

R E S P O N S E

by

SIMPSON & MARWICK SOLICITORS

to

**THE SCOTTISH CIVIL COURTS REVIEW
CONSULTATION PAPER**

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CHAPTER 1

INTRODUCTION

1.1 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?

Yes. In general, parties should be encouraged to consider non-litigation dispute resolution media, such as mediation and ADR where appropriate. Diversion from litigation should not, however, be mandatory. In the field of personal injury, the experience in England would suggest that mandatory pre-action protocols with appropriate sanctions for breach, are very effective tools with which to encourage early non-litigated dispute resolution.

The key features of the system are (a) funding, (b) transparency, (c) speedy resolution, (d) proportionality, particularly proportionality of cost and (e) accountability.

1.2 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?

The principles and assumptions discussed in paragraphs 1.11 to 1.14 are agreed.

In particular, the cost incurred by a party in litigating should be proportionate to what is at stake. The expenses incurred in low value claims should be reviewed given that evidence shows that those expenses can often exceed the settlement value of the claim. Low value claims should not be litigated in the Court of Session where the Sheriff Court is a more appropriate forum. Evidence shows that litigating equivalent claims in the two fora results in a significant differential so far as expenses are concerned. The Court of Session should only be available for those cases which merit the additional costs involved. Sheriff Court procedure will require to be streamlined and the Sheriff Courts will require to be adequately resourced to allow for an increase in Sheriff Court litigation.

Compulsory pre-action protocols with appropriate sanctions for their breach require to be introduced to avoid the cost of needless and disproportionate litigation. The Court of Session should be restricted as a centre of excellence and should be retained as a court of first instance to allow it to deal with cases of real complexity or novelty. The privative jurisdiction of the Sheriff Court should be raised to £50,000.

Within Sheriff Courts there should be a greater degree of specialisation which should focus on the Sherifffdom. There should be a greater use of IT in process work. In general case-floor management should be preferred to judicial case management, leaving it to the parties and the court to redirect

appropriate cases to the more labour-intensive judicial case management system. The continued use of civil juries is anachronistic and disproportionate.

Court fees should not be set at a level which is out of proportion to the value of litigated claims.

1.3 Are there any matters within the Review's remit about which you have concerns but which are not dealt with in this paper?

Little mention is made in the consultation paper of the positive English experience following the imposition of compulsory pre-action protocols with appropriate sanctions.

CHAPTER 2

ACCESS TO JUSTICE

2.1 What contribution can public legal education make to improving access to justice?

While the aim of developing the “enabled citizen” is laudable, there are practical limits on the extent which public legal education may improve access to justice. While it would be possible to better educate the public in relation to legal procedures, it will be a significant task to properly educate them in the whole range of legal issues which come before the courts. Public legal education will probably not make a significant difference to types of litigation which are well known, for instance personal injury and family litigation, where the means of obtaining legal advice are relatively well known but the subject matter is itself likely to be too complicated for unrepresented litigation.

2.2 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?

As a firm, we do not feel we can offer input to this question.

2.3 To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?

Where possible, it is desirable to enable litigants to litigate without legal representation, as a general principle. However, it must be recognised that in relation to some types of dispute, the law concerned may simply be over complex for a party litigant to manage his or her affairs properly.

The existing small claims procedure, where the current maximum threshold has recently been increased to £3,000, offers just such a forum. There are many types of case which can appropriately be dealt with using small claims procedure, without the benefit of representation relatively quickly and cheaply. Many consumer and trading disputes are ideally suited to small claims procedure.

It is possible to envisage a system whereby such disputes were taken out of the Sheriff Court altogether and dealt with by some form of quasi-judicial adjudicator. However, there would be cost implications in setting up such a parallel system of justice. It is possible to argue that the process of litigating in the Sheriff Court for consumer may facilitate compromise and settlement in a way which a more administrative process might not.

By contrast, some types of litigation are simply too complex to be conducted without legal representation. For those types of litigation, retaining procedural rules which make it difficult for party litigants to conduct the litigation, may, rather than presenting a bar to access to justice actually facilitate by ensuring that parties seek timeous and appropriate advice.

2.4 What contribution, if any, can (a) “self-help” services for party litigants and (b) court based advice services make to improving access to justice?

The in-court advice project which has rolled out across the Sheriff Courts has largely been a success in providing support to party litigants, witnesses etc. Self-help publications and the court based advice services have a role to play in enabling the public to overcome any bars to access to justice which are presented by ignorance of the court procedure itself. They therefore have a role in facilitating low value claims where the legal issues are straightforward.

By contrast, it is hard to see how either self-help services or in-court advice can overcome the problems inherent in attempting to understand complex substantive law.

