



RESPONSE

by

FORUM OF INSURANCE LAWYERS (SCOTLAND) (FOIL)

to

CONSULTATION PAPER

by

THE SCOTTISH CIVIL COURTS REVIEW

March 2008

CONTENTS

| | Page nos. |
|--|------------------|
| GENERAL | 3 |
| CHAPTER 1: INTRODUCTION | 4 – 5 |
| CHAPTER 2: ACCESS TO JUSTICE | 6 - 7 |
| CHAPTER 3: THE COST AND FUNDING OF LITIGATION | 8 - 9 |
| CHAPTER 4: THE STRUCTURE AND JURSDICTION OF THE CIVIL COURTS | 10 – 19 |
| CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES | 20 - 24 |
| CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS | 25 - 31 |

GENERAL

The Forum of Insurance Lawyers (FOIL) is a UK wide association of lawyers who act predominantly or exclusively for insurance clients (excluding legal expenses insurers).

Amongst the aims of FOIL is the exchange of information among its members, the development of expertise in insurance related issues through education, and the monitoring and advancement of law reform on matters of interest to insurers.

FOIL is structured on a regional basis. There are 10 regions within the UK with each region having a representative to chair and coordinate meetings and business within the region. Scotland is a region on its own. The Scottish region is an active group and focuses on issues affecting insurers under the Scottish legal system.

Following the publication of the Review's Consultation Paper at the end of November 2007 the Scottish region established a working sub-group of 5 experienced practitioners. This sub-group met on a number of occasions between December 2007 and March 2008. The sub-group produced a draft response to the various questions in the Paper and this has recently been discussed and agreed by the Scottish regional group.

FOIL will be very pleased to cooperate in any further consultation which the Review considers appropriate.

GLASGOW
28th March, 2008

Responses to questions posed at the end of the various chapters in the consultation document.

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?**

We agree that the civil justice system should be designed to encourage the early resolution of disputes, preferably without resort to the courts. Individuals who have compensation claims and the insurance industry wish claims to be resolved as quickly and economically as possible. These are common goals. Litigation adds cost, time and, in some cases, stress to the resolution process. The aim then should be to have in place, as part of our civil justice system, the machinery that allows claims to be settled pre-litigation.

Since 1st January 2006 a voluntary pre-action protocol has operated in relation to the resolution of disputes. The protocol was devised following negotiations between the Law Society and representatives from the insurance industry. It is primarily designed to apply to personal injury claims worth less than £10,000, excluding medical negligence and disease claims.

Views differ as to whether the pre-action protocol has been a success. Anecdotal evidence gathered by insurers suggests that many claims have been settled successfully under the protocol. Whether those claims would have settled anyway, even if a pre-action protocol had not been in place, it is difficult, if not impossible, to tell. What can be said is that the pre-action protocol gives a structure and timescale for the resolution of claims that was absent prior to 1st January 2006. However there are at least two ways in which the existing protocol could be improved. Firstly, consideration should be given to making the protocol compulsory. Secondly, to ensure that there is a coordinated approach throughout the claim resolution process, non compliance with the protocol should be the subject of expenses sanctions in the event that court proceedings are raised.

In summary, FOIL's opinion is that the existing pre-action protocol should be reviewed as part of the current review of our civil justice system. There is no reason too why the protocol should not be extended to deal with other types of claim and higher value claims.

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

FOIL agrees that the principles and assumptions discussed in paragraphs 1.11 – 1.14 are a sound basis for the development of the reviews recommendations. The issue of proportionality is important, particularly in low value claims. Under the existing system the costs of litigation can quickly exceed the amount of money at issue. The desire for proportionality is linked to the need to have a cost effective system for dealing with low value cases. (See the answer to question 6 in Chapter 2).

- 3. Are there are any matters within the reviews' remit about which you have concerns, but which are not dealt with in this paper?**

No. The remit of the review is very wide ranging and the Consultation Paper is a comprehensive document that would appear to cover most of the relevant issues. There is one matter that FOIL considers should be looked at in more detail. That is the suggestion that a system of compulsory before the event ("BTE") be introduced in the United Kingdom. Detailed research could be commissioned, with input from the insurance industry, the legal profession and any other interested parties. The primary aim of such research would be to carry out a cost benefit analysis to determine whether the introduction of "BTE" insurance in

the United Kingdom would improve access to justice and, if so, at what cost. Comparative research on the availability and use of “BTE” insurance in other jurisdictions would assist greatly in understanding the benefits that might be gained from a system of compulsory “BTE” insurance.

CHAPTER 2 - ACCESS TO JUSTICE

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

Public legal education has a vital role to play in improving access to justice. It is important that the public are made aware of the choices that they have in resolving disputes. In particular, it is essential that the public understand that there are alternatives to litigation. Legal education also has a role to play in explaining the different ways in litigation and the other methods of dispute resolution. For example, there is a general lack of awareness among the public of before the event or "BTE" insurance. Often "BTE" insurance is taken out as a low cost extension to motor or household insurance policies. Some members of the public are not aware that they even have "BTE" cover, the original policy having been taken out many years ago and renewed on an annual basis. Others who do not have "BTE" insurance might very well be interested in effecting "BTE" cover if they were aware of the cost of such insurance as compared against the potential cost of litigation. The Executive, the Law Society and the insurance industry could all have a role to play in promoting the use of "BTE" insurance as a means of funding litigation. In FOIL's view, the earlier that public legal education is introduced the better. There is no reason why a form of legal studies should not be taught in schools, perhaps as part of the modern studies curriculum.

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?

FOIL's experience is primarily in relation to insurance litigation. Although the number of Solicitors and legal firms providing advice on insurance related matters has declined in the last decade, there are still more than enough Solicitors practising in this area of law in Scotland to meet the demand. Put shortly there is no unmet need from the insurers point of view. Although not directly within FOIL's area of expertise, it is considered that there can be difficulty in gaining access to appropriate specialist legal advice in some rural areas. There are also some subject areas, for example some aspects of consumer and housing law, in which there would appear to be gaps in the market.

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?

Potential litigants should always have the opportunity of taking legal advice before entering the court process. The Rules of Court, particularly in relation to low value claims, should allow parties to represent themselves where they wish to do so. However there are certain types of claim where it is more difficult for parties to represent themselves. Personal injury claims sometimes raise issues regarding the merits and quantum that would be difficult for a party litigant to present effectively in court, without legal representation. There is an equality of arms issue too in that the defender in a personal injury claim will almost always have access to legal advice via his insurer or otherwise.

4. What contribution, if any, can (a) "self-help" services for party litigants and (b) court based advice services make to improving access to justice?

We refer to answer 3 above. This is an area which requires the involvement of a solicitor, if justice is to be done. For that reason we consider that the provision of "self-help" services for party litigants and court based advice services have no role, or at least a limited role to play in personal injury litigation.

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

No.

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?

There is a basis for having a simplified system for dealing with low value personal injury cases, particularly those cases in which there is no dispute on liability. The issue of proportionality is very relevant here. Up to a level of, say, £5,000, cases could be dealt with on a “fast track” basis, with limited judicial involvement, simplified pleadings and restricted use of expert evidence. A new lower level or “third tier” within the sheriff court could be created to deal with low value cases of this nature.

FOIL does not accept that there is any basis for the introduction of a Personal Injuries Assessment Board, similar to the board currently operating in the Republic of Ireland. It is not accepted that the assessment of damages claims by an administrative board is the appropriate way to proceed in the interests of justice. Both parties have the right to have a claim quantified by a qualified and experienced judge. The element of discretion that involvement of the judiciary brings is essential in the proper administration of justice and in the proper quantification of personal injury claims. A further concern is the cost that would be generated by the setting up of a Personal Injuries Assessment Board. The setting up of a “PIAB” could simply add an extra layer of costs to the resolution process, if those who apply to the board are not satisfied with the Board’s assessment of damages and choose to litigate. The position in Ireland is different. It is understood that the “PIAB” in Ireland was established to deal with a particular problem that had arisen in relation to costs.

