



Forum of Scottish Claims Managers

Response to:

Scottish Civil Courts Review – A Consultation Paper

The forum members deal with the majority of insurance related litigation in the Court of Session and Sheriff Courts throughout Scotland. Attached is a list of our members' employers. The Forum of Scottish Claims Managers is governed by a constitution, a copy of which is also attached. In respect of all responses to this document we would seek to engage in further discussion with the review group.

Chapter One

- 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?***

Agreed. The Civil Justice System should encourage early resolution of disputes without recourse to litigation. The key features of the system are (a) funding, (b) transparency, (c) timescales, (d) proportionality, (e) accountability. Please also refer to our subsequent responses.

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

Agreed. The principles in paragraph 1.1 – 1.4 are very important. Cost penalties should be introduced for litigation that is commenced too early. The pre-action protocols should be mandatory with penalties if not adhered to without good reason. Litigation should be the last resort by all parties. The reforms should also be reviewed regularly, involving representatives from the main user groups.

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

The review is very broadly based, encompassing civil and related criminal matters and we have no other concerns.

Chapter Two

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

Public legal education has a large part to play alerting the public to the alternatives to litigation.

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

The central belt of Scotland is served well but perhaps some more rural areas of Scotland are not.

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?***

Pre-litigation it is both desirable and feasible to deal with unrepresented claimants in non-contentious matters. Post litigation, in personal injury and professional risks, we do not consider it desirable or in the public interest. For some low value property damage cases this may be appropriate.

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?***

Please refer to question 3.

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

The Civil Justice System must be properly resourced at all levels to avoid cancellation and delays, experienced by our members, in the current court system.

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?*

Agreed. There is a case for a new method of dealing with low value (£10,000?), less complex claims within the existing court structure (not procedures), at perhaps a lower level of judicial intervention. These cases should be capable of quick, cost effective resolution. For example, quantum only. The evidence should be submitted electronically with limited scope for oral evidence. An appeal should be to a sheriff sitting on his/her own.

We would suggest a fixed fee would apply to these cases, proportionate to the value of these claims. The process and fee structure should differentiate between personal injury and property claims.

Chapter Three

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

We have reviewed a substantial number of cases, where damages under £20,000 were paid, this being the vast majority of injury litigation and can confirm that costs, expressed as a percentage of damages, payable to pursuer's agents, were:

- Motor - **70.5%**;
- EL - **76.5%**.

We would argue that this clearly supports our point of view that costs are disproportionate to damages and that this is an issue that the review group might wish to address.

The MI to support the above figures can be made available, on a confidential basis, to the review group.

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

The cost of defending a case is a significant factor in all matters, dealt with by our members.

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

The cost of court fees has no affect on access to justice. Court fees (with the exception of the House of Lords) represent a very small percentage of the overall cost of litigation.

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

The current rules for the recovery of judicial expenses are, in the main, satisfactory. It is our members' experience that any sum recovered by way of judicial costs more than adequately pays for the work done at a competitive, commercially agreed rate.

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

The current arrangements for the taxation of judicial accounts are not satisfactory. The auditor should be paid a salary and have no financial interest in his award. The defender should have the ability to tender costs at any stage, after the judicial account has been intimated with expense consequences. The members of the forum would welcome greater clarity and guidance on the appropriate award of additional fees in a given set of circumstances. In addition, there should be strictly enforced rules for the finalisation of litigation and quantification of expenses, eg. three months after the damages are paid.

This should result in fewer taxation on expenses or motions for an additional fee.

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

Legal advice and assistance allows parties access to justice who would not otherwise be able to fund litigation.

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

We understand there may be areas of professional negligence where funding is difficult to obtain.

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

Speculative fee arrangements can improve access to justice for meritorious claims presented by a pursuer who does not have access to legal aid or other forms of funding.

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

We believe “before the events” insurance should have an essential role to play in the funding of litigation in Scotland. The purchase of BTE linked to other insurance products (motor, household, pet insurance etc) spreads the risk and considerably minimises the cost. Typically BTE addition to most personal policies will cost as little as £5 to £10 compared to an ATE premium of more than £1,000.

Our view is, contrary to paragraph 3.36, that the take up of BTE insurance in some products, ie motor, is very high. There may be an element of some claimants being unaware that they have cover in force. This is a public education issue linked to chapter 1, question 1.

