

RESPONSE TO CONSULTATION PAPER
ON SCOTTISH CIVIL COURTS REVIEW

1. EQUALITY OF ACCESS

Problem

The Review addresses the issue of equality of access to justice. There are various references and these concern mainly the aspect of ensuring that lower income individuals are not denied justice due to inability to meet the costs.

In paragraph 5.4, there is a reference to the Civil Procedure Rules in England and Wales which requires the court to deal with a case justly. This is defined as including the obligation to ensure that the parties are on an equal footing.

Included within this obligation should presumably be cases where those whose means are limited are in dispute with those whose means are to all intents and purposes unlimited. The latter group includes, above all, the government, both in its form as a prosecutor in criminal cases and as the provider of unlimited legal aid to one or both sides in a civil case. Large corporations come into a similar category whether pursuing or defending a civil case. In essence, this means that others (smaller companies and private individuals who do not benefit from legal aid) are on many occasions denied justice because they are unable to compete with the big money lined up against them.

It may be worth citing two cases in support of this argument:

One (in England) concerned a female who gave her child away for adoption at birth. Some 7 years later, she changed her mind and wished to have her child back. The adopting parents did not believe that this was in the interests of the child and disputed her wish. The real mother obtained legal aid to pursue her case, while the adoptive parents did not obtain legal aid to defend it. The court decision went in favour of the adoptive parents both in the court of first instance and on appeal. Despite winning, the adoptive parents incurred heavy costs which were not reimbursed. They were forced to sell their house in order to pay their costs.

The second is the well-known case, also in England, when the non-executive directors of Equitable Life Assurance were sued by the company for dereliction of duty after their resignation as directors. Apparently the new board received advice that it had to pursue the old directors because otherwise the new directors would themselves be open to action by the policyholders. The sums sued for were in many millions and most of the defendants would have been bankrupted if the decision had gone against them, while the amount recovered would have been a drop in the ocean as far as the policyholders were concerned.

The normal D & O insurance policy did not fund the old directors' defence because it only covered actions by third parties and only while they were directors. Several of the resigned directors reputedly had defence bills of over £1m, and most ended up having to defend themselves.

The eventual outcome was a settlement in which Equitable Life agreed to drop the actions and reimburse some of the costs.

In both these cases, therefore, individuals without access to legal aid were sued by organisations with deep pockets. In both cases the individuals won the case (counting a dropped action as a win). In both cases winning meant no change. Yet in both cases the individual defendants concerned suffered great financial loss personally.

These cases are of course the tip of the iceberg, because large numbers of individuals in the same sort of situations are advised by their lawyers to offer a settlement rather than defend the case, however innocent they are of the actions complained of.

Equality of justice is inextricably linked to the depth of the pockets of the parties.

Solution

While the granting of legal aid is a political issue rather than a legal one, there are actions the courts could take to improve the problems indicated above.

The first and most obvious is to ensure that the loser in civil cases is forced to cover all of the other side's reasonably incurred costs and not just a proportion of them. Perhaps this could also apply in criminal cases.

A second is to provide that where a pursuer in a civil case wishes to take action against a defendant who is either an individual not on legal aid or a small company with net assets of less than (say) £100,000, the pursuer should be obliged to fund (say) the first £10,000 of the costs of each defendant, whatever the outcome of the case. This would deter pursuers from taking action against poorer defendants – and particularly in circumstances when the action is being brought out of principle rather than for money compensation, as in the two cases cited above.

There may well be other suggestions which could help create the right balance to ensure that both parties are on an equal footing.

2. COSTS AND DELAYS

Problem

The timescales of legal action are very long and the costs involved, perhaps as a result, very high. There are various references in the Review to the need to find ways of streamlining procedures and to achieve justice at a lower cost. It can sometimes be the case in civil actions that swift injustice is better than long drawn out justice.

The costs and delays are themselves only the tip of the iceberg. They do not take account of the time spent by the litigants, the stress and worry created for them by the legal action, and the effects of the legal actions on their personal lives. In the case of corporate litigants, the management time sucked up by legal actions is often cited as the reason why cases should be settled fast rather than disputed, or even not brought at all.

Newton's rule that every action has an opposite and equal reaction applies also to legal actions. The costs and delays of the law are used as negotiating tools by litigants. In several commercial disputes of which I am aware, the defendant effectively admitted liability but offered roughly half of the amount claimed by way of a final settlement on the grounds that the pursuer would only get the full amount several years later and after heavy unrecoverable costs. The calculation was correct and the pursuer accepted much less than the full amount due.

In almost all civil litigations, the defendant will receive legal advice from his lawyers to draw out the procedure in order to achieve the maximum delay and thus improve his negotiating position on any possible settlement.

It must be wrong that the costs and delays of legal action can be used by defendants to reduce the amount they are due to pay out.

Solution

The Review mentions the various efforts being made to streamline procedures, including more active case management and scheduling, as well as the use of mediation and more effective preliminary hearings.

However, one of the problems of the legal system is the monopoly position of the courts. There would not have been a need for the Review if this had not been the case. Market forces would have pushed the courts into much faster action to streamline the service offered to litigants.

The more fundamental change would therefore be to have two court jurisdictions operating side by side with each other but competing on service offered. The broad principles would be that both jurisdictions would apply the same law so that decisions

under one would be regarded as precedents under the other. Advocates could appear in either jurisdiction, but judges would be appointed to one or other jurisdiction and would be limited to that jurisdiction (perhaps with the ability to switch after a lengthy notice period). The aspects on which the jurisdictions would compete would be the very ones of cost and delays. Litigants would choose which court jurisdiction to use in the light of the service offered. There would obviously be many detailed aspects to be sorted out, such as the physical use of courts, but these are capable of resolution if the concept is accepted.

This is a fairly radical change, but not as radical as might be initially perceived. It would ensure that litigants become perceived by the court system as clients and not as irritating nuisances. It would also ensure that through competition there is a natural continuing process of reviewing court procedures. The beneficiaries would not only be the litigants but also legal practitioners generally – partly because they would then be able to deal with more problems more quickly and effectively for clients but also because there would probably be more litigation as a result. In addition, foreigners would probably be more inclined than at present to have commercial documents drafted under Scottish law rather than under English law.