2.5 Are there any other issues which impact on access to justice in Scotland which the review should consider?

The cost of litigating low value cases does have an impact on access to justice. See our response to Chapter 3.

2.6 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?

Both mediation and other types of alternative dispute resolution represent approaches to low value cases, and indeed all cases, which are worth considering. Both are more suited to the situation where there is an ongoing relationship between the parties and there is value in maintaining the relationship. Alternatives to litigation require the consent of the parties to have a prospect of success. It is therefore not thought appropriate to make a diversion from mainstream litigation compulsory. Doing so can simply result in overall delay.

The experience in the Republic of Ireland of PIAB is not recommended to be followed. It does not provide for recovery of legal expenses even though most claims are lodged by solicitors. Increasingly it has not been used by claimants. The level of awards have been criticised. No significant stakeholder in the field of personal injury litigation wishes an equivalent system to be adopted in Scotland. On a practical level, the combination of union backed litigation firms, claims management companies and some access to legal aid means that most Pursuers have little difficulty in attracting legal advice and representation. The few Pursuers who do find it difficult to attract such representation have that difficulty because of the lack of reasonable prospects of the claim which they intend to pursue.

If the aim of the exercise is to achieve expeditious resolution of personal injury claims then the experience in England and Wales would suggest that the best means to achieve that aim is through a system of compulsory pre-action protocols, together with appropriate sanctions for their breach.

There can be no justification for the current system where, even after the recent jurisdictional changes, straightforward low value personal injury claims continue to be litigated in the Court of Session.

CHAPTER 3

THE COST AND FUNDING OF LITIGATION

3.1 Information about levels of legal expenses in litigation and how such expenses compare with sums awarded by the Court or settlement figures

The following general points are worth making:

- We think that anecdotal information, and our own experience, suggests that the probability is that the judicial expenses recovered by a successful party by way of party and party expenses, are likely to amount to approximately 80% of the agent and client expenses which the solicitor for the successful party would be entitled to charge his/her client.
- Legal expenses, whether party and party or agent and client, are considerably higher in England than in Scotland.
- The key issue may be whether it is more or less expensive to litigate in the Sheriff Court, than it is in the Court of Session. Simpson & Marwick's research into this issue indicates that it is significantly cheaper to litigate in the Sheriff Court. An area of major concern for our clients, who are mainly drawn from the insurance industry, relates to the disproportionate cost of litigation as compared to the value of the claim, or settlement achieved. It is not unusual, and indeed in low value cases is very much the norm, that the judicial expenses paid out are higher, and sometimes substantially higher, than the value of the claim. Our in-house Fees Department apply a very vigorous approach to all areas of judicial expenses, but nevertheless it is invariably the case that the costs payable to the claimant are greater than the value of the claim itself. We venture to suggest that the findings of Lord Woolf, referred to in paragraph 3.4, will not be dissimilar to the experience in Scotland.
- Paragraph 3.5 of the Consultation paper suggests that there is little in the way of hard evidence as to the cost of litigation in comparison with the value of the claim. In Simpson & Marwick we have undertaken a comparative exercise and in Appendix 1 to this part of the response will be found the results of that exercise carried out, in relation, initially, to 6, randomly selected, judicial accounts in claims in the Court of Session and Sheriff Court respectively with a value of below £10,000, and, in Appendix 2 a second, randomly-selected, batch of accounts in respect of claims which had settled both below and above a figure of £10,000. No doubt it can be argued that a comparison of judicial expenses in the Court of Session, as against the Sheriff Court, is skewed by the fact that the Sheriff Court expenses will not include Counsel's fees, but in our view what this exercise clearly demonstrates is the fact that the level of judicial expenses in the

Sheriff Court will be significantly lower than the equivalent level of judicial expenses in the Court of Session. In our view it is difficult to see the justification for the involvement of Counsel in cases of a value of as little as £10,000, other than in exceptional circumstances. In a separate exercise in which we carried out a review of settled personal injury cases, in the Court of Session where there was a sum sued for of £10000 or less the expenses payable to the Pursuer equaled or exceeded the sum paid in damages in no fewer than 34 cases out of a total of 42 cases assessed, or 81%, and in the Sheriff Court Ordinary Cause where there was a sum sued for of £10000 or less the equivalent numbers were 515 out of a total of 893 cases assessed, or 58%.

