

**RESPONSE TO CONSULTATION PAPER
ON THE SCOTTISH CIVIL COURTS REVIEW
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The following remarks are based on my personal experiences of appearing in the Sheriff Courts throughout Scotland over a 20 year period, of instructing cases in the Court of Session and since 2001, of exercising my own rights of audience as a Solicitor Advocate. Throughout that period I have largely but not exclusively practiced in the area of reparation and on behalf of defenders. I also however have had not insignificant experience of commercial litigation.

With some Chapters I have simply aggregated my comments but in the case of others I have answered each question individually.

Summary of Proposals

1. The existing court structure is not serving the people of Scotland well in the 21st Century. Radical reform is needed not only in relation to the structure itself but also the rules of procedure
2. There is a need for wider public education as to the role of the legal profession and the role of the court process but as part of a general awareness of civic responsibility in which there are not only rights but duties and responsibilities.
3. The Review should recommend to the Minister that insurers be encouraged to further develop the range of “before the event” legal expenses products. A campaign to make the public aware of the existence of such products should be recommended.
4. There are far too many Sheriff Courts distributed for historical reasons rather than practical ones. The existing structure of the Sheriff Court system needs to be reformed to include the present Sheriffdom structure. There should be fewer but larger regional centres with specialist Sheriffs in certain matters, including personal injury, family and commercial matters
5. There ought to be either a tribunal or subordinate judicial officer within the existing system to deal with issues such as housing debt and consumer disputes who should have wider inquisitorial powers. The use of formalistic written pleadings and other procedures should be discouraged
6. There ought to be a central clearing or commencement centre similar to the County Court Clearing Centre in England and Wales but with a sifting process to determine which types of case should be referred where
7. The jurisdiction of the Court of Session should be reviewed. In particular personal injury actions of a value of less than £150,000 should not be

capable of being raised there unless with leave of the Court on special cause shown, prior to signetting

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

Undoubtedly the civil justice system should encourage the early resolution of disputes. As well as a need to improve access to justice not only for those of modest means but for the many, including small business and traders for whom the cost of litigation is a deterrent to the vindication of rights, there is a pressing need to make the system work better for everyone. I would encourage the Review to be radical and not to baulk at taking on the many vested interests on all sides of the profession who are comfortable with the status quo. All of us who practice before the courts have a once in a lifetime opportunity to contribute to far reaching reforms which will hopefully make the civil courts system fit for purpose in the 21st century.

As governing principles I would agree with the five principles enumerated in paragraph 1.12 so far as they underpin the approach to be taken throughout the remainder of the Consultation Paper.

I have not been struck by the omission of any topic from the wide ranging contents of the review.

Chapter 2: Access to Justice

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

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

I agree that there ought to be steps taken to improve public legal education. This ought to start at school as part of the education process. It seems to me that in recent years society has lost sight of what is involved in becoming a good citizen and of the responsibilities and duties involved. There has perhaps been an over concentration on rights rather than duties. At the same time we have to empower those without adequate access to justice and improve the systems and structures of the court system.

It seems to me that there must be scope for a wider interrelationship between bodies such as SLAB, Citizens Advice centres and other representative organisations including law centres. In my view steps ought to be taken to encourage party litigants to seek representation by solicitors paid for by such bodies failing which to permit representation by non legal representatives of such bodies perhaps on a list approved by say the Sheriff Principal (c.f the preservation of the Sheriffdom system) as lay advocates in certain types of cases whether debt, housing or consumer affairs. This might be modelled on the Office of the Public Defender. Representatives of such a body should be attached to and on duty at the court (or tribunal) as appropriate. The court or tribunal should have powers to appoint a representative. Other than to that extent party litigants should be discouraged. They should not be permitted in larger cases without the appointment of an amicus curiae and certainly not in the cases reserved to any reformed Court of Session. Such a draconian measure would in my view be justified standing the balancing effects of the suggested reforms.

The current small claims and summary cause procedures are wholly inadequate to deal with such matters. They remain unnecessarily formalistic. They favour larger organisations who simply engage high calibre legal representation. The legal aid system does not allow for equality of arms in terms of the rates of remuneration. I am also in favour of the decision maker, for it need not be a Sheriff (see the following comments on the lack of a subordinate judiciary) having

much wider powers to intervene and to determine summarily the case (a benefit to commercial organisations-the time wasting defence- as much as consumers)

The current hierarchy of small claims, summary and ordinary cause is based on the value of the case without reference to the issues (c.f. the special provisions for personal injury Summary Causes). In my view there ought to be a separation of cases by reference to their subject matter. There may be in practical terms in relation to the disposal of such cases by the court but only in respect of administrative convenience (for example all applications under the Debtors (Sc) Act may be heard together or all matters relating to tenancies or the recovery of possession of heritable property may be dealt with in a heritable court.)

