

Scottish Civil Courts Review

A CONSULTATION PAPER

Response

by

The Centre for Professional Legal Studies¹

Chapter 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?

In principle, we would answer the first question in the affirmative. However, the concept of appropriate dispute resolution points to the fact that in some cases the formal resolution of a dispute in courts is both necessary and desirable. Such disputes include actions relating to status where a court decision is required, or determinations of a judicial review. Similarly there are instances where one or other (or occasionally both) of the parties wish the court to rule on a debated point of law because it is a test case. For that reasons we would not necessarily support any reform that required the parties in every case to exhaust out of court procedures and to satisfy the court that they had done so before a date for a hearing could be set. Nonetheless, we see merit in exploring the potential for introducing compulsory pre-action protocols which would, in our view, encourage early resolution of disputes. (See Annex A).

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?

Again we are in the main content with the principles articulated in paras. 1.11-14. However, we have concerns about the Civil Justice Council's requirement that cases be "meritorious" before they can be entertained in a court. We fully accept the responsibility of legal representatives not to abuse the court process by unreasonably raising or defending an action for which there is no legal justification (Paterson & Ritchie, *Law Practice and Conduct for Solicitors* W. Green, 2006: p.300). However, that is a far cry from requiring that an action or defence raised must be meritorious. If by this it is meant that there must be a more than 50% chance of being successful, then by definition no case could be brought which had a defence,

¹ CPLS is an independent Think Tank focusing on access to justice, civil courts, the judiciary, the legal profession and professional ethics, which is based in Strathclyde University Law School. The Think Tank working party who worked on this response included Professor Charles Hennessy, Michael Jones QC, Professor Alan Paterson and David Stewart. CPLS acknowledges its debt to Gordon Nicolson QC who graciously allowed the working party to draw on his own submissions to the Review in relation to chapters 2 & 3.

since one of them must fail the 50% test. Even legal aid does not require such a high hurdle. We would be wary, therefore, of setting the bar for admission to the courts at such a high level because it would be likely either to reduce access to justice or be unenforceable.

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

We have identified enforcement, particularly in low value consumer cases, as an area that could usefully be explored. Unless proper consideration is given to enforcement, much of the emphasis on improving the processes for handling such cases will prove fruitless. We would also like to see more consideration of the consumer's perspectives of the courts and their procedures

Chapter 2

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

'Paths to Justice'² found that there was a widespread lack of knowledge amongst the public about the civil and criminal justice systems and other research has found that of the 1 in 5 civil legal cases that are never resolved "in a third of these cases this (failure) was attributable to those involved not understanding their legal rights or not knowing how to get help."³ Thus lack of knowledge of the legal system and the law in general hinders 'access to justice.' Public Legal Education (PLE henceforth) arguably could make a positive contribution to improving the aforementioned problems. If nothing else it might help to demystify procedures which research has shown the public finds to be alien and intimidating. PLE might well take place at school, and provide a valuable form of general knowledge for the public to draw on in later life. We should be wary, however, of placing too much weight of expectation on the long term information gains of a necessarily limited grounding in the law and the legal system from a course in an over-crowded curriculum. At best it might alert the public to the existence of possible remedies and to the range of sources of help that might be available to them when they are needed at a later stage. It is clear therefore that a significant part of PLE will have to relate to "just in time" knowledge which the public require when problems subsequently arise. Such PLE is particularly valuable where it provides information at an early stage of a problem and can thus help members of the public to take preventive action to avoid the problem escalating or cascading into other social and legal problems.⁴ Certainly, there are lessons to be learned from the programmes introduced in Queensland and in the courts of California⁵ to assist "self-help" litigants with relevant information on legal forms and procedures. A variety of jurisdictions have also experimented with the use of on-line information and advice to citizens with potential legal problems. The long term benefits of such programmes have yet to be evaluated, however the success of in-court advice

² H. Genn & A. A. Paterson *Paths to Justice Scotland* (Hart, 2001)

³ R. Sutherland, "Developing an enhanced role for public legal education and information" in '*Paths to Justice?*' SCOLAG 2007.

⁴ See *Paths to Justice Scotland*.

⁵B. Hough, "Description of California Courts' Programs for Self-Represented Litigants" http://ilagnet.org/conference/general2003/papers/bonnie_hough.pdf

programmes strongly suggest that PLE will have useful role to play in the future delivery of access to justice programmes.

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?

Various studies (usually commissioned by or for SLAB) have suggested gaps or vulnerabilities in the provision of poverty legal services in civil matters in Scotland. Twenty years ago the principal vulnerabilities in supply were in the highly rural parts of Scotland and the areas of law were the social welfare fields of debt, consumer, housing, employment and welfare benefit.⁶ Since then, the supply provision in these areas has not altered dramatically.⁷ There has been a gradual decline in the number of firms doing civil legal aid in the past decade⁸ and in the amount that they do, although paradoxically SLAB reports that the top 200 firms by volume of civil legal aid work have actually been doing more work in the past few years as the overall volume of work in civil legal aid has been in decline. Despite efforts to improve the profitability of civil legal aid work several years ago in return for block fees, there have been sustained complaints from family law practitioners that they find it difficult to make a profit from complex and lengthy family law cases.

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?

As to (a) there is undoubtedly a group of litigants (which has been increased by the raising of the small claims level) who are no longer eligible for legal aid but who have a prima facie cause which they wish to raise or defend in the courts. These litigants cannot afford to be legally represented but frequently find the ordinary procedures of court alien and inaccessible, the more so if hampered by specific educational or disability needs. For such litigants whose cases are below the small claims limit, reforms to the existing procedures would seem desirable, since such anecdotal evidence as there is suggests that the small claims forms and procedures are still insufficiently user-friendly to allow unrepresented litigants to represent themselves with relative ease. Moreover, the information on the Scottish Courts website for members of the public on court procedures is somewhat limited. As to (b) it has to be said that an adversarial system is always going to retain a degree of complexity which will remain impenetrable to not a few ordinary members of the public. A move to a more inquisitorial procedure for low value cases (in monetary terms) may be part of the answer.

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 in Scotland which the review should consider?

The success of the “self-help” services for party litigants in jurisdictions such as California and Queensland indicates that much more could be done in this field through the use of

⁶ A. Paterson, “Access, Legal Aid and Rural Scotland” 1995 J. Rev. 266

⁷ SLAB, *Distribution of the Supply of Legal Aid in Scotland* 2002.

⁸ In 1996/7 there were 1,161 active legal aid outlets in Scotland. Today the figure is below 650.

technology.⁹ Such services must be kept up to date, however, which adds to the resource burden that the services entail. Similarly the overwhelming success of “in court” advice programmes in Scotland¹⁰ and in England – schemes which have been welcomed by all stakeholder groups in the courts – indicates that such programmes should form a central plank for the future if the adversarial procedure is retained even in the small claims courts. This is because, as in tribunals,¹¹ general citizens are more likely to be unsuccessful if they are unrepresented or unassisted in court. We recognise, of course, that there will be practical problems in extending such services to smaller courts. However, we suggest that there would be advantage in seeing whether it may be possible to set up such services on the basis of having an adviser who would operate in a number of smaller courts with the business of these courts being programmed in such a way as to make that possible.

There is some evidence from other jurisdictions that self-help services can reduce litigant dependency on lawyers and that encouraging parties to take a greater part in their own cases can make the citizen feel more positive about their situation, feel more in control and often as a result achieve better results. One famous study¹² in America found that greater client participation in personal injury case resulted in greater client satisfaction and better legal results than was the case for those who did not actively participate in the resolution of their case.

