The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 25 March 2014

Session 4

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CONTENTS

	Col.
DECISION ON TAKING BUSINESS IN PRIVATE	4399
COURTS REFORM (SCOTLAND) BILL: STAGE 1	4400
SUBORDINATE LEGISLATION	4446
Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59)	4446
Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60)	4446
Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62)	4446
Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67)	4446
Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68)	4447

JUSTICE COMMITTEE
10th 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:

Paul Brown (Legal Services Agency)
Ronnie Conway (Association of Personal Injury Lawyers)
Karen Gibbons (Family Law Association)
Louise Johnson (Scottish Women's Aid)
Robert Milligan QC (Compass Chambers)
Dave Moxham (Scottish Trades Union Congress)
Alan Rogerson (Forum of Scottish Claims Managers)
Sally Swinney (Family Law Association)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 25 March 2014

[The Convener *opened the meeting at 10:00*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to the 10th meeting of the Justice Committee in 2014. I ask everyone to switch off mobile phones and other electronic devices completely, as they interfere with broadcasting even when they are switched to silent mode. No apologies have been received.

Under item 1, I invite the committee to agree to consider in private item 4, which is our approach to further scrutiny of stage 1 of the Courts Reform (Scotland) Bill.

Members *indicated agreement.*

Courts Reform (Scotland) Bill: Stage 1

10:01

The Convener: Item 2 is our second evidence session on the bill. We will hear from two panels of witnesses. The first panel will focus mainly—not exclusively, if you do not want to—on those provisions of the bill that relate to sheriff specialisation. I welcome to the meeting Louise Johnson, national worker on legal issues, Scottish Women's Aid; Paul Brown, principal solicitor and chief executive, Legal Services Agency; Sally Swinney, chair, Family Law Association; and Karen Gibbons, vice chair Family Law Association. I know Ms Swinney as a local solicitor in Peebles—I let everyone know that just in case anyone thinks that there is some kind of favouritism, which there will not be.

I invite questions from members.

Margaret Mitchell (Central Scotland) (Con): What is the panel's view on honorary sheriffs—should they be abolished or retained?

The Convener: If you indicate to me that you want to answer, I will call you and your microphone will go on automatically—you do not have to press anything.

Does anyone want to tackle the issue of honorary sheriffs?

Sally Swinney (Family Law Association): I do not think that we have a view on whether they should be retained or abolished. In general practice, they deal with warrants and can deal with hearings. However, we have no strong view one way or the other.

Margaret Mitchell: There has been some concern about access to justice in rural areas. Does that not concern you in terms of family law?

Sally Swinney: I have never appeared before an honorary sheriff in Peebles—it has always been a sheriff. I expect that, when summary sheriffs are introduced, I will appear before either a sheriff or a summary sheriff.

Louise Johnson (Scottish Women's Aid): We did not cover the issue in our response to the bill, but we covered it in our response to the prior consultation. We object to the office purely because legally unqualified persons are able to sit as sheriffs. We think that it is not acceptable that such persons can hear civil cases involving child welfare and domestic abuse. If there is a resource issue, perhaps the provisions in the bill will go some way towards addressing it.

Margaret Mitchell: If there were to be specialisms, what do you think they should be? I am talking about sheriffs, not honorary sheriffs.

Louise Johnson: We would like to see specialisms for sheriffs—not for summary sheriffs—in domestic abuse in both civil and criminal law. There is already a certain degree of specialism, as you know. There are various courts across Scotland that deal with either all procedural parts of summary criminal cases or certain parts of such cases—say, trial or sentencing. We would like that to be retained and expanded in whatever form can best be achieved, given the tensions and burdens of the courts in rural and urban areas. We would also like specialists in family law.

There has been some discussion about whether civil and criminal business should be mixed or separate. We think that there would be merit in having sheriffs who could deal with both the civil and criminal business or in at least having some link between the two types of proceedings in relation to domestic abuse.

Margaret Mitchell: Do you have a view on whether sheriffs should specialise in, for example, domestic abuse and rape, which may help the conviction rates?

Louise Johnson: I note that, in its submission, Justice Scotland mentioned specialist sheriffs. We would certainly support any specialisation that would contribute to improving the situation for women, children and young people in relation to domestic abuse, sexual assault and stalking.

Paul Brown (Legal Services Agency): In effect, the new structure will mean that full sheriffs will be specialists anyway because so much will probably be dealt with by summary sheriffs.

My main concern is the huge remit of summary sheriffs. I would think that, within that, there would need to be specialisation. I agree that the more separation between civil and criminal cases there is, the better. I can envisage summary sheriffs being able to take on family cases, defended evictions and children's hearings referrals, but expecting them to do summary criminal work as well seems to me like a bridge too far.

Our experience at Glasgow sheriff court is that there are specialist sheriffs for adults with incapacity—AWI—cases. That seems to be a sensible way forward. The conclusion of that is that a degree of specialism is built in already but it needs to be cashed out by looking at all the areas and providing for specialisms within the summary sheriff category in particular. I imagine that, otherwise, summary sheriffs will be overwhelmed.

There is a problem with the vocabulary that is used when discussing summary sheriffs. The reference is to low-value cases and so forth, but cases involving children and divorce cases are not low-value cases; they are high-cost cases. I have no problem with saying that summary sheriffs could deal with them, providing that they have the training, specialism and professional background. However, the vocabulary distorts the view with which one looks at those new posts, and that needs to be changed.

The Convener: I ask you to focus on rural areas. Margaret Mitchell has raised that issue already. It is all very well having specialisms in, for example, large urban courts but how would it work in small rural courts?

Sally Swinney: I echo Paul Brown's concerns about the wording that is used in the policy memorandum. I will give an example. It says that summary sheriffs should be introduced

"to relieve sheriffs of the burden of dealing with the more routine, low value … cases"

and there are other examples of descriptions such as run-of-the-mill cases, less complex civil cases, less serious and lower-level summary crime and low-value cases. Those sorts of descriptions are not appropriate when dealing with family law.

The Family Law Association would whole-heartedly welcome the introduction of specialist sheriffs but would also ask that the same specialism be given to summary sheriffs because, in my area—and, I suspect, many rural areas—the provision of summary sheriffs may overtake the provision of a sheriff. For instance, we are not sure whether, in the Borders, we will have a sheriff or whether sheriffs will be available only in the urban courts. If it was a case of having a non-specialist sheriff or a specialist summary sheriff, the association would plump every time for having family cases dealt with by someone who has the specialisation, whether a summary sheriff or a full sheriff.

Margaret Mitchell: To go back to the point that you made initially, which is reflected in some other submissions, to refer to the value is not necessarily helpful in that it does not necessarily reflect the complexity of the case.

Sally Swinney: Not at all. Contact disputes in particular can rip a family apart. It is a pivotal part of society to ensure that those families are helped. Sometimes, parties just need to be given advice on what is in the best interests of the children. Most parties think that they are acting in the best interests of their children when, clearly, they are not. Specialist training in child development and domestic abuse could help tremendously in dealing with complicated and emotive issues such as contact disputes.

When we are talking about divorce cases, which are primarily arguments about the division of

assets, the category of low value makes sense. Even so, a case that involves a family that has £5,000-worth of assets is not necessarily of any less importance to the family than arguing a case that involves £5 million-worth of assets.

Karen Gibbons (Family Law Association): Part of the difficulty for us as family practitioners is that we do not know how cases will be allocated between the specialist sheriffs and the summary sheriffs. Lord Gill's review indicated that he thought that litigants would have an element of choice about where they raised their actions. However, that does not seem to have followed through to the bill, which states that sheriffs principal will decide what types of cases will be dealt with by sheriffs and summary sheriffs. That makes it quite problematic for us to give our view on specialism and summary sheriffs, because we do not know how the arrangement will work in practice.

I can foresee problems with, as the bill proposes, the sheriff principal deciding the allocation of cases. In terms of logistics and practicality, it is simply not possible for a sheriff principal to look at every single writ that comes in. I can only imagine that what is—

The Convener: Excuse me, but I think that the Sheriffs Association mentioned senior sheriffs in that regard, rather than sheriffs principal—a sheriff with a great deal of experience, but not the sheriff principal.

Karen Gibbons: I thought that the bill said that responsibility for the allocation of the work was to lie with the sheriff principal, but I am not clear how that will work in practice. I can imagine only that the sheriff principal will have to say, in order for there to be a delineation, that all cases of a certain type—say, residence and contact—will be dealt with by the summary sheriff and that all cases of, say, financial provision will be dealt with by the specialist sheriff.

I think that that would be the opposite of what the bill is meant to achieve, which is to ensure that cases are dealt with at the correct level. However, if through no choice of their own the sheriff principal simply says that child cases will be dealt with at summary sheriff level and that higher-up cases, such as matrimonial provision or financial provision cases, will be dealt with by special sheriffs, then there is no consideration of the cases and the allocation is just automatic. The bill is meant—I think—to ensure that cases will be dealt with at the right level, but I think that in fact allocation will just be automatic, if that makes sense.

Margaret Mitchell: Yes, it does.

Karen Gibbons: I think that that is one of the main problems, although I can see also foresee problems with giving litigants choice. I do not think that that would work either.

In my view, the best way to deal with the issue is simply to see family law as distinct and say that all the cases matter, and perhaps have the same situation as in Edinburgh sheriff court. I believe that it is the same in Glasgow sheriff court, although I have no experience of that court. In Edinburgh, a number of sheriffs sit as family sheriffs. Some of them, but not all, have a family law background. That works quite well in Edinburgh sheriff court. There is no delineation between sheriffs of a different level: they are all sheriffs, but they are told that they are the family sheriffs.

What happens is that someone raises their action and the case is allocated to a particular family sheriff, not right at the beginning but perhaps just before a child welfare hearing, for example. There are probably two or three family sheriffs at the moment in Edinburgh sheriff court, who sit to hear cases on alternate weeks. There is therefore always a family sheriff at Edinburgh sheriff court, which means that when someone raises their case it will be given to a particular sheriff, who will keep the case until it has concluded.

There are massive benefits from that for all involved, including solicitors and children, because it gives consistency in decisions. Solicitors do not guess what an outcome might be, but they do give advice based on what they think that a particular sheriff will do. We tend to see good-quality decisions coming through because the sheriffs know—I cannot say that they know what they are doing, because they always know what they are doing—but they deal with that type of work day in, day out, so they become specialists at it.

10:15

The Convener: I used to be a family law practitioner—it was a long time ago—and I appreciate that disputes about contact, the residency of children and so on need specialist sheriffs who put their heart and soul into, get involved in and continue to report on cases for a very long time. However, some family law cases come up in which it is just a couple in dispute about money and the family dog. You cannot be saying that those cases should go to a summary sheriff. Some of them really are ridiculous and it is just bitterness on the parties' part that takes them to court. That is a reason to sift out cases. Are you adhering to your point that all family law cases should go to a specialist sheriff, or do you agree that some cases could be sifted out quite simply?

Karen Gibbons: You are absolutely right that some cases will be at a certain level, if you like,

and do not necessarily need to be heard by a specialist. The problem is in finding out those cases.

On my reading of the bill and all the papers that go with it, the main thing that spoke to me was the problem of allocation. How do you decipher who should properly be dealing with cases? If you were able to sit down and consider every single writ, you could say, "Well, that could properly be dealt with by a summary sheriff." The problem is that that is not practical, especially in the bigger courts. You might even find—I do not know if this would happen; I would not want it to happen—that when cases were brought in a sheriff clerk would look at a writ and say, "Well, this deals only with children and, because there's no money involved, I think this can be dealt with by a summary sheriff." You would then be in situation in which somebody who was not legally qualified was making the decision about who should hear a case, and that would not be right. The difficulty is finding a proper way to sift through the cases.

