OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 26 September 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 26 September 2017

CONTENTS

JUSTICE COMMITTEE
28th Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Maurice Corry (West Scotland) (Con)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Simon di Rollo QC (Faculty of Advocates)
Annabelle Ewing (Minister for Community Safety and Legal Affairs)
David Holmes (Medical and Dental Defence Union of Scotland)
Kim Leslie (Law Society of Scotland)
Andrew Lothian (Forum of Insurance Lawyers)
Calum McPhail (Association of British Insurers)
Luke Petherbridge (Association of British Travel Agents)
Andrew Stevenson (Glasgow Bar Association)
Greig Walker (Scottish Government)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 26 September 2017

[The Convener opened the meeting at 10:00]

Subordinate Legislation

International Organisations (Immunities and Privileges) (Scotland) Amendment (No 2) Order 2017 [Draft]

The Convener (Margaret Mitchell): Good morning. Welcome to the Justice Committee's 28th meeting in 2017. There are no apologies.

Agenda item 1 is consideration of the draft International Organisations (Immunities and Privileges) (Scotland) Amendment (No 2) Order 2017, which is an affirmative instrument. I welcome the Minister for Community Safety and Legal Affairs, Annabelle Ewing; Walter Drummond-Murray from the civil law and legal system division of the Scottish Government; and Greig Walker, who is a solicitor in the Scottish Government's directorate for legal services.

Members will have a chance to put questions to the minister and her officials about any points on the draft order on which they seek clarification before we formally dispose of the motion on the draft order. I refer members to paper 1, which is a note by the clerk and invite the minister to make a short opening statement.

The Minister for Community Safety and Legal Affairs (Annabelle Ewing): Thank you, convener. Good morning.

The order will confer various legal immunities and privileges on the unified patent court, which is an international judicial body that is supported by 25 European Union member states, including the United Kingdom.

On 19 February 2013, the UK Government signed the intergovernmental agreement to provide for a unified patent court in the participating European Union countries. The "Protocol on Privileges and Immunities of the Unified Patent Court" was signed in Brussels on 29 June 2016.

The order fulfils Scotland's part of the obligations that such international agreements entail. Equivalent provision in respect of reserved matters and in respect of devolved matters in the rest of the UK is being conferred by legislation at Westminster. To the extent that the privileges and immunities relate to devolved matters in Scotland, conferral rightly falls to the Scottish Parliament. When their respective parliamentary passages are complete, both orders will go before the Privy Council.

Although the order is limited to the issue of privileges and immunities, it might be helpful to say a little about the background to the UPC. The unified patent court will be common to the contracting member states and thus part of their judicial systems. It will have exclusive competence in respect of European patents and European patents with unitary effect. "Unitary effect" means that the patent will not need to be validated in each of the contracting states; instead, it will provide uniform protection in up to 26 EU countries. The UPC's rulings will have effect in the territories of the contracting member states after they have ratified the agreement at the given time. The UPC will not have any competence with regard to domestic patents.

The preparatory committee of the UPC, which is a committee of representatives from signatory states that is tasked with bringing the UPC into being, has stated its aim of bringing the agreement into force in the spring of 2018. To meet that deadline, the United Kingdom and Germany must deposit their instruments of ratification in late 2017. The decision to sign up to the international obligations that provide for the UPC falls within the reserved responsibilities of the UK Government and the Parliament at Westminster.

Many stakeholders have welcomed the establishment of the UPC. For example, the Law Society of Scotland said:

> "It is strongly recommended that the UK should try to ensure that the UPC Agreement does enter into force, and that the UK can continue to participate fully in the Agreement."

To enable the UPC to fulfil its purposes and carry out its functions, certain privileges and immunities must apply by virtue of the protocol to which I referred earlier. The conferral of immunities and privileges is, in effect, a condition of membership and is necessary to enable the court to function as an international organisation in the UK.

The specific purpose of the order is to provide immunities and privileges to the UPC and its officials in the course of official activities in Scotland in order to reflect the equivalent Westminster order and the terms of the "Protocol on Privileges and Immunities of the Unified Patent Court". The order provides that judges, the registrar and the deputy registrar shall have immunity from suit and legal process in respect of things that are done or omitted to be done in the course of the performance of official duties. That immunity can be waived by the presidium of the court. The court officers whom I mentioned shall

also be exempt from devolved and local taxes in respect of salaries, wages and emoluments that are paid to them by the court. No individuals are exempt from the council tax. Representatives of a state that is party to the agreement will also enjoy immunity from legal process when, in their official capacity, they attend meetings of committees that have been set up under the agreement. That immunity can also be waived by the presidium of the court.

The immunity does not apply to a British citizen, or to any person who, at the time of taking up functions with the court, is a permanent resident of the United Kingdom.

In the case of motor vehicle incidents, the court has no civil or criminal immunity where the vehicle belongs to, or is operated on behalf of, the court. Immunities and privileges are, therefore, limited, in that they apply only to official actions and can be waived. They do not give an individual carte blanche to commit criminal activity. An assault, for example, could still be prosecuted in the normal way.

The immunity is, therefore, analogous to, but more limited than, that which has been for generations conferred upon diplomats working in foreign jurisdictions. As with diplomatic immunity, all individuals benefiting from privileges and immunities in Scotland are expected to respect Scots law—both the criminal and the civil law.

In conclusion, the order will help the UK to fulfil its international obligations in respect of Scotland, and it is the duty of the Scottish Government to bring it forward to the Parliament.

I hope that that rather long summary was useful, and I invite any questions that members may have.

The Convener: Thank you for that comprehensive opening statement, which was very helpful.

John Finnie (Highlands and Islands) (Green): Thank you for the statement, minister.

You will be aware that I have a keen interest in this matter, as does my party. It seems to be a worthy organisation. Where is the location of its premises in Scotland?

Annabelle Ewing: The structure of the court at the moment is that there will be no local division of the court in Scotland. However, I have corresponded with the UK Government and have secured the undertaking that the matter will be reviewed, based on future demand.

In terms of physical presence in the initial year of the operation of the court, there could be a sitting of the local division in Scotland, depending on the needs of any particular case.

John Finnie: If that were to happen, any premises used would be considered to be occasional or temporary premises, to which the inviolability provision does not apply.

Annabelle Ewing: That is correct.

John Finnie: Why is that?

Annabelle Ewing: I will ask officials to give chapter and verse on the legal reasoning.

Greig Walker (Scottish Government): With regard to the enabling powers for the orders under the International Organisations Act 1968, neither the Scottish Government nor the UK Government can go any further than the protocol enables them to go. The protocol does not require immunities in relation to temporary premises, so we could not confer them; further, there is no policy reason to confer them in those circumstances. The order has been past the Foreign Office and I understand that the people who are preparing for the UPC are aware of this work, which is all in order.

John Finnie: Paragraph 9 of the covering note says:

"Paragraph 4 provides the Court shall have like inviolability of premises, which means that agents of the state such as the Police cannot enter without permission".

If premises are termed "occasional" or "temporary", could the police enter them?

Annabelle Ewing: The UPC would not have inviolability in the circumstances that we foresee in the initial years, in which the court would not have a physical presence in Scotland—although we have asked about that and the matter is under advisement. There could be a sitting of the court in Scotland, depending on the needs of a particular case; in those circumstances, the inviolability of premises is not required by the policy direction and it has not been provided for in the order.

John Finnie: It is good to hear that you are chasing work in the area. Would the division be termed local or regional if it were to be sited in Scotland?

Annabelle Ewing: If it were to be sited in Scotland in due course—which we will continue to press for and which the Law Society of Scotland supports—I understand that it would be a local division.

John Finnie: Paragraph 12 of the covering note says:

"They shall also be exempt from devolved and local taxes in respect of salaries, wages and emoluments paid to them by the Court."

Have the figures been quantified in that regard? Do we know the numbers?

Annabelle Ewing: I suppose that they would be quite difficult to quantify because the numbers

would vary, and we do not know how many officials in Scotland such exemptions could apply to.

The important point—which I hope that I stressed in my opening statement—is that the immunity relates to those who are acting in their official capacity and is concerned primarily with income tax. As I told members at a previous meeting of the committee, the reasons for that relate to the integrity of the operations of the international organisation. In addition, those in senior positions in the UPC will all pay the same rate of tax, as set by the organisation's rules.

It is not an exemption from council tax, for example, and the exemption for senior officials vis-à-vis income tax will not apply with regard to tax on pensions. It is not an absolute blank cheque. Particular heads of categories are involved and, within that, there is a different approach to income tax or tax and pensions, for example, for more senior officials of the court.

John Finnie: With respect, minister, if we do not know the numbers and we do not know the sum, we do not know the value of the cheque.

As no business regulatory impact assessment will be undertaken, I am not sure how you can reach the conclusion that there will be no financial effects on the Scottish Government, local government or businesses.

Annabelle Ewing: The fact is that there is no direct impact at this time. The order extends the conferral of privileges and immunities as far as any potential devolved activity is concerned. We are required to do that in order to secure the UK Government's ability to implement its international obligations.

As far as we are aware, the UK Government proceeded with a fairly extensive impact assessment process in terms of the underlying principal piece of legislation on joining the UPC. That process carried out the engagement and looked at the impacts. I am asking the committee today to consider the order favourably. The order extends the conferral of privileges and immunities to Scotland as far as devolved matters are concerned.

The Convener: To clarify, is it the case that most or all of the officials will be domiciled in London?

Annabelle Ewing: That remains to be seen.

Certainly, there are different categories. The senior judges will have a particular regime with regard to income tax. General members of staff are the next level down. If they are British citizens or permanently resident in the UK—which they well may be—and are deemed to be members of the UPC staff, they will not be able to benefit from the immunity and privilege regime as far as income tax is concerned. It is a wee bit complicated because different categories of individuals are concerned.

John Finnie: Are you able to provide an aggregate number? You might recall that the last time we discussed this issue, there was some dubiety about numbers. Even if you could write to the committee on that, it would be helpful.

Annabelle Ewing: I am happy to ask officials to look into the matter further. I think that it would be very difficult, at this stage, to anticipate exactly the number of people that you are talking about as far as devolved issues in Scotland are concerned, but I am happy to ask officials to look into it.

John Finnie: Are people able to submit patents in Gaelic? If not, could you chase up an obligation that would allow that to happen?

Annabelle Ewing: I would be delighted to proceed with that. I am afraid that off the top of my head I do not know the answer.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): To pick up on the issue of the inviolability of premises, I take it that the fact that not all premises are inviolable—for example, temporary premises are not—in no way cuts across the provision that the official archives and papers of the court are inviolable. That is, will they remain inviolable even if they are in temporary premises, which are not themselves inviolable?

Annabelle Ewing: They will remain inviolable, according to general international principles.

Liam McArthur (Orkney Islands) (LD): I am wholly supportive of the order, but I will pick up on John Finnie's question on the impact assessment. Like him, I was struck by what was set out in the policy note at paragraph 16 and, in particular, paragraph 17, which talks about there being no impact at all.

