



SCOTTISH CIVIL COURTS REVIEW

COMMENTS:

Chapter 1 - Introduction

Q1. Yes, in short, however experience of mediation in England and Wales has failed to demonstrate that such alternatives to court action are practically applicable to medical negligence claims. We have found that despite the best intentions of all parties, the issues are too complex and the process of investigation too complicated and prolonged. In addition, and more importantly, the 'emotional' overload in medical negligence claims where there has been a death or serious injury, precludes the effective use of mediation as presently operates. It also has proved to be an expensive option involving expensive legal input and prolonged negotiations.

Chapter 2 – Access to Justice

Q 3. Our experience of litigants in person has been that such matters become more prolonged and costly when the litigant has to be given help and advice by a Court in pursuing their claim. Claimants and pursuers who fail to obtain or retain legal services cause increased costs for defenders who may be forced into defending unreasonable claims and in a Court which tries hard to assist the litigant and gives the claimant 'leeway' in the Court processes not available to the defenders.

Q 6. Low value claims in medical and dental litigation are very frequently disposed of without recourse to a court. This process works well at present.

Chapter 3 – The Cost and Funding of Litigation

Q 1. This is a very wide reaching question. There are enormous variations in the costs of litigation. Unnecessary expenditure is often incurred by the present, not infrequent, late settlement of cases, often on the opening day of a trial or proof. Unnecessary expenditure is also incurred by both 'sides' of a claim investigating identical circumstances and maintaining 'secrecy' of such investigations in order to establish tactical positions. There is over elaboration of many claims, by both sides, in fruitless attempts to 'win' rather than agree to settle or go to proof. The need to go to proof in medical negligence claims is infrequent and should remain so.

In many cases costs can easily exceed the settlement and sometimes by factors of two or three or even greater. We could supply some examples of the wide variation in costs. Our experience indicates that while the numbers and settlement figures of claims is fairly stable, the legal costs are rising exponentially.

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

Q 1. There should be an over-riding statement of the philosophy of righting of civil wrongs that includes proportionality, equity of access and the consistent application of what might be termed 'common sense', e.g. the Clapham omnibus.

Q 2. As stated before mediation in some form is to be encouraged and experimented with, to determine the appropriate circumstances and type of case which might best be mediated. As in Chapter 1, Q 1, there are caveats about the use of medication in medical negligence claims.

Q 4. See above

Q8. In general terms, our experience of the application of the Woolf reforms in England has been that active case management whether by judicial or case-flow type has speeded matters up and improved the efficiency with which cases are dealt. This applies to our experience with medical negligence claims.

Chapter 6 – Working Methods of the Civil Courts

Q 1, 2, 3. We believe that pre-action protocols have improved the efficiency and speed of handling claims for damages. The compulsory timetables have sharpened and concentrated minds on the claims and the issues involved. Penalties in terms of exposure to costs have limited wasted time and resources. However, that has had the effect of incurring heavy costs at the 'front end' and in some case of medical or dental claims resulted in legal costs far in excess of the settlements. A claim may require considerable investigation at some cost which plainly requires settlement but may be of a very limited nature. The protocols have intruded on the informal discussions between pursuers or claimants and defenders and therefore resulted in much higher than necessary legal costs.

Q 14. We believe that early exchange of witness statements and expert reports has in England improved the efficiency of dealing with claims. In addition, meetings of experts to resolve conflicts and concentrate of issues in dispute have been a huge improvement. It prevents the 'ambush' of either side during a proof and reduces substantially the need to go to proof to debate such issues which in medical negligence claims can be complex, arcane and not necessarily relevant to the process of righting a wrong.

Q 15. Again, from our experience in England greater control of experts and their input has been a vast improvement. Agreement on the types and number of experts has reduced the associate costs and as a by product allowed expert doctors to devote more of their time to clinical matters rather than the courts.

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