

THE SCOTTISH CONSUMER COUNCIL (SCC)

MODERNISING THE CIVIL JUSTICE SYSTEM

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL02/05)**

APRIL 2005

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 members in the UK and abroad, of which 125 members are based 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 prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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

Fred Tyler	APIL Executive Committee (EC) member for Scotland
Ronald E Conway	Regional Co-ordinator for APIL Scotland
David Short	Regional Secretary for APIL Scotland

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

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

MODERNISING THE CIVIL JUSTICE SYSTEM

Executive Summary

- APIL believes that there is a strong argument for accredited and specialist solicitors to be recognised within publicly funded legal work, and part of this recognition should include a higher fee rate being awarded to them. An appropriate accreditation system which could be used would be the College of Personal Injury Law (CPIL).
- APIL suggests that there should be an inflationary increase in the current summary cause limit for the Sheriff Court backdated to the last time it was raised.
- APIL firmly believes that personal injury cases should be taken out of the small claims court.
- APIL supports the promotion of mediation as a settlement option and believes it is part of a personal injury practitioner's 'toolkit'. It should continue to be voluntary and should not be forced on either party.
- In terms of what processes could help solve civil justice problems within personal injury, APIL supports the adoption of both a pre-action protocol and the widening of the Coulsfield rules to the Sheriff court.
- Public funding for both legal aid and civil legal advice and assistance in Scotland, APIL asserts, should have no further restrictions in terms of funding or eligibility placed on it. In addition the remuneration levels should be increased to reflect the specialism of the lawyer.

Introduction

1. APIL welcomes the opportunity to put forward its comments on the Scottish Consumer Council's (SCC) consultation on 'modernising the civil justice system'. Please note, however, that APIL represents the interests of injured pursuers and so will tackle the consultation only from the viewpoint of victims of accidents and diseases in Scotland. Consequently APIL's responses will not be applicable to areas within the civil justice system which are not directly related to personal injury actions.

Seeking help, advice and representation

Accreditation in state funded legal work

2. APIL believes that there is a strong argument for accredited and specialist solicitors to be recognised within publicly funded legal work, and part of this recognition should include a higher fee rate being awarded to them. The use of accreditation will ensure that only fully competent and experienced practitioners deal with cases. This is particularly important in the context of personal injury actions - which are often very complex - where it is essential that the lawyer dealing with the case has the necessary specialist knowledge required. The use of accredited personal injury lawyers will, lead to considerable cost savings due to the fact that only strong cases properly presented should be brought to court using public funds. This will ultimately lead to more cases being won, with the public purse being reimbursed by the loser paying legal costs, and the refund of benefits and hospital expenses.
3. APIL would like to take this opportunity to highlight to the SCC the experience we have in setting and monitoring accreditation criteria through the College of Personal Injury Law (CPIL). CPIL is overseen by an independent academic quality council, and provides accreditation for legal practitioners who work predominantly for the injured pursuer in all UK jurisdictions, including Scotland.

4. The CPIL accreditation scheme is based on entry to CPIL on one of five levels as follows:
 - Associate (for those least experienced and least qualified in personal injury law);
 - Member (for those with up to 5 years post qualified experience)
 - Litigator (for those with 5 to 10 years post qualified experience)
 - Fellow (for highly experienced litigators with more than 10 years experience in practice)
 - Senior Fellow (for those with more than 15 years experience and who have distinguished themselves through the years by their outstanding contribution to personal injury law and practice).
5. All information is assessed by an independent CPIL panel, which decides whether the application for membership at a certain level should be accepted or rejected in accordance with set objective criteria.

What kinds of institutions are needed for solving civil justice problems?

Jurisdiction levels

6. APIL suggests that there should be an inflationary increase¹ in the current summary cause limit for the Sheriff Court backdated to the last time it was raised². Due to the length of time since the threshold was last increased – nearly 16 years – APIL considers such an increase to be appropriate and proportionate. We are, however, strongly opposed to any attempt to raise the limit further than this. For example, APIL was against the threshold figure of £5,000 as recently suggested by the Scottish Parliament's Justice 2 Committee in respect of the Draft Sheriff

¹ See Cumulative UK Inflation table at: <http://www.safalra.com/other/ukinflation.html>

² The variation in limit of privative jurisdiction of the sheriff court was increased from £500 to £1,500 by The Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 1988 (SI 1988/1993)

Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2001³.