You fairly pointed to the work that was undertaken by the UK Government, where responsibility for much of the matter resides. If we are looking at such instruments in future, it might be helpful if the detail and findings from any impact assessment were fleshed out a little more and shared, even if the assessment was not undertaken directly by the Scottish Government.

Annabelle Ewing: Absolutely—I would be happy to do that. It is a very good point.

10:15

The Convener: If there are no further questions, we move to agenda item 2, which is formal consideration of the motion in relation to the affirmative instrument.

The Delegated Powers and Law Reform Committee has considered and reported on the instrument and has no comment on it.

If the minister does not wish to make any further comments, I ask her to move motion S5M-07771.

Motion moved,

That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment (No. 2) Order 2017 [draft] be approved.—[*Annabelle Ewing.*]

The Convener: The question is, that motion S5M-07771 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Corry, Maurice (West Scotland) (Con)
Fee, Mary (West Scotland) (Lab)
Gougeon, Mairi (Angus North and Mearns) (SNP)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Macpherson, Ben (Edinburgh Northern and Leith) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Mitchell, Margaret (Central Scotland) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)

Against

Finnie, John (Highlands and Islands) (Green)

The Convener: The result of the division is: For 10, Against 1, Abstentions 0.

Motion agreed to.

The Convener: That concludes consideration of the affirmative instrument. The committee's report will note and confirm the outcome of the debate. Is the committee content to delegate authority to me, as convener, to clear the final draft of the report?

Members: Yes.

The Convener: Minister, I thank you and your officials for attending.

10:16

Meeting suspended.

10:18

On resuming—

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill: Stage 1

The Convener: Item 3 is our third evidence session on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. I refer members to paper 2, which is a note by the clerk, and paper 3, which is from the Scottish Parliament information centre.

It is my pleasure to welcome our first panel of witnesses: Simon di Rollo QC from the Faculty of Advocates; Andrew Stevenson, vice president of Glasgow Bar Association; and Kim Leslie, convener of the civil justice committee of the Law Society of Scotland. I thank all the witnesses for providing submissions, which is hugely helpful to the committee.

Before we move to questions, I invite Liam Kerr to make a declaration.

Liam Kerr (North East Scotland) (Con): I declare an interest in that I am a director and 100 per cent shareholder of Trinity Kerr Ltd, which is a provider of legal services, and I am a member of the Law Society of Scotland.

The Convener: Thank you for that declaration.

We move to questions and I will start with success fee arrangements. Do the panel members support the changes in the bill that will allow lawyers to enter into damages-based agreements?

Kim Leslie (Law Society of Scotland): Yes. The Law Society welcomes that change in the way in which personal injury claims and other civil litigation can be funded. We understand that there has to be some regulation of and cap on DBAs for public protection but, broadly speaking, we welcome the liberalisation of how solicitors can provide legal services to their clients. We welcome the simplicity of a damages-based agreement and hope that it will enable clear communication with the public, so that they can understand what they are getting and what they will pay at the end of the day.

The Convener: Are there any other views?

Simon di Rollo QC (Faculty of Advocates): I agree that the proposals are welcome and I support them.

Andrew Stevenson (Glasgow Bar Association): Glasgow Bar Association also supports the introduction of the bill in so far as it permits that form of contract. A degree of secondary legislation is also to be introduced,

which we would be interested in seeing. In principle, we agree with the bill.

The Convener: Given that damages-based agreements give lawyers a direct interest in the outcome of a case, does the panel consider that any changes will be needed to the current professional standards regimes to deal with conflicts of interest?

Kim Leslie: We must be mindful that such work is already being carried out. I do not foresee a need for a change in the regulatory regime. Where there are potential conflicts—for example, in relation to future losses—the bill tries to build in visibility. It puts additional protections in place so that, when conflicts arise, there will be ways of dealing with them to protect the public.

The Convener: Will you elaborate on what those protections are?

Kim Leslie: For example, the bill suggests that, when the legal provider has not recommended that compensation for a future loss should be taken as a periodical payment order, independent scrutiny by an actuary is required to certify—or the court must, in effect, certify—that it is in the client's best interests for the future payment to be made by way of a lump sum rather than a PPO.

The Convener: We will cover future losses in more detail as we continue our line of questioning.

Simon di Rollo: Your question was specifically about professional regulation, convener. Counsel have a duty of independence and a duty not to present a case unless it is statable. There is a case from the inner house in the 1930s—as far as I am concerned, it is still good law—that maintains that, for a case to be conducted on a speculative basis, there must be reasonable prospects of success. There is in place a requirement on counsel not to conduct a case unless there are reasonable prospects of success, and a case may not be stated unless it is statable—I suppose that that is another way of saying the same thing.

Protocols may be needed to ensure that cases are not presented when there is no reasonable prospect of success. By that I mean that pre-action protocols must be in place, such as I believe are envisaged. Case management procedures in the courts are also designed to ensure that cases cannot be presented unless there is a statable basis, and summary dismissal of cases that have no merit is possible.

Liam McArthur: I will follow up Kim Leslie's point about the involvement of actuarial advice. It came up in our evidence session last week that that advice would have to be sought in the absence of the solicitor, which raised some eyebrows. Do you see any problems with a client having to seek that actuarial advice without having a solicitor present? Is it assumed that that provision will work and is in place for a good reason?

Kim Leslie: If the provision gives comfort that there is no taint to the advice, the Law Society will accept it. I wonder whether it is strictly necessary because, in such high-value cases, there will generally be a legal provider, potentially senior and junior counsel and maybe even a financial guardian. However, if the provision gives comfort that the public are being protected—given that there will be a change that means that solicitors will for the first time have a stake in the outcome of a litigation—we understand the reasoning behind it.

As lawyers, we always have a duty to act in our client's best interest. It is comforting that, because of the transparency that is involved, there are very few complaints to the Law Society about arrangements, which are on-going, in which claims management companies are being operated as a funding vehicle but the work is being carried out by solicitors.

The short answer is that we believe that the primary objective must be to include future losses at the appropriate tapered level. If the committee feels that the provision in the bill is essential to protect the public, we understand that and are prepared to accept it.

Liam Kerr: Is the point about the actuary or the court certifying that the deal is in the client's best interest a tacit admission that the true independence of the profession—of which it is, rightly, proud—is potentially compromised? Could there be a public perception that that independence is being compromised?

Kim Leslie: I made the point that a number of people advise in such cases. I have experience of such work and I have certainly never felt conflicted in my advice to a client. As I said, if the provision gives comfort, it is necessary. However, it anticipates a choice that means that a lawyer could be paid more by way of a success fee, or less. I would agree with anyone who said that the lawyer should always be able to make the right choice because it is in the client's interest. The provision is an extra stage that says that the advice will be without taint but, to be frank, the advice will probably be the same as the advice that the lawyer would have given in the first instance.

Simon di Rollo: The Faculty of Advocates has commented that its concern is that section 6(6) carries with it the statutory suggestion that there is a conflict and that the lawyers cannot be trusted, as Mr Kerr just indicated. That is problematic.

It is not clear to the Faculty of Advocates how an independent actuary will be able to assist with

the question that requires to be answered in such a situation. An actuary's purpose is to give advice on how a calculation will work out, but the decision as to what to do in the light of that calculation is for the client to take. Normally—in my experience, invariably—the client should have independent advice from counsel in such cases, and a financial guardian, who should be a professional person, should be present. I have never come across a solicitor who was not conscious of the need to do what is in the client's best interests in such circumstances.

10:30

The Taylor proposal created a conflict and then sought to resolve it. I suggest that the way around the problem is to avoid the conflict by allowing the solicitor to charge a fee when there is a periodical payment order. That would mean that there was no conflict between a lump sum and a periodical payment order. Surely we can find some mechanism to allow a fee to be charged in such circumstances. The fee would have to be a very small percentage of the value, perhaps over a number of years, of the periodical payment order. That money could be found from the damages and should not affect the future element because, in claims of the size that we are talking about, there will be enough money to pay the fee without affecting the ability to fund future care and so on.

Stewart Stevenson: As a mathematician and someone who has been involved in financial things, I have undertaken actuarial calculations. In law, does that make me an actuary?

Simon di Rollo: I imagine that the idea is that someone is an actuary if they are a member of the Institute and Faculty of Actuaries. I do not know whether the Institute and Faculty of Actuaries is happy about all this or whether its members are keen to get involved and do what they are being asked to do in such a situation. I do not know whether that has been considered.

Stewart Stevenson: I am on the same page. I would not wish to be described as an actuary, but I wonder whether we are aware of any legal definition of an actuary and whether—this might not be a question for the panel—there are professional standards for actuaries that cover their independence as part of their professional duties.

Simon di Rollo: Actuaries have professional standards—there is a professional body. You would have to ask the representative body to deal with that question.

The Convener: What does the panel think the impact will be on lower-value cases once caps on the fee levels under the success fee agreement are introduced?

Kim Leslie: Are you suggesting that the power to cap in a written speculative fee agreement would have an impact on lower-value cases?

The Convener: Once the lower value and the cap have been agreed and the case appears to be low value and not worth the solicitor's time, will that have an impact?

Kim Leslie: We are always keen for the judicial expenses to be increased so that what we are getting paid for the work that is done is met by those expenses.

In the lower-value cases, there has to be proportionality. Again, it is about fairness to the client. If it is a low-value claim, we do not want to take too much of the client's damages.

The Convener: Is it likely not to proceed on a no-win, no-fee basis?

Kim Leslie: No. Lower-value claims, like any other claims, are assessed as the best way of doing the work. The bill is introducing options. A client or a consumer will have to work out what is available on the market, and a lawyer will have to analyse those cases and how they can work the cases profitably while still ensuring that the client gets the majority of the damages.

The Convener: I suppose that the fear is that lawyers may be attracted to cases where they know that there is guaranteed income, which would be more lucrative, and that, despite the bill trying to make access better for individuals, very low-value cases may not be taken up on a no-win, no-fee basis.

Kim Leslie: That has not been our experience.

The Convener: Some panel members have highlighted in their submissions that success fee agreements, where the lawyer gets a fee uplift, are currently used in family actions. That would be prevented by provisions in the bill. Can you explain your concerns about that?

Simon di Rollo: I think that it was the Faculty of Advocates that indicated a concern about that. It is important not to overstate the concern, because I do not think that it happens very often. However, there are cases in which, where there is dispute about financial provision on divorce or on the dissolution of a civil partnership or cohabitation and where there is an asset to be preserved or a share of an asset to be sought, counsel might be instructed on a no-win, no-fee basis—not on a percentage of the asset to be recovered or preserved, but on the basis that, if there is an achieved result, they will be paid and, if there is not, they will not be paid a fee. That does not happen very often, but it happens from time to time. It would be useful if that possibility could be maintained. Given how the bill is currently framed, it does not seem to permit that, and we feel that, if

possible, it should be amended or altered to allow that to happen.

The Convener: Is that very much a niche situation?

Simon di Rollo: Yes, it is.