CHAPTER 3 – THE COST AND FUNDING OF LITIGATION

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

The representatives of FOIL are to provide details separately regarding the legal expenses in litigation and how they compare with sums awarded.

- 2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?**

The cost of litigation is not a deterrent only for the very poor (who may receive full legal aid) or the very rich. For the vast majority of people who fall outwith the parameters of the legal aid scheme and who are not wealthy, the cost of litigation may act as a deterrent. However, there are increasingly other funding methods available for people to vindicate their rights. Legal expenses insurance is widely available. Many firms acting for pursuers are prepared to do so on a speculative basis. It is perhaps true to say that the “good cases” (those with more than 51% chance of success) will find funding of one sort or another, but “bad cases” will not. To that extent, the fact that the cost of litigating may deter people from pursuing or defending cases is a good thing in that the cost acts as a control mechanism upon the amount of litigation within the system.

It has to be recognised that defenders will generally have limited visibility of “good cases” which are not pursued for want of funding. Whilst it has to be accepted that some good cases may not be litigated on grounds of cost, most such cases are .

- 3. Does the current system of court fees affect the access to justice? If so how and in what kind of cases?**

The current level of court fees is relatively modest and is unlikely, of itself, to affect access to justice.

- 4. Are the current rules for recovery of judicial expenses satisfactory?**

Yes.

Although the rules for recovery of judicial expenses do not allow for the full recovery of expense the levels of expenses are sufficiently significant to represent a reasonable risk factor to be taken into account when considering either bringing or defending cases in court, without acting as an insurmountable barrier to access to justice. There have to be control mechanisms within the system so that judicial resources (which wherever they are to be found will be relatively scarce and expensive) are used to best advantage. A system whereby full recovery of expenses is possible may encourage more spurious claims. Paradoxically a system whereby each side meets their own costs allied with substantial success fees being taken from recovered damages (as in the United States model) again may encourage spurious claims. The Scottish system whereby a reasonably substantial contribution to expenses can be expected by the successful party nevertheless encourages a prudent approach to litigation.

- 5. Are the current arrangements for the taxation of judicial Accounts of Expenses satisfactory?**

Broadly yes. There may be issues of speed and consistency as between different sheriff court auditors and within the Court of Session the audit process is expensive. There is currently no opportunity to “tender” on the question of expenses and there may be merit in introducing such a procedure.

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

A pursuer in receipt of advice and assistance or legal aid is at a considerable advantage in pursuing a claim. Subject to his or her contribution (if any) that pursuer runs little risk in respect of expenses should an adverse finality be made against him. A defender facing a legal aided pursuer always has to consider the very real possibility that any victory may turn out to be one achieved at substantial cost.

Clearly removing advice and assistance or legal aid from civil claims would adversely affect access to justice in that alternative funding arrangements would require to be made in those circumstances. Likewise, as the rules related to legal aid become more restrictive the number of those ineligible increases and without alternative funding arrangements inevitably access to justice will become restricted.

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

It is difficult to gauge an accurate answer to this question from the defender's perspective. There may be geographic areas of the country where legal aid is no longer offered and that clearly has an impact on one funding stream for litigation. Likewise unless firms of solicitors are reasonably specialist in litigation particularly of civil claims for damages it is unlikely that they will have ready access to insurance based funding arrangements or be prepared to use those solicitors. However it would be wrong to overplay this risk. Already the trend in recent years is for significant personal injury actions to be channelled to that of a small number of expert solicitors in larger centres who will be able to assist in obtaining funding.

8. What impact have speculative fee arrangements had on access to justice?

Speculative fee arrangements have inevitably improved access to justice.

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

This is a difficult question to answer from the defender's perspective. Clearly in the defender's own interest it is not appropriate for there to be any increase in insurance cover except insofar as it would enable a successful defender to recover expenses. Legal expenses insurance may be encouraged instead of legal aid. For overall access to justice, dismantling the legal aid system would probably be a detrimental step and therefore if legal expenses insurance is to be encouraged the impact of that ought to be considered.

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

Of itself, this ability is unlikely to have a significant impact on litigation in terms of increasing the number or quality of cases which are litigated. It may serve to increase the number of "not so good" cases which are litigated on the basis that one of the risk factors in litigation is to be removed. In terms of the overall health of the system that may be regarded as a bad thing. Alternatively, if the aim is to improve access to justice for all and any claims no matter how good or bad then clearly allowing recovery of after the event insurance from unsuccessful parties ought to be encouraged. That is not FOIL's view.

CHAPTER 4 – THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

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

Yes.

There is much anecdotal evidence of delays and disruption in civil business, particularly in small sheriff courts. It is accepted that it is in the public interest for criminal cases to take priority. However, this invariably, particularly in outlying small sheriff courts, leads to delay in disposal of civil cases causing further expense and considerable inconvenience to witnesses and parties. Such delay is extremely expensive when the combined time of lawyers, parties and witnesses (including expert witnesses) is taken into account. On any view this is entirely unacceptable.

2. Should (a) some judges of the Supreme Courts, and (b) some sheriffs be designated to deal with civil business?

This question is inextricably linked with the issue of the privative jurisdiction of the sheriff court. If this was increased to say £100,000, or indeed £250,000, particularly for personal injury cases, then the need for designated civil judges in the Supreme Courts would probably be reduced.

Even if the privative jurisdiction of the sheriff court was increased along the foregoing lines given the volume of criminal business, particularly in large sheriff courts such as Glasgow, there must be some doubt as to whether under the present structure it would be practically possible to have sheriffs exclusively designated to deal with civil business. It is the view of FOIL that at sheriff court level there should be a split between the civil and criminal work. See further the response to question 3.

3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

Yes.

This is essentially an issue of specialisation. The obvious general advantage would be that both criminal and civil business would be capable of being disposed of more expeditiously than under the current arrangements. Delays and disruptions to civil courts caused by the proper requirement for criminal business to be given priority would disappear. Such delays and disruptions are particularly expensive and wasteful where they occur in outlying sheriff courts. It is acknowledged that in smaller courts it may be more difficult to provide separate accommodation for criminal and civil business. It is however submitted that there is no need to have 49 sheriff courts in Scotland dealing with both the civil and criminal business. The concept of regional civil justice centres is sound. It ought to be possible for such centres to be accommodated in the main cities, say Glasgow, Edinburgh, Dundee, Aberdeen and Inverness. Perhaps also in Perth, Oban and Dumfries. The precise locations ought to be determined following an assessment of the volume of civil business.

It is contended that there is a need to balance local justice with expediency. It is felt that criminal courts ought to be accessible at local level. This does not necessarily have to be the case for the bulk of civil cases. Such cases ought to be handled at regional level. The breadth of civil law is now so wide that practitioners have had to specialise, eg in personal injury, commercial law, family law etc. In the same way sheriffs ought to specialise. The number of specialists ought to be determined by the volume and type of work.

It is accepted that in certain civil cases, eg child welfare, that local access to justice would be appropriate to avoid lengthy travelling arrangements. In such cases it may be appropriate to

have certain floating family law sheriffs who could attend a suitably located “local” sheriff court to avoid undue travel by parents and children to the regional justice centre. It is of course the case that under existing arrangements many parts of the country do not have readily accessible sheriff courts eg. some of the islands.

A possible disadvantage of a split between civil and criminal divisions is that this may discourage practitioners from seeking judicial office. Of course the same reasoning could be applied in reverse, ie the lack of opportunity to focus on a particular specialist area could well deter excellent specialist candidates from applying to become sheriffs. See also response to question 4.