The general public should be encouraged to purchase BTE insurance cover at a minimal cost. We believe “after the event insurance” should have no role to play because of the cost

difference between BTE and ATE and the experience in other jurisdictions where satellite litigation continues to rage.

BTE premiums should be within the financial ability of all whereas ATE premiums almost certainly would not be. It was the removal of legal aid in England and Wales that led to an increase in ATE insurance, which in turn led to increased satellite litigation which continues to this day.

Please refer to the recently reported case of Gloucestershire County Council v Evans & Others 2008 EWCA, CIV25, which is attached as **Appendix 1**.

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

The impact on recovery of “after the event insurance” would have a significant affect on costs:

- (a) costs would increase due to the level of ATE premiums – see question/answer 9;
- (b) proportionality would worsen on low cost cases;
- (c) ATE insurance would encourage satellite litigation on the recovery of costs;
- (d) consumers would be uncertain what they could recover;
- (e) would add another tier to judicial/solicitors to deal with costs only;
- (f) commission paid on step premiums for ATE do not encourage early settlements;
- (g) there would be an increased risk of unregulated claims farmers.

Chapter Four

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

Agreed. Undoubtedly civil business in the court is adversely affected by the pressure of criminal business. The availability of

judges to hear proofs is often affected, along with pressure on court time to deal with criminal business. All our members have had an experience of paying additional costs due to delay.

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

Agreed. Some judges and sheriffs should be designated to deal with civil business. Please refer to our suggested answers on specialisation. See our answer to Chapter 4, question 4.

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

Agreed. The advantages would be:

- (a) greater consistency of decisions due to specialisation;
- (b) opportunity for greater proactive judicial case management;
- (c) realistic/proportionate allocation of resources given the volume of civil business;
- (d) reduced delays of proofs allocating;
- (e) proof starting on time, on the allocated day.

Please see our answer to Chapter 2, answer 5. We see no disadvantages to specialisation.

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

Agreed. The volume of personal injury cases warrants further specialisation within the Civil Court system. The number of personal injury cases raised in the Court of Session for the years 2004 to 2006 represented 65.3% of all actions raised. Information from the Justice Department confirms that for a similar period in the Sheriff Courts in Scotland they dealt with 3828 for 2004, 3581 for 2005 and 3167 for 2006.

In our view, this supports our argument for specialist courts and specialist judges.

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?*

It is our belief that the factors which influence a decision to raise an action in either the Court of Session or Sheriff Court are:

- (a) recoverability of greater costs;
- (b) the Coulsfield Rules;
- (c) the right to jury trials;
- (d) the likelihood of a judge with greater personal injury experience;
- (e) the location of the pursuer's agents;
- (f) sanction for counsel.

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

For personal injury cases we believe a specialist regional sheriff court should have exclusive jurisdiction, with the Court of Session only having jurisdiction in a case of wider public interest, otherwise the Court of Session should only act as an appeal court in personal injury cases.

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

Agreed. It is our belief that there should be a limited number of specialise regional personal injury courts, eg Glasgow, Edinburgh, Aberdeen and Inverness. Or such other locations as deemed required.

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?*

Agreed. The Court of Session should become a court of appeal only for personal injury cases, except cases of a wider public interest (eg Piper Alpha).

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

In the event of the status quo we believe that personal injury claims up to £20,000 should be reserved for the Sheriff Court.

If the model of specialist courts were to be adopted, but with the Court of Session still hearing some cases of first instance, we would favour the privative limit being increased to £100,000.

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

In the experience of our members this occurs very rarely. Therefore we have no opinion to express.

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

See our answer to Chapter 2, question 6.

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

Yes – see our answer to Chapter 2, question 6.

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

The current division of sheriff courts into distinct geographical jurisdictions does present problems due to the large number of sheriff courts and the dilution of specialist sheriffs.

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

No comment.

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

No comment.

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

No comment.

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?*

Agreed. See our answer to question 7. The appeal should be to the inner house of the Court of Session.

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

We believe this would be appropriate but only in the event of there being specialist personal injury sheriffs sitting in these courts.

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 leave of the Court of Session to transfer a case there? If so what factors should be taken into account?*

It is our belief if specialist personal injury courts are set up the only power of transfer is for personal injury cases to the Court of Session in exceptional cases where a special public interest can be shown.

