The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 29 April 2014

Session 4

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JUSTICE COMMITTEE
13th 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:

Roseanna Cunningham (Minister for Community Safety and Legal Affairs)
Nicholas Duffy (Scottish Government)
Cameron Stewart (Scottish Government)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 29 April 2014

[The Convener *opened the meeting at 11:00*]

Decisions on Taking Business in Private

The Convener (Christine Grahame): I welcome everyone to the 13th meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting systems even when they are switched to silent.

We are all here; there are no apologies.

I invite the committee to agree to consider in private a claim for witness expenses under item 3 and a work programme paper under item 4. Are we agreed?

Members *indicated agreement.*

The Convener: I also invite the committee to agree to consider in private at future meetings a draft stage 1 report on the Courts Reform (Scotland) Bill. Are we agreed?

Members *indicated agreement.*

Courts Reform (Scotland) Bill: Stage 1

11:00

The Convener: Item 2 is our final stage 1 evidence-taking session on the Courts Reform (Scotland) Bill. I welcome to the meeting Roseanna Cunningham, the Minister for Community Safety and Legal Affairs, and Scottish Government officials: Cameron Stewart, the bill team leader; Hamish Goodall and Hazel Gibson, who are policy executives; and Nicholas Duffy and Alastair Smith, who are solicitors in the legal services directorate. That is a big team.

I understand that the minister would like to make some opening remarks before we move to questions. I invite her to do so.

The Minister for Community Safety and Legal Affairs (Roseanna Cunningham): Thank you, convener. I apologise for not being able to be here last week. I very much hope that having to remit the evidence-taking session to this week has not deprived you all of a free morning; I would feel guilty if it turned out that that was the case.

The Convener: Do not entice them with free mornings. They are not getting any.

Roseanna Cunningham: I should also declare an interest for those who do not recall that, prior to becoming a member of Parliament, I was a practising member of the Faculty of Advocates. Since my election, I have been—and, as far as I am aware, I still am—a non-practising member of the faculty. It is useful to remind people of that, given the nature of some of the discussion on the bill.

I also remind people that the Scottish civil courts review, on which much of the bill is founded, found the current civil justice system in Scotland to be slow, inefficient and expensive. I am not sure that many people would have disagreed with that conclusion. As Lord Gill highlighted, our civil justice courts have remained relatively unchanged for more than a century. That is a very long time to leave something unchanged, so we must take action to ensure that the civil justice system becomes more accessible, more affordable and more efficient for those people who need to resolve civil disputes. We are now of course in the 21st century and, in effect, operating a system that was designed in the 19th century for the 19th century.

The civil justice advisory group and the civil courts review identified a problem of disproportionate costs, particularly in regard to cases of relatively low financial value. It is not true that, as some have claimed, the need to ensure

that legal costs are proportionate serves only the insurance industry. It serves all litigants in the courts and, indeed, the public purse.

The review concluded that only the most complex and legally difficult cases should be heard in the Court of Session, whereas most routine litigation should be conducted in the sheriff court by sheriffs using enhanced case management powers.

At present, the amount paid to the lawyers on both sides of a low-value claim in the Court of Session almost invariably exceeds the settlement figure of the claim or the amount awarded by the court. That factor is disproportionate. If low-value cases are raised in the Court of Session, which involves the employment of counsel as well as a solicitor, the costs will inevitably be higher in relation to the value of the claim than if the case was dealt with in the sheriff court, particularly as Court of Session fees for advocates and solicitors are higher than sheriff court rates.

The policy objective of the bill is to ensure that cases are heard at an appropriate level in the court structure—the right cases in the right courts. The number of civil court cases being heard by the sheriff courts is decreasing substantially. It went down by 43 per cent between 2008-09 and 2012-13. Paradoxically, business at the Court of Session has remained relatively stable and is still dominated by personal injury cases, with nearly 80 per cent of the cases raised in the general department being personal injury.

The bill ensures that actions in which one party is suing another party for a sum of up to £150,000 will now have to be raised in the sheriff court. That means that the resources of the court are being used efficiently and that the cost of litigation is reduced for all parties and for the public purse.

The raising of the exclusive competence of the sheriff court goes hand in hand with the introduction of summary sheriffs and the establishment of a specialist personal injury court, which has been generally welcomed.

I am aware that there has been some debate about whether our proposals will restrict a litigant's access to counsel or their ability to take their case to the Court of Session, and whether the sheriff courts will be able to deal with the increase in the number of cases that are referred to them. I understand that Sheriff Principal Taylor was quite definite in telling the committee that he does not think that his recommendations would lead to sanction for counsel being granted on fewer occasions. Many cases are litigated without counsel, and automatic sanction for counsel could lead to sanction in many other non-personal injury cases in which it is completely unnecessary and would lead to unnecessary cost.

On capacity, the proposals will result in only a 3 per cent increase in case load for the sheriff courts. In view of the drop in the level of civil business in the sheriff courts in the past five years, we believe that they are well placed to handle the business, particularly as most of the cases will now be raised in the new specialist personal injury court.

Finally, many experienced solicitors with expertise in personal injury law are perfectly capable of conducting personal injury cases in the sheriff court. Of course, many already do that. Indeed, in absolute numbers, more personal injury cases are currently heard in the sheriff courts than are heard in the Court of Session.

The committee has heard evidence from a wide range of stakeholders, and I remind the committee that there is a clear majority of support for the proposals and concepts that were detailed in the Government's consultation on the draft bill that was carried out last year. I also wish to point out that the Law Society of Scotland, the Faculty of Advocates and the Scottish Trades Union Congress have all expressed general support for the aims of the bill, even though they might have concerns about certain specific aspects.

I am obviously happy to answer any questions that the committee might have.

The Convener: I am looking around the table but I do not see anyone indicating. Perhaps we can just go home.

Oh no, members are changing their minds. Elaine Murray, Alison McInnes, Margaret Mitchell and Roderick Campbell have all indicated that they have questions.

Roderick Campbell (North East Fife) (SNP): I did not indicate.

The Convener: Oh, you did not.

Roderick Campbell: I will come in in due course.

The Convener: We will go with Alison McInnes first.