- The fee structure in low value claims constitutes a major challenge, and it may be questionable to what extent encouraging low value claims to be litigated in the Sheriff Court will necessarily overcome the inherent problem of lack of proportionality between costs on the one hand, and the value of the claim on the other. One simple solution might be to suggest that a successful party cannot recover more by way of costs than the value of the claim but whilst that might easily be applied to a claimant, it is not quite so easy to apply that to a defender where the claim is not, and has never been his. However one way to overcome this would be to use the sum sued for as the fall back position, if the value of the claim has not been a matter of agreement.
- If one has regard to the sample cases in the Appendix to this section, it will immediately be seen that a substantial amount of expense would be saved if such a ceiling on expenses was imposed. The upshot would be to put an end to the automatic employment of Counsel and instruction of experts in circumstances where the value of the claim did not justify it and the outcome would be a reduction in the amount of the cost recovered in low value claims. Furthermore such a system would avoid arguments about adjustment, and taxation, of judicial expenses with the not insignificant cost of taxation being either avoided, or substantially, reduced.

3.2 To what extent does the cost of litigating deter people from pursuing or defending cases in Court

In the case of a defender it is almost always the case that the party who is actually litigating is the defenders insurer. For insurers the cost involved in litigation assumes a high degree of importance and indeed often the question of the economics of defending the case on its merits are more important than the point at issue in the case itself. Consequently from a defenders insurers point of view the potential cost of defending the case may be more important than the prospect of achieving a successful outcome. As a result the fact that the expenses of the case are disproportionate to the overall value of the claim represents a real deterrent to defending the case.

3.3 Does the current system of levying Court fees affect access to justice

Our overall view on this is that Court fees do not significantly affect access to justice but it has to be recognised that to a significant extent that is because solicitors for the claimant are “bank rolling” the Court fees involved in the case until its conclusion at which point, if they have been successful, they recover them from the unsuccessful defender or his insurers. Given that Court fees are a part of the overall cost of litigation, it is probably fair to say that the Court fees in themselves do not prevent access to justice, but they form part of the overall cost which, if disproportionate, does act as a deterrent for the reasons previously indicated.

3.4 Rules for recovery of judicial expenses

We accept that the ability to recover judicial expenses is necessary to assist in achieving equality of arms, and to balance one party against another who may have greater resources available to them. It should not be overlooked that the existence of power in the court rules for the court to award an additional fee in complex cases certainly assists in achieving that equality.

In paragraph 3.15 reference is made to “re-structuring” of the Table of Fees, but it should be pointed out that that restructuring was mainly in regard to personal injury actions. A table of fees was introduced into the Court of Session in relation to personal injury actions on 1 April 2003. At the time that table was introduced, it was noted that it should be reviewed in light of developments, but such a review has not, as yet, taken place. Our concern is that the Table of Fees is generous in that it had been assumed that a greater degree of work would be undertaken by the instructing agent and such an input was taken into consideration in ascertaining the fee payable. The block fees contain numerous examples where fees are allowed for work that has not actually been undertaken. The Table of Fees has been the subject of a yearly increase over the period of the last 5 years, but at no stage has an overall review of the fairness, or otherwise, of that Table ever been undertaken.

We do not agree with the final sentence of 3.15 or paragraph 3.16. Commercial causes, within the Court of Session, fall to be taxed on an “according to the circumstances” basis. What the party is entitled to do is to increase any element of the fee, whether based on an hourly or a block scale charge, where it can be justified “according to the circumstances”.

In the end of the day, we accept that the principle that expenses should follow success should be retained. That system is fairer than, and is to be preferred to, the situation which exists, for example, in the USA where successful parties are generally not entitled to recover the cost of litigation from the unsuccessful party.

Whatever system of recoverability of expenses is adopted, judicial costs need to be the subject of independent assessment whether by an Auditor of Court or the equivalent.

We firmly believe that it is essential that the concept of tendering in relation to judicial expenses should be introduced, bearing in mind that the sums involved in the taxation of accounts of judicial expenses are significant, as is the time engaged in adjusting and taxation of accounts. In our view, there is no logical argument against the proposition that the paying party should be entitled to found upon an offer made prior to taxation in order to be protected against the costs involved in the taxation of the account.

3.5 Current system of taxation of judicial expenses

In our view, a significant drawback to the current system for taxation of judicial expenses is that it is far too dependent upon the personality of the particular auditor. The system needs to be objective, and transparent. Having said that we accept that there may be no better method of dealing with this by entrusting it to an individual arbiter and making it subject to the ability of the unsuccessful party to appeal by way of note of objection. However, in order to achieve transparency and impartiality, our view is that the post of auditor should be a salaried one, rather than one where remuneration is based upon a percentage of the account of expenses as submitted. Ultimately, there may be no material difference in terms of the eventual cost to the unsuccessful party, but to proceed on that basis will give the appearance of greater objectivity and transparency.

It is extremely important that the post of auditor should be filled by a practitioner, rather than a civil servant or academic. It is of fundamental importance that the person responsible for arbitrating on the level of judicial expenses to be awarded should understand, and have an intimate knowledge of, the litigation process.

