Scottish Government

Making Justice Work

Courts Reform (Scotland) Bill - consultation

A response by the Association of Personal Injury Lawyers

May 2013

The Association of Personal Injury Lawyers (APIL) was formed by pursuers' lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with more than 20 years' history working to help injured people gain the access to justice they need. APIL currently has around 4,300 members, 170 of whom are in Scotland. Membership comprises solicitors, advocates, legal executives and academics whose interest in personal injury work is predominantly on behalf of pursuers.

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; and
- to provide a communication network for members

Any enquiries in respect of this response should be addressed, in the first instance, to:

Lorraine Gwinnutt, Head of Communications
APIL
3 Alder Court, Rennie Hogg Road
Nottingham NG2 1RX
Tel: 0115 943 5404; E-mail: lorraine.gwinnutt@apil.org.uk

Introduction

APIL has been fully engaged in the Scottish Civil Courts Review, led by Lord Gill, from the outset. Many issues and arguments which we believe to be fundamental to access to justice for pursuers are on record and have been well-rehearsed during the review and consultation process. In this response, therefore, we have confined our answers only to those questions where we believe additional emphasis and review is required, and to new developments arising from the Government's consultation. We have also confined our answers to our members' specialist field of personal injury.

Chapter 1: Moving civil business from the Court of Session to the sheriff courts

Q1: Do you agree that the provisions in the Bill raising the exclusive competence and providing powers of remit will help achieve the aim of ensuring that cases are heard at the appropriate level?

We agree that cases need to be heard in the appropriate forum. It is not acceptable, for example, that a straightforward £5,000 whiplash claim should be dealt with in the Court of Session.

It was suggested by Lord Gill in the Scottish Civil Courts Review (SCCR) that an increase in the sheriff court limit to £150,000 would leave approximately 36 per cent of all personal injury cases in the Court of Session.

APIL commissioned research which was conducted by Alex Quinn & Partners (AQP), Law Accountants, who carried out an analysis of judicial accounts prepared by them during April 2012. This data was submitted to the Government in February[1]. We asked AQP to note the sum sued for and sum awarded in all Court of Session and sheriff court cases for that period. The firm is instructed by a number of solicitors' firms specialising in pursuer personal injury work.

The AQP data shows that more than 84 per cent of cases settle at a figure under £30,000, with around 73 per cent settling at under £20,000.

---

[1] Scottish Government Justice Directorate: Civil Courts Reform – Information Gathering; a response by the Association of Personal Injury Lawyers

The research clearly indicates that the proposed increase would remove more than 96 per cent of cases from the Court of Session, effectively eliminating it as a court of first instance for injured people. This research confirmed earlier research, again carried out by AQP, some three years earlier.

If the original intention of the Gill proposals to leave around a third of personal injury cases in the Court of Session still remains, the data suggests that the appropriate limit ought to be based on a settled sum of £30,000 or less. APIL's position has always been that this should be the new limit, provided that the other proposed measures, such as a properly staffed and resourced specialist court, are put in place.

While we agree with the Government's assertion in paragraph 41 of the consultation paper that 'for cases which do not involve large sums of money, the sheriff court......is the best place to deal with them', we do wonder what is meant by 'large sums of money'. Research commissioned by APIL shows that the average settlement sum in the Court of Session is just over £25,000. This is, in fact, a considerable sum of money to many people, especially when the average annual pay for Scots is just under £26,000.

If it is the intention to proceed with the proposed increase in limit, it is important that the level of justice currently experienced by parties using the Chapter 43 procedure ('Coulsfield rules') in the Court of Session, is replicated in the sheriff courts. We address the pertinent issues later in this paper.

We firmly believe that the proposals within the draft Bill and consultation document need to be considered in tandem with the recommendations in the *Shaping Scotland's Court Services* document, recently approved by the Scottish Parliament, as well as the proposed changes to the criminal system, particularly in relation to corroboration. The likelihood is that there will be a significant increase in the volume of business dealt with by the sheriff courts, and it is obviously critical that they will have sufficient capacity to cope.

Sanction for counsel

The suggestion, at paragraph 42 of the consultation, that sanction for counsel in the sheriff court would only be available as an exception, is a matter of extreme concern. We accept, of course, that low value, straightforward disputes will not merit the use of counsel. There is an enormous difference, however, between those types of case and what the consultation paper describes as 'truly complex' cases, such as catastrophic injury.

