

## ***LORD GILL'S REVIEW***

### **Response by Lawford Kidd Solicitors, 12 Hill Street, Edinburgh To Scottish Civil Courts Review Consultation Paper 26/03/2008**

#### ***The Firm***

Lawford Kidd is a Specialist Personal Injury Practice. The core of our work is referred and funded by major Trade Unions. This work is not funded on a speculative basis (contrary to the statement at page 21 of the Consultation Paper at paragraph 3.21).

The firm was accredited by the Association of Personal Injury Lawyers (APIL) in 2006, being the first Scottish firm to receive such an accreditation. The firm plays an active part in APIL, MASS (the Motor Accident Solicitors Society) and is also represented on the Law Society Civil Justice Committee.

The firm has a strict client service policy seeking to ensure that all communications to clients are set out in plain and understandable terms. Each client, at the commencement of the claims process, is issued with a printed brochure setting out in detail the claims process, the financial basis on which any claim is settled and an outline of the court process. The brochure is also available on the firm website.

The firm is ranked third in the list of pursuers' agents raising actions for personal injury in the Court of Session.

The firm considers that access to civil justice in a modern Scotland is well served by the Court of Session and would seek to retain and improve the Court of Session as the principal venue for personal injury litigation in Scotland. *"The judicial function is first and foremost to do justice between the parties in the instant case. But in the Supreme Civil Court it is also part of the judicial function to interpret and declare the law, to set useful precedents and, in new circumstances, to promote the development of legal principles imaginatively"*.

Lord Gill made the above remark to the annual conference of the Law Society in March 1995. It is our position that in relation to personal injury law the Court of Session is providing the above function in an exemplary and efficient manner and any attempt to diminish the standing of the Court of Session by removing the bulk of personal injury cases or using the court purely for appeals would be a substantial and unwarranted limitation on the provision of civil justice to the Scottish public. We will set out the reasons for our position in our following answers to the questions raised in the discussion paper.

## CHAPTER 1

### Answer to Question 1

1. The civil justice system at present is designed to encourage early resolution of disputes whether prior to the initiation of court action or once court action has commenced. The reason for this is that an unsuccessful party (outwith the Small Claims procedure) will require to meet the opponent's costs. This has always been a significant deterrent to the use of courts.

The firm welcomes means of avoiding litigation such as the use of voluntary protocols for personal injury. In relation to mediation and ADR, at the present time such procedures are rarely used in the settlement of personal injury claims in Scotland. The principal reason for this is that;

- a) Experienced practitioners would not normally require the assistance of an outside party in settling cases.
  - b) The costs of mediation in relation to the current level of fees recovered in Scottish personal injury claims are prohibitive.
  - c) The introduction of the *Coulsfield* rules in the Court of Session and in particular, the Pre-Trial Meeting has encouraged the earlier settlement of Court of Session actions involving both the claimant and insurer in a more direct negotiation process thereby avoiding the need for an outside mediator to carry out this function.
2. In relation to personal injury work the firm believes that the current Scottish system for claiming, (both for pursuing claims and thereafter for litigation), provides value for money both for the claimant, the insurers and the state. A minimal number of cases require judicial intervention and legal costs in Scotland are significantly lower than other comparable jurisdictions such as England. There is widespread knowledge amongst the public that Scottish Solicitors will pursue claims on a speculative basis; we do have significant concerns however that any alteration to the present court systems, access to Counsel and recovery of costs will have a severe impact on the availability of access to justice for Scottish claimants. At the present time the Scottish Lawyer does not have the benefit of recovery of after the event premiums or success fees. The lack of availability of the financial benefit which these can provide both for the client and agent is partly set off by the availability of the Court of Session as a central judicial forum for litigating personal injury claims. The removal of cases to Sheriff Courts would create significant financial burdens on legal firms specialising in personal work and would only be of benefit to insurers. It would clearly also restrict access to Jury Trial.