I would be in favour of certain types of case being heard by a tribunal or at least not by a Sheriff, away from the formalities of a court setting. These should include all housing matters relating to tenancy, most consumer cases up to a certain value (for what it may be worth the writers view is that all debt cases up to say £5,000 ought to be capable of being dealt with in such a manner subject to certain safeguards). Use of formalistic written pleadings should be discouraged or else case managed proactively

We have never had in Scotland any sort of subordinate judiciary such as a District Judge in the County Court or a Master in the High Court in England and Wales. I would be in favour of greater use of part time appointments of members of the profession for such a purpose. We already have social security and mental health tribunals which operate very successfully in this way, often involving complex issues requiring specialist knowledge. Likewise the Employment Tribunal system has been greatly expanded in recent years and now deals with significant cases. One other benefit would also be a pool of experienced prospective judicial appointees

I would suggest that any increased cost to the Exchequer would be offset by savings and efficiencies made in the running of the system as a whole and perhaps even from a reduction on the pressure for further judicial appointments simply to deal with perceived volumes.

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 sums awarded by the court or settlement figures?***
- 2. *To what extent does the cost of litigating deter people from pursuing or defending cases in court?***
- 3. *Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?***

- 4. Are the current rules for recovery of judicial expenses satisfactory?**
- 5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?**
- 6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?**
- 7. Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?**
- 8. What impact have speculative fee arrangements had on access to justice?**
- 9. Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?**
- 10. What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?**

It is certainly my view that in lower value cases the legal expenses are disproportionate to the sums involved. This is a barrier to justice. The existing court structures and rules of procedure however exacerbate this by encouraging a formalistic approach. There is a total lack of either case flow or case management. This leads to the accrual of expense.

I have acted both for clients in disputes over goods and services supplied and on behalf of tradesmen and small businesses seeking to recover sums owed. In all cases the likely hood of significant expense accruing has been a major factor in my advice. The lack of insurance in most of these cases means that parties face having to pay their own solicitors and also risk paying the other side. Some cases can raise significant issues disproportionate to the sums involved. Inevitably time has to be spent considering such matters. This may serve to increase the gulf between the clients own legal costs and the amount recoverable from the opponent if successful. The case example in the Appendix in which I was involved illustrates a number of problems with the entire system. It might be argued that the pursuer ought to be able to recover the actual costs of his solicitor. Why should he suffer a diminution of his recovered award because of the extra expense of litigating in an out of town court or because there were wasted costs as a result of the inefficiencies of the court system? Why should the defender if unsuccessful pay for the “devilling” of the pursuer’s solicitor if unfamiliar with the law? Why should he face the uncertainty or unpredictability of

his opponent's expenses being based on an hourly rate in an agreement to which he is not party or upon the discretion of the Auditor?

All of these points are valid ones. The expense however falls somewhere. If the solicitors bear it then their practices are less efficient and less remunerative. Lawyers do operate businesses. They, as much as the courts, are a resource. The availability of skilled lawyers to the wider public is as essential to the doing of justice as the provision of court buildings.

It is nonetheless submitted that the problems evident from the case study are on balance capable of being addressed as part of the wider review of the entire system. It is the problems with the system that I shall expand upon in other chapter headings that aggravate the costs of litigation. If these problems are addressed then the problems with delay and expense which are a symptom of the underlying problems should decline.

Having said, that in my view the Scottish system of having prescribed tables of fees, applicable in every court in Scotland is the correct one. It allows for both a degree of certainty and prediction, two requirements of any system dependent on rules of law. It is essential in my opinion that a party can be advised on the likely cost of litigation. I can see no reason for adopting the English system which I understand is partly based on a prevailing hourly rate in the area of the court.

Nor should we adopt the English CFA system. In my view this has led to all sorts of problems evidenced by the growth in "satellite" litigation over costs, with firms of solicitors and costs draughtsmen specialising in costs litigation. It has also led in my view to the growth of "claims farming" where by outside interests are attracted to the funding of litigation by the returns to be made on after the event policies. The scope for fraud or dishonesty has brought about the need for regulation now enacted in the Compensation Act

Having said that, there is a role for insurance funding in litigation. The fact of the matter is that the bulk of litigation must already be funded in some way by external funders. The average personal injury claim in Scotland was historically brought by a pursuer assisted by his union and defended by an insurer. I would venture to suggest that many other types of cases brought before the courts involving are in reality brought by an insurer exerting rights of subrogation and are defended also by another insurer. In my 20 years in practice I have seen an explosion of motor accident litigation in which the pursuer is assisted either by his motor insurer or by an ancillary legal expenses insurer. Legal expenses insurance is now also a major source of funding in other personal accident situations and in relation to disputes over goods and services or other household matters.

It would be my suggestion that the Review recommend to the Minister that discussions be held with representatives of the insurance industry aimed not

only at the wider provision of bone fide “before the event” insurance as an adjunct to motor or household policies but also, as part of the wider process of public education, its availability to consumers.