7. APIL's opposition to any further increase in the jurisdiction level stems from our concern for the likely effect such an increase would have on the ability of injured victims to achieve access to justice. For instance we are concerned that the abbreviated summary cause procedures in the Sheriff's Court are unsuitable for some personal injury claims and particularly disease claims. In addition, we believe that such an increase would have the adverse effect in a small jurisdiction that claimants would not have the quality and consistency of decision making that is currently achieved within the Court of Session. Finally, we feel that the ability of an injured victim to achieve access to justice will be affected by the potential shortfall in legal costs in claims falling within the summary cause limit. The cost to the pursuer will exceed what is recoverable in costs. APIL considers that negligently injured victims are already in a vulnerable position and this vulnerability should not be exacerbated by a change in jurisdictional rules.

8. APIL firmly believes that personal injury actions should be taken out of the small claims court. The small claims court in Scotland operates for cases up to £750 in value, including personal injury cases. The most significant feature of the Small Claims court is that there is no funding for legal representation, meaning that litigants appear in person, almost invariably against a legally represented defender. APIL feels that due to the complexity of personal injury actions, as well as the potential inequality of arms, the lack of independent legal representation will place the injured pursuer at a significant disadvantage. The research already shows this⁴. APIL therefore proposes that all personal injury actions should be removed from the small claims court.

³ APIL responded to this suggestion by suggesting an inflationary increase. See: <http://www.apil.com/pdf/ConsultationDocuments/40.pdf>.

What kinds of processes are best for solving civil justice problems?

Mediation

9. APIL believes that mediation should be part of a personal injury practitioner's 'toolkit'. Mediation can work well in cases in which there is an ongoing relationship to salvage (such as a claim by a pupil that he is being bullied at school), where more is required by the injured person than monetary compensation (an apology, for example) or where negotiations have broken down or stalled. APIL does, however, believe that there is room for debate on this issue within the Scottish jurisdiction.

10. While APIL endorses the principles of mediation, we view it as an option to be used by the lawyer where he sees fit rather than a default course of action. There has yet to be convincing evidence that mediation is either significantly cheaper or quicker than ordinary litigation, or that it results in more settlements. For example in a recent review of a central London voluntary mediation scheme, rates of settlement have dropped from 62 per cent between 1996 and 1998 to only 40 per cent overall between 1999 and 2003⁵. The use of mediation adds a further layer of procedure and irrecoverable costs. The mediator has to be paid for, accommodation provided, and there are time based lawyer costs for preparation and attendance. This potential increase in costs means that mediation would generally be inappropriate for modest value cases; the costs incurred would be disproportionate to the final award and would inevitably come out of the pursuer's damages.

11. APIL is particularly concerned about the imposition of mediation on parties by the courts. The principles of mediation are based on

⁴ The Scottish Office: Legal Studies Research Findings No. 18 (1998) – “*In the Shadow of the Small Claims Court: The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation*” Elaine Samuel. A summary of this research can be found at <http://www.scotland.gov.uk/cru/resfinds/lrf18-00.htm>

⁵ Hazel Genn and March Manson, *Review of Central London County Court Voluntary Mediation Scheme 1999-2003*, forthcoming, Department for Constitutional Affairs (DCA), Research Series. As mentioned in Hazel Genn's presentation paper to the Scottish Consumer Council Seminar on Civil Justice (January 19 2005) – “*Solving Civil Justice Problems What might be best?*”

consensus between the parties; it defeats this consensual approach if either, or both, sides are forced into using it. In addition APIL feels cost sanctions should not be used against parties who do not wish to mediate.

12. APIL questions the necessity of introducing mediation into the Scottish jurisdiction due to the fact that the Coulsfield rules, in the Court of Session, are currently working efficiently and effectively.