## CHAPTER 2

### Answer to Question 2

#### GEOGRAPHICAL OR SUBJECT AREAS IN WHICH THERE ARE GAPS IN PROVISION IN RELATION TO CIVIL LEGAL ADVICE OR REPRESENTATION:

The firm considers that the current availability of the Court of Session plays an essential part in allowing Solicitors outwith the central areas of Scotland to obtain expert advice and assistance in personal injury litigation. Many smaller firms will only deal with such cases on

an infrequent basis and it is essential that they have access to the best advice and help in dealing with a complex area of law. The current availability of the Court of Session allows a local agent to obtain legal help from an experienced practitioner in Edinburgh who can then instruct Counsel without the potential financial loss which might accrue to the client if the case proceeded in the local Sheriff Court. Practitioners who do not have significant experience in personal injury law should be encouraged to take external advice because they will be faced by experienced and well funded defenders' agents instructed by insurers.

#### MEDICAL NEGLIGENCE

The firm believes there are significant gaps in the provision of help for potential claimants in medical negligence cases due to poor and restrictive legal aid funding. Very few firms will undertake this work; the legal aid costs are low; the cases are always complex and consideration ought to be given to more generous legal aid or state backed insurance funding for medical negligence cases in Scotland.

#### Answer to Question 6

#### PERSONAL INJURIES ASSESSMENT BOARD (PIAB)

At paragraph 2.19 in the Consultation document there is reference to taking claims of a lower value outside the formal court structure, for example with reference to the Irish Personal Injuries Assessment Board. The firm has serious concerns that:

- a) Any consideration of a Personal Injuries Assessment Board was made in the Consultation document without specific reference to Parliament beforehand. Because of the fundamental restriction on the claimant's rights by imposing such a board, we believe any consideration of the imposition of such a board should only have been included with express parliamentary consent.
- b) There is no explanation as to why such a board with its attendant bureaucracy would be appropriate for "claims of lower value". We are concerned at the time and effort which appears to have been expended on consideration of the Irish Board. We hope that in subsequent parliamentary discussions questions will be raised as to why this paper suggested imposing on the Scottish public a system which specifically takes away the Scottish claimant's rights and access to justice. The point of the board appears to be to remove Solicitors and legal help from the claims process. This is at odds with the professed aim of the current Civil Courts Review. In the research paper "*In the shadow of the Small Claims Court*" Professor Elaine Samuel (page 25) confirms the disadvantage suffered by unrepresented claimants in pursuing low value personal injury claims. "*Unassisted pursuers were at a distinct disadvantage in negotiating low value personal injury claims. They lacked the legal knowledge and experience, negotiating skills and status of Lawyers. They reported that attempts to negotiate a settlement were often ignored by defenders. Lay advisers reported similar problems*".

Concerns about the PIAB have been well reported in the press. The Irish Independent published an article on 31<sup>st</sup> October 2006 "*Thousands flee state's personal injury agency*". The article reported the relatively small number of cases being assess by the PIAB, the fact that 90% of the claims were now being lodged by Solicitors and that there was wide spread unhappiness about the level of award the Board handed down.

The Irish example is singularly inappropriate for Scotland; at the time the PIAB was set up it was widely acknowledged that personal injury costs in Scotland were significantly lower than any other geographical area in the rest of the United Kingdom and Ireland. The Irish Board was set up because of a perceived increase in insurance premiums which does not apply in Scotland. An Irish Solicitor, Stuart Gilhooly, published a practitioner's views of the system *JPIL June 2006, page 111*. He summed up his experience of the PIAB as follows. *"It is a greatly flawed system which is unlikely to provide justice to claimants and is also unlikely to any have great effect on insurance premiums"*.

#### LOWER VALUE PERSONAL INJURY CASES

The firm considers that lower value personal injury cases should be dealt with in the Sheriff Court under the Ordinary procedure or the new Chapter 43 procedure when introduced and not under Summary Cause procedure. It is not appropriate to have two separate procedural systems for dealing with these cases and we consider that experienced Sheriffs ought to handle personal injury cases. In relation to consumer claims and non-personal injury accident claims ie. damage to vehicles, we would consider that it may be appropriate to introduce a new tier of judicial arbiter ie. the civil equivalent of the stipendiary Magistrate or English Registrar who could deal with such claims. Decisions could be taken by such a legally qualified individual who does not require to be a Sheriff. Such a judicial figure could work within the existing Sheriff Court system.

### **CHAPTER 3 – The Cost and Funding of Litigation**

#### **Answer to Question 1**

The firm has supplied to the Association of Personal Injury Lawyers details of expense levels in litigation. The firm's position in relation to personal injury law is that expense awards in Scotland are modest and do not deter people from pursuer or defending cases.