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

We have already mentioned the matter of enforcement of decrees. This can cause problems regardless of the manner in which a successful litigant obtains a decree, or its equivalent, in his or her favour. As we have noted earlier, many successful litigants are dismayed to discover that, if a decree which they have obtained requires to be enforced in order to secure payment, they must undertake the cost of that enforcement themselves. In some instances that may be beyond their means with the consequence that the decree in their favour is, in effect, worthless. We are unable to say whether state-funded enforcement procedures are either practicable or affordable, but we suggest that this is something which the review may wish to consider.

The provision or lack of legal aid for middle income families remains a significant problem. Further consideration should be given to the introduction of tapering and a significant increase in legal aid eligibility as was considered by the Justice One review of legal aid and the Strategic Review of legal aid.

6: Is there any 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?

⁹ R W Staudt, “Technology, the Courts and Self-represented litigants”
<http://ilagnet.org/conference/general2003/papers/staudt.pdf>

¹⁰ Sometimes in association with an in-court CAB service or a mediation programme. See E. Samuel, “Supporting Court Users” Scottish Office CRU, Legal Studies Research Findings No.22 (2001) and “Uniquely Placed: Evaluation of the In-Court Advice Pilots” Research Findings No.58 (2006).

¹¹ See Genn & Genn, *The Effectiveness of Representation at Tribunals* (London, LCD, 1989).

¹² D. Rosenthal, *Lawyer and Client, Who’s in charge?*

As the SCC Report highlighted there is a strong case for looking again at the way in which we in Scotland handle low value cases. Although there are arguments for taking many such cases outside the courts as the Consultation Paper makes clear, either to a third tier in the courts, to one or more new tribunals or to a Board, each proposal will have to grapple with the same problems that are encountered by the current procedures, namely, to ensure:

- fair and human rights compliant procedures,
- an ability to cope with the occasional significant point of law,
- the enforceability of the outcome
- that it is affordable.

Given the restricted resources currently available to the Scottish Government, it seems to us that, for the time being, the most appropriate way forward is to retain such cases in the sheriff court. However, we consider that the case for subjecting small debts and low value consumer claims to the same procedure should be re-examined, by looking at the approach taken by England and Wales to such cases. There is also particular merit in scrutinising how housing eviction cases are dealt with in the sheriff court. We believe that the pilot projects linking mediation to the in-court advice programme have been a success and that there is a case for making mediation more available in low value cases which nonetheless may be very intractable, e.g. neighbour problems. However we recognise mediation brings with it issues of cost, training, public legal education and compulsion.

In conclusion, we believe that new procedures taken together with a comprehensive in-court advice service, the availability of mediation facilities, an examination of the potential for a pre-action protocol in contested cases, additional training for sheriffs and new measures on enforcement, would offer a cost-effective blueprint for the medium term.

Chapter 3

1: What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?

We are in no better position than many respondents to comment on the levels of legal expenses in litigation. The matter is in need of urgent research. It is, however, a matter of record that the gap between civil legal aid rates and agent and client legal expenses has grown dramatically in the last decade, in a way that may now be unbridgeable.

2: To what extent does the cost of litigating deter people from pursuing or defending cases in court?

Potential litigants are deterred from litigation by a range of factors including the uncertainty and unpredictability of civil litigation, their unfamiliarity with the courts, whether they are generally risk averse in uncertain situations and by considerations of unpredictable cost. This is in part confirmed by the findings of Genn and Paterson in *Paths to Justice Scotland*.

3: Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?

It is difficult to get hard data on this, since those of low income are exempt from court fees and on many occasions the solicitor for the pursuer will pay the fees on an interim basis in the hope of recovering from the other side at the end of the case. On the other hand the Government has issued a consultation paper proposing that court fees move ever closer to full economic costing. We are unconvinced by this proposal. It appears to be suggesting that the Article 6 right to a fair hearing is only for those who can afford it. This appears to us to be inconsistent with the duty of the Government to provide a state sanctioned, HR compliant method for resolving the disputes of its citizens. We agree with the Review when it says that (para 1.9) “An effective and efficient civil justice system is a vital component of a civilised and prosperous society.” If users are required to pay the full cost of the courts rather than sharing that cost with the wider community of taxpayers they may well begin to expect to call the tune, by selecting dispute resolution mechanisms that appeal to them rather than the Government. In our view there should be a dual support system for the courts with a proportionate input by the taxpayer and the individual litigants.

4: Are the current rules for recovery of judicial expenses satisfactory?

The principle that expenses should follow success is one that we would retain for the future. We do not think we should move towards the standard American position of each side bearing their own costs, with the exception of family cases where this tends to be the norm. We would retain the discretion to award expenses where a party’s conduct in the divorce would merit it. A question remains as to *how much* the winning party should recover in terms of expenses. This is currently set by statutory instrument following recommendations of the Lord President’s Advisory Committee. We understand that customarily, this Committee has not had lay members and its data-gathering has primarily drawn on the Law Society’s Cost of Time surveys – matters which were commented on in the debates of the Scottish Executive’s Research Working Group into Legal Services Markets in Scotland. In our view access to justice and the proper administration of justice and the courts is such an important part of civil society that it should not be the sole purview of lawyers and judges. Accordingly we would suggest that the composition and data-gathering processes of the Committee be revisited.

Whilst recognising the desirability of commercial firms being able to litigate in Scotland without making substantial losses, we are reluctant to penalise those who feel they have a genuine defence to the extent that they are simply unable to defend themselves for fear of crippling expenses on top of any award of damages. The current distinction between the “party and party” scale and the “agent and client” scale seems to us to be a balanced solution to a tricky issue of fairness. That said, we would leave the award of expenses to the discretion of the judge as at present, guided by the principle of proportionality. Moreover we would suggest that the Review should consider certain anomalies in this area. Thus it is widely believed that a judge cannot make an award of expenses against an advocate (as opposed to a solicitor) in Scotland, even where the advocate has been reckless or worse in conducting a case. However, we believe that this is no longer the position in Scots law and that there is no

reason why expenses could not now be awarded against an advocate who pursued a wholly unmeritorious case in a reckless fashion.¹³

5: Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

We do not believe that the current arrangements for the taxation of judicial accounts of expenses are satisfactory. The Report of the Scottish Executive's *Research Working Group on the Legal Services Market in Scotland* found much to criticise in the taxation system in Scotland. A lack of transparency, insufficient guides for consistency and perverse incentives for those taxing accounts are but three of the issues thrown up by the researchers. We believe that the taxation of expenses is a quasi-judicial function and that the post of court auditor, both at Court of Session and sheriff court level, should be seen as a public office where the incumbents are salaried rather than paid by fees from those whose accounts they are taxing. We further believe that auditors should publish statistics of the work done and publish accounts on an annual basis. We believe it is time to review the eligibility criteria for appointment to the office of Auditor of the Court of Session, currently restricted, by statute, to members of the Society of Writers to Her Majesty's Signet and the Society of Solicitors in the Supreme Courts of Scotland. In modern times, this limitation precludes applications for the post from practitioners who would be well qualified to undertake the audit function.

6: To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

As *Paths to Justice* showed, there is evidence of a "middle income" trap in Scotland (and in other jurisdictions) whereby those eligible to legal aid with a small or no contribution, and those with abundant means can afford to litigate, but those in between are deterred by the lack of funding mechanisms to bridge the gap. We believe that the proposal considered by the Justice 1 Committee in its review of legal aid¹⁴ that tapering should be introduced in Scotland is worthy of very serious consideration. This would allow the great bulk of the population to be covered by legal aid even though a significant proportion would be paying a 100% contribution towards the cost of their action.¹⁵ We do not believe that the principal advantage of legal aid in the UK, the fact that it affords a measure of protection for unsuccessful assisted parties against the likelihood of financial ruin, should be altered. Wealthier individuals and businesses typically have far more advantages in litigation than poorer, "one-shot" clients.¹⁶ To deprive those of modest means of the protection of modification of liability for expenses would tip the scales in litigation even more to those with wealth and means.