20. *Are the existing appeal arrangements satisfactory?*

No. The existing appeal arrangements are not satisfactory. An appeal from the Sheriff Court should not be to the sheriff principal but to the Court of Session. The current system creates an unnecessary tier of appeal.

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?*

We do not consider the sheriff principal should hear appeals but do not wish to comment on his/her other functions.

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

No comment.

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?*

See our previous answer.

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

The only advantage is flexibility of resource which is considerably outweighed by the disadvantages.

We see the disadvantages as the potential for a non-specialist hearing the case and a risk of insufficient time given the demands from his/her own business. This can also lead to scheduling difficulties due to their lack of the availability in the court in question.

Chapter Five

1. *Should the rules of civil 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?*

Agreed. The main elements must be:

1. Ease of access to the judicial system.
2. Focus on the issues in dispute between the parties in an open and transparent manner to ensure justice is done.
3. Use of the courts as a last resort when all other avenues have been exhausted.
4. Proportionality in terms of time and costs.

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?*

Please refer to the attached joint submission from Apil to the Sheriff Courts Rule Council dated 20 September 2005 which is attached as **Appendix 2**. You will note that the views expressed on behalf of Foil, Apil, Mass and the Forum of Scottish Claims Managers. It is not considered that mediation for reparation cases is a panacea. Mediation will only be of assistance in certain types of cases and not appropriate in all cases.

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

We believe that most mediation should be capable of being dealt on a fixed time, fixed cost basis. It is the experience of our members that otherwise this can become lengthy and disproportionately expensive.

In litigated cases, there should be, after disclosure and when the areas of dispute are clearly understood by the parties, a judicial lead discussion as to the appropriateness of mediation in individual cases.

Pre-litigation the members would support the party who wishes to litigate being compelled to demonstrate they have exhausted all avenues to resolve the dispute.

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

We believe only limited types of cases would benefit from - mediation. See answer 2. In addition, it would also be inappropriate for points of law or test litigation.

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

In appropriate cases, funded by the defenders, using an agreed independent mediator with restrictions on time and cost.

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

The current process is too paper based and does not take advantage of the affects and economies of information technology. IT is available to almost all users. For example:

1. The use of email should be encouraged.
2. Standardised web based forms.
3. Use of telephone and video conferencing.

We would gladly engage in further discussion to expand on this concept.

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

We support an amalgam of the Coulsfield Rules on case flow management combined with inquisitorial case management as currently adopted in the Glasgow Sheriff Court personal injury pilot. We believe this would only be effective with specialist

judges and courts. We accept this may increase court dues, however, this should lead to long term cost efficiencies and legal cost savings.

We believe this would bring about an early resolution of cases. We envisage this might, for example, include an early proof on liability only.

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

All personal injury cases would benefit – see our answer 7.

Chapter Six

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

The personal injury and professional risk protocols provides best practice guidance to all parties and should minimise disputes in general and litigation in particular. We see no disadvantages to the protocols in general. Please see our answer to Chapter Six question 3.

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

At the moment we have two pre-action protocols agreed with The Law Society (personal injury and professional risks) and with effect from 1 June 2008 a disease pre-action protocol. A mesothelioma protocol should follow when the position in England is clarified. We do not see any other areas, within the scope of our remit, where a further pre-action protocol would be appropriate.

Pre-action protocols should apply to all claims of these types.

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

Please refer to our response to question one. We believe compliance should be compulsory.

We see the only disadvantage of the personal injury and professional risks pre-action protocols, as they currently apply as being the lack of any expense penalties, for either party, for non-compliance in respect of appropriate pre-action conduct and premature litigation.

The use of the personal injury pre-action protocol in most cases is very good, usually in excess of 75% for motor with one leading insurer achieving 95% of cases settled using the personal injury pre-action protocol. In EL and PL claims use of the personal injury pre-action protocol is less frequent with member reporting anything between 50-90% of use of the protocols.

It must be borne in mind that there will be insurers and self insured organisations who are not members of FSCM.

One leading firm of pursuer's agents, please refer to **Appendix 3** article from the February 2008 journal of the Law Society, is of the view that the personal injury pre-action protocol is not working. Whilst our members do not share this view and this is not supported by their experience it must, nonetheless, provide strong support for the pre-action protocol to be made compulsory, with expense penalties.

