

## **MASS Response To Civil Courts Review – Consultation Paper**

### **INTRODUCTION**

- MASS is a UK Society for Solicitors who specialise in pursuing road traffic accident claims.
- MASS is committed to bringing justice to the victims of road traffic accidents.
- MASS is regionally based. Scotland is considered a separate region from the rest of the UK for the purpose of membership. Membership is by office rather than by individual.
- There are currently 14 members of MASS in Scotland. The vast majority of volume litigators acting for victims of road traffic accidents are represented within MASS. This response does not necessarily reflect the view of the individual member firms.
- The current regional co-ordinator of MASS in Scotland is Derek Carrigan of Lawford Kidd, Solicitors.
- MASS welcomes the opportunity to contribute to the timely review of the Courts in Scotland.
- MASS wishes to outline its views on the review of Civil Courts in Scotland before answering the particular questions posed.
- MASS strongly believes the Court of Session should be retained as a court of first instance. Personal Injury represents approximately 60% to 70% of all first instance at the Court of Session. The Court of Session is rightly regarded as a “centre of excellence” for civil litigation. The quality of personnel involved at all levels is extremely high. The quality of the judgements is rightly regarded as

extremely high. Any first instance decisions of the Court of Session are held in high regard throughout the rest of the UK. Since the introduction of the Coulsfield reforms, Personal Injury litigation has been speeded greatly, providing swifter access to justice for victims of accidents. Case-flow management works extremely well, such that few, if any, cases initiated require judicial involvement. This has huge benefit for all of the stakeholders in Civil litigation.

- MASS recommends the 'roll out' of the Coulsfield reforms into the ordinary cause in the Sheriff Court.
- MASS believes that the privative jurisdiction of the Court of Session should remain at £5,000.
- MASS is opposed to the introduction of a Scottish equivalent of the P.I.A.B. A claimant ought to be able to instruct their own legal representation who ought to be able to recover reasonable remuneration for navigating Personal Injury claims which are, by their very nature, complex. Any cost savings suggested by P.I.A.B. are apparent rather than real. P.I.A.B. fails to recognise the legal costs incurred by claimants instructing their own legal representation, compared to the previous system. The system only applies to cases where liability has been admitted. The system is not fit for purpose in Scotland.
- MASS recommends the splitting of the Court system between the Civil and Criminal divisions. Such a division would better reflect a similar division in private practice and also the bar. However, MASS would only recommend doing so provided both divisions were properly funded and adequately resourced.
- MASS believes mediation and other forms of ADR are unsuitable for Personal Injury claims. Mediation will constitute a costly, unnecessary/onerous additional burden prior to or during necessary litigation.
- MASS invites the Board to conduct more specific consultations with regard to Personal Injury litigation with MASS and other interested parties.

- MASS is a society which represents solicitors acting on behalf of victims of road traffic accidents. Accordingly, only those questions which are directed towards Personal Injury will be answered.

## CHAPTER 1

### Questions for discussion

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?

*With regard to Personal Injury claims, the Voluntary Pre-Action Protocol covers all Personal Injury Claims up to a value of £10,000. MASS submits that the system is already designed to encourage early resolution of disputes without resort to the courts. The only cases which reach court are cases where liability has been denied, the insurer makes no offer in settlement, or the insurer makes an inadequate offer in settlement. It is accordingly submitted that the only cases which are raised in court are cases which are, in any event, necessary. Court action is unnecessary, provided insurers properly engage with the spirit of the protocol, and make suitable offers in settlement.*

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?

## CHAPTER TWO

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 enable litigants to take part in the process without legal representation?

*With regard to Personal Injury claims, MASS submits that such claims are complex and too difficult for members of the public to deal with without properly resourced 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?

*See answer 3.*

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?

*MASS is opposed to the introduction of a Scottish equivalent of the P.I.A.B. The Board was set up in Southern Ireland due to perceived high costs of insurance due to high legal costs. This is not the perception with regard to Personal Injury in Scotland. Such costs in Scotland are significantly lower than in the rest of the UK. P.I.A.B. does not remunerate solicitors for being involved in the system. Given the complexity of the system, in the region of 90% of Irish claimants are instructing legal representation, and*

*cannot recover the costs of such legal representation. Accordingly any perceived cost savings have been transferred to the claimant. This is unfair. The claimant has been doubly wronged; firstly by being injured, and secondly by the requirement to fund the pursuit of their reparation claim. Suggested time savings pursuing claims through P.I.A.B. have been overstated. Should the P.I.A.B. award be rejected, the claim returns to the court system. It is too soon to judge the real impact of P.I.A.B. P.I.A.B. covers only those claims where liability is admitted.*