3.6 Availability of legal aid and access to justice

As a firm, we do not feel we can offer input to this question.

3.7 Funding of litigation

As a firm, we do not feel able to offer input.

3.8 Speculative fee arrangements

In view of the relative demise of the availability of legal aid for claimants in Scotland, we think that speculative fee arrangements have had a positive impact on access to justice, but the other side of that coin is that increased use of speculative fee arrangements has resulted in a situation where fewer pursuer's firms are doing more cases which might be thought to reduce the public's choice. It is inevitable that firms who operate on the basis of speculative fee arrangements have to be able to run a sufficient volume of cases in order to effectively ensure that levels of successful cases will underwrite the risk of those cases that are unsuccessful. Whilst all of this may mean that the choice for the pursuer is reduced, it also means, in reality, that the quality of representation for pursuers in this jurisdiction is considerably improved. There are fewer firms acting for pursuers, but they are identified as experts and that of course merely reflects the position which

operates on the other side of the divide whereby defenders' insurers are operating through their own panels of solicitors which equally restricts the market.

Overall, our view is that the result is a much better quality of representation for both pursuer and defender and, therefore, a quicker means of access to justice.

3.9 Legal expenses and insurance

The practical position is that there is little in the way of after the event insurance available in Scotland, partly because of the size of the jurisdiction, but partly because in the current system success fees and premiums are not recoverable. Consequently, the market is not an attractive one from the potential insurers' point of view.

Before the event insurance is not something that has proved popular with the public in Scotland and the reality is that insurance companies are not making the product available.

3.10 Recoverability of "after the event" insurance premiums

Our firm view is that there should be no such recoverability introduced. The practical experience in England, where this principle led to significant satellite litigation, should be avoided in this jurisdiction.

CHAPTER 4

THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

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

Yes. From the availability of Court of Session judges, the prioritizing of Sheriff Court work through to the allocation of courts and witness rooms it is evident that civil business is treated as the poor relation.

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

(a) Yes if the Court of Session is to be retained as a Court of first instance.

(b) Yes provided the distinction is not simply between civil and criminal but recognizes the need for specialists or at least judges experienced in such areas as family law, personal injury and commercial work. A sufficient volume of work will be required to justify the designation.

4.3 Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?

No. Provided judges are designated as proposed above separate divisions would involve additional administration, duplication and associated cost particularly if the current Sheriff court structure is retained. Separation also implies that all civil work has common factors outweighing its differences. Judges should not be required to select a division but be offered the opportunity to accept designation. To enforce separation might discourage some from seeking judicial office.

Separation could however be seen to accord to civil business greater status within the judicial system than it currently enjoys.

4.4 Should there be a greater degree of specialization within the civil courts in Scotland? If so, in what types of case and in which courts?

Yes. Practitioners have long recognized the need to specialize as should the bench.

There should be specialization in reparation/personal injury; commercial (to include contractual and corporate issues, intellectual property and competition matters) and family law.

Specialization should focus on the Sheriffdom rather than individual sheriff courts. Different types of cases could be focused on different cities within a

Sheriffdom (and Sheriffdoms could be recast to facilitate this) e.g., personal injury claims in Perth/Linlithgow and family cases in Dundee/Falkirk.

4.5 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?

- Maximisation of expenses recovery by the claimant.
- Opportunity to Subcontract work to Counsel.
- Value of the claim and availability of Jury to assess damages.
- Increased predictability of outcome given lack of specialist sheriffs.
- Availability of the Coulsfield Rules.

4.6 In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?

Court of Session

- Judicial Review and public law issues
- Petitions to Nobile Officium
- Corporate Law matters involving Plcs
- Defamation

Sheriff Court

Actions of payment/damages where the value of the claim is less than £50,000 (unless the matter is within the exclusive jurisdiction of the Court of Session).

4.7 Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?

No. A superior and lower court structure provides flexibility and allows access to justice with the opportunity of doing so at proportionate cost.

4.8 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?

The Court of Session is a centre of excellence and should be retained as a court of first instance but to deal in that scenario with cases of real complexity or novelty. The great bulk of routine personal injury actions processed in the Court of Session and settled without judicial intervention do not require to be raised there and involve avoidable additional and unavoidable expense in instruction of Counsel.

Rather than attempting to identify in advance particular types of action which could be raised in the Court of Session it would be preferable to allow all (unless excluded for example by value as indicated in Answer 6) but with a far more flexible power to remit to the Sheriff Court – and correspondingly to receive remits from there

4.9 If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?

£50,000. Such a level is essential if specialist Sheriff courts/judges are to enjoy sufficient volume of business. That level would not destroy the independent bar whose continued existence is essential as a source of expertise and experience, but it would require the bar to deploy when and where properly required rather than rely on the regular presentation of routine work to it in Edinburgh.