The Convener: It would be helpful, before we leave this line of questioning, if each of the witnesses could estimate the point at which they receive a payment before the action starts, whether representing the client goes on to pre-action protocol, judicial expenses, the SFA, the DBA or any uplift, and approximately what percentage is involved or how that is valued.

Kim Leslie: I did not quite follow the question. You are asking about the point at which a lawyer—

The Convener: When you are acting for a client, at what stage do you receive payment? Would you receive payment if all the expenses were paid, including the pre-action protocol, the SFA, the DBA and any uplift or judicial expenses?

Kim Leslie: In a damages-based agreement, there might be an interim payment before the claim has concluded. That may be before it has gone into court or after it has gone into court. If there is an interim payment, the lawyer would be entitled to deduct their success fee at that point. They might choose not to, if there is a reason why they are getting an interim payment, because the client has to pay for something, but in effect, the lawyer would be entitled to do that at that point.

At the crystallisation of the claim, when the lawyer gets their cheque or their funds in from their opponent once they have won the case, they will take their success fee and pay the balance. At that point, the lawyer's files are reviewed by a law accountant and an account is drafted and negotiated, and the judicial expenses are either agreed or sent to taxation. An auditor determines what will be paid by way of judicial expenses, and the lawyer would get their judicial expenses at that point.

The Convener: I am just trying to quantify it. When you tot up your fee, along with any interim payment and the final payment, does the final settlement include a payment for the pre-action protocol?

Kim Leslie: No. If the case is settled through a pre-action protocol, that is out of court, and the fee is negotiated. In effect, there is a fixed fee at that point and you are paid when the claim is settled. You will have agreed with your opponent what you will be paid for your client.

The Convener: If the case is not settled but goes ahead, is there still a charge for representing the client at the pre-action protocol?

Kim Leslie: No. There is either the pre-action protocol, which is out of court, or litigation, which involves judicial expenses. You will get a fixed fee if the case is settled out of court, with a success fee over and above that. If the case goes to court, you will get the success fee and then judicial expenses, which are based on a table of fees for judicial work; you will not get anything for the pre-action protocol.

The Convener: Right—that is what I wanted to get at.

Do the other two witnesses want to add to that explanation, or are you happy with it? You are having it very easy.

Simon di Rollo: I am happy with the explanation, but I will add something just so that the committee understands the position of counsel. If counsel are acting on a speculative basis—a no-win, no-fee basis—they will be paid at the end of the case. It is very unusual to be paid at any point before that. Counsel will almost certainly not be acting on the basis of a damages-based agreement; they will continue to be instructed as they are at present, which is on a no-win, no-fee judicial recovery basis. There are reasons for that. The solicitor enters into a damages-based agreement with the client, but counsel is not involved in that. They are brought in at a later stage, in essence as an independent consultant, and they are paid through judicial recovery from the person who is paying the damages.

Liam Kerr: Kim Leslie talked about how the lawyer can "work the cases profitably". Are you aware of any evidence that suggests that extra rewards to solicitors' firms are actually required?

Secondly, I ask the whole panel whether the bill will actually solve the problem. Is there not a risk that solicitors will still prefer to choose the easy, more straightforward claims, or the ones that are most likely to be settled, such as road traffic accidents, whereas the more difficult cases—the longer and more evidentially challenging ones such as stress claims—that are lower value and higher risk, will remain unattractive, so we will not have solved the problem of how those can be taken on?

Kim Leslie: That problem will be solved to an extent by the introduction of qualified one-way costs shifting. Undoubtedly, there are cases where the fault element is straightforward—or it should be, although no case is guaranteed to win—but there are some cases where the risks are higher. You are absolutely correct that some types of work are more complex and time consuming and require greater investigation and financial outlay in the investigation and preparation of the case.

The system has to tie together, and Sheriff Principal Taylor looked at the system in an

overarching way. In effect, he acknowledged that there is an issue with access to justice in certain types of case, which may not be attractive. That is simply because, when a lawyer is balancing up a case and analysing it, if they think that they will have to invest too much money and time in investigating it, and if the cost ramifications will be significant if they lose, it becomes less attractive. The introduction of QOCS will enable certain work types to become viable that may not be viable at present, given the risks involved of losing the case and paying adverse costs to your opponent.

Simon di Rollo: The short answer is that the bill will improve the position but not resolve it altogether, because there will still be difficult cases that are unattractive to take on.

Those cases will probably continue—the bill will not completely resolve that problem. Therefore, there is still a need for legal aid, which is an important resource in allowing those cases to be brought. The very difficult cases for which legal aid is not available will still be difficult to bring, but the solution to that problem will not be easily found.

10:45

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I was going to ask about compensation for future loss, but I feel that the subject has been covered extensively. Instead, I will ask for clarification on a point about periodical payments. If I understood you correctly, Mr di Rollo, you said that, at the moment, a solicitor can decide on periodical payments. Should the court be able to impose periodical payments?

Simon di Rollo: The current law is that, in Scotland, a court cannot require parties to go down the periodical payments route; that has to be agreed between the parties. Up to now, however, it has been quite rare for that agreement to be reached, because either the pursuer or the defender does not want to do it and, if one or the other does not want to do it, it does not happen. There are proposals to change the law on which there has been a recent consultation, which I am sure you are aware of. That would improve the situation by giving the court the power to require a periodical payment order, irrespective of what the parties wanted. The court would also be able to enforce a PPO if one party wanted it. That would make a big difference.

One of the problems with the bill is that, until we have resolved the periodical payment matter through that proposal, it is perhaps not a good idea for the provisions to require an actuary or the court to certify a PPO, as the court currently does not have the power to do that and I do not know whether the proposed legislation will be passed.

Rona Mackay: What are the rest of the panel's views on that?

Andrew Stevenson: I do not have anything to add to Mr di Rollo's evidence.

Kim Leslie: We do not want to take future damages out of the equation altogether. Periodical payment orders may develop in Scotland, where there might be more of an uptake of them and the court is likely to be able to impose such an order on parties. We are content with the provisions so far.

Rona Mackay: The Law Society's view is that that is acceptable—you are all right with that.

Kim Leslie: Yes.

Rona Mackay: Okay. Thank you.

The Convener: Why do you think that damages for future loss should be included?

Kim Leslie: Sheriff Principal Taylor has balanced it out. Rather than ring fencing, it is about getting the percentage right, so that it is a modest amount that does not encourage cases languishing and taking longer. We want to incentivise cases being dealt with as expeditiously as possible, and we see the amount as being very important to that. If it is a modest amount, there is always likely to be enough in the past losses to ensure that it is taken care of.

Frankly, with any future loss, there is always going to be a range. The pursuer is going to have a value for it and the opponent is going to have a value for it, and those are not necessarily going to be the same—it is not a fixed amount; there is always going to be a range. The reality is that the margin between those two figures is unlikely to be as little as 2.5 per cent.

The Convener: Mr Stevenson, do you have a view on why that should be included?

Andrew Stevenson: My organisation, the Glasgow Bar Association, does not generally get involved, in that its members are not generally involved in high-value reparation actions such as those that you have been referring to. I do not really have anything to add to what the others have said, because they, in my submission, are far more qualified than I am to give your committee useful information on these matters.

Mairi Gougeon (Angus North and Mearns) (SNP): I would like to discuss qualified one-way costs shifting, which you mentioned earlier. The bill would apply it to personal injury cases based on what Sheriff Principal Taylor called the David versus Goliath relationship between pursuers and defenders. That David and Goliath scenario might describe the majority of cases, but what about other cases and other situations? That is my concern. Do you have any examples that highlight

those other situations that people might be caught up in?

When I raised that with the witnesses who gave evidence last week, I was told by the witness from Thompsons Solicitors:

"The scenario in which any of us, or any of our colleagues in the profession, would bring a personal injury claim against an ordinary person is virtually impossible."—[*Official Report, Justice Committee*, 19 September 2017; c 19.]

He said that that would not really happen. I will be interested to hear your take on that—and do you have any examples to add?

Simon di Rollo: There are a number of examples of individuals being sued in the non-accidental injury area, for assault, abuse or things of that kind. The person might not be insured, they are not a public authority and they might not have resources. Therefore, they might be in a David against David scenario, rather than David against Goliath. We have suggested that QOCS could be available only to somebody who is insured, a public authority, somebody who has the backing of the Motor Insurers Bureau or somebody whose means and resources are such to enable them to make payment of expenses.

The formulation that I have just given you is the same type of formulation that is found in the interim damages rule of court, whereby you cannot get interim damages against someone who is not a public authority or insured or whose means and resources are such to enable them to make a payment. The idea would be to protect individuals against financial ruin as a reason for paying a small amount to get rid of a claim.

When it comes to such cases, the phrase "almost impossible" is too strong. They are rare, but they do occur from time to time.

Kim Leslie: To extrapolate from that, I add that it is not impossible for a case to arise where someone is suing an individual and abuse is a feature. An example is a survivor suing a perpetrator. Part of the analysis is whether the person is worth suing. Clearly, we cannot take a person through a court exercise that is a paper exercise. In those circumstances, recoverability will be at the forefront for all the representatives of survivors. Examples might involve assault, harassment or stalking. Effectively, the primary question in such cases is, although there might be a great case in law, whether the person has the means to pay out pounds, shillings and pence at the conclusion of the action.

Mairi Gougeon: I return to what you suggested in your submission, Mr di Rollo. Would it be relatively straightforward for people to apply under the proposed legislation?

Simon di Rollo: I would have thought so. You do not want to undermine the whole scheme by having exceptions to the QOCS protection, but I would have thought that it would be possible to build in a formulation of the type that I have indicated by using the phraseology of the interim damages ruling.

Mairi Gougeon: If the bill goes ahead in its current form, with QOCS as a part of it, we will pretty much eliminate all the risk for the pursuer in bringing forward an action. Could that lead to a large increase in spurious claims?

Andrew Stevenson: It will lead to an increase, but I do not know whether it will be a huge one. If we take away the risk, there will be those who will be inclined to sue in circumstances where, otherwise, they would not have sued. That is why I see a real problem with the bill. The whole scheme is predicated on everyone having insurance, but that is simply not the case. For example, it is unlikely that insurance will be involved when a collision between a cyclist and a pedestrian gives rise to a personal injury claim.

Under the scheme, the pursuer will be running no risk—unless they are at it and are a fraudster or someone who is behaving completely unreasonably. However, that would be very much the exception. As Mr di Rollo suggested, it would be far more appropriate to restrict QOCS to situations where the defender is insured and has insurance covering his or her conduct of a litigation. Otherwise, it will give rise to unfairness.

I have come across cases where no insurance has been involved. It does not seem fair to remove the application of the general principle that expenses follow success. Essentially, it would mean that anyone who gets sued in a personal injury case would be out of pocket regardless of whether they were successful in defending the claim. That does not seem fair.

The Convener: On that point, you say that it should apply only to someone who is insured, but in your written submission you pose the question of what should happen if a defender chooses not to involve their insurer because the value of the claim is low relative to their policy excess or because they do not want future loadings on their premium.

