The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 22 April 2014

Session 4

Tuesday 22 April 2014

CONTENTS

JUSTICE COMMITTEE
12th Meeting 2014, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*John Pentland (Motherwell and Wishaw) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Laura Blane (Thompsons Solicitors)
Phyllis Craig MBE (Clydeside Action on Asbestos)
Rt Hon Lord Gill (Lord President of the Court of Session)
Eric McQueen (Scottish Court Service)
Sheriff Principal James Taylor

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Justice Committee

Tuesday 22 April 2014

[The Convener *opened the meeting at 09:16*]

Courts Reform (Scotland) Bill: Stage 1

The Convener (Christine Grahame): Good morning. I welcome everyone to the 12th meeting in 2014 of the Justice Committee. I ask everyone to switch off mobile phones and other electronic devices completely as they interfere with the broadcasting equipment even when they are switched to silent. No apologies have been received, but I advise members that the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, is unwell, so we will not take evidence from her in our final panel of witnesses as we had planned.

This is our fourth evidence-taking session on the Courts Reform (Scotland) Bill at stage 1. We will hear from three panels of witnesses today.

I welcome our first witness, Phyllis Craig from Clydeside Action on Asbestos, to the meeting. I note that she is accompanied by Laura Blane, who is a partner in Thompsons Solicitors. If she will forgive me, I will not allow questions to be directed at Ms Blane as she was not on our agenda. If she wants to consult with Ms Craig at any point, that is fine, but I will not take evidence from Ms Blane today.

Laura Blane (Thompsons Solicitors): Of course.

The Convener: We have seen the written submissions from Clydeside Action on Asbestos, so we will go straight to questions from members.

Margaret Mitchell (Central Scotland) (Con): Could you outline what difference it will make if cases that were previously heard in the Court of Session are heard in the sheriff court or the personal injury court?

Phyllis Craig MBE (Clydeside Action on Asbestos): First, I totally agree with Lord Gill that only the most complex and most important cases should be heard in the Court of Session and all other, routine cases should be heard in the sheriff court.

We ask the committee to consider that asbestos cases are complex. As you can see from our submission, there is often a lot of concern about evidence on the latency period between a person being exposed to asbestos and their being diagnosed with the condition. There are also extreme problems with apportionment in cases, whereby we have to say where a person was exposed to asbestos. All cases apart from mesothelioma cases will be subject to apportionment. That means that, if there are 10 cases, each person's proportion of what the damages would be must be divided according to where they were exposed. That is difficult to do.

The Convener: I did not understand that. I know that the condition is latent. We are just coming back from Easter recess, so I ask you to explain it a little more, please. Did everybody understand it?

Members: No.

The Convener: They did not understand it. I am not on my own.

Phyllis Craig: In mesothelioma cases, if a person worked for 10 different companies where they were exposed to asbestos, the pursuer can pursue for damages any company where the person was exposed and then the insurer for that company could go on and sue other companies. However, in all other asbestos-related cases—involving pleural plaques, pleural thickening, asbestosis and even asbestos-related lung cancer—the pursuer must sue each and every place where the person was exposed. That is quite complex, as the court has to divide up the compensation by the number of years the person worked at each place to determine the proportion of damages that apply to each.

The Convener: So there would be a whole list of defenders in those cases.

Phyllis Craig: Yes. Another point is that, if there are 10 employers but only two of them have insurance that covers the time during which the person was exposed, the person would get only two tenths of their damages.

The Convener: I understand. Thank you for explaining that.

Phyllis Craig: That makes such cases quite difficult and complex. Clydeside Action on Asbestos believes that there are not many cases more important than those in which somebody is going to die without having their case heard in the Court of Session. You can say that business is important, but how can you tell a constituent who is going to die that their case is not as important as a business matter?

Margaret Mitchell: That information has been very useful, and you have demonstrated the complexity of such cases. Is one difficulty the fact that many of those cases are unlikely to attract damages greater than £150,000 and therefore would automatically, under the bill as it is drafted, not be heard in the Court of Session?

Phyllis Craig: That is the problem. Everyone seems to think that the level of damages in asbestos cases is very high, but in 95 per cent of all such cases the value of damages is lower than £150,000. The difficulty is not the value of a case, but its complexity. Some cases that are valued at more than £150,000 are less complex than cases with a lower value.

The biggest issue is that, if a case falls among the 95 per cent of cases that have a lower value, the person will have to decide whether they take the damages in life, because when they die the value would be more than £150,000 after the spouse and dependants are added in. We discussed that issue previously in relation to the bill that became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. We said that it was wrong to make someone choose whether they take their damages in life or let their case go to the Court of Session following their death given that their claim would then be worth more than £150,000.

Margaret Mitchell: Is there also an issue with developing case law? Normally, if a case is very complex, the Court of Session deals with that, but it may well be deprived of it under the bill as it is currently drafted.

Phyllis Craig: You can see from our submission that there is substantial case law in relation to Westminster and the Scottish Government. In Scotland, legislation has been introduced, for example, the act on pleural plaques. There are many things in place, including case law.

One of the biggest issues overall is that, with no disrespect to the insurance industry or to the pursuer, we are here on behalf of our clients and not to side with anyone else. If the cases are to go to the sheriff court, the advocates' fees must be paid, because if we do not have that in place and there is a shortfall, the client will have to pay that money out of their damages, which cannot be fair.

If a lung cancer case goes to the sheriff court and only two employers out of five are insured, the person would get only two fifths of their damages. If the advocates' fees are not met, the pursuer will take payment for their services out of that two fifths, and our clients, who are terminally ill, could go away with next to nothing.

The Convener: I take it that your figure of two out of five companies is based on five companies being found liable. However, it might be that not all of them are found liable.

Phyllis Craig: No. If a client was exposed to asbestos by five companies but there was insurance for only two, they would receive only two fifths of their damages.

The Convener: You would have to establish that they were exposed to asbestos. I am asking, for clarity, whether your figure is based on the presumption that five companies have been found to have been liable.

Phyllis Craig: If there had been no exposure to asbestos, proceedings would not be raised against a company.

The Convener: They might be, but evidence might show that that was not the case. I am just teasing out that your figure is based on liability having been either admitted or proven.

Phyllis Craig: If there was no insurer, nobody would raise any action against the company. We would know to raise just the two actions against the two companies that were negligent and which had insurance at the time.

The Convener: I do not want to get into the complexities of bringing in third parties, although they could do that. I am just clarifying that, in the circumstances, liability has to be either admitted or proven for there to be a claim against a company. Ms Blane is nodding. I just wanted to clarify that so that it is not taken for granted.

Elaine Murray (Dumfriesshire) (Lab): Two possible solutions have been offered by the people who have concerns about that particular proposal. The first is that the bar for referral to the Court of Session should be lowered to, say, £30,000 or £50,000 in line with other parts of the United Kingdom and that the case should go to the Court of Session with the automatic right to counsel. On the other hand, the trade unions seem content with cases going to the specialist personal injury court, but they want there to be an automatic right to counsel at that court. Do you have a preference for either of those suggestions?

Phyllis Craig: If the panel was to say that the cases must be shifted from the Court of Session, we would ask the panel to consider—as Sheriff Principal Taylor has stated in his report—that there should be no cap on personal injury cases and that it must be stated in the bill that advocates' and advocate solicitors' fees should be paid. I would also go further. Sheriff Principal Taylor said that, if a case is lost, the pursuer and the defendant should pay their share because he could see that things were not equal for people with an asbestos case.

Elaine Murray: Would you prefer those cases to be heard in the Court of Session?

Phyllis Craig: I would prefer them to be heard in the sheriff court. However, if they had to be moved, we would want them to be moved into the sheriff court with all solicitors' and advocates' fees paid and with all the procedures that ensure

efficiency in the Court of Session transferred to the sheriff court.

Elaine Murray: I may not have picked up what you said correctly. Would you prefer the cases to be heard in the Court of Session?

Phyllis Craig: Yes, in the Court of Session.

Elaine Murray: Thanks for that clarification.

In your written evidence, in talking about the time bar, you say:

"Unfortunately, the Scottish Government's recent Bill on limitation has failed to address this issue."

Do you think that there is an opportunity to revisit that issue in the Courts Reform (Scotland) Bill?

Phyllis Craig: I would certainly be delighted if something could be done there. As you well know, at the time of the pleural plaque issues, the insurance industry argued that people should not bring a case for pleural plaques but that there should be education and so forth. It argued that it was more concerned with people with mesothelioma and more terminal conditions. We are now finding that we have quite a few cases whereby people did not pursue their pleural plaque issues and now, unfortunately, they have mesothelioma and are terminally ill but cannot pursue their cases because of the Aitchison decision. That is what is preventing them, and they are being told that they should have taken the pleural plaques cases when those arose.

The Convener: Having looked at the purposes of the bill, I have to say that it would be stretching things to put in a time bar. There is also a damages bill that, I suspect, will come our way—

Elaine Murray: We might be able to put something in that.

The Convener: Indeed. Something might come up in that bill that relates to this issue.

Phyllis Craig: Actually, I think that the damages legislation has failed to address this point.

Elaine Murray: We are talking about new legislation on damages that will be introduced later this year.

The Convener: Another damages bill is en route. Forgive me, Elaine, but I simply do not think that there is scope to do what you suggest in this bill. Have you finished?

Elaine Murray: Yes.

09:30

Sandra White (Glasgow Kelvin) (SNP): Good morning. Following on from Elaine Murray's comments, I want to clarify something in my own mind. You have explained very well the very complicated nature of this issue. The bill contains provisions to establish a personal injury court, but in response to Elaine Murray, you said that you would prefer the Court of Session to hear these cases. Are you saying that if, for whatever reason, that option is not available in the bill and the personal injury court is established, counsel must still be available and that those costs must continue to be met?

Phyllis Craig: Yes.

Sandra White: That has clarified that point.

Phyllis Craig: If the specialist personal injury court is established, solicitor advocates' fees must be met. However, that must be specified in the bill. People have told us on many occasions that the fees will definitely be met but, given that we cannot be sure of that, it must be set out in the bill.

In fact, I would go further than that and say that I agree entirely with Sheriff Principal Taylor's view on this matter and ask that the bill specify that, if solicitor advocates' fees are to be met and a case that goes to the sheriff court or a specialist personal injury court is lost, the pursuer and the defendant should pay their own costs.

