

RESPONSE BY THE FACULTY OF ADVOCATES PERSONAL INJURY LAW
GROUP (“APILG”)

TO

THE SCOTTISH CIVIL COURTS REVIEW CONSULTATION PAPER

INTRODUCTION

APILG is a group of Advocates (both Junior and Senior Counsel) who specialise in the field of Personal Injury Litigation in Scotland.

We have a combined experience of many, many years and amongst the members we have been engaged in almost all high profile litigation in Scotland in this field. Many of our members have appeared in the House of Lords on a number of occasions; they appear in the Court of Session almost every week; and they appear in the Sheriff Courts throughout Scotland.

Personal Injury work is an area of civil law that can and does affect members of the public who would otherwise have not expected to have to raise an action against a party. It differs from commercial litigation, where parties realise that entering into a legal relationship may bring the necessity of litigation should matters not work out as they intended.

The public in general do not have that expectation and when it arises, they are entitled to the best representation before the best judges to ensure that justice is achieved.

Similarly, insurance companies (who often meet the awards of damages) have an interest in litigation being conducted in an appropriate, predictable, consistent and efficient manner.

Our members deal with cases ranging from the relatively simple case to cases of great difficulty and importance for individual claimants (“pursuers”) and importance to the

wider public. These often involve litigation concerning injuries of maximum severity (such as birth brain injury, serious head injury, or paraplegia). A just result is essential to any modern society. Furthermore, achievement of justice requires access to the courts and indeed to specialist representatives who can fight for their clients' interests.

The Consultation paper raises a number of important issues. We are the first to recognise that our own experience identifies that the current court system requires review. However, in recent years, the Coulsfield reforms (culminating in Chapter 43 of the Rules of the Court of Session) have undoubtedly been of immense benefit in speeding up litigation but, at the same time, ensuring that justice is not compromised. We would point out that, in relation to Chapter 43 procedure in the Court of Session, there is a User Group which meets regularly to discuss the Chapter 43 rules and comment on the need for change. In the event that a system similar to that under Chapter 43 of the Court of Session rules were being contemplated for personal injuries cases in the Sheriff Court, it would be advisable for there to be some connection between the Rules Councils for each court so that the Sheriff Court can learn from the Court of Session experience.

It is the firm belief of APILG that should many of the changes that are proposed in the paper be implemented, there will be great damage to the principle of access to justice. In particular, any suggestion that a Personal Injury Assessment Board (PIAB) model should be introduced should be resisted. We consider that mediation in Personal Injury work in Scotland is virtually unworkable; and relegating Personal Injury work to the Sheriff court would be disastrous to the public.

As previously indicated, the public do not expect that they will have an accident and thus may require to litigate. However, they should be alive to the reality that a significant proportion will indeed have to do so. Accidents happen. Often such accidents have far more significant consequences than one might expect. They often ruin the lives of those that are affected.

The APILG has seen the response by the Faculty of Advocates to the Consultation Paper. In great measure we agree with its approach. However, from the Personal Injury perspective, we wish to make additional comment.

We intend to simply add comment to the comments of the Faculty where appropriate:-

CHAPTER ONE :

MEDIATION AND ADR

Alternative Dispute Resolution is not, it is submitted, a matter that lends itself easily to personal injury work. Such has been recognised by the Scottish Consumers' Council. Experience of Counsel in Scotland is that it has not worked. Experience of solicitors is that, generally speaking, pursuers (through their advisers) are not willing to submit to mediation. Anecdotally, only two or three Court of Session personal injury cases have been subjected to mediation: that has proved unsuccessful.

Although mediation is commonly resorted to in England and Wales, it should be borne in mind that the vigorous rules under the Civil Procedure Rules concerning disclosure permit the mediator to act as the judge at trial would. Each side will, generally speaking, attend mediation with full knowledge of the opponent's case; full disclosure of all witness statements; with clear and vouched valuations of the claim, as contained in schedules and counter schedules; and all preliminary issues determined. The circumstances of mediation are not markedly different to the procedures that would subsist at trial. In effect, in most cases, the mediator is acting as a substitute judge.