There is in my submission a further benefit to increasing the use of insurance products. Insurance companies are in my view amongst the most sophisticated users of legal services in the country. Most have service standards or handling protocols and many follow these through with service level audits. In short just as we ought to have court procedures that prevent parties litigating at their own pace and at their own discretion the proper management of litigation also has a place at the funding stage.

I am aware that the larger firms operating on behalf of pursuers also have stringent case handling or risk management arrangements to ensure that cases are pursued properly and efficiently and that funders whether unions or legal expenses insurers are not exposed unnecessarily. Some firms (from whom the Review will no doubt hear) have their own funding arrangements and doubtless have similar arrangements in house.

To touch on the remainder of the questions, it is my view that the existing system of taxation of expenses works satisfactorily save in two respects.

Firstly it is inappropriate that the Auditor’s remuneration be at all related to the size of the account. I would recommend that there should be fixed fees payable dependent on the size of the account.

Secondly there should be the entitlement of a party to protect his position by making a tender or similar offer of a sum of expenses. At the moment the paying party is responsible for the Auditor’s fee on the account as taxed and the Auditor cannot allocate responsibility for his fee having regard to the fact that the paying party offered to agree the account at a figure less than the taxed amount. The present system provides no incentive to entitled parties to adjust accounts with paying parties. The views of Lady Smith in the case of *McFarlane-v-Scottish Border Council 2006 SLT 721* whilst offering some protection, may require the Auditor’s determination of the taxation to be the subject of a Note of Objections to the Lord Ordinary or Sheriff as the case may be and it is submitted, is not a satisfactory solution.

So far as the recovery from litigants by way of court fees of the costs of operating the court system, whilst it might be said that the courts ought to be funded from general taxation, the vast bulk of litigation is brought for or on behalf of funded persons and I see no reason in principle why court fees should not be paid subject to appropriate exemptions in certain cases e.g. publicly assisted persons or persons whose income consists of benefits.

Chapter 4-The Structure and Jurisdiction of the Scottish Courts

I should wish to make a few preliminary observations. The first of these is that from the point of view of access to justice and the daily dispensing of justice across Scotland, the Sheriff Court is of paramount importance. It has an extremely broad civil jurisdiction, much of which from family to consumer matters including debt and housing has strong and important social policy and access to justice connotations. However it requires to deal in some centres more than others with commercial litigation and a significant amount of personal injury and other reparation related actions. On top of this Sheriffs have a large and increasing volume of crime, which as the Review notes, occupies about 70% or more of their time.

Sheriff courts are located across Scotland from the major centres to outlying towns and of course the Islands. Some of the smaller Sheriff Courts serve a significant area. Again (by coincidence, for it has done me no harm!) I return to the example of Dunoon which serves a significant part of Argyll.

In one recent case of mine, relating to a road traffic accident we were unable to proceed to proof on the first day allotted, a Monday, on account of an emergency application for an intervention order or similar measure relating to the welfare of a child which had arisen either late on the preceding Friday or over the weekend. There is only one court room at Dunoon (although use is I understand made of the jury room) and only one resident Sheriff. Both parties and all bar one of the pursuer's police witnesses had travelled from the mainland. The pursuer's solicitor had travelled from Perth (it is unfortunate that he had not considered founding jurisdiction on the defender's domicile in Glasgow rather than the locus of the accident near Inverary). Enquiries established that the only persons in court local to Dunoon or its environs were the bar officer and Sheriff Clerk!

The subsequent diet was presided over by a Sheriff transferred from Greenock and subsequent days were in fact heard there.

In one other Sheriff Court case, again in an outlying court with one resident Sheriff, and involving a complex professional negligence action, I was told that unless a Part Time Sheriff could be found, the proof, set down for four days would require to be interrupted each morning or at 2pm where necessary each day, to deal with custody cases and petitions.

The Supreme Courts on the other hand are centralised in Edinburgh. Despite the volume of business which has historically arisen from other centres most notably Glasgow and the west, the Court of Session has never sat outside Edinburgh (cf particular instances where Senators of the College of Justice have chaired inquiries in special situations such as Orkney or Dunblane).

The centralisation of the Supreme Court may allow expertise also to be centralised in Edinburgh. Most of the larger firms specialising in civil litigation are based there including those who profess to offer specialist expertise in say reparation. This it may be said leads to economies of scale and a degree of efficiency in operation which operates in the public interest.

Against that from my experience the system operates increasingly for the benefit of those practising there. Actions of a value which could quite competently be disposed of in the Sheriff Court are raised in the Court of Session to suit the conveniences of the agents. In my submission few cases raised in the Court of Session below say £150,000 (a purely personal figure-I am aware that other parties responding to the Consultation Document have suggested a larger figure) contain matters of great controversy. The few that do or that offer the possibility of establishing new ground or tackling unresolved issues are perhaps more likely in any event to be appealed.

It is within my own experience certainly before but also albeit with decreasing frequency after the introduction of the Chapter 43 procedures, that cases have been unable to start on account of the lack of judges and/or an unusual number of unallocated cases which required to proceed.