Sandra White: That is good.

Given the complexity of the asbestosis situation, should it be made a special case?

Phyllis Craig: It is already a special case. I do not want to cloud the issue by referring to other cases; I am here to talk about asbestos, and I simply point out that, given that the latency period for such conditions is between 20 and 50 years, it is very difficult to get documentary evidence and witnesses. I also believe that the Parliament recognised that these were special cases.

Sandra White: Absolutely. I have visited your office and know that many people in the Parliament have carried out work on asbestosis cases.

On the slightly different issue of health and safety, the Enterprise and Regulatory Reform Act 2013 removes the automatic assumption that, for the purposes of the law of negligence, a breach of health and safety law is a breach of an employer's duty of care to employees. Do you have any comment to make on that change?

Phyllis Craig: We do not deal with health and safety issues—we deal only with people who have an asbestos condition—but I have been led to believe that that legislation has no effect on the issues that we deal with. However, I cannot say any more than that.

Sandra White: Can I ask Ms Blane a question, convener?

The Convener: No. I have already said that we cannot direct questions to Ms Blane. If I allowed that, we would have other people just coming along to give evidence.

Sandra White: Perhaps I will speak to you later, Ms Blane. The situation is a bit of an anomaly.

Phyllis Craig: Could we reply in writing to questions?

The Convener: You can certainly send in more written evidence if something arises. After all, witnesses can be caught on the hop a bit by questions that come up. That is not a problem.

Are you finished, Sandra?

Sandra White: Yes, convener.

John Finnie (Highlands and Islands) (Ind): What is important to you—the outcome and how you get it or where all the business takes place?

Phyllis Craig: Where the business takes place is very important. After all, a mesothelioma case can be heard within two months in the Court of Session. Will that be the same if these cases are heard in a specialist personal injury court or a sheriff court? If they are, I hope that all the procedures that are used in the Court of Session will transfer to those courts.

If an asbestos-related lung cancer case were to be heard in the sheriff court and the sheriff decided to refer it to the Court of Session, the Court of Session would have to decide to accept it. Time is of the essence because the person in question could die in the time it takes for the case to go through the sheriff court and then get referred to the Court of Session. That would be very unfair for that family.

John Finnie: If I have noted it correctly, you used the term "efficiency" in relation to proceedings in the Court of Session. Again, I am playing devil's advocate a bit, but would it be sufficient for you if that efficiency were to be replicated in a new model?

Phyllis Craig: Yes, if advocates' fees were met and if there were the same efficiency that exists in the Court of Session. However, as I have said, that would all have to be put into the bill. People keep saying to me that advocates' fees will definitely be met, but that is not to say that an individual sheriff would not think that right. Given that the insurance industry can afford the best advocates to defend these cases, it is only right that the people in question have the same rights.

John Finnie: In your submission, you refer to

"some of the attempts which have been made by the insurance industry to avoid payment of compensation over recent years"

and say that

"Note should be taken of how many issues were only finally resolved by the Supreme Court or through legislation."

Is it a cause of concern to you that access to the Supreme Court will be possible only if permission is granted?

Phyllis Craig: Yes, because it builds in another layer of appeal before we get to the Court of Session.

John Finnie: Thank you very much.

Roderick Campbell (North East Fife) (SNP): First of all, I refer members to my entry in the register of members' interests as a member of the Faculty of Advocates.

I might be a bit slow this morning—

The Convener: You are never slow, Roddy.

Roderick Campbell: —but there is something that I seek clarification on. In your submission, you say:

"our members must have automatic access to Advocates and Solicitor Advocates".

Should that apply in a specialist personal injury court?

Phyllis Craig: Yes.

Roderick Campbell: You also refer to Sheriff Principal Taylor's report. However, paragraph 17 of chapter 3 of that report says:

"I am not persuaded that there ought to be automatic sanction for the employment of counsel in the specialist personal injury court nor indeed for any personal injury cases in the sheriff court."

To that degree, you are in contradiction with him.

Phyllis Craig: To that degree, we disagree with him, but we certainly agree with him when he leaves out personal injury solicitors with regard to capping advocates' fees. He knows exactly how complex these cases are. We also agree with his view that when a case is lost the pursuer and the defendant should pay their own costs.

Roderick Campbell: So you are not whole-heartedly endorsing Sheriff Principal Taylor's report, just some of his points.

Phyllis Craig: That is right.

Roderick Campbell: He also refers to the fact that very few such cases have qualified for legal aid. Do you have any breakdown of the number of clients who have proceeded on spec?

Phyllis Craig: Because our clients have worked all their lives, they have small pensions from different jobs. As a result, most of them are only just over the threshold for qualifying for legal aid and most of the cases are therefore taken forward on a no win, no fee basis. However, given the

legal aid system, it is much quicker to take the no win, no fee route.

Roderick Campbell: Thank you.

Christian Allard (North East Scotland) (SNP): I have only a brief question. How many of these cases are settled out of court?

Phyllis Craig: To be honest, I cannot say, because I do not deal with the civil side of these cases. We know what is important to the client. I think that there were 65 pleural plaques cases and 120 other cases that went to the Court of Session. However, we have about 800 cases a year.

The Convener: We can easily get that information from you.

Phyllis Craig: Indeed.

The Convener: It is not something that you should have to pluck from the air today, but the information would be quite helpful. I have to say that, from my own experience, cases are quite often settled at the door of the court, which means a lot of money has already been expended. Would you agree?

Phyllis Craig: I think that that is right.

The Convener: I was not going to say this, but I think that members have no more questions. I thank Ms Craig for her evidence—I am delighted that you came along—and thank Ms Blane for attending.

I suspend for a couple of minutes for a changeover of witnesses. I ask members to stay put.

09:39

Meeting suspended.

09:42

On resuming—

The Convener: We move on to our second panel of witnesses. I welcome Sheriff Principal James Taylor, who led the review of expenses and funding of civil litigation in Scotland, and Kay McCorquodale, who was secretary to the review.

Sheriff Principal Taylor, I believe that you wish to make an opening statement.

Sheriff Principal James Taylor: Thank you very much, madam convener, and thank you, ladies and gentlemen, for the opportunity to address you today.

Over the weekend, notwithstanding the good weather, I took the opportunity to reconsider the recommendations that were made in the "Report of the Scottish Civil Courts Review", of which I was a member of the board of four. Sometimes, when one revisits a document after the passage of time, one wishes that one could rewrite a number of the recommendations. This time, I did not have that wish.

The Convener: I am so glad. I wondered where we were going.

Sheriff Principal Taylor: Therefore, I am happy to support the bill, where it is consistent with the terms of the report of the civil courts review. The corollary is also true.

A consideration of some of the evidence that has been presented to the committee suggests that there are a number of areas where those who have a particular axe to grind would have you depart from the bill. One such area is that of the sheriff court having a privative jurisdiction of £150,000. When we selected that figure, my approach was not to consider what percentage of cases should be moved from the Court of Session to the sheriff court; my starting point was to settle on a figure for cases that I consider to be appropriate for determination by a sheriff. It is a judgment call. To assist me, I had my many years of experience as a litigation solicitor in the sheriff court and then as a solicitor advocate practising in the Court of Session. I also had several years as a sheriff in Glasgow and as one of the designated commercial sheriffs.

After the commercial court was established in Glasgow, I and the other commercial sheriffs regularly heard cases in which the sums that were being sued for, and on occasion the sums that were awarded, were well in excess of £150,000. Solicitors did not have a problem with raising such actions in Glasgow sheriff court, where specialist sheriffs were available. Of course, specialist sheriffs lie at the heart of our recommendations.

09:45

When the courts review made its recommendations, we had to consider the sums that would be sued for. We must consider the sums that are sued for because, at the outset of a case, we do not know at what sum the case will settle. Criticism has been made about the paucity of statistics that were available to us. I have obtained more extensive statistics for the purpose of my review. In the 1,096 personal injury cases that were raised in the Court of Session in 2012, the average sum that was sued for was £153,319. The average sum that the pursuer received, either by settlement or by award of court, was £46,952, which is approximately one third of the average sum that was sued for. It might be relevant to the committee to know that the pursuers' solicitor and counsel fees averaged £12,017.

It is thought that not many personal injury cases are raised in the sheriff court, so the committee

might be surprised to learn that, in 2012, 2,386 personal injury cases were raised in the sheriff court under ordinary procedure—that is, cases in which the sum that was sued for was in excess of £5,000. The average sum sued for was £16,019, and the average sum received by or awarded to the pursuer was £6,409. The average for the pursuers' solicitor and counsel fees, when counsel was instructed, was £4,120.

One must remember that there is a facility at present—it will continue—for remitting a case from the sheriff court to the Court of Session if it is particularly complex or if it raises novel legal issues.

Roderick Campbell: On those figures, for clarification, are you assuming that all the 2012 cases in the Court of Session and the sheriff court have been concluded?

Sheriff Principal Taylor: Those were the statistics that I received. I think that they are on the cases that settled in 2012, rather than the cases that were raised.

Roderick Campbell: Right. That is where there was confusion.

Sheriff Principal Taylor: I have just looked at the raw data, and what I have just said is correct.

Roderick Campbell: Something that was not covered in your report or in the civil courts review, because it is far too early to assess, is the impact on sheriff court practice of allowing counsel to appear without solicitors. That ought to reduce costs in due course.

Sheriff Principal Taylor: Yes.

Roderick Campbell: Do you have any comment, other than that?

Sheriff Principal Taylor: My experience in the sheriff court was that counsel often appeared on their own anyway, although strictly speaking they were not supposed to. One would find that a solicitor would start off a case, stay for five or 10 minutes and then disappear. I am not sure of the extent to which there will be a reduction in cost; obviously, there must be some reduction.

The Convener: Excuse me, but if a solicitor disappeared, they would still be entitled to fees, as would the advocate. There would still be costs.

Sheriff Principal Taylor: One would hope not. It might be thought to be fraudulent to charge for something that one had not done.

Roderick Campbell: On the question of sanction for counsel, you basically take the view that, with the exception of the reasonableness test—which I might ask you to expand on—the existing tests should be retained.

When Mr Tyler of the Law Society of Scotland gave evidence, he said:

"it is almost automatic that sanction for counsel is applied for in the sheriff court for anything that is reasonably complex. The question is whether, in the new world, the test will be applied in the same way. I have gained the impression that the intention is to apply it far more stringently such that counsel will be sanctioned on fewer occasions."—[*Official Report, Justice Committee*, 18 March 2014; c 4368.]

