

# **ABI RESPONSE TO THE SCOTTISH CIVIL COURTS REVIEW**

## **EXECUTIVE SUMMARY**

The Association of British Insurers (ABI) represents nearly 400 member companies which between them provide 94% of the UK's domestic insurance. Our members write around 90% of the motor and liability market in the UK. Between them, they pay out over £4.5bn per year in personal injury compensation. Our members also write the majority of legal expenses insurance in the UK.

This paper sets out the ABI's response to the Scottish Civil Courts Review. Our focus is on improving access to justice for people claiming personal injury compensation; as such, the majority of our comments refer to the way these types of claims are processed.

Insurers want a personal injury compensation system which is fast, fair and efficient, and that puts the interests of the legitimate pursuer first while deterring fraudulent claims.

We welcome the Scottish Executive's commitment to improving access to justice in Scotland.

The Scottish personal injury compensation system is ripe for reform because:

- it is adversarial and overly complex;
- it undervalues the importance of rehabilitation;
- it takes too long to get compensation to pursuers;
- it is inefficient, and fails to allocate resources in a way which is proportionate to the value and complexity of claims;
- it allows juries to deliver inconsistent settlements.

The ABI advocates a five-point package of reforms to improve the compensation system in Scotland:

- early notification of claims;
- removal of duplication of work;
- a new process for resolving claims before they reach the courts;
- a simple process for agreeing the level of compensation;
- proportionate costs.

## **QUESTIONS FOR CONSULTATION**

### **Chapter 1: introduction**

**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?**

The civil justice system should encourage early resolution of disputes. Early resolutions benefit parties both in terms of time and costs. Crucially, they get compensation to the pursuer quickly.

With specific reference to personal injury claims, insurers should have the opportunity to accept liability and make an offer of compensation before the pursuer-representatives incur significant costs. UK Government research shows that the vast majority of personal injury claims (80%) have no significant liability dispute<sup>1</sup>, thus pursuer-representative investigations are unnecessary in most claims, merely serving to add to costs. Allowing insurers to conduct their investigations first would substantially reduce the cost of claims. These savings could be passed to insurance customers in the form of lower premiums. Most importantly for pursuers, it would reduce the length of time taken between notification of claim and payment of compensation.

To ensure that insurers have sufficient information to conduct their investigation, standard notification of claim forms should be used; pursuer-representatives could receive a fixed fee for completing the form.

Pre-action protocols can be extremely useful in resolving a dispute efficiently without having to resort to the courts. They provide a clear process for communication between parties, disclosure of information, and timescales by which this should be completed. They can also encourage parties to consider alternative dispute resolution where appropriate. Even if pre-action settlement of a claim is not achievable, adherence to the protocol ensures that the parties are in a good position to comply with the timetable set by the court for the conduct of proceedings. However, to be most useful, protocols must be binding in order to ensure clarity and consistency for all parties; sanctions must therefore be imposed where protocols are not followed.

**2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 and 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?**

We agree that proportionality and value for money should underpin any proposals for reform. To this end, enabling and promoting alternatives to litigation are important.

**Chapter 2: access to justice**

**1. What contribution can public legal education make to improving access to justice?**

As the consultation document suggests, well-informed citizens may be able to engage in discussion and negotiation with a view to reaching a resolution without resort to the courts. This would save time and money, both of which can be barriers to bringing claims and, therefore, access to justice.

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<sup>1</sup> Department for Constitutional Affairs, DCA Research Series 2/06, Fenn, Gray, Rickman and Mansur, *The funding of personal injury litigation*, February 2006

Information on methods of funding as well as process should be made available: awareness of legal expenses insurance in Scotland is very low, but 'before the event' insurance is extremely useful in ensuring people are not discouraged from bringing claims for fear of incurring high legal costs.

**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?**

The consultation document suggests that firms prepared to do legal aid work can generally be found in larger cities, but that there may be gaps in cover in smaller towns and rural areas.

The growth in the internet can help tackle any 'geographical inequality' of information and advice that may exist, although clearly there are some societal groups for whom the internet is not a realistic solution, in particular older people, and people of lower socio-economic status.

On the issue of representation, juries in the Court of Session are largely selected from Edinburgh and therefore do not necessarily have the diversity required to ensure that awards are made fairly.

**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?**

Allowing pursuers to represent themselves in the claims process is highly desirable. Some potential pursuers can be discouraged from bringing a claim because of fears about the cost of legal representation – particularly where relatively low amounts of money are involved and where the legal issues are straightforward. Further, taking legal representatives out of the equation reduces the cost of the action for defendants. Lower costs can lead to lower insurance premiums.