The Scottish system does not, at this stage, have rules which would permit such an informed mediation to take place. Unless such a system was introduced, it is considered by practitioners at the Bar and solicitors that mediation is virtually unworkable in connection with personal injury cases. The negotiation that currently takes place between Counsel often leads to resolution of the dispute. There is no added value that a mediator can bring that cannot be provided by Counsel. More cases are settled by Counsel than are litigated by Counsel. The overarching advantage of the Faculty as a whole is the ability that Counsel have to discuss cases on a "Counsel to Counsel" basis, safe in the knowledge that any discussions will be totally confidential and frank. Despite the ability of mediators to ensure confidentiality by contractual arrangement, this can be inflexible. A face to face exchange will often be more

productive than through the mediator. Within the current court system, in personal injuries cases, the claim will have been made with the appropriate insurers in advance of an action being raised. Indeed, a court action requires to be necessary to the extent that there requires to have been some effort on the part of the party instigating the court action to obtain legal redress before having recourse to the courts. Further, in cases in which Counsel are instructed in particular, there is a clear dialogue between the respective advocates who are under an obligation to minimise the time spent in court by narrowing the ambit of the dispute. This process of refinement of the areas of dispute will often lead to settlement of the case before a hearing on the evidence is required. The ability of the parties' advocates to achieve this end is driven principally by the fact that the parties are operating within the litigation process, where they are forced to address the issues between them and the stark realities of what might happen, were the case to be heard before a judge or jury.

It should also be borne in mind that in most, if not all, personal injury litigation cases, the parties have not chosen to be in a legal relationship with each other. This should be contrasted with the position of mediation within a contractual setting. Indeed, parties in the latter situation may wish to continue in that relationship, or work with the other party in the future, and thereby mediation is encouraged. Accordingly, a 'one size fits all' mediation for parties should not be created. The nuances of personal injury work are such that mediation may simply not work.

We wholeheartedly agree with the observations that are made in a business triangle as commented on by the Faculty. We would prefer to put it in a more down to earth way: no business can deliver something good, fast and cheap. Only two of these can be provided. To the extent that it might be thought that Justice can be provided quickly and cheaply, this can only be achieved if quality is sacrificed.

CHAPTER 2

Should simple cases be dealt with in another type of court or forum?

Personal injury cases are often of immense complexity. Even the simplest road accident may lead to difficult and protracted issues of medical complexity. For example what may be at first sight a simple "whiplash" injury case may give rise to

issues of whether complex neurological difficulty has arisen.¹ There have been many examples where judges have felt that damages assessments are far too complex for civil juries to determine, even when guided by judges themselves and counsel for the parties, with expert witnesses to educate them.

As the valuation of the pain and suffering and loss of amenity claims tend to fall into a band of potential awards rather than a specific figure, any threshold would be problematic in claims which were within that band and thus may exceed the lower threshold

It is extremely difficult to identify what cases may become complex and when they will do so. Medical conditions develop over time. Of course, they can improve over time, but in most cases they deteriorate. Difficulty that was not foreseen arises.

The temptation to say that a case is simple may overlook that a case has a hidden complexity or one which only arises at a later stage.

Whilst we support in general terms that cases that are plainly simple and plainly low value could be dealt with in a lower court, we sound the above note of caution. However, the fact remains that the Sheriff Court doors are open to such cases now. Should a pursuer litigate in the Court of Session in a simple low value case, he may not recover all his cost in doing so. We consider that there is no need to force litigation into a forum where the procedures are already there to regulate that procedure.

We recognise that it is possible that there may be changes to the system where more cases are sent for determination in the Sheriff Court. If that happens in cases of any complexity, then we consider that it is essential that Counsel are expected to appear in those courts, in order that such specialist representatives can fight for their clients' interests.

¹ See for example *Dingley v The Chief Constable*, which concerned a suggestion that a minor accident had caused Multiple Sclerosis. This case was litigated all the way to the House of Lords. Also, *Simmons v British Steel*, where a minor bump on the head was held to have caused major psychiatric injury. Again this case was litigated to the House of Lords. Other examples of complex legal issues include the link between minor head injury and Parkinsons disease, and between minor injuries and epilepsy.

At present, in Scotland, the winning party can only recover his fees to counsel if the Court agrees that the case is sufficiently complex. (Again, that is to be contrasted with the position in England and Wales which does not require that condition to be met.) In addition, the motion for “sanction” or “certification” is usually made at the end of the case.

This introduces an uncertainty that ought to be removed. A party at the start of the case may think that he wants counsel, but is not willing to take the risk that a Sheriff at the end of the case may say that the case is not suitable for counsel. Counsel will be unwilling to appear in the case – especially on a speculative basis – for the same reason.