Would you care to comment on that?

Sheriff Principal Taylor: It was certainly not the intention of any of the members of the board of the Scottish criminal courts review that there should be a more stringent test for counsel. In my report, I have recommended that the wording that has to be deployed in applying the test should remain the same, subject to the additional factor being brought in—at the request of a member of the Faculty of Advocates, which I thought was appropriate—of an explicit provision for equality of arms to be considered.

Roderick Campbell: How do you foresee that working in practice?

Sheriff Principal Taylor: I think that I say in my report that it is unlikely to make a huge change. If the defender in a personal injury action has instructed junior counsel, for example, to appear in a case, it would be rather odd if a defender were to oppose a pursuer's motion for sanction for counsel. However, if my recommendation were accepted, in the event that such opposition were forthcoming, the court would have to take into account the fact that counsel was being instructed by the defender when it was considering the pursuer's motion.

The Convener: Has that already happened, in practice?

Sheriff Principal Taylor: Yes, it has happened in practice.

The Convener: At the moment, if there is a motion by the pursuer for counsel, because the defender has counsel, does the bench usually accept that motion?

Sheriff Principal Taylor: I cannot think of an occasion on which such a motion would be refused.

Roderick Campbell: Just to recap slightly, is there anything else that you want to say about the reasonableness aspect that you added in?

Sheriff Principal Taylor: The reasonableness aspect concerns the fact that, once one has considered the individual factors that are enumerated in the test, one should stand back and ask, "Hold on a minute—is my decision reasonable, overall?" If it is, one should proceed

and, if it is not, one must go back into the various factors and see where one has gone wrong.

Roderick Campbell: You might have heard Clydeside Action on Asbestos, on the first panel, arguing that there should be automatic sanction for counsel—or a solicitor advocate, for that matter—in the specialist personal injury court, which you rule out in your report. Could you tell us why you ruled that out?

Sheriff Principal Taylor: I do not accept that every personal injury action is complex and I do not accept that every personal injury action requires counsel to be sanctioned. Personal injury actions are special, in some respects, in relation to the question of expenses. I deal with that in my report. However, when it comes to complexity and difficulty, the run-of-the-mill personal injury case is not unduly difficult. That is recognised in the fact that there is a special set of procedures to deal with personal injury actions, which, in essence, embody case flow management. There is a predetermined timetable for every case, because each follows a formula. On the other hand, cases that are subject to active case management need to have a bespoke procedure to resolve each and every case.

One must not always look at the system through the prism of personal injury actions, important though they are. One must look to see what the knock-on effect would be if there was automatic sanction for counsel in a straightforward slipping or tripping personal injury case, for example. If there was automatic sanction, can you see what the scenario would be in a non-PI case? Many cases are litigated in the sheriff court without counsel being involved. If there was automatic sanction for counsel in PI cases, it would be difficult for a sheriff to refuse a motion for sanction in some other cases.

It would be submitted that Parliament had decreed that simple slipping and tripping cases merit sanction, so how could m'lord refuse sanction in a case for £10,000 that involves, for example, an allegedly badly installed central heating system, with expert technical witnesses on both sides? Cases such as that have traditionally been conducted in Scotland's sheriff courts by solicitors. It is a cost-effective means of resolving a dispute. If we put ourselves in the position of the consumer who is dissatisfied with the installation of his or her central heating system, he or she might have no form of insurance for litigation, and they might just consider that the risk-to-reward ratio of litigating is appropriate, provided that he or she can instruct their own solicitor.

The prudent client would ask what the downside would be if the case was lost. If the prospective litigant was informed that the bill would include the defender's solicitor's fee, and that sanction for counsel would also probably be granted, in many cases that would tip the balance against litigating because the risk-to-reward ratio would not favour proceeding. That, ladies and gentlemen, would amount to a denial of access to justice.

Roderick Campbell: We heard some evidence about how well the chapter 43 procedure has operated in the Court of Session, but there was some implied criticism of its usefulness in the sheriff court. Will you comment on that?

Sheriff Principal Taylor: I was unaware of any shortcomings in the use of the chapter 43 equivalent in the sheriff court. There was a specialist personal injury court in Glasgow where I was a sheriff principal, and all the reports that I heard said that it operated efficiently. I am aware of one difficulty in certain sheriff courts in which the court will allow only a one-day diet of proof, even if the parties need three, four, or five days. I do not think that that is appropriate. It was certainly not the case in Glasgow, and I know that it was not the case in other sheriff courts. It is my understanding that it will not be the case in the new all-Scotland personal injury court.

Alison McInnes (North East Scotland) (LD): I have a question to follow up on Roderick Campbell's point about the test of equality of arms. I am not clear about the impact that you think your recommendations will have in respect of personal injury cases. You have asked us to consider the knock-on effect from one direction, but can you look at it from the other direction and say what difference your recommendations would make?

Sheriff Principal Taylor: I do not think that the recommendations would make any significant difference. I say that in the report.

My recommendations would give effect to what is already happening. The convener asked whether I think that equality of arms is already factored into the test; I think that it is, but it is as well that it be expressly put into the test. That is all that I seek to achieve.

10:00

Alison McInnes: Are you clear about the extent to which your recommendations will be adopted by the Government? The Government has not responded as yet.

Sheriff Principal Taylor: It is not for me to answer that question.

Alison McInnes: Has there been no further dialogue?

Sheriff Principal Taylor: There has not been further dialogue.

The Convener: I was just checking whether the Government had responded to the review and

whether we are talking about equality of arms being in the bill, in guidance to sheriffs or wherever. What are we talking about, here?

Sheriff Principal Taylor: At present, equality of arms is contained in my report only.

The Convener: I know that it is in your report.

Sheriff Principal Taylor: It has just been confirmed to me that there has been no formal Government response.

The Convener: We will await that response.

Alison McInnes: I seek Sheriff Principal Taylor's view on that. Is it not passing odd that we are proceeding with the bill without incorporating your recommendations? Would it not be much more sensible and comprehensive to take forward the bill and the recommendations together?

Sheriff Principal Taylor: I really do not think that it is for me to comment on the procedure that the Government has chosen to adopt.

The Convener: I will take Margaret Mitchell's question next.

John Pentland (Motherwell and Wishaw) (Lab): I have a brief supplementary.

The Convener: If Margaret Mitchell can bear with me, I will take John Pentland first as he did not get in last time.

John Pentland: You probably find it difficult to comment because the Government has not responded. However, following on from what Alison McInnes was saying, if your recommendations were not to be incorporated, would your answers to questions that have been asked today be different?

Sheriff Principal Taylor: If we are talking about the test for counsel, I do not think that my recommendations would impact at all on the issues that are before the committee today, for the reasons that I have already given.

The Convener: That was, quite rightly, a very diplomatic answer. Margaret Mitchell has been very patient.

Margaret Mitchell: Your opening statement concentrated very much on the £150,000 threshold. I think that you decided, based on experience, that that is the right amount, although there is no hard evidence to back that view. Is that correct?

Sheriff Principal Taylor: We looked at some statistics that support the view that I had come to based on my experience.

Margaret Mitchell: What are those statistics?

Sheriff Principal Taylor: I am sorry—I do not have an encyclopaedic memory. The statistics are set out in the "Report of the Scottish Civil Courts Review".

Margaret Mitchell: The statistics were such that you felt that you had to carry out further research. That is what you said in your opening statement. When did you commission that research and whom did you ask to do it?

Sheriff Principal Taylor: The figures that I obtained were from the Forum of Scottish Claims Managers. The input was from five or six firms instructed by the insurance industry, and the returns that they provided were collated and fed to those who were assisting me with the report.

Margaret Mitchell: When did you ask for the information?

Sheriff Principal Taylor: I asked for it some time in 2012. The information built up over the year.

Margaret Mitchell: Is the information that you have provided today new information and new research?

Sheriff Principal Taylor: No. The information that I have given to you today is information that was available to me when I was compiling my report.

Margaret Mitchell: The information is being made available to everyone else only now. Is there any aspect of it that is new to the committee today?

Sheriff Principal Taylor: I do not know; I am not sure what information is before you. I am sorry. It is more extensive than the information that was contained in the civil courts review report.

Margaret Mitchell: We could check on that, but it had seemed previously that there is very little hard concrete evidence about how the £150,000 threshold had been arrived at. It would be good to check that out because you have cited a lot of figures this morning, which we do not have in front of us. It is not helpful not to have that information. It would have enabled us to ask you directly about those specific figures. We can pass that on and see whether there is anything new.

The Convener: To clarify, I think that Sheriff Principal Taylor is talking about his review, but there was a separate one with Lord Gill, which has different figures in it. Perhaps that is where there is a mismatch.

Margaret Mitchell: Perhaps we have not used your figures, Sheriff Principal Taylor, but they were available to us. We can check up on that.

Sheriff Principal Taylor: I cannot say what has been available to the committee. I know that you have heard from the Forum of Scottish Claims

Managers. I do not know what statistics it has provided to you.

Margaret Mitchell: One of the recommendations in your report was that claims management companies should be regulated. Should that be part of the bill?

Sheriff Principal Taylor: Part of this bill?

Margaret Mitchell: Yes.

Sheriff Principal Taylor: At present, I do not know of any abuse—sorry, that is not quite true; there were, I think, one or two instances of complaints against claims management companies, but they were not made to me. They were made in about 2008 or thereby, when the Scottish Government consulted on whether claims management companies should be regulated.

No complaints about claims management companies were made to me. However, I felt that it was important that there should be a level playing field between claims management companies and the legal profession. That was the basis for my recommendation that claims management companies should be regulated, particularly given that I also recommended that there should be a facility for solicitors to enter into damages-based agreements and so on. I have to say that they enter into such agreements at the moment; they just wear a different hat—they just call themselves claims managers.

Margaret Mitchell: They are regulated in the rest of the United Kingdom. Is that the case?

Sheriff Principal Taylor: Yes. They are regulated in England and Wales.

Margaret Mitchell: On the no-win, no-fee, damages-based agreements that they can enter into, are those likely to improve civil and commercial litigation and increase people's willingness to use the Scottish courts for that purpose?