The centre of excellence argument overlooks the significant number of highly technical and often complex cases heard in centres such as Aberdeen and Glasgow. In particular I would commend to the Review the pilot scheme introduced in Glasgow by Sheriff Principal Taylor for dealing with personal injury actions albeit on a voluntary basis

In my view the fact that some 90% or more of say personal injury cases settle is not a relevant matter as regards the question of which is the most suitable forum. Judicial and court resources are still expended in processing and managing even those cases and even in relation to the 10% or so of cases which proceed. Conversely the fact that such cases are likely to settle, particularly with some degree of case or case flow management adds to rather than detracts from the argument that they should be managed at lowest most efficient level.

Turning to address the questions posed in Chapter 4 in detail:-

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

Undoubtedly so as per the example I have given. There is a widespread practice of assigning only a single day to a civil proof on account of concerns (justified, admittedly although whether this solution is the most suitable one is another matter) at the disruption of court business by late or last minute settlement.

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

Yes. I believe there is great scope for judicial specialisation in a number of different areas, not just between civil and criminal but also in relation to different types of civil case in particular personal injury.

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

Partly. In my view a number of important issues rightly require to be dealt with at local level-family, consumer, housing and so forth, although how “local” the level needs to be is a matter for debate. There may not be the volumes at certain locations for a proper separation of judicial functions c.f. arguments for regional centres for particular types of case. I am also in agreement with the concerns expressed by the Review at paragraphs 4.26 and 4.27. The answer lies in my view in specialisation of function not in separation of functions.

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

As mentioned I believe there is scope for specialisation in family, commercial and above all, personal injury. There is also scope at the lowest level for some sort of third tier or subordinate judiciary particularly in smaller cases

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?

In my opinion personal injury cases in particular are increasingly handled by a number of specialist firms. It is my view which I know is shared by many others that the operational conveniences of those firms dictate that most if not all actions are raised in the Court of Session. The larger pursuer firms are able to self fund or at least concerns over expenditure do not seem to be a factor. The existence of the right to jury trial in the Court of Session may be a factor but in my view Issues are sought only in a few “cherry picked” cases. Some firms outside Edinburgh remain wary of the additional expense associated with the use of Edinburgh agents and the perceived loss of control. The procedures and working practices of the Court of Session and those who operate there still militate against all attempts at operating directly from outside Edinburgh. The working practices of the General Department and established Edinburgh

Solicitors continue to operate in comfortable symbiosis despite all attempts at reform (whether by e-filing or submitting motions by fax) and still require the attendance of court runners or solicitors' clerks. This is aggravated both by the unduly short period allowed for intimating and opposing motions and many of the provisions of the Rules of Court for example Rule 36 that allows the intimation of Inventories of Productions without the provision of copies of the actual productions themselves (c.f the requirement of the equivalent Ordinary Cause Rule in the Sheriff Court). In many cases agents wishing to arrange fixed diets by reference to the availability of counsel (which in many Sheriff Courts receives commendably short shrift!) require to attend in person.

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

In my view the Court of Session should deal with cases of significant value or importance. I would set a threshold in monetary terms of say £150,000. I am aware of arguments for a higher threshold. I would nonetheless permit an application to be made to the court, similar to the pre signet motions now made to remove clinical negligence cases from Ch 43, for leave to bring an action in the Court of Session on a number of restricted grounds, such as an issue of special importance or particular complexity. The Court of Session should continue to deal with the small number of specialised matters reserved to it such as Exchequer causes, actions for reduction of deeds or documents with the exception say of actions for proving the tenor of a lost or missing will, simply on account of the relative volumes involved. Judicial review should in my view remain reserved to the Court of Session, subject to some clarification of the sort of cases which are entitled to such a remedy.

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

No although I do believe that there are opportunities to unify procedure or at least bring the procedures of the two courts more closely together.

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?*

As mentioned I believe that there continues to be the need for a superior forum provided that the demarcation level is clearly set.

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

As mentioned my personal view is that £150,000 would be about right.

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

No. The Court of Session ought to have powers to remit cases to the Sheriff Court. I believe however that the current procedure for remitting a case to the Court of Session from the Sheriff Court would have to be changed to prevent what might be considered to be unsuitable cases being remitted to the Court of Session.

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 the sheriff court?

As mentioned in my remarks relating to Chapter 1 I believe that there is scope for a subordinate level, whether made up of practitioners aspiring to further judicial appointment or a career post in its own right. There is a significant amount of business which ought to be dealt with on a non adversarial way and to enable or empower persons and organisations to pursue smaller cases without rigid forms of procedure. It might also be questioned whether Court of Session judges should be dealing with the more routine interlocutory business even in cases which are otherwise suitable for the Court of Session.

