
# SHERIFF COURT RULES COUNCIL CONSULTATION:

# THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

## A RESPONSE FROM

## THE ASSOCIATION OF PERSONAL INJURY LAWYERS (APIL)

**SEPTEMBER 2006**

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants. APIL has more than 120 members in Scotland

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury
- To promote and develop expertise in the practice of personal injury law
- To promote wider redress for personal injury in the legal system
- To campaign for improvements in personal injury law
- To promote safety and alert the public to hazards wherever they arise
- To provide a communication network for members

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

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## Introduction

APIL welcomes the opportunity to repond to the Sheriff Court Rules Council consultation on alternative dispute resolution. The association has long experience of the development of mediation, and APIL Scotland is assisted in this response by drawing on the experiences of APIL members in other jurisdictions.

In the following paper, our comments will relate to mediation, and only as it applies to personal injury cases.

## Executive Summary

- While there may be a role for mediation in certain types of case, it is not a panacea for reparation cases, and the case for wholesale introduction of mediation has not been proven.

- Mediation should never be imposed against the wishes of the pursuer.

- The suggestion that the sheriff may take account of the conduct of any party when considering any motion for expenses effectively introduces a strong element of compulsion.

- Mediation can lead to additional costs and bureaucracy.

- The Coulsfield rules in the Court of Session have already shortened settlement time scales in personal injury cases.

- The voluntary pre-action protocol for personal injury claims has been in place since January this year and aims to make the process less adversarial, reducing the need for litigation.

## General principles

The association has always been willing to look at ways of improving the civil justice system, provided that the interests of the injured person are central to any discussion.

APIL members have spent considerable time examining the value of mediation to pursuers, and to the system, and believe that, while there may be a role for mediation in certain types of case, it is not a panacea for reparation cases, and the case for any wholesale introduction of mediation has not been proven.

Mediation can have a part to play in those situations where there is a high emotional charge and possible ongoing relationship, such as bullying at school, or cases under the Protection from Harassment Act 1997. Almost all the work of our members, though, is on behalf of "one shotters" against "repeat player" insurance companies. There is no real personal relationship between the parties involved in the negotiation or litigation. The repeat player has no personal interest in the outcome but controls the litigation, negotiation and settlement. The theory of mediation with its vocabulary of empowerment of parties is not apt when the only (and perfectly proper) goal of one party is to escape the negotiation or litigation at the lowest transactional cost.

Under no circumstances is mediation ever appropriate if it would cause undue stress to a pursuer who feels unable to deal with a defender in a face-to-face situation.

## Practical considerations

It is the experience of members that mediation adds an additional and unnecessary layer of costs to the process. A mediator, for example, costs in the region of £1,000 to £1,500 a day. This is before solicitor costs and party wage loss are considered. Some mediation providers will also charge a percentage of the final sum agreed as a fee. Recent APIL research into small claims found that more than 69 per cent of claims generated damages of less than £5,000[1]. In this context, the use of mediation would result in disproportionate costs.

Mediation is unnecessary in most reparation cases, as the majority of cases settle prior to proof. Evidence based on the experience of mediation in the family court, however, shows there was only 'agreement' in 50 per cent of cases involving children, and in only 34 per cent of disputes relating to financial issues.[2]

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[1] *Potential impact of the threshold limit for personal injury cases within the small claims court being raised to £5,000*, APIL research, March 2005

[2] 'Monitoring Publicly Funded Family Mediation – summary report to the Legal Services Commission' (Gwynn Davies)

The Coulsfield rules in the Court of Session have shortened settlement time scales. A key factor of the procedures under the Coulsfield Rules are pre-trial meetings, by which point, all relevant documents, valuations, reports and notices must have been produced. This has achieved its objective of bringing settlement times forward. APIL has long argued that the rules could be adapted for the Sheriff Court and we are greatly encouraged by the Sheriff Court Rules Council's most recent consultation on procedural rules for personal injury actions in the Sheriff Court. Where the procedural and structural drivers are in place agents will settle almost all cases without any actual assistance from a judge. The small number of cases which do not settle under the present system will have already been closely examined by both sides and run to trial for a reason. They are unlikely to settle merely by the introduction of a mediator.