Alison McInnes (North East Scotland) (LD): Oh, thank you.

The Convener: You did have your hand up.

Alison McInnes: Indeed, yes.

Last week, the committee discussed with Lord Gill the test in the bill for remitting cases from the sheriff court to the Court of Session. The bill proposes changes to that test to make it a bit stricter than it is. Lord Gill was concerned about that and he has written to the committee since. I am talking about sections 88(4), 88(5) and 88(6). Lord Gill's letter says:

"My conclusion is that the test of 'exceptional circumstances' in section 88(4) ... is too high. In my opinion, the test ... should be the same as that set out in section 88(2)"

and

"A single test for all remits is desirable in principle and has obvious practical advantages."

On section 88(5), Lord Gill expresses concern about the test of "on special cause shown" being too high, and says that he thinks that the test of "cause shown" would be adequate to meet the situation. Would you respond to those comments?

Roseanna Cunningham: We have only just seen that letter so we need some time to look at it in more detail and consider the specific issues that Lord Gill raises.

The ability to remit cases is a necessary and important tool that has always existed in our system for very good reasons. However, we must be careful that it is not abused, so we need some rules in and around that ability so that we do not end up with anything and everything being remitted.

The Convener: As you have just received the letter, minister, if you want to give the committee a more considered response in writing, we would be happy with that.

Roseanna Cunningham: We will do that. I just wanted to remind members that remitting cases is routine in the sense that it is part and parcel of the current system and we expect that that will continue to be the case, including when the new personal injury court comes in. As Sheriff Principal Taylor indicated, cases will continue to be remitted and everyone would expect that.

We want to ensure that, over the next few years in particular, people do not just default to the current system, in effect, by the use of the remit rule. We want to ensure that the reforms that we bring in are applied and that they work.

We need time to consider the specific issues that were raised by Lord Gill and I hope that we will follow up on that within the week. I am looking at the officials: is that too soon? No; it seems that we can do that within the week.

The Convener: That is the beer and skittles off for the officials if they have to reply within a week.

Alison McInnes: That would be very helpful. I do not think that any of us doubt the need to have some sort of test—it is just that the bar is perhaps too high.

Section 88(6) in particular concerns me. You seem to be allowing consideration of the business and operational needs of the court to come into play somehow.

Roseanna Cunningham: I understand the comments that were made around that. We need to take care to consider that point. Given Lord Gill's comments, we will consider some of those issues very carefully.

Alison McInnes: That would be helpful—thank you.

I turn to what is perhaps the most significant part of the bill—or the part of the bill that has caused the most concern and discussion at the committee—which is that on the privative limit of £150,000. You will know from the evidence that we have received that those provisions have caused a lot of concern. We have heard that they risk driving those who can take action down to the English courts. Do you accept that concern?

Roseanna Cunningham: I am not sure that I do. There is evidence that people are already using the English courts because of the inability of the Court of Session to function efficiently and quickly. Our reforms will ensure that cases that must go to the Court of Session—for whatever reason, whether it is because they are high-value cases or because they are incredibly complex—get through the Court of Session system far more expeditiously than is the case. That is likely to drive up confidence in the use of the Court of Session. Those organisations that are currently defaulting to the English court system may review that once they see the Court of Session functioning a good deal more efficiently than it is currently.

These things are all linked. When a specialist personal injury court is established and running, that is likely to increase confidence in the way in which cases are dealt with.

Elaine Murray (Dumfriesshire) (Lab): On the issue of privative jurisdiction—I am never quite sure how it is pronounced—we have heard—

The Convener: You should say it in your own voice—do it the way you like. We do not mind.

Elaine Murray: We have heard evidence on that from a number of people, and the minister will be aware that it has probably been the most contentious area of the bill. We have received evidence that the limit of £150,000 is too high. It is considerably higher than the equivalent limit in Northern Ireland or in England and Wales. Suggestions have been made that it should be lowered, or that a new limit should be introduced in a staged fashion to see how it works—and there could be a staged increase if it was felt that it was not high enough. How do you react to that suggestion?

Roseanna Cunningham: There are two issues there. One is that of staging the introduction; the other is the actual limit. Those are not the same

thing. You should not forget that we are discussing setting up a specialist personal injury court. One of the difficulties is that, if we start to phase in a limit, that gives a much more faltering, slow start to the personal injury court, too. Having that phasing in would have the knock-on effect of holding back that court from developing its expertise and ability as quickly as it otherwise could. That is one side of it. I would be more resistant to that sort of phasing in.

11:15

The question is whether the limit should be £150,000 or, say, £120,000 or £100,000. We picked £150,000 to provide a volume of cases that will create expertise in the personal injury court. Do not forget that it is the figure sued for. That amount is not necessarily what the settlement is. A staggering number of these cases do not actually go to any proof at all and are settled, sometimes at the door of the court. Indeed, I have been in that position myself. It is quite rare for them to get to the point at which you are in court, actually having the arguments, and they are settled for sums that are often considerably less than the sum sued for.

I repeat that the £150,000 limit relates to the sum sued for, not to the percentage of cases that have a settlement figure attached to them. We have chosen that approach because we feel that it is the most sensible in terms of volume and complexity, but if you are asking me whether I would die in a ditch for the £150,000 limit, my response is that I am listening to everyone and having conversations with people and that we will continue to look at the matter as the bill proceeds. I am certainly interested in seeing the committee's stage 1 report and learning its final views on where the limit might be better fixed. We will look at all that. I am keeping as open a mind as I can on the limit, but I have to say that I have a less open mind on the proposal to stage it.

Elaine Murray: Thank you. In your opening remarks, you mentioned your membership of the Faculty of Advocates. Given your experience of these matters, what is your view of the concern expressed to the committee that taking that amount of casework out of the Court of Session could lead to problems in the development of Scots law through case law?

Roseanna Cunningham: In fairness, I should point out that, as far as the Faculty of Advocates is concerned, I last fired shots in anger in that respect pre-1995 and I am cautious of expressing any opinion based on personal experience. However, I remind members of my earlier response that surprisingly few cases actually get to the point at which you are debating them in court. As a result, we are talking about behind-the-scenes negotiations and a settlement being reached before the cases get to the point of proof, and we need to remind ourselves that this is not a system in which the majority of cases end up in a civil proof. If the concern that has been expressed is about an individual's expertise and ability in a courtroom, people should bear it in mind that the majority of these cases are not providing that at present.