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

See above

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

I believe that some local access to justice is essential. This need not mean an actual court far less a Sheriff. I do believe that the current geographical distribution is archaic. There are numerous examples of Sheriff Courts located within a few miles of each other yet in different Sheriffdoms-Paisley and Glasgow or surprisingly far apart-Campbeltown and Kilmarnock for example. I am aware of

the fact that many courts serve wide geographical areas. On balance I feel there are too many Sheriff Courts with single Sheriffs which leads to a disparate and inefficient use of resources. I agree with the Review's comments in Para. 4.56

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

I would advocate a clearing centre similar to the County Court Clearing Centre in England and Wales. There is no reason why every Sheriff Court action could not be raised centrally and only allocated to the most appropriate court once defended.

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

My knowledge of this area is somewhat general and would defer to those more experienced to provide the Review with a cogent response.

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?

There might be aspects of the Sheriff Courts administrative function which could be dealt with by a subordinate judiciary or by a suitably enhanced role for the Sheriff Clerk.

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?

I would support a central clearing centre but preserve aspects of the current system for example by way of allocation to local courts or specialist courts once defended. I believe that the current system of appeals to Sheriffs Principal should be preserved at least as "regional appellate Sheriffs". The disposal of short procedural appeals within a reasonably short time frame is a commendable feature of the current system. The existing Sheriffdom structure has probably outlived its usefulness although it may be possible to reform it to preserve some localised presence.

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

This would depend on whether the Sheriffdom structure is retained. I would agree that there are advantages in Sheriffs being able to move between courts which are comparatively near to each other irrespective of formal “ties” (the Falkirk/Linlithgow example is an obvious one). The system of “all Scotland” floating Sheriffs is an example of how this might work.

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?*

As suggested the Court of Session ought to have greater power to remit cases down to the Sheriff Court ex proprio motu or on the motion of either party. The existing power of the Sheriff to remit to the Court of Session may have to be changed as the Court of Session might find itself receiving cases of a type it might regard as inappropriate. I have suggested that despite any increase in the jurisdiction limits, it ought to be possible to seek leave of the Court of Session to commence proceedings there below the appropriate level on say special cause shown in cases of special value or importance or unusual complexity or which raise novel or important questions of law. The same criteria might apply to transfers from the Sheriff Court by way of motion to the Court of Session to essentially call in a case from the Sheriff Court.

20. *Are the existing appeal arrangements satisfactory?*

In my view the existing system of appeals to the Sheriff Principal work satisfactorily and could be retained even if the structure or composition of Sheriffdoms were to be radically overhauled. I am of the view that further appeals should require leave or alternatively that a sifting process similar to that utilized in criminal appeals might have to be devised to prevent unmeritorious appeals. I would be in favour of certain of the statutory appeals currently heard by the Inner House being heard by single Outer House judges (particularly if the volume of Outer House business should fall as the result of the raising of the financial threshold). I also agree that appeals from the Inner House to the House of Lords should require leave unless say the judgement of the Inner House was

divided. As a safeguard perhaps the right to appeal to the House of Lords by way of petition, similar to the system in England might have to be introduced.

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?*

I would retain the office of Sheriff Principal for the reasons suggested. The office of Sheriff Principal has a number of existing important administrative functions and may yet acquire additionally important ones depending on the outcome of the review as regards management of shrieval workloads between neighbouring courts or at larger “super” or specialist courts.

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

See paragraph 20 above

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 paragraph 20 above. I do not believe lay appellants should be permitted particularly before the Inner House. An Amicus Curiae should be appointed

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

I am a firm believer in the appropriate use of Temporary Judges and Part Time Sheriffs. If some sort of subordinate judiciary is deemed appropriate this would be a useful starting point for those seeking judicial office. A modern trend seems to be developing whereby aspirants for full time appointments may be expected to have served in a part time capacity. The concerns of the Review are well founded but are in my submission capable of being addressed if the problems which give rise to excessive dependence on part time judges or Sheriffs are themselves addressed that is to say inefficiencies and lack of best use of resources in the existing system.

Chapter 5 Principles for Reform to Civil Procedure and Key Procedural Issues

I agree that proportionality as to the use of resources having regard to the value and complexity of the cause should be adopted as an overriding consideration and should inform every proposal for reform. Many of the existing structures and methods of working are not fit for purpose. In particular control of the progress of the litigation should be vested in the court not in the parties as was the case (to some extent) with the pre 1993 Ordinary Cause rules and was certainly the case in personal injury actions prior to the Chapter 43 reforms (and remains at least a problem with non personal injury cases and personal injury cases and clinical negligence cases removed from Ch 43)

With some reluctance I am of the view that the system of dependence on detailed written pleadings may have outlived its usefulness and may operate unjustly (see the critique of the Scottish system “Tyranny of Fact Pleadings” in *The Journal*, 2003 *JLSS*, 48(1) at 19). In the Sheriff Court there remains the scope for needless pedantry of a form which seems to have vanished even in the ordinary procedure of the Court of Session

I am reminded of Lord Diplock’s comments in *Gibson-v-BICC 1973 SC (HL) 15 at 27*

“My Lords when I first became a member of Your Lordships’ House I was unacquainted with the niceties of the Scots system of written pleadings. Since then my acquaintance has grown: so has my disenchantment”

An over concentration on the form of pleading may deny justice and in some cases almost blinker the court. In my view the comparatively modern approach taken to “mere amplification” of cases on record and the more relaxed approach to amendment in the Court of Session are signs that judges depart from the system in ways that are not necessarily wholly transparent or prescriptive.

