Sheriff Court Rules Council

Adopting the Court of Session rules for personal injury cases in place of Chapter 34 of the Summary Cause Rules 2002

A response by the Association of Personal Injury Lawyers

June 2008

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 over 170 members in Scotland. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

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 members in preparing this response:

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Executive summary

It is our view that the Court of Session rules for personal injury cases ("the Coulsfield Rules") ought to be adopted in place of Chapter 34 of the Summary Cause Rules 2002. There are several reasons for this. Firstly, we believe there are problems with the current summary cause rules. Secondly, the Coulsfield Rules are a well established set of rules that frequently lead to cases settling in the Court of Session and their introduction for summary causes would benefit parties involved in personal injury litigation. Finally, we believe that having one clear procedure for personal injury claims would be less confusing than applying different procedures depending on the value of the claim.

In addition, the Sheriff Court Rules Council ("the Council") decided in February 2007 that cases with a value of between £1,500 and £5,000 should be subject to the Coulsfield Rules. The majority of cases within the new summary cause bracket would therefore have been subject to these rules had the summary cause limit not been increased in January 2008. The Coulsfield Rules are, therefore, clearly thought to be the most appropriate rules for the majority of cases which fall within the summary cause bracket and as such we believe these rules ought to be the ones which apply to all personal injury actions which fall under the summary cause limit of £5,000.

Finally, we remain concerned about the restrictions in place in relation to the parties' ability to appeal on the facts in summary causes, and hope that the Council will look at this issue at the same time as considering whether to introduce the Coulsfield Rules for summary causes.

Problems with current rules

We do not believe the current summary cause rules cases are appropriate for personal injury actions up to £5,000. We have concerns about the current procedure for raising a claim and the rules regarding the first hearing, as well as the short timetable imposed thereafter.

The procedure for raising a claim

Starting a case under the current summary cause procedure is time consuming and therefore incurs significant cost. A statement of claim must be accompanied by a medical report as well as a statement of valuation with supporting documents so that at the first hearing the sheriff can try to resolve the case.

If the client has instructed solicitors shortly before the time-bar for raising the claim, this can be problematic as there may be no time to gather all the documentation needed, such as a medial report and details of wage loss from an employer.

In addition, as most cases are not resolved at the first hearing (see below), producing documents and gathering supporting evidence early is rendered a premature exercise. In cases which settle early this could mean that costs have been unnecessarily incurred. The Coulsfield Rules do not require the pursuer to lodge a statement of valuation of claim until after the lodging of defences.

The first hearing

Under the current rules, at the first hearing the sheriff should ascertain the factual and legal basis of the action and defence and seek to settle the action (rule 8.3). We understand this is not generally happening in practice and that instead defences are being noted and proofs fixed. There may be some sheriffs who seek to settle a few cases at the first hearing, but because this not done across the board this just makes the system inconsistent.

We believe that sheriffs are not usually able to consider cases in any detail at calling diets even if they are inclined to do so because of the volume of cases which they have to deal with.

There were 6087 personal injury cases raised in Scotland last year[1], approximately 60% of which were worth less than £5,000[2] and therefore fall within the summary cause procedure. In many of these cases significant debate in law will be required to resolve the case as the same legal principles can apply to cases with a value of £1,000 as in cases of £100,000 making it just as necessary for the sheriff to hear arguments.

The rules as drafted therefore require a significant amount of sheriffs' time to be spent at the rule 8.3 hearing, but this time is simply not available. The Coulsfield Rules do not require such an investment of judicial time.

A short timetable

If a matter is set down for proof, the time allowed to prepare for this is often too short. The proof itself can sometimes be fixed for a date only 12 weeks from the calling diet, giving parties only eight weeks to lodge any expert reports, as these have to be lodged not less than 28 days before the diet of proof.

If an incidental application needs to be made, for example for an inspection of the accident locus, this must be done after the defence has been stated but whilst trying to comply with the rules. The rules currently allow only 28 days after the fixing of the proof for each party to intimate and lodge a list of documents, as well as intimate a list of witnesses to every party. This leaves insufficient time for an incidental application to be made and heard to ensure that further dates are complied with.

[1] APIL sent a request for information to the Court of Session Management Information System team on 1.2.08. On 10.3.08 the MIS team replied to our request for information and said that 2485 personal injury cases were raised in the Court of Session and 3602 raised in the Sheriff Court in 2007.
[2] In March 2008 APIL asked members in Scotland for settlement figures for cases which had been litigated and concluded in 2007 and 2008. A sample of 2,840 cases collected from members at seven different firms showed that 1701(60%) settled for less than £5,000, 532 (19%) settled for between £5,000 and £10,000 and 607 (21%) settled for over £10,000.