The Convener: Can I let another member in for a little bit, Margaret?

Margaret Mitchell: Absolutely. Before you do, I mention that two points were made: how you decide the specialism and the problems of choice if there is no specialism. Although choice is built into the bill, there is no choice if there is no specialism to go to. Was that your other point?

Karen Gibbons: Sorry? Could you say that again?

Margaret Mitchell: Choice is built into the bill, in that someone can choose whether to go to a specialist sheriff or have a case decided locally. If there is no specialist sheriff nearby or someone does not have the means to travel, there is no choice.

Karen Gibbons: We do not know where the specialist sheriffs would sit, although I think that it is envisaged that they would sit at 16 points across Scotland. Someone living in a rural area might be able to travel to a specialist sheriff if they decided that they wanted to and they had the funds to do so—they might have legal aid funding to do that. In essence, however, there is no choice for them to travel to the specialist sheriff. That is not fair and geography is dictating that.

The Convener: Before I bring in the other witnesses, I want to know whether John Finnie also wants to ask about specialisms. I see from the nod of his head that he does.

John Finnie (Highlands and Islands) (Ind): Good morning, panel. I have a number of questions for Ms Johnson. Your evidence is highly critical of the proposal, as is clear from your responses. Your written submission says:

> "The proposals will not achieve reduced system/time delays, improved user experience, or fair and equitable justice for women, children and young people experiencing domestic abuse."

Will you expand on that a little bit, please.

Louise Johnson: All the discussion to date on the summary sheriffs' role has been very clear that they are to hear the low value and less complex run-of-the-mill civil and criminal cases. For a start, the majority of their remit seems to be their dealing with criminal cases. There will be difficulty with that at summary level. More to the point, the deprioritisation of domestic abuse cases and cases involving children would not facilitate access to justice. Doing what are referred to as "lower-value" cases would depreciate the public's and—more to the point—the litigants' and participants' views of such cases.

Criminal cases in the domestic abuse court in Glasgow are currently delayed. Instead of cases being heard at eight weeks, as was originally envisaged, they are running at around 22 to 26 weeks. Given the pressure that there will be on summary sheriffs, we do not see how that situation would be alleviated. Therefore, for all the reasons that we have set out since the review back in 2008-09, we are definitely of the view that specialist sheriffs should hear cases involving domestic abuse and many cases involving children. Once those cases go to the specialist sheriffs, it might be decided that they are not so particular and there might be scope to review them elsewhere, but we think that sheriffs should retain the jurisdiction for those cases, which would ensure efficiencies in case management.

Paul Brown: A fundamental issue about the simple procedure is that the summary sheriffs are to have an inquisitorial role, but I cannot see how that can be properly exercised without a degree of specialism. The simple procedure will include adjudication on fundamental human rights—in particular, in defended eviction cases and possibly in repossession and mortgage arrears cases. If the inquisitorial role is to be pursued at all, the sheriff will have to have expertise: there is no question about that. If specialist sheriffs in those matters are not appointed in rural areas, some form of joint training will be needed so that there is a degree of consistency in the operation of that jurisdiction.

I have already mentioned that I think that the language that is used is prejudicial. When somebody risks losing their house, that is not a "low value" matter; it is a high-value matter that goes to the heart of the family's human rights.

The Convener: I think that committee members probably accept that "low value" is unfortunate terminology in the policy memorandum.

Louise Johnson: On access to specialist sheriffs, we mentioned in our written submission that we support the development of specialist sheriffs but have concerns—which my colleagues on the panel have voiced—about their being in a distant hub and about how the system will work in rural areas. We said:

"Given that court users already travel considerable distances, it is not unreasonable to expect specialist sheriffs ... to travel to local courts".

My memory might be failing me, but I am sure that there was a reference to access to sheriffs in the original Gill review. I might be talking nonsense, but I am convinced that it was referred to. Why should sheriffs not have the opportunity to go out and practise their specialism, rather than just have them centralised so that people in some areas cannot get access to justice?

The Convener: When we considered the review of the court estate and court closures, we put that question to various witnesses and received the reply that sheriffs can travel in circumstances in which their doing so is in the interests of the parties—for example, in child welfare cases. Sheriffs can set up a court in a community hall or wherever—it does not have to be in a courthouse. There are opportunities for rural areas to have equality of justice through specialist sheriffs travelling to where the parties are, rather than have the parties travel to the city.

Louise Johnson: Indeed.

Sally Swinney: In the Borders, a sheriff from Edinburgh visited and sat at Peebles sheriff court for a considerable period. That worked extremely well, and only the sheriff was inconvenienced by the travel—

The Convener: And we do not care about sheriffs. I will not lead you there, because you have to appear in front of them.

Sally Swinney: The sheriff who sits at Selkirk also travels to Duns and Jedburgh and deals with the courts there. In the Borders, it is not a new facet that the sheriff travels. In fact, the sheriff readily accepts that it is better to inconvenience him with the travel than to have all the parties travel. It is incomprehensible to us that that cannot happen.

John Finnie: The policy memorandum specifically mentions island communities. It says that

"It is therefore envisaged that the sheriffs currently in post at those island courts will remain in place and it seems doubtful that there would be sufficient business to justify the appointment of a summary sheriff at those courts, at least in the short term."

I think that the phrase

"at least in the short term"

is the important one there. Ms Johnson—will you share with us the likely experience of a woman with children whom you support and who needed to travel from Shetland to, say, Aberdeen or perhaps even Edinburgh to access a sheriff rather than a summary sheriff? What challenges would be connected with that?

Louise Johnson: Part of the problem might be in finding solicitors to represent such women. We have had such difficulties in the past. For instance, on Skye, a woman was unable to find a solicitor to represent her and had to travel to Lochaber or even further to get one.

Issues to consider in travelling from the islands to the mainland include ferry times, childcare and loss of income. There are also knock-on effects for everyone else who has to support the court. The difficulties of people travelling from the islands to the mainland would have knock-on effects for support agencies, the police, social workers and everybody else who would have to travel to the mainland to support the court.

Would it be possible for sheriffs to sit as specialists in the islands on particular days? We know that that can be achieved in rural areas. Is it possible to cluster cases in the islands, as well? There is already a degree of clustering in, for example, criminal cases that involve domestic abuse. Cases involving family domestic abuse could be clustered on particular days or in particular weeks.

Does that answer your question?

John Finnie: It does. That may already have been suggested to the sheriff principal, who may be considering it.

It may be suggested that there is a role for mediation in relation to domestic violence issues. You mention that in your response. Why would that be appropriate?

Louise Johnson: We do not think that there is a role for mediation. Domestic abuse is not a dispute—we must be very clear about that. It is a misuse of power and control in which one of the parties is clearly in fear, or is being coerced or threatened by the other. Mediation is predicated on a degree of willingness to engage. It is unfair and quite dangerous and irresponsible to expect someone who is just trying to survive on a daily basis—to mediate their lives, in a way—to undergo a process in which they have to discuss their safety and their children's safety in a setting in which they are open to further abuse and coercion, whether tacit or overt. There has been a lot of discussion of sifting this out, but it can be very subtle. For instance, if a woman thinks that she is obliged to undergo mediation as a precursor to getting the case to court, or that she must undertake mediation because it will go against her

if she does not, she will undertake that process but with great reluctance and definitely to her detriment. We do not think that there is a place for mediation in cases of domestic abuse—especially in cases that involve child contact.

The Convener: I do not think that sheriffs can compel mediation in any event, can they?

Louise Johnson: Sheriffs can refer cases for mediation. I am talking about the degree of compulsion that people feel they are under.

The Convener: I doubt that a sheriff would refer in certain circumstances—

Louise Johnson: It has happened.

The Convener: Has it?

Louise Johnson: It has.

The Convener: That is extraordinary.

Louise Johnson: Women have said that they felt that they had to go to mediation because it would have gone against them either by suggestion or—

The Convener: Do you mean in domestic abuse cases?

Louise Johnson: Yes.

The Convener: I am surprised by that.

Sally Swinney: In cases of domestic abuse, contact is often used as a means of continuing the control, which is another reason why specialist sheriffs should deal with contact cases.

Louise Johnson: I definitely support that.

The Convener: I remember that from years back.

I will bring in Elaine Murray, then John Pentland, then Sandra White, then Christian Allard, then Roddy Campbell. You all know where you are in my list: feel secure.

Elaine Murray (Dumfriesshire) (Lab): I would like to hear your views about the pressure on the courts and the feeling that civil business tends to be squeezed out because criminal business is prioritised. Do you feel that this is a missed opportunity to separate civil and criminal business, or do you think that there would be downsides to adopting such an approach?

Sally Swinney: The Family Law Association feels strongly that civil and criminal business should be separated. I am sorry to keep talking about the Borders, but—

The Convener: Do not apologise. It makes a change from hearing about the Highlands and Islands.

Sally Swinney: If we encounter a difficulty in the Borders, we tend to deal with it locally. At Peebles sheriff court, there was a recognition that there was a real difficulty with civil business being squeezed by criminal business, so the decision was taken to separate the two; one court hearing deals with civil business, and the next deals purely with criminal business. That works extremely well.

10:30

Elaine Murray: Should that be in the bill?

Sally Swinney: To have that in the bill would do no harm.

Louise Johnson: On criminal and civil business, we would like to see the rolling-out of the specialisation in criminal terms of domestic abuse courts, in whatever way possible. We have discussed court business in rural areas; it might not be possible to have a specialist domestic abuse sheriff sitting every day, as there is in Glasgow, for instance, but there should certainly be the possibility of holding cluster courts over periods of weeks. That would, in itself, generate savings.

When sheriffs develop specialisms, they understand better what is before them. Part of that is about the information that they receive, so as we improve the information that goes from the police to the fiscal to the sheriff, and as we use judicial training as well, sheriffs will have greater understanding and will be able to deal with cases in a more focused way. They will also be able to prioritise cases, thereby gaining time for other disposals and other business to be dealt with appropriately.

The Convener: Some domestic abuse or family cases will be urgent. How do you see that being resolved with specialist sheriffs, in particular in rural areas, when you are looking at interdicts, exclusions or whatever?

Louise Johnson: For an urgent case, could not the court be programmed so that a sheriff would come to deal specifically with urgent cases on a particular day or time? Alternatively, there has been a lot of discussion about using technology—a videoconferencing and so on. Could urgent cases, or some of the procedural work for those cases, be dealt with in that way? That would take the burden off parties in terms of their having to travel. The urgent cases could be dealt with and the facts of the case discussed before a specialist sheriff at the next available opportunity.

Sally Swinney: Urgency need not be a problem. In the initial steps of really urgent cases, the writ needs to be taken to a court, warranted, and then served. It is generally the case—in the Borders and Edinburgh—that an individual has to

ring the court to find out when the sheriff is available, and the case is fitted in. I do not see that that will change when the bill is enacted.

John Pentland (Motherwell and Wishaw) (Lab): We have heard much about specialisation. Is there any category of case that the members of the panel would like to see designated for specialisation and what are your reasons for that?

Karen Gibbons: You would expect us to say that family sheriffs are a must. In fact, it does not really matter whether they are summary sheriffs or sheriffs as long as they are experienced and have knowledge of family cases. That is the most important thing.