A simple solution would be to introduce a rule that allows a Sheriff to determine at the outset of the case that it is suitable for the employment of counsel. Of course, there should be provision that that decision can be reviewed: for example a complex issue on liability may become irrelevant if liability is admitted, or established by summary decree. Or, conversely, a simple case may suddenly become complex: there may be a deterioration in the condition, or the introduction of other parties to the case.

Accordingly we suggest that Rules be introduced to permit sanction for counsel to be obtained at the outset of the case in Sheriff Court actions.

THE COST OF FUNDING LITIGATION

As is indicated in the Faculty paper, the position in England and Wales is totally different to the position in Scotland in respect of funding of litigation.

We are concerned that the general Scottish public is unaware of the large quantities of work that members of the Faculty of Advocates carry out in Personal Injury cases without fees ever being paid. Furthermore, Counsel regularly “write off” fees that they would be entitled to charge, quite simply because they know that the loser will be their client.

The Difference between Judicially Recovered Fees and Agent and Client Fees

We adopt the views of the Faculty that the difference between recovered and incurred expenses is hard to justify. Typically in Scotland, the successful party is paid their expenses by the losing party. However, the expenses that are recovered from the opposing party are often far less than those that are actually due by the client to his own legal team.

It is unclear why this disparity should be of greater concern to commercial clients than to those engaged in personal injury litigation. A significant difference exists between both scales in both forms of litigation. There is no reason why solicitors acting in a complex personal injury case should obtain fees that are lower than those engaged in commercial litigation. The Faculty understands that fees in personal injury litigation in England and Wales recoverable by assessments of costs are not markedly different to the expenses chargeable to the client. Although it is open to the court in Scotland to make an award on the alternative and higher scale, the test for reaching that threshold is high. The actions of the party against whom the order is sought must have acted in a manner that is virtually an abuse of process: cf *McKie v Scottish Ministers* 2006 SC 528.

With regard to personal injuries actions in particular, we would take the view that the greater recovery of judicial expenses would not be as equitable as might be the case in commercial cases. In commercial cases, the litigants are more likely to be able to pay the shortfall in such circumstances. In a personal injury claim, the shortfall is either borne by the legal advisers or by the client from the damages award. It is not clear why this should be so.

There is then a choice: should the advocate insist that the shortfall comes from the client, or should he write it off? Our experience is that many thousands of pounds are written off by all counsel who act for pursuers.

There are also many cases where counsel have taken on cases in the certain knowledge that they will not be paid at all. They do so as a matter of public service, often in high profile cases.

Speculative Actions

Finally, as is stated in the Faculty paper, speculative actions are now more common than ever. They are usually known as “no win, no fee” actions. Counsel will often take on cases on that basis when there is no other means of funding the case.

A number of problems arise when a case is funded speculatively. The first is that the client has no protection against a finding of costs against him if he loses. This is unlike legal aid cases, now rarely presented due to lack of funding from the Legal Aid Board for most cases. If a person in receipt of Legal Aid loses the action, they will almost always be protected from the other side seeking an award of costs. It is possible that a pursuer can purchase an insurance policy against a finding of costs against him. However, this can be expensive and (as the rules are currently formulated) the premium is not recoverable from the losing party.

The second problem is that from the advocate’s point of view he will not be paid unless he wins; he will often not be paid the full amount of his fees because of the shortfall discussed above and in the consultation paper; and even if he is successful, it may take years until he is paid. We know of no other type of business which can withstand such a situation: where a self employed person is taking on work with only a chance of being paid; and even if he is being paid he is being underpaid, a long time in the future.

Speculative actions are part of a long tradition in Scotland and one that has served the public well. However, unless the Justice system is alive to the reality that such actions are becoming more and more unattractive to Advocates, this essential part of the Justice system will wither. The Faculty paper points out the reality of the quantity of such speculative work: outstanding speculative fees amount to about £6m and most civil practitioners have speculative fees outstanding. This accounts for a significant proportion of all income at the Scottish Bar (17%).

Many high profile cases have been fought on a speculative basis. These cases have included *Cross v Highland Council* (which was ultimately unsuccessful, and concerned allegations that the pursuer's husband committed suicide as a result of stress caused by the defenders); *McTear v Imperial Tobacco* (an allegation that the deceased had died through the defenders' negligent provision of cancer inducing material, namely cigarettes); and *McKie v The Scottish Ministers* (concerning an allegation of fabrication of evidence, a case which settled at the door of the court when previous offers had been made to the pursuer and rejected on Counsel's advice).

It is our view that the Scottish Civil Justice system should be brought into line with the position in England and Wales under the Civil Procedure Rules (CPR) in respect of funding arrangements.

