RESPONSE BY
FORUM OF INSURANCE LAWYERS (FOIL)

TO THE SHERIFF COURT RULES COUNCIL CONSULTATION PAPER ON PROPOSED CHANGES TO THE PROCEDURAL RULES FOR PERSONAL INJURY ACTIONS IN THE SHERIFF COURT

The Forum of Insurance Lawyers (FOIL) exists to provide a forum for the exchange of information between lawyers acting predominantly or exclusively for insurance clients. Accordingly FOIL has a considerable interest in the proposals for change to the procedural rules for personal injury actions in the Sheriff Court.

In general FOIL supports the proposals for change detailed in the Consultation Paper. It makes sense to have the same procedural framework for actions in the Sheriff Court as applies to actions in the Court of Session. The experience of FOIL members is that by and large the new procedural rules in the Court of Session have worked well since their introduction in April 2003.

There are though some issues raised by the proposed new rules that FOIL would like to make comment on. Where no answer is given to a question it can be assumed that FOIL has no comment to make and is content with the terms of the proposed new rule.

QUESTION 1

Do you consider that the Court of Session Rules for Personal Injury Actions, suitably adapted for use in the Sheriff Court, should be adopted in the Sheriff Court Ordinary Cause Rules?

Yes. For the reasons already expressed it makes sense to have the same or at least similar rules operating in the Sheriff Court and Court of Session.

QUESTION 2

Do you consider that the Court of Session Rules for Personal Injury Actions, suitably adapted for use in the Sheriff Court, should be adopted into the Sheriff Court Summary Cause Rules in place of the existing chapter 34 of the Summary Cause Rules 2002?

No. It is considered that chapter 34 provides a sufficient enough procedural framework for the determination of low value claims worth £1,500 or less. Chapter 34 already

contains some of the features of the existing Court of Session Rules, for example the requirement to produce Statements of Valuation of Claim. The introduction of other elements of the Court of Session procedure, for example the holding of a Pre-Proof meeting, may not be economic given the relatively low value of the claim.

QUESTION 3

Do you consider that the Court of Session Rules for Personal Injury Actions, suitably adapted for use in the Sheriff Court, should be adopted into the Sheriff Court Small Claim Rules?

FOIL supports the Executive's intention to exclude personal injury actions from the Small Claims procedure. If that does not happen, personal injury claims for £750.00 or less should continue to be dealt with under the existing Small Claim procedure. It is unlikely to be cost effective to apply the Court of Session rules for personal injury actions to Small Claim actions in the Sheriff Court.

QUESTION 4

Application of Chapter XX

Is the proposed new rule XX.1 satisfactory?

Yes. The proposed rule XX.1 is satisfactory in general. However it may be advisable to state at the end of rule XX.1(4) that a defender should state (usually in the last answer of the defences) a brief summary of the propositions in law that he is seeking to establish in his defence (e.g. that the claim is time barred or that the pursuer was to blame or partly to blame for the accident).

QUESTION 5

XX.2 – Form of Initial Writ

Is the proposed form P1 suitable for this type of action in the Sheriff Court?

It is not clear what format form P1 will take. It is assumed that form P1 will follow broadly form 43.2A being the form of summons used in the Court of Session. There is no reason why the form of initial writ in the Sheriff Court should be materially different from the standard form of summons in the Court of Session. However some members of FOIL have expressed concerns about the lack of fair notice of lines of argument and heads of claim given in some personal injury cases. For that reason it may be appropriate to re-word Rule XX.2(1)(a) to read "(a) averments in numbered paragraphs sufficient to give the defender fair notice of the facts necessary to establish the claim, the legal basis of the claim and the heads of claim sought."

QUESTION 7

XX.4 – Inspection and Recovery of Documents

Is the proposed procedure for inspection and recovery of documents suitable for this type of action in the Sheriff Court?

In the majority of personal injury actions, either one or both of the parties will wish to recover the medical records. Often a party will wish to send the medical records to a Consultant for consideration when preparing a report. In recognition of the foregoing it is suggested that Rule XX.4 should require a pursuer to include in the writ a specification of documents seeking to recover the medical records of any practitioner and hospital referred to in Rule XX.2(1)(b). The pursuer's agents should then be obliged to recover and lodge those records in process so that either party can access them for the purposes of the litigation.