There are a number of reasons for that, the most important of which is consistency. In Edinburgh in years gone by, when we raised a case we could end up with any sheriff. At different stages of the case, be it at the options hearing or a child welfare hearing or proof hearing, we did not know what sheriff we would get.

Such inconsistency can have a bearing on a number of things. For example, it is not good for clients; if at first they appear in front of a sheriff who particularly listens to them, they might go away feeling quite positive about what has happened in court, only to come back a few weeks later, perhaps for a child welfare hearing, only to meet a different sheriff who might have less interest in their case. They then feel that they are not being listened to. A change in sheriffs can have quite a bearing on what happens in a case.

Having the same sheriff deal with a case can help to focus minds. If you know that a sheriff is not going to put up with certain types of behaviour or is not going to put up with a report about a business evaluation not being produced, for example, the clients focus and make sure that what is necessary happens, which can lead to earlier settlement.

The Convener: It is interesting that you mentioned a business evaluation, because family cases can involve really complex commercial issues. You talked about family law sheriffs being specialists. They might also have to be specialists in commercial matters.

Karen Gibbons: You are right. A wide variety of issues can come up in family law, and we need specialists for that reason.

The other thing to think about is the time that can be saved by using the same sheriff. If people appear at different hearings along the way, time can be spent regaling the court with accounts of sometimes years of things that have happened, especially in child residence and contact cases. A sheriff will not really want to hear about years of things that have gone on from two people with two different views of what happened in those years. Therefore, people quite often cannot get across what they want to get across, and the clients are unhappy when that cannot be done. When there is the same sheriff each time, they will not have to go through the background, because the sheriff will know it.

Depending on their nature, sheriffs can be quite good at reading situations. In family cases, it is not necessarily about what is said; much can be about what is not said. Especially in domestic abuse cases, it can be quite important for the sheriff to understand the dynamics between the parties and why a person might have behaved in a certain way, for example. Such understanding can be hugely helpful.

Family sheriffs who deal regularly with family cases can be quite creative in their solutions, especially in relation to contact. I am thinking of a particularly difficult case that we had that involved a client who travelled from abroad for each hearing. A sheriff in Edinburgh would find time in his diary to hear that case because it was his case at times that suited the client to come from abroad, and that helped hugely.

Creativity is useful in thinking about how contact will work; it is useful, for example, to think about places where contact with children will be more comfortable. Even with telephone contact, really listening to what is important to clients can be hugely significant to how a case pans out.

The Convener: I think that the committee appreciates the value of specialists in family domestic abuse, but I would like to hear more from Mr Brown. People would not usually focus on your area and say that.

Paul Brown: We represent significant numbers of children in children's hearing referrals, and we also have a specialist team that deals with mental health matters. In both types of case, it is often very important to tell people what to expect—not necessarily in respect of particular legal issues, but of the demeanour and approach that the court will take. Therefore, I support the notion of specialist sheriffs in both areas.

I appreciate that there will be difficulties in areas in which the number of those cases is very low, but it certainly seems to me that there is, in the bigger sheriff courts, a clear justification for children's hearing referrals and mental health matters going to specialist sheriffs. The sheriff's having an understanding of the medical issues in mental health cases in particular is essential. I do not mean that the sheriff should substitute their own knowledge; I mean that they should simply understand what a particular drug might do or what a particular diagnosis might mean. I appreciate that many generalist sheriffs already

know such things, but to be able to assume that the sheriff has such understanding is very useful.

Louise Johnson: My colleagues have made very important points. A person must want to be a specialist sheriff and have interest in that work. There is no point in designating someone as a specialist sheriff if they are not interested in the work, or if they think that the issue is trivial and have opposing views on, for instance, domestic abuse or the treatment of mental health. The success of specialist sheriffs is predicated on the sheriff's interest in the work, on their commitment and on the training that goes towards supporting their appointment so that they have information and awareness of all the issues around family domestic abuse, housing and mental health. Otherwise we will simply be back at square 1.

The Convener: I have a feeling that we are exhausting our questions, but if members have something new to ask—

Sandra White (Glasgow Kelvin) (SNP): Yes, I—

The Convener: I am not saying that you do not have anything to ask, but I am just laying that out.

Have you finished, John?

John Pentland: No—I have one further question. As I am sure you will agree, the whole justice system is under review just now. Do you have any thoughts on whether what is being proposed by way of court reform might have an impact on the Criminal Justice (Scotland) Bill? Are there any issues there?

The Convener: Oh, heavens!

John Pentland: That question is directed at you, Louise.

Louise Johnson: The statistics are that 70 to 80 per cent of summary sheriffs' business will be criminal, which might well impact on the other cases that they will be considering under the civil remit. Apart from anything else, that is why we are interested in the proposals for specialist sheriffs to deal with domestic abuse. There will be a knock-on effect purely from the programming.

Sally Swinney: I am anxious to avoid the difficulties that are currently experienced in the sheriff court being pushed down to the summary sheriff so that the same difficulties appear in that court. I am referring to the squeeze on civil and criminal business—unless the two areas are separated.

The Convener: Thank you. We will have questions now from Sandra White.

Sandra White: Thank you, convener, and good morning everyone.

I have a small point to make about specialism. Having heard the evidence today, and having read the evidence from last week, I think that people agree that it is important to have specialisms. Louise Johnson mentioned training and the will to carry it out. My question for the whole panel is: are there any issues in training sheriffs for their specialisms in relation to the timescale? With Lord Gill's court reforms coming in, will there be enough time to train each person in a particular specialism?

There is one area that has not been asked about so far, and I think that Mr Brown specialises in it: housing. It is not clear how housing cases will work. The limit for the simple procedure will be £5,000. The Parliament is considering the Housing (Scotland) Bill and what will happen with private tenancies. How will the arrangements work for housing cases? It is being said that they are being downgraded, but it is obviously important to people that they do not lose their house. I do not see anything in Lord Gill's submissions or in the Courts Reform (Scotland) Bill that covers housing cases to the nth degree.

Paul Brown: My understanding is that defended eviction for landlord and tenant matters will come under the simple procedure. It will be more complex if the case is based on rent arrears and the crave for payment is more than the limit for the simple procedure, which is currently £5,000. As I understand it, the majority of defended eviction for rent arrears cases will come under the simple procedure. That will mean that summary sheriffs dealing with the simple procedure, particularly given that they will have an inquisitorial role—arguably, they have that at the moment to an extent—will have to develop an expertise not just in substantive housing law but in the relevant peculiarities of procedure, housing benefit and so forth.

Sheriffs who have an interest and inclination are generally very capable lawyers, and I cannot imagine that there will need to be a great deal of time to train people to do the job. Some sheriffs already have huge amounts of expertise and could train their colleagues. I do not see it as being a major problem. However, I do view it as something that should be flagged up—training is required.

I have a concern, and this reflects what other witnesses have said. The mixing of criminal and civil cases is sometimes not a very happy mix. There are summary sheriffs who are enthusiastic about dealing with eviction matters and family matters but who are not hugely motivated to deal with summary criminal cases.

I think that the specialisms should be divided up so that people can be hired to do civil matters. When the proposals were originally mooted, that was how I understood that the system was going

to be constructed—and I think that that would be a much happier approach, particularly given the expectation that, as Sandra White says, a sheriff will go into a case with a high degree of expertise. I do not think that it is reasonable to pay summary sheriffs a bit less than sheriffs and expect them to know about everything that sheriffs currently deal with and to have the same responsibilities.

The Convener: Ms Johnson, I am mindful of time, but do you want to say something on training?

10:45

Louise Johnson: I will briefly add that the Judicial Institute for Scotland already has a fairly comprehensive training programme. We were involved with it two or three years ago in developing a DVD based on the Canadian judicial training model in relation to domestic abuse. The institute has a rolling programme, so it would be useful to engage with it to figure out how its programming will be carried forward. I think that there will be a commitment from the institute to ensure that the judiciary is trained in the various specialisms and other matters that are needed.

Sally Swinney: It would be unusual to have an applicant for a specialist post who did not come from that background, so I do not see that there is a huge issue.

The Convener: I think that some sheriffs already indicate that they have a preference for certain types of case. As Karen Gibbons said, in Edinburgh sheriff court, there will be sheriffs who prefer family cases and will take them right through. That is certainly what happened in my experience.

Christian Allard (North East Scotland) (SNP): I have a couple of quick questions. First, I heard Louise Johnson's views on mediation and domestic abuse, but what about all the written evidence that we have received from organisations asking for alternative dispute resolution to be included in the bill? Would it be possible to exclude domestic abuse cases from that, and should that be covered in the bill?

Louise Johnson: I have seen the evidence from various organisations that do not think that the bill goes far enough.

Chapter 7 of Lord Gill's report, at page 169, states:

"We insist on the fundamental right of the citizen to have access to the courts."

It continues:

"We do not consider that the court should have power to compel parties to enter into ADR. That is entirely contrary, in our view, to the constitutional right of the citizen to take a dispute to the courts of law."

Therefore, you would have to be careful about what you put into the bill.

If there was any suggestion of such a move towards ADR, we would like domestic abuse to be specifically excluded. At any rate, given those comments in the review and the access to justice issues, I do not think that it would be helpful for parties to put a power to compel in the bill.

Christian Allard: So there should not even be the power to compel at least one assessment meeting before a writ can be lodged.

Louise Johnson: The assessment would depend on the skill of the people involved and, as we have mentioned, the people who are before the mediator actually discussing issues of domestic abuse. The problem is that women would not want to talk about it, because they would be scared and they would be there with the partner who was abusing them. I see that you are nodding, so you understand. My answer is therefore no.

Christian Allard: I asked about excluding domestic abuse cases from such a power, but having it in other cases.

Louise Johnson: If there was any appetite to put that power in the bill, we would want domestic abuse to be specifically excluded but, as I said, I do not think that it is necessarily the way forward to have such a presumption or compelling notion in the bill in any case.

The Convener: I am not trying to cause difficulties, but we are talking about allegations of domestic abuse.

Louise Johnson: Yes—absolutely.

The Convener: That is the problem. We cannot prejudge what a court will decide even on a civil matter on the balance of probability, and I think that that is the issue. If we were to be as rigorous as to categorise cases, we would be prejudging. Or are you saying that, where there is an averment of domestic abuse, the case would be excluded?

Louise Johnson: Even with an averment—yes. Domestic abuse is a hidden issue. We are talking about women—

The Convener: I agree, but do you agree with my point that, at the stage that we are discussing, what has been said is an allegation?

Louise Johnson: It is an allegation, but the issue is taking that seriously.

The Convener: I do not dispute that.

Louise Johnson: In relation to proceedings, if we said that every case had to go to mediation until the mediator—rather than the parties—was

satisfied that domestic abuse was not an issue, that would take power out of the hands of the woman.

The Convener: Or the man.

Louise Johnson: Or the man, as the case may be. However, my organisation talks about women.

The Convener: I try to keep the balance a little, if you do not mind.

Louise Johnson: That is no problem.

Sally Swinney: In general, clients tend not to come in and say, "I want to go to court." The cases that end up in court tend to be those that have tried other routes before. The proposal's timing is wrong. In many cases that get to court, the parties are so entrenched in their positions that mediation would not be appropriate. I am all for mediation, but the timing might be wrong.

The Convener: I ask people to be brief with questions and answers.

Paul Brown: The issue relates to judicial review. The bill sets a three-month time limit on judicial review applications, which is far too short and will preclude involvement in all the other forms of discussion, negotiation and mediation that could be used in relation to a complex matter. If a time limit is to be implemented—I urge the committee to recommend that it is not—the minimum should be six months, if not a year.