There is a suggestion that those without legal representation pursue cases with little or not merit, however, if simple, independent information about the legal process was more widely available, many of these claims could likely be resolved before going to court. Greater use should be made of opportunities for unrepresented parties to gain advice prior to hearings through the voluntary sector.

In terms of the feasibility of court procedures for unrepresented pursuers, the small claims procedure is already set-up to handle these types of claims. It provides a process for resolving straightforward legal disputes which is quick, cost-effective, accessible and efficient. Most importantly, it achieves high levels of consumer satisfaction.

At the moment, though, the small claims process in Scotland excludes all personal injury claims. Yet some low value, low complex, but high frequency personal injury claims such as whiplash are well-suited to the simple, user-friendly small claims system. In England and Wales, where personal injury cases are included in the small claims track, consumers report high levels of

satisfaction, with research showing that a majority would be willing to use it again<sup>2</sup>.

We therefore advocate including personal injury claims with the small claims track.

#### **5. Are there any other issues which impact on access to justice in Scotland which the review should consider?**

Justice is not simply about ensuring pursuers receive fair compensation within a reasonable time, it is also about ensuring that the pursuer makes as full and speedy a recovery as possible. Rehabilitation should therefore be a key component of any compensation system, and any review of the Scottish regime should consider how to promote and encourage early rehabilitation for pursuers.

Poor occupational health does not just mean disadvantage, social exclusion and poor health outcomes for those unable to work. It also leads to lost competitiveness for the economy. Unfortunately, it is currently undervalued in Scotland.

Because rehabilitation reports are discoverable documents, some insurers fear that they may prejudice a subsequent claim and, therefore, are reluctant to offer this type of care before liability is admitted. Further, scale costs are relative to the value of a claim: any measures that might reduce the overall level of damages are viewed with suspicion by some pursuer lawyers. However, in two-thirds of cases where it is provided, rehabilitation speeds up return to work<sup>3</sup>.

Accordingly, this review should consider how to promote rehabilitation in Scotland.

Early notification of claim is key to rehabilitation. The earlier an insurer finds out about a claim, the earlier they can make an offer of rehabilitation. Providing rehabilitation early is important for ensuring that the pursuer makes the best and quickest possible medical, social and psychological recovery.

Further, in England and Wales, insurers and lawyers have worked together to develop a voluntary rehabilitation code, which should be considered for all personal injury claims. The Rehabilitation Code is designed to ensure that the pursuer's need for rehabilitation is assessed and addressed as a priority, and that the process of doing so is followed on a collaborative basis by the pursuer lawyer and the insurer.

We advocate the introduction of a similar rehabilitation code in Scotland.

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<sup>2</sup> Department for Constitutional Affairs, 1997

<sup>3</sup> ABI

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

The burden of high legal costs is particularly great in cases low value claims, despite the fact that there is no dispute about liability in a the vast majority of them: UK Government research shows that there is no significant liability dispute in 80% of cases<sup>4</sup>.

For the reasons set out in our response to question 3 (above), the small claims process should include low value personal injury claims.

For personal injury claims above the limit of the small claims process, a new method is needed for dealing with the majority of straightforward claims. The current disproportionately high legal costs not only discourage some pursuers from making a claim, they also push the cost of insurance up for all customers. Therefore, there is a strong case for finding a new way of processing low value personal injury claims more efficiently.

Early notification of claim is key to speeding up the claims process because it takes longer to investigate incidents that happened many months ago than more recent incidents.

Insurers should be given the opportunity to investigate claims first. If they agree they are liable, the claim could then move immediately into the next stage of the process: negotiating settlement. There would be no need for the pursuer-representative to conduct their own investigation to prove liability. Removing duplication of work in this way would speed up the claims process and reduce legal costs.

There should be a simple process to negotiate the level of compensation: we advocate defined timescales within which both sides should attempt to agree a settlement. Where the amount of compensation cannot be finalised within the timescales, the claim should be referred to a judge for determination.

This type of system – with early notification of claim, no duplication of work, quicker admissions of liability, and a simple process for negotiating quantum – would deliver faster and more efficient compensation.

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

**2. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?**

Consumers of legal aid are not exposed to any costs or risk and therefore Government rules and regulations are required to prevent costs from spiralling out of control. Disproportionate costs are not consistent with the 'proportionality' criterion of 'access to justice'.

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<sup>4</sup> Department for Constitutional Affairs, DCA Research Series 2/06, Fenn, Gray, Rickman and Mansur, *The funding of personal injury litigation*, February 2006

The consultation suggests that a lower proportion of Scots qualify for legal aid than in previous years. There is therefore a case for looking at alternative methods of funding to ensure that people can bring claims without worry of losing money: promotion of 'before the event' (BTE) legal expenses insurance would be a sensible way forward. BTE insurance provides cover against the future risk of making or defending a legal action, whether in court or not, and is usually available with an existing insurance policy such as motor insurance.