Pre-action Protocol

13. APIL currently supports and is working closely with the Law Society of Scotland in order to introduce a pre-action protocol into the personal injury arena in Scotland. The pre-action protocol came into English law via the access to justice reforms in the early 1990s and governs all personal injury cases. The purpose of the protocol is to promote the early and appropriate resolution of cases prior to issue. This is achieved by the use of rules of disclosure and evidence and a strict timetable to which each side has to adhere. The current situation in Scotland is that there is little or no incentive to resolve the case prior to issuing proceedings. This means that a disproportionate number of cases result in proceedings. A pre-action protocol would mean fairer and earlier settlements, thereby minimising time and expense for all parties and reducing pressure on the court service. It seems likely that primary legislation is required for a compulsory pre-action protocol regime and with the legislative timetable currently crowded, a wait for primary legislation would cause considerable delay. As such APIL feels that it would be for the benefit of all parties concerned – both defenders and pursuers – if a voluntary pre-action protocol were established in the interim. APIL supports the efforts of the Law Society of Scotland in this regard, and offers its expertise and experience in this area as we were directly involved with the drafting of the English pre-action protocol as well as negotiating a fixed fee structure for some types of personal injury case.

14. A further procedural change which APIL believes would help address some of the current civil justice problems is the widening of the Coulsfield rules so that they become applicable in the Sheriff court for personal injury cases as well as the Court of Session. The Coulsfield rules (Chapter 43 of the rules of the Court of Session⁶) establish a strict timetable with minimalist pleadings and a 'no excuses' culture against delay. The Coulsfield rules are applicable to all personal injury Court of Session cases which have been issued. One of the most successful features of the Coulsfield rules is that representatives from both sides have to attend a pre-trial round the table meeting, to discuss the issues involved and to complete a compulsory pre-trial minute. Anecdotal evidence from our members suggests that these meetings very frequently result in a satisfactory settlement some considerable time before trial. Indeed APIL considers the use of such pre-trial meetings to be working so effectively and efficiently, that there is little perceived need for the introduction of separate mediation procedures into personal injury practice in the Court of Session. The success of the Coulsfield rules has also demonstrated in practice that the detailed rules of pleading in Scotland are cumbersome, unnecessary and devoid of any real practical utility. It is anomalous that they have been abolished in the Court of Session but should remain for personal injury work in the Sheriff court.

The results of the APIL proposals for personal injury in the Sheriff court would be;

- (i) All cases up to the new summary cause level as adjusted for inflation as a summary cause
- (ii) All other personal injury cases in the Sheriff court as an ordinary action with the Coulsfield rules as adapted for the Sheriff court.

⁶ See <http://www.scotcourts.gov.uk/rules/chpater43.htm> for a copy of the rules.

Funding

15. Public funding for both legal aid and civil legal advice and assistance in Scotland, APIL asserts, should have no further restrictions in terms of funding or eligibility placed on it.

16. APIL strongly believes that public legal funding in Scotland should continue in its present state, with no further restrictions placed on it. We are concerned, however, that the continuing erosion of legal aid eligibility criteria is making it more difficult for ordinary people to gain access to public legal funding. There is anecdotal evidence that some people on benefits don't even bother to apply for legal aid because the income threshold is so low. This has led to some clients enquiring about pursuing cases on a 'no win, no fee' basis. At the moment, however, this type of funding is not universally viable due to the lack of an effective after-the-event insurance market in Scotland. This lack of alternate legal funding options means that the retention of a fully financed legal aid and civil legal advice and assistant system is essential.

17. In terms of civil legal advice and assistance payment rates, even though recent changes have meant that there has been a total increase of 21 per cent, APIL still considers the payments levels too low. Even after the increase, the hourly rates are well below those of party and party judicial costs. This combined with the current lack of interim funding for investigation disbursements, means that solicitors have to bear a considerable cost burden in taking on state funded cases. Inevitably this lack of appropriate state funding will lead to fewer and fewer firms and solicitors, taking on this type of work, eventually resulting in 'advice deserts' – i.e. areas where there will be no firms or qualified lawyers prepared to work at legal aid rates. APIL firmly believes such a state of affairs will directly affect injured people's access to justice.