If the time limit was three months, there would be only a couple of weeks at the most when formal or informal negotiation could take place, because the procedure means that all the papers must be ready well before the three-month deadline. In effect, parties would be locked into applying for legal aid or trying to get the funds together almost immediately.

In emergency cases, that would be fine. We deal with a lot of homelessness matters, when applying for or threatening to apply for judicial review involves—we hope—a matter of a couple of days. However, in more complex matters—and particularly given the opening up of judicial review following the AXA General Insurance decision—it would be impossible to achieve in three months all that needs to be done.

The AXA case opened the door a bit and has made it possible for community and campaigning organisations to take up cases, as in England. However, in the context of our court procedure, the three-month deadline and our lack of a tradition of such judicial review will close the door again. We need to think long and hard about that. I urge the committee to recommend a minimum time limit of six months, if not nine months. I understand that not really any of the bodies that have submitted written evidence supports the three-month time limit.

The Convener: I may have an ignorant question, as I am not sure about the process—I am looking at Rod Campbell to see whether he knows about it. I do not know whether it is possible to apply for judicial review and then sist proceedings while mediation takes place or legal aid is applied for. Is it possible to put down a marker and stop the time limit applying, and then sist proceedings while other matters are dealt with?

Paul Brown: I see no reason why that should not be done at the right point, but we are told that the procedure is that an application will have to be made and served, and then a permission hearing will take place, because permission is not given automatically. Written evidence in support of the application and copies of the documents will be needed. That will all have to be done at the beginning.

The Convener: Will that have to be done without halting proceedings? You will not be able to sist proceedings while you do other things.

Paul Brown: I do not see how that can be done.

The Convener: I just wondered.

Paul Brown: I do not see how it would be in the system's interests to allow people to apply for judicial review and then leave everything. That would result in large numbers of inappropriate judicial reviews being raised to stop the time limit applying.

The Convener: You have answered my question—I did not know whether a sist was possible.

Roderick Campbell (North East Fife) (SNP): I refer to my registered interest as a member of the Faculty of Advocates.

I have a quick question on adoption and permanence. The Advocates Family Law Association takes the view that

"adoption and permanence order cases should be removed from the list of family proceedings"

that are suitable for hearing by summary sheriffs. What are the witnesses' comments?

Sally Swinney: The Family Law Association would agree with that if the specialist was to be only a sheriff. However, our view is that specialism in family law should be for sheriffs and summary sheriffs. In that case, as long as the summary sheriff has specialist knowledge, there is no reason why they cannot deal with the whole remit of family law matters.

Karen Gibbons: The difficulty is in ensuring that the summary sheriff is specialist enough.

Adoption and permanence cases require a level of specialisation. It would be fine for summary sheriffs to deal with those cases if they had the requisite experience, but the important point is that we must ensure that they have that experience.

The Convener: I am not looking at members, because I do not want to see somebody putting up their hand to speak—I have blinkers on.

I thank the witnesses. That ends the evidence session. I will give members a break until 11, when we will hear from the next panel.

10:55

Meeting suspended.

10:59

On resuming—

The Convener: We move on to our second panel of witnesses, who will focus mainly on the provisions relating to personal injury about which we heard quite a lot last week. I welcome to the meeting Alan Rogerson, chair, forum of Scottish claims managers; Dave Moxham, deputy general secretary, Scottish Trades Union Congress; Ronnie Conway, co-ordinator in Scotland, Association of Personal Injury Lawyers; and Robert Milligan QC, Compass chambers. Welcome. I know that many of you sat through the earlier session.

Roderick Campbell: I will begin with a question about equality of arms. I invite you to commence, Mr Rogerson. Paragraph 13 of your written submission states:

"Recent comments such as 'trade unions being outgunned by the massive resources of the insurance industry and the big businesses they represent' are simply not the case—in the reformed system, there will be equality of arms and representation would be on an equal footing—for an insurer to do otherwise would make no commercial sense and the comment is highly misleading."

Could you amplify your thoughts on that, please?

The Convener: Mr Rogerson, if I call you, your microphone light will come on automatically. There is no need to press the button. The other panellists should let me know if they want to come in.

Alan Rogerson (Forum of Scottish Claims Managers): It is a myth that insurers instruct counsel in every case. Insurers are subject to market forces and it would be financially imprudent of them to instruct counsel in every single case in which the other side has a specialist personal injury solicitor acting on behalf of the claimant. I do not see insurers doing anything different; they will use their own specialist personal injury solicitors to deal with defensive cases rather than try to outgun the claimant by using counsel. Ultimately, the insurer will pick up the cost of representation on both sides. I thought that that comment was highly misleading; that was the gist of the submission.

Roderick Campbell: I would like the rest of the panel to comment.

The Convener: I am just looking for someone else to comment. Perhaps people think that it is a bully-boy tactic to use counsel if the other side has a solicitor.

Dave Moxham (Scottish Trades Union Congress): Our experience is not particularly helpful with respect to the actions of the insurance industry across a range of areas, including asbestos, which is an issue that we quote frequently.

We are particularly concerned that, following the changes that were brought in under section 69 of the Enterprise and Regulatory Reform Act 2013 and their impact on common law, there is proof that it will indeed be in the particular interests of the insurance industry during the next period to deploy its resources in a way that will affect the development of case law, much of which is now an open book because of the section 69 changes. As well as having negative past experience of dealing with those problems, we have some significant worries about what the future holds.

Alan Rogerson: It is a question of proportionality. Dave Moxham mentioned asbestos, and we would expect a mesothelioma case to be over the exclusive competence of the sheriff court and go to the Court of Session. A matter of clear law raised under the 2013 act's changes to health and safety law would be a clear example of a situation in which the sheriff court could use its power to remit the case up to the Court of Session, which has more resources at hand to deal with such cases quickly and efficiently.

We are talking about proportionality. The question was about the use of counsel in every case. In low-level personal injury cases of whiplash, for example, there is no suggestion that either party would or should use counsel. That would not be proportionate.

Ronnie Conway (Association of Personal Injury Lawyers): The current position whereby there is automatic sanction for counsel in the Court of Session for cases of more than £5,000 is indefensible. No one is suggesting that that should stay.

Mr Rogerson says that the limit should go up to £150,000 and that automatic sanction for counsel should be available only for cases of more than £150,000 in the Court of Session. The civil law review and the policy memorandum talk about low-value cases, modest-value cases and high-

value cases. The problem is not with the low-value cases, which everyone agrees should be out of the Court of Session.

However, some modest-value cases—cases that are worth, say, £10,000 or £15,000—might require counsel. I do not have a problem with the test that is proposed in the Taylor review—I should declare an interest, in that I was part of the Taylor review.

The Convener: Yes, I think you should.

Ronnie Conway: It is an excellent test. The question is where the modest-value cases should go. In every walk of life, modesty is a relative concept. The idea—which appears throughout the policy memorandum—that a case of £50,000, £100,000 or £150,000 is a modest-value case is, with respect, simply absurd.

The Convener: I would like to tease out your view on the monetary limit first, and then your view on the use of counsel. You would suggest a different limit for privative or exclusive jurisdiction.

Ronnie Conway: There should be a different limit.

When I read the policy memorandum, the financial memorandum and the explanatory notes, I see that there will be judicial salary savings of £2 million after all the summary sheriffs are in place. We are told that the Scottish Legal Aid Board and the public purse will save £1.2 million. Personal injury clients are simply to have a change of venue—they will still get a Rolls-Royce system—and a few lawyers may do a bit less well out of a system that they appear to have worked to their advantage. Reading all that, one thinks, "What's not to like?" The problem is that saying it—even saying it again and again—does not make it so.

The personal injury court could work but it is grossly underfunded. The civil courts review analysed and described a system that is slow, inefficient and expensive. Such slowness and inefficiency do not apply to the Court of Session, which has a Rolls-Royce system. The challenge is to replicate that system in the sheriff courts, and that cannot be done without its being paid for.

The saving of £1.2 million to the legal aid fund is completely illusory. From what the financial memorandum says about the £1.2 million saving, it appears that the public purse will save £1.2 million, but that is complete nonsense. According to the financial memorandum, 85 per cent of legal aid cases are successful. They are paid for by the defenders, which are the repeat institutions: local authorities, utilities such as Scottish Water and the people whom Mr Rogerson represents. There will be a saving, but it is Mr Rogerson's clients who will make the saving.

The Convener: You are saying that the £1.2 million is not a net figure.

Ronnie Conway: It is not a net figure; it is an accounting protocol.

The Legal Aid Board says that it spends £5 million on reparation—that is in paragraphs 94 to 97 of the financial memorandum. It says that 85 per cent of cases are successful, which means that the true saving—at best—would be 15 per cent of £4.9 million, if that. I can speak from my own experience. To get a Court of Session legal aid certificate, one must first prove that the case is transparently worth more than £50,000. To get legal aid in the sheriff court, a whole list of stringent requirements must be met. The idea that the public purse will save £1.2 million is simply wrong.

The Convener: You have not answered my question about the limit. You have talked about the saving; can we get back to the limit?

Ronnie Conway: You are quite right, convener. I will start with what the civil courts review said that it would like the courts system to look like.

The review said that 65 per cent of cases should be downshifted from the Court of Session to the sheriff court—it said that all but 36 per cent would be removed. The policy memorandum says that the figure for the number of cases moving should be 80 per cent. Based on the figures that we have looked at, we say that around 95 per cent of cases will be downshifted.

The civil courts review admits in its report that the figures it relies on are weak, and I would suggest that in some areas they are unreliable. They come from an insurer database, and there are all kinds of caveats in the civil law review. The Scottish Parliament information centre briefing says that SPICe tried to interrogate the figures but was told that they were confidential.

The Association of Personal Injury Lawyers carried out an anonymised test, via a well-recognised law accountant, Alex Quinn and Partners, which acts for both pursuers and defenders. The important figure is the settlement figure, not the sum sued for. I will not bore you with the detail of our figures, which are attached to our submission; instead, I will give you the headline figures. We looked at 53 cases and their settlements and we found that in only two of those cases was the settlement figure more than £150,000. If you wanted a balance of 65 per cent or so of cases being heard in the sheriff court and 36 per cent being heard in the Court of Session, the exclusive competence figure would be between £20,000 and £30,000. We say £30,000; as I said, the detail is in our written evidence.

I hope that I have answered the question, convener. I appreciate that I have gone on to—

The Convener: It is fine. I will let Robert Milligan and Alan Rogerson in, and then I will go back to Roddy Campbell.

Robert Milligan QC (Compass Chambers): Historically, victims of personal injury accidents have had the right to representation by counsel, even at a low level, and they have also been protected by health and safety legislation. It would be a very unfortunate double whammy if, after the Westminster Parliament has in effect removed that health and safety protection, the Scottish Parliament were to remove the historical right to representation by counsel.

I accept Alan Rogerson's point that when a specialist personal injury solicitor acts for the pursuer, there may well be equality of arms, but many victims will see their local family solicitor if they do not happen to have a specialist personal injury solicitor. The historical advantage has been that victims have always had available an independent referral bar with specialist skills in the area, which has been able to help them right from the outset. Even in low-value cases that can be very important.

I will give an analogy. My son recently fractured his wrist while playing football. I took him to the fracture clinic for an X-ray and I was surprised to see a consultant orthopaedic surgeon reviewing the X-rays. He was doing that not because a junior doctor or even a nurse could not review the X-rays, but because it had been worked out that it was cost effective in the long run to have a specialist in at the outset to ensure that the initial diagnoses were correct. It is precisely the same in personal injury cases.

