



## **Response to Scottish Civil Courts Review: A consultation paper: March 2008**

### **About AvMA**

Action against Medical Accidents (AvMA) was originally established in 1982. It is the UK charity specialising in advice and support for patients and their families affected by medical accidents. Since its inception AvMA has provided advice and support to over 100,000 people affected by medical accidents, and succeeded in bringing about major changes to the way that the legal system deals with medical negligence cases and in moving patient safety higher up the agenda. In England & Wales in particular, the legal reforms of Lord Woolf in the medical negligence field and the creation of agencies such as the National Patient Safety Agency and the Healthcare Commission have followed after years of campaigning by AvMA.

AvMA has played a key role in making medical negligence a specialism within legal practice. It continues to accredit solicitors for its specialist clinical negligence panel in England & Wales (without membership of AvMA's or the Law Society Panel a law firm is not entitled to a clinical negligence franchise) and promotes good practice through comprehensive services to claimant solicitors.

Accordingly, our insight and experience will be limited to the arena of medical law and medical negligence and therefore the observations that we make are confined to those areas within our knowledge. Given AvMA's specific expertise in medical negligence and healthcare law much of what the consultation is concerned about falls outside of our remit. However, we have commented where we feel it appropriate to do so.

### **Introduction**

AvMA welcomes the opportunity to respond to this consultation paper from the Scottish Civil Courts Review. As an organization predominantly concerned with issues of patient safety and access to justice when medical accidents occur, our response and comments in relation to questions posed by the consultation paper will necessarily be limited to the remit of medical negligence. Our concerns, therefore, relate to the impact that the review may have in relation to access to justice in relation to medical negligence claims brought on behalf of Pursuers.

Although AvMA is based in the South East of England, AvMA is passionate about ensuring that the reach of its work extends to the four countries of the UK. At least twice a year, AvMA holds Lawyers Support Group meetings for AvMA medical negligence lawyers in Ireland (both Northern and Southern), Wales and Scotland. However, we have identified Scotland as being a particular priority for us. Hence we took the decision last year to hold

the highly esteemed AvMA annual conference in Glasgow last year, where we launched a 'Call for Justice' in relation to medical negligence in Scotland. We are currently in the process of registering AvMA as a charity in Scotland. We hold meetings during the year with medical negligence lawyers undertaking Pursuers work. AvMA is a unique organization in that although we work closely with our lawyer members, our contact and concerns relate to advising clients directly who have experienced a medical accident advising them about all their potential options and potential remedies. These may include but may not be exclusively about recourse to litigation.

We regularly advise and assist clients through the complaints procedures whilst advising them about the clinical issues that might either undermine or support any response that we get from clinicians or hospitals.

Because AvMA advises in relation to a gamut of options that may include but may not be exclusively about pursuing a legal claim (e.g. we might advise about complaints and/or regulatory matters), we are ideally placed to adopt an overview of what may often be disparate elements that need to be looked at in the round. Given the symbiotic relationship between any administrative justice system, ombudsman and other forms of dispute resolution it is very important that any Scottish legal reform takes into account the possibility of change or need for reform within the complaints jurisdiction as well. In this connection, we understand that a committee chaired by Lord Philip is expected to report soon on the potential need for review of the administrative justice system and we suggest the findings of Lord Philip's report need to be taken into account by the Civil Courts Review.

For the reasons stated above, AvMA regrets that the recommendations of Lord Ross' Expert Group that recommended amongst other things that the funding of a Scottish branch of AvMA be set up and funded have never been taken up. Despite ongoing meetings with the Scottish Executive that recommendation has still not been implemented to date. Further, any Civil Courts Review needs to be seen in the context of access to justice in General. AvMA has real concerns about the provision of public funding in relation to medical negligence. Currently few medical negligence specialists are prepared to take on medical negligence work in any significant volume. We are therefore very pleased to note that Chapter Three of the paper makes reference to the provision of public funding. With this in mind, AvMA now turns to address the questions specifically posed in this paper.

