

Scottish Civil Courts Review

Summary

- Every individual (which includes all corporate and unincorporated bodies) should have the right of access to the civil courts to determine disputes between individuals and between individuals and the state.
- The review should determine a changed structure and processes for the delivery of civil justice in Scotland within broadly the same cost envelope at present since it is unlikely that the state will provide further public resources and litigants should not have to bear any greater proportion of the cost of the system than they currently bear.
- There should be a fundamental redirection of the great bulk of first instance cases away from the Court of Session to the sheriff court; achieved primarily by an increase in the privative jurisdiction of the sheriff court to £100,000 in the first instance rising to £250,000 within a defined timescale of not more than 3 years.
- The concurrent jurisdictions of the Court of Session and sheriff court should be extended to include judicial review, reduction, proving the tenor and interim delivery.
- The sheriff court should provide specialist sheriffs and procedures for commercial actions, family cases, personal injury and judicial review. In each sheriffdom there should be adequate sheriffs to service each of these specialist areas. This may mean that, at least in relation to smaller sheriff courts, sheriffs become to some extent peripatetic to avoid work having to go to a court that is not local to the participants to the litigation.
- Sheriffs principal should be able to require that shrieval vacancies within their sheriffdoms are filled by candidates with requisite expertise and experience to fill specialist positions.
- In addition to the existing concurrent jurisdictions the sheriff court should have jurisdiction in judicial review, reduction, proving the tenor and interim delivery.
- Appeal to the Inner House from the sheriff court should be limited to those cases where leave is granted by the sheriff, sheriff principal or Inner House.
- To generate cost savings and in order to free resources for the specialist services there should be an all Scotland bulk processing centre to deal with all undefended actions for payment of money not paid, simplified divorce, heritable actions and petitions for sequestration. Confirmation could also be processed in the bulk centre.
- As a general rule a successful litigant in all but the small claims procedure should be able to recover the full extent of the reasonable expenses incurred by him or her.

Chapter 1

1. No; access to the court should be one of a range of options available to parties to select from. The court system should be the only method of dispute resolution funded by this state. If parties wish to elect for other methods of dispute resolution then parties should be responsible for funding such methods. The right of access to a state funded civil court system should be paramount.

2. Yes; subject to the additional principle that everyone should have the right of access to a state funded civil court system for the resolution of disputes between individuals and between individuals and the state. This is not to be taken to mean that parties should have an automatic right to the state funding of representation before the civil courts, only that the system itself should be state funded.

Otherwise, the principles and assumptions discussed in paragraphs 1.11 – 1.14 are a sound basis for the development of the reviews recommendations.

3. No.

Chapter 2

1. In relation to small claims procedures these should be designed on the assumption that parties will be unrepresented. Otherwise court procedures should assume that parties will be legally represented.
3. We share the concerns regarding the serious strain caused by party litigants on both administrative and judicial resources, particularly in the Court of Session. We consider that any initiative to design court procedures to enable party litigants should be restricted to small claims procedures.
6. All cases, whatever their value, should be capable of being resolved within the court structure. This is not to be taken to imply that parties should be encouraged to litigate, only that where other methods do not result in a resolution of a dispute, that parties have the right to have their dispute determined by a court.

Chapter 3

1. In commercial causes of significant value the expenses recovered by the successful litigant are typically less than 50% of the costs of litigation charged to the litigant by the solicitors concerned. In our view the level of expenses as compared with sums awarded is less significant than the level of recovered expenses against the costs actually incurred.

Steps should be taken to modify the basis upon which expenses are awarded and taxed in the civil courts. Broadly speaking the successful litigant should be able to recover all, or virtually all, of the costs which the successful litigator incurs in prosecuting his or her litigation. Indemnity costs should be the norm.

2. The cost of litigating is a significant consideration for all categories of person who may be contemplating litigation. For those commercial organisations who receive advice to the effect that their claim or defence has good prospects of succeeding, we do not consider that the cost of litigating will generally deter them from embarking on litigation.

The cost of litigation has the greatest deterrent effect on private individuals who are neither very wealthy nor have legal expenses insurance or any entitlement to legal aid. For such persons the cost of litigating, particularly in high value cases, can be prohibitive. The vast majority of people will find the cost of litigation to have a deterrent effect.

For prospective litigants with “good” cases, we think that the deterrent effect could be reduced by allowing for a fuller recovery of expenses in the event of success. The prospect of

incurring very significant costs even if their position is entirely vindicated has an obvious deterrent effect on potential litigants. See answer 4 below.