The Convener: Was it not because they realised that your son had a father who was a Queen's counsel who specialised in personal injury? That sounds more like it: "I recognise the name."

Robert Milligan: I specifically asked, because I was surprised to see a consultant orthopaedic surgeon. He explained to me that that was the reason: in the long run, it was cost effective.

The Convener: Well, you interpret it as you will. [*Laughter*.] Sorry, you are quite right. You made a real point.

Robert Milligan: I hope that you can see the analogy.

I suspect that we would all agree that nobody would criticise the service that is currently provided in the Court of Session. Indeed, the criticism seems to be that it is too good. I am in favour of a personal injury court. I would like it to be as good as the Court of Session, but a cheaper version. I would like to see people litigate in the personal injury court through choice, not because they have been forced to. I would like a more positive view of the personal injury court. If it is good, people will not have to be forced into it, because they will want to use it. At the moment they have the choice between the sheriff court and the Court of Session and people use the Court of Session—they vote with their feet—because it offers a better service.

11:15

Alan Rogerson: I have a couple of points. First, I take issue with Robert Milligan's point that the Court of Session runs completely smoothly and there are no lumps and bumps along the way. I have cases at the moment where all the evidence is ready to be heard by the court but the proof dates are off into late 2015, simply because the court does not have the capacity to hear those cases.

As the justice secretary said in the papers today, it is all about the right cases being heard in the right courts at the right time, as and when they are ready. It comes back to proportionality and the efficiency of the system. The new personal injury sheriff court is needed to free up time in the Court of Session so that it can deal with health and safety issues under the Enterprise and Regulatory Reform Act 2013. Those issues will be breaking new ground in the next couple of years and it is right that, in those cases, people receive proper representation—from skilled advocates, for example. That should be the aim of the new Court of Session, as and when the reforms come in.

On exclusive competence, it is very difficult to work out at an early stage of a case whether it is worth £30,000 or £75,000—you would be relying on a specialist sheriff who had in front of them not the evidence but only the pleadings in trying to determine that. While £150,000 may seem high, it sets a clear bar and suggests that a claim that goes over the exclusive competence will involve future losses or someone who cannot return to the occupation that they enjoyed before or who requires some future level of care. It will not take into account cases where all the injury is in the past and the person has recovered and gone back to work. A case within the £30,000 to £75,000 realm could involve an injury that is essentially behind the person and you are just talking about numbers at that point.

The Convener: I have experience of a personal injury case that looked like a simple case of whiplash and eventually turned out to be a twist of the spine, which is much more complex. I appreciate that you aim really high to start with because you sometimes do not know where you

are going until the medical evidence has all come in over a long period.

Alan Rogerson: Yes.

The Convener: You said that it is not all without bumps and lumps in the Court of Session. It has been put to me that, with its expertise, the Court of Session, does in fact expedite personal injury cases. Transferring those cases to the sheriff court might mean long continuations and disrupted proofs over a period of time—given the burden of work in the sheriff court, it might become extremely difficult to get the same sheriff hearing the case. Might there be more bumps and lumps in the sheriff court?

Alan Rogerson: Under the present system, yes, but the Courts Reform (Scotland) Bill sets out the new personal injury sheriff court where there will be specialist sheriffs who will try to hear the case in one go as opposed to dealing with continuations and hearing it a day at a time. I totally accept your point—if that was to be what we end up with, it would be completely unsatisfactory for everybody involved.

The Convener: Do we not already have a specialist personal injury system in the Court of Session? Is this not just relabelling it?

Alan Rogerson: We have a specialist personal injury system in the Court of Session, but the problem is that it also deals with low-value cases, so we are using a high-value, Rolls-Royce service for cases in which that kind of service is not necessary.

Dave Moxham: In passing, I refer the committee to the report, "In the Shadow of the Small Claims Court", which found that insurers employed the best possible solicitors in small-value cases. That is a matter of record and it is referred to by a number of the people who have provided evidence.

Robert Milligan made some important points about replicating, or attempting to replicate, all that is good at the moment in the Court of Session, if it is indeed the view that a specialist personal injury court is to go forward. I am thinking in particular not just about time but about the back office, for want of a better term—the electronic and other systems that are made available in the Court of Session, which I know that the people who act for us find particularly useful and efficient. It seems to us that that, among other things, makes the case for any new personal injury court to be sited in the Court of Session.

Robert Milligan: If a case is low level and not complex, it will probably settle before any type of litigation at all—most cases do—and even if it gets to litigation, it will settle quickly. I act for both pursuers and defenders fairly equally, and I know that both sides want cases to settle quickly. Neither side has any incentive to drag a case out, so a low-value, easy case will not use up any court time, wherever it is.

Ronnie Conway: I would like to speak about our members' experience in the sheriff court. The civil courts review has already identified slowness and inefficiency as endemic in the sheriff court. How on earth is the addition of some 2,500 to 2,800 cases going to improve that? Your point, convener, was extremely well made.

The Convener: It was a question. I am not allowed to give evidence.

Ronnie Conway: It was a good question.

In the Court of Session, four days are allocated for proof. The defenders know that there is a no-excuses culture and that there will be no adjournments—they know that they will have to go to the dentist before the four-day proof. The Government's research identified other settlement drivers that the Court of Session has but which the sheriff court will not have.

The existing system is in crisis, and what you are being asked to approve will turn it into a train wreck. I do not apologise for the apocalyptic language, because that is exactly what will happen. The APIL briefing gives an example of a case in which a single day was allocated and the case proceeded; it needed a further three days and two days were allocated; and on the day before the case was to restart people were advised that the sheriff had to deal with a jury trial that was running over, so those two days were lost. The case bounced about in court for two separate procedural days while the court tried to fit in a hearing, and by the time that it was finally dealt with, it had taken the best part of a year to hear four days of evidence. I am not quite clear on the specifics of that case, but it is in the APIL submission. Such situations are not unusual because of the pressure of criminal and family business.

The PI court at present is seriously underfunded, and no new resources are proposed. All that will happen with the changes that you are being asked to approve is that pieces will be moved about the chess board. On the one hand, one reads that those cases are clogging up the Court of Session and consuming judicial and administrative procedure; on the other hand, one hears that, by the time they get to the sheriff court, the effect will be minimal. Both parts of that sentence cannot be accurate.

The scoping for personal injuries in the sheriff court is 200 days. That is the equivalent of a single sheriff, at 205 days. Quite apart from the procedural issues, they will be inundated with arguments about whether counsel can be

sanctioned. My firm has twice tried to get sanction for counsel in advance, both times for asbestosis cases, and it has been refused twice, mainly on procedural grounds. One of the defects in the current law is that the court cannot sanction a case as suitable for counsel; every single step of the procedure has to be sanctioned as suitable for counsel, so there have to be serial applications at every point.

The point that I would make to Mr Rogerson is that the insurers are sniffing blood.

The Convener: That is a very unfortunate metaphor, but please proceed.

Ronnie Conway: The insurance industry is the big winner out of this, so I am not prepared to back down on that point. You will see, again and again, sanction for counsel being opposed. If insurers oppose sanction for counsel in an asbestosis case, what cases do they think are worthy of counsel?

The Convener: Before the bloodhounds come in, having sniffed the blood, I will move on to the next question, because there is quite a queue of members wanting to come in.

Roderick Campbell: A number of the written submissions mentioned competition issues relating to the litigation arrangements between counsel and parties' speculation agreements. Will Mr Milligan comment on that?

Robert Milligan: In Scotland, we are unique in having a requirement for sanction for counsel—in pretty much every other jurisdiction, it is automatically assumed that counsel will be required. There is then the question of the fee level that is incurred, but the Gill review and the bill envisage that fees will become a matter for regulation and be controlled. That is the way forward.

In the past, the competition issue has not really arisen because sanction for counsel has been automatic in the Court of Session and that is where most personal injury litigation, even for low value, is raised. If such litigation is moved into the sheriff court, the issue will arise very starkly because it is clearly anti-competitive, given that an advocate cannot compete with a solicitor for work in the sheriff court.

The Convener: Are you talking about advocates taking a pay cut?

Robert Milligan: Much though it pains me, that is an inevitable consequence. I do not necessarily shrink from that; rather, I shrink from being denied the opportunity to compete for the work.

The Convener: Right.

Elaine Murray: Compass chambers and the APIL have raised doubts about the hoped-for savings in the financial memorandum, arguing that the exclusion of counsel cannot be justified on cost grounds because most of that is recovered through the award of fees and so on. Consequently, should we examine the financial memorandum with caution?

Robert Milligan: I will pick up on Ronnie Conway's point about legal aid funding. The financial memorandum has two difficulties. First, as Ronnie says, 85 per cent of legal aid funding is recovered by the Government, so it does not spend that money. Secondly, legal aid is very seldom allowed in anything other than the most serious personal injury cases and I do not see why that will change, because people do not get legal aid for straightforward, low-value personal injury cases. A 50 per cent saving is anticipated. I do not know where that 50 per cent figure comes from; I do not see that any saving will be made to the legal aid budget.

The Convener: The Scottish Legal Aid Board is coming in front of us, so we can raise the matter with it, too.

I will take Mr Rogerson first—not that I am in any way penalising you for your comment, Mr Conway.

Alan Rogerson: I am not sniffing for blood or anything like that. First, I endorse Robert Milligan's point that insurers want cases to be settled and rightful compensation paid to injured people. Indeed, insurers do not want to end up in litigation any more than the injured person does. It is quite telling that last year's core statistics show that 8,725 personal injury actions were litigated. That is not satisfactory from an insurer's or an injured person's perspective.

It is a misnomer to suggest that insurance companies will pick up the tab and pay the expenses, because the cost of insurance goes back to the consumer or to the business that pays the insurance premiums in the first place. There is no windfall here for the insurers.

Ronnie Conway: I will pick up briefly on what Mr Rogerson said. First, if insurance companies are so desperate to settle cases, why are 98 out of 100 settled only after proceedings are raised, many at the door of the court? Secondly, he is absolutely right that this is not a victimless crime and that insurance premiums should be appropriate.

11:30

From our perspective, low-value cases should be taken out of the Court of Session. That is where expenses are inappropriate. I have made my remarks on modest-value expenses and I have—in so far as I can—covered the Legal Aid

Board point, but there is a further big point to make about the finances. As it stands, the Court of Session is funded largely by personal injury actions. The fees funds that it receives amount to about £4.6 million, £2.3 million of which relates to moneys that are paid by parties in Court of Session actions. The analogous amount in the sheriff court is £804,000—that is what is taken in by the Scottish Court Service for the sheriff court. Since the call for evidence was made, we have done some basic scoping, which I would be quite happy to make available. Our figures show that there will be a net loss to the fees fund of £1 million. The only way in which that £1 million can be made up is by a substantial hike in sheriff court fees.

When Lord Gill appeared before the committee, he was asked by Ms Marra what would happen to the fees if thousands of cases were to disappear from the Court of Session. It seemed to me that he said that, as the people would be getting a quality product, they should be expected to pay for it. I have no problem with being expected to pay for a quality product, but what is on offer is not a quality product.

Elaine Murray: The Government would argue that those cases would be substituted by commercial cases. Do you think that that is likely?

Ronnie Conway: No, I do not think that that is right. It is said time and again that the personal injury cases are preventing high-value commercial work from coming to the Court of Session. That is simply an assertion, but simply saying something does not make it true.