Andrew Stevenson: I would suggest that QOCS should not apply at all. However, if it is to apply, my suggestion is that it should be restricted to situations where the defender either has insurance or chooses to invoke insurance. My primary submission is that it should not apply at all.

The Convener: Okay.

Mairi Gougeon: I have one more question on that point. I would like to hear the panel's thoughts on after-the-event insurance. Is that an alternative? Is it commonly available in Scotland?

Kim Leslie: It is available, but at a considerable price.

Simon di Rollo: After-the-event insurance is prohibitively expensive, so it is not available from a practical point of view. I have heard of a recent example. I cannot speak at first hand, but my understanding is that it is extremely expensive and not really worth trying to obtain.

Kim Leslie: Unless someone has a volume of cases, it is difficult to get a premium at a level that is manageable cash flow for most legal firms.

Liam Kerr: Mairi Gougeon made an important point about the removal of risk. Do the panel have views on the impact that QOCS will have on settlement negotiations and the prospect of settlement throughout the process?

Kim Leslie: Both sides of the litigation have a part to play in being the gatekeepers for the courts. We might want to talk some more about the exceptions to QOCS but, in effect, you are building in conditions that, if they are met, remove the benefit of QOCS. Those are—

The Convener: We will come to that aspect, so there is no need to go into it now.

Kim Leslie: I apologise.

Simon di Rollo: The question that you are asking is about the effect of the removal of risk on settlement. In most cases, I do not think that it will make a massive difference. Cases in which defenders recover expenses are relatively rare. The most important incentive for the pursuing lawyer is that they will get paid if the case is settled or won and will not get paid if the case is lost. There is a big incentive for the pursuer's lawyer to resolve the case—on favourable terms, clearly.

It would be wrong to overstate the effect that QOCS, by removing the risk of an adverse finding of expenses, will have on the settlement of cases. It will have some effect, but not a large one, because the big incentive for the pursuer's lawyer is not to lose the case and therefore not get paid. There are also outlays that the person will be responsible for, such as for experts and medical witnesses, which are quite often high.

11:00

Kim Leslie: The other point relates to the impact that tenders, which are not in the bill, will have on QOCS. A tender is, in effect, a sealed bid offering to settle a claim. The bill is silent about the impact on QOCS if a defender offers to settle a claim and lodges a sealed bid in court to say, "I'm betting that this case isn't going to be worth more than this", but the pursuer says that they will take their chances and does not take the offer as they want their day in court. Taylor suggested that those circumstances would remove the benefit of QOCS save for a restriction. The pursuer would still get 25 per cent of their damages, but if you failed to beat the tender or sealed bid, you would pay the opponent their damages but on a capped basis to 75 per cent of the court award. That is not in the bill.

The Convener: Would you be satisfied if that was done by regulation or should it be in the bill, given that the bill is supposed to reflect the findings of clarification? We are supposed to know exactly what we are talking about.

Kim Leslie: The Law Society suggests in its submission that the issue be addressed by an act of sederunt. If it is not in the bill, we will be relying on the Parliament to get it in for clarity, so that we can advise our clients on it.

The Convener: Would you prefer to see it in the bill or dealt with in the rules of court?

Kim Leslie: Tenders are generally being dealt with. There may be a reason why it is not in the bill—I am just raising the issue for the committee. If it can be put into the bill, that will be a matter for the bill's draftsman. However, I am surprised that it is not in the bill, and there must be a reason why it is not.

The Convener: So it is a question for the minister.

Andrew Stevenson: There should be specific reference to tenders in the bill, because they are a very important part of this form of litigation.

The Convener: Mr Di Rollo?

Simon di Rollo: I have nothing further to add.

Liam McArthur: I want to pick up on various themes. I anticipate where the bill may take us and I appreciate that there are uncertainties around it. QOCS has been in place south of the border for a while now and, according to Department for Work and Pensions data, the rate of increase of cases was fairly significant at the time when Sheriff Principal Taylor's report came out. There was a sense that a compensation culture existed south of the border that did not exist north of the border. Since then, there has been a rapid decline in the rate of increase in personal injury cases south of the border and a marked increase north of the border.

Do you believe that we could learn lessons from any safeguards that were put in place alongside QOCS in its application south of the border? Could we apply those to the bill that we are scrutinising

or indeed to any subsequent statutory instruments?

Kim Leslie: One thing to say at this stage is that, although there may be an increase in personal injury claims, the bill deals with civil litigation. QOCS will deal with cases that are in court, which have remained relatively steady over the past four or five years. It is about legitimate claims, is it not? We need to ensure that the cases where people are accessing justice are legitimate claims where the public are choosing to exercise their legitimate rights and seek a remedy.

Is this the point where you want to discuss fraud and the exceptions to QOCS?

Liam McArthur: I think that we will come on to that in a second.

The Convener: We will.

Kim Leslie: I will pause there.

Maurice Corry (West Scotland) (Con): Do the panel members consider that the tests in the bill for losing QOCS protection will implement what Sheriff Principal Taylor recommended?

Simon di Rollo: I think that the bill will not quite do that in relation to the reasonableness test—the wording does not seem to reflect what was suggested. It was suggested to the committee by another witness earlier in the month that the wording be the same as Wednesbury unreasonableness, but I am not sure that I agree with that suggestion.

The Faculty of Advocates has suggested that in terms of reasonableness, the wording should be,

"if in the opinion of the court that person's behaviour is so manifestly unreasonable that it would be just and equitable to make an award of expenses against him."

That is stronger wording than is in the bill. I think that that is required in order to make it clear that it is only where one has behaved manifestly unreasonably that one should lose the benefit of QOCS.

There is no issue in relation to abuse of process, but there is a potential issue about fraudulent representation because of the wording. As the committee will see from our submission, there is concern that it will be a little bit too easy to meet the test. Material fraud or something that goes to the root of the claim should result in a person losing the benefit of QOCS.

Abuse of process is the essence of the matter. If you have abused the process, you should lose the benefit of QOCS. Fraud and unreasonableness are just examples of abuse of process.

Andrew Stevenson: Are you asking about exceptions to the application of QOCS?

Maurice Corry: Yes.

Andrew Stevenson: It seems to me that section 8(4)(b) would really take in 8(4)(a) and (c), although I think that paragraph (b) is a bit nebulous.

The test that applies in relation to legal aid is quite interesting because frequently, where a party is in receipt of legal aid, a motion will be made for modification of his or her expenses if he or she loses. The test is that the court will not make someone in that situation liable for an amount that exceeds an amount that is reasonable, having regard to all the circumstances, including the means of all the parties and their conduct of the proceedings. That may sound a bit bland, but the courts generally know what that means and, in my experience, it works in a fair way. If QOCS is to be introduced, the exception should probably be worded in a way that is similar to the test that applies in relation to legal aid because everyone understands what that means and it works reasonably well.

Kim Leslie: This starts with the principle that introduction of QOCS should give certainty about what our exposure will be. We certainly do not want a provision that says, "You will be protected, unless—", because that could end up making legitimate pursuers anxious. Given that litigation is perceived as being a costly business, they want total reassurance that they are protected.

There is absolutely no doubt that the principle is that QOCS should apply in the majority of cases, but exceptions to it should be of a high standard. In other words, one should lose QOCS only if conduct has been such that it would be unjust and inequitable for QOCS to apply. You do not want in effect to push people back into having to get insurance because of the exceptions.

The Law Society of Scotland is also concerned about the reference in section 8(4)(a) to making "a fraudulent representation". Again, we are trying at all costs to avoid satellite litigation so, as a result, we talk in our submission about "materiality" and suggest that the bill refer to a person making a material "fraudulent representation" that is designed to materially increase the value of the claim. We want the provision to get to the root of the litigation instead of its dealing with some ancillary claim about, say, an individual being off for three weeks instead of two and the paperwork not showing that.

With regard to abuse of process, I just want to pause and point out that Lord Gill said in a case in 2004 that

"There are many diverse ways in which a litigant can abuse the process of the court; for example, by pursuing a claim or presenting a defence in bad faith and with no genuine belief in its merits ... or by fraudulent means ... or for an

improper ulterior motive, such as that of publicly denouncing the other party."

The definition of abuse of process could be broader than that which has been suggested by Sheriff Principal Taylor, who used it in relation to falsification of documents: in other words, someone has gone to court, borrowed out-of-process documents and put back different and more advantageous ones. That would, of course, be an abuse of process, but we argue that if you have section 8(4)(a) and (c), you might not need section 8(4)(b) at all.

Maurice Corry: A number of respondents have suggested that the test of fraud be replaced by the English test of "fundamental dishonesty". Do you agree?

Simon di Rollo: I would be slow to agree without having considered the issue more carefully. All I can say is that the test of fraud that is proposed at the moment is a little light, so I am keen for it to be strengthened. It should be stronger and clearer about whether there has been a fraud relative to the claim.

Andrew Stevenson: I do not think that there is any need to introduce English law terminology.

Kim Leslie: I do not agree with the suggestion. Material fraud and abuse of process should be the exceptions to QOCS.

Maurice Corry: Finally, do you have any other suggestions for improving the tests?

Simon di Rollo: I have already made a suggestion with regard to section 8(4)(b) and its reference to reasonableness.

Maurice Corry: What about sections 8(4)(a) and (c)?

Andrew Stevenson: As I have said, I think that the committee should look more at the exception that is set out in section 18 of the Legal Aid (Scotland) Act 1986. It has been operating for decades now—everyone knows how it works and it seems, to me, to work very well.

Maurice Corry: Is that a justification for continuing to use that exception?

Andrew Stevenson: I think that it is a justification for replicating the exception in the bill. As I have said, we all know what it means, and it works well. People who are in receipt of legal aid should not be able to use that as a means of pursuing a claim in bad faith, and we would always advise clients in such situations that they are not immune to an award of expenses simply because they have legal aid. People are not allowed to abuse it.

The situation in the bill is analogous to that. If you are going to introduce QOCS, you should have a safeguard similar to that with regard to parties who are in receipt of legal aid.

11:15

Kim Leslie: We say that section 8(4)(a) should read, "makes a materially fraudulent representation which is designed to materially increase the value of the claim." Our position on section 8(4) is that, if we have paragraphs (a) and (c), paragraph (b) may not be necessary, but if (b) is retained its wording should be drawn from the Wednesbury unreasonableness—the "manifestly unreasonable" principle. The current wording does not quite match the wording that has been suggested by Sheriff Principal Taylor.

Liam Kerr: Sheriff Principal Taylor recommended that claims management companies should be regulated. They will not be regulated under the bill, and probably will not be for a number of years. What are the consequences of not regulating claims management companies under the bill?

Kim Leslie: In effect, that will mean that solicitors and claims management companies are not on a level playing field. There is obviously a public protection issue. Sheriff Principal Taylor, the Law Society of Scotland and, no doubt, others would welcome regulation of claims management companies. We understand that Esther Roberton is currently conducting a review.