QUESTION 9

XX.6 – Allocations of Diets and Timetables

Is the proposed overall procedure suitable for this type of action in the Sheriff Court?

Yes. The proposed procedural timetable is suitable for the Sheriff Court, subject that is to certain modifications. First of all the Council have recently issued a Consultation Paper on the use of ADR/Mediation in the Sheriff Court. The Consultation Paper envisages that there will be a new rule in the Sheriff Court Rules encouraging the use of

ADR/Mediation. If ADR/Mediation is to be encouraged in the Sheriff Court it may be appropriate to provide for a deadline for parties to submit a notice stating whether or not they consent to a referral to ADR/Mediation in terms of the timetable issued in proposed Rule XX.6(1)(b). Secondly, FOIL have concerns about the administrative implications of the rules. In particular it is essential that there is sufficient time between the commencement of the action and the diet of proof to allow parties to prepare and comply with the rules. It is likely that timetabling and administrative issues will differ from Court to Court. At least some element of consistency is desirable. Accordingly it may be desirable to fix a minimum period between the commencement of the action and the proof. The views of FOIL members differ on this issue. However it is thought that a period of at least nine months is appropriate. Thirdly, it is considered that there may be benefit in having a hearing or case management conference in personal injury cases of this nature. The experience of FOIL members participating in the Personal Injury Pilot Scheme at Glasgow Sheriff Court has generally been positive. It is suggested then that it may be appropriate to amend Rule XX.6 to provide that a hearing takes place at the stage when the record is closed and further procedure is being determined. At that hearing (as well as determining further procedure in the case) the Court could consider the state of preparation of both parties, the likelihood of settlement, the length of time required to conduct the proof and the likely date of the proof itself. In order to maximise the benefit of any such hearing it is suggested that it would be better to require the defender to lodge a Statement of Valuation of Claim prior to the hearing. Rule XX.6(1)(b)(vi) would require to be amended accordingly. Finally it is accepted that in the majority of cases it would be appropriate to fix a proof. However there may be case, albeit rare, where the pleadings raise an issue of relevancy. Such an issue might best be determined at debate without the expense associated with a proof. Accordingly it is suggested that rule XX.6(5) be amended to make the fixing of one of the specified options. Also there may be cases where there is an argument that a party has failed to give fair notice of a particular aspect of his case or defence. To deal with that situation rule XX.6(5) might be amended to read "to make some other specified order including, without prejudice to the foregoing generality, an order requiring a party to provide further specification of (a) the facts necessary to establish the claim or defence, (b) the legal basis of the claim or defence or (c) the heads of claim."

QUESTION 12

XX.9 – Statements of Valuation of Claim

Is the procedure for Statements of Valuation of Claim suitable for this type of action in the Sheriff Court?

The procedure for requiring parties to lodge Statements of Valuation of Claim is to be welcomed. However there would not appear to be any good reason why a party should only have 14 days to make a request for sight of the documents produced with the valuation. It is hard to see why there should be any time limit at all. Also it may be sensible to make it clear in rule XX.9 that a party minuter such as the MIB or an RTA insurer is also obliged to lodge a Statement of Valuation of Claim.

QUESTION 13

XX.10 – Pre-Proof Meetings

Is the procedure for pre-proof meetings suitable for this type of action in the Sheriff Court?

It is appropriate to introduce the pre-proof meeting in Sheriff Court procedure. However consideration should be given to the pre-proof meeting being held at an earlier stage of the litigation. There is no reason why, for example, the pre-proof meeting ought not to take place within, say 6 weeks of the hearing before the Court which is referred to in the answer to question 9 above. A requirement to hold a pre-trial meeting at an earlier stage of the litigation would be in keeping with the encouragement of ADR/Mediation in personal injury claims. From the practical point of view it could be difficult to have a face-to-face meeting in all Sheriff Court personal injury cases. There may be cases where parties and their agents are based in different parts of the country. For that reason it would seem sensible to provide that the pre-proof meeting can be conducted by way of a video or telephone conference call.

October 2006