We refute the claim that 'many solicitors feel that they have the expertise and the experience to conduct....cases involving catastrophic injury'. Indeed, at a recent meeting of around 30 APIL practitioner members, attendees were asked if they would be comfortable conducting catastrophic injury cases, without the benefit of counsel, and the response was entirely in the negative.

Furthermore, it must be remembered that there are many other cases where the injuries may be serious but not catastrophic, or where there are issues of complexity, such as complicated matters arising from loss of future earnings, which benefit from the input of counsel.

The issue here is one of equality of arms, and ensuring people have the right advice to help them gain the right settlement or award as soon as possible, and it must be recognised that the availability of counsel is an important asset in facilitating early settlement. The Bar brings the benefit of years of experience in case preparation, case pleading and presentation, which levels the playing field with defenders.

We also would draw attention to the specific retention of civil jury trial within the proposed new specialist personal injury court. This is an important feature of access to justice in personal injury cases and it seems strange that the ability to instruct counsel, with their almost unique experience of conducting civil jury trials, will be significantly restricted.

It is also important to recognise that defenders' insurers have the resources to fund counsel as a matter of routine and it would be especially iniquitous if a pursuer's solicitor were to find himself facing a defender's advocate or even QC in court because sanction for counsel was not available to the pursuer in such circumstances.

Paragraph three of the consultation sets out some principles for the operation of the civil justice system which include fairness in procedures and working practices; accessibility to all, and sensitivity to the needs of those who use the system. In order to help ensure these principles are maintained, we submit that it should be the responsibility of the sheriffs to implement the current test in each individual case. This decision should surely rest with the sheriff.

Chapter 2: Creating a new judicial tier within the sheriff court

Q5: Do you think that the term 'summary sheriff' adequately reflects the new tier and its jurisdiction?

Our concern does not lie with the name of the new tier of judge, but with the remit. Summary cause rules and procedures to deal with personal injury cases below the value of £5,000 are already in place and it would be completely inappropriate for such cases to be dealt with in 'new, more user-friendly and appropriate ways' as described in paragraph 56 of the consultation paper.

There are sound reasons for introducing a specialist PI court and it makes absolute sense that all cases should go through that court. While we recognise that the current intention is that there should be scope for specialisation, we believe such specialisation will never materialise for personal injury cases when the priorities of the summary sheriffs will be to focus on the criminal cases which will form 80 per cent of their case loads.

It is difficult to comprehend why personal injury cases should be subject to any simplified procedure when the Government quite clearly recognises the reasons why this would be completely inappropriate. Scotland has already tried a simplified procedure for low value personal injury actions, in the shape of the small claims court. Research by Elaine Samuel in 1998 highlighted the difficulties faced by pursuers who were expected to represent themselves or with the assistance of in-court advisers. Indeed, in September 2007, Justice Secretary Kenny MacAskill announced that, as part of a package of measures for lower value claims, all personal injury actions were to be removed from the small claims procedure. “This will mean that anyone pursuing such a claim will be able to obtain the necessary medical evidence and legal representation required,” he said at the time.[2]

The new summary cause rules, introduced just last year, were the latest step in the move towards uniformity of rules for personal injury actions in Scotland. The Government has clearly recognised that the value of personal injury claims does not necessarily reflect their complexity, as Mr MacAskill suggested when he said of personal injury cases:

> *“Such actions are different in their potentially technical nature and in the fact that legal representation and the availability of legal aid may be important. Personal injury cases are often complex, and in addition to legal representation, may require expert witness evidence and attendance.”*[3]

Personal injury cases below the value of £5,000 still have the potential for complexity, and should not be subject to a separate procedure, but should be dealt with by specialist sheriffs in the new specialist court. If such cases do happen to be raised in local sheriff courts, they should be subject to a specialised personal injury procedure such as the current summary cause model with, where at all possible, specialist sheriffs dealing with them.

---

[2] http://www.scotland.gov.uk/News/Releases/2007/09/12100801

[3] Extract from Justice Committee Debate, 23/10/07

The issue of complexity in personal injury cases has been thrown into sharp relief since the Enterprise and Regulatory Reform Act received Royal Assent. Changes to the law relating to civil liability are expected to be introduced before the end of this year, which will mean pursuers injured in a workplace will no longer be able to rely on the fact that they have been injured as a result of a breach of statutory duty, but will be required instead to prove that negligence has occurred.