The problem with commercial work is that, 500 miles from here, in London, there is an international centre of globally accepted excellence. It gives me no pleasure to say this but, throughout the world, contracts are written in terms of English law. The English commercial court exerts an enormous pull on litigation throughout the world. In fact, one of the complaints that is made in England is about litigation tourism—it is felt that England is having to fund people to come from around the world to use the commercial court. When the international commercial and arbitration centre was set up in Dubai, it was set up in terms of English commercial law and it imported Lord Woolf and a cadre of English judges. The idea that, simply as a result of our saying, "We are now open for business," the Court of Session will attract a huge number of commercial cases is a fantasy.

Dave Moxham: The advice to the STUC vis-à-vis potential commercial activity is in complete agreement with that. We already have excellence in the Scottish courts—we have excellence in personal injury. People from across the UK and Europe look at what we do. I would prefer us to nurture the centre of excellence that we have and the reputational and other value that that provides for us rather than go on fishing expeditions for commercial work.

The Convener: So you sort of agree.

Dave Moxham: I think we do.

Alan Rogerson: I agree with both the points that have just been made. We have excellence in Scotland; my problem is with the proportionality. We did some statistical analysis of our cases. We looked at more than 8,000 settled litigated cases and, in the cases that settled for less than £50,000, £1.56 was paid out for solicitors' costs or legal costs for every £1 that the injured person got in compensation. To our mind, that is not proportionate. It is at the low levels that we need to do something. We need to change the mechanism. That is where the bill will help.

Alison McInnes (North East Scotland) (LD): To stick with the personal injury court, Mr Rogerson is obviously very comfortable with all the proposals, but there is decreasing interest in and support for that as we go along the other witnesses. It would be helpful to know what safeguards or amendments to the bill you would like to see to make the bill work and make it as efficient as you would like it to be.

The Convener: Who wants to start with decreasing support?

Ronnie Conway: I would like the exclusive competence to be reduced to £30,000. Perhaps I have been unduly critical. There is no problem with the vision thing in the proposals; the problem is in the detail and the funding. Currently, the PI court is simply not funded. The idea that all the cases can cascade down and be seamlessly accommodated in a system that has already been analysed and found wanting is not correct.

I have not even started on the information technology provision. The civil courts review is hugely critical of the Scottish court system as far as IT concerned. As one of my colleagues said, in the sheriff courts we are barely in the analogue age, never mind the digital age. The civil courts review wanted wholesale technological improvement. The total budget for IT investment in the personal injury court—it is not just one court; there will be personal injury centres in each of the 16 sheriffdoms—is £10,000. I have no idea how that £10,000 is to be spent. I run a small to medium-sized business and cannot conceive how that can be an appropriate figure.

The Convener: On mouse mats?

Ronnie Conway: Yes, we could have a lot of them.

The impression is that the Government or, to be more accurate, the proponents of the legislation saw the promised land. They liked what they saw. The figures were then crunched and, suddenly, there was a retreat from the principles in the civil courts review. We see that at every turn. We see it as far as the PI court, the specialist court, which is not funded, investment in IT and the sheriff appeal court are concerned. The original proposal for appeals was that three judges of sheriff principal level would deal with cases. We now find that, far from that, the appeal will be to a single person, who might simply be another sheriff.

If everything comes to pass, a fatal case could be raised for a widow for £150,000, and that could be lost on the merits in front of a sheriff. On appeal, the person would go to another sheriff, and they might lose there. Under the current rules, they would find it well-nigh impossible to get to the inner house of the Court of Session, because they would be told that what was happening was not exceptional, that the courts or the sheriffs had simply applied—or, the argument might be, misapplied—the law, and that that does not give them grounds to go to the Court of Session. With the legislation, the kicker is that it can be said that the business exigencies in the Court of Session might trump that.

The Convener: I think that more than one sheriff can sit in the appellate courts. I am just checking that.

Ronnie Conway: There can be more than one. The original proposal was three. Either the policy memorandum or the financial memorandum says that it is expected to be one person, although I am not able to put my finger on that.

The Convener: Yes, but even in the inner house, there can be a bench of three or seven. Roddy Campbell will remind me.

Roderick Campbell: The Government's position is that, in 95 per cent of cases, there will be just one sheriff and that in the other 5 per cent there will be a multimember bench. That is how it sees things panning out.

Ronnie Conway: I am obliged for that. That was my recollection.

The Convener: Are there not advantages in having an appellate court at sheriff level for the whole of Scotland instead of having sheriffs principal applying slightly different views of the law, perhaps, in the different sheriffdoms?

Ronnie Conway: Yes—and the civil courts review was correct to point those advantages out. By definition, a three-member bench is more likely to get things right than—

The Convener: But what I am suggesting is that it would be applicable nationally rather than just in the sheriffdoms.

Ronnie Conway: Indeed, and such an approach should create some consistency. I have no problem with that. However, the problem that I come back to again and again is its implementation. Am I being cynical in thinking that the full implications of the resources that are needed have suddenly dawned on the proponents of this legislation and they have simply decided to put a quart into a pint pot?

Alan Rogerson: With regard to the original question, the one aspect of the bill that I am uncomfortable with is the introduction of jury trials in the civil courts, which, to my mind, will detract from the efficiency and calibre of justice that you receive in the personal injury court. At the heart of this is the need to be proportionate. Having a jury trial to decide damages in a low-level injury case involving, say, whiplash or other fairly minor injuries seems to me to be completely out of all proportion, and I think that, with such an approach, we would lose the efficiency that we have in the system.

Dave Moxham: If we are still talking about having a personal injury court that would give some—what is the word I am looking for?—comfort, I think that all workplace personal injury cases should be able to be heard in the special personal injury court. Indeed, that was the original feeling of a range of contributors to this whole process. There would be automatic right to counsel for cases involving more than £5,000 and, as we have said in our submission, we also think that, for a range of reasons that I am sure can be highlighted more eloquently by Clydeside Action on Asbestos and other practitioners, it would make sense to continue to hear asbestos-related cases in the Court of Session.

I also repeat the point about resourcing and support. The court needs to be ready to go, which will require a great deal to be done about resourcing and getting things ready.

Robert Milligan: Modesty was going to prevent me from raising the issue of sanction for counsel, but as Dave Moxham has just made the point, I have to say that it seems to me to be the most obvious safeguard. It would be a great shame if we set up a specialist personal injury court and then excluded from it the very specialists who make the system work.

As far as the exclusive competence and privative jurisdiction limit is concerned, I agree that the proposed figure of £150,000 is too high. The SPICe briefing is generally a very good document, but I particularly commend to the committee its critique of the statistical basis for the £150,000

limit. To a certain extent, it would not matter so much if there were ready access to counsel, as that would simply replicate the current situation. Surely, as I have said, we want to encourage people to go to the personal injury court, not force them in.

Finally, on resourcing, it is essential that things are set up and ready to go before there is any increase in the exclusive competence threshold, because there is no doubt that the current sheriff court system does not work for personal injury cases. The person who brings the case gets one day, and then they have to wait months for another day, by which stage everyone has forgotten what happened on the first day. The system must be set up and ready to go before the work is moved into it.

The Convener: It is all right, Mr Conway—I have seen you indicating that you want get back in.

Ronnie Conway: I just realised that, in responding to Ms McInnes's question, I forgot a quite important part of the answer. It is not absolutely crystal clear but, as far as I have read it, the proposal is for cases under £5,000 to be subject to the simple procedure. The committee has heard consumer and charity groups argue that the sheriff should adopt an interventionist and inquisitorial approach on that, that matters could be dealt with in a single day and that the sheriff should mediate or negotiate settlement.

11:45

The Convener: I think that what was said was that the sheriff should mediate, not negotiate. The sheriffs made it plain that they do not want to influence.

Ronnie Conway: Yes—I accept that distinction.

There are a great deal of cases of £5,000 and under—they constitute the biggest number of cases in Scotland generally, and about a third of all cases are under £5,000. However, from research that was carried out by the Government researcher Elaine Samuel and published in the report "In the Shadow of the Small Claims Court", which my friend Dave Moxham referred to, we know that the simple procedure does not work for such cases. Unrepresented litigants do not know how to identify a cause of action and they do not know the law on employer's liability, statutory liability and occupier's liability. They do not know that they will be required to provided medical evidence and they do not know how to bring—

The Convener: So there are hurdles for most, but not all, party litigants.

Ronnie Conway: Yes, indeed.

In fact, that has been acknowledged in that, at present, all those cases are summary causes, or a special subset of summary causes, which have a special set of rules. We say that, if the personal injury court is to be set up, it should not be dealt with by summary sheriffs and it should not be part of simple procedure. It should be incorporated into the specialist court—either the all-Scotland specialist court or the courts around the country where there will be expertise and economies of scale. The idea that those cases will resolve is not accurate.

The Convener: Mr Rogerson, I think that you said that, with claims of £5,000 and over, there should be an automatic right to counsel. Is that right?

Alan Rogerson: No, I did not say that.

Dave Moxham: I said that.

The Convener: Will people not just ask for £5,000 or more simply to get automatic sanction for counsel, notwithstanding what they settle for, or what the claim is really worth?

Dave Moxham: I have not considered that specific point and I am happy to get back to you on it. However, if there is not an automatic right to counsel that is set at a specific limit, our people might be surprised by counsel and have to apply retrospectively for their own counsel, having found themselves in a situation that they did not predict.

The Convener: If I were acting and I thought that, for cases of £5,000 and over, there would be automatic sanction for counsel, I might just put that in from the start.

Dave Moxham: The other obvious point is that people could be penalised under cost recovery if they did that.

The Convener: Yes, that would be at the end of the day, but, nevertheless, it might happen.

Robert Milligan: I point out that the test that is used to decide whether people get sanction for counsel is not the sum sued for; it is what the case is worth. We make that point in the Compass response and set out the test.

John Finnie: Mr Moxham, in your written evidence, you talk about the Scottish courts having produced a disproportionate amount of case law in respect of health and safety. You also talk about section 69 of the Enterprise and Regulatory Reform Act 2013, which was mentioned earlier, and about workplace injuries being about more than the individual redress that is being sought. You state:

"As a result of Section 69, workers who are injured as a consequence of an employer's breach of a statutory duty within the Act's regulations will be prevented from enforcing that breach."

I wish you well with your complaint to the European Commission. What is your preferred forum for dealing with the issue? I note what you say about counsel, but can those issues be dealt with under the bill?

Dave Moxham: They will be affected by the legislation. It is not absolutely clear how our people pursuing cases will attempt to deal with all the implications of section 69 of the 2013 act. They will certainly have to rely more on proof of negligence and on medical expertise, and they might have to rely more on other legislation, such as European directives, in order to tip back the balance and create a body of case law that we hope replaces, to some extent, the strict liability that existed prior to 1 October.

Our difficulty with that is that we think that the broad thrust of health and safety legislation and European legislation has implicitly recognised the disproportionate relationship between the employee and the employer. In a perfect world, the employee would have far more choice over the machinery and systems that were put in place in the work place. The fact is that they do not. Therefore, historically, the way that legislation has been constructed and interpreted has sought to redress that balance and has had the positive additional effect of creating a culture of health and safety and a safety-first approach, which we think benefits not only our members but society more generally.

I have been reading a bit of the commentary by insurers and the friends of insurers around this issue—

The Convener: Insurers have friends?

Dave Moxham: Exactly. [*Laughter*.]

One of the things that they look at is the prospective impact on employers and the possibility that employers might begin to think that they can relax a little bit. That is not the fault of anyone in here, but clear messages have been coming from Westminster that the culture needs to change and that employers can relax.

John Finnie: I believe that the phrase that has been used concerns the desire to slay the "health and safety monster".

