

Response to sheriff court rules
council consultation on proposals
for procedural rules for personal
injury actions in the sheriff court
September 2006

About the Scottish Consumer Council

The Scottish Consumer Council (SCC) was set up by government in 1975. Our purpose is to promote the interests of consumers in Scotland, with particular regard to those people who experience disadvantage in society. While producers of goods and services are usually well-organised and articulate when protecting their own interests, individual consumers very often are not. The people whose interests we represent are consumers of all kinds: they may be patients, tenants, parents, solicitors' clients, public transport users, or simply shoppers in a supermarket.

Consumers benefit from efficient and effective services in the public and private sectors. Service-providers benefit from discriminating consumers. A balanced partnership between the two is essential and the SCC seeks to develop this partnership by:

- carrying out research into consumer issues and concerns;
- informing key policy and decision-makers about consumer concerns and issues;
- influencing key policy and decision-making processes;
- informing and raising awareness among consumers.

The SCC is part of the National Consumer Council (NCC) and is sponsored by the Department of Trade and Industry. The SCC's Chairman and Council members are appointed by the Secretary of State for Trade and Industry, in consultation with the First Minister. Martyn Evans, the SCC's Director, leads the staff team.

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The SCC assesses the consumer perspective in any situation by analysing the position of consumers against a set of consumer principles.

These are:

ACCESS

Can consumers actually get the goods or services they need or want?

CHOICE

Can consumers affect the way the goods and services are provided through their own choice?

INFORMATION

Do consumers have the information they need, presented in the way they want, to make informed choices?

REDRESS

If something goes wrong, can it be put right?

SAFETY

Are standards as high as they can reasonably be?

FAIRNESS

Are consumers subject to arbitrary discrimination for reasons unconnected with their characteristics as consumers?

REPRESENTATION

If consumers cannot affect what is provided through their own choices, are there other effective means for their views to be represented?

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Introduction

The Scottish Consumer Council welcomes the opportunity to respond to the Sheriff Court Rules Council consultation paper on Proposals for Procedural Rules for Personal Injury Actions in the Sheriff Court.

The purpose of the Scottish Consumer Council is to make consumers matter. We do this by putting forward the consumer interest, particularly that of disadvantaged groups in society, and by working with those people who can make a difference to achieve beneficial change. We are therefore particularly concerned within the impact of the proposed rules on individuals who suffer personal injuries and then have to pursue compensation through the civil justice system.

We agree with the recent final report of the Civil Justice Advisory Group chaired by Lord Coulsfield¹ that the courts should be viewed as a last resort, should other less formal means of dispute resolution prove unsuccessful. It is therefore important that the proposed new rules are viewed in the context of the court rules currently proposed by the Council to encourage the parties to an action to consider alternative dispute resolution at an early stage.

We are not in a position to respond in detail to the questions in Part 2 of the consultation paper, but we do respond below to the questions in Part 1 about the general proposition. In general terms, we welcome the thrust of the proposals. While we still await the forthcoming research report on the new Court of Session rules for personal injury cases, we understand that this is likely to demonstrate that the reforms have been a success, leading to faster, and presumably also cheaper, resolution of personal injury cases. This can only be in the interests of the injured parties, at a very difficult time in their lives. Quicker resolution should reduce the stress and anxiety involved in the court process, and should result in faster payment of any damages awarded than under the previous system.

We therefore welcome these proposals to introduce similar rules into the sheriff courts, in order to speed up the process, deal with contentious issues at an early stage, and encourage earlier settlement. The Civil Justice Advisory Group's report noted that there was evidence of a demand for greater specialisation within the courts generally. Where they have been introduced, specialised procedures, including the personal injury procedure in the Court of Session, have been seen to work well and to have clear advantages for all of those involved. In larger courts, the sheriffs allocated to a particular procedure may have specialist knowledge of the relevant area of substantive law. However, some of those consulted by the Civil Justice Advisory Group expressed the view that

¹ *The Civil Justice System in Scotland - a case for review?: the final report of the Civil Justice Advisory Group*, published by the Scottish Consumer Council, November 2005.

specific knowledge of the specialist *procedure*, together with a guarantee that the same sheriff will deal with the case throughout, may be even more important than specialist knowledge of the law. While the scope for specialist sheriffs may be more limited in smaller sheriff courts, a more streamlined and efficient procedure should benefit the parties wherever they may be.

We understand that the availability of an improved and streamlined procedure in the Court of Session is also one of the principal reasons why some solicitors choose to raise lower value personal injury cases in the Court of Session. This procedure is seen to offer quicker resolution and a higher standard of consistency than the sheriff courts. As the final report of the Civil Justice Advisory Group noted, however:

*'it can be forcibly argued that there are many practical reasons why the time of the supreme court should not be occupied with cases of lower financial value, unless they raise questions of general importance and that the proper approach is to find ways of improving consistency and speed in the sheriff courts. Cases of general importance can be dealt with by permitting a reference to be made to the superior court where appropriate.'*²