The law in this area will return to being complex and uncertain; it will be more difficult and more risky for people who have been injured to claim proper redress, when all they did was simply turn up for work; it will be more difficult to establish liability, cases will be more likely to run to proof, and take longer to resolve.

According to Scottish Government statistics, there were almost 2,500 personal injury cases dealt with under the summary cause procedure in 2011-2012. While the vast majority of these were road traffic cases, the remainder were predominantly injuries sustained by people at work. It is difficult to see how a summary sheriff, possibly working on a part-time basis, under a simplified procedure, and under pressure from a massive criminal caseload, would manage to cope.

Chapter 4: Creating a specialist personal injury court

Q16: Do you agree with the establishment of a specialist personal injury court?

APIL has always supported the establishment of a specialist personal injury court, as we believe specialisation to be fundamental to the success of these reforms. This, however, is on the basis that sufficient safeguards are in place to ensure a similar quality of justice and service as is currently provided by the Court of Session. At this stage it is difficult to say with any certainty how many cases will be raised in local sheriff courts and how many in the specialist court, although, if it is to work properly, the specialist court should be used as much as possible to allow the sheriffs there to develop their specialist skills and develop the specialist court as a centre of excellence.

We do have serious concerns about the resourcing of the specialist court, particularly given the removal of more than 96 per cent of personal injury cases from the Court of Session to the sheriff courts, and the impact of the Scottish Court Service's proposals to close some sheriff courts.

In APIL's response to the Scottish Court Service (SCS) consultation on court closures, we acknowledge the need to make cost savings and, insofar as personal injury work is concerned, recognise the fact that closing some outlying sheriff courts in favour of a central specialised court may be the least damaging way to cut costs while retaining access to justice for injured people. We also argue, however, that in addition to the proposed specialist court in Edinburgh, there should be a further specialist court in Glasgow, to ease the very real possibility of delays and strain on the Edinburgh court's facilities.

According to the AQP research, of the 2,571 personal injury cases initiated in the Court of Session in 2011-12[4], 2,468 will go through the sheriff courts under the Government's current proposals. The SCS consultation and response indicate that the 1,170 civil cases dealt with by the Haddington sheriff court in 2011-12 will be transferred to the Edinburgh Sheriff Court once the Haddington court closes. The combined sitting days of the two sheriff courts in the same year was 3,160, and Edinburgh Sheriff Court has a capacity for 3,750 court sitting days a year.

The analysis carried out by the Scottish Court Service in relation to court capacity simply relates to physical capacity. It does not address the availability of sheriffs, court clerks and, in criminal cases, procurator fiscals. Constraints in the availability of each or any of these would have a significant impact on court business being dealt with effectively.

Even allowing for the fact that not all cases will be heard in the specialist court in Edinburgh, and for the fact that High Court sitting days in Edinburgh Sheriff Court will be removed, the statistics clearly suggest that the specialist court, with its proposed 200 sitting days and two specialist sheriffs, will struggle to deal with the volume of cases.

---

[4] Civil Law Statistics in Scotland 2011-12

It is widely accepted that the Coulsfield reforms have been a great success in improving the personal injury procedure within the Court of Session. The Court has developed into a centre of excellence with specialised practitioners on both sides,often utilising counsel to the benefit of both parties and the court. The vast majority of cases are resolved without the need to utilise any court time whatsoever.

One of the principal concerns we have is the difference in culture and behaviour between the Court of Session and the sheriff courts. There are a number of reasons for this. One is that parties know that if a case is not settled before the date set down for proof in the Court of Session, then the proof is virtually certain to go ahead on the allocated date. That knowledge influences behaviour. The situation in the sheriff court is very different. It is unusual to be allocated more than one day at a time for a proof. It is unusual for a proof to commence on the first allocated day, as there is often other business which takes priority. It is common for those proofs that do run to be spread over a number of weeks or even months. This again influences behaviour. Our concern is that with only two specialist sheriffs, all that would need to happen is for three cases to run to proof one particular week, or a two or three week proof to run, and the ability of the court to hear cases is significantly affected. Consequently rather than having a culture where the expectation is that the case will go ahead if it is not settled, there is an expectation that in fact the case will not go ahead. That influences behaviour on both sides.