Sheriff Principal Taylor: I am convinced that that is the case; it should improve. I would be very disappointed and very surprised if the recommendations on damages-based agreements and qualified one-way cost shifting did not improve access to justice quite significantly.

Margaret Mitchell: Would more of a level playing field be created with claims management companies, if they are not regulated?

Sheriff Principal Taylor: In theory, but solicitors are getting round the ban on their entering into damages-based agreements at present by forming their own claims management companies. One might think that if a rule or law can be so easily circumvented, it must be a bad law.

Margaret Mitchell: So, does that improve or add to the case for regulation?

Sheriff Principal Taylor: I do not think that it does either.

Margaret Mitchell: Okay. Thank you.

Elaine Murray: Some of the witnesses have argued that increasing the financial bar from £5,000 to £150,000 in one go is going too far, too fast and that the increase should be staged or the bar should be set lower, perhaps at £50,000 as in England and Wales or £30,000 as in Northern Ireland. Is it appropriate to increase it to that extent in one go or would there be value in having a staged approach?

Sheriff Principal Taylor: I do not see any need to have it staged, to be honest. If one set the threshold at £50,000 and if the figures that I provided today are broadly accurate and the real value of a case is approximately one third of the sum sued for, it would mean that cases of a value of £17,000-odd would still be tried in the Court of Session. In my view, this is all about cases finding their correct level. The correct level for a case with a value of £17,000 or £20,000 is firmly in the sheriff court.

Elaine Murray: We have had evidence that, in the Court of Session, the involvement of advocates results in a large percentage—I cannot remember the exact figure—of cases being settled before they go to court, which was considered less likely if cases go to the sheriff court. Will you comment on that?

Sheriff Principal Taylor: I have no statistics whatever that suggest that rates of settlement are different in the Court of Session from in the sheriff court. I have always understood that the two were about the same, and that 98 per cent of personal injury cases settle, regardless of which court they are in.

Elaine Murray: And you do not think that it is the involvement of advocates that helps to promote that settlement.

Sheriff Principal Taylor: I do not.

Elaine Murray: Another of the arguments that we have heard is that the Scottish Government hopes that increasing the availability of the Court of Session will mean that more commercial cases will come to Scotland. On the other hand, we have also heard evidence suggesting that the fact that a case worth £50,000 could go to the sheriff court here but not the Court of Session would have the opposite effect and result in commercial cases being more likely to be heard in the English courts. You have experience as a commercial sheriff, so what is your view of those arguments?

Sheriff Principal Taylor: I would be astonished if the £150,000 privative jurisdiction caused cases to be raised in England that might otherwise be raised in Scotland. It will not happen. Those who practise commercial law seem perfectly content to take to Glasgow sheriff court cases with a value well in excess of £150,000. I see no evidence to support the apocalyptic view that might have been expressed there.

Elaine Murray: How are decisions made about the jurisdiction to which one takes a commercial case? What would be the factors that would decide whether the case went to Scotland or England?

Sheriff Principal Taylor: I am putting myself back to when I was a solicitor. One would look at the court and the quality of the bench in the court. One would look at how quickly one could get the case through the court and the procedures that the court adopts. There might be more factors but those are the three that come readily to mind.

Elaine Murray: I think that that is the basis of the argument—that the case would go through the High Court in England more quickly than it would go through the sheriff court here, because of the workload of the sheriff court.

Sheriff Principal Taylor: That certainly was not true in Glasgow. I was quite gratified and amused to learn, when bids were being made for construction work to be carried out for the Commonwealth games, that some contractors from Glasgow were urging the people with whom they were contracting to put into contracts a jurisdiction clause giving exclusive jurisdiction to Glasgow sheriff court's commercial court.

The Convener: John Finnie—

Sheriff Principal Taylor: I am sorry—I did not answer the other part of Elaine Murray's question, which was about whether work would come back to Scotland. What first has to be done is to stop work haemorrhaging to England. I have no doubt that the package in the bill will go a long way towards stopping that haemorrhage.

Elaine Murray: What is the reason for the current haemorrhaging of cases?

Sheriff Principal Taylor: The view is that crime still gets in the way of civil work, and that the time to get to proof is longer in the Court of Session because there is such competition for judges' time. The bill should free up the top judges in the country to deal with the top cases in the country.

10:15

The Convener: Why is it important to stop civil litigation haemorrhaging? It might be helpful to have an explanation on the record. The public will not care, so it might be useful for you to tell us why that is important.

Sheriff Principal Taylor: When we were down in London in preparation for the civil courts review report—I am sorry that I keep jumping between reports—we had a meeting with the commercial judges there and with the head of the commercial court, whose name I regret to say I cannot remember. In Scotland it has been suggested that the concentration of resources into commercial procedures removes valuable resources from other parts of the Scottish system. I inquired of our host whether the commercial court in England and Wales washed its face in financial terms. He did not quite preface his reply by saying, "Dear laddie," but he came quite close to it, because he said that the commercial court in England and Wales is credited with £2 billion in invisible earnings. I would not for a moment suggest that that will ever be replicated in Scotland, but I think that the Scottish economy would benefit considerably from having at least a share of that, and that the Scottish economy certainly loses if cases haemorrhage to England.

The Convener: Thank you. I do not think that people appreciate the wider financial implications for the economy if we lose these cases—especially high-profile ones. It is therefore important to build jurisdiction for such cases into contracts, as you have already mentioned in relation to the Glasgow Commonwealth games.

John Finnie: Good morning, sheriff principal. On the fact that protected expenses orders should be available in cases that raise a matter of public interest, will you perhaps outline what would constitute a case involving public interest and how that would, I hope, dovetail with the Aarhus convention?

Sheriff Principal Taylor: I am sorry, but I do not think that it is for me to say what constitutes public interest. That is for the courts to determine and to build up their own jurisprudence. I am sorry, but I will not be drawn on that one.

John Finnie: Do you envisage that the system is likely, given the changes, to limit the scope of the Aarhus convention?

Sheriff Principal Taylor: I think that it is unlikely to limit the scope of the Aarhus convention.

Sandra White: Good morning. This may be a hypothetical question, so you can decide whether you wish to answer it.

The Convener: I am sure that the sheriff principal will answer.

Sandra White: My questions follow up on the evidence that Rod Campbell mentioned that we received from Clydeside Action on Asbestos,

when we asked whether it would prefer cases to go to the Court of Session or the personal injury court. Its representatives said that it would prefer cases to go to the Court of Session but that, if it was written into the bill that counsel and costs were available at the personal injury court, they would look favourably upon that—I am not saying that they would favour cases going to the personal injury court. What is your opinion on that? Asbestosis cases are very complicated. Would it be written into the bill that counsel and costs would be available in the personal injury court?

Sheriff Principal Taylor: First, a complex asbestosis case will probably be remitted to the Court of Session. However, even if it were to remain in the sheriff court, it would almost certainly merit sanction for counsel. I do not think that I can say much more. I understand why there might be some concern, but it is not a real concern—if I can put it that way. When sanction for counsel is sought, it is rarely refused. I am trying to think how often I have refused sanction for counsel when sitting on the bench, and I do not remember ever having done so. I am not saying that I have never done so, because I am sure that somebody around here would find a case in which I had done it, but I do not remember ever refusing sanction for counsel. Solicitors—and counsel—tend to know the cases in which such sanction is merited and they apply in appropriate cases.

As I said, the downside of having a blanket sanction for counsel would be the knock-on effect on other forms of litigation, where it would bump up the expense considerably. That would deny access to justice to those who currently enjoy it.

One cannot look at personal injury litigation in a vacuum; we must consider the knock-on effects. As I said, most personal injury cases are formulaic and are not complicated. The distinction in personal injury cases relates to expenses and the David and Goliath effect. The pursuer might be able to regulate the fees that are due to his or her solicitor by entering into a speculative fee agreement or another form of no-win, no-fee agreement, but the pursuer still has the risk that, if they lose the action, they will have to pick up the defender's costs. I addressed that in my report. However, that factor is separate and independent. The matters that the committee is dealing with in no way depend on qualified one-way cost shifting coming into being.

Sandra White: That was a diplomatic answer. It was enlightening.

Sheriff Principal Taylor: I hope that it was more than diplomatic.

Sandra White: It was much more than diplomatic.

The Convener: I take it that Sheriff Principal Taylor does not think that asbestosis cases should be a special case for which counsel is mandatory. Are you saying that whether counsel should be sanctioned will depend on each case on its merits?

Sheriff Principal Taylor: Exactly.

Roderick Campbell: I think that I am right in saying that Scotland is fairly unusual in having a test for sanction for counsel. Have you considered the alternatives to that approach in other jurisdictions? Do you have general comments on the issue?

Sheriff Principal Taylor: Do you wish to put particular models to me for comment?

Roderick Campbell: No—the question is purely general. I am not about to spring on you a model that I think would work better. I just wonder whether you have thought about the issue in general.

Sheriff Principal Taylor: I am content with the model in our jurisdiction. The bill will not increase the volume of litigation, reduce the availability of lawyers or diminish lawyers' abilities. Supply and demand will remain constant, and lawyers will adapt. If necessary, perhaps a new business model will be developed for delivering legal services to the public. That might be in the public interest—I do not know.

Lawyers always adapt to the changing situation. They are also good at preaching the apocalyptic message. Remember how the Faculty of Advocates said that advocates were doomed when divorce became possible in the sheriff court. Remember how solicitors said that they, too, were doomed when they lost the exclusive right to convey heritage. I will leave you, ladies and gentlemen, to judge whether their predictions came to pass.

Roderick Campbell: As a member of the Faculty of Advocates, I made slightly similar comments in a debate in the Parliament last year on corroboration, but that is another story.

The Convener: Please do not mention corroboration, Roddy.

Roderick Campbell: I think that Sheriff Principal Taylor makes a fairly valid point. I am sure that it is true that lawyers will adapt.

I have a final question on an issue that is not covered by the bill, but which is behind some of the criticisms of the sheriff court—the perception that management of time in the sheriff court does not work very well and that, under a new system, it will have to be vastly improved. Would you care to comment on that?

Sheriff Principal Taylor: Yes, I would be happy to do so. I have already touched on one aspect of that, which is the allocation of a one-day diet of proof when everyone accepts that more time than that will be required. That is an unfortunate approach to take.