#### **Answer to Question 3**

We consider the proposed increase to court fees wholly unwarranted and a matter which could have an impact on access to justice. The courts are a public service and the fees should reflect this.

#### **Answer to Questions 4, 6, 8, 9 and 10**

- a) As stated earlier, the core of this firm's work is funded by Trade Unions. We have to express concern that it was noted that the Trade Union funding of cases proceeded on a speculative basis (3.21). This is incorrect in relation to the major Trade Unions from whom we receive instructions; payment is made of both defender and claimant's legal costs in unsuccessful cases and most Trade Unions provide their members with funded and wide spread legal aid schemes. Trade Unions play a major part in modern Scottish society; they provide a nationwide network of help for members and because of their funding base can give members help in pursuing cases which might otherwise not be accepted on a speculative basis, particularly in the forum of industrial diseases.
- b) In Scotland the legal costs recoverable for personal injury have consistently been at a lower level than elsewhere in the United Kingdom. There are significant advantages to claimants where a scheme of 'after the event' insurance is introduced on the basis that

premiums are recoverable and success fees are paid. The introduction of such a scheme in Scotland has not been widely promoted because of concerns of extensive satellite litigation, as has happened in England. We are, however, extremely concerned that an increase in Court of Session jurisdiction limits would result in considerable extra cost through the requirement to use local Sheriff Courts and lack of availability of Counsel. In the paper, *Personal Injury Litigation, Negotiation and Settlement*, by Scottish Executive Social Research 2002 on page 37 at paragraph 4.9 the authors comment on the reasons for practitioners working on behalf of Trade Unions raise cases in the Court of Session. *“Reasons for this included firstly the fact that if the sheriff court was to be selected as the appropriate forum, this would often involve instructing a local practitioner....Another reason given was the necessity to appear in court, which many high volume pursuers felt was a much more likely occurrence than if the same case was raised in the Court of Session”*. We believe that this still remains the position even with the introduction of *Coulsfield* reforms”.

The use of speculative fee agreements is now widespread in Scotland and allows Solicitors to recover a success fee from the client. Some firms will have access to insurance policies which will not be recoverable from insurers or defenders. Clearly, at the present time the Scottish claimant will be at a disadvantage compared to the English claimant who can recover the insurance premium and a success fee from the insurers. In *JPIL December 2002 at page 399* David Hartley sets out the problems which arose in the Compensure ‘After the Event’ Insurance Scheme in Scotland. The Law Society launched the scheme in 1997 and in June 2002 underwriters terminated cover. The article sets out the conclusions which could be drawn from the abandonment of the scheme. Clearly, there had been a lack of appropriate risk assessment and management of cases, there had been cherry picking of cases and more risky cases had been pursued than in England. One interesting conclusion (*page 404*) was that “the average cost of loss in a Scottish claim is lower than in England and Wales”. The firm believes that the lack of access to ‘after the event’ insurance in Scotland can be offset by the appropriate recovery of judicial costs and we would welcome the introduction of a cost regime allowing the recovery of agent and client, rather than party and party expenses. This would certainly offset the cost that the firm might be paying for an insurance premium which is not recoverable or for the lack of success fee. Scottish Solicitors are still struggling with a traditional system of payment for personal injury cases which often gives inadequate reward for specialist knowledge and responsibility in settling difficult claims. On page 180 of her social research paper on the evaluation of the Chapter 43 Rules Professor Samuel comments (*page 180, paragraph 11.69 referring to defenders*) *“Nevertheless, they accepted that pre-litigation (extra judicial) fees were “a pittance” in Scotland compared to England and Wales”*. We would also welcome a more liberal approach to the granting of additional fees which are unduly restrictive.

## **CHAPTER 4 – The Structure and Jurisdiction of the Civil Courts**

### **Answer to Questions 5 and 6**

In our introduction we mentioned the importance of the Court of Session in the Scottish Civil Court structure. We believe that litigants should have the choice of pursuing personal injury claims in both the Sheriff Court and Court of Session and that the present jurisdiction limits for the Court of Session are appropriate.