4.10 Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?

No. They operate too inflexibly and at the discretion of the Sheriff. There should be a right to seek leave of the Court of Session if a remit is refused by the sheriff and a power to require remit if the Court of Session is satisfied that the cases or cases (perhaps raised in different Sheriffdoms) raise issues of novelty or complexity.

4.11 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?

No. While matters involving consumer law and social housing may be of limited value they are of considerable importance to the litigant who may often be representing himself. The issues moreover may be complex. A lower tier would require its own Court Rules and processes adding to cost

4.12 Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?

No. For the reasons given above and because recruitment of “third class” judges might not be straightforward. The equivalent of a stipendiary magistrate for the JP courts may not be easily replicated across the country.

4.13 Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?

Difficulties

Current jurisdictions inhibit specialization that regional justice centres could provide. Allocation of adequate time for hearings can be difficult especially in small courts.

Some jurisdictions have not matched demographic change.

Advantages

- Accessibility – but only at any hearing
- Local knowledge

4.14 Are the current arrangements for dealing with undefended actions satisfactory?

As a Defender's practice we do not have sufficient experience to comment.

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

Yes

4.16 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?

Commissary business should be dealt with as an administrative process providing that a dispute could always be resolved judicially. Beyond that matter we have no comment to offer.

4.17 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?

A single centre to process warrants would provide economies of scale and more easily facilitate the use of IT. Standardized writs could be completed "on line" and actions only allocated to the appropriate regional sheriff court according to specialty once defended.

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

No. This would be a substantial disincentive to judicial applicants and would be inconsistent with our view that regional specialist centres are the way forward.

4.19 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?

Yes

If so, what factors should be taken into account?

- Value
- Novelty
- Complexity

4.20 Are the existing appeal arrangements satisfactory?

No. Automatic appeal to both the Sheriff Principal and subsequently to Inner House gives too great an opportunity to the determined litigant. If the

appellant appeals to the Sheriff Principal unsuccessfully leave for further appeal should be required from the Sheriff Principal or the Inner House.

Appeal directly to the Inner House should require leave of that Court so to do.

Appeal to the House of Lords should require leave of that Court in the event of unanimity of opinion in the courts below

4.21 Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?

The office of sheriff principal should be retained and the office should be both judicial and administrative.

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

We believe this is a matter for the legislature to consider in light of the regional structure proposed but if the volume of business before the Outer House is reduced as proposed then appeals could be dealt with far more quickly if heard by a single judge in the Outer House.

4.23 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?

Yes. See Answer 20 above.

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

The advantages of reliance on temporary judges and part-time sheriffs are:-

- necessary flexibility to cover illness/absence;
- the opportunity to use the expertise of those with specialist skills;
- aspiring advocates/solicitors can “test the water”; and
- cross jurisdictional experience may be useful.

The disadvantages of such reliance may be:-

- too great a reliance may prevent specialization in some courts;
- some may feel they are getting a “second class” judge; and
- absence of local knowledge – particularly in criminal matters.

CHAPTER 5

PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

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

The key objective of civil procedure should be the expeditious, just and proportionate resolution of disputes. It is considered that this objective is inherent in the manner in which court procedures have developed over the years, however the introduction of an overriding statement of philosophy could be seen as desirable in tandem with the birth of a new system of administration of civil procedure.

5.2 Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?

The key aim of the court should always be to encourage the expeditious just and proportionate resolution of disputes, and to this end it should facilitate the best means of achieving this end. It is considered that it should not be prescriptive and constricted by rules governing the exact process of alternative resolution, as for example mediation may not always be the best means of resolving a particular issue between parties.

5.3 If so, how should this be done and at what point or points in the progress of a dispute?

The court should be live to the issue of possible alternative means of resolution both prior to litigation and throughout the currency of a case, and also be sufficiently flexible to allow the parties to voluntarily submit for mediation or any other means of resolution (for example a meeting between the parties with experts present) which would best fit the circumstances of each case-as has been recognised within the discussion paper, mediation is not necessarily the optimum means of progress in every case, particularly in personal injury actions. It is considered that it would be sufficient that prior to any case being warranted for service, the pursuing party is required to declare that attempts at alternative resolution of the case, including mediation, have been considered.

5.4 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?

In any system of litigation there will be cases where both parties are so entrenched in their respective positions that only a judicial determination will secure resolution of matters. This option should always be open to the parties to an Action and should not necessarily be seen as a negative

outcome-judicial determinations can often clarify and develop the existing law.

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

The primary liability for costs of alternative dispute resolution should be on the parties to the Action.