Pursuers are particularly disadvantaged if a reasonable time to gather evidence is not allowed. To recover damages, a pursuer must prove his case to the court. This involves proving the defender owed the pursuer a duty of care, that the duty was breached; that the breach caused injury; and the extent and value of the injury.

The need to gain evidence to properly prepare a case, as well as sheriff courts' heavy workloads, means that the timetable for personal injury actions in the sheriff court often slips and cases are not resolved in an expedient manner. In contrast, the Coulsfield Rules impose a strict timetable upon parties, whilst at the same time allowing sufficient time periods for cases to be properly prepared. They ensure that cases progress steadily and are brought to a conclusion efficiently.

The success of the Coulsfield Rules

Chapter 43 of the Rules of the Court of Session (the Coulsfield Rules) have been widely welcomed as a success. We think their use for summary causes would enable claims to be resolved more efficiently than the system imposed by the current rules. As we said in our response to the Council's consultation on introducing the Coulsfield Rules to the sheriff court in 2006,

> *"The rules introduced in the Court of Session in 2003 have generally been welcomed by practitioners as improving the system. These rules have established strict timetables for cases, meaning that there can be no excuse for delays. Practitioners have also found that a high percentage of cases now settle before reaching trial."*

The Coulsfield Rules have not only been welcomed by pursuers' solicitors: others who responded the Council's 2006 consultation also welcomed them. The Forum of Insurance Lawyers said:

"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."

North Lanarkshire Council's view was that:

"the Court of Session Rules have resulted in a speedier resolution to cases which is of benefit to all parties."

In addition, Elaine Samuel's evaluation[3] of the Coulsfield Rules says their introduction was responsible for reducing delay (paragraph 11.2), and was successful in bringing forward the day of settlement (paragraph 11.5).

It is clear from these views, and others expressed in response to the Council's 2006 consultation, that the Coulsfield are considered, in general, to be working well in cases in which they are applied. It is our belief that they would work just as well in the sheriff court for summary causes.

One clear system for PI cases

We believe that everyone will benefit from having one clear procedure for personal injury cases. Parties would be able to have a better understanding of the procedure involved and sheriffs would not have to apply different rules in cases which may be similar because of the injury and the way in which the pursuer sustained the injury but are perhaps different in value due to the fact that one injured pursuer earned significantly more than another.

[3] "Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session (Chapter 43) " Elaine Samuel School of Social and Political Studies, University of Edinburgh, 2007

Having one standardised procedure is much clearer than having different systems which apply depending on the value of the claim. The boundaries for different types of claims are arbitrary in any event, especially in personal injury matters where one case can so easily thought to be worth a certain amount of damages but with a sudden, unexpected worsening of a client's illness or improvement in condition can easily become worth much more or less than previously thought.

The Council's decision to apply the Coulsfield Rules to cases over £1,500

We note that the Council had of course already decided that the Coulsfield Rules should apply to all personal injury actions above £1,500 by applying these rules for ordinary causes. The reason this decision is not, at present, going to be implemented for cases between £1,500 and £5,000 is the increase in the summary cause limit.

We believe that the reasons for the Council's considered decision, which was reached after extensive consultation, still pertain and that as the majority of cases within the new summary cause bracket of £0 - £5,000 would have been subject to the Coulsfield Rules prior to the limit being increased, they should still be subject to these rules now. There cannot be a system of rules in place designed only for the minority of cases which those with a value of £0 - £1,500 will surely be.

Most of the respondents to the Council's 2006 consultation who supported the introduction of the Coulsfield Rules for ordinary causes but not for summary causes argued that the procedure is uneconomical for the latter. This argument does not hold up for cases worth up to £5,000.

Another argument made in 2006 was that low-value cases are straightforward and need a straightforward procedure. The Coulsfield Rules are such a procedure, with a clear structure and strict time limits. It is therefore entirely appropriate for the Coulsfield Rules to be introduced for summary causes.

Appeals

By virtue of rule 25 an appeal in a summary cause is now available on a point of law only. We believe this is unduly restrictive. At present in ordinary procedure appeals are available on findings in fact, although in practice the appellate courts will amend findings in fact only where the judge at first instance has gone "plainly wrong". This was discussed in *Thomson* v *Kvaerner* [2003] UKHL 45, a decision of the House of Lords. This is an essential proviso to cover extreme cases.

In summary causes even the "plainly wrong" safeguard has been removed. Our members have experience of ordinary cases on appeal for amounts between £3,000 and £5,000 where these arguments have been successfully made before sheriff principals without undue expense. The raising of the summary cause level has had the effect of depriving litigants on both sides of legitimate points of appeal. In addition to adopting the Coulsfield Rules for summary causes, we therefore believe that the Sheriff Court Rules Council should take action to ensure that appeals on points of fact can be made in cases less than £5000, to restore the previous position and provide parties with a course of action in extreme cases.