As major users of the Court of Session we would identify the following matters are being important in our choice of that venue for litigation:

- a) The accessibility of the court. We find the use of a central Court for handling cases to be of enormous benefit in administrative and practical terms. As the bulk of the Court's work relates to personal injury, the Court has evolved efficient and long established procedures for dealing with these cases. The procedures have been improved by the Chapter 43 Rules and there is currently a minimum of judicial time spent on administrative matters (this is unlike the situation which vexed Lord Gill at the time of his address to the Law Society in March 1995 where he comments "*What might surprise them...is the regularity with which legal debates are discharged on a motion to amend, the length of time during which current actions are on the Adjustment Roll, the tendency for crucial new information to arrive on the eve of the By Order Roll appearances and the now prevalent attitude of the profession that the closing of the Record is the end of the beginning rather than the beginning of the end*". The Chapter 43 procedures have swept away many of such difficulties. The normal Court of Session action will now settled without any judicial intervention, often well before or following the Pre-Trial Meeting.
- b) This firm handles a number of industrial disease cases, either related to asbestos, vibration white finger, industrial disease or asthma. A number of these cases may involve multiple defenders. The cases may be extremely complex involving several defenders (a recent vibration white finger case we litigated had 9 defenders) and we do not consider it appropriate or efficient to raise such cases in the Sheriff Court. We suspect defenders would also not wish to deal with such cases in the Sheriff Court. They are legally complex and we wish the assistance of Counsel; they are administratively complex because they may involve the petitioning of the court to allow actions to proceed against liquidated companies; they often involve issues of time bar where actions need to be raised urgently. The Court of Session is always available to allow instant signetting and the subsequent service of cases. Urgent matters can be brought before a Judge immediately. In the Sheriff Court there are currently significant problems with understaffing and access to judicial time. Recent anecdotal evidence suggested that phoning Inverness Sheriff Court on a Friday gained access to an answering machine and a recent attempt in this firm to obtain permission to sue a liquidated company in Falkirk Sheriff Court took three days before the matter was directed to a Sheriff. The Sheriff Court can normally only allocate a one or two day Proof Diet. Individual Sheriff Courts often have separate procedures governed by practice notes.
- c) The main firms dealing both with the pursuit and defence of personal injury cases are based in Edinburgh or Glasgow. The Court of Session allows matters to be dealt with centrally both for the benefit of the firms and the clients. Meetings and in particular, Pre-Trial Meetings, can be arranged at the court with the enormous benefit that provides in settling cases. Even with the introduction of Chapter 43 model in the Sheriff Court it is likely that Pre-Trial Meetings will take place by telephone and we do not consider it will give the same prospect of successful resolution of the case.
- d) By raising an action in the Court of Session the practitioner knows he will be allowed the costs of Counsel's fees; personal injury cases are complex and becoming even more complex and we believe that the public interest is served by access to expert advice such as is provided by Counsel. Some firms are now using in-house Solicitor Advocates but that is often for administrative convenience. This firm does not employ Solicitor Advocates and believes that the benefit of independent advice from Counsel cannot be understated and is of enormous importance for the client. We have

noted criticisms that the Court of Session apparently ought to be dealing with more important matters. In his article in the Law Society Journal in February 2007 (page 16), Sheriff Principal Edward Bowen comments on “*The need to curtail the present levels of business which occupy the time of judges of the Court of Session and the High Court of Justiciary*”; he agrees with the Lord President that “the business of the Court of Session...ought to be restricted to those categories appropriate to the Supreme Courts”. The article referring to Supreme Courts states “*The Lord President expressed the view that the primary function of the Court of Session should be that of a Court of Appeal and, at first instance, of review....or for issues of general importance or exceptional value*”. We cannot agree with such a suggestion.