I am probably right in saying that the Faculty of Advocates is about twice the size that it was when I joined, and it has grown almost in response to the current pressures in the system. It would be difficult to work this out, but one might ask whether the faculty has grown to its current size because of what is happening with cases at the Court of Session.

Last week, Sheriff Principal Taylor made the interesting point that he would expect the same number of cases to be remitted. We should remember that there will still be work for advocates, and I would be surprised not to see advocates in the personal injury court on a regular basis. I do not think that we are talking about pushing the faculty off a cliff, which is sometimes how the rhetoric comes across.

I have also been reminded by officials that divorce cases, too, were taken out of the Court of Session. I am sure that people will have forgotten that, given that it happened so long ago—

The Convener: No, I remember that. I go back that far.

Roseanna Cunningham: All those cases used to be heard in the Court of Session. The faculty adapted to that situation and diversified, and I think that it is well capable of doing the same now.

The Convener: I should perhaps remind the minister that Sheriff Principal Taylor said that he had never refused sanction for counsel and, indeed, did not foresee that sort of thing happening.

Roseanna Cunningham: I think that I have already referred to that. I was probably concentrating more on the remitting of cases, but I realise that Sheriff Principal Taylor also said that he tended not to refuse sanction for counsel.

There can be a tendency to slightly overstate the consequences of the proposed change. That said, we continue to be in dialogue with the faculty and with those who have concerns to ensure that their concerns are heard. If we believe that there is a genuine issue at the heart of some of the concerns, we will look very carefully at that.

Elaine Murray: As the convener just said, Sheriff Principal Taylor said in evidence last week that he could not remember ever having refused access to counsel. In your view, is that the general experience throughout Scotland? I was not terribly

sure when he gave that evidence whether he was just a particularly sympathetic sheriff principal and others might take a different view, or whether that was the general position across Scotland.

Roseanna Cunningham: Far be it from me to say that Sheriff Principal Taylor's view would necessarily apply to every single sheriff. We are all perfectly aware that sheriffs can vary enormously, and I think that solicitors, too, are very aware of that. I could not possibly answer your question, because I am not sure that any research has been done on individual sheriffs. Doing that would be a bit invidious, of course, because there will always be a spectrum. However, I understand that the Law Society gave evidence to the committee that sanction for counsel was almost never refused. That would tend to support the position that Sheriff Principal Taylor's view is much more widespread and is not confined simply to one or two sympathetic individuals.

Do not forget that sheriffs have an enormous amount of practical experience and will be very conscious of cases in which they knew that counsel was necessary, perhaps because they felt a bit out of their depth or not able to devote the time and resources that counsel would. Sheriffs come with their own knowledge and understanding of the processes and do not arrive from a different system.

The Convener: We were also helpfully told by Sheriff Principal Taylor that he does not give guidance but gives indications to sheriffs. I thought that that was rather interesting.

Roseanna Cunningham: In their own courts, sheriffs have a wide degree of latitude. We know from criminal courts that sheriffs will vary in the way in which they respond to things. Believe you me, practitioners, too, are very well aware of that.

The Convener: And they do not overplay their hand, or if they do, they never do so again.

Roseanna Cunningham: Well—you know.

The Convener: We must not get into memories of legal practice.

Roseanna Cunningham: No.

The Convener: It is Margaret Mitchell next, then Roderick Campbell. I know that he is a conscript, but I think that he has a question.

Margaret Mitchell (Central Scotland) (Con): Good morning, minister. Your comment this morning that things are not set in stone and that you will listen to arguments about the £150,000 ceiling will be widely welcomed. I wonder particularly whether you will take on board concerns about section 69 of the Enterprise and Regulatory Reform Act 2013, which removes the automatic assumption that a breach of health and safety law is a breach of an employer's duty of care. Is that likely to have an effect on cases coming forward? Also, as I understand it from the bill, counsel will be sanctioned only for the pre-trial stage as opposed to people having the benefit of counsel at the hearing stage. Could that have an impact on the willingness of people to settle before a trial because they feel that they have looked at the case inside out, have had the benefit of counsel and are quite content therefore to settle before going to trial? What would be the impact of all that on the business in the sheriff court?

The Convener: That was a long, long question.

Margaret Mitchell: It had two strands.

The Convener: Did it? Really? Good.

Roseanna Cunningham: I will try to cover all the different aspects. I am sure that if I miss any out, Margaret Mitchell will come back on that.

The Cabinet Secretary for Justice has had discussions recently with the STUC and others about the removal by section 69 of the 2013 act of the strict liability provision. There is no doubt that we have considerable sympathy with their concerns. We are going to continue discussions to consider whether there is anything that we can do to mitigate the effects of the removal of the provision. Obviously, though, we will need to explore that quite carefully. We also make our views heard where they have to be heard. I gently remind the member that this is a reserved matter and not something over which we have direct control—yet. Therefore, we have to operate within the rules as they are going to be laid down by this change.

The change does not impact on the common-law issue. I had an interesting if somewhat technical discussion with some of the legal officials yesterday. The common-law equivalent is called res ipsa loquitur. The lawyers here will know what that means. It means that the thing speaks for itself—it is so obvious.

The Convener: We could have got brownie points for knowing that—we were ready to come in. Was that about the case in which a bag of sugar fell on someone's head, or something like that?

Roseanna Cunningham: Yes, it was something like that. The point is that, although this change removes the statutory strict liability, it does not remove the capacity to plead a civil case on the basis of res ipsa. That is an interesting and technical argument, and I would not like to guess how many res ipsa cases the courts currently hear. That would probably take place in a debate prior to proof, assuming that that is still the procedure that we adopt—I am looking to my officials to check that my remembrance of practice

is not out of date. We need to caution that the change cannot remove the common-law equivalent. Res ipsa is a kind of strict liability, but it is not couched in statutory terms. I do not want to overstate that argument, as this is still an issue and we will continue to explore its impact in considering whether we can mitigate it.