7: Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?

¹³ See A. Paterson & B. Ritchie, *Law, Practice and Conduct for Solicitors* (Edinburgh: W. Green, 2006).

¹⁴ *Report on Legal Aid Inquiry: SP Paper 437*.

¹⁵ The attraction of legal aid in such cases would be the ability to spread contributions over a substantial period and the fact that in most cases the liability of a losing assisted party to pay the other side's expenses is substantially modified.

¹⁶ See M. Galanter, "Why the 'Haves' come out Ahead" 9 *Law and Society Review* 95:

Areas where there is a difficulty in funding litigation include those who wish to pursue a case before a tribunal – especially where considerable sums of money are at stake. The current arrangements (brought in after the introduction of ECHR into Scotland through the Scotland Act), which allow ABWOR to be available in employment and immigration cases, do not go far enough – the lack of legal aid in tribunals has been a longstanding weakness in the UK’s otherwise impressive commitment to substantial expenditure on legal aid. Similarly, it has been argued by some in the “not for profit” sector that legal aid rates for litigation in the social welfare law field (debt, housing, employment, consumer and welfare benefit) are inadequate.¹⁷ Moreover, legal aid is highly individuated in nature, which means that it cannot easily be used to benefit a large number of people with similar problems but widely varying means. This was a major problem in the Opren litigation and even in the Thalidomide actions. It also partly accounts for the lack of a class action procedure in Scotland. There are also difficulties in legal aid funding where the claimant’s case has a no more than an even chance of success.

8: What impact have speculative fee arrangements had on access to justice?

It is very difficult to know, given the relative absence of work in this field. There is a very strong need for research in this area. Moreover, there is a need for regulation in this area. In England and Wales, the terms of conditional fees agreements were thrashed out between the Law Society and the National Consumer Council and the courts have given extensive guidance on the permitted size of the uplift in fees in the event of success. Neither of these has occurred in Scotland and the terms of written fee charging agreements in Scotland are much less regulated in Scotland than in England.¹⁸ It is not clear why Scottish citizens should be differently protected than their English counterparts in this area. Further, where an uplift in fees is agreed between the lawyer and the client in Scotland the uplift is not paid by the losing side (as in England) but out of the successful client’s winnings.¹⁹ In our view this is an area where greater regulation may be required to protect the client.

9: Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?

For historical reasons, Legal Expenses Insurance is much more established on the Continent than it is in the UK. Successive UK governments have hoped that the take up of LEI would enable them to reduce legal aid expenditure. That has proved difficult to achieve, in part because the public has not accepted that they should take out LEI in the same way that they

¹⁷ See e.g. P. Brown, “What Price Justice?” 2008 February SCOLAG 32.

¹⁸ The relevant SI limits the uplift to 100% but otherwise leaves it to solicitors and clients to make their own arrangements. (See Paterson & Ritchie, *op.cit.* para 10.05:02.) There is anecdotal evidence that in some situations the 100% has become the norm rather than the upper limit.

¹⁹ Under fiduciary law where an agent makes a contract with his/her principal to acquire some of the latter’s property, the contract is always voidable, there is a presumption of undue influence, and the contract must be fair and reasonable in the circumstances and one that an independent lawyer would advise. In professional ethics the contract’s terms must be the subject of independent legal advice. (See Paterson & Ritchie, *op.cit.* ch. 8). Despite this, for pragmatic reasons, these protections are not applied in full in Scotland where a speculative fee agreement with an uplift is entered into even though that uplift comes from the client’s winnings and not from the other side.

pay National Insurance for medical care. Legal aid is a distress purchase that everyone hopes they will not need to make. National Insurance is accepted because everyone needs healthcare. Curiously, although we have no reliable information as to the extent and coverage of LEI in the UK or Scotland, it is probably more extensive than is sometimes realised since it is contained in many motor insurance and house insurance policies.²⁰ That said, it usually has such wide exemptions e.g. crime or divorce and such low ceilings on expenditure that it does not offer a significant saving for the Fund. Moreover, the limited penetration of “before the event” policies makes the market prone to adverse selection. The Law Society experimented with an “after the event” policy but found it to be financially unviable, in part because the premiums could not be recovered from the other side.

10: What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?

The English experience on this front is not comforting. Conditional fees and “after the event” insurance premiums have generated a considerable amount of expensive satellite litigation, sometimes as far as the Court of Appeal.

Chapter 4

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

Yes. Compliance with statutory time limits for criminal business makes it inevitable that crime gets priority.

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

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

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

Questions 2, 3 and 4 are linked and we prefer to respond to them as a collective.

There is clearly a case for some specialisation, as evidenced by the establishment of the Commercial Court in the Court of Session and the family court in Glasgow Sheriff Court. There are interesting questions here, too, for the role of the Judicial Appointments Board in recommending people for appointment. It is conceivable that greater diversity in applications might be achieved if applicants were able to apply for a post with specific characteristics in which they had special skills, whether they are in the criminal or civil fields. At present, with very few exceptions, applicants have to apply on the basis that they may be selected for a post in any area of Scotland and with an unknown mix of civil or criminal business. It is

²⁰ For a recent research study into LEI in the UK see P.Abrams, *In Sure Hands* University of Westminster 2002.

conceivable that good quality candidates are deterred from applying because of the great uncertainty of what it is they may be asked to take on. Undoubtedly, most of our smaller sheriff courts will continue to require sheriffs who can take on whatever business is brought before the court, whether civil or criminal in nature. But this should not rule out the possibility of designing some posts which would be predominantly civil in nature and attract quality applicants who have proven skills in that discipline.

Notwithstanding these views, we are not in favour of separating the sheriff courts into civil and criminal divisions. Many sheriffs enjoy the variety of work and an undiluted diet of civil or criminal work respectively would reduce the attractions of the office for most people.

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?

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

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

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?

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

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

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?

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

At present, a party is generally free to commence court proceedings without having made any attempt to resolve his dispute beforehand. Should that state of affairs be allowed to continue, there would be a clear need to examine the allocation of business as between the Court of Session and the sheriff court, and some attraction in the suggestion of a third tier judiciary, although it is not clear that this is affordable, at present. We would propose that the Court of Session should retain its first instance jurisdiction for cases of high value and cases in which important or novel questions of law require to be decided. By “high value” we mean a figure of £50,000 or more with all cases of lower value being taken in the sheriff court. The sheriff should have a power to remit a case to the Court of Session to decide whether the case should more appropriately be heard there.

Given sufficient funds we could envisage a third tier court operating as part of regional centres for such business. It is less easy, however, to see how this might operate for court users in more remote areas who would not welcome the prospect of substantial journeys to have their business heard in a single centre e.g. Inverness for the central and West Highlands and islands. The possibility should be examined more closely before it could be put forward as a live proposal.

If, as we propose in our response to Chapter 6, compulsory pre-action protocols are introduced, it is to be expected that the substantial majority of disputes will be resolved

without the need for litigation. In these circumstances, a radical re-structuring of the court system is unlikely to be necessary.

We consider that the Court of Session should retain its first instance jurisdiction in judicial review cases.

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

We support the present arrangement for the division of Scotland into 6 sheriffdoms which to a very large degree mirror the organisation of local authority boundaries and associated services such as police and social work.

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?

No.

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

While there is a case for all sheriffs having an all Scotland jurisdiction as a means of ensuring the best use of shrieval resources, it is also the case that permitting the Lord President or Sheriffs Principal to re-locate a sheriff to anywhere in the country is likely to alienate sheriffs and militate against diversity on the bench.