We believe we are supported in this view by the main representative bodies.

The article also implies that litigation is the only resort available to the author's firm. This is despite the availability of an agreed trouble shooting protocol, which is rarely used by pursuer's agents. Use of the trouble shooting procedure often leads to amicable resolution.

In the event that the pre-action protocols were to remain voluntary there is nothing to stop individual solicitors or insurers deciding to stop using the protocols. We would then revert to the previous adversarial position with no structure, or time frame for the settlement of claims.

The current personal injury and professional risks pre-action protocols apply to low value cases and in the event this were to be extended to all claims some aspects of the wording and timetable would require to be adjusted. If the protocols become compulsory we would be in favour of clear and transparent guidance being provided by the judiciary on the sanctions that would apply and in what circumstances. We would also like to see the protocols, penalties etc enshrined in the rules of court.

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?*

Please refer to Section Five, question 4 which supports the view that litigation should be the last resort.

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

In the event that our answer to question 3 is adopted, we believe the Forum of Scottish Claims Managers should have one lay member on the rules council. The vast majority of civil litigation is funded by companies our members represent.

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

Agreed. See our previous answers to Chapter 5, question 7 and Chapter 2, question 6.

We believe there should be separate, simplified procedural rules for dealing with low value personal injury cases, see Chapter 2, answer 6. There should be separate procedural rules for dealing with all other personal injury cases, litigated in the sheriff courts – see our answer to Chapter 5, question 7.

Any case of special public interest which requires to be raised in the Court of Session should be subject to the same procedural rules that govern Sheriff Court cases.

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?*

Agreed. However, our answer relates to personal injury claims only. A common claim form could be used for all personal injury actions up to £100,000 in value with restricted pleas in law provided there was a mechanism to deal with unmeritorious cases being removed from the system.

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

As per the Coulsfield Rules.

9. *Are the current arrangements for summary disposal satisfactory?*

No comment.

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?*

We have no objection to administrative matters, such as unopposed motions being dealt with in this fashion but to extend further would be in conflict with our caseflow/case management philosophy.

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

Should be done electronically – see our previous answer. See our answer to Chapter 5, question six.

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?*

We believe that the length of time should be allocated consensually following discussion with all of the parties and the specialist judge allocating the case. The timetable should be agreed by the parties with reference to the case.

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

Agreed. This should be done electronically in most cases, however, there should be the right to make oral submissions.

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

The Forum fully supports a transparent and open approach to all claims procedures. All documents on which you intend to rely (pre-action or post action) should be disclosed within a fixed time period (eg, 6 weeks per the pre-action protocols) and if not, with proportionate and appropriate penalties (eg a party may not be allowed to rely upon the disclosed expert report). All of this is based on judicial case management as part of the procedure.

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

In the context of judicial case management, we accept the court will have some control over the use of experts and other evidence. We would not envisage this including the appointment of experts by the court. This has to be proportionate to the case and its issues (eg the number of experts on a low value case).

The court should have the power to order a joint statement from conflicting experts with the intention of focussing the court's attention on the matters of dispute.

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

We are supportive of the principle of "pursuer's offers" post litigation. This must be linked to full and open disclosure of all

evidence on which the pursuer intends to rely. Any further disclosure invalidates all earlier offers.

28 days should be allowed to consider the offer and if not accepted, and the offer is not beaten, the penalty should be 2% above judicial interest on the damages awarded. We believe any windfall benefit should accrue to the pursuer and not his agents.

17. *Should civil jury trials be retained?*

We believe jury trials should not be retained as they create a number of inconsistencies.

A fundamental principle of any modern jurisdiction is that it should be open, transparent, fair and consistent to all parties. Jury trial achieve none of these aims for the following reasons:

- (a) the outcome is unpredictable and this prevents pre-trial settlement. It is the experience of our members that the pursuer's counsel cannot properly advise the pursuer on any offer made or on the potential outcome and will often refuse to do so;
- (b) it is unlikely any two pursuers will be awarded the same damages for similar injuries and therefore there is a two tier system between juries;
- (c) a jury does not provide any rationale on the sums awarded leaving parties unable to analyse the fairness of the award.