I take on board Margaret Mitchell's question about the pre-proof involvement of counsel and what impact there might be on that. The fact is that most cases do not go to proof, and that will include these cases. They will end up in a settled action, and it is sometimes hard to glean from the settlement what, in legal terms, were the telling points.

Margaret Mitchell: Could I ask a more straightforward, or less lengthy, question? As we know from Lord Gill's evidence last year, summary sheriffs are key to the reform. I understand that the Scottish Government is looking at a one-in, one-out arrangement whereby, when a sheriff retires, a summary sheriff will be appointed. Can you confirm whether that is the case and how that will impact?

Roseanna Cunningham: The one-in, one-out description is slightly misleading. I would not want people to think that we are automatically going to appoint a summary sheriff when a sheriff retires, as the situation will have to be looked at case by case. We expect that it will take about 10 years to make the crossover—my officials will remind me if that is wrong. The one-in, one-out proposal is not a rule whereby a summary sheriff will be appointed when a sheriff retires, as there will be cases in which that will not be the appropriate thing to do. I would not want the one-in, one-out description to make it sound as though that is what is going to happen, because it is not.

It will also be a matter for the Scottish Court Service, which is the recruitment body that will, in each case, have to look at the situation in the sheriffdom. In some sheriffdoms, the appointment of summary sheriffs will be a more obvious and better way in which to proceed, but in other sheriffdoms that may not be the case in the early years. The four stipendiary magistrates in Glasgow will become summary sheriffs.

One in, one out is a shorthand term that has been used, understandably, but I would not want it to mislead people into thinking that it means what the member has interpreted it to mean.

Margaret Mitchell: Summary sheriffs will be appointed—

Roseanna Cunningham: When appropriate.

Margaret Mitchell: Only when appropriate?

11:30

Roseanna Cunningham: When vacancies arise, we will look at whether a summary sheriff or a sheriff would be appropriate. It will not automatically be the case that when a vacancy arises, it will be for a summary sheriff. We are trying to move to a point where we have a pool of summary sheriffs in place. Many of the vacancies will result in replacement by summary sheriffs, but it will not automatically be sheriff out, summary sheriff in.

Margaret Mitchell: Is there any indication about when you might reach a full complement of summary sheriffs, given that those posts are key to the reforms?

Roseanna Cunningham: I think that I mentioned a 10-year timeline. You cannot snap your fingers in any part of the legal system and effect the reforms overnight. People will have time to get used to the new system and at no point will there be a rupture. We have around six retirals a year, so we are not talking about a huge sudden influx. We are giving the reforms time to bed in. Elaine Murray asked a question about phasing in the privative limit. In a sense, that phasing is what will happen with summary sheriffs.

Margaret Mitchell: The representatives of the Scottish Court Service looked at the 10-year timeframe, too. Do you have any concerns about all the cases under the £150,000 privative limit coming in a oner when the court reforms will take 10 years? It was mentioned that the information technology system and various other things would need to be reformed to accommodate the reforms.

Roseanna Cunningham: No, because the change in the privative limit will shift a workload and the introduction of summary sheriffs is about rationalising a workload. I do not see an issue in that.

Margaret Mitchell: I was thinking of the estate, for example.

Roseanna Cunningham: I remind the member about the specialist personal injury court, which there has not been very much discussion about.

The Convener: Yet. I am sure that someone is poised to ask about that.

Roseanna Cunningham: I am sure that they are. The specialist injury court would also sit and it would absorb a pretty big percentage of the workload that is transferred over. It will be for individuals to choose whether they want to take their personal injury case to a local court or to the specialist injury court in Edinburgh.

I was discussing that issue before the meeting. When the specialist injury court is up and running, it may very well sit in a Court of Session court with

counsel going in and out, so it will not look a heck of a lot different from the current system. The system all fits together in that sense.

The introduction of summary sheriffs will remove from sheriffs some of the issues that they get caught up in. At the moment, a very good personal injury sheriff could spend half a day in a motions court listening to a stream of things coming in and out when his expertise might be better placed elsewhere.

Margaret Mitchell: Lord Gill and others very much welcomed summary sheriffs as they would bring consistency and a level of experience throughout the judiciary. Lord Gill recommended that the use of part-time sheriffs be eliminated or at least cut down, but the bill removes the cap on their numbers. Will the minister comment on that?

Roseanna Cunningham: Given Scotland's geography, it is necessary to continue to make available the potential to have part-time sheriffs. An urban/rural issue exists, which I know that some committee members have concerns about. The provision of part-time sheriffs might alleviate problems that arise in some areas. The cap is an artificial one. The intention is not to have loads of part-time sheriffs; indeed, we have moved away from that in recent years. However, we need to retain the capacity to employ part-time sheriffs where and when necessary, so there will continue to be part-time sheriffs. Indeed, I think that I am right in saying that there might be part-time summary sheriffs as well. We must ensure that the resources fit the need and that we do not have full-time sheriffs sitting in places where there simply is not the work for them.

Margaret Mitchell: You do not have any concerns about consistency in relation to part-time sheriffs or summary sheriffs.

Roseanna Cunningham: No, because there will be some quite specialist summary sheriffs. With summary sheriffs, the idea is, we hope, to recruit people who have specialisms whose absence on the shrieval benches has been criticised—for example, in family law. It is not a case of having one group of generalists and one group of specialists. Specialism can run throughout the system. We want the whole thing to fit together as one. I am being reminded that there are also peripatetics, whom it will be possible to deploy nationwide.

We must always keep in mind the issues that exist in Scotland and particularly the concerns that are expressed in very rural areas, where there might be few cases. We need to ensure that capacity is available throughout Scotland.

Margaret Mitchell: That is helpful; thank you, minister.

The Convener: Do you wish to have a short break, minister, or shall we just plough on?

Roseanna Cunningham: I am fine.

The Convener: We will plough on.

I say to Elaine Murray that we have discovered what the correct pronunciation of "privative" is—you can take that home with you.

Elaine Murray: I will write it above my bedpost.

Roderick Campbell: I refer to my entry in the register of members' interests: I am a practising member of the Faculty of Advocates.