## CHAPTER THREE

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

*Judicial expenses recovered in both the Sheriff Court and the Court of Session are by way of a block fee rather than being any real representation of the time/effort expended on a particular claim. The levels of judicial expenses recovered in Scotland are significantly less than those recovered in England and Wales.*

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

*From the perspective of pursuers' Personal Injury litigation, the cost of litigation encourages only cases with very strong merits being raised.*

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

*Given that court costs are only a small part of the overall costs of litigation, MASS does not believe the levy of court fees has a significant impact upon the question of litigation and therefore access to justice.*

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

*Please see Question 1. There is a significant disparity between expenses recovered on a party/party basis compared with solicitor/client basis. MASS would encourage the review to recommend an increase in the proportion of expenses which are recovered in Civil litigation.*

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

*Broadly, yes.*

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

*MASS believes that legal advice and legal assistance should remain in place as a safety net for those either unable to afford to pay their solicitor or who wish to pursue difficult or novel cases, or cases with a perceived public interest unattractive to lawyers who are prepared to act on a speculative basis.*

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

*The current system favours specialist practitioners pursuing straight forward cases. Concern has been expressed about pursuing claims on behalf of those injured as a result of medical negligence and/or industrial diseases, which may not be suitable for speculative arrangements between solicitors and clients. Access to justice may accordingly be denied to such claimants.*

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

*Broadly, the impact has been very beneficial. For the last ten years there has been an increase in specialisation in practises both pursuing and defending Personal Injury work. There are now far fewer Personal Injury firms doing a higher proportion of work, arguably far more efficiently, due to increased specialisation. This has been beneficial for claimants and insurers alike.*

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?

*There would appear to be a great deal of ignorance amongst the public regarding the availability of “before the event” insurance (which is often an “add on” to their household motor insurance or credit card insurance).*

*There is no “after the event” market in Scotland of any significance. The reasons for this, it is submitted, are that Scotland is a smaller jurisdiction compared with the English and Welsh market and the cost of the insurance premiums and success fees are irrecoverable.*

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

*MASS believes the recover of “after the event” insurance premium from unsuccessful parties would have a negative impact on Civil litigation in Scotland. Whilst it may be argued that recovering the cost of the premium and obtaining a success fee would make pursuing claims more attractive and better reflect the reward/risk involved in pursuing Personal Injury claims, the likely significant increase in satellite litigation (as was witnessed in England and Wales) would have a detrimental effect on the claim process in Scotland. Further , and in any event, the considerably smaller size of the Scottish jurisdiction may dissuade providers of “after the event” insurance from entering the Scottish market.*

## CHAPTER FOUR

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

*MASS believes that there has definitely been an adverse affect on civil business in both the Sheriff Court and in the Court of Session. Most Sheriff Courts will only set down one day for a proof diet. Should a proof run for more than one day, then agents and clients, witnesses etc. require to return to court perhaps months later. Such “staccato hearings” erode public confidence in the civil justice system in Scotland.*

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

*Reference is made to the introduction. MASS believes that splitting the Civil and Criminal Division would be of benefit. It would follow that some judges in the Supreme Courts and some Sheriffs should therefore be designated to deal with either Civil or Criminal business.*

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

*Reference is made to the introduction. MASS believes it would be advantageous to split the Civil and Criminal Divisions. This would better reflect the reality of private practice and allow a greater degree of specialisation amongst individual sheriffs and judges securing more consistent decisions.*

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

*MASS would welcome the introduction of Personal Injury courts staffed by Personal Injury judges or sheriffs.*

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?

1) *Speed and certainty: The introduction of the Coulsfield reforms have been a resounding success (please see Elaine Samuel’s papers for confirmation of this). The*

*Sheriff Court proceeds very much on a piecemeal fashion. Please see earlier answer with regard to “staccato diets”.*

*2) Availability of a specialised Personal Injury bar.*

*3) The possibility of jury trial.*

*4) The quality of the decision maker: judges of the Court of Session are held in extremely high regard. c.f. Sheriff Court where the Sheriff appointed to hear a proof could be someone with little or no Civil experience.*

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

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

*MASS believe the existing relationship is adequate, albeit there is scope for improvement.*

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?