Dave Moxham: Exactly. We also imagine that, in a number of cases, clients will ask their insurers to contest cases that they previously would not have contested. Of course, we will be in the position of having to reach different tests for negligence and liability. In our view, irrespective of whether you think that section 69 is a good thing—I think that I have made my position on that clear—that creates an incredibly complicated playing field on which it will be difficult even to assert which are the important test cases and which are not. We believe that it would be fundamentally wrong to undertake any of that work under the simple procedure, and we think that it will be particularly important to recognise the importance, within the new specialist court, of access to counsel and other mechanisms that will make that court a good court. If it were the case, five or 10 years further down the line, that things were seen to settle down—perhaps as a result of a statutory instrument or something like that—and the Parliament wanted to take another look at the situation, that might be a reasonable thing to do. However, this is a crucial period with regard to creating the right health and safety landscape in Scotland and across the UK.

Alan Rogerson: I agree—

The Convener: Who are your friends, by the way? [*Laughter*.]

Alan Rogerson: I agree entirely with Dave—

The Convener: Is he a friend?

Alan Rogerson: I do not know. We will see afterwards.

I agree entirely that employers should not be taking their foot off the gas in relation to health and safety in any way, shape or form. It is certainly not in insurers' interests that they do so.

With regard to cases under the Enterprise and Regulatory Reform Act 2013 that would involve groundbreaking health and safety cases, the proposals in the bill would involve people applying for sanction for counsel or for the case to be remitted to the new, efficient court where, it is to be hoped, the case would be heard more quickly. That way, we keep the groundbreaking Scots law to the fore.

The Convener: What do you understand by "exceptional circumstances"? I think that that is the test. You have just mentioned sanction for counsel.

Alan Rogerson: In the "Review of Expenses and Funding of Civil Litigation in Scotland", Sheriff Principal Taylor said that, in the sheriff court, the test for whether the employment of senior counsel is appropriate relates to

"circumstances of difficulty or complexity, or the importance or value of the claim."

Clearly, what is important is not necessarily the value of the claim but the importance of the matter, not just to the individual but to society in general.

The Convener: Is that different from exceptional circumstances, or is it the same?

Alan Rogerson: You could argue that it is the same, if it is important to society in general.

The Convener: Do all the witnesses agree? Mr Milligan, you do not agree.

Robert Milligan: No. Funnily enough, I do not agree, but I think that that illustrates the difficulty of having a subjective test for sanction for counsel. What seems like an important matter to one sheriff might not be important to another, and the litigant does not know that until it is too late. I just do not accept that it is sensible and fair that a person who, after all, has been injured through somebody else's fault could be penalised in that way.

The Convener: They could appeal against counsel not being sanctioned, surely.

Robert Milligan: In theory. There is plenty of authority that appeals on expenses are actively discouraged, and quite rightly so, because expenses are seen as a discretionary matter.

The Convener: I can see that Mr Conway wants to comment. You do not have to be discreet about it; I know the hand gestures.

Ronnie Conway: If APIL's figures are correct—and we say that they are robust—then 95 per cent of cases will be removed from the Court of Session and it will, in effect, no longer be a court of first instance for personal injury. We had no problem with the original scoping of 65 per cent of cases being removed from, and 35 per cent of cases being left in, the Court of Session.

You mentioned the prestige of the court. Mr Moxham is correct to say that Scotland has led the UK in the field of health and safety for more than 100 years, with the abolition of common employment, a safe system of work, the dust and disease cases in the 1960s and 1970s, the health and safety cases now, and, of course, Donoghue v Stevenson.

The Convener: That was the case involving ginger beer.

Ronnie Conway: Yes, it was the snail-in-the-bottle case. We are all laughing, but it is the most famous common law case in the world. The policy memorandum says that it started out in the sheriff court, but I beg to differ. It started in the Court of Session and was dealt with by a Lord Moncrieff, who went against the conventional wisdom that a manufacturer of foodstuffs had no duty towards the persons who would consume those foodstuffs. He was eventually found right by the House of Lords, against all the conventional law, and he therefore invented product liability.

My point is that a lord ordinary, who is at the absolute top of the profession, by reason of ability, temperament and self-confidence will make the law in a way that sheriffs—with all due respect to them—cannot do by training or by inclination, because the court system means that they must defer to authority.

The Convener: I am thinking of Sheriff Wood's reaction when he reads your evidence, but go ahead, Mr Conway. I hope that you are never in front of him.

Ronnie Conway: Yes, indeed.

The Convener: Please do not feel inhibited.

Ronnie Conway: I am not, but I take your point, convener. I will be avoiding Sheriff Wood.

The system will not let a sheriff do that, because he is bound to apply the law as it is, instead of making the law as it ought to be, which is what the Court of Session has done.

The Convener: You have saved yourself.

Ronnie Conway: That is what the Court of Session has done for hundreds of years. That is an important thing and it seems to be being tossed away without so much as a backward glance.

John Finnie: We hear a lot of evidence, and most people imagine their own to be a special case, but I think that we would all agree that there are compelling issues around domestic violence.

Given the wider implications of health and safety cases—as has been said, it is about more than the individual—should there be a presumption in favour of counsel being sanctioned in health and safety cases?

Dave Moxham: I have made clear my position that that should be the case. Personal injury cases are already dealt with under special rules, for good reason. We believe that in the next period—as a consequence of the changes that we have seen—there will be no such thing as a straightforward and simple workplace personal injury case. Certainly for cases above £5,000 that are held in the personal injury sheriff court, we would favour automatic counsel.

12:00

Alan Rogerson: I disagree with that on the basis that if the employer has already said that they are liable and the insurers have spoken to the employer and they are admitting their liability pre-litigation, there is no reason for an automatic presumption in favour of counsel.

The Convener: Would you like to rebut that, Mr Moxham?

Dave Moxham: I presume that the parties would already have gone through various pre-action protocols, but there will still be a range of issues around levels of compensation and so on that we would need assistance with.

Alan Rogerson: We do not have compulsory pre-action protocols yet in Scotland but I know that the Scottish Civil Justice Council is looking at that

issue just now. That would, I hope, feed into the new sheriff personal injury court system.

The Convener: Could you let us know what a pre-action protocol is?

Alan Rogerson: It is just a series of steps for both parties so that the issues are narrowed before the case is litigated.

The Convener: Is it about narrowing the dispute?

Alan Rogerson: Yes.

Margaret Mitchell: To return to the sheriff appeal court, the Gill review recommended three judges. The bill allows for one judge to sit, who could be a sheriff principal or a sheriff of five years' standing. Lord Gill had some real reservations about a sheriff of five years' standing hearing an appeal on the decision of a colleague and was very much of the view that sheriffs on the same level of the hierarchy should not be hearing appeals. What is your view on that?

Ronnie Conway: I think that I have already made my view plain. It is really not at all satisfactory. To try to dress it up as an improvement in the civil justice system is an Orwellian use of language, quite frankly. In the civil court review, Lord Gill said that the appeal courts model with three sheriffs principal could be achieved with negligible expense. It is incomprehensible to me why that model has been departed from.

Margaret Mitchell: You made a point about the development of law. As the bill's provisions stand, under section 47,

"A decision of the Sheriff Appeal Court on the interpretation or application of the law"

can be binding on a sheriff and on a justice of the peace. Such decisions can be made by a sheriff of only five years' standing—as opposed to going to the Court of Session with all the reasons—so obviously that would be a cause for concern.

Ronnie Conway: Indeed. It is a diminution—

The Convener: Would you call that compounding it in some way?

Ronnie Conway: Yes, indeed.

Margaret Mitchell: You have very clearly outlined the pressure on sheriff courts at present. If sheriff courts do medical negligence cases, the timeframe involved could be mind boggling. Are you aware of or do you have concerns about sheriff court closures and how they would impact on and compound the concerns that have already been expressed?

Ronnie Conway: The synergy or the synchronicity—I am not exactly sure which is the correct word to use—

The Convener: We will take both.

Ronnie Conway: The compounding effect—I used the term "train wreck" and I am conscious that that is a slightly apocalyptic description—

The Convener: You use apocalyptic language all the time, Mr Conway. It is quite entertaining.

Ronnie Conway: I do not shrink from it. May I invite the committee members to go to their local sheriff courts to see the pressures on the courts? The courts are operating under huge time constraints. I was amused to see your exchange with the sheriffs, convener, when you asked them whether there might be a meltdown if the proposals went ahead.

The Convener: Did I? I think that it was Mr Pentland, and we are not easily confused with each other. [*Laughter*.] I think that you need to go to Specsavers.

Ronnie Conway: As I recall, the sheriffs were not prepared to say that there was a meltdown, but—with all due respect to them—they are not the ones who are being melted down as a result of the proposals.

I will say, in case I meet Sheriff Wood again, that the sheriffs are all hard working, the sheriff court staff are extremely helpful and the agents do their best. However, we are soldiering on in a hopelessly antiquated system and it is deluded to believe that it will be improved without funding.

To go back to my point, the people who will suffer are those who have to turn up, have their cases adjourned on day 1, get some sort of priority three or four months down the line on day 2 and then watch as the case bounces about in the sheriff court timetabling system, subject always—quite properly—to the demands of crime cases and of family cases involving children. It is not a proper legal system for the 21st century.

Robert Milligan: I agree whole-heartedly, and I suspect that no one on this panel would disagree with the view that personal injury work is not adequately dealt with in sheriff courts as things stand. That is not a criticism of the people who work in the courts; they simply do not have the economies of scale and they have more pressing requirements, particularly in the form of criminal cases.

Christian Allard: Mr Rogerson touched on the idea of reintroducing civil jury trials, which would not be a saving. What do other panel members think of that idea?

Ronnie Conway: I am in favour of civil jury trials because—for want of a better expression—

they bring people directly into the court and involve them in the quantification of damages. It seems that over time—and it is not just me who says this—the judiciary tends to lose touch with the value of money.

The Convener: First the sheriffs, now the judiciary—you are living dangerously, Mr Conway.

Ronnie Conway: One might ask why, but the previous Lord President, Lord Hamilton, has said so in terms, and every so often there is a spike in damages to reflect that reality.

Mr Rogerson spoke about jury trials for whiplash cases, but there are no jury trials in such cases. Very occasionally there are jury trials in cases involving fatalities, and the jury has to be told—so to speak—that there is a range for damages above which they cannot go.

Just now we have a mixture of judicial involvement, which is quite proper, and, from time to time, the intervention of a jury, which keeps the judiciary honest.

The Convener: I knew that you were going to dispute Mr Rogerson's claim. Are you?

Ronnie Conway: I am not necessarily disputing it; I am just clarifying it slightly.

The Convener: That sounds like a subtle way of disputing it, but we will find out.

Alan Rogerson: With regard to what Ronnie Conway said, there should be jury trials in cases that involve fatal damages awards, for instance, because they will be above the exclusive competence of the sheriff court. I have a problem with the idea of proportionality with regard to jury trials for low-level personal injury cases; adding such complexity to something that the court should be looking at efficiently and quickly would be completely disproportionate.

Robert Milligan: I must contest what Alan Rogerson says about fatal claims being above privative jurisdiction. I have crossed swords in a number of fatal claims, many of which have not been worth £150,000.

One of those cases went to the inner house to fight the five-judge decision in a case called Hamilton, which set the benchmark for the way in which juries are now given guidance. In that case, the jury had awarded £90,000 for the loss of a son but the court held that that was excessive and the case ultimately settled for a lot less than that. The most recent judicial pronouncement for a similar award was £42,000. It is not true to say that fatal claims always exceed the limit, even if it is set at £50,000.