## **CHAPTER 1**

***Question 1: Should the Civil Justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?***

Yes. However, early resolution of disputes cannot be achieved in isolation. So far as Pursuers or complainants in medical negligence claims are concerned, in order to meet aspirations of early resolution, this would entail a different culture within the medical profession, particularly regarding being open when mistakes occur. Further, there cannot be early resolution of disputes unless and until a complainant / Pursuer is fully informed. This means that the latter needs assistance in navigating their way through the complaints procedures and understanding some of the clinical issues involved. This entails wholesale

review of the culture of openness within NHS hospitals, private hospitals and amongst doctors and clinicians in general. Until that is addressed, early resolution of disputes can only remain aspirational although it is an aspiration that AvMA supports. Unfortunately, the way in which the current complaints system is constituted means that the lack of candour and unwillingness to own up to admitting when treatment goes wrong is probably a bar to the early resolution of disputes. No Pursuer wishes to go through a costly – both financially and emotionally – court process which take time and energy to resolve. In general terms, the court is a last resort.

Much of AvMA's concerns relate to access to justice. In general terms, without recourse to funding, a complainant is not in a position to come to the table to resolve a clinical dispute. This inequality of arms means that he or she is continually placed on the back foot. Thus, although the remit of this review is specifically concerned with the Civil Courts, it is necessary to look at advice and assistance in the round. This is why an organization such as AvMA has played such a large part in moving on disputes in medical negligence claims in relation to England and Wales. Very often lack of funding means that many clients come to AvMA, as the only organization that helps clients in relation to medical accidents and where the resource is free to clients. Although, AvMA has no funding to actively litigate claims, many claimants find with our help and assistance that their dispute can be resolved without the need to resort to professional legal advisors.

The low volume of clinical cases that reach Scottish courts attests to the fact that the court is the port of last resort. The reasons for this are multi-factorial. As alluded to in the introduction, the limited scope of public funding means many specialist medical negligence lawyers are put off undertaking medical negligence claims on a legal aid basis. In practical terms there is the danger that those cases taken on are "self-selected" by which we mean that the business imperative of any solicitor firm might lead to lawyers only taking on those cases that have good prospects of success and where costs can be recovered from the opposing party. We deal with this aspect further in our response to questions raised in Chapter Three of the consultation paper.

***Question 2: Do you agree that the principals and assumptions discussed in paragraphs 1.1 to 1.14 are a sound basis of the development of the Reviews recommendations? Should they be supplemented by other factors?***

AvMA agrees with the principal of proportionality always mindful that this does not mean "justice on the cheap". With medical negligence disputes, specifically in mind, proportionality is not always easy to apply. In particular, the value of the claim may be small or modest but complex legal issues may arise. In England, for example, where a statutory bereavement award applies in fatal accident cases, this means that in the absence of a dependency claim many of these cases do not satisfy the criteria applied to qualify for legal aid. Therefore it is important that the significance of the dispute to the litigant as well as the public as a whole (in holding public bodies to account) are taken into account and not simply judged on the value of the claim alone.

***Question 3: Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?***

We have raised concerns in relation to resolution of problems, particularly complaints, and the need to review any form of civil courts reform in the context of administrative justice

generally. Any review of the civil justice system must also consider the availability of funding – particularly civil legal aid in Scotland.

## **CHAPTER 2**

### ***Question 1: What contribution can public legal education make to improving access to justice?***

AvMA has no particular comment to make on this save that, the public ought to be informed about essential concepts such as statute of limitations, so that when pursuing a complaint, for example, they are mindful of the potential for a claim to become statute barred.