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

The use of developing modern communication methods should be embraced by the court, particularly in relation to the issue of lodging of pleadings and papers to the action. In addition, it is considered that the court should encourage the increased use of tele- and/or video communication in order to avoid the requirement of parties physically attending court in procedural matters; in this way, the courts themselves can be freed for cases where personal appearance is unavoidable, such as Proofs. However, the court should be sufficiently flexible to allow for paper communication where any parties to the Action do not have the benefit of elements of technology (e.g., access to the internet which allows for electronic communication of pleadings).

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

It is desirable that the court should have some means of control over both the conduct and pace of litigation. Experience of both judicial case management as seen in the Glasgow Sheriff Court Personal Injury Pilot Scheme and case flow management as seen in Chapter 43 has demonstrated positive results in the resolution of cases which might otherwise have remained live as at the morning of Proof.

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

Judicial case management may be beneficial in the extremes-namely, cases where one or more of the parties to the Action are at best inexperienced or unfamiliar with the subject matter of dispute, and complex, high-value cases, where the less flexible nature of case flow management may not assist with the particular circumstances of each case. It is recognised that there are likely to be significant resourcing issues involved in case-flow management, and the generally positive experience of Chapter 43 suggests a possible solution whereby the default position for cases is to proceed under a case-flow management system, leaving it up to the parties, and potentially the court, to seek to redirect suitable cases to the more labour-intensive judicial case management system.

CHAPTER 6

WORKING METHODS OF THE CIVIL COURTS

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

Advantages

- Give parties advance notice of potential claims, allow appropriate investigations to be initiated and evidence to be obtained and preserved.
- Encourages parties to communicate/exchange information at an early stage and allows straightforward claims to be resolved quickly and economically.

Disadvantages

- Both sides require to be fully committed and resourced in order for the protocol to work appropriately. If the protocols are compulsory but parties are just going through the motions prior to litigation additional costs will be incurred without any benefit.

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

Pre-action protocols should be compulsory for all recovery, personal injury and professional negligence actions. The exact framework of the protocols can then be fine tuned to match the complexities of the subject matter. Protocols should be compulsory in both the Sheriff Court and Court of Session.

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

Compliance should be compulsory and the courts should be able to penalise parties by way of additional court costs when they do not comply.

6.4 Should there be greater requirement for leave to bring or 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?

All Writs raised by party litigants should be approved by a Sheriff/Judge before leave to bring proceedings is granted.

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

Assuming that benefit is seen in harmonising the roles of the Court of Session and Sheriff Court procedure particularly in relation to personal injury

actions there must also be benefit in harmonising the make up and approach of the Rules Councils in order to ensure a consistent approach.

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

Certainly in relation to personal injury actions.

It ought to be possible to come up with a single set of rules based on Chapter 43 procedure.

6.7 Should there be a single initiating document for (a) all types of action and/or (b) at all levels in the court structure? If so, what format should the document take?

Certainly in relation to personal injury a single initiating document based on the current Chapter 43 requirement should be capable of adaptation to serve both in the Sheriff Court and Court of Session. Perhaps a value limit of £50,000 might be thought appropriate to distinguish between the two forums.

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

There is little doubt that Chapter 43 procedure has been a success and it is bizarre that extended pleadings are still required in the Sheriff Court. Abbreviated pleadings should be introduced in the Sheriff Court following the Chapter 43 model subject always to the requirement of fair notice. If issues of complexity arise parties should have the opportunity, as with the current Chapter 43 procedure, to opt out on cause shown and revert to a more expansive level of pleading.

6.9 Are the current arrangements for summary disposal satisfactory?

Arrangements for summary disposal are generally satisfactory.

6.10 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?

No. If there is a reform of the rules towards a more case flow managed system in the Sheriff Court there should be a reduction in routine procedural business. If Options Hearings are done away with and disclosure of information is automatically required (pre and post accident medical records, accident reports, wage details) the amount of procedural business should be significantly reduced.

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

In the Sheriff Court, no. The requirement to attend court for Options Hearing and/or disputed Motions can take up 3 or 4 hours in any given court day. The amount of time actually spent appearing is usually much less and if, as

suggested above, Options Hearings were done away with and there was greater automatic/mandatory disclosure of documentation a great deal of time could be saved.

6.12 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?

If we are making a distinction between actions up to a value of £50,000 in the Sheriff Court and those of greater value in the Court of Session and adopting Chapter 43 roles in the Sheriff Court the automatic allocation of a 4-day Proof Diet will in most instances be too long for a Sheriff Court action. Perhaps the Proof automatically allocated for Sheriff Court actions could be two days with parties having the opportunity to apply for a longer or a shorter hearing on cause shown.

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

Yes. In many Proofs the Sheriff will request written submissions in advance. If parties exchange their own submissions 2 weeks in advance of the date for submissions and then adjust in light and pass on finalised submissions to the Sheriff a week in advance the amount of time taken to present the submissions is normally significantly reduced.