In the event that civil juries are obtained we believe that some changes need to be, relating to a desire to ensure that jury awards are more consistent.

Judges should be required to give the jury clearer guidance and direction.

There should also be an appeal mechanism that removes sole discretion from the jury. The appeal court should have the power to overturn awards that are not in keeping with other decisions. This should include the power to substitute their own award, as

opposed to order another jury trial, where potentially the problems highlighted above can be repeated all over again.

18. *Should written judgements be required in all cases?*

Yes. There should be a written judgment issued in all cases. However, it may be appropriate in lower value, liability admitted cases, for an abbreviated form of judgment. This type of claim is envisaged in our answer to Chapter 2, question 6.

The judgment should be issued within a specific time limit prescribed by the Rules Council.

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

Yes. See our previous answer to Chapter Six, question 3. The sanction should be proportionate and relevant to the breach and this might not always be financial, eg. failure to timeously disclose an expert's report on which a party seeks to rely might lead to the party not being able to lead their evidence.

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

See our previous answer – Chapter Five, question 7.

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

The current legislation on vexatious litigants is satisfactory.

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. In the context of insurance related actions, we consider it inappropriate that any party who has no interest in the outcome of the proceedings be allowed to address the court.

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

Some multi party litigation (eg members of the same family in a motor accident) could be dealt with by case management under our proposed rules. Please see our response to Chapter 4, question 8.

It is accepted, however, that there are other scenarios that would require separate procedure, ie class actions on a catastrophe basis, for example Piper Alpha, Dunblane, Stockline.

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

No comment.

SOLICITOR — Costs — Conditional fee agreement — Solicitors instructed under conditional fee agreement with success fee — Whether success fee recoverable at 100% for risk on costs — Whether conditional fee agreement contrary to statute — Courts and Legal Services Act 1990, s 58(4)(b) — CPR Pt 44, PD para 11.8

Gloucestershire County Council v Evans and others: [2008] EWCA Civ 21; [2008] WLR (D) 25

CA: (Dyson and Lloyd LJ): 31 January 2008.

A conditional fee agreement which provided for payment of a basic rate of £95 per hour, with an enhancement first to £145 per hour as the basic charge on winning the case, and then to £290 per hour, in the event of success for risk element was not contrary s 58(4)(b) of the Courts and Legal Services Act 1990 and art 4 of the Conditional Fee Agreements Order 2000 and was therefore enforceable.

The Court of Appeal so stated dismissing the appeal of the first and fourth defendants, Keith Evans and K J Evans & Sons (Roofing) Ltd, from the decision of the Deputy Master Lightman dated 25 June 2007 sitting at the Bristol District Registry of the Queen's Bench Division in an action brought by Gloucestershire County Council against Keith Evans, Michael Dean Evans, Kevin John Evans, K Evans & Sons (Roofing) Ltd and K J Evans & Sons (Roofing) Ltd in respect of land acquisition; when the parties reached an agreement the first and fourth defendants agreed to pay the cost of the proceedings to the council who had a conditional fee agreement ("CFA") with its solicitors. They claimed a maximum success of 100% on their hourly rate of £145.00 (making a total of £290 an hour).

DYSON LJ said that the maximum success fee permitted by s 58(4)(c) of the 1990 Act and art 4 of the Conditional Fee Agreement Order 2000 was 100%. It was the defendants' case that, in substance, the agreement rewarded the solicitors for the win with a success fee of 290%, with the consequence that the agreement was unenforceable. According to his Lordship the correct interpretation of s 58(2)(b) should be as follows: "a conditional fee agreement provides for a success fee if it [the CFA] provides for the amount of any fees to which it [the CFA] applies to be increased, in specified circumstances, above the amount which would be payable if it [the amount of fees to which the success fee is applied] were not payable only in specified circumstances". The agreement was a CFA which provided for a success fee within the meaning of s 58(2)(b) because it provided for the basic charges of £145 per hour to be increased in the event of a win. Applying the language of s 58(4)(b), the agreement stated 100% as the percentage by which the amount of the fees which would be payable if it were not a CFA (£145 per hour) was to be increased. The agreement provided for basic charges of £145 per hour. That was the amount of the fees that would be payable if the agreement were not a CFA. What made the agreement a CFA which provided for a success fee was the provision that, if the client won, the amount payable would be £145 plus the success fee. That interpretation of s 58(4)(b) as applied to the agreement is consistent with the interpretation of s 58(2)(b). The lawfulness of the percentage increase was measured not by reference to the costs at risk, but by reference to the fees that would have been payable if the (CFA) were not a CFA. In determining whether the success fee claimed was reasonable, the court was bound only to consider the risk of failure: see para 11.8(1) of Practice Direction 44 of CPR. The court should take into account all relevant factors. It was difficult to conceive of a case where the risk of failure would not be a relevant factor. But it was clear that it was not the only relevant factor. In the case of a discounted fee CFA, the court could, and usually would, also have regard to the fact that a reduced level of fees would have been recoverable even if the case had been lost. That the agreement which provided for a success fee of 100% on the basic charges of £145 per hour was not in breach of s 58(4)(c).