Alan Rogerson: I have a final point to make on the issue.

The Convener: The word "final" means final.

Alan Rogerson: Definitely. Robert Milligan is right to say that not every fatal claim would be over the exclusive competence limit, but the cases in question involved more family members, which in total would have pushed the amount over the exclusive competence limit.

The Convener: I see. You are talking about multiple claimants.

Alan Rogerson: Yes.

The Convener: Rod Campbell has a small question.

Christian Allard: I have a little question to ask, if I may.

The Convener: Are you not finished? Sorry. You can ask a small question, then it will be Roddy's turn. This will be your final question.

Christian Allard: My question is about what Mr Moxham said about pursuers representing themselves. I know that personal injury cases are often complex, but I also know that a lot of them are not so complex. Do you recognise that there may be an issue of access to justice for people who want to represent themselves in simple cases? We have talked about the sheriff having a mediation role. Would you be reassured by that?

Dave Moxham: No, not really. I would hesitate to deny anybody the opportunity to pursue a case as they wanted. Would I advise people to represent themselves? Absolutely not. Workplace personal injury cases are complicated and will only get more complicated. I will move to one side the question whether people should have the right to represent themselves, but if I were asked whether I would advise them to do so, my answer would be "Absolutely not." The presumption should be that workplace personal injury cases are pursued only in the specialist court.

On access to counsel, in our experience it often takes the instruction of counsel before we can get the insurance industry to settle. In our experience, that is required in at least 80 per cent of cases. It is not our experience that we can get to the stage of agreeing employer liability and everything is hunky-dory before counsel is instructed.

Ronnie Conway: Mr Allard, we have tried that already. The old small claims system was a system of unrepresented pursuers. However, the problem that was encountered—I refer to the 1998 research that I have already mentioned—was that, in a system involving what the academic writers talk about as the "one shotters", who are the people who have only one brush with the legal system, and the repeat players such as Mr Rogerson et al, the repeat players will always instruct lawyers. For example, if I sued Scottish

Water I would not get the in-house technical person for Scottish Water; Scottish Water would instruct lawyers. There would be no equality of arms; there would always be representation for the repeat defenders.

Christian Allard: You do not see the sheriff's new mediation role balancing that.

Ronnie Conway: The point was made earlier that, in most consumer cases, we are talking about a single issue. Was the suite defective? Was it delivered on time? Did it look like it did in the catalogue? In almost all personal injury cases, the facts are much more difficult to prove than that. Was there a duty of care? Is there a statute that refers to it? What did the previous authorities decide? What medical evidence is required?

An academic once said, "Let the forum fit the fuss." [*Interruption*.]

The Convener: What? Sorry—we have a member who is dying of a cough to my left. [*Interruption*.] Excuse me—I am coughing myself now. I missed your last word. "Let the forum"—

Ronnie Conway: "—fit the fuss."

The Convener: The fuss? Not the fleece. I was wondering where a fleece came into this. Thank you. [*Interruption*.] Excuse me—I think that there is something going around here.

Roddy Campbell will ask definitely the last question—that is what the word "final" means.

Roderick Campbell: Mr Milligan, Compass's submission says:

> "costs of litigating personal injuries cases in Scotland have been significantly lower than in England (although we are not aware of this having translated into lower insurance premiums for Scots)."

What is the evidence for that? What do Mr Rogerson and others on the panel say to that?

12:15

Robert Milligan: I read the various responses from the Association of British Insurers and others, and looked in vain for a promise of the reduction in our premiums that we can expect once the reforms come in. The simple answer is, of course, that Scotland is a small country and part of a much larger jurisdiction insurance-wise, so a multinational insurance company is not going to reduce premiums significantly because it is saving some money in Scotland.

Indeed, we have already seen that in relation to the far higher litigation costs in England. I do a lot of work for English insurers and have been asked to assess costs a number of times. When I tell them what the costs will be, they say that they sound reasonable and ask what the costs will be for the other side; then I tell them that that is all in.

As Alan Rogerson will confirm, until now, England has had a system whereby large success fees have been recoverable, but in Scotland they are paid out of the claimant's damages. That has meant that costs have been much higher in England. They have recently been reduced and are now more in line with the position in Scotland. There is no appreciable difference between the insurance premium that you pay for your car insurance and the premium that is paid by someone in a similar position in England. That is almost inevitable, because you might be injured in an accident in England and therefore be subject to the rules there.

The Convener: Are you going to corroborate that, Mr Rogerson? That is our favourite word.

Alan Rogerson: I will be very careful in what I say next. There is a danger in just looking across the border because England has fixed fees for low-level cases and the compulsory protocols to which I alluded earlier. England already has a proportional step change in place for its cases. As Robert Milligan says, the fees in larger cases have been well out of proportion down south compared with what they are up here.

The data that we have identified and collected show that our problem up here is the disproportionate approach that currently exists in relation to the low-level cases, which there are more of. That is what the Courts Reform (Scotland) Bill needs to address; I hope that the rest will follow.

I would defer to the ABI on the issue of lower insurance premiums.

The Convener: Did you want to say something, Mr Conway? Is it wise to say more now that you have offended the judiciary and the sheriffs? Have a go at the Parliament and the committee now.

Ronnie Conway: Convener, you will be shocked to hear that I do not know the answer to Mr Campbell's question. I have already suggested that the insurance industry will be big winners out of the bill. It has a further prize in sight, which is the low-value cases.

The Taylor review has already dealt with the issue. Sheriff Principal Taylor pointed out that there is an asymmetrical relationship between one-shotters and repeat players, and that, unless a reasonable level of expenses or costs is assimilated into low-value procedure, specifically for cases under £5,000, claimants will be unrepresented. Not satisfied with all the savings that the insurance industry will get as a result of the sanction for counsel issue, Mr Rogerson is now hunting for an even bigger prize.

The Convener: Does he smell blood?

Ronnie Conway: I was deliberately not going there.

The Convener: You are provocative.

Ronnie Conway: Convener, that is exactly what he is doing.

The Convener: Before you come back on that, Mr Rogerson, I will ask Mr Moxham to come in.

Dave Moxham: Perhaps Alan Rogerson will contradict this, but we are not aware of any reductions in premiums down south as a consequence of the outcome of the Jackson review and the various attempts to limit costs. We were promised that those would come, but I do not think that we have seen any yet.

The Convener: Mr Rogerson, you seem to be pretty friendless now.

Alan Rogerson: I know, convener, but I should say that I am not going home to get my deerstalker just yet.

Just to come back on what Ronnie said—

The Convener: So you are calling Mr Conway "Ronnie" now. I am so glad that we are ending on that note.

Alan Rogerson: I am trying to attract friends, convener, but it is not just happening.

With regard to low-level cases, one of the recommendations in the Taylor review of expenses was the introduction of one-way qualified cost shifting to ensure that those who pursue small actions do not incur any costs. Insurers welcomed that move, but they want it balanced out with the compulsory pre-action protocol to ensure that not as many cases go to litigation simply because the parties cannot agree and that the issues in question are narrowed.

The Convener: So we might or might not see reduced premiums.

I hope that you have some kind words for Mr Rogerson, Mr Milligan.

Robert Milligan: I want to finish on a friendly note and point out that the insurance industry is not an ogre but is, in fact, essential to the whole process and generally very well run. However, we are also talking about commercial organisations that have to take benefits where they can.

The Convener: On that—I think—neutral note, I end this evidence-taking session and thank the witnesses for their attendance.

Subordinate Legislation

Firemen's Pension Scheme (Amendment) (Scotland) Order 2014 (SSI 2014/59)

Firefighters' Pension Scheme (Scotland) Amendment Order 2014 (SSI 2014/60)

Police Pensions (Contributions) Amendment (Scotland) Regulations 2014 (SSI 2014/62)

12:21

The Convener: Agenda item 3 is consideration of five negative instruments. The purpose of the first three, which come into force on 1 April, is to increase members' contribution rates in public service pension schemes in accordance with the 2010 spending review. I also note that the Delegated Powers and Law Reform Committee is content with them.

Do members have any comments?

John Finnie: I will not object to them, because it would be a futile exercise, but I find it deeply depressing that the Scottish Government was precluded from doing anything because of the intervention of the Chief Secretary to the Treasury, Danny Alexander, and his threat to remove moneys. This attack on public sector workers is simply not merited.

Sandra White: I reiterate those comments. The fact is that we were going to have £50 million taken out of our budget. It is an absolute disgrace.

The Convener: When we spoke to the police, one of their main concerns was about what was happening to their pensions. Of course, that matter is subject to UK legislation.

Do members agree to make no recommendations on the instruments?

Members *indicated agreement.*

Police Service of Scotland (Performance) Regulations 2014 (SSI 2014/67)

The Convener: The purpose of the regulations, which also come into force on 1 April, is to introduce a new definition of "unsatisfactory performance" as

"an inability or failure of the constable to perform the duties of the constable's role or rank (or both) to a satisfactory standard."

The Delegated Powers and Law Reform Committee is content with the regulations. Do members have any comments?

Alison McInnes: I was concerned that the proposals make a change to who can hear the appeal. The policy note says:

"An appeal can now be heard by a Senior Officer, rather than the Chief Constable",

which is what happens under the Police Service of Scotland (Performance) Regulations 2013. It would have been useful to have had an indication of the representations from the unions on that matter.

The Convener: As the regulations come into force on Tuesday, there is nothing procedurally we can do. Nevertheless, your remarks are on the record.

Are members content to make no recommendations on the regulations?

Members *indicated agreement.*

Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68)

The Convener: The purpose of the regulations, which come into force on Tuesday 1 April, is to introduce procedures that are more akin to modern employment practices and which take into account the Advisory, Conciliation and Arbitration Service principles. They also set out the standards of professional behaviour that constables should maintain during their service.

The Delegated Powers and Law Reform Committee agreed to draw the instrument to the attention of the Parliament for two reasons. First, it agreed that the form or meaning of the instrument could be clearer. Although regulation 7 provides that a constable may be legally represented in any misconduct hearing or appeal hearing, the effect of regulation 25(8)(b) is to make legal representation at an appeal hearing subject to the discretion of the person determining the appeal, so it may, as such, be refused in cases other than those where disciplinary action constituting demotion in rank or dismissal has been ordered.

Secondly, the Delegated Powers and Law Reform Committee agreed to draw regulations 15 and 16 to the committee's attention. It suggests that we consider whether the exercise of the right of a constable to object to the appointment of an assessor, a solicitor or an advocate to advise at misconduct proceedings might be frustrated by the fact that the appointment of such persons is not a matter on which the constable is required to be given notice in the misconduct form.

Do members have any comments?

John Finnie: Strange though it might seem, the regulations actually enhance conditions.

The Convener: Can you explain why that might be the case? They seem to me to diminish them.

John Finnie: The top three options of dismissal, requirement to resign or reduction in rank entitle an officer of the federated ranks to legal representation. Under the previous system, there was no such entitlement. There will now also be an entitlement to legal representation for very low options such as reprimands, cautions, fines and stoppage of increments.

The Convener: The regulations did not seem to be an improvement to me, but you assure us that they are better.

John Finnie: That is certainly my reading of them. As with other issues, we can rest assured that had there been any concerns we would all have been lobbied very strongly.

The Convener: Thank you for that.

Are members content to make no recommendations in relation to the regulations?

Members *indicated agreement.*

The Convener: We now move into private session.

12:26

Meeting continued in private until 12:37.

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