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, not least because the provisions of the Judiciary and Courts Bill, currently before the Scottish Parliament, envisages the transfer of substantial additional responsibilities to the Lord President as Head of the Judiciary in Scotland. Whilst the allocation of business will be a matter for the Lord President it is entirely possible that he may delegate additional responsibilities for sheriff court matters to the Sheriffs Principal. Accordingly, this is not the time to contemplate removing or reducing the role.

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

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?

We see no grounds for changing the present arrangements for appeals in small claim and summary cause actions. But action is needed to rationalise appeal procedures as between the Sheriff Principal and the Court of Session. We support the proposal in the consultation paper that the “leapfrogging” provision should be abolished.

We support the idea of a bigger role for the Sheriff Principal in the matter of deciding leave to appeal directly to the Inner House on cases which may raise important points of principle or legal interpretation which may have wider application.

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

The availability of temporary judges and part-time sheriffs provides the courts with a valuable resource which helps ensure continuity of business and improves the speed with which justice may be delivered. These considerations far outweigh any perceived concern about the status and independence of part-time judiciary.

Chapter 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?

Yes.

In essence, the purpose of rules of procedure should be to ensure that the judicial process is fair, efficient and effective. Experience tells us, however, that it is not possible to predict all of the circumstances which may arise during such a process. Consequently, problems will occur that are not directly addressed by the rules. The case of *Barrie Tonner and Anr v Reiach and Hall*, 12 June 2007 is a good example. Operating in a mixed jurisdiction, the Scottish Courts are used to devising solutions to such problems by applying the guidance to be derived from statements of principle.

Further, where the application of rules of procedure involves the exercise of a judicial discretion, a statement of principle will provide guidance on how such discretion be exercised.

The statement of principle, however phrased, should contain reference to the need for efficiency in achieving the just and effective resolution of civil disputes. It can expressly be made clear that the concept of efficiency embraces the requirements of expedition and proportionality.

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?

Yes.

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

In answer to question 2 in Chapter 6, we express the view that there should be greater use of pre-action protocols, and we propose a model. We believe that a requirement for negotiation, and encouragement of the use of mediation during and as part of a pre-action protocol would greatly assist in avoiding litigation.

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? Please specify.

Yes.

A judicial determination is required in disputes where the resolution by the court is declaratory of status or real rights or otherwise affects third parties. A judicial determine may also be required in actions concluding for payment where it is not disputed that the debt is due, but the defender is unable to pay and the pursuer wishes to do diligence. There are cases where one or more parties to the dispute wish a judicial determination as a declaration of the law.

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

Form of dispute resolution methods

In the model which we propose for a pre-action protocol, we suggest that parties should be required to negotiate and encouraged to mediate during the pre-action phase of the dispute resolution process. We do not believe that a single form can be devised that can be applied in all such processes, regardless of the nature of the dispute. We would not expect that, for example, a form of mediation appropriate to the resolution of a child residence dispute will lend itself to the mediation of a dispute arising from an alleged breach of a commercial contract. Rather, we are of the view that the nature of the dispute will shape the form of the dispute resolution process that is adopted.

To be effective and efficient, a negotiator should possess certain specialist skills. The form of negotiation appropriate to the resolution of any dispute is, we believe, a matter best left to the negotiator in the exercise of these skills. The same is true for mediation. In the pre-action protocol which we suggest, therefore, the parties will be advised to engage a negotiator or a mediator with the skills appropriate to the resolution of disputes of the same type as theirs.

Funding of Dispute Resolution Methods

We agree with the view expressed by the Civil Justice Advisory Group to the Scottish Consumer Council that greater use of mediation at an earlier stage would potentially save cost, delay and stress for the parties involved, while freeing up court resources.²¹ We believe that the same is true of negotiation. It is for that reason that, in our pre-action protocol model,

²¹ The Final Report of the Civil Justice Advisory Group, page 61, paragraph 68.

negotiation is required and mediation is encouraged. Even if the dispute is not resolved, in many cases the issues may be clarified and narrowed, with a consequent saving in time and cost in a subsequent litigation.

There presently exists a number of different sources of financing litigation, within the two broad categories of private and public funding. Funding for mediation is currently available through legal aid, and mediation is free of charge through Family Mediation Scotland if children are involved. In commercial disputes, the parties themselves fund their negotiations and mediation. We are of the view that negotiation and mediation should be funded from the same sources and in the same way as litigation is funded.

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

Paper documents can be wholly replaced by electronic documents, with a consequent saving in cost, time and paper. Where appropriate, court proceedings can be conducted by teleconference or video link, with a saving in cost and time. As has been demonstrated in *McTear v Imperial Tobacco* and *HMA v Transco*, the electronic accessing and display of documents in proofs and trials brings substantial savings in court time, with a consequent saving in expense.

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

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

The operation of the Chapter 43 rules in the Court of Session has demonstrated that case-flow management works well to force the pace of litigation. We believe that, as in other jurisdictions, a timetable could be issued by the court in every type of case, subject to alteration by the court in appropriate circumstances, at its discretion. Compared with judicial case management, case flow management requires little by way of court resources.

We find it difficult to identify any type of case that would not benefit from judicial case management. It brings the parties together to clarify and narrow the issues in the case, it enables the court to identify and adopt procedures that will assist the efficient and effective resolution of the case, it allows the court to control the nature and extent of the evidence that will be led, and it may facilitate settlement of the dispute.

When the case-flow management concept that became part of the Chapter 43 Rules was devised during the deliberations of the Coulsfield Working Party on Court of Session Procedure, it was proposed that there should be a compulsory hearing to follow on shortly after the pre-trial meeting, in cases where the pre-trial meeting did not result in a settlement. That proposal was not incorporated into the Working Party's final recommendations, because of a feeling that a pre-trial hearing would be too demanding of judicial resources.

The model for a pre-action protocol in personal injury actions which we put forward for consideration is, in essence, a case-flow management tool. The requirement for leave to initiate proceedings in the event that settlement of the dispute is not achieved is a form of judicial case management.

Chapter 6

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

Advantages

- Disputes can only be resolved if the parties communicate with each other. Pre-action protocols require parties to communicate;
- They require investigation of the facts at an early stage;
- They requires an exchange of information between the parties;
- They facilitate the narrowing of issues in the case;
- As a consequence of all of the foregoing, they facilitate settlement of the dispute; and
- If settlement is not achieved, pre-actions protocols help subsequent litigation to proceed efficiently and effectively.

Disadvantages

Raising an action has certain practical implications that, at present, pre-action protocols do not. For example, the commencement of litigation interrupts the running of the prescription and limitation periods. At present, pre-action protocols do not. In the model for a compulsory pre-action protocol which we propose, however, there is a registration process, administrative in character, which operates to interrupt the running of the prescription and limitation periods. Amending legislation would be required.

Further, by raising an action, a pursuer can avail himself of diligence on the dependence. Granting a warrant for such diligence is a judicial act, which, at present, can only be done after an action is raised. If compulsory pre-action protocols were introduced, however, the scope of section 1 of the Administration of Justice (Scotland) Act 1972 could be extended to allow an application to be made to the court for a warrant for diligence on the dependence of the pre-litigation protocol and any subsequent litigation.

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

Yes.

We believe that pre-action protocols should be instituted in the courts and for the types of action where analysis indicates that the advantages of a pre-action protocol, identified in the answer to question 1, are likely materially to increase the chances of settlement or a substantial narrowing of issues. An obvious candidate for a pre-action protocol are personal injury claims. By way of illustration, a model is appended to this response, at Annex A.