Firstly, it is clear both from the statistics provided in the Consultation Paper and earlier research that the number of cases actually proceeding to Trial was minimal. The Scottish Executive research paper referred to earlier *Personal Injury Litigation, Negotiation and Settlement* found that “around 1% of personal injury cases are settled out of court (page 47, para 5.5)”; “around 90% of litigated bases settle before Proof (page 48 at 5.8)”. There is a culture of negotiated settlement of cases which means that an effective filter takes place to ensure a minimum use is taken up of judicial time. Agents have developed their own procedures for settling cases without the intervention of judicial or other mediation. Because personal injury law relates to health and safety we would put forward the argument that any reported case is generally of benefit in clarifying the common law or providing a guide to statutory interpretation. Personal injury law is now founded on European statutory legislation which means that even a standard claim can involve implications of European law which require specialist knowledge. Judicial interpretation at the highest level is merited in relation to these regulations. For example, the APIL publication (Model Pleadings and Applications) in relation to a manual handling claim against an “Emanation of the State” (ie. public body) suggests in the particulars of claim the following statement; “*The defendant is an Emanation of the State, to which the framework (89/391/EEC) and the Manual Handling (90/269/EEC) Directives are directly applicable*”. In 2005 the firm acted on behalf of a member of Amicus, Peter Neil, who fell off a ladder whilst employed by East Ayrshire Council. His case went to Proof running over six days and a Judgement was issued by Lord Brodie on 25<sup>th</sup> January 2005. The case was thereafter reported in Greens Reparation Law Reports (2005 at page 18). The editorial in the magazine stated “*Find out why a ladder was not suitable equipment for climbing up into a loft, and why the employers were therefore in breach of the Work Equipment Regulations in Neil –v- East Ayrshire Council*”.

In his Judgement, Lord Brodie takes 32 pages to run through the evidence and the statutory grounds of claim. (Damages had already been agreed). The final settlement figure was £6,307.50 (after contributory negligence was deducted). This case has subsequently been referred to as a leading authority on the Provision and Use of Work Equipment Regulations. The case exemplifies why the Court of Session is an appropriate forum for dealing with personal injury cases, even if not of the highest value. It falls precisely within the parameters set out by Lord Gill in the introduction to our paper ie. that the court interprets and declares the law, sets a useful precedent and promotes the development of legal principles.

It is interesting to note the proportion of Scottish cases reported in the Journal of Personal Injury Law. We referred earlier to an article in the June 2006 volume

relating to PI changes in Ireland. On looking at that volume, which is principally directed to English Solicitors, we find case reports and commentary on three Scottish cases. The commentary on the cases makes clear their value.

Case (a) - *Mathews -v- Glasgow City Council* (page C54)

Commentary: “It is difficult to fault the logic of the Court of Session in coming to the clear conclusion that the appellant was engaged in construction work...”

Case (b) – *McGowan -v- W & J R Watson Limited* (page C58)

Commentary: “This is an interesting Scottish case on the Provision and Use of Work Equipment Regulations 1998...A proper reading of regulation 11 would lead to the assumption that this opposes an absolute obligation, but it is extremely helpful to have the judicial authority for this approach, particularly set out in this coherent way”.

Case (c) – *Hughes -v- Grampian Country Food Group Limited* (page C107)

This is a report on the Manual Handling Regulations relating to Carpal Tunnel Syndrome and will have been included in the volume because of the particular interpretation of regulation 4.

We cite the above cases as examples of the major part played by the Court of Session in the development of Health and Safety law in the United Kingdom. Cases dealt with at first instances in the Sheriff Court are unlikely to have the same impact both by way of judicial authority and by way of widespread reporting. These cases are of fundamental importance to solicitors practicing in the area of personal injury law. In this firm (and in many others) details of all reported Court of Session Personal Injury Judgements are circulated to practitioners.

We would also express serious concern about the ability of the Court of Session to operate without the case load which personal injury cases provide. We note that £60 million is being spent on refurbishing the court and that the Government is keen to have a Supreme Court that deals with commercial cases. The Court of Session magazine “The Proof” in March 2008 reports that 76% of actions raised in the Court of Session between February 2007 and February 2008 relating to personal injury. If these were removed it is hard to (a) what business would occupy the court, (b) what business would occupy the Court of Session Judges unless there was a large switch to doing criminal work. We do not think this would be good for civil society or for the Judiciary.

We believe that a substantial reduction in the volume of cases proceeding through the Court of Session would have an adverse and unwelcome impact on the Faculty of Advocates. We consider that access to justice in Scotland is well served by the thriving Faculty providing expert advice to agents whether a specialist or generalist. Even if a device were established to allow the sanction for Counsel in the Sheriff Court prior to any action commencing, this would not be of the same value to agents as the automatic payment of Counsel’s fees in the Court of Session. If a system of sanction for Counsel certified at the commencement of the action was promulgated in the Sheriff Court, it would still leave the difficulty;

- a) That defenders would inevitably object to the sanction
- b) That there was no guarantee the Court would grant sanction and the agent would be left to process the case without the assistance of Counsel.