I appreciate that there is anxiety that the changes may make this more attractive ground for claims management companies. The committee may have evidence about that; we certainly do not. It might be worth considering that although claims management companies cannot be regulated through the bill, solicitors can be. Conduct of civil litigation is a reserved area, so claims management companies need lawyers, certainly to carry out appearances in court, and there is a way of regulating what instructions lawyers are able to take from claims management companies.

It will depend on how long the regulation review takes. There will be a lag, but how long will it be? It would clearly be optimal to have it all wrapped up but, on balance, we would not want to delay the legislation's implementation until that review concludes. However, we may well be able to manage the issue by regulating solicitors who accept instructions from CMCs.

Liam Kerr: So, do you think that the issue should be dealt with in the bill?

Kim Leslie: In fairness, we have not consulted on that. Regulation of CMCs is not in the bill and we would want more time to think about it. I appreciate from the discussion that there is a bit of

anxiety about the bill being implemented without regulation, but the matter would need to be given more good-quality thinking.

Andrew Stevenson: I agree.

Liam Kerr: The Scottish Government's position appears to be that there is a kind of quasi-regulation, in so far as claims management companies are caught by section 1 because they are providers of "relevant legal services". Is it the panel's view that claims management companies are providers of relevant legal services and are therefore caught by section 1?

Kim Leslie: I am not sure that they would be caught comprehensively, because not all CMCs are structured in the same way. One claims management company may employ paralegals and carry out work in-house, but another may in effect be nothing more than a funding vehicle that contracts a firm of solicitors to provide legal services.

Simon di Rollo: It is fair to say that, depending on how it is structured and how it goes about its business, a claims management company may not necessarily be caught by section 1.

Liam Kerr: Kim Leslie made a good point earlier. During last week's meeting, a witness expressed hope that claims management companies will "wither on the vine". I think that his argument was that, following the passage of the bill, law firms would start to take claims management companies in-house. Do you have a view on that? I presume that separate claims management companies would remain unregulated, but if a law firm takes one in-house it would be subject to all the perfectly appropriate regulation that the Law Society would expect and will, therefore, become less attractive. Is that fair?

Kim Leslie: It could be argued that such a firm would be more attractive, because the provision will allow businesses to compete—for example, solicitors firms that would not need a claims management company in order to offer a DBA. That is, arguably, a selling point to the public: firms could say, "Come to us. We're regulated and there are additional protections available to you that you will not get from a claims management company." The effect would be to widen the market by introducing damages-based agreements. Claims management companies have in part existed because there is no alternative to funding. One view is that a solicitors firm that was offering such work might not need a claims management company. What would a CMC add? What would it bring to the party that the law firm cannot do?

Liam Kerr: It would bring lack of regulation.

Kim Leslie: But the solicitor is regulated—and solicitors provide the legal services.

Liam Kerr: Yes.

Recommendation 75 in Taylor's report suggested that the Law Society should make it a ground of professional misconduct for a solicitor to accept a referral from a claims management company that makes cold calls. My understanding is that just north of 40 per cent of cold calls are about accident claims. Will the Law Society be looking to implement that recommendation?

Kim Leslie: I would take some advice on that. I cannot answer today.

Mary Fee (West Scotland) (Lab): Good morning, panel. I will move on to third-party litigation funding. The bill would make it possible for third-party funders to be found liable for legal expenses. In the evidence that we have received, the Law Society's submission referred to "unintended consequences", and Mr di Rollo's submission suggested that certain sections of the bill should be reworded. There are concerns that trade unions, insurers and solicitors might be caught. The Scottish Government has given an assurance that those organisations will be exempt and that they are not where the bill is aimed. Could you expand on your concerns and tell us how you think those concerns should be dealt with?

Simon di Rollo: It is really a drafting problem. The concern is that the bill, as it is currently framed, would catch people that it is not intended to catch. As I understand it, the idea behind the provision is more to deal with people in a commercial context, who are using the funding of litigation as an investment vehicle, and to make them liable for expenses in such situations. The concern is that, as it is framed, the bill is wide enough to catch even solicitors firms that are offering that service—not just trade unions and the like. I understood from reading Mr Goodall's evidence that there is an understanding that the provision needs to be looked at again and redrafted in order to make it clear that that will not happen.

Mary Fee: Would you like the bill to state explicitly who will be caught by that provision?

Simon di Rollo: That is difficult; I think that that might be the case. It should be clear and explicit, but how that is achieved is a matter for the draftsman.

Mary Fee: Okay. What is Ms Leslie's view?

Kim Leslie: There is an exception for family proceedings. Who could be caught? Imagine a divorce proceeding in which a father is providing funding to his daughter who is going through a divorce. It can be argued that they would be caught by the provision.

Also, solicitors that are offering DBAs would be caught if they were to pay for an outlay. That would create a bizarre situation; the solicitors might be better simply not to prepare the case, because if they were to pay for an outlay they would effectively be putting themselves forward as third-party funders. It is clearly a drafting issue and it needs to be looked at again.

Mary Fee: So, if nothing was done, might solicitors in particular be put off taking cases because they might get caught up in the third-party funding provisions?

Kim Leslie: Absolutely. Any firm that offered a damages-based agreement and said that it would pay for the pursuer's outlays would, as soon as it paid for a medical report for example, be caught, which would mean that, if it lost the case, the solicitors firm would be found liable for expenses.

Mary Fee: Mr Stevenson, would you like to add anything?

Andrew Stevenson: I share the concerns that have been expressed. It is a drafting issue. The provision needs to be tidied up and it needs to be made clear who would be drawn into the net of the provision.

Mary Fee: Thank you. The Scottish Government stated that it would amend the bill so that transparency requirements on funding arrangements are not linked to liability to pay expenses. Do you have any other concerns about revealing funding arrangements?

Simon di Rollo: I cannot think of any at the moment, although I am not suggesting that everything is okay.

Mary Fee: If you think of anything, it would be helpful of you to let the committee know.

Simon di Rollo: Yes.

Mary Fee: What about you, Ms Leslie?

Kim Leslie: I have nothing to add.

Mary Fee: And you, Mr Stevenson?

Andrew Stevenson: I have nothing to add, either.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): For clarity and transparency, I point out that I am no longer a non-practising member of the Law Society of Scotland, but I am still on the roll of Scottish solicitors.

Paragraph 32 of the Law Society's submission suggests that after-the-event insurers be excluded from the provisions on third-party funding. I ask Kim Leslie to specify why the society thinks that that is important.

Kim Leslie: It is, in effect, because of the cost. If you allow solicitors to offer DBAs, they have to be meaningful. The cost involved will still be prohibitively expensive if the after-the-event insurers are caught by the third-party funding arrangements.

John Finnie: The bill will empower the Court of Session to introduce rules on group proceedings. I ask the witnesses to outline their position on those provisions.

Kim Leslie: The Law Society was originally a bit more ambitious but has, on reflection, agreed that because group proceedings are novel—we have not had them before—the simplest route is perhaps not the wrong choice.

In our response to the bill, we distinguish between liability and causation. The bill does not allow jury trials for group proceedings. However, once all common issues of liability and causation have been dealt with, there may be pursuers whose claims may be better dealt with or could be dealt with by juries, so we did not understand why that restriction encapsulated liability, causation and quantification of damages. We wanted to bring that to the committee's attention. Of course, if a pursuer makes an application for their case to be heard by jury, the defender can always make the argument that the case is too complex and not suitable. Therefore, there is a hurdle to get over at that point, anyway.

Simon di Rollo: I welcome the proposals. There is a long-standing need for provision for group proceedings. It is not the easiest matter to resolve by way of legislation, however. The provisions are enabling and will allow the court system to work through a method of dealing with such matters through court rules. However, they are a significant improvement on what we have at the moment, which is nothing. There are lots of examples of cases going through the courts in which groups are involved, but there has been no specific provision in the rules for that. Lord Gill's report highlighted that and the provision is long overdue.

11:30

John Finnie: Sheriff Principal Taylor mentioned the contingent legal aid fund. It is mentioned in the Law Society evidence but not in the bill. Could the society comment on that, please?

Kim Leslie: That is something that we picked up on that was in the recommendations but did not find its way into the bill. The contingent legal aid fund is for when one does not know whether one has a case. For example, in a clinical negligence case, something might have gone wrong medically but we do not know whether the case has merit and so would have to get a report from a suitable

expert to say whether there had been clinical negligence. One would go to that fund as a precursor, before offering a DBA, to enable payment of the outlay to determine whether there was a case, on the understanding that, if there is a case and it is successful, the outlay will be paid back to the Scottish Legal Aid Board.

John Finnie: Does the fund's absence from the bill suggest that anything has changed with that?

Kim Leslie: We just suggested that it is a good idea and that there might well be benefit from its being in the bill.

Ben Macpherson: I have a small point, convener. It goes back to the group proceedings in section 17. I read with interest that the Law Society submission states that England and Wales distinguish between class actions and group actions and it is not clear whether that has been deliberately omitted from the current draft. Kim Leslie said that it would be helpful if that were to be considered. Could you elaborate on that?

Kim Leslie: Because group proceedings are novel, some of the terminology is interchangeable. As I understand it, class actions are opt-out actions, whereas group litigation orders or group procedure are opt-in actions. I do not want to elaborate further, but we have picked up on the fact that some language might be being used that might not mean the right thing.

Ben Macpherson: It is almost about making sure that the public's expectations are not inflated.

Kim Leslie: Absolutely.

The Convener: Will the provisions in the bill have the net effect of overrewarding solicitors?

Kim Leslie: There is still an issue with recoverability of judicial expenses. We are looking for imaginative ways to be paid properly for the work that we do.

Simon di Rollo: The essential point is that there will be a cap set by statutory instrument or some other mechanism. The ability to obtain a fee will therefore be subject to control. If there is a need for modification in due course, that can be done.

Andrew Stevenson: That is right. As I indicated at the outset, secondary legislation is still to come in. That will no doubt keep things reasonable.

The Convener: Are we depending on the secondary legislation to keep things reasonable?

Andrew Stevenson: It is clearly envisaged that there will be further control. It is a package and we cannot look at one in isolation from the other. We will need to see what the secondary legislation says, but I anticipate that it will ensure that there is control over how the primary legislation operates, and will provide a reasonable package.

The Convener: I thank the witnesses for attending this comprehensive evidence session.

11:34

Meeting suspended.

11:42

On resuming—

The Convener: I welcome our second panel of witnesses on the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. Calum McPhail is from the Association of British Insurers, Luke Petherbridge is a senior public affairs manager at the Association of British Travel Agents, Andrew Lothian is from the Forum of Insurance Lawyers and a partner at DWF LLP, and David Holmes is the head of legal services, Scotland and corporate, at the Medical and Dental Defence Union of Scotland. I thank you all for providing written submissions. The committee finds that hugely helpful.

I will ask the first question. Does the panel support the introduction of damages-based agreements? Who would like to start?

Andrew Lothian (Forum of Insurance Lawyers): I am happy to start. In the main, such agreements are contracts between pursuers and pursuers' solicitors. The members of my organisation—FOIL—are comfortable, in principle, with damages-based agreements being available for solicitors. They are available at the moment but they are unenforceable—there is a distinction. It makes sense for them to be regulated.