It is important to take on board that one should not test the model that is proposed in the bill by looking at particular aspects of it and seeing how they would apply in the present situation, because the whole thing will change. I agree entirely with Mr Campbell's assessment that, traditionally, crime has squeezed out civil work, to the detriment of civil work—I am not giving away any trade secrets. The Lord President said when he was Lord Justice Clerk that our present system was not fit for purpose. We accept that—that is why there is a bill.

Elaine Murray: I seek a little clarification. You explained that you could not remember ever having refused sanction for counsel. I presume that you give guidance to sheriffs on that sort of issue.

Sheriff Principal Taylor: No, that is not the role of the sheriff principal.

Elaine Murray: Okay. How do we ensure that the standard of recommendations is the same across the country? A sheriff principal in another part of the country could take a more severe approach to applications. How do we ensure that a consistent approach is adopted across Scotland?

Sheriff Principal Taylor: There are two aspects to that. The Judicial Institute for Scotland is responsible for the training of the judiciary. In my report, I said that some additional training requires to be given in certain areas, which were highlighted to me in the course of the consultation process that I undertook. One instance that I can think of relates to an additional fee, on which there was criticism that there was not a uniformity of approach.

The second point to make is that, normally, one does not obtain leave to appeal decisions that are of a discretionary nature, because the test is quite high. It is necessary to be able to establish that no sheriff who properly applied his mind to the facts could ever have come to the decision in question. Decisions on the award of expenses and the sanction of counsel are discretionary.

In my report, I recommended that, in the early days of the specialist personal injury court, leave to appeal should be granted more readily than would otherwise be the case. Leave to appeal discretionary decisions is not usually granted, but to enable a jurisprudence to build up and a body of case law to be developed for the guidance of other sheriffs, I suggested that, at the outset, the normal stringent test for allowing leave to appeal should perhaps be watered down.

The Convener: How do you ensure that that happens? You can say that and you can put training in place, but how do you ensure that it happens?

Sheriff Principal Taylor: The sheriff principal would be able to suggest to the sheriff that, on the first few occasions on which leave is sought to appeal against a refusal, leave might be granted.

The Convener: But you said that sheriffs principal do not give guidance to sheriffs. That would appear to me to be guidance.

Sheriff Principal Taylor: It would not be guidance; it would just be an indication.

The Convener: Oh dear. There is no winning, is there? I have given up.

I think that that concludes our session. Thank you very much, sheriff principal.

Because we have had quite a long session, I will—with members' agreement—suspend the meeting for 10 minutes.

10:30

Meeting suspended.

10:39

On resuming—

The Convener: I welcome our final panel of witnesses: Lord Gill, the Lord President; Roddy Flinn, legal secretary to the Lord President; and Eric McQueen, chief executive of the Scottish Court Service.

We move straight to questions, starting with Christian Allard.

Christian Allard: Good morning, panel. Lord President, we heard earlier from Sheriff Principal Taylor, who said in his opening statement that special sheriff courts are at the heart of the recommendations. I want to ask you about the appointment of special sheriffs and summary sheriffs, and what kind of concern that could give to some of the rural areas that I represent. Sheriff Principal Taylor talked a lot about specialism in sheriff courts, particularly the Glasgow court. However, how challenging will specialism be for sheriff courts in rural areas? How can sheriffs there get the required training and how can we be assured that a lot of cases will not end up in the central belt, for example?

Rt Hon Lord Gill (Lord President of the Court of Session): I do not see that as a problem. Admittedly, specialisation will be heavily concentrated in the major courts in the cities—that

is inevitable. However, that is no reason why any of the outlying courts should not have access to the services of a special sheriff or a specialist summary sheriff. That is not a matter of policy; it is a management matter. It is for the sheriff principals to devise arrangements that will ensure that that happens. I do not foresee the slightest difficulty in that.

Christian Allard: There are concerns about some sheriffs specialising too much in one particular subject and not being able to have the experience or opportunity to deal with other areas over the years. Would that be of concern to you?

Lord Gill: I do not see that as a difficulty. When we speak of specialist sheriffs, we do not mean that they are capable of doing only one type of case. We are talking about sheriffs who will do one particular type of case for most of their work, but that does not mean that they will not be able to turn their minds to other types of case if the need arises.

Christian Allard: You do not think that it will be difficult for sheriffs to move from one specialist court to another after a certain period of time.

Lord Gill: No, I do not think so at all. I do not see any difficulty in this. At the end of the day, the system will work if it is capably and efficiently managed, and the deployment of the sheriffs in each sheriffdom will be a matter for the sheriff principal. I would have thought that that is a straightforward management matter.

Christian Allard: Will specialism be an asset for recruitment or could it make it more difficult to recruit sheriffs, given that they will not have a wide remit but will be asked to specialise?

Lord Gill: If you are talking about recruitment in terms of people applying for appointment as a sheriff, the evidence shows overwhelmingly that there is keen and intense competition for the jobs when they come up. We can go into the statistics if you like, but I can tell you that there are huge numbers of applications when vacancies are advertised. So far as serving sheriffs go, they are being given a fairly wide degree of flexibility. They can choose to ask to do a particular type of work in which they feel most experienced and most comfortable. However, they may also be asked by their sheriff principal to help out in other areas of the law. I do not think that there should be any difficulty over that.

Christian Allard: Thank you very much.

The Convener: Lord Gill, will having specialist sheriffs require just training on the job or will it require additional training? Is such training in existence just now?

Lord Gill: We already have all the systems in place, madam convener. We have the Judicial Institute for Scotland, which is now housed in the Court of Session building. Every judicial officeholder is required to do continuing professional training, and there are no exceptions to that. I go for training myself and I find that I enjoy it very much.

The Convener: I was about to ask about that, but I am glad that you have volunteered that information.

Lord Gill: I have never gone on a course from which I have not benefited and learned a lot. That side of things is already taken care of. You may be assured that the continuing training of sheriffs and, indeed, of judges will take into account the new landscape that we will have.

10:45

Margaret Mitchell: The review recommended that three judges, all at sheriff principal level, should preside in the sheriff appeal court. However, the bill allows for one ordinary sheriff to preside in the court, and we are told that 95 per cent of appeals could be heard in that manner. Is that a cause for concern?

Lord Gill: No. We took the view that the sheriff appeal court should start off as an out-and-out appellate court, and it should be manned by sheriffs principal. That was the plan.

As you can see from the bill, the opportunity will be given for first instance sheriffs to sit in that court. I do not see that as a major difficulty. After all, in the High Court—our own appeal court—we regularly bring in first instance judges as third judges in appeals and that system works quite well. To answer your question, Ms Mitchell, it is not an issue that I would go to the stake for.

Margaret Mitchell: Is there not a danger that some sheriffs will not want to look at their peers' judgment, that we are just substituting one opinion for another, and that that is less robust?

Lord Gill: It is in the nature of appellate work that one is invariably passing judgment on the work of one's colleagues who are generally also one's friends. It just happens. We are all used to it, and we have all been overturned in our time.

Margaret Mitchell: Would the distinction not be that, under your recommendation, sheriffs principal would be sitting in judgment of sheriffs' decisions? We are looking at a different level of judiciary.

Lord Gill: Yes, I take your point entirely. In effect, you are arguing for the position that we adopted in the civil courts review, and that certainly would have been my preferred option. However, as I said, I do not really see the issue as a major one that should in any way hold up the bill.

Margaret Mitchell: Do you have a view on the abolition of honorary sheriffs?

Lord Gill: The honorary sheriffs have fulfilled a need, particularly in outlying courts, but in a modern judicial system, all judicial work should wherever possible be done by professionally qualified and properly trained sheriffs.

However, there is value to be had from the services of honoraries in the outlying courts. I imagine that, over time, the need for those services will steadily diminish because, with the increased flexibility that we will have through the use of summary sheriffs, and the ability to deploy summary sheriffs over a wide area and between courts, the need to bring in honoraries at weekends, for example, should be so much less.

Margaret Mitchell: On the point about consistency and experience, one of the recommendations was that the summary sheriff role would reduce the reliance on part-time sheriffs, and the review envisaged a lesser role for part-time sheriffs, if not an elimination of their role. However, the bill continues the role of part-time sheriffs and removes the cap on their numbers.

Lord Gill: In the civil courts review, we took the view that part-time sheriffs had a role to play in emergencies in which there was a shortage and a need. We were also of the view that they ought not to form part of the normal day-to-day complement of the sheriff court. That was the view, and I remain of that view. I think that the need for part-time sheriffs will diminish considerably over time, and I am confident that over a period of, say, 10 years you will find that part-time sheriffs are used only in situations of true emergency.

Margaret Mitchell: Is the removal of the cap on numbers unhelpful?

Lord Gill: No. The removal of the cap does not mean that there will be more part-time sheriffs. I am completely confident that when the bill is passed the need for part-time sheriffs will diminish steadily as we introduce all the new procedures. The key to the whole thing is the appointment and effective deployment of summary sheriffs, because that arrangement provides the opportunity to take out a huge case load from the lower end of the sheriff court and to free up that court. The reforms start at the bottom and work their way up. The key is to get the summary sheriffs system working effectively.

The Convener: May I take you back to the sheriff appeal court? Your review recommended three judges, all at sheriff principal level, but we are now being told by the Scottish Government that 95 per cent of appeals will be heard by one judge who is just an ordinary sheriff. You have said that you are not really concerned—I am paraphrasing—but that seems to me to be a huge difference from what you recommended. For the sake of the validity of appellate judgments, I would have thought that your recommendation is where we want to be. You said that in the appeal court, the Court of Session, you sometimes have an ordinary judge, but there are two other judges sitting there, so we are not comparing apples with apples.

Lord Gill: I do not depart from a word of what was said in the civil courts review, but there you have it. The view has been taken that there should be the opportunity for those appeals to be dealt with by a single sheriff. The numbers do not tell the whole story, because in appellate work in the sheriff court the great bulk of the appeals are not appeals on the merits of the case at all, but procedural appeals against a refusal by a sheriff to allow a party to amend a case. A common situation is an appeal where a decree has been taken in absence, because through some blunder the defenders did not enter appearance on time. In fact, in numerical terms, the great bulk of appellate work in the sheriff court is about such minor procedural issues, which have traditionally always been dealt with by a sheriff principal sitting alone. My hope would be that, if cases are to be heard by one sheriff—although that would not have been my preference—it should be a sheriff principal.