I have questions on a variety of slightly different issues, but I will start by commenting on the personal injury aspect. I think that some of the concerns of personal injury practitioners relate to how much workplace health and safety law is generated in Scotland at the present time. Under the new arrangements, the test will be to try to preserve that and to ensure that the right kind of cases on those points still make it to the Court of Session, where they can make law.

The Convener: That was not a question—it was a statement; it was evidence.

Roderick Campbell: Yes, it was. I just wanted to record that.

I will move on to commercial jurisdiction. A number of members of the bar do not see why the same jurisdiction limit should apply to commercial cases as applies to personal injury cases. They say that the new jurisdiction will result in no saving—or an intangible saving—to the public purse. Commercial procedure works well in the Court of Session. We also heard from Sheriff Principal Taylor that, in his view, commercial procedure was working well in Glasgow sheriff court.

Some junior members of the bar have suggested that, if we are to maintain that distinction, there is a case for having an all-Scotland commercial court. Would you like to comment on that? The bill makes provision for that possibility in due course.

Roseanna Cunningham: It is fair to say that that is not something that we are considering in the immediate future.

On the issue of differentiating between personal injury cases and commercial cases, I hear and understand the concerns. We will consider that extremely carefully throughout the bill process. I would be interested to know the committee's views on the matter. At this stage, I signal that I am still reasonably open minded on whether the limit for commercial cases should be different from the more general £150,000 limit. I do not want to get drawn into what such a different limit might be, but

I understand and take on board the comments that have been made on that.

Roderick Campbell: I move on to the contentious area of automatic sanction for counsel.

In its submission, Axiom Advocates said:

"if the purpose of restricting the freedom of litigants to choose is to control costs it would be better to have measures aimed directly at that issue rather than the blunt instrument of dictating what forum may be used."

Will you comment on that?

Roseanna Cunningham: In a sense, the ability to remit from one forum to another and the capacity for sanction to be granted where it is considered appropriate are both things that contradict the apparently dictatorial element. We are trying to shift a substantial amount of business, but we are cognisant of the fact that we cannot legislate for every single case. It is therefore important that we ensure that, when cases are incredibly complex, regardless of the amount of money that is being sued for, there is capacity for them to be sent to the Court of Session. I am not entirely sure that I would accept the characterisation as it is being expressed. I am sure that it was a paraphrase of somebody else's characterisation.

On the notion that we could deal with costs, I rather imagine that, had we done it the other way, by beginning to interfere in what could and could not be feed and all the rest of it, there would be as many objections to that. In a sense it is a more obvious restraint of trade to impose that kind of rule on what people can charge, is it not? That is the other side of the coin, but we have not chosen to do that.

Our argument is that very low-value cases probably do not really require counsel. Experienced solicitors are already doing them week in, week out, and in my view they can continue to do that without there being any detriment. I go back to the creation of the personal injury court. That rather blunt characterisation of what we are doing ignores some of the detail around it.

Roderick Campbell: Can you give us a further update on when the Government will issue its response to Sheriff Principal Taylor's report?

Roseanna Cunningham: That is a good question.

Cameron Stewart (Scottish Government): It will be in the late spring.

Roseanna Cunningham: It is imminent.

Roderick Campbell: I will not ask you the next question, which is when spring becomes summer. [*Laughter*.]

The Convener: Do you mean this spring?

Cameron Stewart: Yes.

The Convener: I did not know which spring we were talking about.

Roderick Campbell: Some submissions have suggested that there is some correlation between the two things and that it would be sensible if we had a better idea of how they are going to embark before we reach a final view on the bill.

Roseanna Cunningham: It is pretty much in the hands of officials. I do not know whether our response will be available before the stage 1 debate.

Cameron Stewart: I would hope so. It will certainly be available before stage 2.

The Convener: That will be in late June, I am told.

Roseanna Cunningham: Which is summer. [*Laughter*.]

The Convener: Yes. Late June is no longer spring. Fledglings will have fledged by then.

Roderick Campbell: I have a couple more questions, the first of which is on alternative dispute resolution. I detect from the submissions from the Scottish Arbitration Centre and Citizens Advice Scotland concerns that, although the bill provides that courts may, in the rules of court, make reference to ADR, not enough is being done to try to promote it. Will you comment on that?

Roseanna Cunningham: As a Government, we have been very much in favour of the promotion of ADR. In fact, the Scottish Arbitration Centre would not have come about had it not been for the very good work of Jim Mather when he was a minister, and it is partly funded by us. Through all the Government's work, we look for opportunities to embed the use of arbitration into what we do, and that will continue. Personally, I have always been very much a proponent of the use of all forms of alternative dispute resolution.

The difficulty is that, as members know, some aspects of alternative dispute resolution cannot be mandated. We cannot force people into mediation because, by definition, it simply would not work in those circumstances. Even with arbitration, which is a more formal process, people have to agree at the start to accept the outcome as binding.

The point about alternative dispute resolution is that we cannot simply make it mandatory for people. What we would hope is that everybody involved in the legal system understands the importance of it. I know that there are certain areas of the law where that is already recognised. Family law practitioners in particular are very good at trying to ensure that as much as possible is

done in that way. However, it will not be practical or possible in all cases.

11:45

From a Government perspective, we try to do as much as we can, but there is a point at which any Government has to be careful not to start to interfere with the mechanisms of the court and the way in which the court rules are drawn up. It is not really our place to do that. To return to an earlier discussion, the extent to which sheriffs encourage or give credence to prior attempts at mediation or alternative dispute resolution will vary from sheriff to sheriff. The bill recognises overtly that it should be encouraged in court rules, but we can go only so far in that regard. I think that some of this is generational—it will be a generational change.

Roderick Campbell: I move on to the question of the sheriff appeal court and the anticipation that 5 per cent of total civil appeals would require three appeal sheriffs. The suggestion is that a bigger bench would be more appropriate where novel and complex issues were involved. I think that Lord Gill made the point that it is open to parties to seek a bench beyond one. Given the significant financial cost, where did the Government get its figure of having 5 per cent, as opposed to 100 per cent, of cases heard by three appeal sheriffs and how robust is that figure?