The solution lies in greater case management and case flow management coupled with the right to seek or to compel amplification of uncertain pleadings. In the Sheriff Court the presumption is against debate unless a material issue arises, defined as one which if sustained at debate, might result in the dismissal of the cause in whole or in part or the restriction in the scope or mode of proof (see *Gracey-v-Sykes 1994 SCLR 909* and *Blair and Bryden-v-Adair 1995 SLT (Sh Ct) 98*). Despite this in my view many practitioners fail to argue against the allowance of debates and many Sheriffs fail to adequately conduct Options Hearings no doubt due to lack of adequate opportunities to consider the papers in advance.

I would agree that the Options Hearing has not been as effective as the rule providing for it might suggest. I distinctly recall that at the time the current rules

were introduced perceived wisdom was that they would be the “death knell” of agency. Agency is alive and well to the present date. The practice in some courts of running generic civil courts dealing with all business and the realities of out of town litigation make use of agents an economic necessity despite all dire warnings of the consequences (*Tilcon (Sc)-v-Jarvis (Sc) 2000 SLT (Sh Ct) 55*)

I am in favour of the Ch 43 reforms and advocate their extension to personal injury cases in the Sheriff Court. Indeed I would extend case flow management to all actions in the sense of a fixed end point and milestones for preparation or disclosure

Mediation I find a complex and difficult area of which to form a view. On balance I believe that it is more appropriate in cases such as some commercial disputes and in family cases where the desire is to both resolve a dispute and in some manner of way repair a relationship or working relationship. In the average personal injury case does the pursuer wish ever to see again the person who caused his accident? And in most cases is not that wrongdoer likely to be represented by an insurer who may not involve or in cases where liability is admitted need to involve, the insured?

To answer the specific questions

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?*

I believe that it would be appropriate to record such a general statement of principle. Such a proposition is nothing new. It already appears in the preamble to Rule of the Ordinary Cause Rules in the Sheriff Court

I believe there may be scope particularly in low value cases for a more interventionist approach to be adopted by the “decision maker” whether a Sheriff or a new subordinate judicial official. I also believe there is scope to expand the services made available for lay representation or intervention by lay advocates of a designated type.

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?*

Yes but not compel. Perhaps by way of a certificate signed on behalf of a party at say the stage when an order is sought remitting the action for proof stating whether mediation or similar ADR has been attempted. There is no reason why a judge dealing with any hearing such as the Options Hearing or any equivalent case management hearing could not require parties to address him on the matter.

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

Some forms of personal injury action. Clinical negligence actions particularly where fraught or tragic may be the exception to that where an explanation and apology may be as much the desired outcome as monetary compensation.

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

See my remarks concerning lower value cases in Ch 3

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

Electronic case management and use of telephone case conferences particular in specialised cases such as personal injury cases. One can envisage cases being handled by specialist Sheriffs at centres comparatively remote from the participants

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

I believe that this is vital to the success of any reforms to follow on this Review. Some form of case flow management should be extended to non Ch 43 cases and non commercial cases in the Court of Session and their equivalents in the Sheriff Court. To prevent parties (or more likely their advisers) litigating at their own pace is essential if the underlying principles of the review are to be met

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

The size of the claim may be the determining factor. In my view it is uneconomic in lower value commercial cases. There are in my view value judgements inherent in the assumption that say commercial cases should necessarily be allocated scarce resources ahead of actions with other important considerations. Some sort of twin track procedure, one with active judicial case management and the other with case flow management might be possible, with parties being able to elect for either if certain criteria are met or else the court deciding by default in certain cases which form is more suitable-personal injury or disease, commercial or family and so forth

Chapter 6 Working Methods of the Civil Courts

I have to some extent touched on many of the matters raised in this chapter in my comments on preceding chapters. Accordingly I propose simply to address the questions posed:-

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

In my view some sort of pre litigation regulation is essential in order to focus the issues, facilitate discussion and disclosure and thereby promote and foster settlement. They must however not be too rigid in application nor dispense entirely with the adversarial process in that it is for the pursuer to assert and prove his claim. In turn the pursuer is entitled to a reasoned rebuttal of his case if justified. It is within my own knowledge that for whatever cultural or historic reasons some pursuer's solicitors decline to enter into any reasoned discourse or provide any meaningful amount of information. Likewise as someone who habitually acts for insurers it has to be acknowledged that certain ways of working, for example the use of the classic "claims inspector" who might call by arrangement to discuss or settle claims is in decline or indeed is almost extinct. I believe that the voluntary protocols work well in Scotland but lack sanctions (cf the discretionary power of the court to award expenses) and it would be my submission that the present protocols be made legally binding.