I suspect that you will come on to address the issues that we have with DBAs in relation to future losses, so I will pause there.

The Convener: It is a qualified yes from your organisation.

Andrew Lothian: Yes, it is.

Calum McPhail (Association of British Insurers): I echo Mr Lothian's comments. In principle, we have no objection to damages-based agreements—it is very much for a pursuer and their agent to come to such an agreement—but we have concerns about future losses.

The Convener: Is that the view of the other panel members?

David Holmes (Medical and Dental Defence Union of Scotland): Yes, that is our view, too.

The Convener: The Association of British Insurers has highlighted research that suggests that consumers do not understand DBAs and do

not shop around between providers. Could you explain the results of that research in more detail, Mr McPhail?

Calum McPhail: I am not sure that I have that information immediately to hand. I will need to check with one of my colleagues.

The Convener: If you do not have it to hand, you could get back to the committee in writing.

Calum McPhail: We are certainly willing to get back to you on that.

11:45

The Convener: The bill's provisions would allow a solicitor to keep judicial expenses that were awarded in a case as well as charge a success fee. Do panel members think that that is justified?

David Holmes: The comments that my organisation has made have sought to draw out the fact that there are three levels of recovery for a claimant's solicitor: there are the judicial expenses that are recovered at the moment; there will be the DBA with the client; and, as of now, a claimant can apply for an additional fee from the court to reflect a range of factors such as the case's importance, its value, its complexity and the amount of work that has had to be done. That money will be reimbursed to the solicitor who is representing the claimant if they are the successful party in the case.

As an organisation, we do not have an issue with the DBA success fee or the recovery of judicial expenses, but we think that there might be room to look at reforming some of the means of recovery of the additional fee in the circumstances that I have described.

Andrew Lothian: I echo that. The position of the additional fee is quite important. I think that the committee received some evidence on the matter last week. In higher-value cases, the solicitor's judicial expenses—the first level of recovery that Mr Holmes mentioned—will normally be a five-figure sum. The additional fee is calculated as a percentage of that, and it can sometimes be 100 or 150 per cent of the first amount. On top of that, under the bill, there might be a DBA, too. In effect, the solicitor will be paid three times for working on the case. I mention that because it plays into some points that we might develop later on in the discussion.

The Convener: It was helpful of you to set that out.

Calum McPhail: I have just had a bit of clarification. I think that the point that was made in the report that you referred to was about conditional fee arrangements. We would be happy to write to you with the details of that.

The Convener: That would be very helpful.

Rona Mackay: Would the panel like the bill to provide greater protection for compensation for future loss? As you know, we covered that issue with the first panel.

Andrew Lothian: I think that the answer is yes. Our position is that future losses—in the main, we are talking about the most seriously injured victims—are calculated carefully according to an actuarial table. Care reports are submitted and the losses are calibrated in such a way that care can be provided for in the future. As far as we can see, there is no reason why some of those losses should be paid over to lawyers; we think that they should stay with the victim.

In his report, Sheriff Principal Taylor recognised that issue. I understand that his difficulty was more to do with the practicalities. If a case is settled out of court, as happens with most cases, how do we know which part of the £5 million settlement is for the future and which part is for the past? There are a number of ways in which that practical issue could be dealt with. For example, a threshold could be set whereby, above a certain level, the deduction under the DBA would be nothing rather than 2.5 per cent. The solicitor would still be paid, because they would still receive the judicial expenses and, in cases of that value, they would always get an additional fee. That is the position at the moment.

Rona Mackay: You feel that, as the proposal stands, it is more heavily weighted towards the solicitor benefiting.

Andrew Lothian: Yes. Our members think that that is unnecessary. It is the pursuer's money that we are talking about, and it should stay with the pursuer. There are ways in which the issue could be addressed—for example, a threshold could be set beyond which no deduction could be made. Above that level, the pursuer's solicitor would still have an incentive to pursue the case, because they would have a professional obligation to do so and would be paid the judicial expenses and an additional fee anyway.

Rona Mackay: Are there any other views?

Calum McPhail: As insurers, we are of the view that people who have been injured through no fault of their own should be compensated for pain and suffering and that that should include past and future losses. We would like as close to 100 per cent as possible of the pursuer's damages to be received by the pursuer.

David Holmes: It is relevant to bear in mind the context of the discount rate change in February this year, which I am sure the committee is aware of. That change, which was brought in by the Lord Chancellor and by ministers in Scotland, was said

to ensure that full damages are available to the severely injured party for all their future care.

Luke Petherbridge (Association of British Travel Agents): I echo Calum McPhail's comments. We support the principle that the claimant should retain as much as possible of any award.

The Convener: We have a number of supplementary questions.

Liam McArthur: You will have heard the previous panel's responses to this line of questioning by the deputy convener. The Law Society said that there would be an actuarial table but that a range of projected future costs would also be put forward by the defence and by the pursuer. The gap between those costs often exceeds by some margin the proposed 2.5 per cent cap. Although we all want to ensure that any of a claimant's future costs are fully and properly met, is there not a risk inherent in the line of argument that you are prosecuting, given that we are generally dealing with a range of estimates of future costs?

Andrew Lothian: There is a range of estimates, but what is ultimately determined is the right amount of compensation for the pursuer. It would not be surprising if the pursuer's solicitors argued for a higher figure and the defender's solicitors for a lower figure—that is their job. However, at the end of the day, the figure that is arrived at is intended to be the correct figure to provide for the pursuer's future care.

Liam McArthur: Do you see a risk that, due to the additional work and complexity involved in these cases, some of them might not be taken forward or might not be taken forward as successfully were there not some form of reward? That suggestion was put to us during last week's evidence session. Although we want future costs to be met, we also want to ensure that no case that has validity and all the rest of it is not embarked upon in the first instance because of that complexity and the additional workload that would be involved in pursuing it.

Andrew Lothian: No, I do not see such a risk. The position that you describe is the position that exists now. Solicitors are more than adequately compensated for those cases. With the additional fee, the fees can be significant in higher-value cases, and rightly so. The more work that the solicitor does, the higher the judicial expenses will be, and the higher the judicial expenses are, the higher the additional fee will be, because it is calculated as a percentage of those expenses.

Ben Macpherson: This is another question for Andrew Lothian and FOIL. In your written evidence, you make two strong statements about the issue. At paragraph 19, you state:

"To safeguard pursuers we strongly support an overall cap on the success fee."

You add, at paragraph 21, that you believe that a

"complex mechanism is unnecessary, and can be avoided entirely by ring-fencing future losses and making them exempt from the DBA/SFA."

For clarity, will you put that in the context of your statements about the threshold and your answer to Liam McArthur?

Andrew Lothian: Yes. In a case in which an award is made by a judge or a jury, it is possible to identify what the future losses will be and to ring fence them, because they are known—they are identified. However, that will be harder in a case that is settled out of court, because in current circumstances it will be settled for a lump sum—an amount—and the distinction between future and past losses will not be described within that amount. That is why we are suggesting, as an alternative, that a threshold should operate as a means of protecting the likely future losses. There are other potential mechanisms—a threshold is only one—but we are trying to avoid the sort of complex mechanism that the bill envisages to deal with the conflict of interest that the bill creates. That point was made in the earlier evidence session. That complexity can be avoided by introducing some sort of cap or threshold in cases that are settled out of court and ring fencing future damages in cases in which the court makes the award.

Ben Macpherson: Thank you for clarifying that point about the threshold and cap. That is helpful.

Liam Kerr: This point is of concern to me and I raised it with a previous panel. In the panel's view, is there a risk that there will be an inflation of the awards given by the court in order to ensure that future losses are covered? One of you—Mr Holmes, I think—made the point that a pursuer should get the full amount. Will the court decide, in order to ensure that the pursuer gets the full amount, to add the legal fees on, whether explicitly or not, leading to an inflation of the awards? I ask you, with your insurer's hats on, what impact that would have on your business models and the premium for the consumer at the other end.

Calum McPhail: Potentially, that raises a driver or an expectation that the pursuer will be aware that an element of their damages is not going to be paid to them and that, therefore, they might seek a higher amount than they would ordinarily. That may have the result of driving cases into litigation that would otherwise have been settled out of court.

I understand the point that you are making about how the courts might view the matter. I am not qualified to comment on how any individual court would view the matter, but I certainly

understand your concern that that awareness might colour how they approach awards. If we see that in court awards, we will also see an increased expectation in pre-litigation awards. We will see claims inflation, which will increase the cost of claims and will ultimately have an impact on our customers' claims experience. That will obviously colour how their renewals are viewed. For some of our customers, we handle claims with their money, so there will be a direct impact on their bottom line.

David Holmes: I will answer just the second leg of Liam Kerr's question, about the impact on premiums. The MDDUS, which I am representing today, is a rather different organisation because it is not an insurer. It is a not-for-profit organisation that has no shareholders but has 14,000 members from the medical and dental professions in Scotland. If there is claims inflation, either in the level of award or the number of cases coming forward, that will directly correlate with what general practitioners and dentists have to pay for their annual indemnity subscription. The MDDUS is slightly different, because there is no shareholder body as there is with an insurer. It has a more direct correlation with the membership, so claims inflation would be a significant concern for us.

Luke Petherbridge: In the travel industry, the vast majority of claims do not fall back on an insurer but are within the deductible costs of the tour operator. I echo the comments that have just been made. We have some concerns about claims inflation and the knock-on impacts of that for the premiums that our membership will pay.

Mairi Gougeon: I would like to discuss qualified one-way costs shifting. In its submission, FOIL said that

"if QOCS is implemented without appropriate safeguards, there will be significant adverse consequences including increase in nuisance calls, increase in fraudulent claims and higher insurance premiums".

The submission then goes into further detail about that. Will you elaborate? What additional safeguards should there be if the bill passes?

12:00

Andrew Lothian: We think that it is important to have safeguards to balance QOCS. Some of the safeguards were in Sheriff Principal Taylor's review and are not in the bill, but the world has moved on since he finished his report. In the Taylor review, as has been discussed previously, there was provision that claims management companies should be regulated. I imagine that we might come back to that. That is one thing.

The second part of the Taylor review that is not in the bill was discussed earlier, where a pursuer does not beat a tender—a sealed offer. For example, if the offer is £10,000, the pursuer could reject it and go to court but only get £8,000; they would still have full QOCS protection, despite the defender offering more than the case is worth. That is not in the bill. We might come back to that, too.

Sheriff Principal Taylor also recommended that it should be a criminal offence to pay a referral fee to someone who is not a regulated person, or for an unregulated person to receive a referral fee. In other words, if you are paying or receiving a referral fee, you should be a regulated person; otherwise, it is a criminal offence. That is not in the bill either, as I read it. Those are important safeguards that were in the Taylor review but are not in the bill.

Over and above that, because the world has moved on, there are other safeguards that we think would assist. We might talk in a minute about the fact that there are now more injury claims in Scotland than there have ever been. There are procedural steps that can help, for example the courts in England and Wales have put in place steps that might assist. I can write to the committee about that, if that would help, so that I do not get too far into the detail now. There is no anticipation of such steps happening here—at least, they are not in the bill and we have no indication that they will be coming through the court system either.