4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of cases and in which courts?

Undoubtedly.

As has already been highlighted most court practitioners (ideally after some years of general practice across a range of areas) sooner or later specialise in particular areas of law. Such specialisation is inevitable given the very wide spectrum of law which has evolved during the last 30 years or so. This process does of course reflect changes in social and economic activity. Specialisation by practitioners and judges ought to lead to faster and fairer disposals.

The main broad areas of specialisation ought to be in the fields of reparation (particularly personal injury), commercial (including contractual disputes and personal/corporate insolvency, intellectual property and competition law), and family law.

There may also be justification for a specialist (or “third tier”) court to handle what might be described as consumer/welfare/social housing law. Such a court would allow a suitable qualified judge to focus on the plethora of housing/consumer disputes and ensure the expeditious progress of such cases in a fair and transparent manner.

It is considered that the Court of Session should focus on appeals and on first instance cases which are particularly complex and/or involve large sums of money. Examples of such cases would be catastrophic personal injuries where damages of millions of pounds are involved, complex contractual disputes, including intellectual property disputes, and cases involving major public law issues, eg devolution issues, election petitions, major judicial reviews.

If the privative jurisdiction of the sheriff court is raised very substantially (to say £250,000) this would ensure that valuable time of senators is spent on cases involving complexity, high value and/or matters involving major points of law. This would be, it is submitted, a good use of the valuable time of senators who would focus on the development of the law of Scotland. This would enable guidance to be provided to the lower specialist sheriff courts in determining volume and less complex cases involving commercial disputes, personal injury actions and family law.

It is contended that it is wholly inappropriate for senators of the college of justice to spend a significant proportion of their time on low value personal injury cases. Although by far the majority of personal injury cases settle, and this is increasingly the case under Chapter 43 procedure in the Court of Session, such procedure still takes up a significant proportion of the time of senators in dealing with incidental motions and of course a very large proportion of administrative time of the supreme court is taken up with such cases.

Power to remit cases between the Court of Session and the sheriff court should remain to enable the courts to exercise discretion in appropriate cases of novelty, complexity or as the case may be simplicity.

There would be less need for senators to specialise in civil cases in the event of a significant reduction in first instance cases, particularly those involving personal injury and personal insolvency. Perhaps specialisation would be appropriate in the consideration of appeals whether in the Inner or Outer House level.

It is contended that specialisation in the sheriff court in the areas of personal injury, commercial and family law, is essential.

5. What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?

Key Influencing Factors at Present

- (a) The perception that in many sheriff courts there is a distinct prospect that the sheriff may not have detailed knowledge and experience of the subject matter of the cause.

This leads in our view to many low value personal injury cases (which generate higher and disproportionate expense) being raised in the Court of Session. Such cases ought to be capable of effective disposal at specialist sheriff court level.

- (b) The value or complexity of the subject matter of the case. Clearly complex cases of high value, eg a personal injury case where the pursuer has been rendered tetraplegic or a contractual dispute involving hundreds of thousands/millions of pounds, ought to be raised in the Court of Session.

It is suggested that cases of complexity/high value justify the knowledge, skills and experience of a senator. Focusing on fewer and more complex cases will enable senators to scrutinise and develop the law for the benefit of the lower courts.

- (c) In personal injury cases the entitlement to a jury trial in the Court of Session. It is contended that civil jury trials ought to be abolished (see detailed response to question 17 of Chapter 6).

- (d) Some firms are “geared” to running cases in the Court of Session via case management systems.

It is submitted that against a background of a specialist and efficient sheriff court system the main factor which ought to influence the decision to choose either the Court of Session or sheriff court should be the cost of litigating relative to the value/importance of the case. Against such a background most litigation ought to be conducted and disposed of in specialist sheriff courts, the location of which should depend on the volume of business and available resources.

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

- (a) Court of Session.

Nobile officium.

Public law issues, eg devolution issues under the Scotland Act 1998

Declarators of Incompatibility under Human Rights Act 1998

Judicial Review

Election Petitions

Exchequer Cases

Defamation

Actions of Reduction

Petitions dealing with Company Law where the paid up capital exceeds say £250,000 (£500,000?)

(b) Sheriff Court

Actions where the sum sued for does not exceed the privative level. There is a strong view that this level should be increased very substantially, perhaps initially at £100,000 and after a transitional period to enable specialisation to make an impact this could be raised to £250,000 – unless the subject matter falls within the exclusive jurisdiction of the Court of Session as above, eg defamation.

NB – As touched on in the response to question 4 it is suggested that there is merit in the sheriff court having a specialist court to handle the many and varied social housing and low value consumer law disputes.

It is considered that the sheriff court and the Court of Session ought to have concurrent jurisdiction in actions where the sum sued for exceeds the privative level of the sheriff court (subject of course to those types of action in which the Court of Session has exclusive jurisdiction).

7. Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

No. It is considered that the hierarchy of the lower and Supreme Court structure (as restructured as per the views detailed herein) provides the necessary balance and flexibility to achieve a fair and efficient disposal of cases at proportionate cost.

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, it is contended, retain its “first instance” jurisdiction in cases of major importance and high value. It is essential that in the major areas of public law involving issues such as the exercise of powers by the state or where vast sums of money are involved in a dispute there is the weight, knowledge and skill of a Supreme Court to properly scrutinise and determine such cases of major importance and high value. Such an approach is entirely in keeping with the concept of proportionality set out in the remit to the Review. This would also enable senators to keep up to date with developments across a whole range of law. Detailed scrutiny by a Supreme Court also assists lower courts in determining complex points of law. Furthermore, it is important that a lower court is able to remit complex cases to a higher court.

9. If the current structure of the court is retained, at what level should the privative jurisdiction of the sheriff court be set?

This is one of the most important issues in the whole discussion document. It is the view of FOIL that a privative limit of £5,000 is far too low. If we are going to have specialist judges at sheriff court level, particularly in the field of personal injury, they ought to be able to relieve the Court of Session of a substantial volume of personal injury cases. Specialist sheriff courts would be able to handle such cases at less cost than in the Court of Session thereby fulfilling one of the major objectives given to the Review, ie ensuring that cases are dealt with in a way which is proportionate to the value, importance and complexity of the issues raised. As indicated in our response to question 6 of this chapter FOIL contends that the privative jurisdiction of the sheriff court must be raised very substantially. In FOIL’s view the level should be at least £100,000 with it being increased to at least double that limit following a reasonable period of transition and for the benefits of specialist sheriffs to be realised.

FOIL would wish to make it clear that they greatly support a specialist independent Faculty of Advocates. Equally FOIL does not believe that it is a good use of resources for members of

the Bar to be regularly involved in low value road traffic PI cases. It seems to FOIL that such a situation is what the remit to the Review is seeking to avoid.

10. Are the current powers to transfer cases between sheriff courts and between the Court of Session and the Sheriff court satisfactory?

Current procedures are probably not flexible enough to enable inter sheriff court transfers to be carried out within the sheriffdoms thereby allowing greater use of existing resources which in turn would facilitate speedier disposal of cases.

11. Given the range in value and complexity of civil business in the sheriff court should there be a tier of civil cases below the level of the sheriff court?

This again revolves around an issue of specialisation. In our view there is a case for a specialist court (probably within the sheriff court structure) presided over by a legally qualified judge to handle the plethora of cases which arise under social housing and consumer law. Such cases will invariably include all small claims (now up to a value of £3,000). The court could be analogous to the district court (soon to be JP court) for criminal cases presided over by a Stipendiary Magistrate.

As touched on in our response to question 4 such a court would enable (a) judicial expertise in these areas of the law; (b) a more inquisitorial approach; and thereby (c) facilitating a speedy and just disposal of cases.

12. Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?

This question is essentially covered by the answer to question 11.

Whether the specialist “small claims/social housing/consumer” court is established as part of the sheriff court or whether it be established as a separate tribunal ought to be decided by reference to available accommodation and resources within the relative sheriffdom or region.

13. Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

The fundamental difficulty is again one of lack of specialisation.

While in theory the local sheriff court provides the advantage of closer physical access of justice the difficulty is that the presiding sheriff may not have the necessary specialist knowledge to properly deal with the case in question. This lack of specialisation is compounded by the delays and disruptions in remote courts as highlighted in answer 1.

The ideal would of course be for specialists to be available in every local court by the resources are clearly not available for such a utopian structure.

In the same way that hospitals require to specialist so must also the sheriff court system. Someone requiring a hip operation on the Isle of Arran for example requires to travel to Crosshouse Hospital in Kilmarnock to have such surgery carried out. (As it happens they would in any event have to travel to Kilmarnock Sheriff Court to attend for the disposal of their legal business!)

No matter where a court is located it will not be convenient for everyone. The location of specialist courts must therefore be determined by case volumes the majority of which are likely to emanate from the main centres of population in Scotland ie. within a radius of say 30 miles of the major cities.

We consider that there is a very strong case for regional civil justice centres so that civil business can be separated from the ever increasing volume of criminal work. Such civil justice centres ought to be located within regions (perhaps as per existing sheriffdoms) with specialist courts the locations of which ought to be based on careful scrutiny of volumes, types of cases (over say the last five years or so) and of course available accommodation. If resources are not currently available for the construction of new sheriff court buildings for such specialist courts then a better use of existing buildings could be made. Funds could also be made available through the sale of those sheriff courts which become redundant. Indeed, suitable premises could be leased.

As touched on in answer 3 it is acknowledged that in certain types of civil cases local access is desirable (eg. child welfare cases) but this is not always available.

14. Are the current arrangements for dealing with undefended cases satisfactory?

We are not aware of any difficulties here. Logically it makes sense for the court in which the action is raised to issue the extract decree (whether the Court of Session or relative sheriff court).

15. Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?

It is submitted that the arrangements for judicial review procedure in the Court of Session are satisfactory. However we consider that in the same way that the Court of Session should be decluttered of relatively small value/non complex actions (particularly in personal injury cases) it can be argued that it should not be burdened with judicial review of administrative decisions where the body in question is a private club such as golf club. The principles on which such cases are determined (ultra vires, natural justice, gross error in procedure, etc.) ought to be capable of being determined by a sheriff.

16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by an administrative rather than judicial process? For example are the current arrangements for the disposal of commissary business satisfactory?

Commissary business ought to be capable of being handled administratively. In practical terms this is what happens. However given the legal issues involved with Petitions for the appointment of executors dative these are essentially judicial matters. There is no real difference here between those petitions and petitions for the appointment of a trustee in a personal sequestration or a personal insolvency or a liquidator, receiver, administrator, etc. in a corporate insolvency.

Other procedures are perhaps not essentially judicial in nature such as consideration of notarised inventories/applications for confirmation. It may be more appropriate for such business to be dealt with by the exchequer whether via the HM Revenue & Customs/Capital Taxes Office etc.

Of course any saving in resources within the sheriff court will cause additional resources to be found in other government departments.

17. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?

There is a certain logic for having an all Scotland sheriff court. This would on the face of it provide opportunities for economies of scale, administrative savings and uniformity in the operation of sheriff clerk procedures.

Such a model may also be able to harness information technology more effectively (at least in theory) and control the use of overall resources in a better fashion than at present. At first glance this approach seems attractive since it appears to answer that part of the remit to the Review which seeks to identify changes which make the best use of resources.

However we have concerns with “an all Scotland” sheriff court model. Although Scotland is a relatively small country with a population of around 5 million it is rich and varied in its geography, its people, its cultures and its economic activities. As already highlighted elsewhere in this response we believe that at the core of the Review’s remit is the issue of access to justice. It seems to us that the overall boundaries of the six sheriffdoms in Scotland probably reflect the diversity of geography and economic activity to which we have referred. Sheriffs principal are able to gain an understanding of peculiar needs for the efficient access to justice in these regions. It is suggested that total centralisation of procedures and resources would dilute the quality of access to justice, at least in the eyes of the local people concerned.

It is of course accepted that there is only one Court of Session which in theory is accessible to all the people of Scotland and arguably Court of Session judges do not have the “local knowledge” of a region of Scotland available to a sheriff principal. For the reasons already highlighted in our response to answer 6 we believe that the Court of Session should essentially be an appeal court with its “first instance” jurisdiction being restricted to the major public law issues and private law cases involving complexity and high value.

Power to remit suitable cases to/from the Court of Session/sheriff court should always be available to cover exceptional cases.

The Court of Session’s function ought to be to decide major cases in the fields of public law and private law and thereby develop the law of Scotland for the benefit and guidance of sheriff courts.

Regional based sheriff court arrangements along the lines of existing sheriffdoms also provide fair and meaningful appeal arrangements via the procedure for appeals to the sheriff principal. In contrast an “all of Scotland” sheriff court system could no doubt provide sheriff court appeal judges along the lines of “centralised sheriffs principal”. We believe that this would dilute the concept of local access to justice. On balance therefore we would be disinclined to support the case for a national sheriff court.

18. Is there a case for all sheriffs to have an all Scotland jurisdiction?

Yes. Given the immediately preceding answer it may be thought that our view is that it is appropriate for a sheriff’s commission to be restricted to a region or sheriffdom. However, as we understand it the position currently is that floating sheriffs (and indeed part time sheriffs) can sit in any sheriff court in Scotland. Conferring sheriffs with an “all Scotland” jurisdiction ought to provide greater flexibility when suitable circumstances arise than a restricted commission system.

It may be considered at an “all Scotland” commission system might deter suitable candidates from seeking judicial appointment, given the prospect of regular travel and overnight stays.

19. If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek the leave of the Court of Session to transfer a case there? If so, what factors should be taken into account?

On the hypothesis that the sheriff court becomes the primary court of first instance (which we would favour as per our previous answers particularly answer 6) then the question of remitting from the Court of Session to the sheriff court will presumably only arise in concurrent jurisdiction cases.

If the privative jurisdiction of the sheriff court is raised substantially to say £100,000, or £250,000, the number of cases remitted by the Court of Session to the sheriff court is likely to be relatively small. In personal injury cases for example it is unlikely that a case where the sum sued for is say £500,000 the Court of Session would remit to the sheriff court. Of course if it becomes clear that the sum sued for is grossly excessive and that a realistic value of the case is below £250,000 (or whatever the level of the privative jurisdiction of the sheriff court might be) then the Court of Session should be entitled to remit to the sheriff court (no doubt with a suitable finding on expenses!)

Another example might be in a judicial review involving a golf club/tennis club dispute where the Court of Session considers that the issues are capable of determination by the sheriff court. The main factors are essentially complexity and value.

In relation to a remit by the sheriff court to the Court of Session in addition to complexity and value the novelty of the point of law involved should also be a factor. A case within the privative jurisdiction of the sheriff court (and we would again emphasise that we feel it should be substantially increased to at least £100,000 initially) could be of relatively low value but raise a new point of law.

In such a situation the sheriff ought to be empowered either on the motion of a party or *ex proprio motu* to seek leave of the Court of Session to have the issue heard in that court. The Court of Session ought to give continuing guidance on the factors to be taken into account. In general terms it is considered that novelty, complexity and value are the main factors here.

20. Are the existing appeal arrangements satisfactory?

Having considered this aspect our feeling is that in seeking to achieve the balance between fairness and expediency there should be some restriction in the present appeals procedures.