Another reason for the differences in behaviour is the success of pre-trial meetings in the Court of Session. These generally assist settlement in cases which have not yet settled by the time of the meeting. An important element is the requirement to have the meeting face-to-face with the other side. This contrasts sharply with the sheriff court requirement to have a pre-proof conference which invariably is conducted by telephone. Our members' experience is that these are far less successful in achieving any meaningful progress in a case, far less settlement. Defenders' agents are often unprepared, and unwilling to discuss resolution, with the result that the case simply proceeds to the proof diet. While most cases do settle, it is often at a late stage, and as indicated above, given the uncertainty as to when the case will be heard, this can often be very close to, or indeed after, the case was originally due to commence.

We feel that the role of counsel should be acknowledged as a factor in the high settlement rate within the Court of Session procedure. Often counsel's involvement in a case is the important factor facilitating settlement.

For the specialist court to work properly, it should have sufficient capacity and resource, particularly in relation to.the number of sheriffs, clerks and support staff who are available to run the court, both in terms of any appearances that may be required but also in respect of administrative work. It should perhaps be noted at this stage that the Court of Session currently receives around £2 million a year in court fees from personal injury actions, which accounts for around 50 per cent of its total income. Given the relatively small number of cases that go to proof or trial – around 20-30 per year – and the limited number of cases that go through the court at all, this represents an extremely good return, and reflects the positive impact of the Court on the behaviour of all parties.

Technology in the sheriff court requires significant improvement and investment. Much of the administrative work in the Court of Session is carried out by email, in particular the e-motion procedure. This really needs to be available , not just in the specialist personal injury court, but also in the other sheriff courts dealing with personal injury cases. In addition, electronic recording of evidence, which is currently available in the Court of Session, should be extended to the sheriff court, particularly in complex cases.

As indicated above, we would support the introduction of the pre-proof conference or an equivalent 'actual' meeting where both parties' representatives are present, and in a position to take and act upon instructions. In certain situations one could see that allowing this meeting to take place by video-link may be appropriate, but subject to the condition relating to availability and provision of instruction.

An important feature of the Chapter 43 procedure which would need to be replicated in the specialist court is the allocation of a fixed diet of proof/trial at an early stage of the case. This would assist in providing certainty to parties, and a standard four-day diet as a default allocation should be implemented.

Specialisation of sheriffs

Paragraph 112 of the consultation points out that, under the SCCR proposals for greater specialisation among sheriffs in the sheriff court, 'there may be at least one sheriff in each sheriffdom who specialises in personal injury actions and so it may not be necessary for actions to be raised in the specialist court to access a specialist sheriff'.

While this is obviously promising, it is also vague. The review recommended that 'the sheriffs principal should have responsibility for designating sheriffs within their sheriffdom to hear cases in a particular area of specialisation'.

It would be helpful to have some confirmation from the Government about how specialisation is to be achieved and within what timeframe. Not only will specialised sheriffs help to relieve some of the strain on the specialist court by attracting cases to the sheriff courts but, as we point out in our response to the Government's response to the SCCR report, specialist sheriffs could make a significant difference in helping injured people receive justice in a timely way, as well as saving costs. Dedicated sheriffs would be able to develop the expertise necessary to ensure effective case flow management and for any interlocutory and procedural hearings which may be necessary.

For a system of specialised sheriffs to work properly, however, it is important that there are enough of them and that there is significant investment in training and administrative resources.

Chapter 7: Alternative Dispute Resolution

Q36: Do you think that ADR should be promoted by means of court rules?

We refer here to mediation, as this is the most relevant form of ADR to personal injury cases.

Mediation can be a useful part of every personal injury practitioner's 'toolkit', and APIL has an ongoing commitment to ensuring its members are aware of mediation and how it may be used to benefit injured people.

Mediation can work very well in certain cases in which there is an ongoing relationship to salvage, or where more is required by the injured person than monetary compensation, such as an apology; or where negotiations have broken down or stalled. While we have no objection to mediation being encouraged, where appropriate, under no circumstances should it ever be forced upon unwilling parties by the courts.

It should also be remembered that mediation is costly and adds an extra layer of expense to the process of making a claim.

Where mediation is seen by all parties to be a reasonable option, it is essential that the process is conducted by trained mediators with experience in personal injury litigation.

- Ends -

Association of Personal Injury Lawyers

▶ 3 Alder Court, Rennie Hogg Road, Nottingham, NG2 1RX

● T: 0115 958 0585 ● W: www.apil.org.uk● E: mail@apil.org.uk