6.14 To what extent should there be earlier and/or wider disclosure of evidence?

As suggested above there should be mandatory disclosure of pre and post accident medical records, accident reports, perhaps even witness statements within say 4 weeks of an action being raised to remove the need for standard Specifications of Documents.

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

The court should have more control. The test for certification of experts should be widened to include a specific consideration of proportionality of cost.

If, for example, in a personal injury case worth £10,000 a Pursuer instructing a consulting engineer to prepare a report which costs £2,500, looking at proportionality sanction for that expert should be very much the exception rather than the rule.

On occasion reports seem to contain a lot of analysis of legislation in relation to potential breaches but perhaps not quite so much explanation of what actually happened in a form which would assist the court.

Perhaps as a parallel but separate exercise expert witnesses might be reminded of the opinion expressed by Lord President Cooper on the function

of an expert witness in the case of *Davies –v- Magistrates of Edinburgh* (1953 SC 34) at pages 39 to 40.

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

Yes. Certainly in personal injury actions. The Pursuer's offer system could run in much the same way as the established procedure for tendering. Perhaps as an incentive for "putting his cards on the table" the Pursuer could be rewarded with a percentage increase in the sum sued for, perhaps 5%, when an award greater than the Pursuers offer is made after Proof.

6.17 Should civil jury trials be retained?

No.

In reality the complexity of a high value personal injury cases means that a jury have neither the time, material nor ability to come up with a just and appropriate determination. It is no longer in the interest of justice to retain civil jury trials in higher value cases.

On the assumption that personal injury cases with a value of less than £50,000 are transferred to the Sheriff Court is there any justification of retaining the option of a jury trial in these lower value cases?

We would suggest that taking account of the imposition on the public in terms of time and on the public purse in terms of cost reintroducing civil jury trials in the Sheriff Court would not be justified. They were done away with in the Sheriff Court many years ago and there has been no suggestion that the level of awards have been materially affected by their absence.

Assuming Sheriff Court cases were limited in value to £50,000 that would be a ceiling for the jury in terms of their award and again it is difficult to see what practical benefit the increased cost of running a jury trial would have in the circumstances.

Continuing with jury trials brings with it the potential for inconsistency of awards. This might be addressed if the jury were allowed access to publications such as the Judicial Studies Board Guidelines but that may well cause problems for the Sheriff in having to explain to a jury how the JSB Guidelines are to be applied and more fundamentally if a jury need to be referred to the JSB Guidelines in order to achieve consistency of awards do they have any real function at all?

If it is thought that jury trials are to be retained then we would suggest certain changes:-

- (1) The conventions in relation to material which could be provided to a jury need to be relaxed so that documents such as the Judicial Studies Board Guidelines can be made available;

- (2) The jury should be required to give justification for the basis of their awards; and
- (3) The appeal process should be revised to allow Sheriffs/Judges the opportunity to correct decisions which can clearly be shown to be either ill considered or inappropriate.

6.18 Should written judgements be required in all cases?

Yes.

Perhaps they can be tailored to the individual circumstances with more detailed cases over £50,000 and less in cases below.

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

If we are moving towards a case flow management system for lower value cases then there will require to be appropriate sanctions in order to ensure parties comply. The obvious sanction would be penalties in terms of court costs with the ultimate sanction of either dismissal of the action or decree in absence for the most serious or persistent breaches of the Regulations.

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

All cases brought by party litigants should be considered by a Sheriff/Judge before warrant is granted. They should also be required to obtain leave to appeal or go through some form of sift process before being able to initiate further proceedings.

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

In the Sheriff Court all cases raised by party litigants should be considered by a Sheriff for merit before warrant to proceed is granted.

6.22 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?

This would depend on the value of the case. Legal representation of a party litigant in summary cause/small claim actions. In ordinary actions and above where matters will be more complex it is perhaps preferable to have professional representation where possible.

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

It seems that some more formal mechanism for dealing with multiple party actions may be required. As a counter balance perhaps these should also be

subject to judicial consideration for merit before warrant to raise proceedings is granted.

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

The rule governing procedure for judicial review is satisfactory.