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

If pre-action protocols are voluntary, one party to a dispute has it in his or her power to frustrate the process by refusing to engage in it. In our view, if an objective of the reform of the civil courts is that “the courts should be used when the parties cannot move towards a settlement in any other way”²² it will be necessary to compel adherence to the protocol.

4: Should there be a greater requirement for leave to bring or to 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?

Yes.

Our model for a pre-action protocol contemplates that no action can be raised without leave of the court, unless and until the pre-action protocol has been exhausted. The extent to which the protocol has been complied with is recorded in a joint minute which will be lodged in process when a new action is raised. The court will only allow the litigation to proceed if, having regard to the terms of the joint minute and to any representations made on behalf of the parties, the court is satisfied that the dispute can not be resolved other than by allowing the litigation to proceed. In that event, a proof (or jury trial) will be fixed. By that time, all of the preparations necessary for a hearing will have been completed, so that the hearing can be set down for a date within a relatively short time, perhaps six or eight weeks.

We are of the view that leave should be required to go to debate or Procedure Roll, in order to avoid what often proves to be an unnecessary and, on occasions, tactical delay. In the Court of Session at present, for example, in ordinary actions, a defender may insist that a cause goes to the Procedure Roll. Depending on the time required and the availability of counsel for the hearing, the delay occasioned can exceed one year. Often, there is a late amendment to the pursuer’s pleading, and a proof is then fixed. On other occasions, after the Procedure Roll discussion, a proof before answer is allowed. If leave were required, parties would have to persuade the court that a debate or Procedure Roll discussion is necessary in the interests of justice. If a fair notice point is taken, there would be an opportunity for the matter to be resolved in early course. If a party offered to amend, the court could set a timetable for the amendment procedure.

A model for this type of approach is to be found in the procedure of the Commercial Court and in judicial review in the Court of Session.

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

Because the sheriff court and the Court of Session have separate rule-making bodies, there is a tendency to for them to have different solutions to the same problems. In some instances, that is because the different circumstances in which the courts operate render different solutions necessary, in others it is because there is no sharing of ideas between the two bodies.

²² Civil Justice Debate Col 24856, a sentiment that attracted cross-party support.

We believe that rule-making would be better done by a single body, comprising representatives from both court systems, so that the rule-making process can be better informed by shared ideas and experience. The joint meetings of the IT Committees of the Court of Session Rules Council and the Sheriff Court Rules Council are an example of that general approach working in practice.

6: Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?

No.

These courts perform a number of different functions, and the rules in place assist them to perform their respective functions. Even where their functions are identical, such as in personal injury actions, we believe that it is better left to the respective courts to determine the rules which they consider will facilitate the proper conduct of business before them.

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

No.

The purpose of an initiating document is to give the other side fair notice of the case against it and, related to that, to limit the scope of any enquiry. Different forms of initiating documents have been developed over time to meet the different needs of different types of action in different forums. We do not believe that a single initiating document could be devised that would meet its purpose for all types of action at all levels within the court structure.

Further, the legal complexity of actions varies among different types of action. An initiating document, such as a form filled out by a lay person in the Small Claims Court, will not lend itself for use as an application for judicial review.

We are conscious that, in his final Report on Access to Justice, Lord Woolf recommends that all proceedings should be initiated by means of “a claim”.²³ It seems to us, however, that what is proposed is a change in form rather than of substance. If the question comes to be whether different names for the initiating document (“Summons”, “Petition”, “Initial Writ” etc.) should be abandoned, and the first page of the initiating document should be the same no matter what the substance of the action may be, we can see that such a reform may go a little way to improving access to the court.

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

The Coulsfield Working Party on Court of Session Procedure recommended that pleadings in personal injury actions should be simplified, on the view that, in the majority of cases of that

²³ Chapter 12 paragraph 3.

type, it is unnecessary to have more elaborate pleadings. After a number of years of operation, however, the Coulsfield form of pleadings and its contribution to achieving justice between parties remains controversial.²⁴ One concern is that the absence of pleas-in-law removes an important check on the relevancy of an action. There is no way of gauging whether justice is, in fact, being impeded by the use of simplified pleadings in actions of that type.

Nonetheless, the introduction of a system of abbreviated pleadings may be merited in certain types of action. To determine whether that is the case for any particular form of action, however, we believe that those working with the pleadings, i.e. the court and the practitioners within that area of practice, should be consulted in order (a) to determine whether there are reasons for simplification and (b) to suggest ways in which such simplification might be effected.

9: Are the current arrangements for summary disposal satisfactory?

No.

It seems to us unfair that pursuers have the protection of a procedure for summary disposal, whilst defenders do not. Introducing a requirement for leave to bring proceedings, which we propose later in this document, would go some way to protecting defenders. Such protection, however, would not extend to actions where the pursuer's case appears statable on the pleadings, but is unsupported by any credible evidence. In our view, the system in England and Wales, which is referred to in paragraph 6.48, produces a speedier, cheaper and more just result in demonstrably unmeritorious cases than anything that is currently available in Scotland.

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?

Yes.

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

No.

“The idea of proportionality in the use of resources to resolve civil disputes is integral to the concept of justice.”²⁵ In our view, having routine procedural matters dealt with other than by full-time judges of the Court of Session or of the sheriff court would be consistent with this principle. Such work might be allocated to temporary Lords Ordinary or temporary sheriffs, at a saving to the public purse. Such a system would free full time judges and sheriffs to undertake more complex work.

²⁴ See Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session (Chapter 43), Chapter 7.

²⁵ Consultation Paper, paragraph 1.13.

Such business could be conducted by email and/or conference call or video link. There would be a cost saving by avoiding the need for practitioners to travel to and from court, and wait their turn to be heard.

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?

In our answer to question 24, we cite an example of delays caused by a party's representatives wrongly estimating the time required for a hearing. Such examples are not uncommon. Unfinished business is inefficient. Effort is duplicated and the determination of the action is delayed. We believe that judicial involvement in the estimate of the time for which a hearing should be set down would help to achieve more realistic estimates.

Estimates, however, are exactly that. The time which proves necessary for a fair hearing depends on such factors as how cooperative witnesses are; how long they take to answer questions; how clearly they express themselves in the answers that they give; the nature and extent of judicial interventions both during evidence and during submissions; and how arguments develop as a result of dialogue during submissions. None of these things is in the control of the parties, nor is the list exhaustive. We believe that to time limit hearings or to conduct them by reference to a timetable determined by the court has a real and significant potential to lead to injustice.

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

Yes.

Written submissions save time in presentation (which outweighs the time required by judges and sheriffs to read them), and assist in focussing and narrowing the issues between the parties. Where the case has gone to proof, the expense of written final submissions is unlikely to be wasted, because they would not be exchanged until after the conclusion of the evidence, when the parties are, in general, committed to seeing the process through to a judicial determine.

Actions rarely settle in the shadow of a debate or Procedure Roll discussion. Where written submissions are exchanged in advance of such proceedings they may have the effect of prompting amendment, as do Notes of Argument at present. Where a debate or Procedure Roll hearing is discharged, there is saving in judicial time and court resources, and a saving to the parties in legal fees. Where the discharge comes close to the hearing, there will have been unnecessary delay, and we suggest that, if there is to be an exchange of written submissions, that would have to be done soon after the case was sent to debate or Procedure Roll.

14: To what extent should there be an earlier and/or wider disclosure of evidence?

As a general proposition, a party will not offer or accept an offer to settle unless he believes that he is properly informed about the facts and issues in the case. Often the other party is in sole possession of such information. The Chapter 43 procedure in the Court of Session was designed to require early disclosure of information. We believe that that has contributed to earlier settlement of personal injury actions than was achieved before Chapter 43 was introduced. In principle, therefore, we are of the view that there should be earlier disclosure of evidence. To what extent that should be done, however, depends on the nature of the dispute and the type of evidence under consideration.

