

## **RESPONSE BY ANDREW S POLLOCK, SOLICITOR, PEACOCK JOHNSTON TO SCOTTISH CIVIL COURTS REVIEW CONSULTATION PAPER**

### **INTRODUCTION**

I am a solicitor in a private practice with a particular specialisation in Pursuer's clinical negligence and personal injury work, although my experience has covered all aspects of Court work over the past 20 years, ranging from criminal through to matrimonial, and also commercial litigation. I am one of what would appear to be a decreasing number of experienced civil litigators in Glasgow who are still prepared to carry out work under Legal Aid.

In responding to this Consultation paper, I shall try to avoid responding to questions "purely for the sake of it", and I would prefer simply to limit my responses to the questions where I feel I can make a useful contribution. For this reason, my response does not purport to be a comprehensive response to all of the wide ranging questions raised in the review.

My responses to the questions are therefore as follows:

### **CHAPTER 1**

Q1. *Should the Civil Justice System be designed to encourage early resolution of disputes, preferably without resorts to the Courts etc?*

In reality, most civil practitioners will regard the Court as the last resort and will seek to negotiate rather than litigation. However, even although my philosophy as a clinical negligence specialist has been to seek to spare my clients from the stress associated with litigation, this has to be balanced by the fact that the threat of litigation is available in the background is frequently a very powerful and effective lever which facilitates effective resolution.

However, in my own particular area of interest, clinical negligence, it is clear to me that it is impossible to consider a framework for early resolution of disputes without including a complete review of the NHS Internal Complaints Scheme. An attempt to deal with clinical negligence within the scope of the presence of the Civil Justice Review, in the absence of a detailed overhaul of the NHS Internal Complaints Procedure, will not "encourage early resolution of disputes".

It may well be that increased use of pre-action Protocols will lead to more early resolution of disputes.

Q2. *Are the principles and assumptions discussed in paragraphs 1.11 to 1.14 a sound basis etc?*

There is a danger about the issue of "proportionality". In clinical negligence, an undue emphasis on quantum of a potential claim or costs of proceedings can lead to the importance of the issue to the client being overlooked. Other than that, the principles and assumptions appear sound.

Q3. *Are there any matters not dealt with etc?*

As I have indicated above, it is difficult to consider an overhaul of the civil justice system as applicable to clinical negligence claims, without considering a review of the NHS Internal Complaints Procedure.

## **CHAPTER 2**

- Q2. *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?*

I feel very strongly about this particular issue. Successive Scottish governments and prior to that successive Secretaries of State, systematically neglected civil legal aid for 13 successive years with no increase in the hourly rate, followed by the current system of block fees which is wholly inadequate to remunerate practitioners carrying out complex cases, has led to a wholesale abandonment of the civil Legal Aid system by sectors of the profession. For all too many solicitors, civil Legal Aid has become the domain of the junior, the inexperienced, or unfortunately the inexpert. In my own field, clinical negligence, most clients affected by clinical negligence are dependent on Legal Aid/Legal Advice and Assistance. However, there are only a handful of experienced clinical negligence practitioners in Scotland who are prepared to deal with clinical negligence cases on Legal Advice and Assistant/Legal Aid. There is a huge gap in representation which can only be dealt with by improved remuneration to attract solicitors back to doing Legal Aid work.

- Q3. *To what extent is it desirable or feasible to design Court procedures with a view to enabling litigants to take part in the process without legal representation?*

In cases of clinical negligence, it is quite simply neither feasible nor desirable for litigants to be unrepresented. The legal and factual issues are far too complex. What is required is a greater number of solicitors with the training and specialisation to deal with such cases.

## **CHAPTER 3**

- Q1. *Levels of Legal Expenses*

There is a great danger in comparing Scottish legal expenses with English legal expenses. English costs are much higher than Scottish costs per case. Therefore, the Woolf Report Access to Justice has very limited relevance to Scotland. I am aware, through having employed directly an English personal injury solicitor, that English cost awards are much higher than Scottish cost awards. Therefore, there would be a grave danger in attaching undue weight to the figures contained in Lord Woolf's Access to Justice Report.

- Q4. *Are the current rules for recovery of judicial expenses satisfactory?*

The recovery of judicial expenses has greatly improved over the last 10 years, and it is to be commended that judicial expenses now reflect a solicitors' true costs to a far greater extent than previously was the case. However, in certain complex cases judicial expenses are still insufficient to meet all of the true costs. Also, with the raising of the ordinary cause limit to £5,000, it may well be that there are a number of medium value personal injury and clinical negligence cases, which had a degree of complexity but which are not worth more than £5,000, end up attracting wholly inadequate awards of judicial expenses.

