertise to comment, but I understand that the amount is fairly small and I doubt that it would be as much as the 1 per cent that you cite. If the tables are to be applied to working out damages at all, it is logical to do so consistently, which in a fatal case means approaching the situation from the date of death.

Gordon Keyden: I suspect that we face again the problem of trying to get one size to fit all situations. I am certainly nowhere near bright enough to express a view about actuarial matters and I accept the proposition that, in general, the actuarial risk—certainly for a younger person—between the date of death and the date of proof might be relatively insignificant. I am not so sure whether that would apply to the more elderly mesothelioma victim—I would be interested to know the actuarial risk in that case, which I suspect would be much higher.

Mr Maguire talked about a matter of months or a year, which I think that he implied was between the date of death and the date of proof. That is conceivable in mesothelioma cases but, in the normal run-of-the-mill fatal claim, a case would be unlikely to reach the stage of proof so quickly.

Part of the emphasis behind the bill is to speed up the resolution of cases. The committee should bear it in mind that, if it goes with the proposition that the multiplier should be calculated from the date of proof, that is certainly not likely to encourage early resolution from the other side of the fence from me, because the judicial rate of interest is 8 per cent and, as has been said, interest is calculated on the past element of the award from the date of death to the date of proof.

Given that 8 per cent is probably the best rate of interest that can be obtained in the free western world at the moment, the claimant hardly has an incentive to move the claim forward. I do not suggest for a minute that my colleagues Frank Maguire and Ronnie Conway, who are on my right, would ever dream of deliberately delaying matters—they never have done and I do not think that they ever will—but the judicial rate of interest is incredibly high.

Robert Brown: Forgive me for saying so, but that argument seems to apply to a relatively small part of the overall claim. I can hardly conceive that the relatively marginal issue of the interest on a little bit of damages would induce anybody to hold up the whole process.

Gordon Keyden: I simply draw to the committee's attention a side issue that must be borne in mind—that would be the effect of the proposed change.

Frank Maguire: I do not think that that would be the effect but, in any case, that would incentivise the insurer to get ahead with settling the case.

The Convener: Is there an argument for keeping it simple by reducing the interest rate?

Gordon Keyden: Certainly.

Ronnie Conway: The source document is called the Ogden tables because Mr Michael Ogden QC started them in about 1985. The tables are in their sixth edition and are now published by the Government Actuary's Department, so they have the imprimatur, so to speak, of official Government publication.

The relevant tables are on pages 24 and 25 of the publication. One table gives a 50-year-old's likelihood of survival a factor of 0.99 at three years and at six years. Apart from cheering up some of the 50-year-olds among us, that shows that the difference is infinitesimal.

Robert Brown: The figure is not 1 per cent—it is 0.01 per cent or something; it is very small. That point is helpful.

Section 4 excludes damages for mental illness as a consequence of a death from the new definition of solatium and loss of society. There is a gap in time until the Scottish Law Commission's separate report on psychiatric injury can be looked at and, perhaps, implemented. It seems logical to deal with the matter in that way, but do you have concerns about the interim position? Are there ways of getting a satisfactory resolution? Should the anomaly be left until we deal with the issue of psychiatric injury, or is there another way forward?

11:45

Ronnie Conway: APIL took the view that these damages are relationship-based damages—a point that has already been made. There is currently a decision that, if a surviving person suffers mental illness, which must be defined as psychiatric disorder and requires a psychiatrist who has examined the survivor to say that he or she has the cluster of symptoms that are consistent with a diagnosis—generally, the American definition is used—of psychiatric injury, that person should receive increased damages.

APIL took the view that, although persons may deal with difficulties in different ways, at the end of the day the death of a loved one—a spouse or a child—is such a traumatic event that it is invidious to have a league table of grief. That does not mean that, under the present law, a person who is a participant in the traumatic event—a witness or a co-passenger, for example—cannot claim separately, but there would need to be a duty of care from the wrongdoer towards that person before they could claim damages for mental illness. That is APIL's position in respect both of the bill and of the proposal for damages for psychiatric injury.

Robert Brown: Most people outside would take a slightly different view of the issue. You are right to say that we should not discriminate between people. However, if someone is struck prostrate by an identifiable mental illness in consequence of the trauma of the death, besides experiencing the ordinary grief that people suffer in such circumstances, are we not in practical terms dealing with a different and more serious situation in which, under the normal rules and taking the normal approach, greater compensation would be appropriate?

Frank Maguire: I agree. My position is that there should be full compensation for whatever damage has been caused by the fatality and that compensation should not be restricted. If someone reacts adversely to what has happened and develops a psychiatric condition, they should be compensated for their reaction. That is how we deal with all compensation issues; such damage should not be excluded. Likewise, there are people who react amazingly well to or do not care about the death that has occurred; there is a vast range of scenarios, which reflect the relationships that existed. I cannot see the logic of excluding someone who has been tipped over the edge.