3. The current levels of court fees are such that in the vast majority of cases they represent only a relatively insignificant proportion of the total cost of litigation. Of themselves, they are, at present levels, unlikely to constitute a deterrent against the raising or defending of proceedings.
4. No; the current rules governing party/party accounts of expenses are unsatisfactory. In our experience, even the well-known rule of thumb, that the amount recovered by a successful party to litigation is around two thirds of the actual fees paid, is an overstatement of the true position, particularly in commercial cases where the recovery is often lower than 50%.

The concept of party and party expenses as presently interpreted seems to us to be artificial. If the concept were truly applied so as to allow recovery of “such expenses as were reasonable for conducting the cause in a proper manner”, one would expect recovery of close to 100% in most cases.

The fact that there is such a significant shortfall impacts most on the impecunious litigant and is likely to have significant impact on access to justice. It also contributes to a perception that the system is designed to serve interests other than that of doing justice between the parties.

We consider that the successful party in a litigation should be able to recover a far more realistic percentage of the costs actually incurred, and that recovery of close to 100% should be the norm.

Clearly, some degree of protection for the unsuccessful party is required but we consider that adequate protection against abuse of the system would be afforded by applying the concept of reasonableness rather than the artificial distinction between expenditure which is on the one hand party/party and on the other agent/client in nature. Recoverable hourly rates should be far more closely aligned to market rates.

5. We agree with the findings of the Working Group that the present system for taxation of judicial accounts of expenses leads to inconsistency and suffers from a lack of transparency.

Part of the problem stems from the unsatisfactory rules governing party and party accounts. The principles to be applied do not appear to be based on the reality of how legal services are provided in a litigation context and are open to being interpreted to a variety of different standards. The very wide discretion available to auditors leads to inconsistency.

These difficulties could be removed by moving towards a system of fuller recovery based on a simple test of reasonableness. There also seems to us, at present, to be an effective presumption in favour of significant abatement of accounts (from a starting point which already leads to a substantial shortfall in recovery), which should be replaced with a presumption of reasonableness.

Problems of inconsistency also apply to the rules regarding additional fees. In our experience, a number of firms will apply for an additional fee in virtually all commercial cases as a matter of course, as a means of improving the recovery of expenses. Such motions are determined so inconsistently that it is virtually impossible to predict how a given judge, or the auditor, will resolve the question.

There are also problems caused by the manner in which auditors operate. No reasons have to be given for the “taxing off” of particular expenditure unless the auditor’s findings are challenged. Such decisions are often only made several weeks or, in complex cases, months after a diet of taxation, and can often be extremely costly to the successful party.

6. The availability of legal advice and assistance and legal aid will inevitably improve access to justice for those persons entitled to benefit from it.

A party to litigation with legal aid funding is generally, however, at a considerable advantage over his opponent. The party defending such proceedings will generally be faced with the prospect of making no recovery of expenses even if wholly successful, which can lead to claims being compromised on purely economic grounds even in undeserving cases. The legally aided pursuer, on the other hand, will generally take on little, if any, personal risk in expenses.

7. No.
8. Speculative fee arrangements have inevitably led to a significant increase in the number of personal injury claims being litigated by private individuals with no entitlement to legal aid and no legal expenses insurance, leading to an improvement in access to justice for persons falling within that category.
9. Almost certainly, yes.

We consider that the greater prevalence of “before the event” legal expenses insurance would improve access to justice, particularly for private individuals with complex or high value claims, but without significantly encouraging vexatious or frivolous actions. Legal expenses insurers require to be satisfied on an ongoing basis throughout a litigation as to the prospects of succeeding with the claim, which we think would provide a degree of protection against a substantial increase in the level of frivolous litigation.

In our experience “after the event” legal expenses policies are often prohibitively expensive for the Scottish litigant, largely as a consequence of the fact that the insurers offering such policies are based in England and have little knowledge of the Scottish system.

10. The ability to recover “after the event” insurance premiums from unsuccessful parties would seem to us to be justifiable as a matter of principle.

Chapter 4

1. Yes; in our experience it is effectively a lottery in the civil courts whether a proof or debate will happen on the date assigned because of pressure of court business partly dictated by the pressure on the court systems of criminal business. In addition it is routine for civil courts not to start at 10am because the sheriff is otherwise engaged dealing with deferred criminal business.
2. Yes to both (a) and (b).

See comments below relating to privative jurisdiction of the sheriff court.