The Position in England and Wales

As noted in the Faculty response, under the CPR a person who is in legal dispute can enter into a "Conditional Fee Agreement" (CFA) with his own lawyer.

The CFA allows the client to agree with his lawyer that, in return for dealing with the case on a no win/no fee basis, in the event of success the lawyer can recover a "success fee" which is limited to up to 100% of the fees charged.

Critically, this fee is payable by the opposing party. The Faculty notes that although in Scotland a similar agreement can be entered into, the uplift cannot be recovered from the other party and must be paid by the client for their damages.

Further, any insurance premium taken out after the event (ATE) can be recovered from the losing party in England and Wales. Again, in Scotland, this cannot be achieved.

Finally, in England and Wales, if a party obtains a better result than they offered to accept informally, they are entitled to "indemnity costs", which are similar to agent and client costs in Scotland.

By way of example, we consider the case of a litigant in Scotland who approaches a solicitor and counsel is instructed on a speculative basis. The solicitor and counsel may agree that an uplift of 50% of the fees should be payable in the event of success.

If his lawyers state that he will accept a certain sum of money, but he is awarded more after judgment, the following would occur:

1. His lawyers would recover only their “judicial expenses” from the other side. They would be entitled to seek the shortfall from their own client from his damages. They may be up to 30% or so of the fees of solicitors and counsel.
2. The success fee would trigger giving rise to a further liability.
3. If the client has taken out a protective ATE insurance policy, he cannot recover that premium from the other side. Many such premiums (even for a potential liability of £20,000) can cost many thousands of pounds.

The result is that a significant proportion of the damages (or, in some cases, all of the damages) could be swallowed up in liability to the lawyers. Of course, it is for that reason that many fees are written off by the lawyers. And of course, if the client is properly advised at the outset, it may simply not be worth the risk to sue, if this results in a net loss. It is neither just nor fair that the client should suffer a loss; but neither is it just nor fair that the lawyers should be cutting their fees because of defects in the system.

This should be contrasted with the same scenario in England and Wales where the consequences are:

1. Because the offer was beaten, indemnity costs will be triggered. They will be completely recoverable from the other side.
2. The success fee would be recoverable from the other side.

3. The insurance premium would be recoverable from the other side.

The net result is that the lawyers are suitably paid; the client keeps all of his damages; and the only “loser” is the defender or defendant who has failed to pay up the amount that he should. Of course, members of the Scottish public contribute through insurance premiums to the system in England and Wales but fail to derive the consequent benefit of access to justice in this way.

Such a system as operates in England and Wales is good for the public who litigate; good for the legal system as the lawyers are encouraged to provide the service; and good for the public purse.

Legal aid is more or less at an end for personal injury cases. Very few such cases are now litigated due to difficulty in qualifying on account of income of an individual. Only the very poorest litigants are now granted legal aid.

The gap has been filled by speculative cases, but unless it is attractive to counsel, there is a risk that it will no longer be a service that is provided.

Denial of Access to Justice in Scotland

The English reforms are embodied within the Access to Justice Act. The Act does not apply in Scotland. We firmly believe that the reality is that many individuals in Scotland are being denied access to justice.

The Risk of Litigation leaving Scotland for England

We therefore submit that reforms, similar to those under the CPR be introduced in Scotland. We note that there are cases that can be litigated on both sides of the border (for example where a defender also has a place of business in England, or there are multiple wrongs (such as exposure to asbestos or noise) in many locations throughout the UK.)

Such claimants would be well advised to litigate in another jurisdiction rather than Scotland, if they wish to recover all that they have entitlement to.

Again, we consider that a legal system that discourages litigation in favour of another jurisdiction is a legal system that has problems that have to be addressed urgently. We submit that the issue can be addressed as indicated above.

Specialist Judges

Scotland has produced law which is respected worldwide. Any country with such a strong tradition of respect should ensure that Scottish cases are litigated in Scotland.

As far as personal injury litigation is concerned, there has perhaps been a perception in the past that personal injury cases are straightforward. If that was the perception, it was misconceived. What is plain is that personal injury litigation is exceptionally complex in terms of both liability and quantum. The overwhelming production of EU regulations and domestic implementation of these regulations renders liability issues potentially complex; medical science has advanced in all fields giving rise to complex medical issues (especially in the fields of neurology and psychiatry); and even “straightforward” valuations of claims are not without difficulty in applying the various editions of the Ogden Tables for losses.

As discussed above, the Scottish Bar is proud to have a strong team of specialists who are familiar with all aspects of complex cases.