In order for the Scottish Courts to attract high quality business be it commercial or other, it is essential that there is a properly functioning Supreme Court attracting a substantial volume of business. This is a prerequisite for a continuing and thriving Bar. The removal of the bulk of personal injury actions from the Court of Session would severely restrict the number of Advocates able to provide an expert service for solicitors and the public.

## **CHAPTER 5**

### **Answer to Question 1**

We do not consider the rules of civil procedure should have an overriding objection or statement of philosophy.

### **Answer to Question 2**

We welcome mediation or other methods of dispute resolution as long as they are not compulsory.

### **Answer to Question 6**

We welcome modern communications and information technology in improving access to the court.

### **Answer to Questions 7 and 8**

We consider that case flow management is the appropriate means of dealing with litigated cases. We consider that the pace of litigation is currently well controlled by the Chapter 43 procedure.

## **CHAPTER 6– Working Methods of the Civil Courts**

### **Answer to Question 1**

We welcome the use of Pre-Action Protocols and consider that the current voluntary introduction of Protocols to be of significant advantage and in due course consideration may be given to the use of compulsory Protocols once an appropriate trial period has taken place for parties to become familiar with the current Protocol.

### **Answer to Question 6**

We consider that for personal injury cases there should be a single set of rules in both the Court of Session and Sheriff Court. We welcome the introduction of the Chapter 43 Rules in the Sheriff Court and do not consider there is a place in the Sheriff Court for the current Summary Cause rules in relation to PI actions.

**Answer to Question 8**

We consider that the use of abbreviated pleadings in the Sheriff Court, of a similar nature to those currently used in personal injury cases in the Court of Session would be appropriate.

**Answer to Questions 12, 13,14 and 15**

We consider that there ought to be wider disclosure of evidence by the defenders. The lack of frankness by defenders in written pleadings is a constant problem. The use of skeletal defences is still a major problem. We believe that if the defenders were forced to be more frank in their pleadings by admitting where appropriate matters such as the designation of the defender, the fact the pursuer was employed at the time of the accident and that the defenders were aware an accident happened, would save considerable time and expense both of Solicitors and the court. Lengthy Proofs are often fixed which are wholly unnecessary because in the event the defenders will be required to accept liability or will be arguing about a modest amount of contributory negligence. It is practice often for the defenders not to accept responsibility when they have adequate information allowing them to form an early view on liability. Particularly frustrating is the practice of failing to acknowledge the claimant's employment with a defender when information is provided such as a Contract of Employment or wage slips showing clearly that the party was employed at the time of the alleged accident. We would welcome an improved procedure for Summary Decree where the court can consider documentation and decide whether defenders have been suitably frank in their defences. This is one of the merits of the current scheme in Glasgow Sheriff Court where there is an element of judicial case management. We do not consider such case management generally necessary but provision ought to be made where a case would either be dealt with by Summary Decree or put out By Order so that the Court could consider on the basis of documentation whether an appropriate defence had been stated. We would also consider that procedural matters in the Court of Session could be dealt with by Judges equivalent to that of a Master in the High Court in England and Wales.

**Answer to Question 16**

We consider that a system of pursuer's offers should be introduced into the civil courts. The effect of such a system would be beneficial in encouraging early settlement and it does not appear logical for the defenders to have a tender system which impacts on expenses without pursuers' agents having access to a similar procedure. The sanction of a successful pursuers' offer should be an increase in costs.

**Answer to Question 17 – Should Civil Jury Trials Be Retained**

We consider that Civil Jury Trials play an important part in the development of the law and are a fair and equitable means of assessing damages. We consider that since the reporting of awards in Civil Jury cases there has been a welcome improvement in the overall level of damages awarded in Scotland. This has been long overdue. There are very few Jury Trials proceed; when they do proceed they can be of valuable guidance to Judges and agents. We do not consider Jury decisions are arbitrary or prejudice the defenders. The position can best be summed up by Lord McCluskey in *Girvan –v- Inverness Farms Dairy (No. 2) (Ex Div) 1996 SLT at page 635* "Twelve Jurors from different walks of life and with different incomes and needs might be thought to be better placed to understand the value of money than a Judge such as myself; indeed, as all the authorities show, it is just because juries are deemed to be

*more fitted to make such a judgement that judges have been so reluctant to interfere with their assessments of incalculable elements of damages, such as solatium”.*