

Scottish Civil Courts Review

A response to the Consultation Paper

The Civil Justice Review was initiated by the then Scottish Executive in February 2007 at the same time its paper “Modern laws for a modern Scotland” was published. The remit of the Review is to examine the whole of the devolved civil court system but the political debate on the place of civil justice in a 21st century Scotland, the resources it requires or on the content of “Modern laws for a modern Scotland” has not yet taken place. How then is the respondent to approach over 70 questions, each of which would grace an honours exam paper on the Scottish Legal System?

Chapters 1 and 2

Any examination of the provision of civil justice is fatally undermined unless more than lip service is paid to the fundamental purpose and importance of an independent public system for the resolution of disputes. Democracy and the rule of law are trumpeted as pillars on which Scottish society is firmly constructed. It is necessary to remind ourselves that an independent system of civil justice is also a fundamental cornerstone of a civilised society. It is the means by which the rule of law as governing human relationships is maintained. A civilised society requires a system for resolving disputes where parties are placed as far as possible on an equal footing. The purpose of this is to ensure that the strong do not prevail irrespective of the merits of their position. Civil justice also represents a bulwark against state tyranny or the abuse of power. Tyranny may come in a multitude of forms, some of which may be categorised as trivial or unimportant. The courts must be available nonetheless to deal with these matters.

This means recognising that civil justice is just as important as criminal justice in sustaining the fabric of a democratic society. One cannot be subordinate to the other. The terms of reference of the Review must be read with this openly acknowledged and accepted. Once that is done, questions of cost, proportionality, and management of cases can be properly considered.

This means it is not tenable to continue with a situation where there is a competition for the same judicial resources in which the most trivial criminal matter will always take priority

over the most serious civil matter. Civil litigation is conducted largely at the expense of the parties not the state. It is not acceptable for that expense to be inflated because the state is unable or unwilling to provide adequate resources for the administration of criminal justice. It is unlikely that civil justice will be accorded its proper place unless the civil and criminal courts, at least at first instance, are completely separated from one another.

It is equally unacceptable to erect barriers to civil justice, such as compulsory extra judicial dispute resolution mechanisms, in the name of expediency or as a deterrent to the unprincipled or unmeritorious litigant. The appropriate course is to ensure due process as expeditiously as possible within a structure which is open to all and in which there is, so far as possible, an equality of arms. This means recognising that civil justice cannot be obtained on the cheap. Those whose rights have been infringed or which require to be enforced must not be expected to rely on their own wits and act on their own without proper legal advice, the cost of which, if successful, they can expect to recover. A society in which more and more of life is subject to regulation cannot expect its citizens to do without lawyers.

Chapter 3

In most non-contentious civil matters a client expects to pay his own lawyer and is free to agree the rate of payment for the work. As soon as the matter becomes contentious, however, the client expects to avoid paying his own lawyer so far as possible, though faces the risk he will have to pay both his own and his opponent's. The client cannot negotiate with his opponent's lawyer so there is a system whereby the court regulates the amount of recoverable expense. The current system fails properly to compare what the client might have to pay in the market for an equal amount of work in a non-contentious and a contentious matter. One way of assisting bridging the gap would be to remove the distinction between party/party and agent/client accounts. There should also be annual revision of rates to ensure that they do not vary substantially from the market rate for non-contentious work.

The question arises whether the current system is the appropriate way for contentious legal work to be paid for. Would it be better if each side simply paid his or her own lawyer irrespective of the outcome? This would leave each side to negotiate with his or her own lawyer as in non-contentious matters. The drawback is that the person with the deepest pockets has an advantage and there would be little penalty for protracting proceedings.

Legal aid in civil proceedings (for pursuers) must now be all but confined to cases where the party is on means tested state benefits and in cases where there is no financial recovery sought. If the dispute does not involve a financial claim but a substantial right, a party of moderate means faces an almost impossible choice between abandonment of rights or self-representation as well as prospective ruination. This is an entirely unacceptable situation which requires to be dealt with.

Chapter 4

The issue of the relationship between civil and criminal justice arises once again. The consultation paper contains a lengthy discussion about reforms of the criminal justice system. This is to make the tail wag the dog. There is no doubt about the importance of a properly resourced criminal justice system. The problem is with the continued lumping together of criminal and civil justice with civil having to make do with whatever is left after criminal justice has been paid for. It might be strongly suggested that the current problems in the criminal justice system are the direct result of attempting to penny pinch on legal aid and prosecution expenditure over many years, so we should be wary of attempting to make everything “cost effective”. If there is to be a civil justice system fit to deal with the challenge of sustaining a democratic and fair society in the 21st century then it has to be regarded on its own.