I will pause there, because the next thing that I would like to say is about the exceptions to QOCS, which might take me into someone else's area.

Mairi Gougeon: Thank you. Tenders and claims management companies will be covered by other members. Does anyone have any further comments?

Calum McPhail: We have a real concern that we will see a further influx of claims management companies into Scotland. It has already been identified that that is happening. We are very conscious of what is happening in England and Wales, and the work that has been done to try to deal with that. We are also very conscious that there is regulation of claims management companies in England and Wales for the protection of the man in the street—the consumer—and that we do not have that in place in Scotland at the moment. Whether to transfer that to the Financial Conduct Authority is currently under review in England and Wales.

Changes that have happened in England and Wales around the compensation culture, as it might be described, have created more pressure on less scrupulous bodies. Our concern is that with the advent of QOCS and the removal of the

risk, the development of a compensation culture will accelerate in Scotland.

If I can use a bit of conjecture, the UK Government has said that, by mid-2019, it intends to stop entitlement to claim payment protection insurance compensation—these are very sophisticated companies that pursue those claims on behalf of people and they will be looking for something else to generate their revenue. Some of the activity that is being considered around whiplash will change the small claims track in England and Wales and will move business models. As we see it at the moment, there is a real risk that we will see an influx—with all the challenges, such as increased nuisance calls—into Scotland.

Luke Petherbridge: It is probably worth adding that, since the introduction of QOCS, the travel industry in England and Wales has seen claims increase by more than 500 per cent on average across our membership. We certainly think that there is a risk that the introduction of this regime will increase the activity of claims management companies in Scotland.

Mairi Gougeon: I presume that you heard the earlier evidence session. There was a suggestion from the Faculty of Advocates about the David and Goliath situation that we talked about earlier. Would you agree with the suggestion that QOCS should be limited to people who have insurance and larger organisations?

Andrew Lothian: Yes, I would.

Liam McArthur: I am conscious that we have touched on a couple of issues there. The evidence that we heard from the earlier panel showed the shifting picture of claims from the time that Sheriff Principal Taylor was taking his evidence and producing his report to now. There was a rapid increase year on year in claims brought forward south of the border while there was a less pronounced increase in Scotland. That situation has in effect been reversed in the more recent past.

Mr Petherbridge made a point about the rapid 500 per cent increase in claims that his industry is seeing. I am not sure where that increase is coming from but it must be matched by a significant decrease in other areas if those figures are to be believed.

The point that the Law Society was making was that QOCS will apply to cases brought to court when a civil action is brought forward and a lot of the DWP data reflects claims that go nowhere near court. Therefore, getting an accurate picture of the impact that QOCS would have here—although we are to have a discussion about safeguards—is pivotal. However, the figures might not be as straightforward to interpret as they first appeared.

Andrew Lothian: That is absolutely right in the sense that the majority of claims do not ever reach court; they are never litigated. Something like 85 per cent of injury claims never result in a court case being raised because they are settled before they reach that point.

The rules that apply to litigated cases go right through to the very start of a claim, even if it is never litigated. That is because the question in the minds of the insurer and the pursuer's solicitor—who is advancing that claim through the protocol—at all times is "What will happen if this is litigated?" The change will have a huge impact on every single claim, whether it is litigated or not. It does not matter. The decisions about whether to pay a little bit more because the pursuer has QOCS will be made pre-litigation just as much as they will be made post-litigation.

To pick up on a couple of other points, the rate of claim in England is actually going down. There is negative growth, if you like. The rate is declining by about 4 per cent a year. While claims are going down in England, we are seeing a substantial increase in Scotland.

Liam McArthur: That is from a much lower base, we were told last week.

Andrew Lothian: That is right. There are dangers with comparing ourselves to England; I do not know why we keep doing it. The reality is that this is a form of arbitrage by claims management companies. Injured people are not choosing which place to litigate in; business models determine where they will bring their activities and generate claims.

Mr McArthur made a point about travel claims increasing; I will let Mr Petherbridge speak about that. That is right, because there was a decline somewhere else. In England, that decline has been in road traffic claims. That happened because QOCS came in but claimant costs were capped, so the margin reduced in that area of work. The risk reduced, but the margin reduced, too, and the business model moved on to travel claims. For us in Scotland, the risk is that, because we are bringing in QOCS but we are not banning referral fees or immediately regulating claims management companies and there is no discussion about reducing costs, we will find ourselves in the same position.

Liam McArthur: I take your point about the regulation of claims management companies, but in its evidence a couple of weeks ago, the bill team gave us a pretty heavy hint that such regulation is coming down the track. Are you seriously saying that, with regard to where you would seek to operate and how you would build

your business model in the future, you would ignore the fact that the regulation of claims management companies is coming down the track?

Andrew Lothian: We are looking at a delay of several years.

Liam McArthur: As we are with the implementation of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill. In a sense, the two things are progressing in parallel. When the provisions on claims management companies are introduced, their implementation will march ahead at the same pace as the bill's implementation.

Andrew Lothian: If that is the case, we would entirely support the regulation of claims management companies and the bill becoming effective on the same date. That would be a major step forward, but there is a risk that that will not happen and that the bill will be implemented before CMC regulation. From the CMCs' point of view, we are talking about the flick of a switch. They are technology enabled and, in many cases, they are highly efficient—they are largely call centres. It would be very easy for them to add in some postcodes to the areas that they phone.

Luke Petherbridge: I will provide some additional clarity on travel. The big problem that the travel industry has in England and Wales, which it will also have in Scotland, is the exclusion of travel from the pre-action protocol. That made us particularly vulnerable to the activities of, and attractive to, claims management companies. We will pick that up separately with the Scottish Government and the Scottish Civil Justice Council.

To go back to the principle of sharing the risks of litigation in the bill, we do not think that the bill has struck the right balance. We will come on to talk about QOCS in more detail, so I will not say much about the issue now, but in paragraph 59, the financial memorandum accepts the premise that the bill incentivises the settlement of claims that do not have merit. That does not seem to us to be good policy. As an industry that has struggled with that, we would not like that to be introduced.

Liam McArthur: But the point has been made that that is happening already. The financial memorandum does not go on to quantify the extent to which the situation might shift.

John Finnie: Mr Lothian, a casual listener might think that it is incredibly public spirited of you to make some of the representations that you have made. You have talked about the business model of claims companies, but that is not in any way dissimilar to the business model of insurance companies, which make massive profits.

Andrew Lothian: The distinction is that, in Scotland, insurance companies are regulated and claims management companies are not.

John Finnie: But insurance companies operate the same sort of business model as the claims companies.

Andrew Lothian: I am not sure that I understand in what sense it is the same. We could open a claims management company above a garage this afternoon and we would be in business. Nobody would regulate us or check our contracts, and there would be no one to complain to. Insurance companies, on the other hand, are, as I understand it—I am not an insurer—heavily regulated.

Calum McPhail: I would like to pick up on Mr Finnie's point about insurance companies making massive profits. I think that I am correct in saying that, in the UK motor insurance market in the past 25 years, two companies have made underwriting profits on their motor books in individual years. Only two companies have done that in 25 years.

John Finnie: I am sorry—I do not understand your point.

Calum McPhail: You talked about insurers making massive profits.

John Finnie: I am quite sure that their business model is not predicated on one form of insurance.

Maurice Corry: Mr Petherbridge, in relation to the QOCS situation, you said that the bill does not strike the right balance. Can you explain why you feel that way?

Luke Petherbridge: Our experience in England and Wales has been that a very low proportion of claims see the reversal of QOCS—I think that the financial memorandum picks up the fact that that happens in 0.1 per cent of cases in England and Wales. We certainly do not feel that the balance has been struck correctly in England and Wales, or that the bill strikes the right balance.

We agree that the wording of section 8(4)(a) needs to be changed, but fundamentally we want a better balance in Scotland than there is in England and Wales. That is the point that I was trying to make.

12:15

Maurice Corry: Does the rest of the panel agree?

David Holmes: Yes.

Maurice Corry: Do you wish to make any comments about that?

David Holmes: Will there be questions about tenders and exceptions more generally?

Maurice Corry: Yes.

A number of respondents to our call for evidence suggested that the fraud test be replaced with the English test of "fundamental dishonesty", but Sheriff Principal Taylor thought that that would not be well understood in Scotland. What are your views on that?

Andrew Lothian: It is not a major issue. One of the potential benefits is that there is already case law on the definition of "fundamental dishonesty" in England and Wales, and there might be less risk of satellite litigation if we adopt a test that has already been considered by the courts in the context of personal injury claims.

Calum McPhail: A witness on the previous panel suggested that a material increase in the value of a claim could be used to try to identify fraudulent behaviour, and I would certainly encourage that approach. I can think of one recent case in court in which the pursuer claimed for around £180,000 in damages; although the judge had concerns about the pursuer's credibility in various areas of his evidence, he still made an award of £7,000. If such increases were regarded as material, I would certainly support the suggested approach, because the legal costs of dealing with that claim were astronomical. This is really about reaching a clear and acceptable definition.

David Holmes: Practical issues arise at a public policy level when we look for a deterrent against, for instance, the embellishment of claims, which could have a significant effect on outcomes. We have certainly seen that at MDDUS; we have had concerns and, ultimately, much lower settlements have been achieved when further evidence has been forthcoming.

Maurice Corry: Finally, do you have any suggestions for improving the tests in the bill?

Andrew Lothian: The fraud test that we have just discussed relates to fraud in connection with proceedings. Given that the majority of claims never reach court, that test should perhaps relate to claims rather than proceedings; otherwise, there will be no incentive for people to tell the truth in the majority of cases that are never litigated. It is a small but, I hope, sensible point.

Liam Kerr: Going back to claims management companies, what are the practical consequences of not formally regulating such companies in the bill?

Calum McPhail: I think that, as has been mentioned, there will be an influx of claims management companies into Scotland and we will see the onset of the types of activities associated with their models, such as increased nuisance calls. There will also be an increase in claims of little or no merit. Our policy holders expect us to investigate claims, to pay out on the correct claims and to pay the correct amount for those claims. We entirely agree with that, but where they think that there is a claim without merit they have a very strong view that they do not want their insurer to make an economic decision to get rid of it.

As we see more claims of little or no merit, we expect our claims departments to be inundated with claims requiring more investigation. That operational strain will get in the way of our handlers dealing expeditiously with the more meritorious claims, and our concern is that pursuers with valid claims will experience delays in getting their settlements.

Luke Petherbridge: I echo that last point. It is something that we have seen in the travel industry, where the sheer increase in the volume of claims has caused problems in dealing with genuine claimants. No one is suggesting for a moment that there are not genuine cases of holiday sickness—there are—but it is important that we deal with those cases as quickly as we can.