### ***Question 2: Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?***

There are country wide difficulties in getting specialist medical negligence representation in Scotland as well as particular geographical gaps, particularly in rural areas and in the North of the country. The Law Society of Scotland's website lists only five firms with specialist medical negligence solicitors representing Pursuers. However, geographically such firms are based exclusively in Edinburgh or Glasgow. (Worryingly, the Law Society lists some 379 firms all over Scotland as providing a medical negligence service even though the vast majority do not employ any specialist solicitors. We believe it is a disservice to suggest to potential medical negligence clients that they should approach such non specialist firms for legal representation). Even amongst the firms that have solicitors who are genuinely qualified to undertake medical negligence work, many will only take on Pursuers eligible for legal aid on a very restricted basis or are already so busy they have little or no capacity to take on new clients. We understand that the level of fees set by the Scottish Legal Aid Board (SLAB) acts as a significant deterrent to solicitors in representing clients in this work. As discussed later in this document, addressing public funding of medical negligence claims is essential if access to justice is to be significantly improved in this area of law.

AvMA is also keen to work with the Law Society of Scotland & other stakeholders to develop access to specialist medical negligence solicitors in Scotland. AvMA publishes details of solicitors who have demonstrated their specialization in medical negligence by joining AvMA and signing up to AvMA's Code of Conduct for medical negligence solicitors, including undertaking to attend specialist training.

### ***Question 3: To what extent is it a) desirable or b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?***

AvMA does not consider this to be desirable or feasible in the medical negligence domain. If anything, the number of specialist lawyers undertaking this work needs to be extended, backed with appropriate legal funding in order to appropriately represent Pursuers.

However, we do believe it to be desirable to develop alternatives to using the court procedures at all in certain medical negligence cases. We support the development of a compensation scheme for the NHS in Scotland which could provide quicker, less costly and less stressful remedies for injured patients and their families combined with

appropriate apologies, explanations and measures to improve patient safety. Such a system needs to be planned very carefully. It would need to be seen as an optional alternative to legal action – access to the courts would need to remain a viable option. Such a system would only be suitable for less complex (probably low monetary value) ‘claims’. In such a system advice and support and some legal advice would need to be available to the injured party (even though this is not full legal ‘representation’ in the sense of the courts system).

**Question 4: What contribution if any can a) “self-help” services or party-litigants and b) court-based advice services make to improving access to justice?**

AvMA welcomes proposals by the previous Scottish Executive to extend publically funded legal assistance to non-solicitor advice agencies. The Legal Aid & Legal Profession (Scotland) Act 2007 provides for grant funding to such agencies. Lord Ross’ Expert Group specifically made a recommendation that a branch of AvMA be established in Scotland with Government funding there. To date this has not happened. We believe that an advice agency such as AvMA would offer an indispensable addition to non-solicitor advice agencies. However, these services might be appropriate in relation to administrative justice and early dispute resolution but cannot be any substitute for professional representation once a claim needs to be litigated.

Very often, AvMA whilst not directly representing a client in Court represents the client so far as assisting in any administrative processes and in relation to concerns such as complaints and dealings with the ombudsman, regulatory bodies such as the GMC etc. AvMA with its in house medical advisors can assist in relation to the analysis of clinical as well as legal issues, thus ensuring a greater “equality of arms” between the Pursuer and Defender. AvMA has also been able to assist in relation to alternative dispute resolution including mediation. AvMA has also assisted clients at Inquests, and the development of a support service for families at Fatal Accident Inquiries involving medical related deaths would be desirable.

**Question 5: Are there are any other issues which impact on access to justice in Scotland which the Review should consider?**

AvMA considers that funding of claims impact on access to justice in Scotland. This is discussed in Chapter 3 below.

**Question 6: Is there is a case for dealing with low value cases? If so, should this be within the existing court structure or separate? What kind of cases would be suitable for such treatment?**

In our answer to question 3 we discuss an alternative administrative scheme for the NHS dealing with less complex, lower value medical negligence ‘claims’. There is the NHS Redress Act which applies to England and Wales. Ostensibly, should an NHS Redress Scheme be implemented this offers a potential new method of dealing with low value cases of import both to the client and to the public at large. The kind of cases that would be suitable for such treatment would be claims of low value where the issues are not complex i.e. against one potential Defender rather than against multiple parties e.g. a general practitioner and a hospital. We believe there is merit in developing an alternative scheme along the lines of this in Scotland but that the opportunity should be taken to avoid the biggest criticism of the English version – that it retains the courts system definition of negligence but lacks independence. There has been discussion of a so called ‘no-fault’ compensation scheme in Scotland. Technically, we believe that the term ‘no-fault’ is

inappropriate. What is needed is an alternative test to the legal test of negligence. For example, AvMA have developed the concept of an 'avoidability test' which would be appropriate for the NHS. Similarly, the compensation scheme in Denmark uses a more flexible test than the legal test of negligence.