3. We see no pressing need for the formal separation of the sheriff courts into two separate divisions. However, with greater specialisation of sheriffs (see below) it should be possible

to target resources to the efficient disposal of civil business.

Within sheriffdoms the courts should be organised in such a way that sheriffs undertake the work that best suits their interests, expertise and aptitudes. In some sheriffdoms this will mean single courts or only a limited number of courts dealing with commercial business with perhaps a limited number having specialist personal injury and/or family courts. In some of the largest centres the courts would have all forms of specialism catered for. There is no “one size fits all” solution.

When filling judicial vacancies sheriffs principal should have a significant input into judicial appointments in their sheriffdom, as they will be responsible for ensuring allocation of sheriffs with particular expertise etc. to particular specialist areas. The post should then be advertised and appointed on that basis.

4. A division of specialisation between criminal business and civil business is too crude a division. Within the civil jurisdiction of both the Court of Session and sheriff court there should be specific procedures for the disposal of particular types of cases. Specifically in the Court of Session outer house the special arrangements for the disposal of intellectual property, commercial and personal injury cases should be retained.

In the sheriff court there should be specialist procedures available in all sheriffdoms for the disposal of commercial business, personal injury and family cases. Sheriffs should be allocated, based on expertise and aptitude, to the specialist areas. This should not be taken as implying that sheriffs should work only in their specialist area. There should be a range of shrieval duties undertaken by every sheriff but with a significant amount of time allocated to their respective specialisations.

It would not be appropriate to provide specialist commercial or judicial review procedures in every sheriff court but there should one or more courts in every sheriffdom where the commercial and sheriff court judicial review procedures are available.

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

Subject to ensuring that each specialist judge or sheriff has the requisite level of expertise, there should be a sufficient number of specialist judges or sheriffs in each area to ensure that issues of “personality” do not have an undue impact on the system.

5. The principal driver for cases being taken in the Court of Session for our firm are the exclusive jurisdictions of the Court of Session in relation to particular types of cases and the complexity of the case, in terms of the factual and/or legal issues arising.
6. The exclusive jurisdiction of the Court of Session in particular types of cases should be limited. Judicial review, actions of reduction and actions of proving the tenor should all be within the concurrent jurisdiction of the sheriff court. In the case of judicial review there should be a facility for transfer of the action to the Court of Session by motion in the event that any party considers that it is appropriate that the matter be determined in the Court of Session
7. There is merit in maintaining separate first instance jurisdictions in the Court of Session and sheriff court providing that the first instance jurisdiction with the Court of Session is limited

and that of the sheriff court correspondingly extended. The overall policy direction should be towards cases at first instance being commenced in the sheriff court.

8. The Court of Session should retain a first instance jurisdiction but restricted to cases of particular significance, size, complexity etc which merit being raised in the Court of Session and cases which involve major public questions or Orders requiring Scotland-wide jurisdiction. This facility should be available only with leave of the court on special cause shown.

However the Court of Session exclusive jurisdictions should be limited by giving the sheriff court concurrent jurisdiction in judicial review, reduction and proving the tenor.

The privative jurisdiction of the sheriff court should be raised to £100,000 initially, rising within a defined timescale of not more than 5 years to £250,000. This timetable would allow for a transfer of resources over a period of time to the sheriff court from the Court of Session.

By raising the privative jurisdiction in this way the vast majority of first instance cases would, in effect, be re-directed to the sheriff court.

Consideration should be given to clarifying the powers of the Courts to modify expenses to the Sheriff Court scales in actions raised in the Court of Session where the sum sued for has been artificially inflated to exceed the privative jurisdiction.

9. The privative limit of £5,000 is too low.
10. Flexible procedures should be developed so as to allow defended cases in specialised areas to be transferred to sheriffs with relevant specialisation.
11. No; subject to there being particular procedures for the disposal of commercial actions, personal injury actions, judicial review and family actions in the sheriff court.
12. There may be merit in larger sheriff courts in having a lower level of the judiciary to deal with small claims and summary cause business as well as straightforward ordinary civil and personal injury claims.
13. Subject to the observations below in relation to undefended actions for payment of money the distinct geographical jurisdictions of the sheriff court system does not present any significant difficulties. Reduction in the overall number of sheriff courts might be warranted but that is purely a question of economics and convenience. However, it is at least arguable that some sheriff court districts are too big, thus losing for members of the public and its representatives the benefit of the court being local. For example, Hamilton sheriff court serves a very populous area, with witnesses being drawn from East Kilbride to Wishaw. It is arguable that a sheriff court in Motherwell could serve the North and East ends of the current Hamilton district.
14. For the whole of Scotland there should be a central bulk processing facility for the disposal of actions involving claims for payment of monies due but unpaid, simplified divorce, heritable actions and personal insolvency together with the variety of administrative functions such as the issue of enforceable orders under the CJA and European Enforcement Orders. The central facility would handle the actions up to the stage of becoming defended. At that point the relevant action would be passed to the appropriate sheriff court with geographical jurisdiction in relation to the cause.