I want to build on previous evidence and suggest a couple of areas where the bill could take a practical step. The first relates to the transparency obligations. Claims management companies thrive on the lack of transparency in the links between them and solicitor firms. With the regulation in England and Wales, we have called for an obligation to name the source of claims to make it easier to track things such as referral bans. If such an obligation were to be introduced in Scotland, we would certainly support it.

The bill could also deal with the notification of alternative sources of dispute resolution. The Carol Brady review in England and Wales recommended that the regulation of claims management companies could include an obligation on those companies to notify the consumer of any alternative dispute resolution scheme that might be available to them at low or no cost. We see no reason why that could not apply to solicitors offering DBAs.

Andrew Lothian: I want to add a couple of points. First of all, until claims management regulation is introduced in Scotland, the Scottish consumer will be at a disadvantage compared with consumers in England and Wales. Disreputable claims management companies—and I make it clear they are not by any means all disreputable—have an incentive to operate in Scotland rather than England and Wales, with the result that the deductions from damages can be quite significant.

There has been some useful discussion on that point this morning. It was envisaged that section 1

would apply to claims management companies as well as solicitors, but the difficulty with that is that solicitors are regulated and claims management companies are not. If there were a cap on DBAs and it was breached, the solicitor would, quite properly, be subject to professional discipline, whereas there would be nothing to catch the rival claims management company. Sometimes, two deductions can be made, one by the solicitor and the other by the claims management company, and there is nothing to prevent that from happening until such companies are regulated.

Liam Kerr: Let us say that a claims management company took a significant deduction from damages. What recourse would I have, as the man in the street that Mr McPhail referred to earlier? How could I challenge that, either currently or in the immediate future? Do I have any recourse?

Andrew Lothian: I am not aware of any. In future, you would have to understand the bill and the statutory instruments lying behind it to know what would and would not be enforceable. There is no one to complain to about that.

Liam Kerr: Presumably, I would have to consult a solicitor.

Andrew Lothian: Yes, you would have to find a solicitor.

Liam Kerr: On another point that was raised earlier, is it your view that the claims management companies will wither on the vine when the bill is passed?

Andrew Lothian: Our strong view is that until such companies are regulated, the opposite will be the case. There is little doubt about that. They might well wither on the vine once they are regulated, but who knows? The bill will put solicitors on a level playing field with claims management companies only after such companies are regulated. Until that time, there is no level playing field and therefore no reason why such companies should wither on the vine.

Calum McPhail: Making a profit is the incentive for claims management companies, and there is more money to be made in the claims process in Scotland than there is in England and Wales. Let me take as an example a road traffic claim settlement in which damages of £10,000 are awarded in both jurisdictions; in England, the recoverable costs for a solicitor, excluding any disbursements, would be £500, whereas in Scotland the figure would be over £2,000.

Sheriff Principal Taylor had no objection to referral fees, but their being part of our process and system and the potential acceptance that they are part of what we will allow is a fundamental driver for claims management businesses to seek to operate here and to continue to do so. There is money to be made out of the claims process.

Liam Kerr: Finally, we have talked about premiums and the cost to small businesses increasing. I note in the evidence the reference to the holiday industry and the point that, because many travel agents are small to medium-sized enterprises and because any claims might be below their insurance excess, they do not have insurance backing. If premiums go up, the people who will feel the most impact will be the less well-off purchasing insurance products to cover themselves or their business, as well as those in rural areas seeking motor insurance. Does the panel think that an unintended consequence of the legislation might be a long-term reduction in access to justice because, although it will make the court system more accessible, it will also make damages less recoverable? Does that make sense?

Andrew Lothian: The question does make sense. What you suggest is a possibility. As a solicitor, rather than an insurer, I cannot speak about the effect on insurance premiums, but I have had clients who had to defend claims that fell within their excess and they did not have the backing of insurance. That sometimes happens. There are also the other risks that you have suggested.

Calum McPhail: It is probably a risk for many local authorities with regard to the level of deductible they hold. It is a risk to public funds.

Luke Petherbridge: Just to clarify, the majority of claims on larger tour operators fall within their deductibles and are therefore not insurer backed. We have begun to see some SME members who had previously relied on insurance no longer getting their excess at a level where they can pass things off to the insurers. It is a huge concern for the travel industry, particularly because, next year, the package travel directive is being extended, and that will extend obligations with regard to travel sickness claims to many more small and medium-sized travel companies that currently do not have them.

David Holmes: There could also, as you have mentioned, be a wider societal impact. I know that the convener has written to the national health service central legal office looking for more information on what effect it expects the loss of the deterrent to have on claims frequency with regard to the NHS in Scotland in general. It will also have an effect on my organisation; if the deterrent is lost and more claims are made, subscriptions are likely to rise for general practitioners and dentists. There will be wide impacts across the NHS generally, and perhaps a point for discussion is whether QOCS should apply to all sectors or just in relation to insurers or public bodies.

Liam Kerr: That is interesting. Thank you.

Ben Macpherson: On claims management companies, paragraph 39 of the FOIL submission suggests that regulation could be provided most expediently through the UK Financial Guidance and Claims Bill. Can you expand on that?

12:30

Andrew Lothian: I understand that the bill is going through Westminster just now. There was a debate in the House of Lords about whether an amendment including Scotland in the regulation of claims management companies should be allowed, but I think that, ultimately, the amendment was dropped. However, that vehicle is still available. The bill has not yet been passed, and it would be possible for the Scottish Government, if it were so minded, to make representations to the UK Government that Scotland should be included, at least for the time being.

Among the Westminster bill's other purposes is the transfer of the regulation of claims management companies in England and Wales to the FCA, which is a UK-wide body. That, too, would be possible in Scotland. As other parts of the bill relating to financial assistance, debt management and so on apply to Scotland, I think that that would be one option. If it is going to take some time to set up a claims management regulator for Scotland, that could be an option for filling the gap.

Ben Macpherson: That is very interesting. Thank you.

Liam McArthur: On Ben Macpherson's line of questioning, when I raised the same matter with the bill team, they revealed that they anticipated moves to be made in relation to regulation sooner rather than later. I hope that the minister will read this evidence and come up with a response to that specific suggestion, as it does not seem unreasonable.

Going back to the responses to Liam Kerr's line of questioning, I am slightly concerned at the suggestion that claims management companies might wither on the vine. In other parts of the UK where regulation has been introduced, we have seen no such withering; indeed, as has been accepted, there are highly reputable claims management companies operating. Despite the margins that Mr McPhail referred to north and south of the border, we in Scotland are still dealing with a market that is very much smaller than the market in the rest of the UK, and I have to wonder about the extent to which Scotland will somehow be seen as a great nirvana in which the unregulated can romp to their hearts' content, making massive profits, while the bulk of the work will remain, albeit regulated, in other parts of the UK. We are slightly in danger of inflating the risk—to make an entirely valid point, I will admit—as the impacts of what we are talking about are probably going to be more marginal over the next few years.

Andrew Lothian: We have already seen an increase in the number of claims, but as that has been discussed in previous evidence sessions, I do not need to go into it today.

Scotland is, of course, a smaller market; nevertheless, we have seen more evidence of claims management company activity in Scotland. For example, according to Companies House, 16 new claims management companies have opened in Scotland over the past 18 months. As Mr McPhail has said, the margins are better here; as a result, even though the volume of claims is lower, the profit per claim is better. How that plays out might be an unintended consequence of the bill. However, it is not my intention to overstate things.

Fulton MacGregor (Coatbridge and Chryston) (SNP): The Scottish Government has given assurances that the third-party funding provisions will not apply to trade unions or solicitors, and it has stated that it will amend the bill to remove the link between transparency requirements and the liability to pay expenses. Does the panel have any concerns about those changes?

Andrew Lothian: In our view, third-party funding is an important part of the bill. The origin lay in Sheriff Principal Taylor's view that a venture capitalist or someone buying part of a commercial claim who benefited and derived a profit from it should also be liable for any adverse consequences. However, the bill's drafting goes wider than that. An analogy can be made between a claims management company taking a percentage of an injured person's claim and a venture capitalist taking a percentage of a commercial claim, and it is therefore important that, as I think the financial memorandum mentions, the claims management company is caught by the current provisions. As I understand it, trade unions do not take a percentage of their members' damages, so they ought not to be caught. If, inadvertently, they were, I would recognise that and would not think it appropriate.

Calum McPhail: I agree with Mr Lothian. What is of interest is how the disclosure is actually achieved, whether it is adhered to and whether there should be any implications for failure to disclose. However, I have no objections with regard to the overall principles.

John Finnie: My question, which I asked in the previous session, is primarily for Mr Holmes, but I

am happy to hear from other panel members. It relates to the issue of group proceedings, which Mr Holmes specifically talked about at some length. Mr Holmes, in acknowledging that it would be for an act of sederunt to introduce specific provisions, you said that you had some concerns in that respect. Would you care to outline them?

David Holmes: The MDDUS has been engaged in the group litigation with regard to vaginal mesh material that is working its way through the Court of Session. We have some concerns about the current arrangements in that respect, but we readily acknowledge that efforts have been made, particularly by the Lord President, to improve them. There have been issues around adequate judicial resources, and we also felt it particularly important to have continuity in the judge hearing the case. That is why we focused on those issues at the tail of our submission.

John Finnie: What is the solution to that? Presumably, continuity is desirable in every case. Why does it become an issue? Is it because of the duration of a case?

David Holmes: I cannot be precise on the figures, but the cases in the group have been going on for a matter of years now and are still not at the stage of reaching a conclusion. Indeed, it will be some considerable time before they are resolved. The issues that are raised in those cases are very complex and involve a number of parties.

John Finnie: I just want to clarify that what you are saying applies to more than the one case that you have outlined and that it is actually a general principle.

David Holmes: For now, our experience lies comes from that group of cases. There is quite a number in it.

John Finnie: Thank you. Do other panel members want to comment on group proceedings?

Calum McPhail: If they bring better efficiency and a quicker resolution of such cases, we will support them.

John Finnie: Thank you very much.

The Convener: I have one last question. Insurance responders have suggested that insurance premiums in Scotland might increase as a result of the bill's provisions. If, now and in the past, the environment in Scotland has been less conducive to spurious claims than that in England, have Scottish customers benefited from reduced premiums in comparison with English customers on that basis?

Calum McPhail: I am sorry, but I am not in a position to comment on that.

The Convener: Perhaps you could follow that up with some written evidence. I would also like to see whether the reverse is true. Is the market for mainstream insurance products currently structured on a UK basis? If so, is it worth it to insurance companies to identify Scottish customers, who make up a small proportion of that market, in order to charge them more?

Calum McPhail: As member companies will look at that on an individual basis, it is difficult to give a generalised view.

The Convener: Okay, but you could answer the first question. Indeed, if the other panel members can come back with a fuller explanation or any further thoughts on whether that is likely to be the case, it will be much appreciated.

In the meantime, that concludes our questioning, and I thank all our witnesses for appearing today. Our next meeting will be on 3 October, when we will begin to take evidence on the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill.

Meeting closed at 12:40.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

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

The Scottish Parliament
Pàrlamaid na h-Alba