The Convener: Is there not at present a variation in law on the issue? I take it that Mr Conway was referring to the case of Gillies v Lynch.

Ronnie Conway: I was.

The Convener: That is a case from 2002. In 2004, a different view was taken in the case of Ross v Pryde. Neither of those cases were appealed, which is singularly unhelpful. There is a clear discrepancy.

Ronnie Conway: There is. I have been chided by my colleagues for referring to the law in this area as chaotic, but you have given yet another example of the chaos that exists. I am currently dealing with a case in which I will have to refer the grieving parent for psychiatric assessment because, as a claimant lawyer, I must ensure that she gets the benefit of the Gillies v Lynch approach. After I have done all that, I may come before a judge who says that Gillies v Lynch is wrong.

With all due respect to Mr Maguire, that seems to me to be precisely the kind of intrusion that is not particularly helpful. In England, the stated position with regard to bereavement damages is that as no amount whatever could ever compensate a person for the death of a child only a token amount will be given. I do not agree with that approach, but it has a certain logic. Going down the route of claiming, "My grief is greater than your grief—in fact, my grief amounts to mental illness," does not seem to me to be a helpful societal development.

Robert Brown: The clarification about the legal uncertainty has been helpful but what about section 4(3), which essentially changes the Law Society of Scotland's current arrangements and specifically excludes mental disorder caused by the death? That comes in advance of any approach to dealing with the Law Commission's report on this area. Should section 4(3) be left out for the moment, even though doing so would leave the law uncertain? If so, what do we do in the meantime before we are able to take a proper look at what is, at the end of the day, quite a complex issue? What should the interim position be?

Gordon Keyden: The interim position should be to leave the two matters separate. The Law Commission paper, which I believe is now six years old, highlights the difficulties faced by the law in the general area of psychiatric injury. One would be in danger of creating a category of claimant separate from the totality of those who are entitled to claim.

It should also be borne in mind that the existing law does not prevent certain relatives who might fall under the category of claimant that can claim under the existing law from claiming. As Ronnie Conway pointed out, a claimant might be a passenger in the vehicle and witness the traumatic event. Relative or not, they will be entitled to claim for psychiatric disorder anyway. I fear that tinkering with the law in this area gives rise to the danger that one category of society will not be looked at and dealt with within the whole spectrum.

Robert Brown: In the panel's experience, is this a common issue? I am talking not about witnessing the accident but about experiencing extra grief.

Ronnie Conway: In my experience, the issue has to be considered in almost every case. For example, a mother might lose a son. I think that the committee can make its own mind up about how people might feel about that.

Robert Brown: My question is whether an identifiable additional psychiatric and mental health issue emerges from all this.

Ronnie Conway: For the courts, a psychiatric injury involves a medical diagnosis which, in turn, involves the identification of a cluster of symptoms conforming to the American "Diagnostic and Statistical Manual of Mental Disorders". As a result, there has to be a certain level of intrusion with people being asked how they feel about what happened, whether they have flashbacks, whether they are capable of functioning and so on. Certainly my practice is to ask every parent those questions.

Robert Brown: Does anyone else wish to comment?

Frank Maguire: With these clients you are going to have to intrude at some point anyway, so the question about the level of intrusion is neither here nor there. However, there is still a lacuna in the law. We do not know what the Parliament will do in the next session or when it will get round to the Law Commission's paper on psychiatric injury. Perhaps the gap has to be filled pro tem and, if so, I would prefer any such move to include rather than exclude the mental health aspect.

Cameron McNaught: We do not tend to see cases in which the question of purely grief-related psychiatric injury is not somehow tied up with the existing law under which someone can make a claim as a result of being present at the event, or in the immediate aftermath, and with all the complications that go along with that type of claim. I am speculating, but I rather suspect that that is because of the uncertainty to which the convener referred about whether such a claim can properly be made. I agree with Mr Keyden that the preference is to consider psychiatric injury in its totality, rather than to pick one particular aspect of that whole rather complicated area of damages to deal with in the bill.

The Convener: Finally, we turn to financial issues that might arise from the bill. James Kelly will process those matters.

James Kelly (Glasgow Rutherglen) (Lab): Some of the issues have been touched on, so I

will try to be as brief as possible. From today's session and from what we have heard previously, it seems that there is a fair bit of agreement that the people who will potentially benefit the most from the bill in cash terms are victims' spouses who are high earners and that therefore we would be introducing a policy that would skew compensation in favour of those who are better off. Some have said that that is unfair. The contrary view is that that simply represents the compensatory nature of the scheme that is before us and would provide compensation to those who have much to lose. I am interested in your views on that. I direct the question to Frank Maguire and Cameron McNaught.