In small claims and summary causes the first calling should be dispensed with in favour of a system which simply allocates proof dates where the action becomes defended. If some form of interlocutory order is sought then that will be dealt with at the sheriff court concerned when an action becomes defended. If there is an interlocutory application in an undefended action then that will be dealt with at the bulk processing facility.

15. Yes.
16. To be handled in a central bulk processing facility.
17. No; subject to there being a national bulk processing facility.
18. Yes, if only for flexibility. If this question is intended to mean “should all Sheriffs be entitled to sit in any Sheriff Court?” We would agree, however, if the question is intended to mean, “Should all Sheriff Courts have an all-Scotland jurisdiction?” the effect would be that a pursuer would have jurisdiction to raise all actions against a Scotland-domiciled defender in any Sheriff Court. Could this not lead to actions being deliberately raised in particular courts purely for the purpose of causing as much inconvenience as possible to the defender?
19. If the level of privative jurisdiction of the sheriff court is raised, per 8 and 9 above, then there should be limited scope for the transfer of cases from the Court of Session to the sheriff court at first instance. There should be a facility for transfer of cases at first instance from the sheriff court to the Court of Session in the event that it is demonstrated to the sheriff that the case is of sufficient complexity to warrant its transfer. This would be in addition to the particular arrangements made in relation to judicial review actions raised in the sheriff court.
20. The current appeal arrangements in relation to small claims and summary causes are satisfactory. In the case of ordinary actions in the sheriff court they are not satisfactory. Appeals both at interlocutory and final judgment stage should be to the sheriff principal only, unless leave to appeal to the Court of Session is granted by the sheriff who made the original decision or the inner house itself. There should be appeal from the sheriff principal to the Court of Session only with leave of the sheriff principal or the Court of Session inner house.

The office of sheriff principal should be retained and enhanced so that the sheriff principal has greater powers of supervision and appointment in relation to sheriffs within his sheriffdom.

21. 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. Yes.
23. See 20 above.
24. No comment.

Chapter 5

1. No.

2. No; subject to adequate provision being made for the sist of proceedings whilst alternative dispute resolution methods are employed in an individual case. The courts are the forum best suited to determining the rights and obligations of parties and to doing justice between the parties to a dispute. It should not be the role of the courts to seek to fetter access to justice.
3. N/A.
4. No.
5. Parties should be at liberty to select whatever form of alternative dispute resolution they consider appropriate. Parties should be required to fund such alternative methods themselves.
6. The court system should move towards electronic communication being the norm for communication as between litigants and the court and between litigants. Unless specific direction is made, electronic communication, including scanned documentation should be treated as the equivalent of originals without “hard copy” having to be submitted or exchanged. In cases involving judicial case management, hearings should be conducted by conference call or video conference, unless the particular nature of a hearing requires parties to be personally present before the judge or sheriff. The digitisation of documentation and the use of livenote or equivalents should be encouraged in cases involving substantial documentation.
7. The court can only control the conduct and pace of litigation in circumstances where the procedures provide for judicial case management or case flow management. In such cases both the conduct and pace of litigation should be primarily dictated by the court.

Consideration should be given to the introduction of either judicial case management or case flow management in all categories of procedure. The present rules governing ordinary actions in the Court of Session, which allow the parties effectively to control the progress of a case, lead to lengthy periods of inactivity and delay. The allocation of provisional proof dates and a provisional procedural timetable should be appropriate in the majority of cases, subject to variation of the timetable being possible where necessary.

Active judicial case management should be available in all commercial cases.

8. The commercial procedure in the Court of Session has been a qualified success. The commercial cause procedure in the sheriff court, particularly in Glasgow Sheriff Court, has been an unqualified success.
9. The commercial cause procedure in Glasgow Sheriff Court has been an unqualified success, in substantial part because of the attitude and flexibility of the sheriffs who have been allocated to commercial causes.