### **Chapter 3: The cost of funding and litigation**

***Question 1: What if any information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?***

AvMA agrees with the Review that it would be inaccurate to extrapolate from the information available from England and Wales in relation to costs how this can be transposed into the Scottish context. As we understand it, costs in relation to legal representation are significantly lower than that of England and Wales (in relation to medical negligence litigation). Other than this, AvMA cannot comment.

***Question 2: What extent does the cost of litigating deter people from pursuing or defending cases?***

We are not aware of any quantitative or qualitative research in relation to the cost of litigation acting as a deterrent either in relation to Defenders or Pursuers. However, there is real concern frequently addressed to AvMA about the availability of legal aid in Scotland. In particular, it's inadequacy. Many firms, some of them good ones are deterred from undertaking claims on a legal aid basis in all but the clear cut cases.

***Question 3: Does the current system of levying court fees affect access to justice? If so, how and in what kind of cases?***

AvMA has concerns about litigants being required to pay towards the costs of his/her court case given that the system ought to provide a public service.

***Question 5: Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?***

It is essential that Pursuers be entitled to recover the full costs of recovering compensation.

***Question 6: To what extent and in what respect does the availability of legal advice and assistance and legal aid affect access to justice?***

In all respects. For a publicly funded legal aid service, the system must be resourced adequately. In turn, SLAB need to adequately remunerate lawyers in order to ensure that there is an appropriate resource of legal firms who are prepared to undertake publicly funded medical negligence work at legal aid rates. Limiting certificates following investigation to a fixed fee that in some cases is barely more than the fee allowed to investigate the claim itself, is not realistic. Effectively, Scottish legal aid lawyers undertaking medical negligence work are being asked to undertake the claim on a no win no fee basis – without the enhanced incentive of a success fee. This acts as a disincentive to undertake anything other than those "dead cert" claims.

***Question 7: Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?***

Yes. See response to question 6. There is very small pool of specialist medical negligence lawyers who are able or willing to undertake medical negligence work at legal aid rates. Clients in rural areas as well as in cities outside of Edinburgh are particular poorly served.

***Question 8: What impact have speculative fee arrangements had on access to justice?***

AvMA does not have any empirical data on this. However, we do know of lawyers undertaking medical negligence claims on a speculative fee basis. In the absence of legal aid or eligibility for legal aid, no win no fee agreements do provide access to justice that would otherwise not be there. However, AvMA is concerned that there is insurance to underwrite the risk in the event that the Pursuer is unsuccessful and is liable to paying the Defender's costs. In situations where a premium is taken out, AvMA believes that it is essential that the costs of the premium be recoverable in the event that the Pursuer wins the claim. The cost of the premium in medical negligence claims can be significant. AvMA notes that this contrasts with the position in relation to personal injury claims generally where the premium is lower and where the same issues therefore may not apply. This is currently not the case in Scotland.

***Question 9: Should legal expense insurance, including "before the event" and "after the event" insurers, have a greater role to play in the funding of litigation in Scotland?***