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

Yes for many of the reasons given above. Further more they would be essential if the system of written pleading was to be relaxed or if some "gate keeping" system were to be introduced.

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

Compulsory. Care should be taken to avoid however the problems understood to be prevalent in England where there seems to be much posturing or point scoring over perceived transgressions and consequences for costs.

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?*

Yes. I have touched on this in earlier comments. In my view were the financial threshold for raising actions in the Court of Session to be raised, leave to raise a complex yet lower value action ought to be capable of being sought. I agree with the comments made concerning the unfettered right to appeal final judgements from Sheriff to Sheriff Principal to Inner House to House of Lords. I believe there ought to be some sort of sifting system for unmeritorious appeals or a greater number of instances where leave is necessary.

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

When the current ordinary cause rules were introduced in 1993, I had understood at that time that it was intended that the rules of the Court of Session and Sheriff Court would undergo gradual harmonization. We now have as the Review observes four sets of procedural rules in the Sheriff court alone and a sub set of rules dealing with personal injury summary causes. In the Court of Session there are myriad chapters of specialist rules in a form that are barely accessible to the lawyer far less the layman. I would accordingly be in favour at least of greater harmonization of the rules of each court at least to the extent whereby common themes-early disclosure, abbreviated pleadings, case flow or case management – are evident. I am not persuaded that the current separation of rules councils facilitates this process notwithstanding the instances of cooperation e.g. use of IT.

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

I have largely dealt with this above. It is my strong view that we should endeavour to move to a common code of civil procedure as between the two courts allowing for the complexities of larger cases at one end and the need for simple processes at the other. This would in my view sit neatly with the concurrent jurisdiction of the two courts and facilitate movement between each. There would still be need for specialist chapters dealing with complex or specialist areas for example IP or commercial 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?

Yes. Again this would enable a single centre for the raising of all actions to be created after which if defended, cases could be referred to appropriate courts. There ought to be appended not only a schedule of documents to be relied upon or to be sought but a document akin to a questionnaire in which the pursuer's agent provides answers to questions of relevance to the disposal of the case such as the anticipation of a substantive defence, compliance with any pre

litigation protocol, the use of experts, whether one or more, the use of counsel, the number of witnesses, whether the geographic location of the court to be seized of the case is of importance to the parties or witnesses and so forth (perhaps including whether the case might be suitable for mediation).

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

I am generally in favour of this for the reasons given in my general remarks in answer to Chapter Five above. There would have to be a corollary however in that notice and disclosure by some other means would be necessary whether by way of statements of value, milestones, case flow management or improved means of summary disposal and I would preserve the right to seek further and better specification by way of motion. I am not persuaded that especially in an ordinary reparation action pleas in law as opposed to simple concise propositions of law (e.g. fault at common law or breach of enumerated provisions of a set of regulations), are now necessary

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

No. I would provide for equivalent provisions for defenders to seek summary dismissal. I would also set out the test to be adopted as developed in case law to date in Summary Decree cases and even go as far as the English standard as discussed by the Review.

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?*

I am in favour of a junior or subordinate judiciary perhaps comprised of part time judges drawn from members of either profession. I doubt even if the Review were to recommend it that the Treasury would sanction the creation of a salaried, pensioned, third tier. There is no reason why simple procedural matters could not be dealt with or more importantly why they require the attentions of a Lord Ordinary.

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

See above

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?

I believe that much scope remains for the proper exercise of judgement by the advisors of either side perhaps backed up by an appropriate sanction in expenses or levying of administrative charges. The court has a role to play by encouraging candid discussion particularly where case management as opposed to case flow management prevails. In the Sheriff Court and in many smaller Sheriff Courts the proper estimation of time by practitioners is academic; the court assigns only one day on account of the lack of resources. The court exercises no judgement or discretion at all in so doing. The risk of late settlement would be reduced by a step similar to a pre trial meeting or a pre proof hearing.

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

I would be in favour of greater use of expanded notes of argument or skeleton arguments or written submissions particularly in the Sheriff Court. The Rule 22 Note is produced prior to the Options Hearing to secure a debate not to assist the determination of that debate and in most cases is nothing like a Note of Argument for a Procedure Roll debate in the Court of Session. For some reason the authors of the Ordinary Cause rules determined that a party has to submit a Rule 22 Note one day earlier than the latest date for lodging and intimating a Record which in complex cases hardly makes for easy study of the pleadings.

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

A balance has to be struck between promoting disclosure and avoiding undue expense or complication. In my view a combination of a pre action protocol with its own disclosure obligations, a requirement to produce medical or other evidence founded or relied on at the time an action is raised, the right to automatic recovery of standard documents and early dates for listing witnesses or productions would go some way to addressing any perceived mischief.