Roseanna Cunningham: I think that the Lord President indicated that the vast majority of appeals are minor and procedural. The figure will have come from the information that we have on that basis. I am sorry, but I am being surrounded by post-it notes from my officials. I am told that the figure came from work that the Scottish Court Service did, so one has to assume that the information that Lord Gill has about the minor and procedural cases is from work that the Scottish Court Service did itself.

The quorum is to be left to court rules. We have not constrained that. Sheriffs principal and experienced sheriffs will potentially be appeal sheriffs. Having the bench of one replicates the current system with the sheriff principal hearing the appeals. At present, the appeal is to the sheriff principal in such cases. In a sense, what we are doing is replicating the current system. We believe that it is proportionate and provides a lot of the benefits of the current system.

I think that the Lord President indicated last week that parties could seek a bigger bench. I hesitate to disagree with the Lord President, but I am not sure that he is correct in his interpretation of the bill. We will double check that for the committee, because that would be a conflict of evidence, which might be arising from a completely mistaken understanding of something.

The Convener: Lord Gill got something wrong—perhaps?

Roseanna Cunningham: I hesitate to disagree with the Lord President, but it is possible that he has misinterpreted something in the bill.

Roderick Campbell: It is true that the bill differs from the Gill review on that point, so the committee will want to look at that carefully.

Roseanna Cunningham: I can understand why the committee would do that. On the upside, it is evidence that we are not simply enacting everything that the Lord President has said to us. We have looked at the issues on a case-by-case basis and what we have provided for in the bill pretty much replicates the current system. As I said, appeals in the sheriff court go to a single sheriff, who is the sheriff principal, who sits on his own.

The Convener: Roddy, did you ask about section 49 and the fact that the Lord President could just have a sheriff sitting in appellate capacity?

Roderick Campbell: No.

The Convener: The committee had some general issues around that point. Let us imagine that we have a sheriff sitting on their own to hear an appeal. Section 47(1) of the bill says:

"A decision of the Sheriff Appeal Court ... is binding—

(a) in proceedings before a sheriff anywhere in Scotland".

Lord Gill reflected on that when he was questioned and his personal view was that it should be a sheriff principal and not just a sheriff.

Roseanna Cunningham: Appeal sheriff is a new office or role. It is not just that we want to draft in Sheriff Joe Bloggs and then draft him out again. We will designate an office of appeal sheriff. Members need to remember that even in the present set-up, sheriffs act up as temporary sheriffs principal and, when they do so, they can hear appeals.

The Convener: Yes, but their decisions are binding only in their own sheriffdoms. If someone of the rank of sheriff is sitting alone and making decisions on appeals that will be binding across the whole of Scotland, there might be unintended consequences. That is the issue. I do not want to put it any more seriously than that.

I challenged Lord Gill on his view at last week's meeting:

"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 replied:

"That would be my personal view."—[*Official Report, Justice Committee*, 22 April 2014; c 4534.]

Roseanna Cunningham: I remind you that we are talking about a new office of appeal sheriff. The designation is new and I want to remind the committee of that. Applying the precedent across the whole of Scotland is not a bad thing, and I do not know that Lord Gill was as exercised about it as you suggest. It will lead to greater certainty.

I am conscious that members in different debates and on different aspects of what we do are always concerned about postcode lotteries, and the same thing could apply here if we are not careful. It would therefore be useful to have the ability for the appeal sheriffs' decisions to apply across Scotland. We are talking only about experienced sheriffs doing the job. We are not talking about someone coming in the door as a brand new sheriff with six months' experience and being appointed to the office.

The Convener: Forgive me, minister, but obviously we do not think that. I do not think that we have an issue with the decisions of the sheriff appeal court applying across Scotland, but there is an issue about a sheriff sitting in an appellate court and making a decision that applies throughout Scotland before going back the next day to being a sheriff again. There are issues about the substance of the appeal and its standing.

Roseanna Cunningham: You could apply that argument to those sheriffs who occasionally sit as temporary Court of Session judges and make decisions in cases before going back to sit in their sheriff courts.

The Convener: But we are talking about the appellate level, not the first instance. That is the issue.

Anyway, we will leave it there. Lord Gill raised the issue and I see by a few nodding heads around the table that his concern might have been shared by a few members. I just wanted to highlight the issue to the minister.

Nicholas Duffy (Scottish Government): It might assist the committee if I point out that, if the sheriff appeal court thinks that the issue is complex, it can convene a larger bench and provide more sheriffs.

The Convener: We know that, but I am talking about the principle of appeals being heard by a sheriff principal rather than a sheriff. Even if the sheriff in question happened to be the most wonderfully experienced on the entire planet, they would still be dealing with appeals to cases that had been heard by other sheriffs of the same rank. We are, after all, talking about an appellate court, not a court of first instance, as in the Court of Session.

I will leave it at that. The issue had been raised with us, and given that Roddy Campbell did not raise it, I thought that I would do so. Is that all right, Roddy?

Roderick Campbell: Fair enough.

Sandra White (Glasgow Kelvin) (SNP): Good morning, minister. I want to ask about the personal injury court, but first of all I want to comment on something that Lord Gill said. In your opening remarks, you said that the current situation has to be reviewed and changed; at the end of last week's session, Lord Gill said that the system was 50 years out of date. Given that, we need to look not at individual aspects but the system in the round.

A number of questions have been raised about the personal injury court, including whether it will give a service that is better than, or at least comparable to, that provided by the Court of Session, and whether adequate resources have been made available for it. Do you have any comments on that?

Roseanna Cunningham: Traditionally, the legal system in Scotland has resisted specialisation; in other words, the traditional view of solicitors and advocates is that they should be capable of taking up almost any case. In practice, that has never really been the case, and people will long have been aware that certain practitioners and sheriffs are much more capable or comfortable in some areas than they are in others. Now that we have a new Lord President, who has a very different view of things, that reluctance to embrace specialisation will change; indeed, that is why we can consider the establishment of a personal injury court.

As I have said, that does not mean that every single personal injury case in Scotland will come to the personal injury court. People will still be able to choose to pursue their action in their local court if they so desire or to come to the court in Edinburgh. The court in Edinburgh will develop a specialisation centred around much more complex cases. If we had a time machine that could take us forward 20 or 30 years, we might find a system in which simple, straightforward cases continued to be heard locally and much more complex cases were heard in Edinburgh. I think that the changed view in the Lord President's office will begin to filter down and have an impact on all practitioners.