- Q6. *To what extent does the availability of Legal Advice and Assistance and Legal Aid affect access to justice?*

As I indicated above, there is no point in the Scottish government proclaiming that Legal Advice and Assistance and Legal Aid is universally available, if there are no solicitors around to provide that service. There are many areas of law where there is quite simply no longer meaningful access to justice. My own firm receives many phone calls each week, if not each

day, from people who need a solicitor but it is quite simply no longer economically feasible for us to be able to provide a service to many of these clients who are then turned away.

- Q7. *Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?*

In clinical negligence, there is a major problem in obtaining funding for litigation. If the client is not eligible for Legal Aid, then it will only be in wholly exceptional cases that a solicitor will be prepared to deal with a clinical negligence on a speculative fee basis. It is very unusual for a household legal expenses insurance policy to provide for clinical negligence cases.

- Q9. *Should legal expenses have a greater role to pay?*

After the event insurance at present is wholly prohibitive in terms of cost for clinical negligence cases. – it runs to many thousands of pounds.

- Q10. *What impact would the ability to recover “after the event” insurance premia from unsuccessful parties have on litigation?*

This would be of considerable assistance. This is a significant shortfall in the system at the moment. However, it must be stressed that I would not wish the ability to recover insurance premia to be a substitute for Legal Aid being available. It is still vitally important that Legal Aid is available for clinical negligence and personal injury claimants.

#### **CHAPTER 4**

- Q2. *Should some Judges and Sheriffs be designated to deal with civil business?*

Yes. As fewer and fewer current legal practitioners practice both in criminal and civil law, then it is to be recognised that there will be fewer and fewer “all rounders” being appointed to the bench. It is only right that civil cases should be dealt with by people who have had civil experience, and similarly, criminal cases by those who have had criminal experience.

- Q4. *Should there be a greater degree of specialisation and if so in what types of cases and in what Courts?*

The Glasgow pilot of introducing a specialist personal injury court has worked well. It would make sense for personal injury courts to be introduced in all Courts or, if the particular Sherifffdom were to have an insufficient number of personal injury cases, than for a centralised personal injury Court to cover a number of Sherifffdoms. Similarly, clinical negligence could also usefully be dealt with by such Courts.

- Q5. *What are the key factors, which influence the decision to raise an action in either the Court of Session or the Sheriff Court?*

Complexity of the case, the value of the claim, and, crucially, the availability of a jury.

- Q8. *Should the Court of Session become a Court of Appeal only?*

It is appropriate that the Court of Session should continue to deal with complex cases, and if jury trials or civil cases are not to return to the Sheriff Court, then it is vitally important that the Court of Session retains its first instance jurisdiction if for no other reason than to hear jury trials. Juries in civil cases over the last 20 years have been vitally important in bringing awards of damages in line with what the public considers to be fair.

- Q13. *Does the current division of the Sheriff Court into distinct geographical jurisdictions present difficulties or are there advantages?*

There is no one solution which covers all areas of law. What may be a solution for personal injury cases, i.e. to have a larger volume of personal injury cases gathered into one Court which covers a larger area, is wholly inappropriate for family cases where immediacy and accessibility are vitally important, for example in urgent contact hearings, or for protective remedies such as Interim Interdict etc. It is therefore clear that there is no one simple solution that fits all categories of law. In the areas of law where immediate remedies are to be sought, particularly matrimonial cases, a locally accessible Sheriff Court is vital. For personal injury and clinical negligence cases, regional centres may be more appropriate.

## **CHAPTER 5**

- Q2. *Should the Court encourage, require or in some other way facilitate the use of mediation or other methods of dispute resolution?*

Mediation should never be compulsory.

In clinical negligence cases, mediation may held but it is impossible to be prescriptive and require cases to go to mediation. Mediation will only work if parties wish to go to mediation. Also, it has to be recognised that many responsible solicitors will address many of the issues which otherwise might only be raised in mediation.

- Q6. *In what respects can modern communications and IT be harnessed to improve access to the civil Courts?*

It is important that more Courts follow the example of Glasgow so that uncontentious appearances can be avoided. In Glasgow, this is very effectively achieved by emails being sent to and from the Sheriff for routine matters, and by telephone Case Management Conferences.