The Convener: We are moving a bit, I think, because you would have known all that when you wrote your recommendations about the kind of matters that are taken to appeal. May I suggest that, if we cannot have the position of three sheriffs principal sitting, we should at least have one sheriff principal sitting, and not a sheriff, even if it is a procedural matter?

Lord Gill: That would be my personal view.

The Convener: Would there be circumstances in which it would be appropriate to have three sheriffs principal sitting, rather like a large bench, and who would determine that it should be a larger appellate bench?

Lord Gill: That is an operational matter for the court to decide. The court will have a considerable degree of discretion and flexibility as to how it handles its business, but every now and again there are cases in the sheriff court that raise an important question of practice. When that happens, a decision that is made by the sheriff appeal court will have a bearing throughout all the sheriffdoms. I would have thought that it would be almost inevitable that three sheriffs principal would sit in such cases; that was certainly what we envisaged in the report.

The Convener: Forgive me—how would it be determined that three sheriffs principal should sit in a particular instance?

Lord Gill: That would be for the president of the court to discuss with his colleagues.

The Convener: Thank you—I just wanted to clarify that.

Lord Gill: In addition, one must not forget that the parties are always free to apply to the court to convene a bench of three sheriffs principal if they consider that the case warrants it. It is not as though the decisions are just handed down: the parties get the chance to be heard.

Elaine Murray: We have heard concerns about the increase in the privative jurisdiction threshold of the sheriff court from £5,000 to £150,000, which is happening in one go. Various suggestions were made to the committee that there should be a small increase, in line with what happens in the rest of the United Kingdom; that there should be a staged increase; and that there should be a differential between personal injury claims and other cases. Can you comment on the concerns?

Lord Gill: It is a huge increase in the privative jurisdiction of the sheriff court; there is no doubt about that. Some of the opponents of the proposal have said that it is an increase of 3,000 per cent, which it is. That seems to be a startling figure, but it is large only because the present limit is so utterly ridiculous and so the base figure from which we are starting is preposterous.

In chapter 4 of our review, we produced what I consider to be very robust evidence to demonstrate that, in so many cases, the legal expenses were much greater than the sum at stake. That is simply unacceptable in a modern legal system. We set out that justification at paragraphs 114 to 116, so I will not go into all the details, but our evidence showed that, in many cases, the legal costs had already outstripped a case's value before it had even reached the lunch adjournment. That just cannot go on. We need to set a realistic level so that decisions can be made on whether cases are allocated to the sheriff court or to the Court of Session. Our considered judgment was that £150,000 was the appropriate limit, and I remain very much of that view.

I do not believe that it would be wise to have some sort of staging exercise whereby we would increase the limit to such and such a figure, and then have another look at it in 2017 or whatever. All that would happen would be that, when the time came to look at the next phased increase, we would go through all the trauma as has been going on for the past year or two, arguing about what the appropriate limit should be. The debate would be never-ending.

Secondly, once we got to the first phase of the exercise, there would be a very good possibility that it would also be the last phase, because there may not be the will to look at the matter again. Therefore, all the work that has gone into the integrated scheme that we have proposed would, in my judgment, go to waste. It would be a terrible pity if the whole scheme were to be ruined by that sort of thing.

It has also been suggested that all this could be achieved with a much lower limit, and in fact a lower limit could be set provided that you were willing to accept that, in the higher courts, there would be an uneconomic use of public resources. There would be an uneconomic use of public resources, because there would be a costly form of litigation that could equally well be dealt with competently and efficiently in the sheriff court at much lesser public cost, quite apart from the fact that there would be a lesser cost in terms of lawyers' fees.

11:00

Elaine Murray: Another concern that has been raised with us is that, because a significant percentage of personal injury cases—I cannot find the exact figure—will transfer from the Court of Session to the sheriff court, the Court of Session will be so starved of cases that it will not be able to develop Scots law in the area. What is your view on that?

Lord Gill: I have heard that argument. There is nothing in it, really, because the vast majority of such cases never see the light of day. We have been given dramatic figures on the number of personal injury cases that, in one fell swoop, will be transferred to the sheriff court. In fact, only a tiny fraction of the cases that are in the Court of Session ever get to proof. They are settled and dealt with administratively, and that is it. Our argument in the report is that, if that is the situation, they can be dealt with equally well administratively in the sheriff court at much lower cost and where the infrastructure is also in place.

Elaine Murray: Do you have any concerns about the resourcing of the changes? No additional resources have been allocated to bringing in the new system and it is assumed that the resources can be raised through revenue increases and increases in court fees. Does that cause you any concern? It seems that the process of implementing the bill will take a long time. At one point, we heard that it might take 10-plus years to get the new system into place. Does that concern you at all?

Lord Gill: From the work that has been done by the Scottish Court Service and the Scottish Civil Justice Council, I am absolutely satisfied that the reforms can be adequately funded. They are part of the long-term planning of the Scottish Court Service. I can go over the figures with you if you like, but my colleague Eric McQueen, who is chief

executive of the Scottish Court Service, could probably explain them to you more lucidly than I can. I have looked at the figures, and they are absolutely compelling.

Eric McQueen (Scottish Court Service): I am happy to give a summary. We have discussed the issue on a number of occasions with the Lord President, the SCS board and the Cabinet Secretary for Justice. The important thing is that the civil courts reform is part of our long-term planning—it has not just come along so that we are all of a sudden trying to work out how to deal with it. All our work in the past two years through "Shaping Scotland's Court Services" has been about how we deal with the reforms, get the right investment in technology and improve our services.

When the fee increase went through in 2012, there was an above-inflation element, which generated about £1.6 million of additional funding for the Court Service. That allowed us to invest in some of the pre areas, such as setting up the Scottish Civil Justice Council, putting in the team that is doing the rules rewrite and starting work on some of the information technology developments that we know that we need. To a large extent, the spending review protected our revenue budget for the next two years, which will allow us to continue investing in those areas. We were also allocated an additional £3 million this year and £3.5 million next year in capital expenditure over and above what was planned, so big investment is going into the organisation this year and next year, particularly in information and communications technology. We are investing about £2.5 million in each of those years to give us the type of infrastructure and case management systems that we need.

As I explained to the committee when I appeared before you previously, over the next 18 months we will start to think about whether the reforms will have a knock-on effect on the level of court fees. The presumption of successive Governments, including the current one, has been that the costs of litigation should be met through court fees. We will look at the total cost of the reformed civil courts system and what that means for court fees. We will consider whether we need a rebalancing between some of the courts, particularly when the specialist personal injury court is set up.

Cost is always a concern—there is absolutely no doubt about that—but we are confident and comfortable that, within the funding that we have in our allocations from the Government, and given the plans for the future and the investment in technology, we have sufficient funds to implement and facilitate the civil court reforms.

Elaine Murray: Do you have any idea by how much court fees might have to increase in order to fund it?

Eric McQueen: It is quite an interesting one. At the moment, the total cost of civil business in Scotland is about £40 million. An element of that is covered through court fees, there are some areas of exemptions because of earnings, and there are some subsidies, where we do not charge for certain things.

One of the things that we will be looking at is the total cost of a civil court system in future. We expect that it will not be radically different. A lot of this is about redistribution of business; it is not necessarily about doing new business. It is about doing things more effectively, using different tiers of the judiciary and using technology. There may be costs at the start, but there is no suggestion that the long-term costs, and therefore civil fees, will increase. We reckon that the pool will be similar. What we have to look at is what the redistribution of fees will be now that we have a new judicial tier in relation to the specialist personal injury court. It may be that there is some rebalancing across the fees rather than a significant increase in the overall pool.

The Convener: I am a bit bewildered by that. However, I want to ask you about the court fees, because those are outlays that parties may have to pay. They are not the solicitors' fees but the fees as we go through court and the various stages. The concern is that if the fees take a bump up, it will prohibit access to justice—that buzzword phrase—to people who are litigating who are not big companies. You have talked about the mix, and about rebalancing—I do not want to be rude, but I always find that a bit dodgy; I do not really know what it means. Can we have your assurance that, whatever happens, we will not see such a bump up in court fees that people simply cannot pay the outlays for a solicitor to take a case forward?

Eric McQueen: Yes. One thing that we do not expect to see is a large overall increase in the total amount of fees that are recovered for the cost of civil business.

To give an example of the rebalancing, one of the things that have been mentioned in the media is the transfer of cases to the personal injury court. At the moment, the cost of taking a personal injury case forward in the sheriff court is £90 or £95. In the Court of Session, it is around £200. Once the specialist personal injury court—which will operate throughout Scotland—is created, we will look at the appropriate fee level for that court, which will be somewhere between the £95 and the £200.

The Convener: Is that just for lodging the writ?

Eric McQueen: That is about the rebalancing. That is looking at the proper cost.

The Convener: Can you just clarify whether, when you say that that is the cost, that is just for lodging the writ? That is for the first stage.

Eric McQueen: Yes. That is the fee cost to take that part forward.

The Convener: Alison McInnes should stop me if she was going to ask about this. You talk about the transfer of business to the sheriff court. A couple of things crossed my mind. Will there be sufficient sheriff time to take the civil business, because sheriffs are also doing criminal work? Will there be sufficient time to do, say, four-day proofs, which I think would be a luxury? Many years ago, I took a contract case through Paisley sheriff court that extended for months to ensure that we had the same sheriff—we got one day here and two days there. Forget the closures—maybe I will leave that to Alison McInnes to deal with. How can you, with this organisation, guarantee that the sheriff will have four days to hear a proof, whether it is commercial or in the personal injury court? How will we be able to do that? There are issues in the Court of Session; it seems to me that there will be bigger ones in the sheriff court.

Eric McQueen: There are two issues here. There is one about physical capacity of the courts—

The Convener: I will leave that to my colleague Alison McInnes.

Eric McQueen: —and there is one about resources. What the bill is doing in terms of court reforms is about redistributing resources to get cases to the right level. With that redistribution comes a move of the judicial and staff resources that are required to fulfil that. At the moment, we use a range of temporary judge resources in the Court of Session to deal with business. In future, that resource will be directed to the sheriff courts as and where we need it. There is no question that what we are doing is just piling on extra work. Of the 2,700 cases—2,000 personal injury cases—that will transfer, we expect that about 700 will go to the sheriff courts. The amount of those that go to proof will be very small, but we will look to see where it is best to move the judicial and staff resource to match that particular complement.