As stated above there should be separation of the civil and criminal courts at least at the level of first instance (whether in the sheriff court or the Court of Session) and probably also at the level of the first appeal. In some civil cases in the Court of Session recently there have been delays of over a year and even two years in the issue of opinions. One of the reasons/excuses which is trotted out is the pressure of criminal business. The Coulsfield system for personal injury cases in the Court of Session has worked extremely well largely because of the lack of judicial input which is required in the average case. The timetable breaks down when substantial judicial intervention is required and then months or years elapse before the opinion is issued. In the sheriff court delays in civil business frequently arise from the inability to arrange sufficient court time to complete cases, again because of pressure from criminal business.

It is hard to see how a “one size fits all” (question 7) court of first instance for civil business would actually operate. There would still have to be local courts and whether it is realistic to streamline court administration to make the result of a single court a reduction rather than an increase in overall expenditure must be very doubtful. If there was a single tier, it would have to be the Court of Session, or a completely new court, and not the sheriff court. For comments about appeals, see below under Chapter 6.

There should not be a concern about the use of part-time judges in principle. The availability of a body of experienced practitioners to fill a proportion of requirement for judicial resources should be welcomed within a system which does not have a career judiciary. It ought to allow the dual benefit of training for prospective full-time appointees and spotting those who should not be appointed full-time before it is too late.

Chapter 5

Some forms of alternative dispute resolution have an honourable and lengthy tradition, some are just lengthy. The important point should be that parties are free to choose these methods but that they should not be imposed upon them by the courts. On the other hand such methods must themselves be subject to review by the courts. There is a case for regulation of those who offer mediation for profit.

There is a public interest in the proper conduct of litigation. This extends not just to the pace at which the parties choose or attempt to conduct the case but also in how long the court takes to come up with a decision. It is not acceptable for parties in a personal injury action to be expected to have prepared and presented a case to the court within one year for the court then to take a year or more before issuing its decision and then for an appeal to take at least another year to come on and a further delay before that is advised.

As stated above, the Coulsfield personal injury procedure has worked well because a strict timetable with limited judicial intervention has created a better opportunity for mutual disclosure and negotiation. Case management can be equally useful, though more costly, if properly operated. The commercial court in the Court of Session was initially successful but has become less so, probably because the parties have been given too much leeway, there has

been over emphasis on pleadings and the court has not been sufficiently rigorous in focussing the issues in dispute.

Chapter 6

In principle pre-action disclosure (questions 1 to 3) is beneficial and should be applied. It is not necessarily appropriate in every case. If there are to be specialist courts it would be appropriate to consider whether there are pre-action protocols for the particular types of business they deal with. In most petition procedure it would probably not be appropriate. We also have to consider family cases, heritage court, debt actions, bankruptcy and insolvency, judicial review etc. There is a general risk that protocols become another stalling tactic and basis for spending vast amounts of time arguing about expenses.

Similar comments apply to questions 4 to 7. A single initiating document which covers the entire gamut of civil proceedings would either be a form longer than an application for disability living allowance or be so short as to be meaningless without the actual basis in a second document. If there is to remain a multi tier civil court structure the rules should be the same in each tier.

The abbreviated pleading method used in the Coulsfield personal injury rules seems to be working reasonably well, largely because fair notice debates are now virtually unheard of. The same method could apply to other types of case, putting the onus on the person who complains of lack of notice (or whatever) to persuade the court that a fundamental question arises from the pleadings which must be debated otherwise a proof will automatically be allowed. In contrast parties have generally not had greater problems at proof with lines of evidence being disallowed because of “no record”.

There is no reason to restrict a party’s right to lead expert evidence as they see fit in any type of case, subject to the matter being one for expenses at the end of the day.

The current right to jury trial should be preserved. The discussion paper deals with the matter in perfunctory fashion, with such comments as there are suggesting that the author(s) disagree with the decisions of the court in *Heasman v Taylor* and *McLeod v British Rail* (that jury trials are human rights compliant). Juries are just as capable as judges of deciding on straight

forward issues of fact. When it comes to decisions on the level of damages for solatium, it is frequently stated by judges that this is a “jury question”, but they are a one person jury with a rarefied background attempting to reflect what society as a whole would consider is just compensation. The fact that few jury trials actually proceed provides no guidance as to their importance or influence. Very few proofs proceed in personal injury cases as compared to the total number of actions raised but it is not being suggested they be replaced or abolished. The House of Lords has recognised that jury trial awards must be taken into account by judges in assessing damages in similar cases. There is an automatic assumption that juries will be overgenerous but in fact there have been not infrequent cases where an unsympathetic pursuer has obtained less from a jury than a judge might have awarded. This suggests that juries are more sensitive to the actual loss suffered by individuals.

All appeals should require leave but whether or not leave is granted is not for the judge who made the original decision but the appeal court (or a limited version thereof) itself. This would make the cluttering up of the appeal court with unmeritorious appeals largely a thing of the past, while at the same time ensuring due process.

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