Yes and no. AvMA's concern is that when potential clients have suffered an adverse event following medical treatment, that they go to the best lawyer that understands this complex area. AvMA advocates that potential clients only go to specialist panel lawyers to receive specialist advice. In England there have been concerns about the prohibitions many legal expenses insurers (before the event insurers) impose as to the solicitor firm that can act on behalf of the client. This has the effect of restricting the client's choice as to who should represent him/ her. Very often the solicitor appointed by the insurer is not a medical negligence specialist but a specialist in personal injury cases. There are also many exclusions to before the event insurance policies. Many are keen to exclude medical negligence from the policy altogether and devise many exclusions or ambivalent wording in the policy in order to achieve this exclusion. The costs are often capped. This means that once the caps are reached, the solicitor then has to seek alternative funding. In practice, this leaves only a no win no fee or speculative fee agreement being entered into with a need for after the event insurance to support it. In practice, the further on down the line a claim is the more difficult it is to source after the event insurance. At that stage, the insurance premium will be even greater than if it had been obtained from the outset. Before the event insurance can also be a fetter to obtaining legal aid. Once the presence of a policy is known, legal aid is often not forthcoming. If the difficulties and problems with before the event insurance could be ironed out and clients were given a full choice as to which solicitor could represent them and if "top-up" or after the event insurance could easily be substituted for the BTE insurance once the cap had been exceeded then there might be more reasons to commend them. So far as after the event insurance is concerned this may well have a big part to play in Scotland. However, premiums need to be recoverable where an action is successful. Also, for a firm to undertake a case on a speculative fee agreement basis, the solicitor needs to undertake its own risk assessment on behalf of the firm. This raises a number of concerns: not least that many clients may fall along the wayside being denied access to justice on the basis that their claim may not stand a high enough prospect of success with solicitors not willing to take such a risk on

behalf of the firm. There is also the issue of conflict; bearing in mind the investment the firm has made, so closely bound up with the client's prospects of success. The solicitor / counsel may be agitating for a settlement rather than taking the risk of the claim going to trial subsequently.

From a Defender perspective, particularly in the context of medical negligence claims, the impact of speculative fee arrangements has been significant. In particular because of the success fee, in cases which the NHS litigation authority defend to the hilt and subsequently lose means in some cases that the NHS do take some significant "hits" on costs. Conversely, the impact of the success fee, plus premium acts a deterrent to defendants running speculative defences and ought to lead to the making of earlier admissions. Many insurance providers of after the event insurance set premiums as a percentage of the costs incurred by the claimant thus acting as an incentive to settle before the costs are significantly increased. In England, it is also the case that many lawyers enter into staged no win no fee agreements where the success fee levied increases or decreases depending upon which stage is reached during the litigation.

***Question 10: What impact would the ability to recover "after the event" insurance premiums from unsuccessful parties have on litigation?***

We imagine that it would have a significant effect. Premiums can be extremely expensive and act as a deterrent to entering into a speculative fee arrangement. After an initial spate of litigation regarding recoverability of insurance premiums and success fees, the situation is gradually bedding down in England. It needs to be emphasized, for the avoidance of doubt, that any speculative fee arrangements need to be operating in parallel with a publicly funded legal aid scheme and is not a substitute for it.

## **CHAPTER 4:**

***Question 1: Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?***

AvMA understands that the conduct of civil claims is being adversely affected by the disproportionate amount of time dedicated to criminal cases rather than civil ones, delaying applications and proofs.

***Question 2 - 4: Should a) some judges of the supreme courts and b) some sherriffs be designated to deal with civil business?***

AvMA believes that separating civil and criminal divisions would increase the experience and knowledge of judges both in relation to substantive and procedural law.

***Question 5: What are the key factors which influence the decision to raise an action in the court of session or the Sheriff Court where jurisdiction is concurrent?***

Most lawyers will remit those claims of greater complexity and greater value in the Court of Session. However, it remains difficult logistically for those firms outside of Edinburgh to conduct business in Edinburgh. For such firms agents may have to be instructed from time to time. In general terms, use of agencies is not ideal since those conducting the claims

ought to be present at significant court hearings where possible. We believe one set of rules applicable to both courts would simplify procedures. As important, is the need for there to be specialist (junior) judges assigned in relation to the case management of medical negligence claims. The Court of Session is an appropriate forum for medical negligence claims where claims involve issues of complexity and judges are well equipped to determine the issues. Should the Sheriff court retain its jurisdiction in relation to medical negligence claims then the same quality and benefits that the Court of Session confers needs to be replicated in the Sherriff Court? The Coulsfield Rules (Chapter 43 of the Rules of the Court of Session) ought to be incorporated into the Sherriff Court to improve practice there.