Not all specialist courts have been as successful as others, but if you never try something, you will never know what might happen. I have every confidence that the specialist injury court will be successful, and we look forward to its establishment. However, I return to the point that

our view is that it will take a number of years for things to build up; it will not all happen overnight. Two sheriffs have already been identified for the new court, so the work on ensuring that it is ready to go as soon as the whistle is blown is already under way.

It is still early days. Hundreds of cases will not come into the specialist personal injury court all at once—the figure that I have been given is between 25 and 30.

Cameron Stewart: That is the figure for the cases that will go to proof in the first year.

Roseanna Cunningham: As Mr Stewart has said, that is the number of cases going to proof. As I said right at the start of the session, a huge number of cases do not go to proof. Given the way in which the court will sit, 25 to 30 proofs in the first year will work out at roughly one a week. However, it is difficult to think in those terms and, of course, the cases will not come along as easily as that. However, that sort of number is eminently schedulable—if that is a word.

The Convener: We will check with Elaine Murray—she is good with words. Is "schedulable" a word, Elaine?

Elaine Murray: I think so.

The Convener: It has been corroborated.

Roseanna Cunningham: That number works, in terms of managing the business.

12:00

Sandra White: We do not want to talk about corroboration again, though the convener does quite often.

I take on board the minister's point that there will not be a huge influx of cases, including complicated cases. That is an issue that I wanted to raise.

Minister, I am pleased that you said that you have been in talks with the STUC about cases involving injuries that have been sustained at work. We heard evidence from representatives of Clydeside Action on Asbestos who, when asked, said that they would prefer their cases to be heard in the Court of Session, but that if the personal injury court was able to ensure that the cases were heard at the highest level and if they were able to get an advocate, they would go for the personal injury court. Will you have meetings with Clydeside Action on Asbestos, or do you see its cases as special because they are complicated?

Roseanna Cunningham: The cabinet secretary has already had meetings with Clydeside Action on Asbestos. We understand that the complexity of the cases is such that—I think that the cabinet secretary shares this view—they will probably continue to end up in the Court of Session. I would be wary of drawing an artificial line around a particular category of cases—I am not particularly keen on going down that road. However, the complexity of those cases is precisely the kind of thing for which the Court of Session probably should be the forum, certainly at the moment. Ten years down the line, people may feel that cases as complex as those can be heard in the new personal injury court, but my guess is that, in the early years, they will continue to be heard in the Court of Session. I am not seeing horrified looks on the faces of my officials, so my guess is that that is what they think, too.

The Convener: I do not think that we had horrified looks on our faces, either—if we may be part of this happy day.

Christian Allard (North East Scotland) (SNP): Sheriff Principal Taylor told us that specialist sheriff courts are at the heart of the court reforms, and representatives of the Scottish Court Service told us that the cost of those reforms could be met from within its existing funding. However, we also heard that there is to be a revaluation of court fees thereafter. Can you reassure the committee that changes in court fees will not partly fund the court reforms?

Roseanna Cunningham: Decisions about court fees are not mine to make. Any consideration of fee structures would be for the Scottish Court Service.

Nicholas Duffy: The fees of solicitors, advocates and so on in the courts are a matter for the courts to determine, but ministers retain power over the fees for raising an action in the courts.

Roseanna Cunningham: Those are two slightly different issues.

The Convener: We know that. We are talking about outlays—the payment of fees to lodge documents, for example. Is that the point that you are making, Christian?

Christian Allard: Yes.

The Convener: We are talking about procedural fees—court fees rather than solicitors' and advocates' fees.

Roseanna Cunningham: Those are for the Scottish Court Service's decision-making process. I take it that the member is concerned that we might suddenly see an artificial increase in some of those fees as a way of funding the reforms. I am not here to speak on behalf of the Scottish Court Service, but I think that it is well aware that people will be watching those fees rather carefully. I doubt that it intends to suddenly whack up fees in any part of the system.

It is certainly not ministers' intention to raise fees for raising actions in the first place—again, none of my officials looks worried about that. In any case, on a routine or rolling basis, people will be considering whether costs are appropriate, given the results. Costs have undoubtedly gone up in the past for that reason, and that will continue to happen, because the fees will not be held at an artificially low level. However, if Christian Allard's concern is that the costs will be raised artificially to pay for something, I say to him that we would not want that to happen.

To reassure members, I point out that there is a three-year process for consideration of fees. As part of the next consideration, there will be a consultation in 2015, and orders will be laid in Parliament for scrutiny. If the committee has any concerns, it can keep its eye out for those orders coming through after next year's consultation.

The Convener: The next question is from John Pentland, who will be followed by John Finnie. I think that those will be the last two questions—although if I say that, I get members putting up their hands. If it is all right with the committee, we will make these the last two questions.

John Pentland (Motherwell and Wishaw) (Lab): Minister, will you comment on the apparent conflict in the Scottish Government's argument? It says that removing 2,700 cases from the Court of Session will significantly increase efficiency, while arguing that a large number of those cases do not involve substantial work for the court, because 98 per cent of personal injury cases are settled without a hearing.

Roseanna Cunningham: They settle without a proof, but that does not mean that they have not been called or that there have not been proceedings throughout the conduct of those cases. The proceedings are not necessarily long or particularly complicated, but they are part of the problem of clogging up the courts. Court of Session judges sit listening to motions of adjournment or of this, that and the other, because such sittings are part and parcel of the process, even though the cases do not go to a final proof.

I do not want to get into the involved complexities of taking a civil case through the court process, but the member can take it from me that although the proof, if the case gets there, or the settlement is the final part of the process, the case will have been called in the court on a number of occasions leading up to that. Everybody, including advocates, will have had to have been there, even if only for five or 10 minutes.