These sheriffs have recognised the flexibility which the commercial cause rules give them and have used that flexibility to drive through cases to an expeditious conclusion. We have repeatedly seen cases which have been concluded at a far earlier stage than would have been the case had they been raised either in the commercial cause procedure or ordinary procedure in the Court of Session or the ordinary procedure in the sheriff court.

In our view there must be at least one sheriff court in each sheriffdom where the commercial cause procedure and sheriff court judicial review procedures are available to litigants so that those procedures are available to all litigants throughout Scotland in appropriate cases.

Sheriffs should be specifically allocated to the commercial cause procedure in the sheriff court and should demonstrate prior to appointment the particular flexibility and familiarity with technology which are essential components of the role.

Any departure from the judicial case management arrangements in the sheriff court for commercial causes would be a seriously retrograde step.

Case flow management would not be appropriate in commercial cases, but ought to be capable of being introduced in respect of most other forms of dispute. The fixing of a provisional procedural timetable at the outset of litigation, in a manner similar to Chapter 43 procedure in the Court of Session, should significantly reduce the procedural duration of a case.

Chapter 6

1. In our experience the pre-action requirements introduced in relation to the commercial procedures in the Court of Session have been negative in their impact. In commercial causes there should be no protocols of any description required prior to the commencement of proceedings. The system has sufficient flexibility to enable the sheriff at the first CMC to make such directions as he or she thinks appropriate in order to expeditiously dispose of the action.
2. See answer 1 above.
3. See answer 1 above.
4. Under no circumstances should parties require leave to bring proceedings at first instance in the civil courts. The right of access to the civil courts should be a central principle.
5. We have detected no issues with the arrangements for making rules of civil procedure in Scotland.
6. No; abbreviated pleadings should be the norm for all actions in the sheriff court. If greater specification is required of a party's position then sheriffs in all proceedings should have the power to require parties to submit detailed notes of argument in relation to all or parts of their cases. Further, in all cases, sheriffs should have the power to require parties to provide greater specification in relation to factual matters where the sheriff considers fair notice dictates that such is required.
7. The employment tribunals have devised and adopted a single UK wide online application form for all cases. There is no reason why the same should not be possible for all cases in which a money remedy is the only or principal remedy sought in litigation. Standard online forms should also be developed for consistorial actions and personal insolvency.
8. The abbreviated system of pleadings should be the norm in all sheriff court actions.
9. An opportunity for summary disposal on the application of the defender in a cause should be introduced.
10. No.
11. Yes, subject to the proviso that during proceedings where an application is made for the

discharge of a debate or proof to allow amendment of pleadings to take place that it should be the usual requirement that the parties seeking leave to amend tender a minute of amendment, or at least a document setting out the scope of the amendment that will be sought to be made, prior to a discharge of the debate or proof being allowed.

12. Sheriffs should have discretion to timetable hearings. However, timetabling should not be applied in every case.
13. The production of skeleton arguments for debates and submissions at conclusion of proofs should become the norm.
14. No.
15. No.
16. Yes, on a similar basis to that for a current defender's Tender.
17. Civil Juries should be retained in the Court of Session only. If a civil jury is sought in a case below the privative jurisdiction then the action will require to be remitted to the Court of Session and that will have to be justified based on the complexity of the cause etc.
18. No; there should be no requirement for written judgments in small claims or summary causes, except in relation to appeal. In ordinary actions in the sheriff court some form of judgment should be required in each case but there should no longer be a requirement for sheriffs to state findings in fact as such in their judgments.

In straightforward cases there is merit in the sheriff being able to produce a summary decision which requires to be extended on the application of a party.
19. Wasted costs orders or their equivalent should be introduced.
20. The introduction of the availability of summary disposal to defenders in respect of cases which are unstateable should assist in this respect. Leave to appeal should be required in all cases where a party to a litigation is unrepresented.
21. The definition of vexatious behaviour should be extended so as to encompass the continuing of vexatious proceedings, or the making of vexatious applications.
22. The current restrictions on persons without rights of audience representing party litigants should be maintained. There is already developing a trend whereby the "recreational" party litigant offers his experience or "expertise" to other party litigants in advising how to enrol motions etc. Quite often these people are described to the court as being a friend or acquaintance, but in reality are charging a fee of some sort for their services. If the current restrictions were to be relaxed, this trend would almost certainly develop such that there were professional services being offered by "litigation advisers" or the like.
23. Yes.
24. Yes; subject to the introduction of an equivalent procedure in the sheriff court.