We see no reason why there should not be increased specialisation of judges and sheriffs. However, it is clear that the Courts must truly rely on the specialists at the Scottish Bar to guide them in the complexities of that litigation. It is difficult to know how expertise can be acquired without experience and guidance from those who know their way around those complexities.

The “Privative Jurisdiction” of the Sheriff Court

The question is raised as to whether there are cases of such low value that only the Sheriff court should deal with them. We refer to our comments above.

We support the Faculty’s suggestion that in cases where the maximum damages for all heads of claim is less than £10,000, these cases should generally be litigated in the Sheriff Court. However, this rule may be difficult to apply in all cases.

There may be good reasons for not litigating in the Sheriff Court in even small value claims: for example complexity in law or fact; or a test case; or indeed a justified desire for a jury trial. It is undoubtedly the case that should such a rule be introduced, it will require careful consideration as to how it is to operate. It is submitted that for such a rule to work, it will have to ensure that it is only if a claim could not on any view exceed the figure suggested that the claim could not be litigated in the Court of Session.

The great difficulty though is in valuing solatium (that is, damages for pain and suffering and loss of amenity). As noted above, solatium is a figure within a band of possible awards. It would not be fair to litigants to deprive them of litigating in the Court of Session if it was merely unlikely that a judge or jury would award them less than the set figure.

Should Jury Trials be Retained in the Court of Session?

APILG is of the firm view that jury trials should be retained in the Court of Session, for the reasons stated by the Faculty in its response. In brief, we are of the view that jury trials provide the public with a unique forum to indicate what public expectation of damages is; and to provide a pursuer the opportunity of having his case determined by his peers.

To the extent that there is a perception that juries award higher damages than judges, this is not always the case. There are examples where juries take a much more critical view of the extent of injury (especially in small value cases, such as in whiplash or

minor back pain type cases) in a common sense way rather than in an over analytical way.

Judges making awards will (as explained in the Faculty response) look to jury awards where a pattern can be seen. Accordingly, the theoretical position is that the public guide the judges, rather than the other way around. Without that opportunity through trials, there is a risk that the perception is that judge awards do not meet public expectation. In England and Wales, it was necessary to carry out surveys, and wholesale adjustment of damages awards in a rather broad axe way, to rectify the position (see *Heil v Rankine*). Such a position is wholly unnecessary in Scotland because, and only because, of the jury trial system.

The use of jury trials is another distinctly Scottish aspect to our system of justice. It is envied by other jurisdictions, and should be retained.

The Arrangements for Assessments of Expenses in litigation

The current position that exists is that when a party is successful, he is generally entitled to his court expenses from the opposing party.

He then makes up an account of expenses, which is presented to the opposing party; who then considers it and often will make an offer of what he thinks the proper amount should be.

If it is the case that the account cannot be agreed, then the account is sent to the Auditor of Court. In the Court of Session, and in both Glasgow Sheriff Court and Edinburgh Sheriff Court, the Auditor is a permanent appointment staffed by former solicitors who have experience of law accounts.

The hearing before the Auditor is a summary one; but it is arbitrary. The Auditor will issue a reason for his decision, but only if a party wishes to challenge his views. Appeal is by “note of objection” and is heard usually in the Outer House, before a single judge (or by a Sheriff if the case is a Sheriff court one).

This entire procedure is slow, cumbersome and uncertain. Furthermore, it is the practice that no interest is paid by the paying party on the account of expenses until it is finally determined. It may take (and on some occasions has taken) years from the conclusion of a case until payment is made.

Such a system is wholly unacceptable in a modern commercial country. The delay, and lack of interest on outstanding accounts compounds the inherent unfairness of the system noted above.

Again, we consider that there is much to commend the position in England and Wales under the CPR.

As indicated by the Faculty Response, accounts are assessed in a summary way at the end of any hearing. They are usually payable within fourteen days failing which interest is due. This has an attraction to it that is consistent with a commercial economic climate that now subsists. The UK and Scottish Governments have been keen to ensure that interest will apply on commercial debts (see for example the Late Payments on Commercial Debts legislation). There are doubts over whether this legislation may apply to debts for court costs, as the parties do not contract with each other. This lacuna should be addressed.

We therefore suggest that a similar system be introduced to that in England and Wales under the CPR to allow for summary assessment of accounts at the end of a case or other hearing; that the assessment is carried out in all but the most complicated of cases by the judge, there and then; and that payment is due within a short period, failing which interest is payable.