The Convener: So we need more sheriffs.

Eric McQueen: We do not need more sheriffs; we are talking about moving the resource from one level to another as and when we need it.

The Convener: So we will not need more sheriffs to hear cases if we move more cases to the sheriff court.

Eric McQueen: Not necessarily, because a very small number of cases actually go to proof. We use a temporary pool of judicial resources at the moment and, in future, we will allocate that to the best place.

Lord Gill: Madam convener, to add to what Mr McQueen has said, from a judicial point of view, one of the big scandals in the sheriff court over the past 20 or 30 years has been the dreadful process of continued diets, where cases are heard in dribs and drabs over a year or a year and a half. It is unjust. It is a denial of justice.

A major part of the idea behind the summary sheriff is to take out of the sheriff court all the summary criminal business, which is one of the most disruptive parts of the business of the court. If that is all taken out of the brief of the sheriff and put into the summary sheriff level, it will free up an enormous amount of judicial time.

I would regard it as a critical success of the proposals that they will ensure that civil actions can be dealt with in one diet, unless there is some special reason not to do that. That is doable and I am confident that it will be done.

The Convener: That is helpful. In my experience of the continued proof, we kept having to go back and work out where we were the last time.

Alison McInnes: I have a couple of points but, as the convener has raised the issue of court closures, it would be remiss of me not to pick up on that.

The Convener: I know that you would have raised the issue of closures anyway, so do not say that you were not going to raise it.

Alison McInnes: There is an issue. We have a confluence of a number of changes in the system. What assurances can you give us, given the scale of the coming court closures, that there will be a proper and efficient court system in the future?

Lord Gill: I do not think that the court closures issue has any bearing on what we are discussing today. The court closure programme is to do with closing down courts that were semi-redundant and were not being fully utilised. Some of the courts were sitting for as little as four or five hours a week. Those courts are not pulling their weight. In a modern Scotland with effective communications, a good road network and good public transport, rationalisation is the obvious answer. The Victorian pattern of courts is simply unsustainable. That is that issue.

In fact, if we add up the case load of the redundant courts, it comes to very little relative to the whole case load of the sheriff courts. The work will now be dealt with much more effectively. If someone is a sheriff in an outlying court and they

have a proof and it settles at 11 o'clock, they are free for the rest of the day. If we rationalise the courts and concentrate the business in well-resourced centres and there is a settlement in one court, another case can be brought in from another court. We will use our resources much more efficiently and at less public cost.

Forgive me, Ms McInnes—that was a very long tirade. To answer the question, I am absolutely certain that the capacity exists in the sheriff courts to absorb all of the business, even with the closure of the outlying courts.

Alison McInnes: You are extremely confident. Your definition of those courts as semi-redundant does not sit well with what I know about places such as Stonehaven or Arbroath, which have been working as a safety net for overflows from Aberdeen, but perhaps we will leave that to one side.

Lord Gill: I understand the difficulty in the particular case that you are referring to.

11:15

Alison McInnes: In relation to the issues that Elaine Murray raised with regard to the privative jurisdiction of the system, there is also the issue of remitting and the appealing of cases from the sheriff courts to the Court of Session. The bill proposes changes in the current test. The current test is that cases can be remitted where

"the importance or difficulty of the cause makes it appropriate to do so".

Under the new provisions introduced by the bill, we will also have a test whereby the sheriff can request a remit, which is different, but only when

"there are exceptional circumstances justifying such a remit."

Then it is for the Court of Session to consider that request. Do you feel that those tests are appropriate?

Lord Gill: We did not go so far as to prescribe that in the civil courts review; it is something that has emerged in the bill. It is quite a stern test. My hope would be that the two tests in section 88 would be applied with a bit of common sense on the part of the bench. After you have been in the legal business for a number of years, you can soon recognise cases that involve an important point of law, and there are other cases that may not have an important point of law but may have some other unique or special importance. I hope that those tests would not have the effect of preventing appeals in cases where they ought to proceed, but one has to look to the bench for some common sense and good judgment in applying them.

Alison McInnes: Is it the case that you do not think that there is a need to amend the legislation as it stands, but just a need to make it clear what kind of common sense we are looking for?

Lord Gill: If you are asking me for my personal opinion, I would imagine that you could do equally well by using the same test in both cases. That would be my own, purely personal, opinion, since you have asked me, and I think that the second test in section 88 could be seen as too strict.

Alison McInnes: That is helpful. When you talk about the second test, are you referring to the ability to take into account business and operational needs?

Lord Gill: Not so much that as the "exceptional circumstances". Those two words set a high standard, and I would be perfectly happy if it was lower than that.

Going on from there, you will see that, under section 88(5), the court may

"allow the proceedings to be remitted to the Court."

There is also the question of the court having regard to the state of its own business. That is probably quite a wise proposal, in the sense that it would prevent a flood of appeals on unimportant cases, which would simply dislocate the effective running of the court, but again, since you have asked me, I think that the system could function quite efficiently without that provision.

Alison McInnes: I am a wee bit confused, because you have said that we might need to have that provision in case we have a flood of unreasonable appeals, but you have just told me that common sense will usually prevail. In what circumstances do you envisage that we would have floods of unreasonable appeals?

Lord Gill: It is impossible to predict. The one certain thing in the law is that legislation will produce unexpected results. All that I am really saying is that, on the question of "exceptional circumstances" and on the question of the exception for the business of the court, it would not trouble me in the least if those two provisions were not in the bill.

Alison McInnes: That is helpful.

The Convener: Yes, that is very helpful. That is the clarity that we wanted.

Roderick Campbell: In relation to section 88(10), what is your personal view on whether a sheriff's decision on remission within the exclusive competence should be final or whether there should be Court of Session overview of that?

Lord Gill: To the best of my knowledge, the provision does not stem from a recommendation in the civil courts review. I suppose that the

justification for it is that it would prevent a rush of appeals to the Court of Session. On the other hand, in some cases the Court of Session might take the view that an appeal should have been allowed. It would therefore be no bad thing if something to that effect were written into the bill to provide a safety net. It might be that a sheriff made a decision based on inadequate information or on an incorrect understanding of matters, so it would be helpful if there was the fallback that the Court of Session could take a second look at the matter, rather than someone's claim being ruled out for ever. My answer to Mr Campbell is that I agree with him.

The Convener: So we could delete section 88(6), which gives consideration to the business of the court, as we do not need that. Is that right?

Lord Gill: Yes.

The Convener: And we could also amend section 88(10), so that an appeal can be taken against the sheriff's decision to refuse a remit. Should we tamper with anything else in section 88?

Lord Gill: No. I think that "improve" is the word that you are looking for.

The Convener: I was just testing you.

Lord Gill: We ought not to try to do a drafting exercise round the table. As long as I have made clear my views on the principles, I am sure that the draftsmen—if the bill team were agreed—could do the drafting.

The Convener: Are you suggesting that, rather than looking at each subsection, we should go back to where we were, because it was perfectly okay before? Should we look at what existed previously on remits to the Court of Session from the sheriff court and keep it as it was?

Lord Gill: The basic structure of section 88 is pretty sound. The issue is just these policy points, which are very much a matter for the committee.

The Convener: Yes, but we value your views.

Has Alison McInnes finished?

Alison McInnes: No, if I may, I have further questions. In drafting the bill, the Government has diverged in a number of areas from Lord Gill's original recommendations. One area in which it has not taken things forward as strongly as we would like is in-court advisers and alternative dispute resolution. Do you want to comment on the impact of that?

Lord Gill: Our report recommended that that should be available in every sheriff court and that is very much my view. However, it is not a matter that requires legislation; it is essentially an operational and managerial question. I would certainly like guidance to be available in every sheriff court for litigants, particularly party litigants. Mediation services should be available and there should be encouragement of instruction and help for McKenzie friends, wherever they appear. I support all of that, because it is all part of a much wider priority: to increase access to justice. I do not disagree with any of those proposals, but I do not think that it is necessary to write them into statute.

Alison McInnes: Nothing in the bill prohibits such provision developing as good practice. Would Mr McQueen support such provision?

Eric McQueen: Absolutely. It is a key part of the work of the Scottish Civil Justice Council, which is particularly looking at the support that is provided to party litigants on the use of mediation. We will support the findings that come from the council's work.

Roderick Campbell: I have a brief question for Eric McQueen on the location of the specialist personal injury court. I presume that it is envisaged that it will be up and running before there is a change to the privative jurisdiction practice.

Eric McQueen: Sorry?

Roderick Campbell: I presume that the specialist personal injury court will be up and running before changes are made to privative jurisdiction.

Eric McQueen: That would certainly make sense; it is certainly part of our plan that that will happen.

Roderick Campbell: Do you have any further thoughts on location?

Eric McQueen: At the moment, Edinburgh is our preferred choice for the setting up of the personal injury court. We have said that, as time progresses, we will consider whether there is a need to have it in other locations, but Edinburgh is our preferred location at the moment.

Roderick Campbell: In his evidence, Sheriff Liddle was concerned about where the personal injury court would be accommodated. If I recall correctly, Sheriff Wood suggested the Court of Session, although I am not sure whether he was being entirely serious.

Eric McQueen: I am not sure why that is such a joke. When Sheriff Principal Stephen appeared before the committee, she made it clear that her preferred location for the personal injury court is Edinburgh sheriff court. Clearly, she feels that Edinburgh sheriff court has the capacity to accommodate that.

At the moment, all that work is conducted in the Court of Session in Parliament house. That is

where the facilities and the staffing are based. As the sheriff principal said, the change does not involve a scenario in which work will arrive on day 1. It will take time to get up to speed and to get the volume of work right. For the initial period, we might run the personal injury court in the Court of Session until we get a sufficient volume to switch the whole enterprise to Edinburgh sheriff court. It is not completely beyond the bounds of credibility that the personal injury court would start operating in the Court of Session, with a view to moving it to Edinburgh sheriff court as soon as there is sufficient capacity and a sufficient volume of business.

The Convener: How could that be done, given that, apparently, Edinburgh sheriff court is to take all the cases from Haddington sheriff court? I was trying to work out when the specialised PI court will be set up—that will be after the bill is enacted, whenever that happens—and where it will be. You said that it was part of the plan that the PI court would be up and running before the privative jurisdiction changes, but plans are plans—that is all they are.