*Please see the introduction. MASS believes the Court of Session should rightly be viewed as a centre of excellence. The Coulsfield reforms have been a resounding success. Properly conducted Personal Injury claim under the Coulsfield reforms in the Court of Session ought not to ever require any judicial involvement due to the smooth function of the case-flow management system. Personal Injury actions make up approximately 60% to 70% of first instance actions in the Court of Session. The Sheriff Court is currently struggling to deal with the volume of Personal Injury cases being litigated. To introduce all of the Personal Injury cases which were previously litigated in the Court of Session could lead to complete collapse. Reference is also made to an earlier answer about the quality of decision making in the Court of Session as opposed to many Sheriffs, especially in regional Sheriff Courts, who may spend the vast majority of their time dealing with criminal matters, and may not have the requisite Civil experience to deal with Personal Injury claims which, by their very nature, are complex. Also, given the Coulsfield reforms, pursuers’ solicitors are able to give clear advice in the*

*likely time frames involved in pursuing cases. This is already not the case with regard to the Sheriff Courts. Should the Court of Session be lost as a court of first instance, the situation will deteriorate markedly. This is not in the interests of any stakeholders in Civil litigation.*

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

*The privative jurisdiction of the Court of Session was increased in January 2008 to £5,000. It is too soon to say what the ramifications of this increase are. As a consequence MASS believes that the figure should remain at £5,000.*

10. Are the current powers of transfer between Sheriff Courts and between the Court of Session and the Sheriff Court satisfactory?

*Broadly, yes.*

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?

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

13. Does the current division of the Sheriff Court into distinct geographical jurisdictions present difficulties, or does it have advantages?

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

*Broadly, yes.*

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

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?

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?

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

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.

20. Are the existing appeal arrangements satisfactory?

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?

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

Yes.

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?

*MASS believes that the current system is satisfactory and not in need of any particular change.*

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

*MASS believes the current arrangements are satisfactory and do not require any change.*

## CHAPTER FIVE

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

*MASS does not believe that there is any need to have an overriding objective or statement of philosophy governing the rules.*

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?

*MASS believes the benefits of mediation have been oversold. There is no benefit in having an extra tier of discussion in Personal Injury cases. Reference is made to the answers in Chapter 1. The Voluntary Pre-Action Protocol governs Personal Injury claims pre litigation. Pursuers' agents litigate only when liability has been denied, an inadequate offer has been made, or no offer has been made by the insurers. To impose mediation in such circumstances will merely delay the inevitable. MASS also has concerns as to who will fund the mediation.*

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

*Please see answer 2.*

4. 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.

*Please see answer 2.*

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

*Please see answer 2.*

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

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

*MASS members have reported positive feedback on Sheriff Principal Taylor's experiment at Glasgow Sheriff Court. The perception was that the judicial case-management had a beneficial impact on focusing the issues in cases and in particular encouraging early settlement. However, intervention is not particularly cost effective. MASS is concerned as to how workable these procedures would be in high volume Personal Injury litigation. Reference is made to the earlier answers regarding the perceived success of the Coulsfield case-flow management system as witnessed in the Court of Session. Such procedures should be introduced into the ordinary cause in the Sheriff Court.*

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

*Reference is made to the previous answer.*

## CHAPTER SIX

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

*Pre-action protocol was introduced for Personal Injury cases under £10,000 on 1<sup>st</sup> January 2005. The protocol has been a success only insofar as the insurers have been properly engaging with the protocol.*

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

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

*MASS believes that the protocols should be voluntary.*

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?

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

*Broadly, yes.*

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

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?

*The members of MASS believe it may be difficult for this to be implemented given the huge difference in types of action it would have to apply to.*

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

9. Are the current arrangements for summary disposal satisfactory?

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?

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

*Broadly, yes.*

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?

*Reference is made to an earlier answer with regard to the setting down of proof diets in the Sheriff Court. Most Sheriff Courts will provide only one day at a time which needlessly drags out hearings.*

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

*The current arrangements are satisfactory and do not require to be amended.*

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

*MASS believes the current arrangements are satisfactory and do not require to be changed.*

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

*The current arrangements are satisfactory and do not require to be changed.*

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

*MASS would wish to see such a system introduced and should broadly follow the Part 36 rule in terms of the English pre-action protocol.*

17. Should civil jury trials be retained?

*MASS are very keen that civil jury trials remain. They are an important part of the Scottish legal system.*

18. Should written judgements be required in all cases?

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

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

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

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?

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

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

DC/smm

31 March 2008