We are aware of the problem that has been encountered in England and Wales, and other jurisdictions, of unduly burdensome demands for and provision of information. Pre-action protocols could be shaped to regulate the time and nature of disclosure.

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

We have concerns about proposals to introduce the concept of a remit to a single expert, assessor or man of skill. These concerns can best be expressed by example. Suppose that a party engages a well-qualified, experienced expert who gives certain advice which is favourable to that party's case. If the court appoints its own expert whose view is different from the party's expert's view, and the case is decided on the basis of the court appointed expert's views, there is scope for injustice, or at least a sense of grievance by the losing party, if the court's expert's view is not open to challenge.

We would not argue against giving the court power to regulate the nature and amount of expert evidence that can be led.

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

Yes.

As is recorded in the Consultation Paper, in 1996 the Court of Session altered its rules by introducing a system of "pursuers' offers". It was hoped that parties would be encouraged "to reach agreement at an earlier stage with consequential benefits to the administration of justice as a whole." (See *Taylor v Marshalls Food Group Ltd. (No. 2)* 1998 SC 841) The rules provided that, where the pursuer offered to settle for a specified sum, and where he was subsequently awarded a sum equal to or more than the sum specified in the offer to settle, he would be entitled, to (a) the expenses of process as taxed or agreed and (b) a sum equal to the amount of those expenses ("an additional sum").

Defenders were concerned about the practical workings of the rule. A pursuer could make an offer at a very late stage in the action and, if he was awarded more than the amount of the offer, he would be entitled to an additional sum of the same amount as that to which he would have been entitled if he had offered to settle at an early stage of the litigation.

On a challenge to the validity of the rule, the First Division held that the court did not have power to provide for payment of an additional sum. Towards the end of its Opinion, the court made the following observation:-

“... .. it may well be, as the defenders argued, that rule 34A.6 operated in a somewhat capricious fashion. That does not mean that it would be impossible to design a different rule which would operate satisfactorily and promote the desirable aim of promoting the more efficient administration of justice which this rule was designed to achieve.”

The rules on offers to settle contained Part 36 of the Civil Procedure Rules in England and Wales appear to avoid the “somewhat capricious” operation of the rules on pursuers’ offers that gave rise to resistance to that system. We believe that the introduction of a scheme based on the English and Welsh model would encourage parties to “reach agreement at an earlier stage with consequential benefits to the administration of justice as a whole.”

17: Should civil jury trials be retained?

We do not favour the retention of civil jury trials for the reasons set out below.

As is recorded in the introduction to the Consultation Paper, the Review Team’s remit is to “review the provision of civil justice by the courts in Scotland”. The fundamental question which falls to be addressed when considering whether or not jury trials should be retained in the Court of Session is whether or not they can be relied on to produce a just result. We believe that they can not.

The feature of civil jury trials which causes us most concern is the assessment of damages. The Court of Session Act 1988 provides that a motion for a new trial will be allowed on a number of grounds, among which is inadequacy or excess of damages. In *Girvan v Inverness Dairy Farmers* 1998 SC (HL) 1, the traditional approach taken by the Inner House to the question of whether a jury’s award of damages was excessive was the subject of challenge and was held to remain as laid down in *Landell v Landell* in 1841. To be properly so regarded, the damages awarded “must be such as to raise on the part of the Court, the moral conviction that the jury, whether from wrong intention, or incapacity, or some mistake, have committed gross injustice”

There were two jury trials in the *Girvan* case. The pursuer had sustained an elbow injury, and liability was not in issue. In the first trial, the jury assessed the damages to which the pursuer was entitled at £193,080, of which £120,000 was for *solatium*. A motion for a new trial was successful. In the course of its Opinion, the court said “*Since the award made to this pursuer for solatium is £50,000 higher than the highest award in Scotland for solatium made to a paraplegic, we are quite satisfied that the award made to the pursuer is plainly excessive and indeed extravagant.*”

At the conclusion of the second trial, the jury awarded *solatium* of £95,000. An Extra Division refused the motion for a new trial, Lord Abernethy dissenting. An appeal to the House of Lords was unsuccessful.

On each occasion when the motion for a new trial was considered, the court determined the question whether the damages awarded by the jury were excessive by reference to judge-made awards in other cases. In his dissenting Opinion, Lord Abernethy said this:-

“... .. as Lord President Clyde said in the second McCallum case (at 1969 SC, p 88; 1969 SLT, p 178), the power given to an appellate court to set aside a jury’s award was written into the statute “to secure . . . that in a broad and general way awards for similar injuries should conform to a general pattern”. Sir Thomas Bingham MR in his foreword to the second edition of the Judicial Studies Board Guidelines expressed a similar view when he said that “while mathematical precision is unattainable some broad working consensus on the appropriate level of compensation for different injuries is highly desirable both in principle and in practice. Such a consensus is desirable in principle if different claimants are to be treated fairly, one as compared with another. . . . It is desirable in practice because without it a claimant (and his advisers) will not know what to accept nor a defendant (and his advisers) what to offer”.

Civil juries are given no practical guidance to assist them in assessing damages. The Court of Session Rules Council, when it was under the chairmanship of Lord President Hope, considered changing that practice, and concluded that such a change would give rise to such difficulties that the balance of advantage lay in making no change to the practice. (*Girvan* per Lord Hope of Craighead at page 21)

When the case reached the House of Lords, Lord Hope said this:-

“The third observation [on possible changes in practice to the system of the civil jury trials] raises a more fundamental point, which was also drawn to the attention of the Court of Session Rules Council and was one of the principal reasons why the possibility of making changes to the existing practice was not pursued. It is also a reply to the suggestion that it might be advisable by legislation to confer on the Inner House a power to assess damages on a successful motion for a new trial and thus save further procedure. This suggestion is, at first sight, an attractive one. But on further examination it seems to me to raise a fundamental issue of principle. This is whether it is still appropriate for damages in personal injury cases to be left to juries or whether the time has now come in Scotland, as in England, to alter the balance of the whole system in favour of judge made awards. The existing legislation does not permit this, for reasons which I have already sought to explain. A piecemeal alteration to the existing system will cause confusion, and before long further changes will be inevitable. If reforms are to be made it may be thought that they should follow the English pattern, enabling judges to withhold a cause from jury trial in a case of disputed damages except in exceptional circumstances and enabling the Inner House, in those cases which do go to jury trial, to substitute its own assessment for the jury’s award if it is persuaded that the award was excessive or inadequate. But the question whether such changes are desirable is a difficult one on which I suggest your Lordships should decline to express an opinion. This is something which is best left for consideration by the Scottish Law Commission, so that a more complete study of the whole matter may be undertaken and a recommendation made for legislation, if thought appropriate, after all interested parties have been consulted.”

This review was not in contemplation when Lord Hope made these remarks, but it seems to us that the Review Team will be well placed to make a recommendation for legislation if it considers it appropriate to do so.

We believe that the civil jury trial system cannot be relied on to produce a just result for the following reasons:-

- As is evidenced by what happened in *Girvan*, a jury award can be made which is out of proportion to what a judge would have awarded in the same case, and what judges have awarded in other cases, yet the jury's award is, effectively, unappealable; that offends against the notion of comparative justice, when looked at from the perspective of either side;
- Because the jury's award is wholly unpredictable, legal advisers are unable to give reasoned advice to their clients on what offer to make in settlement and what offer to accept; that amounts to an inhibition of access to justice;
- More generally, in our system of justice, there is an ever increasing emphasis on transparency. As it is put in the Consultation Paper, "It is an important rule of law that a litigant has a right to know why he has won or lost his case." Jury verdicts, however, are inscrutable. We believe that justice is denied where parties do not know why the jury found as it did.