Lloyd LJ gave concurring judgement.

27 July 2005

Ms Glynis McKeand
Secretary to Sheriff Court Rules Council
Sheriff Court Rules Council
St Andrew's House
Regent Road
Edinburgh
EH1 3DG

Dear Ms McKeand

Mediation

During regular liaison between the Association of Personal Injury Lawyers (APIL Scotland); Forum of Insurance Lawyers (FOIL); the Motor Accident Solicitors Association (MASS) and The Scottish Claims Managers Forum, the four organisations – which collectively represent around 90 per cent of all pursuers and defenders - have considered the issue of mediation at great length.

It is the collective view of all four organisations that mediation for reparation cases is not a panacea.

While there may be a role for mediation in certain types of case it is clearly not appropriate if it would cause undue stress to a pursuer who feels unable to deal with a defender in a face-to-face situation. Neither would mediation be necessary in cases where there is no ongoing relationship to preserve between pursuer and defender (ie cases which are dealt with directly by insurers).

Colleagues in England and Wales – who have had greater experience of mediation – have found that its use in lower value cases can lead to disproportionate costs and so we suggest that mediation should not routinely be applied in Scotland in cases with a value of less than £30,000. And, under no circumstances, should it be forced on unwilling parties by the courts.

Mediation can have a place in resolving cases where there is an ongoing relationship to preserve, or where pursuers are seeking more than financial redress, such as an apology, for example. It can also help to broker compromise in the resolution of serious liability disputes which are identified early in a case.

Representatives of our four organisations would welcome the opportunity to discuss these issues with you in more detail, if you think that would be helpful.

Yours sincerely

David Short
Secretary, APIL Scotland on behalf of:

David Taylor (FOIL)

Stan Moffat (Scottish Co-ordinator, MASS)

Iain D Johnston (Chairman, Scottish Claims Managers Forum)

A Breach of Protocol: Why the Voluntary Pre-Action Protocol is not working.

In January 2006, following discussions between a Law Society of Scotland working party and the Forum of Scottish Claims Managers, a Voluntary Pre-Action Protocol for Personal Injury cases was introduced in Scotland. [1] The Protocol was loosely modelled on a compulsory pre-action protocol which had been established in England and Wales as part of Lord Woolf's reforms of the civil justice system. While any attempt to speed up the claims handling process seemed worthwhile, some of us on the working party harboured major reservations as to how effective the Protocol would prove in practice. Our concerns related to, firstly, the ability or willingness of insurers to resource the claims-handling process in ways which would allow them to comply with the Protocol and, secondly, whether the insurance industry could actually move away from a culture of deliberate under-settlement of claims to a position where it sought to put forward realistic pre-litigation offers. The experience of my own and other pursuer firms since the introduction of the Protocol would suggest that such concerns were not unfounded. At the time a cynic (it may have been me) suggested at an Update seminar that the Protocol might at least result in insurers puffing forward inadequate offers within a rather shorter timescale. Events since January 2006 have led me to conclude that even that limited expectation was unduly optimistic.