***Question 6: In what, if any types of cases should a) the Court of Session and b) the Sherriff's court have exclusive jurisdiction?***

See response to question 5 above. Conversely, lower value claims, say under £10,000 should be raised in the Sherriff Court.

***Question 7: Should the jurisdiction of the Court of Session and the Sherriff Court be unified to create a single civil court?***

AvMA is not really qualified to comment on this. However, it seems to us that there may be sense in establishing a coherent set of procedural rules that apply to both the Court of Session and the Sherriff Court in relation to civil cases.

***Question 8: Should the Court of Session become a Court of Appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?***

The Court of Session should remain as court of first instance for complex claims of significant value.

***Question 24: What are the advantages or disadvantages of reliance on temporary judges and part-time Sherriffs?***

Please refer to response to question 5 in chapter 4 above. The courts are severely congested. There are procedural delays and delays in obtaining dates for the proof, particularly if the time estimate is significant, say 10 days or more. More judicial appointments need to be made rather than relying on temporary judges or Sherriffs, particularly in complex medical negligence claims.

## **CHAPTER 5**

***Question 1: Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of the overriding objective or statement of philosophy be?***

The principle of the overriding objective (enshrined in Rule 1 of the Civil Procedural Rules) formulated by Lord Woolf underpins the civil justice system in England and focuses the mind of those representing either claimants or defendants. Underpinning any statement of philosophy needs to be the principle of fairness, accessibility and equality between the parties. The Court needs to facilitate this objective.

***Question 2 – 5: Should the court a) encourage or b) require or c) in some other way facilitate the use of mediation rather than that of dispute resolution?***

AvMA believes that the court ought to encourage the parties to agree what areas are/ remain in issue where possible. Alternative dispute resolution should be encouraged. However, mediation or other methods of dispute resolution should never be mandatory. In particular, AvMA believes that no alternative dispute resolution can ever be instigated in a meaningful way until both parties are fully **informed** as to the nature of the issues that arise. In practice, this means that mediation or ADR of some sort may not be appropriate in the initial stages. There needs to be openness and transparency (entailing a change of culture within the medical profession) so that the Pursuer needs to be informed at the earliest stage possible what the Defender's case is. In such circumstances, mediation or ADR can be used creatively to narrow down one or more issues, leaving aside those issues that remain in dispute to go to trial if necessary.

**Question 6: In what respect can modern communications and information technology be harnessed and improve access to the civil courts?**

Email, telephone conference calls.

**Question 7 – 8: Case management.**

Please refer to response to question 5 in chapter 4 above. AvMA supports judicial case management provided the judiciary has an understanding of the area involved. For example, in medical negligence questions relating to expert evidence often arise, such as the number of experts to be instructed, the nature of the discipline and the expert meeting. Any member of the judiciary needs to be live to these issues and be familiar with the medical negligence terrain.

## **CHAPTER 6**

**Question 1: What are the advantages and the disadvantages of pre-action protocol?**

AvMA is a keen advocate of the pre-action protocol. A pre-action protocol avoids trial by ambush and helps to focus both parties in relation to the issues in dispute. It offers the opportunity to negotiate a settlement at an earlier stage. Equally, it avoids having to issue proceedings or having to wait to particularize the claim formally at the pleadings stage so that the Defender is in a position to know what the case s/he has to meet is. Correspondingly, the Defender needs to set out its case so far as its defence is concerned just as fully and candidly. Bare denials ought to lead to sanctions being applied.

**Question 2: The greater use of pre-action protocols? If so, in what courts and what types of action?**

Yes, it works very well in medical negligence claims. This is the experience in England.

**Question 3: Should compliance with pre-action protocols be voluntary or compulsory?**

Compulsory.

**Question 6: Should there be a single set of rules of civil procedure in both the Court of Session and the Sherriff Court?**

Yes.