Frank Maguire: Many of the mesothelioma clients whom my firm represents are at the lower end of the income scale, although there are some who are at the higher end. Therefore, for the vast majority of our cases, that is not an issue. However, in so far as there are such people, if that is the way in which the compensation goes, that is the compensation that they should get. I do not agree that there should be discrimination on financial grounds so that someone who is a high earner would get less compensation or be victimised just because of that. They are a high earner for whatever reason, and therefore they should get compensation just like anybody else.

Cameron McNaught: Under the current system and under the system that is proposed in the bill, the levels of compensation for higher earners are almost by definition higher, because the method of calculation, in both systems, looks at incomes. As you say, and as we tried to highlight in examples in our written submission, when the surviving partner is the higher earner of the two and there is a disparity, the differences are much greater. That feeds into our reasons for saying that, in considering the percentages and what to do about the whole family income, we have to look at the whole picture. In an environment where, so often, both spouses are earning, it does not reflect the reality of life today simply to disregard one of those incomes completely when assessing compensation for death. The issue is tied in with that of how to address the percentages.

12:00

James Kelly: In a similar vein, Simpson and Marwick have made the point, in their evidence, that people who are higher earners tend to be more inclined to make provision for their loved ones through life assurance or personal pension plans. It follows logically that lower earners should be given greater priority. What are your views on that? I ask Gordon Keyden to answer first, then Ronnie Conway.

Gordon Keyden: I suspect that Ronnie Conway will answer your question by saying that, under the existing law, we are not entitled to take account of such provision. I accept that absolutely. However, for the purpose of making policy, I suggest that the committee is entitled to look at the reality of the situation. Cameron McNaught has used the phrase "reality of the situation" and that is the important tag line to keep hold of. You need to be aware that, if you ignore the surviving spouse's income, there is a danger that you will create an unreal situation.

One of the realities of life is that higher-earning individuals tend to make separate provision for their loved ones. Therefore, if one ignores the surviving spouse's income because it is not their death that we are talking about, one not only maximises the compensation to the surviving spouse; one may be ignoring the reality of what is going on behind the scenes. It is unreal to do other than recognise the fact that those other means of protection are available and have often been taken up.

Ronnie Conway: I am somewhat bemused by my friend's idea that there is an element of social engineering in the bill. It seems perfectly straightforward to me. An income stream has been lost and must be replaced according to as accurate a calculation as we can get regarding lost future income. A higher-earning individual will, therefore, be entitled to greater compensation while alive and his or her surviving partner, spouse or cohab will be entitled to greater compensation if he or she dies. Where is the surprise in that? With respect to Mr Keyden, the idea that Parliament should somehow look into the private arrangements that individuals make in order to ensure that a wrongdoer pays the proper measure of compensation seems unworkable and absurd.

James Kelly: Looking more specifically at the financial memorandum, one of the ways in which savings could be achieved by the bill is through its putting a more efficient system in place. It is recognised that that has the potential for reducing legal costs—Mr Keyden pinpointed that in an earlier answer. I am interested in your views on that. Can you give a rough estimate of the sort of reduction that could be achieved in an individual case? I ask Mr McNaught to answer first, then Mr Conway.

Cameron McNaught: That is a rather difficult question to answer. It is perhaps easier for Mr Conway to answer than for me, as I do not have the detailed financial information. Much of the work that is done on these cases is interrelated in terms of the investigations that are carried out. The Law Society figure shows that there would be a saving of between £1,000 and £2,000 per case if detailed financial inquiries did not have to be

carried out. I have no basis for either accepting that figure or saying that it is wrong.

Having dealt with such cases, I suspect that a rather modest amount of time is spent on those specific financial areas and question the extent to which not pursuing those investigations would speed things up. I highlighted earlier that the really contentious areas are often outwith those purely financial calculations—they are things such as issues of liability, contributory negligence and so on. I am sorry that I cannot be more helpful than that.

Ronnie Conway: I read the Law Society's evidence and I tend to agree with its general tenor. We are looking at, perhaps, four or five hours' work involving interviews with the surviving spouse and a general outline profile of the financial circumstances, the deceased's hobbies, and what he spent on himself in general terms. The committee will understand that that is a difficult exercise. I think that Mr Garrett said that it might take four or five hours, and that is realistic. It seems to me that we would be looking at a saving of £1,000 to £1,500.

Dave Thompson: What about other time savings associated with that, in so far as it would lead to fewer delays in the process? How many extra weeks and months can be added on because we are having to go through that process?