While the introduction of such rules will not preclude parties from going to the Court of Session, bringing more streamlined procedures into local sheriff courts will allow the parties to choose a court which may be more convenient for them and for any witnesses involved, rather than having to travel to Edinburgh. The new rules should also benefit those who are eligible for legal aid in personal injury cases, as these pursuers are currently obliged in most cases to use the sheriff court procedure. The Scottish Legal Aid Board will not generally make legal aid available to raise proceedings for financial claims in the Court of Session where the amount likely to be awarded is less than £50,000, unless the solicitor can show that there is a particular complexity or difficulty which would make the case unsuitable for the sheriff court.³

In 2004, we reached agreement with the STUC that, while the small claims limit should be substantially increased, the privative jurisdiction limit should not change in relation to personal injury cases. We accepted that there should be no change to the limits for personal injury cases until there was a review of how such cases were dealt with, including issues of access to justice, the benefits of the new Court of Session rules and the recovery of insurance premiums. This remains our view: we believe that the small claims limit should be increased to £5000 for other cases in the meantime,⁴ although we would like to see an entirely new approach to dealing with cases of lower financial value generally.

² See footnote 1, at paragraph 8.39.

³ Source: *The Recorder, Issue No.39*, published by the Scottish Legal Aid Board, May 2004.

⁴ Note: we also believe that there may be a case for excepting housing disrepair cases from the increased limit, as in England and Wales.

We believe that the introduction of the proposed new rules in the sheriff courts should address some of the concerns expressed by some lawyers that some lower value personal injury cases cannot currently be adequately dealt with in the sheriff court.

More generally, we agree with the conclusions of the Civil Justice Advisory Group that there is scope for greater case management by judges and sheriffs in Scotland, as one way of addressing issues of cost and delay in the civil justice system. If these rules are to be truly effective, we consider that they need to be part of a wider strategy of increased case management, encouraging all of those within the civil justice system to try to settle cases as early as possible.

We note in this context that the Law Society of Scotland and the Federation of Scottish Claims Managers have recently agreed a voluntary pre-action protocol for personal injury claims with a value of up to £10,000. We believe that greater case management along these lines is to be encouraged, and we hope that this will lead to an increase in cases being settled at an early stage, as has happened in England and Wales, following the introduction of pre-action protocols there.

Answers to the consultation questions

Part 1 General proposition

Q1a 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 Ordinary Cause Rules?

Q1b Please provide comments reasons for supporting or rejecting the general proposition.

Yes, we agree that such rules should be introduced, for the reasons outlined in the introduction to this response. Parties in ordinary cause personal injury actions will generally have legal representation; in most cases, this is likely to be provided by their insurance company or their trade union. There may, however, be a small number of pursuers who do not have legal representation, and it is important that this should be borne in mind when drafting the rules and any accompanying guidance.

Q2a 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?

Q2b Please provide reasons for your answer.

We can see no reason in principle why the rules should not apply in summary cause cases. However, we would again be concerned that there may be some individual pursuers who do not have legal representation because they do not qualify for legal aid and/or cannot afford to pay the disproportionate costs involved, given the low financial limit for summary cause cases.

Summary cause procedure remains for historical reasons, having been left in place when the small claims procedure was introduced. We are not convinced that there is any longer a case for retaining three separate procedures. We think that, if the small claims limit were to be substantially increased – and we have argued that it should go up to £5000⁵ - there would be a strong argument for abolishing summary cause procedure altogether. We also understand that at present summary cause procedure can result in more administrative work for solicitors in undefended cases than ordinary cause procedure.

While summary cause procedure remains, however, we would be concerned that any requirement for excessive formality under the proposed rules may

⁵ *Policy paper on increasing the financial limit in small claims procedure*, Scottish Consumer Council, November 2003.

disadvantage any individual pursuer. Ways would have to be found of ensuring that this does not happen, as this would deny such pursuers access to justice.

Q3a 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?

Q3b Please provide reasons for your answer.

In 1999, the Scottish Executive announced that personal injury cases were to be taken out of the small claims procedure altogether. We supported this, and this remains our policy. We believe that personal injury claims present particular problems within the small claims procedure, given their complex and difficult nature and the imbalance of power between the parties, regardless of the sum involved.

Research has found that unrepresented pursuers in small claims personal injury cases are at a distinct disadvantage in negotiating their claims, as they are generally faced with large companies or other legally represented bodies. The small claims procedure also puts at a disadvantage those pursuers who are represented, including those with a claim for more than £750. The negotiating power of those who pay privately is reduced by the expenses ceiling in small claims, while legal aid is not available for representation in a small claim.⁶ Exempting personal injury cases from the small claims procedure would allow those who are financially eligible to apply for legal aid for representation.

If for any reason personal injury cases were not excepted from small claims procedure, we would be concerned about proposals to introduce the new personal injury rules into the small claims procedure. It is clear that pursuers in such cases are already disadvantaged, and any requirement to comply with more formal and complex rules than at present would only serve to aggravate this imbalance. We are concerned that there are many problems with the way in which the current small claims procedure is operating, and we do not believe that rules changes alone will address these.

We agree with the conclusion of the Civil Justice Advisory Group that there is a need to review the way in which cases of lower financial value are dealt with. The current small claims procedure is not working as intended, and better ways of securing access to justice for those with lower value claims need to be found as a matter of urgency.

⁶ *In the Shadow of the Small Claims Court*: Samuel, Scottish Office Central Research Unit, 1998.