**Question 14: To what extent should there be an earlier and/or wider disclosure of evidence?**

The scenario relating to exchange of evidence is one with which AvMA has grave concerns in relation to medical negligence claims. It is essential for reasons of justice, fairness and equality that each party knows the case against them as soon as possible. In medical cases, there have been problems with obtaining statements from the defence (both witnesses and experts) in relation to treatment or non-treatment by a clinician or institution. There has often been a history of trial by ambush. It would be hoped that with judicial case management conduct in relation to disclosure of evidence would be more fairly and more tightly controlled. (See AvMA's response to question to 7 – 8 in Chapter 5).

***Question 15: To what extent should the court have control over the use of expert and other evidence.***

For the reasons as stated in our response to Question 14 above, we believe that there ought to be judicial case management in relation to the use of expert and other evidence. For this reason, we believe that judicial members exercising such case management or case flow control need to have some specialist experience in medical negligence matters. There needs to be an appreciation of the need for certain clinical expert evidence to be adduced. In complex cases, there may need to be a multiple number of experts to give evidence, particularly in relation to quantum. The number of expert witnesses that may need to be called ought to be governed by the concept of proportionality. A complex claim of high value will justify the use of more experts than a simple case with low value attached. Our concern would be if the court were enforcing say, the use of single joint experts in medical negligence claims which would not be appropriate given the issues of dispute that often arise in relation to the type of treatment or intervention or non-intervention that might have been required.

***Question 16: Should a system of Pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?***

We believe such a system ought to be introduced into the civil courts procedure. The use of part 36 offers by Claimants in England has been broadly a success. In particular, the rules permit the Claimant or Pursuer to make a reasoned assessment and/or valuation of the claim, often evidenced, affording the opportunity for the Defendant or Defender to compromise the claim at the earliest opportunity. At the same time, the Claimant or Pursuer whose offer is not accepted is afforded the protection of knowing that a costs sanction might apply in the event that the Pursuer's offer is not defeated at trial or earlier.

***Question 17: Should civil jury trials be retained?***

Yes. AvMA has seen the benefits of this in Scotland, although we appreciate such trials are not common. Very often, when up against powerful institutions such as the medical profession, it instills the pursuer with confidence that those arbitrating are in touch with the people.

***Question 18: Should written judgments be required in all cases?***

Unreservedly yes. A written judgment avoids any ambiguity in relation to any decision determined. It affords the opportunity for appeal and informs the development of the law.

***Question 19: Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?***

AvMA is keen that there are sanctions applied in relation to non-compliance with court rules or unreasonable behavior. Sanctions can include imposition of costs orders, both on the standard or indemnity basis as well as the application of a wasted costs order against lawyers representing the parties personally. Other sanctions might be non-admissibility of evidence should a party be in default of compliance within the timetable.

***Question 20: What measures should be available to the court to identify merit / unmeritorious causes or appeals brought by party litigants?***

In the medical negligence context, AvMA is not familiar with the concept of vexatious litigants. We understand that those not represented are in that position only because they have no funding in order to pursue their claim. Given the costs of the court issue fees and application fees, this would in most cases act as a deterrent to a “vexatious litigant”. We would have concerns about an unrepresented Pursuer in relation to a medical negligence case being denied access to justice in relation to what might well be a reasonable and tenable grievance but due to lack of funding he/she has no representation. Offering advice and information services in relation to complex medical negligence disputes might be a way to obviate the need for a claim to be litigated in the first place. An advisor might be able to suggest alternatives to litigation in order to resolve the dispute and also advise in relation to the clinical issues at stake.

***Question 21: Is the current legislation on vexatious litigants in need of reform and if so, how should that be done?***

See response to Question 20 above.

***Question 22: Should a person with rights of audience be entitled to address the court on behalf of the party litigant and, if so, in what circumstances?***

AvMA has no comment on this.

***Question 23: Would it be desirable to introduce separate procedures from multi-party litigation?***

AvMA understands that the current rules in relation to multi-party litigation generally work well in Scotland.

***Question 24: Is the rule governing the procedure to be followed for judicial review satisfactory?***

AvMA has no comment on this.

**Fiona Freedland,  
Legal Director  
AvMA**