Ronnie Conway: I entirely agree with the point of that question, Mr Thompson. The theme that has been repeated throughout the evidence is that, if there is certainty, there will be settlements, and there will be fairer settlements. It would certainly provide a platform for earlier and more realistic negotiations to take place, so there might well be further savings. It is impossible to put a figure on those, but there is certainly an opportunity to make them.

Frank Maguire: It depends on how much dispute there is on the issue and how far along the road it goes. Obviously, the further it goes, the higher the cost will be. If it goes further, we are talking not just about the solicitor but about counsel or the solicitor advocate, so the costs will go up. If there are hearings or debates, the costs will go up. The further the case goes, the more the court costs will go up as well. There is an opportunity to reduce those costs by getting rid of the cases because they have resolved themselves.

On the other side of the coin, some cases are settled early. We could settle more cases at an early stage, and if we spend less time on each case, the turnover will get better in the pre-litigation solicitor stage. There are all those business considerations as well.

James Kelly: I have a final question for Frank Maguire. In its supplementary written evidence, Thompsons criticises as irrelevant and misleading the use in the financial memorandum of an average multiplier to calculate the average cost of damages. That evidence was criticised by the Scottish Government at the Finance Committee last week. Will you outline your views on the matter and deal with the Scottish Government's criticism?

Frank Maguire: The multiplier depends on each person's health, their stage of life, what they are doing, and all those factors. It is almost like an arbitrary factor that one is introducing. It also depends on the person's general health, quite apart from what has happened to them, even in an accident case.

One might have an argument in a case where the defenders say, "This man would otherwise have had only four years to live because he had a heart condition"—or another comorbid condition—"whereas this woman was fairly young and she had a good life ahead of her." They might say, "This person is aged 54 and they lead a certain kind of life," or, "Here is a 75-year-old who is very fit and here is a 75-year-old who is not very fit."

Our point was that the multiplier could not be used properly in some kind of logical way because, if it is taken as an average, it simply skews the statistics. After all, you are talking about different cases at different stages involving different individuals. We were concerned with the Law Commission's concentration on the multiplicand, which varies but not as much as the multiplier. Our point is that the multiplier is arbitrary and absolutely depends on each individual's circumstances.

James Kelly: Does anyone else wish to comment on the use of the multiplier in the financial memorandum to calculate damages?

Ronnie Conway: I agree with Mr Maguire that an individual calculation must be done in each case. The approach that has been taken has been to look at the median figures for the multiplicand; although one can see how that could be done, the range is so huge that I have to wonder—not, I should add, as a statistician—whether there is any appropriate basis for adopting a median approach. I very much doubt it.

The Convener: Playing the devil's advocate for a moment, I point out that times have changed. As we all know, people's domestic circumstances nowadays are totally different from what they were in 1970 or, for that matter, 1990. Equal pay legislation has to some extent paid off and in many households things are split 50:50. Would it not be just as appropriate to recognise that and say that

if, sad to say, one partner goes, the contribution is 50 per cent?

Ronnie Conway: It is difficult to answer such a question without revealing one's own life experience, but I would think that to most people around this table the idea that in a household there is a partnership in the broadest sense and that each partner has a box in which he or she keeps 50 per cent of the income for his or herself simply does not reflect reality. Instead, it is, so to speak, a joint financial project. As more money goes in, the standard of living increases; the mortgage and car payments increase; the loans increase; and the debts increase. That is what we are talking about, Mr Aitken, not the little boxes that you have referred to.

The Convener: As members have no further questions, I ask Bill Butler, who has listened with great care to this morning's proceedings, whether he wishes to pursue anything with the panel.

Bill Butler (Glasgow Anniesland) (Lab): No, convener. I am content with what I have heard. The evidence has been very useful and helpful and I look forward to next week.

The Convener: I thank the witnesses for their evidence in what has been an exceptionally useful and interesting session. We very much value your input.

I suspend the meeting briefly to let the witnesses leave the table.

12:13

Meeting suspended.

12:16

On resuming—

Subordinate Legislation

Criminal Legal Assistance (Fees) (Scotland) Regulations 2010 (SSI 2010/270)

The Convener: Item 4 is consideration of two negative Scottish statutory instruments. On the first set of regulations, I ask members to note cover note J/S3/10/25/2. The Subordinate Legislation Committee draws the committee's attention to the fact that the regulations have breached the 21-day rule, but states that it is content with the reason that the Scottish Government has given.

If members have no comments, are we content to note the regulations?

Members *indicated agreement.*

Criminal Legal Assistance (Fees) (No 2) (Scotland) Regulations 2010 (SSI 2010/312)

The Convener: The Subordinate Legislation Committee did not draw any matters to the Parliament's attention in relation to the regulations. If members have no comments, are we content simply to note them?

Members *indicated agreement.*

The Convener: The committee will now move into private.

12:17

Meeting continued in private until 13:08.

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