Those of us dealing with volume personal injury litigation have recognised for many years that, in general, the only means available to force insurers to put forward realistic offers was to litigate. In recent years, that stance has been reinforced by two significant developments: the adoption by an increasing number of insurers of software packages such as Colossus, which are expressly designed to produce valuations well below the level of judicial awards, and the introduction of the Coulsfield rules in the Court of Session. The Coulsfield rules, which now govern almost all personal injury litigation in that court, have been outstandingly successful in encouraging realistic settlements and in removing much of the intrinsic delay of the old procedure. The average time between raising and settlement in my firm's cases is now less than six months. Given that background, I had fairly low expectations that the introduction of the Protocol would bring with it a cultural change in the insurance industry and that the necessity for litigation could be reduced, let alone avoided. Any hopes which I may have had for the Protocol very quickly disappeared as it became clear that many insurers were unable or unwilling to comply with the Protocol time limits which they had agreed to and that the culture of under-settlement appeared to be more firmly embedded than ever. I was aware from discussions with colleagues in other firms that they shared my views. I was equally aware that much of the evidence for this perception was anecdotal and that what was needed was rather more in the way of facts and statistics, decided, with considerable assistance from my partners and staff, to examine all litigated cases concluded between 1 January 2005 and 31 December 2007 in an attempt to properly explain why it proved necessary to litigate these cases. This study involved the creation of additional fields in our case-management system in order to capture the history of pre-litigation negotiations in each case. The results may surprise some but not, I suspect, those of us with experience of claimant personal injury practice. The views expressed in this article are mine and do not necessarily reflect the views of the Law Society of Scotland or the Protocol working party.

The study produced a total of 2,148 litigated cases which were concluded during the three year period. These were broken down into three categories: cases in which a pre-litigation offer was made; cases in which the insurers had denied liability and cases in which liability was not formally denied but no pre-litigation offer was made. The success rate was above 99.5%. The figures are as follows:

| Category | Number of Cases | Percentage of Total |
|--|-----------------|---------------------|
| Pre-Litigation Offer Made | 480 | 22% |
| Liability Denied | 581 | 27% |
| No Denial of Liability but No Offer Made | 1,087 | 51% |
| Total | 2,148 | 100% |

I will consider each category in greater detail.

Pre-Litigation Offer Made

| Cases | Total Pre-Litigation Offers | Total Damages | Average Multiple |
|-------|-----------------------------|---------------|------------------|
| 480 | £2,068,486 | £4,892,292 | 2.27 |

This category can be broken down further between cases litigated in the Court of Session and the Sheriff Court:-

| Court | Cases | Total Offer | Total Damages | Average Multiple |
|------------------|--------------|--------------------|----------------------|-------------------------|
| Court of Session | 127 | £1,399,602 | £3,679,696 | 2.9 |
| Sheriff Court | 353 | £668,884 | £1,212,596 | 2.0 |

It will be noted that insurers made offers in just over one in five cases. Of these offers, the bulk (74%) were made in low value cases which resulted in Sheriff Court litigation. The average multiples represent an average of the multiple for each case rather than the figure produced by dividing average damages by the average offer. That figure would be distorted by a number of cases where substantial damages were obtained. Gratifyingly, the minimum multiple was 1 which means that in no case did the damages recovered amount to less than the pre-litigation offer.

Liability Denied

| Cases | Total Damages Recovered | Average Damages |
|--------------|--------------------------------|------------------------|
| 581 | £22,583,005 | £38,936 |

Again, this category can be broken down into Court of Session and Sheriff Court cases:-

| Court | Cases | Total Damages Recovered | Average Damages |
|------------------|--------------|--------------------------------|------------------------|
| Court of Session | 3113 | £21,271,697 | £67,961 |
| Sheriff Court | 268 | £1,311,307 | £4,893 |

The disparity in damages recovered in the Court of Session and the Sheriff Court is explained by the fact that my firm, in common with other volume personal injury practices, has adopted a policy of raising only low value cases in the Sheriff Court.

No Denial of Liability but No Offer

| Cases | Total Damages Recovered | Average Damages |
|--------------|--------------------------------|------------------------|
| 1,087 | £23,475,224 | £21,596 |

This category, which makes up 51% of the sample, is a mixed bag. In some cases we were never contacted by an insurer. In others, the insurer either failed to indicate a position on liability or, having agreed to deal with the claim, failed to produce an offer.