**9. Should legal expenses insurance, including 'before the event' and 'after the event' insurance, have a greater role to play in the funding of litigation in Scotland?**

Ensuring that people are not deterred from bringing meritorious claims on the basis of cost should be a fundamental element of any justice system. The consultation document observes that cost can be prohibitive for some pursuers in Scotland; it is vital that this is addressed.

Legal expenses insurance allows pursuers to bring a meritorious claim without fear that they will lose money should the claim fail. There are two types of legal expenses insurance: 'before the event' (BTE) and 'after the event' ATE. BTE insurance provides cover against the legal costs arising from a future incident, while ATE insurance covers the pursuer against the legal costs arising from an incident that has already happened. We suggest in our response to question one, chapter one, that insurers should be given the opportunity to accept liability before the pursuer-representative incurs significant cost. Under these circumstances, once the defendant has admitted liability, there would be no risk to the pursuer and, therefore, ATE insurance could not be justified. Of course, should the defendant deny liability, it would be appropriate for the pursuer representative to arrange ATE cover.

**Chapter 4: the structure and jurisdiction of the civil courts**

**6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?**

With less complex procedures, lower costs and more efficiency the sheriff court is ideally suited to resolving lower value claims: the sheriff court is able to deal with personal injury claims on average 25 weeks quicker than the Court of Session, and the cost of bringing a claim there is on average 25% less than for an equivalent claim in the Court of Session. It would therefore seem sensible for the majority of low-value straightforward personal injury claims to be handled by the sheriff court. The Court of Session, with its increased case management, judicial intervention and broader regime regarding pleadings and evidence is more proportionate to higher value, complex claims.

At present, pursuers have the option of raising any personal injury action with a value of £5,000 or more in the Court of Session. In 1999, 21% claims brought in the sheriff court were for £30,000 or more. As evidence shows, the sheriff court is able to handle personal injury claims up to £30,000 within

shorter time scales and with lower costs. It would therefore make sense for all of these claims to be dealt with in this court, and the Court of Session to be reserved for high-value claims only (over £30,000).

However, the ABI recognises that allocating cases to different procedures based solely on their value does not itself ensure that they are dealt with in a way which is proportionate and efficient. The choice of court in which a claim is brought should be based upon a number of different factors rather than value alone including the issues involved, the geographical location of interested parties, the numbers of experts required and the amount of expert evidence. Any cases which fall under £30,000 and which the pursuer believes would be better suited to the Court of Session should be individually assessed by the courts on the basis of these factors to determine which procedure is most suitable.

## **Chapter 6: working methods of the civil courts**

### **1. What are the advantages and disadvantages of pre-action protocols?**

Pre-action protocols can be an extremely useful tool in resolving a dispute efficiently. They encourage a more cooperative approach to dispute resolution, allowing parties to obtain the information they need to make an appropriate settlement or offer of settlement within reasonable timescales and at a reasonable cost.

### **3. Should compliance with pre-action protocols be voluntary or compulsory?**

The Forum of Scottish Claims Managers agreed a voluntary personal injury pre-action protocol with the Law Society of Scotland which has been in place since January 2006. The basis of the protocol is ensuring that adequate information is provided early in proceedings for the defendant to make a decision on liability.

To realise the full benefits of the pre-action protocol, it is essential that it is enshrined within court rules. Without potential sanctions where a party does not take up or comply with the protocol, there will always be parties who remain unwilling to adopt a more cooperative approach. This builds delay and cost into the process, to the detriment of the pursuer.

The ABI would therefore wish to see the current voluntary personal injury pre-action protocol enshrined within court rules.

### **17. Should civil jury trials be retained?**

The issue of trial by jury, particularly for personal injury actions, should be carefully examined within this review.

Assessment of damages in a jury case is left largely to the members of the jury with little intervention from the judiciary. Judges are not allowed to offer guidance on the amount of the award for general damages and jurors are not referred to the JSB Guidelines or any other indicative tariff of damages. As a

result, awards for general damages are often far above what a pursuer would be awarded by a judge. In one case, a pursuer was awarded £120,000 for an elbow fracture which, following surgery, did not affect his quality of life. This was reduced to £95,000 on appeal. Compare this to the highest award for general damages made by a Lord Ordinary which was £115,000 for a woman rendered quadriplegic.

Insurers believe that jury trials should be abolished because awards for damages are unpredictable and can be unreasonably high; there is no effective process of appealing a jury award; the threat of a jury trial is used as a tactical measure by pursuer-representatives to force a higher settlement offer from defendants; the unpredictability of jury awards affects the defendant's chance of making an effective tender; and jury trials drive up the cost of litigation which has to be met through increased taxes, charges and insurance premiums.