We talk about the vast majority of cases settling prior to proof, but that does not mean that proof dates have not been fixed. Proof dates are fixed and are put in the court's diary. Almost invariably, however, when the proof date arrives, at 10 o'clock in the morning, the pursuer's and the defender's advocates stand in front of the judge saying that they have had a long discussion and have agreed on a settlement and on this and that. The proof dates have to be scheduled and so are put into the Court of Session's diary, which displaces a load of other business. However, many cases collapse at 10 o'clock in the morning, so the days and judges that were designated for the proofs are not used. That scheduling is done in the knowledge that that is the more likely outcome, but nevertheless it still has to be done.

So it is not as simple as saying that nothing happens. Lots of things happen and scheduling of those things, including the proofs, has to happen. All of that is disruptive and increases the inefficiency of the Court of Session.

We will probably never get to a position in which the majority of personal injury cases go to proof, whatever court they are in. Most of them settle. Much of the expertise is not in-court expertise; it is backroom expertise.

We estimate that we will transfer about half of all cases heard in the Court of Session. Given what I have just said about the way in which business has to be scheduled, you can see what a huge difference that will make to the Court of Session. If that business is lifted away from it, its other business will be able to proceed far more expeditiously.

The Convener: I was in danger of giving evidence myself, having instructed counsel in PI cases.

Roseanna Cunningham: That is always the problem when there are lawyers on the Justice Committee.

The Convener: As we know, three or four proofs will be set to begin in a week and take four days, on the presumption that two or three will settle.

I want to sit over on the other side of the table for a wee while to give evidence, but I must not.

John Pentland: Perhaps you can arrange that for next week.

The Convener: We can arrange it for next week, John, and you can take the chair.

John Pentland: In earlier evidence, minister, we heard from the Association of Personal Injury Lawyers, which described the existing system as being "in crisis". Having heard that, do you think that it is possible for the reforms to be implemented, including the 2,700 additional cases to enter the system, without any additional resources?

Roseanna Cunningham: Yes, because we are shifting cases from one part of the system to the other. We are not changing anything. We are not increasing the number of cases overall but shifting them within the system, and that comes from within the same overall set of resources.

As I indicated, we have already designated two sheriffs as being suitable for the new personal injury court. I gave a figure of 25 to 30 cases a year that are likely to go to proof in that court, and we think that all of that is absolutely doable. After all, those cases already have to go through the system as it is.

It is not that we have created a whole new set of cases or procedures; all we are doing is moving things around. Arguably, given the benefits for it, the Court of Session might be able to make considerable savings because it will be able to work far more efficiently than it is currently able to do.

John Pentland: I take it that you are saying that the extra cases that will go to the sheriff courts will not add to the existing pressure in those courts.

Roseanna Cunningham: No. I indicated in my opening remarks that the number of personal injury cases in the sheriff courts has already decreased significantly.

Cameron Stewart: Total cases, not personal injury.

Roseanna Cunningham: There is already capacity in the sheriff courts. We are setting up the new specialist court. The global number of cases will not change; it is just where they are heard that will change. We are not increasing the case load in the Scottish civil justice system at all; we are moving it. We believe that we are making it far more efficient than it currently is.

The Convener: I call John Finnie.

John Finnie (Highlands and Islands) (Ind): Thank you, convener.

The Convener: I feel the Highlands and Islands coming upon me. Am I right?

John Finnie: You are correct.

The Convener: I knew it.

John Finnie: Minister, I was reassured by some of your earlier comments about rural communities and one size not fitting all. If I noted your comments correctly, you also talked about your aspiration for the system to be accessible, affordable and efficient.

The policy memorandum states that the Scottish Court Service proposes that the three island courts will be sheriff and jury centres. I could read out the whole paragraph, but I suspect that I would be better just to quote some words from it:

"not expected … envisaged … seems doubtful"

and

"at least in the short term".

It is heavily caveated, but the paragraph states that it seems unlikely that a summary sheriff would be appointed to those courts at any point.

In the past, I have asked Mr McQueen—the Scottish Court Service's chief executive—about greater use of technology. If we are to retain sheriffs on the islands—and I sincerely hope that we will—can we look at using technology to allow people outwith those areas to use those courts' services, which would help to retain people in post? That would be a significant morale booster for communities.

12:15

Roseanna Cunningham: We are looking at that. Significant issues can be managed through the good use of new technology such as videolinking, electronic signatures and all the rest of it. That could remove some of what currently has to be done locally and which might not in practice need to be done in the future. At the same time as we hope to retain the island sheriff courts, we do not want the sitting sheriffs to have to do a lot of stuff that can be dealt with by better technological means.

We are looking carefully at the capacities; doing that is part and parcel of our reform package. I do not have a time machine, so I cannot look ahead, but we hope that there will be the capacity to sustain the sheriff courts in island areas. I am sure that everybody wants that to happen.

John Finnie: Will a sheriff, however they are termed, be sustained?

Roseanna Cunningham: Yes.

The Convener: I know that I said that John Finnie would have the last question, but I have a question on the committee's behalf.

Roseanna Cunningham: That is like what photographers do—they always say that they are taking the last photograph.

The Convener: This is my supplementary. We have before us petition PE1504, which concerns the requirement for two advocates to certify an appeal to the Supreme Court. The bill proposes a requirement for permission to appeal to the Supreme Court—I think that that is the position in England, where the highest court must give permission to go to the Supreme Court, so the provision will bring us into line with that. Will the proposal adequately protect the interests of party

litigants? If the minister has not considered that, it would be fine for her to write with an answer. I raise the issue because of the petition that is before us.

Roseanna Cunningham: An official has just told me that your assumption about the situation in England is correct.

Nicholas Duffy: The bill brings the position into line with the position in England.

The Convener: That is a worry off me. I got that right.

Roseanna Cunningham: The bill brings the position into line. I am being advised that we probably should not comment too much on individual cases; the petition arose from an individual case.

The Convener: The question is about the petition and not about the petitioner's case, which would not be affected in any way. Does the bill make the position harder for party litigants?

Nicholas Duffy: I clarify that whether someone is a party litigant or is represented by counsel in the Court of Session will make no difference to whether their appeal goes to the Supreme Court. The Court of Session will decide whether the case goes up.

The Convener: That is the kind of clarification that I sought.

I conclude the meeting—I mean the item; I wish that I could conclude the meeting. I thank the minister for her evidence.

12:18

Meeting continued in private until 12:48.

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