We consider that in a model of regions or sheriffdoms a party litigating in the sheriff court ought to be able to choose to appeal either to the sheriff principal or directly to the Inner House of the Court of Session. In deciding which route to go down the party will no doubt be advised on the cost implications.

If the volume of cases in the Court of Session is reduced there ought to be greater capacity for dealing with appeals either directly from the sheriff court or from the sheriff principal. Where we believe there is scope for restricting appeals to the Court of Session is in circumstance where the appellant is unsuccessful before the sheriff principal. He will have had two judges find against him. In that scenario we do not believe that he should have an automatic right of appeal to the Court of Session. He ought to require the leave of the sheriff principal to proceed with a second appeal.

In circumstances where an appeal to the sheriff principal is upheld in our view the unsuccessful party ought to have an automatic right to appeal to the Court of Session. This is because there has been a finding by judge in favour of each party.

In relation to the House of Lords our feeling is that where there is a unanimous finding by the Inner House leave of that House ought to be a pre-requisite for appealing to the House of Lords. Where there is a majority decision then we feel that fairness dictates that there should be an automatic right of appeal to the House of Lords.

21. Should the office of Sheriff Principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

It follows from our answers to questions 17 and 20 that we believe that the office of Sheriff Principal should be retained and that the office should incorporate both judicial and administrative roles.

22. Should the majority of statutory appeals continue to be dealt with by the Inner House of the Court of Session?

In the time available we have not been able to carry out a detailed review of the plethora of statutory appeals procedures currently available. Some of these provide for appeal directly to the Court of Session and some to the sheriff court.

It seems to us that in general terms where the appeal relates to a “local” public issue eg. a liquor licensing matter the appeals procedure should be confined within the region or sheriffdom concerned. Thus if an appeal is made against the decision of the local licensing board that ought to be in the first instance to the sheriff and thereafter to the sheriff principal.

If the initial appeal is from a decision of the sheriff then there ought to be a right of appeal to the sheriff principal with a further right of appeal to the Court of Session on the restricted basis outlined in our answer 20.

Where the statutory appeal is directly “to the Court of Session” it seems to us that there would be merit in reviewing the tradition of such appeals going directly to the Inner House.

Where the appeal relates to a wider public issue eg. Inland Revenue Commissioners it seems to us that the appeal should be directly to the Court of Session (whether the Inner or Outer House).

We think there would be merit in the Scottish Law Commission conducting an exhaustive review of statutory appeals with a view to establishing a logical and consistent hierarchial structure for disposing of such appeals.

23. Should there be a limit to the number of levels of appeal through which an action can progress? If so, how many levels would be appropriate? What provision, if any, should be made for exceptional cases and how should these be defined?

In so far as the first and second parts of this question are concerned we would respectfully refer the Review to our responses to questions 20, 21 and 22.

In relation to the third issue (exceptional cases) it is difficult to precisely define what these might be. Like the proverbial elephant, hard to describe but you know it when you see it! Phrases such as “compelling reason” are to a large extent meaningless in isolation. The inherent power of the Court of Session under its *nobile officium* is available, the exercise of which can be sought by a party in circumstances where no other remedy prevails.

24. What are the advantages and disadvantages of reliance on temporary judges and part time sheriffs?

One advantage is that temporary judges and part time sheriffs can be used to supplement capacity at particularly busy/intense periods for the courts.

The danger is one of over reliance on such arrangements in circumstances where permanent appointments are justified.

The system of temporary judges probably works well in the Court of Session where experienced members of the bar are well qualified to handle a variety of cases. In the same way suitable experience members of the bar can also adequately provide temporary cover at sheriff court level.

The main disadvantage is at sheriff court level. This is again related to the ongoing common theme of specialisation. If solicitors or part time sheriffs are able to handle cases within their speciality it follows that the system works well and cases can be disposed of fairly and expeditiously. The converse does of course apply.

There is anecdotal evidence of part time/temporary sheriffs having difficulty with “grasping the nettle” in cases outwith their speciality. This is perfectly understandable and indeed can apply equally to permanent sheriffs handling cases in which they have little experience. For example a sheriff whose experience as a practitioner has focussed on family law will have difficulty in dealing with a complex personal injury case and *vice versa*.

The problem appears to be exacerbated with part time/temporary sheriffs handling cases in the areas of social housing and consumer law. There is anecdotal evidence of sheriffs (perhaps understandably due to lack of knowledge) allowing such cases to drift. The heritable court appears to be a particular example here. This of course is related to the question of the creation of a specialist/third tier court to handle such cases. Whatever the level of such a court it is essential that it is presided over by a judge who has reasonable knowledge of the relevant law involved.

A further advantage of the use of part time/temporary judges and sheriffs is that it provides an opportunity for practitioners to experience the bench. This can be a useful transition to permanent judicial office.

CHAPTER 5 – PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

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

Yes.

The over-riding objective of the rules of court procedure should be the expeditious provision of justice to parties to a civil dispute. While parties should be allowed sufficient time to investigate the issues involved in their dispute and produce documentation or expert reports to support their position, the rules of civil procedure should have as a goal, an early focussing of the issues in dispute between parties. Discussion to explore possible settlement of the issues in dispute should be encouraged by the rules but ultimately, if a settlement is not achievable, a judicial determination of the dispute should be available to parties within a reasonable time.

In the context of personal injury litigation, parties should be allowed sufficient time to make investigations into liability and quantum and obtain expert reports if necessary.

Formal communication by a party to the court and to the other party of the position being adopted on liability and on quantum should be an objective and a requirement of court rules. Fair notice should be given to opposing parties of the line being taken on liability and quantum at as early a stage as possible.

As we state in our answer to question 7 below, procedural duration of a civil court case in Scotland should rarely be longer than a calendar year and the approach adopted under the Chapter 43 procedure in the Court of Session of fixing a provisional timetable for the full life of a case at the outset is a sensible one.

2. **Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?**

In many areas of civil dispute, particularly in family cases or neighbour disputes, mediation is a valuable tool in attempting to address and resolve the issues in dispute between parties. In commercial disputes, where parties may wish to carry on a trading relationship after the dispute has been settled or determined, mediation is also useful.

FOIL's response is addressed primarily to personal injury litigation in Scotland's civil courts. It is submitted that, in the context of personal injury litigation, mediation is not a particularly useful tool.

While solicitors, counsel and insurance company personnel will deal with one another on a regular basis, personal injury court actions are, by their very nature, one off events for the parties themselves. One pursuer is statistically unlikely to have another claim in the future against the same defender or the same insurance company. In the main, the desire to maintain an ongoing personal or commercial relationship after resolution of the dispute does not apply to personal injury litigation. The only major exceptions to this lack of an ongoing relationship are employers' liability claims where the pursuers remain in the employment of the defenders. However, negotiation and settlement of employers' liability claims is usually controlled by insurers, rather than the employers themselves and the pursuer will have no desire for an ongoing relationship with his employers' insurers.

Parties in personal injury litigation are increasingly represented by specialist solicitors and counsel. Personal injury lawyers on both sides of the fence and claims staff within insurance companies build up relationships and methods of dealing with one another to attempt to negotiate settlements.

While fora in which discussions of the issues between parties such as pre-trial meetings should be encouraged or required by the court rules for the purposes of determining those issues likely to require resolution by way of proof, it is submitted that requirement or facilitation of mediation involving a third party is not appropriate in most personal injury cases and should not be part of the rules of procedure applicable to these cases.

There are some personal injury cases, such as those involving catastrophic injuries, where mediation might be of some assistance but FOIL are of the view that it should not be compulsory for parties to personal injury litigation to participate in, or even consider participating in, mediation or other forms of alternative dispute resolution.