- Q8. *What types of cases would benefit from (a) judicial case management and (b) case flow management?*

The Glasgow Sheriff Court Commercial Court and the Glasgow PI pilot scheme of Judicial Case Management have worked well. It is clear from these schemes that no one pre-set timetable works best. In some cases, a Proof or a Debate can be fixed after perhaps only one or two Case Management Conferences. Other cases require more. On the whole, it is the more complex cases which benefit most from judicial case management. I would therefore wholly support the idea of clinical negligence cases being subject to judicial case management.

I do have to sound a note of caution. Judicial case management is only as good as the individual members of the judiciary managing the case. In Glasgow, this has worked well both in the PI pilot scheme and in the Commercial Court.

## **CHAPTER 6**

- Q2. *Should there be a great use of pre-action protocols?*

There is a considerable need for pre-action protocols in clinical negligence cases. Whilst unexpected delays can arise from time to time in relation to the instruction of experts, if all

parties were to become used to working within a pre-action protocol, it would be much easier to have a clearly defined timescale and therefore greater certainty and predictability of process and outcome for clients.

Q3. *Should compliance with pre-action protocols be voluntary or compulsory?*

It should not be compulsory, but the Court should be able to make the appropriate finding of expenses in the event of a party's failure to follow a pre-action protocol without just cause.

Q5. *Are the current arrangements for making the rules of civil procedure satisfactory?*

No. For the reason that will become clear in the following answer, I believe that there should be a single Rules Council and there should be no distinction between Sheriff Court Rules and Court of Session Rules.

Q6. *Should there be a single set rules of civil procedure rules in both the Court of Session and the Sheriff Court?*

Yes. If the Scottish Civil Courts Review does nothing else, other than to provide that procedures within the Court of Session and the Sheriff Court be unified, then the whole process will have been worthwhile. The fact that the Court of Session has a different set of rules from the Sheriff Court is a huge barrier to affordable justice.

Although in theory, the Court of Session is accessible to non-Edinburgh practitioners, the reality is that most non-Edinburgh practitioners will seek safety by instructing an Edinburgh agent because the rules, procedures and practices are all different. If there were to be a unified set of rules and procedures so that a Sheriff Court practitioner could litigate directly in the Court of Session, without a "fear of the unknown", that would bring about a considerable reduction in the cost of litigation in the Court of Session, thereby making it more accessible. I know that in theory I can litigate directly in the Court of Session without an Edinburgh agent, but the reality is that the practices and procedures of the Court of Session are not practices and procedures with which I am familiar, nor do I have a sufficient volume of work within the Court of Session to become familiar with them, hence the need to instruct an Edinburgh agent. I am aware that many non-Edinburgh practitioners will litigate directly in the Court of Session, but the Court of Session should be accessible to all, and not just those whose caseload enables them to be able to litigate directly in the Court of Session. **A major overhaul is required of the Sheriff Court Rules and the Court of Session Rules so that there is a single unified set of rules.**

This can be done without necessarily altering the rules regarding rights of audience in the Supreme Courts.

Q11. *Are the current arrangements for dealing with routine procedural business satisfactory?*

No. Far more use should be made of direct e-mailing to the judiciary for routine and uncontested matters, to reduce unnecessary appearances.

Also, where matters are not routine or uncontentious, far greater use should be made of the telephone Case Management Conference. In the Court of Session, solicitors should be entitled to conduct such telephone case management conferences without the need for Counsel. For routine procedural steps, there should not be a requirement for the solicitor to be a solicitor/advocate.

In this day and age the practice of a solicitor and Counsel, or a solicitor and solicitor/advocate both having to appear is utterly unjustifiable for routine business.

Q16. *Should a system of Pursuer's offer be introduced into the civil Courts procedure?*

Yes. Such a system should provide that if the Pursuer's offer is rejected by the Defender, and the Court awards what is offered by the Pursuer or a greater amount, then the Pursuer should be entitled to recover, from the date of the Pursuer's offer onwards, all expenses i.e. expenses on an agent/client basis as opposed to expenses on a party/party basis. It is not fair that at present, only a Defender has the lever of a Tender. The Pursuer should also be given that lever.

Q17. *Should jury trials be retained?*

Yes. Although numerically small, their influence has been huge. Jury awards, more than anything else, have been responsible for loss of society awards in fatal cases moving towards what the public would consider to be an appropriate level of just compensation. The importance of the civil jury cannot be over-estimated.

If it had not been for the Jury Trial, fatal awards would have become increasingly out of line and out of touch with what the public (whom we all seek to serve) consider fair. Although few in number, they are a vital safeguard to the public.