You say that the PI court will move to Edinburgh sheriff court. Are you satisfied that Edinburgh sheriff court will have sufficient capacity, given that the business from Haddington sheriff court will be moved there?

Eric McQueen: Absolutely. Sheriff Principal Stephen confirmed that that is her view when she appeared before the committee a few weeks ago.

As part of the redevelopment work in Edinburgh, the High Court has been using Edinburgh sheriff court for the past two to two and a half years. In September this year, the High Court will cease to sit in Edinburgh sheriff court, which will immediately make available one full-size jury accommodation there. The Haddington business is due to move to Edinburgh sheriff court in January. As I said, the sheriff principal has no concerns about that. In planning terms, we will look to move the personal injury court to Edinburgh sheriff court at a later stage—that will probably take us into the early part of 2016. There are no concerns about the capacity of Edinburgh sheriff court to deal with that business, and the sheriff principal provided an assurance to that effect.

The Convener: That is on the record now.

Roderick Campbell: I will move on to judicial review. Some witnesses have expressed concerns about the proposed three-month time limit being too short. In relation to permission, concerns have been expressed that, as there is no real evidence that unmeritorious petitions for judicial review are being brought, we might not need the leave provision. I would be grateful for some general comments on those issues, Lord President.

Lord Gill: The essence of judicial review is about rescinding a decision made by a public body. The nature of public affairs is such that, if a decision is rescinded a long time after it is made, many other public decisions might have been made in reliance on it. Therefore, it is important that, if a decision of a public body is challenged, that should be done promptly and before it is acted on.

The fact that we do not have a time limit for bringing petitions for judicial review is one of the gaps in Scottish civil procedure. There is evidence of petitions being brought far too late in the day. We had to consider what would be an appropriate time limit. We took the view that three months is a more than reasonable period for anyone who is aggrieved by a public decision to take advice on the matter and to go to law, and I remain of that view.

Roderick Campbell: The second part of my question was about unmeritorious applications for judicial review and whether we need a leave provision.

11:30

Lord Gill: Yes, we undoubtedly do. Some of the petitions that are raised lack any probable cause. Sometimes, petitions for judicial review are brought not so much to rescind a decision as to postpone the inevitable, if I can put it that way. It is entirely reasonable that, if somebody wants to challenge a public decision, the court should have the power—I would say the duty—to decide whether the challenge should be allowed to go ahead on the question of whether it discloses probable cause.

The Convener: If someone has applied for legal aid, would that be covered by proposed new section 27A(1)(b) of the Court of Session Act 1988, which refers to

"such longer period as the Court considers equitable having regard to all the circumstances"?

I am not sure, but I suspect that it is hard to get legal aid for judicial review, so there might be a bit of an argy-bargy with the Scottish Legal Aid Board.

Lord Gill: As a matter of routine, the court has always been prepared to sist a case to enable a person to apply for legal aid. There is nothing in the bill that would prevent that.

Proposed new section 27A(1)(b) could cover a wide range of circumstances that would justify a petition outside the time limit. Let us suppose that the petitioner is a foreigner and has been unable to communicate his complaint in time to an

appropriate person. That is the sort of situation in which it is valuable to have another safety net so that there are no hard decisions.

Roderick Campbell: How do you envisage a pre-action protocol for judicial review—if it comes into being—operating with the time limits?

Lord Gill: Proposed new section 27A of the 1988 act, which is in section 85 of the bill, seems to be concisely and clearly expressed, which leaves no one in any doubt of what is required of them if they petition for judicial review. I cannot see any way in which it could be improved on.

Margaret Mitchell: Mr McQueen referred to redistribution and resources being made available through, for example, improvements to ICT. I ask him to elaborate on that.

Eric McQueen: Are you referring to how we will do business in future?

Margaret Mitchell: Yes. Exactly how much will you rely on ICT improvements? Often, they are fraught with problems.

Eric McQueen: That is one of the most challenging areas for us, but we think that it will significantly underpin the work on how we want the justice system to operate in future. This year, we will install a new network infrastructure to ensure that we have high-speed connections across all our courts. We will provide wireless access in all our courts to facilitate not only the bench but the defence and other litigants accessing data in that environment. We will also bring in a new civil database system that will allow electronic registration and the electronic use of evidence in the court to try to move civil business away from the current paper-dominated environment.

Through time, that should help us to allow better access to justice through some of the more specialised services and specialised sheriffs or summary sheriffs. In future, it might be more possible and feasible to connect to some of those services through videoconferencing rather than have people physically appear in court. One of the big drives is to limit the amount of time that people need to physically appear in court.

We are already doing quite a lot of work on that, and we are running some projects to test it out. For example, the vast majority of High Court appeals by people who are currently in prison are now done by videolink. We want to extend that more widely, including across civil business.

Margaret Mitchell: I appreciate the objective behind it. Have you done costings? Are computer systems compatible? What kind of savings are we talking about? Is there one particular system that is going to be rolled out?

Eric McQueen: The current scoping plan is to upgrade our infrastructure during this year. Later this year, there will be a tendering process in connection with the new civil database. We are working closely with the Scottish Government to ensure that our system fits with digital standards. We are also working with all the justice organisations on the new methods of evidence presentation and the standards that we will apply to videoconferencing so that we can ensure that we are progressing with the design in a sensible way that will fit into the overarching justice strategy for Scotland. We are not working in isolation; we are working closely with experts from a range of organisations to ensure that we deal correctly with the issues of compatibility and consistency of systems. We want to mitigate risk as far as possible.

The Convener: I will stop this line of questioning here, Margaret. It is useful, but I do not know whether it is directly relevant to the bill. It might be helpful if the committee could take evidence at another meeting on the use of technology across the justice system. The committee has not discussed this, so I am just floating the idea, but would it be useful for us to go on a visit to see what technology is currently in use in the courts and to hear about the intended changes and when they will be made? Would it be useful to see what is happening rather than just talk about it?

Eric McQueen: If the committee would find that helpful, I would be happy to facilitate it.

The Convener: We might want to discuss it.

Margaret Mitchell: The issue is quite germane to the discussion. The resources have been questioned and it has been suggested that savings will be made through IT improvements. Therefore, some facts and figures would be appreciated.

The Convener: Yes, but I think that it would be useful for the committee to have some hands-on experience of the action that is being taken in courts and what the plan is, so that we can better consider whether it will work across all courts uniformly and will connect properly with bodies such as the Procurator Fiscal Service and the police.

Eric McQueen: That would be a good discussion.

The Convener: I think—[*Interruption*.] Oh, I beg your pardon, Rod. I did not realise that you wanted to speak. I thought that you were just waving at me.

Roderick Campbell: I have one small point. Some views have been expressed to us about how sheriffs should operate in the simple

procedure and whether they should perhaps be more inquisitorial or take up a stronger role in terms of mediating or negotiating. Does the Lord President have any general views on that?

Lord Gill: The most desirable outcome of the legislation would be that, at summary sheriff level, the procedure has maximum flexibility built into it. The bane of the civil justice system is the obsession with following procedures and rules when, often, the solution is staring us in the face. I hope that the summary sheriffs will be able to have a great degree of flexibility in the way that they go about their work. No doubt, some general practices will emerge, and the sheriffs principal will have an important part to play in that. However, at the end of the day, as long as people get a fair hearing of their case, I hope that the procedures will not be rigid.

The Convener: I am trying to remember the word that Sheriff Principal Taylor used—it was not guidance; it was something else. It was awfully close to guidance, anyway.

That is the end of our questions. Do you wish to say anything further before we conclude, Lord President?

Lord Gill: Thank you for allowing me to do so. As you know, the bill is the outcome of great effort in my life and in the lives of my colleagues who were on the civil courts review. We are gratified that all of the main principles that we recommended have been taken up.

Obviously, I have read all the consultation responses that were submitted. It is entirely understandable that the profession should have concerns, to the extent that the proposals might affect the profession's financial position. However, my purpose in being here really is to argue for the question of public cost. Inefficient litigation, wherever we find it, involves needless public expense. The present system is a failure. It is inefficient and needlessly expensive and, as a result, at a time when resources are scarce, public money is being inefficiently spent. The whole thinking behind the bill concerns not so much the financial effects on the profession but the effects on the public purse.

We are in a time of economic stress when there are many claims on the public purse. The legal system is only one of those claims—we also have to think about the sick, the old and the weak. All of those claims on the public purse are perfectly legitimate and valid.

I hope that the committee will support the bill and that the outcome of the bill will be a huge saving in public cost. That is the overriding public interest for which I am here to argue.

The Convener: But is your point that, although the action is economically driven, the reform is required anyway?

Lord Gill: Absolutely. It is probably 50 years overdue.

The Convener: Right. On that, I thank you for your evidence.

Members should brace themselves for our next meeting, which is on 29 April. It will be our first day of stage 2 of the Criminal Justice (Scotland) Bill, covering part 1 of that bill. We will also consider our approach to automatic early release amendments. We will probably also take further evidence on the Courts Reform (Scotland) Bill from either the Minister for Community Safety and Legal Affairs, who is unwell today, or the Cabinet Secretary for Justice, in lieu of the minister.

Alison McInnes: A Parliamentary Bureau motion setting out the stage 2 timetable for the Criminal Justice (Scotland) Bill has not yet been lodged. Is it appropriate to announce the start of stage 2 before that happens?

The Convener: I am told that it is. I am glad that you have your Parliamentary Bureau hat on, because I do not understand these matters.

My goodness, I see a flurry of hands being raised.

Sandra White: Something came into my mind that I had forgotten all about, with regard to the minister from the Home Office who was coming to meet the cabinet secretary—

The Convener: I was going to brief members about that after the meeting. That is not on the agenda; this is not a general open discussion.

Sandra White: I know that; I just thought that I would raise the issue.

The Convener: Thank you. That concludes the meeting.

Meeting closed at 11:43.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice to SPICe.

Available in e-format only. Printed Scottish Parliament documentation is published in Edinburgh by APS Group Scotland.

All documents are available on
the Scottish Parliament website at:

www.scottish.parliament.uk

For details of documents available to
order in hard copy format, please contact:
APS Scottish Parliament Publications on 0131 629 9941.

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@scottish.parliament.uk

e-format first available
ISBN 978-1-78457-197-9

Revised e-format available
ISBN 978-1-78457-206-8

Printed in Scotland by APS Group Scotland