3. If so, how should this be done and at what point or points in the progress of a dispute?

Our comments primarily relate to personal injury litigation. We are of the view that use of mediation involving a third party is not generally appropriate in personal injury litigation.

4. Are there particular kinds of dispute in which the use of mediation or other kinds of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.

Our comments primarily relate to personal injury litigation. We are of the view that use of mediation involving a third party is not generally appropriate in personal injury litigation.

5. What form should mediation or other methods of dispute resolution take and how should this be funded?

Our comments primarily relate to personal injury litigation. We are of the view that use of mediation involving a third party is not generally appropriate in personal injury litigation.

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

It will be noted from our response to the questions at the end of Chapter 4 that we envisage civil cases being dealt with within regional centres. FOIL's response relates mainly to personal injury litigation. Solicitors acting for both pursuers and defenders in this type of litigation increasingly work in specialist firms centred in Scotland's cities, particularly in Glasgow and Edinburgh. Even if civil cases are only heard in regional centres, rather than in sheriff courts throughout Scotland, the agents acting for parties will often not be based in the town or city where the court handling the case is located. It is preferable for parties to be represented at hearings, including procedural hearings, by the principal agent rather than a local agent. For this reason, we submit, it is preferable for procedural hearings in civil cases to be conducted by telephone conference call with principal agents being "dialled in", rather than a physical appearance being required. The experience of FOIL members of case management conferences conducted by telephone conference call, under the Personal Injury Pilot Scheme being operated at Glasgow Sheriff Court, has been generally good. Use of telephone conference call should be encouraged for most procedural hearings in civil litigation.

However, we would submit that the presumption in opposed motion hearings should be for parties to be represented in court. There could be provision for submissions by conference call on opposed motions in certain circumstances such as where agents are located far from the court, but where there is genuine dispute on a matter it is preferable for the judge or sheriff to be addressed personally.

There are also situations where use of modern communication methods such as video conferencing could be utilised for hearings on evidence. Perhaps as a consequence of the big firms in personal injury litigation being based in the central belt, medical experts and other

expert witnesses instructed are often also based in Glasgow or Edinburgh. In particular, the time of NHS consultants is valuable. Witnesses being able to give evidence via video conference from their own office or consulting room or a similar location, rather than at court in another part of the country should be considered.

FOIL members have experience of evidence being given by video conference link by witnesses located abroad to avoid lengthy and costly journeys to attend court.

However, it is much more difficult for a court to assess credibility and reliability of a witness via video conference so the presumption should still be that witnesses will be required to give evidence in person unless there is a good reason to depart from that presumption.

Use of email to communicate with the court should be encouraged so that parties can make it clear when a step of process is agreed by both parties, to avoid court time being taken up with routine and unnecessary callings.

Consideration should also be given to the process in civil actions being held electronically. By use of password encrypted intranet, parties could adjust pleadings electronically, cutting and pasting online using a method similar to the paper cut and paste used in pre-1993 ordinary actions in the sheriff court. Environmental considerations mean a paperless process would be a welcome development.

7. To what extent should a court control the conduct of and pace of litigation?

Historically, the courts have not taken a particularly proactive approach to controlling the conduct and pace of litigation. This traditional position was altered to a certain extent by the introduction of revised ordinary cause rules in the sheriff court in 1993 and altered further for personal injury litigation with the introduction of the Chapter 43 procedure in the Court of Session. However, there is still scope for civil actions to be sisted for lengthy periods without any automatic enquiry into the present position by the court.

In the context of personal injury litigation, we would submit that lengthy periods of inactivity are rarely down to the parties themselves and more often due to lack of attention to the case by one or both of the agents involved. With the best will in the world, most solicitors are busy people and without some control by the court over the progress and timetable of litigation, there is a potential for a case to fester.

Parties to personal injury cases do require sufficient time to investigate liability and quantum issues and often need to obtain expert reports. These investigations cannot be done instantaneously and when the parties wish to utilise a particular expert, there may be a wait for that expert to become available. The pursuer will, at times, have a head start on the defender in terms of investigation of a case, and the defender should not be put at a disadvantage in terms of investigations by an overly short timetable.

While there will be cases where further time to investigate a claim will be required, the procedural duration of a case should rarely be longer than a calendar year and the approach adopted under the Chapter 43 procedure in the Court of Session of fixing a provisional timetable for the full life of the case at the outset is a sensible one.

8. What types of case would benefit from (a) judicial case management, and what types of case would benefit from (b) case flow management?

FOIL's submission primarily relates to personal injury litigation so we address our response to this question only to personal injury litigation.

There are currently examples of both judicial case management and case flow management in operation in Scottish civil courts dealing with personal injury litigation.

The pilot scheme operated at Glasgow Sheriff Court for personal injury cases utilises judicial case management whereby, at a pre-arranged time, the allocated sheriff will initiate a case management conference by telephone conference call with principal agents for both parties.

The knowledge that a sheriff will be on the end of a telephone asking the principal solicitor personally what is happening in a case and what the state of investigations into liability and quantum are will tend to cause more concern to that solicitor than dispatch of instructions to a local agent to appear at an options hearing where very little will tend to be asked from the bench about detail of investigations and parties' readiness for proof or debate.

The Chapter 43 procedure in the Court of Session has very little judicial involvement and is case flow management operating mostly very well. The Chapter 43 procedure sets a fixed timetable at the outset with dates by which parties must produce valuations and documents in support thereof and also fixes a date by which parties must have a pre-trial meeting.

One amendment to the Chapter 43 procedure which FOIL suggests is that there ought to be a presumption against vouching, such as expert reports, which are in the possession of parties at the time when their valuations are lodged but are not lodged with the valuations, being received as a production to be relied upon at a later date. If a party has a report at valuation stage but does not lodge it then, then that report should only be received as a production at a later stage on cause shown.

It is the innovation of the pre-trial meeting, which has had the most positive impact from the Chapter 43 procedure. Most cases now settle at or before the pre-trial meeting and in the ordinary course of events will have had no judicial input at all. The threat that parties will be called before a judge if they do not comply with the timetable has generally been enough to ensure parties do comply.

In discussion about this review a question often put has been whether the time of Senators of the College of Justice should be taken up with fairly low value personal injury claims. It is submitted that most personal injury actions in the Court of Session resolve with no judicial time having been taken up at all.

The case flow management model in the Court of Session therefore works well for personal injury claims. A question that then follows from this is; does the model work well simply because it is a good model or does it work well because it is a good model operating in the Court of Session.

One reason why the use of pre-trial meeting in the case flow management model works well in the Court of Session is that all parties have an agent in Edinburgh and Counsel are all at hand in Parliament House. All parties have representatives in Edinburgh so it is fairly easy to arrange a meeting. The same does not apply to cases currently in the Sheriff Court, where agents are spread more widely geographically. Pre-trial meetings work best where principal agents and ideally parties themselves (or their insurers in the case of defenders) are personally present. Negotiations where instructions have to be taken by telephone do not work quite as well, in the experience of FOIL members. However, many cases do settle at pre-trial meeting where parties and insurers are not personally present.

In our submission, the case flow management model works well in the Court of Session not simply because it is operating in the Court of Session but because it is a good model. The model could be transferred fairly easily to sheriff courts and more easily to regional civil courts. In certain situations, meetings could take place by telephone conferencing where agents were based in different locations, although the presumption ought to be for a face-to-face meeting.

We note that it has been recommended by the Sheriff Court Rules Council that the Chapter 43 procedure should be adopted for personal injury cases in the sheriff court.

Case flow management and judicial case management are not mutually exclusive. A case management conference by telephone conference call initiated by the judge or sheriff could be built into the Chapter 43 procedure, perhaps shortly after the defender's valuation is lodged. At the case management conference parties could be asked about the state of their preparations for proof and about what further investigations they still require to carry out.