We accept that part of our critique can be met by giving guidance to juries. If civil jury trials are to be retained, we recommend that (a) juries be given guidance to assist them in assessing damages, by reference to other cases and (b) the Inner House be given power to assess damages on a successful motion for a new trial and thus save further procedure.

18: Should written judgments be required in all cases?

Yes.

The requirement to give reasons for a decision are an important aspect of the rule of law. It provides a safeguard against arbitrary decision-making. A reasoned decision assists the losing party to decide whether or not to appeal, and it assists the appellate tribunal in deciding whether the tribunal below has erred. There are cases where it may be appropriate to deliver a judgment *ex tempore*, and that has been done in the High Court, sitting as an appeal court, and in the Court of Session. On such occasions, however, the judgment has been recorded, thus providing a means to create a permanent and official record of the decision for the litigants.

19: Should the courts have greater powers to impose sanctions for noncompliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?

Yes.

Failure to comply with court rules and unreasonable behaviour by a party to an action can seriously hinder the efficient and effective administration of justice, and produce unfairness

to the other side. We believe that such behaviour should be discouraged by the availability of a range of sanctions from dismissal of proceedings at the most severe end of the spectrum to an adverse finding in expenses at the opposite end of the scale. We believe that the power to find representatives personally liable in expenses would have an important deterrent effect, as would a requirement that a party in breach of the rules must apply to the court at their own expense for relief from the consequences of such breach.

We add the qualification that any such set of rules should be circumscribed in such a way as to ensure that parties are not penalised for the faults of their representatives.

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

One of the functions of lawyers who practice in the courts is to sift out unmeritorious causes and appeals, by giving appropriate advice. In cases covered by the legal aid scheme, that is also what, in practice, the Legal Aid Board does. We believe that, where these filters do not operate, for whatever reason, a party litigant should be allowed to bring an action or appeal only with the leave of the court. If a compulsory pre-action protocol is in place, it will be necessary for all litigants, whether represented or not, to seek leave to bring proceedings.

In our view, the sifting process which is in place in the High Court of Justiciary might provide a helpful model for appeals in civil cases.

We believe that, where leave is granted, the court should have wide discretionary powers to regulate proceedings in whatever way that it considers best meets the interests of justice in the particular case.

We have more difficulty with the question whether representation should be made compulsory in all cases. There appears to us to be a tension between the desire to make justice more accessible and a requirement that parties are legally represented, regardless of their wishes. The funding issues that arise are complex.

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

In our view, it is a weakness of the current legislation that there is a requirement of habitual and persistent prior proceedings. It is of scant comfort to a party, who happens to be the first to face a particular vexatious litigant, that he is helping to provide grounds for subsequent proceedings to be taken by the Lord Advocate against his opponent for an order under section 1 of the 1898 Act. If all party litigants were required to persuade the court that their action or appeal has sufficient merit to be allowed to proceed, as we propose, that would effectively supplant the 1898 Act in the case of those without legally qualified representation.

We are unaware of whether there is a problem with vexatious litigation in cases where a party is legally represented. Should there be such a problem, we should have thought that the professional rules of the representative could be invoked to address it. A power to award

expenses against representatives in appropriate cases may act as a disincentive to lawyers from assisting vexatious litigants.

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?*

The cases of *Kinneil* and *Anderson*, referred to in the Consultation Paper at paragraph 6.91, demonstrate that there may be cases in which it is in the interests of justice that a person without a right of audience be allowed to address the court on behalf of a party litigant. In our view, it is likely to assist in meeting the objective of making justice more accessible if courts are given a discretion, in exceptional circumstances, to allow a person without a right of audience to address the court on behalf of a party litigant. The test to be applied should be whether, in the particular circumstances of the case, it would be in the interests of justice to do so. The person whom it is proposed would address the court should make the application.

23: *Would it be desirable to introduce separate procedures for multi-party litigation?*

Yes.

We believe that the perceived advantages of such procedures identified in the Consultation Paper at paragraph 6.96 are real. It is likely to be possible to avoid, or at least minimise the perceived disadvantages, and their effect, by taking account of them in framing the rules. The problem of blackmail litigation, for example, may be addressed by compulsory pre-action protocols, and the requirement to seek leave to commence litigation.

24: *Is the rule governing the procedure to be followed for judicial review satisfactory?*

We have no knowledge of particular problems having arisen because of the absence either of a limitation period for judicial review, or of a requirement to seek leave to apply.

The existing procedure can work well where the application comes before the court and case management decisions are taken at an early stage. Chapter 58 makes an early first hearing possible but not mandatory. At present the first hearing is fixed by the Lord Ordinary when the first order is made. In practice, the petitioner applies to the Keeper for a date for the first hearing before the first order is made, and it is fixed at the Keeper's discretion, having regard to such matters as the availability of counsel. According to current practice, therefore, there is no judicial control over the fixing of the first hearing.

If procedures are to be introduced to enable interlocutory proceedings to be conducted by teleconferencing, over video link, or by exchange of emails, we would favour a change in practice, whereby the Lord Ordinary fixes the date of the first hearing, in consultation with the Keeper, having regard to the representations of parties. At the same time, the case management process could be put in train.

Such a change in practice would also allow the best estimate to be made of the likely length of hearing. In one relatively recent application for judicial review, which was considered urgent by the petitioner, the first hearing was fixed for 2 July, one day being considered

sufficient for the determination of the issues that the petitioner had raised in the petition. When the hearing was fixed, there were no answers. The respondent, however, took competency and jurisdiction points, quite properly, and the hearing took a further six days. Because of the unavailability of the Lord Ordinary, who was engaged in criminal business, the case was continued to a further day in late August, two days in mid-October and three days in early November. Had parties been able to discuss the likely issues before the first order was made, the Lord Ordinary would have been able to fix the first hearing for a more realistic duration, and avoid at least some part of the series of delays that occurred.

A Model for a Pre-action Protocol

Personal Injury Claims

Introduction

1. At the time when the Working Party led by Lord Coulsfield looked at Court of Session procedure, it found that almost 95% of cases settled without proof and, in the case of ordinary actions in respect of personal injury or death, the figure was 98.2%. The Chapter 43 procedures in the Court of Session have had the effect of bringing settlement dates in personal injury actions forward by requiring:-
 - a. the exchange of information between parties;
 - b. the exchange of statements of valuation; and
 - c. a meeting between parties in good time before the date of proof or trial, with a view to discussing settlement or the narrowing of the dispute;
2. The hypothesis that underlies this model for a pre-action protocol in personal injury actions is that, if the settlement of a court action can be facilitated by the imposition of appropriate rules prescribing the conduct of the parties to the litigation, the settlement of a claim before an action is raised can be facilitated by the imposition of appropriate rules prescribing the conduct of the parties before an action may be raised.
3. The model which we propose draws heavily on the Chapter 43 procedures. We are conscious, however, that the evaluation of the Chapter 43 carried out for the Scottish Government (“the Chapter 43 evaluation”) suggests that the rules could be improved on, to give greater assistance to parties to reach a settlement. For example, the following observations are made in the evaluation report:-

“While Statements of Valuation were welcomed in principle, there was a high degree of dissatisfaction with them in practice. They were reported to be poor in quality, and were marked by missing information, an absence of realism and a lack of seriousness. Practitioners attributed their limited success to the ways in which the provisions were put into practice, and to the provisions themselves. They identified issues around vouching, timing and compliance.”²⁶

“Practitioners reported that valuations were failing to generate early tenders and to achieve early settlement because solicitors were not adequately providing them with documentary support. This was partly a matter of culture, which the new procedure had failed to change. It was also a matter of the procedure itself. Many practitioners blamed the provisions for failure to

²⁶ Chapter 8, paragraph 4.

specify the documents that should be produced, and saw this to be a fundamental flaw in the Rules. Defenders were dissatisfied with provisions for the inspection and recovery of documents, and observed that it was difficult to lodge realistic valuations without seeing the records.”²⁷

4. On the efficacy of the pre-trial meeting in encouraging settlement, one person interviewed by the Chapter 43 researchers said this:-

“It’s a pity they [pre-trial meetings] are not within a judge’s ambit. Delaying tactics are unlikely to be tolerated by a judge if these cases were in the ambit of the court. It’s not even what a judge does – it’s the threat of a senior legal figure coming down on you for delay”.