Conclusions

The introduction of the Protocol has demonstrably failed to tackle the principal causes of litigation, namely, a serious under-resourcing of the claims-handling process and the deliberate policy of under-settlement which the insurance industry has adopted. The past twenty years have seen a sea change in the way claims are handled. When I first became involved in personal injury work more than thirty years ago claims tended to be dealt with by experienced claims inspectors, most of whom had a reasonable understanding of the liability and quantum issues. They would meet claimants' solicitors face to face and while there would always be cases in which litigation was inevitable, a substantial volume of claims were settled extra-judicial, including some fairly substantial cases. That system has largely disappeared. The insurers have moved to a call centre approach in which such negotiations as there are tend to be conducted by telephone with fairly junior personnel. It is relatively rare that the person one speaks to will have visited the locus or conducted the investigation of the claim. Levels of knowledge among claims handlers range from mediocre to woeful, particularly in employers' liability claims. It is commonplace when dealing with a claim based upon a strict liability statutory provision to be met with a common law defence such as non-foreseeability. Frequently, when such cases are subsequently litigated, the defences are accompanied by a Minute of Tender. This dumbing down of the claims handling process may make sense to a cost-accountant but does nothing to reduce litigation.

The growing practice among insurers of using software programmes to drive down settlement levels was discussed in Ronnie Conway's excellent article in the January edition of the Journal. [2] There is little which I can usefully add to his very full treatment of the subject other than to endorse his views and to point to my firm's statistics, which fully support his position. As is clear from the comparison between pre-litigation offers and litigated settlements, insurers are not pitching offers just below the level of judicial awards. The reality is that cases have to be litigated because insurers are making offers which represent only a fraction of the true value.

The average settlement in Sheriff Court cases was twice the pre-litigation offer, in the Court of Session it was nearly three times more.

Finally, I believe that this study carries implications for two matters which have been touched upon by Lord Gill's Civil Court Review in its recent Consultation Paper; mediation and the Irish Personal Injuries Assessment Board. Mediation is sometimes advanced as a serious alternative to litigation and sometimes as an interim process which parties would require to negotiate before being permitted to litigate. There is a welcome recognition in the Consultation Paper that, in order to succeed, mediation really requires two parties who wish to mediate. While there are areas, such as family law and consumer disputes, where mediation might provide a useful auxiliary settlement tool, it would be a curious and unsatisfactory outcome if accident victims were prevented from raising proceedings without first being channelled into an expensive mediation process with the very insurers who have up to that point shown such little inclination to negotiate realistic settlements.

The Irish Personal Injuries Assessment Board is a body which insurers are keen to replicate in the UK. Their enthusiasm for the Irish model is not difficult to understand. When the PIAB, which is run by the Irish insurance industry, was set up in 2004 it was intended to be a "lawyer-free zone". All personal injury claimants were expected to apply to the Board, which would not meet the cost of legal representation. It was claimed that the Board would speed up the claims process and that unrepresented accident victims would receive fair levels of compensation. In 2006 the PL4B announced cost savings of €30.7 million compared to the pre-PIAB system. In fact this claim is quite disingenuous. As reported in a damning article in the Irish Independent, 90% of claimants have voted with their feet and have instructed solicitors to represent them despite the fact that they will be unable to recover legal costs. [3] The supposed cost saving is simply the result of shifting the cost of representation from the insurers to the claimants. Insurers have seen their profits soar since the PIAB was set up. Motor insurers alone have posted increases in profits of 25%. The same article points out that only some 10% of applicants to the PIAB have actually had their claims processed and settled. It is easy to see why Irish accident victims are unwilling to submit themselves to the tender mercies of the insurance industry without representation. My experience of the Protocol in Scotland would suggest that if my firm, which is a specialist personal injury practice, cannot make insurers put forward realistic offers, there is little prospect that unrepresented claimants could. The notion that the insurance industry would treat unrepresented claimants better than at present is at best naïve and at worst dishonest.

Notes

[1] Graeme Garrett (2005). *'New Deal for P1 Claims: Commentary on, and text of the Voluntary Pre-Action Protocol agreed between the Society and the FSCM'*, JLSS, December 2005.

[2] Ronald Conway (2008), JLSS, January 2008.

[3] Dearbhail McDonald, "Thousands Flee State's Personal Injury Agency", *Irish Independent*, 31 October 2006. See also Pat Leahy, "Injuries Board Needs Treatment", *Irish Independent*, 5 November 2006.