It is hoped that a reformed civil court structure will make provision for specialist personal injury or at least specialist civil judges or sheriffs, who will be able to play a part in case management of personal injury litigation in the way that the sheriffs taking part in the personal injury pilot scheme at Glasgow currently do.

However, demands on judicial time from criminal business and other civil business such as family actions may well continue to be such that, automatic judicial input into personal injury litigation prior to proof will have to be minimised. The current case flow management model with minimal judicial input works well in the Court of Session and is the model which should be adopted for all personal injury litigation in Scotland. If judicial resources allow, an element of automatic judicial case management in personal injury actions would also be helpful but is not, in our submission, essential. However, if a model with minimal automatic judicial input prior to proof is adopted it is essential that, where parties do not comply with the timetable then the case should be set down automatically for a calling or case management conference so that the party not following the timetable can be asked to explain the position to the court. A "hands off" system in terms of judicial involvement has to be backed up by appropriate sanctions, where rules are not followed.

CHAPTER 6 – WORKING METHODS OF THE CIVIL COURTS

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

Pre-action protocols generally provide that relevant information is given by each side to the other, covering both liability and quantum. It therefore follows that the sides ought to be able to take an informed and measured approach to the claim. If the issues have been accurately identified, then this in turn ought to mean that attention can focus on the area or areas of dispute/disagreement with a view to resolving such areas.

If resolution is impossible, agreement cannot be reached and the case is litigated, the outstanding issues ought already to be clear. This in turn ought to mean resources are focused on the area of dispute with, it would be hoped, a consequent saving in expense.

In a wider sense, the existence of pre-action protocols ought to mean that if the protocol has assisted the parties to focus the issues, then it is less likely cases will proceed to court, thereby reducing litigation and expense.

If a protocol has been in operation for some time and difficulties appear, then it ought to be possible to agree amendments to the protocol to remove these difficulties. Theoretically, at least, it could be argued that with the ability to amend a protocol, there ought not to be any disadvantages.

There may be some types of cases which a protocol simply will not suit, but that is an entirely separate matter from disadvantage.

2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?

Greater use of pre-action protocols can only be advantageous. The use of protocols to cover personal injury in RTA and workplace personal injury cases, for “industrial disease” and professional negligence, will go a considerable way towards including a substantial number of cases where litigation is possible. Given that England and Wales operate with protocols in other areas such as construction and engineering, similar additional protocols should be possible in Scotland.

In the Court of Session there is a Commercial Court Practice Note, which provides for the exchange of information pre-litigation.

There is no obvious reason why if pre-action protocols are to be used, the use should not simply be in advance of litigation irrespective of the court in which the litigation might ultimately proceed.

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

Compliance should be compulsory.

If protocols are to be used, there is little point in making that use voluntary. Whether through inexperience or worse, allowing a party not to use a protocol, because use is voluntary would seem to defeat the ultimate purpose of a protocol, namely to assist in achieving a resolution and cutting down on litigation and expense.

The protocols should be part of the Rules of Court. Current voluntary protocols should be reviewed before becoming part of the rules.

4. Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points in proceedings and what criteria should the court apply in deciding whether leave should be granted?

In respect of the commencement of proceedings, party litigants in the Court of Session already require leave. This provision should be extended to cover actions in the sheriff court.

Consideration should be given to whether, following the lodging of defences in an action being pursued by a party litigant, a preliminary hearing of some type would be appropriate. Even if such a hearing were not to go so far as to allow the Court to assess the pursuer's case as if the hearing was a procedure roll/debate, at the very least it would allow concentration on the truly relevant issues. This in turn would assist in preventing lengthy proofs where the party litigant seeks to range over a wide variety of issues, many irrelevant or at best, marginally relevant.

A similar procedure involving a preliminary hearing could also be applied to cases where the party litigant is a defender.

There are grounds for the court exercising greater scrutiny over motions which involve seeking leave where something is late. In particular, motions of this type which would involve discharge of a hearing of some description should receive very careful scrutiny. It is not uncommon for a Minute of Amendment to seek to amplify a party's case although the information contained in the minute was available to that party weeks, or even months, before the minute is presented. The party making the attempt to amend may end up being responsible for the expenses of the amendment procedure as well as expenses in respect of preparation for the hearing, if the hearing is adjourned. Nevertheless, there is still a waste of resources. The diet could have been available for another case. A new diet has to be found for the case which has been adjourned.

There is arguably no requirement to change the current avenues for appeal. However, at the very least, the sheriff court ought to have a sift procedure, as in the Court of Session, to deal with incompetent appeals. Whether it is possible to set up a sift system to consider the merits of an appeal, as exists in the Criminal law system, is debatable. Certainly, at sheriff court level, it would be an invidious position to have one sheriff assess the merits or otherwise of an appeal from one of his/her colleagues. If a sift were to be carried out by the sheriff principal there would be an argument that he/she could be viewed as pre-judging the ultimate appeal as it would be heard by the sheriff principal.

On the other hand, there might be grounds for a sift system in any appeal which went direct from the sheriff to the Inner House. If the sift was carried out by an Outer House judge then any question of pre-judgement would not arise.

5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.

No.

As indicated in the Consultation Paper for the two Rules Councils to separately consider the same matter and potentially arrive at different views or different methods of implementation, is both ineffective and inappropriate. Justice, and so far as possible, procedure and approach to justice, should be uniform as between the Court of Session and the sheriff court. If there was a move towards either a single set of civil procedure rules for both the Court of Session and sheriff court or something very close to a single set of rules then only one Rules Council would be necessary, provided the members had the appropriate experience of one or both courts.

6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

Yes.

A single set of rules would make it much easier for everyone involved in the court process, be it judges, court officials, lawyers or lay people. Particular types of action might require some variants to a single set of rules but any such variants could be encompassed within the one set. After all, the current Court of Session Rules is one set which accommodates a variety of actions. The procedure appropriate for a judicial review may not be the same procedure as is appropriate to a personal injury action but this can still be accommodated within the one set.

7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?

At the very least, the same initiating document should be used for the same type of action in either the Court of Session or sheriff court.

While a single initiating document might be possible for all types of actions, the information necessary for that document may vary considerably from one type of action to another to the extent that a single style of initiating document would be meaningless. One danger in having the one bland initiating document for all types of action is the possibility that information relevant to a particular type of action may be omitted.

8. To what extent should a system of abbreviated pleadings be introduced?

The abbreviated system of pleadings for personal injury cases in the Court of Session has worked well. There is no reason why an abbreviated system should not be introduced for personal injury in the sheriff court. Any such system should always be subject to the proviso that it allows each side to have fair notice of the other side's position.

If a system of abbreviated pleadings is introduced along with obligatory protocols then, in most cases, both sides ought to have reasonable notice of the other side's position on both the merits and *quantum*.

It is important that abbreviated pleadings adequately focus the key factual and legal issues in dispute while at the same time complying with basic rules of relevancy and fair notice.

9. Are the current arrangements for summary disposal satisfactory?

Yes.

10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?

No, unless it is being suggested that it takes up an inordinate amount of a judge/sheriff's time to deal with unopposed motions.

If opposed motions are considered to be "routine procedural business", it would not be appropriate for them to be considered by a junior judge of some description. Some opposed motions can be of major significance in the context of the individual case.

11. Are the current arrangements for dealing with routine procedural business satisfactory?

There is a need to cut down waiting time, particularly if procedural business such as motions, are set down on an unallocated basis. Telephone conferencing may well be possible. Video conferencing is probably not currently practicable as an insufficient number of court users will have such conferencing facilities.

It should not be forgotten however that if a motion is calling, this is likely to be on the basis it is opposed. While that is not a reason of itself to argue that time slots are not appropriate,

the allocation of time slots might have to depend on parties' estimate of the time with either consequent gaps between Motions if one finishes earlier than anticipated and the possibility of motions over-running.

12. Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?

There is merit in a greater degree of court scrutiny in allocating the length of time to be set aside. At the very least certification by the agents directly involved, or counsel in the Court of Session, may be appropriate. Consideration to the length of time could, in the sheriff court, be given at the pre-proof hearing which takes place in some courts. However, at the moment such a hearing takes place three or four weeks before the already allocated proof diet. Clearly, it would need to be moved to the point where the proof is being fixed.

There are considerable dangers in trying to time limit a hearing in the sense of any suggestion that if two days are allocated to a case then it must be completed within these two days. No matter how diligent the parties' representatives may be, it is difficult to cater for witnesses who may go on at length or what avenues of questioning may develop once a case actually gets underway at proof.

There remains the difficulty that only so much can be done in advance. Even if parties agree that two days are necessary and those two days are then allocated, there is the potential for settlement and the risk that court time may be wasted.

13. In the conduct of substantive hearings should there be greater use of written rather than oral arguments?

Yes it should be possible to exchange outline arguments in advance. Detailed submissions in proofs will normally depend on the actual evidence heard.

For a procedure roll/debate, it ought to be possible to produce more detailed submissions.

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

Compulsory protocols would mean that in practical terms, there was more disclosure prior to litigation.

In the course of a litigation, earlier disclosure can only assist to clarify the issues. On the basis that such disclosure is under control of the court, i.e. via a Specification of Documents, then a party objecting has the opportunity to argue that the specification goes too far, is more burdensome than necessary etc. Similarly, if a specification is granted which involves a substantial amount of information which could be produced unsorted, then the court ought to be able to direct the manner in which the information should be produced.

There should be an obligation to lodge at the valuation stage, the productions on which the relevant party is relying. If productions are not lodged at the point when the valuation is lodged, then parties should not be able to use any productions produced at a later stage, unless they are able to satisfy the court that there is a good reason why the productions could not be lodged with the valuation. An updating medical report might be one obvious example of a situation where the court would allow a production to be used, although lodged after the valuation.

Specifications ought to be possible at any time after commencement of the action.

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

In personal injury action, where the sum sued for does not exceed £10,000, the rules should provide that on quantum there will be a joint expert report. At that level of claim, the injury sustained should not be of such a nature that medical experts in different disciplines are required and proportionality suggests that such an approach is a reasonable one in lower value claims. This approach appears to work in England.

In a claim where the sum craved is above £10,000, a party in a litigation should be allowed to lead expert evidence in whatever discipline or area of expertise is considered appropriate, but only one expert in that area, unless leave of the court is obtained.

A party is entitled to present their case properly and provide the appropriate support for their contentions by way of expert evidence.

16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?

Yes on a similar basis to that for a current defender's Tender.

17. Should civil jury trials be retained?

In FOIL's unequivocal view civil juries ought to be abolished.

FOIL considers that juries are unpredictable and inconsistent. Insurers require to know within a reasonable range of figures the likely value of a claim. This enables responsible estimating and reserving to be carried out. Awards by judges are reasonably consistent. Such awards enable legal advisers (whether for pursuers to defenders) to give meaningful advice on the likely value of a case.

Juries are prejudicial to defenders in that because of their unpredictable nature it is difficult for a defender to decide at what level to pitch a tender.

Juries do not give reasons for their decisions. It is submitted that this is entirely unacceptable in a modern civilised and just legal system.

In FOIL's view juries ought not to be retained.

18. Should written judgments be required in all cases?

Yes.

If no written judgment is provided then this may significantly prejudice the chances of a successful appeal in a situation where the court of first instance, or a court in the appeal chain, was an error. It is incumbent upon the court to demonstrate a proper basis for a decision.

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?

Currently court powers include, (a) the ability to impose a penalty by use of an award of expenses and (b) by refusing, for example, a Minute of Amendment to prevent a party leading evidence and seeking to prove facts based on the averments in the minute.

Are any greater powers necessary? Is there actually a reluctance to use the existing powers to a greater extent, particularly the power to refuse to allow something to happen late? While an appropriate balance has to be struck, it could be said that in too many instances near to a proof, the expenses penalty is used rather than the power to refuse the motion of whatever nature.

Currently the power to make an award of expenses includes the power to make the award against agents personally. Perhaps consideration should be given to using this power more often, particularly where additional expense has clearly been caused as a result of the late actions.

20. What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?

In the absence of statistics to show the percentage of actions raised and defended by party litigants, it may be somewhat difficult to comment on the percentage of appeals by party litigants to the sheriff principal. Nevertheless, the fact that the figures range from 21% to 31% in the five sheriffdoms strongly suggests that in comparative terms, a greater number of cases involving party litigants proceed to appeal than cases involving agents. Support for this view can be gained from the figures available from Lord Penrose's Review of Inner House Business.

It is the experience of many members of FOIL that many aspects of a litigation involving a party litigant can occupy a very significant amount of time, often with the party litigant pursuing irrelevant lines of argument or questioning. Courts seem generally reluctant to take a firm line in such situations and appear to feel the need to "lean over backwards" to be seen to be fair to the party litigant.

Accordingly, in the case of appeals by party litigants, there are good grounds for suggesting that such appeals should be subject to a sift of some type. There ought to be greater willingness on the part of the court to prevent a party litigant "going off" at irrelevant tangents.

A sheriff court power should be introduced similar to that in the Court of Session in that if a party litigant wishes to raise an action, he/she must seek leave of the court.

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

Yes, although there may be considerable difficulty and indeed danger in extending any provisions dealing with vexatious litigants to cover a defender. Any party is entitled to defend himself/herself against a perceived unjustified attack on his/her rights.

The current provisions are too restrictive. As the matter is one of public interest, it may well be inappropriate to extend the right of application to anyone other than the Lord Advocate. On the other hand, overhaul of the requirements which have to be established is appropriate. Even if any restrictions are on those who institute proceedings rather than defend them, is there any need to establish that proceedings were "vexatious"? In a modern justice system, should it not be sufficient to establish that proceedings were "without reasonable ground" and had been raised "habitually and persistently". Proceedings raised on these two grounds alone are an abuse and misuse of the justice system.

In respect of a party litigant who is a defender, it would be possible to introduce a preliminary hearing following the lodging of Defences (as has previously been suggested) at which hearing the court could assess the merits or otherwise of the defence.

22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?

No. At least, not in personal injury cases beyond the extent to which the right already exists.

23. Would it be desirable to introduce separate procedures for multi-party litigation?

Yes.

It is felt that the advantages of a specific procedure for multi-party actions or “class actions” outweigh the disadvantages. However, this issue is so significant and wide-ranging that it is impossible to go into detail in the context of this response. It is a topic which needs to be addressed through specific research.

24. Is the rule governing the procedure to be followed for judicial review satisfactory?

No.

Proper use of the court’s powers to exercise case management can only be effected by rules which allow the court early exercise of its powers. Accordingly, at the very least, there should be a proper time scale for the lodging of Answers and productions and a first hearing should be fixed to take place, for example, fourteen days after Answers are lodged rather in the same manner as a commercial cause. It may be necessary to make provision for a continuation of the first hearing.

Alternatively, it may be thought that as a judicial review can be served on a respondent “out of the blue”, a period longer than fourteen days after the lodging of Answers should be allowed before a first hearing takes place. On that basis, if a period of, say, eight weeks were allowed then there should also be a sufficient period to allow parties to put their arguments together and therefore allow for the introduction of a rule that a Note of Argument should be lodged in advance of the first hearing.

Whether or not any filter or sift is needed before an application for judicial review is allowed to proceed may depend on the extent to which statistics are available to show what percentage of applications are unsuccessful.