5. In outlining the principal elements of a pre-action protocol, we have attempted to address some of the perceived shortcomings in the existing Chapter 43 procedure. It should be appreciated, however, that this model is intended to be illustrative of an approach to a protocol rather than definitive of the terms of a protocol.

Initiation of the Protocol

6. Many claims are settled on an exchange of correspondence or at a meeting, without the need for either party to initiate any formal procedure. This model is not designed to impose any rules on the conduct of such negotiations. At present, litigation is commenced where it appears to the claimant that, for whatever reason, he or she will not achieve the level of damages that is considered appropriate unless he or she litigates, or where it is necessary to litigate in order to preserve the claimant’s rights, typically where the limitation period is about to expire. At present, the timing of the commencement of the litigation is entirely in the hands of the claimant. In the absence of proceedings, the person against whom the claim is made may have difficulty in recovering medical and other relevant records. That person may be anxious to have the claim disposed of as soon as possible, but must wait for the claimant to take the initiative.
7. In the model which we propose, the protocol can be initiated by either party, using a standard form (“the claim form” in the case of the claimant and “the initiating form” in the case of a party other than the claimant). The initiating form can only be served in cases where the claimant has first intimated a claim in writing. In order to avoid time-bar difficulties, the service of the claim form would be registered in an appropriate administrative process and registration would interrupt the running of the limitation period.
8. Where the protocol is initiated by a party other than the claimant, the protocol will require service of a claim form by the claimant on the respondent, within a specified period after the initiating form is served on the claimant. The claim form must give

²⁷ Chapter 8, paragraph 5.

notice of (at least) the same matters as are required at present by Chapter 43. On receipt of the claim form, the respondent must serve a response on the claimant, setting out fully the reason for rejecting the claim. There would then be a period of adjustment of the claim form and response.

The negotiation of the claim

9. After initiation of the protocol, the procedure would closely follow the provisions of Chapter 43. For example, where the claim form or initiating form contains a specification of documents, an order granting commission and diligence for the production and recovery of the documents will be pronounced by the relevant administrative officer. Claimants and respondents must exchange valuations of claim, but these would not be lodged in court or in the administrative process.
10. Documents in support of each side's valuation must be served by a date fixed by reference to the date of service of the claim form. The protocol would prescribe documents to be disclosed to the other side. These documents would not be lodged in court or in the administrative process.
11. A settlement meeting must take place by a date fixed by reference to the date of service of the claim form. It would be incumbent on the parties to attempt to settle the claim, failing which to attempt to narrow the issues.
12. If settlement of the claim is not effected by the conclusion of the settlement meeting, that fact must be minuted, as in the Chapter 43 procedure. The parties must, at that stage, consider mediation of their dispute. Where they do not agree to mediation, that fact must be recorded. If both sides agree that there will be no mediation, each must record its reasons and there must be an exchange of reasons. Where there is no agreement to mediate because one side does not agree, written reasons must be given to the other side.
13. At this stage, if the parties do not mediate, or if mediation does not result in an agreed settlement, the claimant may raise an action by service of an appropriate initiating writ. The claimant must lodge all of the documents served on him by the respondent in terms of the protocol. When the initiating writ is served on the respondent, that party must lodge all of the documents served on him by the claimant in terms of the protocol.

Timing

14. Presently, the Chapter 43 procedure spans about one year. The end point is a proof or trial, fixed at the commencement of the action. It seems to us that there is no need for a pre-action protocol to take that long. On the other hand, the parties ought to have a realistic period in which to complete their investigations. If they are given too little time, they may be forced into litigation by default. An overall timetable of six months seems reasonable.

Judicial Case Management

15. When what later became the Chapter 43 procedure was first proposed within the Coulsfield Working Party, it was a hybrid case flow and judicial case management scheme, incorporating both a pre-trial meeting and a pre-trial hearing. There was resistance to the latter, because of the implications for the deployment of judicial and other court resources, and that part of the proposed scheme was not adopted. There was a concern within the Working Party that, without a pre-trial hearing, the scheme would lack sufficient teeth to encourage practitioners to engage fully in attempts to settle, or at least to narrow issues. The view quoted in paragraph 4 above is held by a number of practitioners, and may be thought to bear out that concern.²⁸
16. If the pre-action protocol fails to result in the settlement of the claim, parties will be required to justify that failure to a judge (here meaning a Lord Ordinary or sheriff) before being allowed to proceed further in the litigation. That itself may be seen as an encouragement to settle during the pre-action protocol stage.
17. At the hearing, it will be open to the court to explore, in some depth, the reasons why settlement was not effected. It may be, for example, that problems were caused by lack of candour on the part of the one of the parties. The lodging of and adherence to a skeleton response to the claim form might be regarded as a lack of candour, and there may be a sanction imposed on the respondent by an adverse finding of expenses.
18. At the hearing seeking further procedure, the judge may do any one or more of a number of things, among which are the following:-
 - a. Make up a record
 - b. Fix a debate on any legal issue;
 - c. Allow a proof or trial, on the issues that are determined to be outstanding between the parties, or on any preliminary issue, subject to such conditions that the judge may deem just;
 - d. Require disclosure of such documents by one side to the other as the court may determine;
 - e. Require the parties to have another settlement meeting as a condition precedent to proceeding further;
 - f. Award expenses against a party in respect of the whole or any part of the pre-action protocol.
19. Given that the claim ought to have been fully investigated during the protocol period, the debate, proof or trial can fixed for a date within a few weeks of the hearing.

²⁸ See also Chapter 9, paragraphs 9.62 to 9.64.

Offers to settle

20. At any stage during the running of the protocol, either side is entitled to make a formal offer to settle. Where such an offer is not accepted and the other party ultimately fails to beat the offer, these circumstances will be taken into account in awarding expenses, including those in respect of the whole or any part of the pre-action protocol.

Interim damages and Complex Actions

21. Provision would have to be made for determining disputes about *interim* damages and provisional damages. In the Chapter 43 procedure, a motion can be made for *interim* damages. In this model for a pre-action protocol, parties would be expected to attempt to agree *interim* and provisional damages. If they are unable to agree, it will be necessary for the claimant to raise an action and apply to the court. Each side will have responsibility for lodging documents served on it by the other side, as when an application is being made for a proof etc.. Such applications would be discouraged by an appropriate award of expenses against the unsuccessful party. When the application has been disposed of, the case will be sisted pending the completion of the pre-action protocol process.
22. There will be cases where one or more of the parties to a dispute considers that compliance with a pre-action protocol will not lead to a resolution of the dispute and will cause unnecessary and avoidable expense. The pleural plaques test case is an example. Rules of court could provide that a party may apply to the court to dispense with the requirement to comply with the pre-action protocol. If the requirement were dispensed with, the court would immediately take on a case management role to regulate further procedure. Where the party seeking dispensation is unsuccessful, there will be a penalty in expenses.