**Responses to consultation questions**

**Recommendation 1**

**Q1 – Do consultees consider that such a rule is necessary or desirable?**

APIL accepts that the court may encourage parties to seek resolution through mediation. As explained above, mediation can be a useful tool in some personal injury cases. The draft rule in section 3 of the consultation paper, however, appears to contradict the assertion in recommendation 1 that the court should encourage rather than compel parties to seek mediation. By suggesting that the sheriff may take account of any unreasonable conduct of any party when considering any motion for expenses, a strong element of compulsion is introduced.

This completely flies in the face of mediation as a voluntary process, and APIL members would not support any move towards compulsory mediation. Injured people are already extremely vulnerable and it would be iniquitous to cause further distress by compelling pursuers to use a procedure against their will. This would clearly be the effect of introducing the concept of penalties by way of expenses.

A further serious concern is how 'unreasonable conduct' in 9A.5 of the draft rule would be defined. This is a very vague concept which would inevitably lead to satellite litigation which would not be beneficial for either pursuers or the civil justice system.

**Q2 – Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?**

See answer to question 1 above.

**Q3 – Should the court have the power to require parties to an action to consider ADR?**

Giving the court the power to require parties to consider mediation is considered acceptable. This could be effected by discussion of mediation at a pre-trial meeting, which could be officially recorded. This approach could also save judicial time as the sheriff would not have to be involved in the process.

**Q4 – Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?**

No, as this would prejudice the client's interests, as being required to provide reasons will potentially add fuel to any possible disputes still outstanding in the claim.

**Q5 – Do consultees have any comments to make in relation to this part of the recommendation?**

APIL has no comment to make on this part of the consultation.

**Q6 – Do consultees consider it appropriate to have an express reference in the rule relative to the awarding of expenses?**

We believe there is no justification for such a reference for all the reasons outlined above.

**Q7 – Is it appropriate to include a reference to ADR in each set of court rules?**

A reference to ADR, without any element of compulsion, should be included in each set of rules, as the option to consider mediation should be available for all.

**Q8 – This question is not applicable to personal injury cases**

**Recommendation 2**

That a new paragraph be inserted into OCR 3.1 in the following terms:

> "(5A) An article of condescendence shall be included in the initial writ averring the steps taken by the parties prior to the raising of the action by other forms of dispute resolution (whether by way of mediation, negotiation or otherwise) with a view to avoiding the need for litigation."

APIL believes the introduction of this paragraph would be both unnecessary and counter-productive.

One of the aims of the Coulsfield Rules is to reduce pleadings to a basic level and the suggested article of condescence would, therefore, be completely contrary to the spirit of the Rules by adding a further layer of pleading. The writ already explains why the action is being brought, and the courts already have the power to impose sanctions where litigation has been entered into prematurely. (Eg: the case of Neilson v Motion 1992 SLT 124 , in which a pursuer's expenses were limited for failing to enter into pre-action negotiaton.)

The ability to negotiate and make concessions on a without prejudice basis is at the heart of most constructive settlement discussions. Whilst pre-action correspondence may be considered on questions of expenses, normally it is only looked at after proceedings on liability are concluded.

APIL would also be concerned about the effect of such a rule on the voluntary pre-action protocol. The protocol was introduced in January this year for personal injury claims with a value of up to £10,000, although there is nothing to prevent parties dealing with higher value claims under the protocol by mutual agreement. The aim of the protocol is to enhance the claims process by creating a timetable for tasks to be completed and encourage a climate of greater openness and co-operation between insurers and solicitors. It is hoped that the process will ultimately become less adversarial, with claims being resolved more quickly and reducing the need for litigation.

The protocol is, in effect, a form of mediation, involving clear responsibilities to disclose information and make a decision on liability within a defined timetable. Litigation should only be commenced after the protocol is exhausted. It is specifically agreed in the protocol that pre-action correspondence can be disclosed for expenses purposes, but any discussion will be limited to the parameters of the protocol.

The proposed new paragraph, on the other hand, invites a free-for-all in which all kinds of wide ranging averments and counter averments will be made involving a blow-by-blow account of the settlement process. This is a guarantee of satellite litigation on costs.