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

I believe that there ought to be some control. I have suggested a questionnaire at the outset. In my view however it would be unworkable without adopting different rules for different levels of case value simply to provide say that only two experts may be engaged. In many cases, not simply complex ones, experts frequently beget experts. Neurological or psychiatric experts may be suggested by the results of say orthopaedic examination

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

I would be in favour of codifying the law and practice relating to Tenders generally to include their extension to pre-litigation offers. A sanction is needed to compel compliance with protocols and the matter is much too important to be left to the uncertainties and vagaries of post settlement arguments over the general discretion of the court to award or refuse to award expenses. The difficulty with a pursuers offer is the sanction to be imposed. The former rule, declared to be ultra vires the power of the Court of Session to regulate its own procedure, was indiscriminate in its approach and was not balanced by any provision requiring disclosure by the pursuer of a reasoned valuation or even medical evidence. Some sort of sanction perhaps based on an automatic entitlement to an additional fee might be appropriate (although it might be asked why the pursuer's agents alone and not the pursuer should benefit).

17. *Should civil jury trials be retained?*

No, for the reasons discussed by the Review, It cannot be right to preserve a method of disposing of cases which detracts from the fundamental requirements of any system of norms namely that they be predictable and certain. Only a small number of cases proceed to jury trial. Despite pursuers having the "right" to a jury trial in a personal injury action, that "right" is exercised somewhat sparingly and only in cases where the pursuer or more likely his advisers deem it prudent or advantageous to do so. If the system is so desirous I would have expected pressure for its reintroduction to the Sheriff Court. I am unaware of any.

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

Yes save for as present summary cause and small claim hearings. I think it is important for the doing of justice and for the reasons given by the Review.

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

Yes, by way of awards of expenses and the forfeiture of the right to charge clients for the steps taken

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

I have commented above on steps that might be taken, for example a sifting process or the strengthening of the requirement to seek leave. The courts should have greater powers to appoint amicus curiae especially in appeals.

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

I do not have significant experience and would defer to those better placed to comment.

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?

Yes particularly in lower value cases in the Sheriff Court. As part of securing access to justice I would like to see an extension of the system of approved representatives in the lower courts. I am not in favour of such a system in the supreme courts and would advocate the appointment of amicus curiae.

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

I am generally supportive of the views canvassed by the Review. It seems to me that the overriding interest of the courts must be to reduce the multiplicity and hence expense of litigation.

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

Again this is not an area in which I have expertise and would defer to those more experienced.

*Andrew R Ireland
Solicitor Advocate
Glasgow 3rd April 2008*

Case Study

A client, a jobbing builder was engaged to carry out renovations to a house. He carried out works to a value of about £7000, having estimated these, on his version, at about £6,000. Due to what was alleged to be a delay and or variation in the scope of the works they remained unfinished when a dispute arose. The client was excluded from the site and the works remained unfinished but none the less substantially complete and moreover in the employers hands and the client unpaid. There is a factual dispute over (1) whether the price was indeed a quotation or was fixed (2) whether the delays were the clients fault or the fault of the other party (2) whether the client was excluded from the works (putting the employer in breach) or abandoned them (affecting the entire basis of his right to payment, if any). Immediately parties are faced with potentially complex issues of payment quantum meruit or on one version, recompense quantum lucratus, issues which require careful research and under the present system, careful and accurate pleading. There are many grounds on which the defender can properly insist on a carefully pleaded case and indeed there has been a requirement to amend to address certain points. The action takes place in a small out of town court with one Sheriff to deal with all sorts of business. One debate could not proceed on account of pressure of other court business, this not being ascertained until the morning of the debate. Both solicitors are based in Glasgow. I should say in this case my client has the benefit of Legal Aid. I am unlikely to recover anything like the true cost of representing my client. Even if he had been funding the action, and were he to be successful there would be a significant extra judicial element payable out of any recovered settlement. He is unlikely to be offered anything like the true value of his case and may not even recover all of what he seeks in any event. As always there is some risk of a restricted or even no recovery. The defender is not insured. The fact that any settlement offer will require to be coupled with an offer of expenses is in my view inhibiting settlement. An offer to settle without or inclusive of expenses may not be attractive to the pursuer. Quite simply the middle ground is occupied by the lawyers on either side.

It might be said that

- The complexity of the case is disproportionate to the sums involved
- To some extent the case is unlikely to be fully remunerative to the lawyers involved as they will discount time spent “devilling” in relation to the legal issues (as indeed they must under the present law and practice whereby solicitors are assumed to know the law) and travelling to the out of town court.
- The existing court structures and systems are aggravating rather than solving the dispute. There is no case flow management far less active case management. The written pleadings system may be said even on the most objective view, to be a complicating factor. The defender is entitled

to fair notice and has the entitlement to take points relating to relevancy and specification. The proceedings are of course, adversarial

- The case is taking up time at court to the exclusion of other matters
- The clients are no nearer a resolution to their dispute