APPENDIX 1

	COURT OF SESSION TABLE OF FEES	COMPARISON ON SHERIFF COURT TABLE OF FEES
STYLE 1	SETTLED AT: £7,000.00 TAXED FEES: £3,989.35 VAT: £698.14 TAXED OUTLAYS: £2,673.18 TOTAL (INC. AUDIT FEE): £7,684.67	FEES: £3,134.51 VAT £548.54 OUTLAYS £947.00 TOTAL (INC. AUDIT FEE): £4,791.05
STYLE 2	SETTLED AT: £8,000.00 TAXED FEES: £10,504.70 VAT: £1,838.32 TAXED OUTLAYS: £16,538.69 TOTAL (INC. AUDIT FEE): £30,037.71	FEES: £7,159.52 VAT £1,252.92 OUTLAYS £4,412.99 TOTAL (INC. AUDIT FEE): £13,341.43
STYLE 3	SETTLED AT: £1,000.00 TAXED FEES: £4,699.28 VAT: £822.37 TAXED OUTLAYS: 2,597.60 TOTAL (INC. AUDIT FEE): 8,119.25	FEES: £3,598.38 VAT £629.72 OUTLAYS £222.87 TOTAL (INC. AUDIT FEE): £4,630.97
STYLE 4	SETTLED AT: £6,500.00 TAXED FEES: £6,597.95 VAT: £1,154.64 TAXED OUTLAYS: £3,029.69 TOTAL (INC. AUDIT FEE): £11,214.29	FEES: £5,064.90 VAT £886.36 OUTLAYS £743.22 TOTAL (INC. AUDIT FEE): £6,962.48
STYLE 5	SETTLED AT: £4,000.00 TAXED FEES: £9,560.80 VAT: £1,673.14 TAXED OUTLAYS: £3,917.88 TOTAL (INC. AUDIT FEE): £15,759.82	FEES: £6,789.15 VAT £1,188.10 OUTLAYS £1,111.40 TOTAL (INC. AUDIT FEE): £9,452.65
STYLE 6	SETTLED AT: £1,500.00 TAXED FEES: £5,784.65	FEES: £4,309.28

	VAT:	£1,012.31	VAT	£754.12
	TAXED OUTLAYS:	£8,350.51	OUTLAYS	£1,984.13
	TOTAL (INC. AUDIT FEE):	£15,755.47	TOTAL (INC. AUDIT FEE):	£7,331.53

*IN STYLE 5 ACCOUNT AGREED WITHOUT TAXATION AT A FIGURE OF £13,615.00, FIGURES GIVEN FOR COURT OF SESSION FEES ARE AS ACCOUNT WAS PRESENTED.

APPENDIX 2			
	COURT OF SESSION TABLE OF FEES	COMPARISON ON SHERIFF COURT TABLE OF FEES	
STYLE A	SETTLED AT	£7000.00	
	FEES:	£8390.90	FEES: £5385.88
	VAT:	£1468.41	VAT: £ 942.53
	OUTLAYS:	£3235.32	OUTLAYS: £ 744.22
	TOTAL:	£13094.63	TOTAL: £7072.63
STYLE B	SETTLED AT	£22000.00	
	FEES:	£5255.85	FEES: £3788.72
	VAT:	£ 919.77	VAT: £ 661.28
	OUTLAYS:	£3680.77	OUTLAYS: £1213.59
	TOTAL:	£9856.39	TOTAL: £5653.59
STYLE C	SETTLED AT	£66000.00	
	FEES:	£8125.65	FEES: £4526.60
	VAT:	£1421.99	VAT: £ 871.37
	OUTLAYS:	£3204.84	OUTLAYS: £ 645.00
	TOTAL:	£12752.84	TOTAL: £6495.63
STYLE D	SETTLED AT	£22500.00	
	FEES:	£12693.90	FEES: £9920.13
	VAT:	£ 2221.43	VAT: £1736.02
	OUTLAYS:	£ 2599.07	OUTLAYS: £ 578.02
	TOTAL:	£17514.40	TOTAL: £12234.17
STYLE E	SETTLED AT	£11000.00	
	FEES:	£5088.43	FEES: £3334.99
	VAT:	£ 890.48	VAT: £ 583.62
	OUTLAYS:	£1262.88	OUTLAYS: £ 669.00
	TOTAL:	£7241.79	TOTAL: £4587.61
STYLE F	SETTLED AT	£75000.00	
	FEES:	£8920.05	FEES £6091.80
	VAT:	£1561.01	VAT: £1066.07
	OUTLAYS:	£7219.76	OUTLAYS: £4724.00
	TOTAL:	£17700.82	TOTAL £11881.87
STYLE X	SETTLED AT	£4000.00	
	FEES:	£6972.24	FEES: £9812.40
	VAT;	£1220.14	VAT: £1717.17
	OUTLAYS:	£1341.52	OUTLAYS: £ 857.41

	TOTAL:	£9533.90	TOTAL:	£20046.98
STYLE Y	SETTLED AT	£13000.00		
	FEES:	£4503.57	FEES:	£5499.95
	VAT:	£ 788.12	VAT:	£ 962.49
	OUTLAYS:	£ 222.00	OUTLAYS:	£2776.14
	TOTAL:	£5511.69	TOTAL:	£9238.58

