SHERIFF COURT RULES COUNCIL

PROPOSALS FOR PROCEDURAL RULES FOR PERSONAL INJURY ACTIONS IN THE SHERIFF COURT

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL 07/06)

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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 around 5,000 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured pursuers. APIL has more than 140 members in Scotland.

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 of APIL Scotland's planning committee in preparing this response:

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Introduction

APIL welcomes the opportunity to respond to the Sheriff Court Rules Council's proposals for procedural rules in personal injury (PI) actions in the sheriff court.

In this response, APIL's views on the general proposition are followed by observations on the draft rules and general comments which we believe would assist with the implementation of these new rules and help improve personal injury procedure in the sheriff court generally.

Part 1
General Proposition

Question 1

APIL considers that in principle the Court of Session rules for personal injury actions, suitably adapted, should be adopted in to the Sheriff Court Ordinary Cause Rules.

Personal injury is a complex area of law and PI claims would benefit from a tailored procedure different from that currently used when brought in the sheriff court.

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.

In addition, standardising PI procedure across the Scottish Courts will be beneficial to pursuers.

Question 2

APIL believes that the Court of Session rules for PI actions should be adopted in place of Chapter 34 of the Summary Cause Rules 2002 to ensure there is one clear procedure to follow for PI claims. The new rules are designed to streamline the process in any event and it is therefore not necessary to have a separate summary cause procedure.

Question 3

APIL strongly believes that there is no place for PI actions in the small claims courts and supports the Scottish Executive's proposal to remove personal injury claims out of the remit of the small claims court altogether. PI is a complex area of law where a pursuer must, amongst other things, prove negligence as well as calculate entitlement to compensation. In addition a pursuer may need to obtain a medical report. Most people would struggle to deal with these issues without proper legal advice.

It makes sense for every personal injury action to be subject to the same procedure in whichever court it is issued, but we do not believe the proposed new rules would be suitable for the small claims court because it may be difficult for unrepresented pursuers to follow. It is much more appropriate to remove personal injury claims from the remit of the small claims court altogether.

Part 2

Draft Rules

APIL agrees that the proposed rules as drafted are generally are suitable for the sheriff court (although we raise specific points in our answers to questions nine, 13 and 23 below). It is anticipated, however, that as with any new system, practical difficulties may become apparent once the new rules are implemented. It is therefore essential to establish a user group to resolve any problems which arise, as happened after the introduction of the new rules in the Court of Session.

Question 9

Proposed rule XX.6(7) is too prescriptive. It places an obligation on the sheriff clerk to fix a date and time for the parties to be heard by a sheriff where a pursuer fails to lodge a record by the date specified in the timetable. We believe that fixing a hearing should be left to the court's discretion.

One of the benefits of the proposed new rules is that there is less pressure placed on the court's resources. Requiring the sheriff clerk to list a hearing in all cases, whether or not it is necessary, detracts from this benefit.

We understand that there is draft statutory instrument in respect of this matter in the Court of Session, which when implemented will allow the court discretion as to whether it fixes a hearing if the record is not lodged in time and believe this should be reflected in the new sheriff court rules.

It is suggested therefore that proposed rule XX.6(3) is amended by the removal of the words "other than that referred to in paragraph (7) below", and that proposed rule XX.6(7) be removed altogether. This would then bring the fixing of a hearing for failure to lodge the record in time within the discretionary scope of XX.6(3).

Question 13

There should be provision for parties to be able to hold the pre-proof meeting by telephone conference. This would not detract from the efficiency of the meeting, as representatives will still be required to have access to their clients (proposed rule XX.10(4)) and would therefore be able to take instructions as required. Pre-proof meetings by telephone conference would, however, mean less time is spent travelling to the meeting, and therefore reduce the costs involved. It may also help with practical matters such as making it easier to schedule such meetings at a convenient time for all parties and representatives involved.

Question 23

Defences

The experience of some APIL members is that the limited rules on what defences must contain, together with the absence of a requirement to produce any medical evidence early on in a case, means that time needs to be spent (and costs therefore incurred) in trying to get relevant information about the defender's position from them.

Additional rules should therefore be introduced to require defenders to materially answer the issues contained in the writ. Proposed rule XX.2 sets out the requirements for the contents of the writ; it is rational to include a rule to set out the requirements for the contents to the defence. A defender should also be obliged to include with the defence any medical evidence they have obtained on which they intend to rely. This would mean that both parties are fully aware of the other parties' case early on, would highlight the issues in dispute which needs to be dealt with, and prevent unnecessary investigation of agreed points.

General comments

Length of proof

One consequence of the new rules which is of concern is the length of time for which proofs are listed. Under the new rules a diet of proof is set down early, when parties will not necessarily have enough information to accurately estimate how much court time will be needed for the proof.

The concern is that a proof may be scheduled to last for one day (which is common practice in the sheriff court), with it becoming apparent later on that the issues are more complicated than were first thought, and as a consequence the proof will need to be longer. This could result in the proof starting on one day, overrunning, and being concluded on the next available court date (which could be several weeks later), or alternatively having to be rescheduled altogether.

Either way the purpose of the new procedure, which is designed to make the process of making a personal injury claim more efficient, would be undermined and the delays this would bring would not be beneficial to either party.

This problem does not occur in the Court of Session because the system which operates means that each case is allocated a four day period, with parties and their representatives being available to start the trial at any time during this period. The trial then runs for as long as is necessary.

Whilst we recognise that the Court of Session system would not work without adaptation in the sheriff court because the courts have fewer resources than the Court of Session, some flexibility in relation to the length of the proof would certainly benefit parties and avoid potential delay and uncertainty.

Court of Session Practice Notes

As these proposals, if implemented, would mean the rules for personal injury procedure in the Court of Session and sheriff court would be harmonised, practices that develop in one court should also be reflected in the other. It would be unfortunate to have one set of rules but have separate practices developing in each court. We therefore propose that the Court of Session Practice Notes relating to personal injury action be applied to the sheriff court.

Terminology

Likewise, we would like to see the terminology used in the Court of Session reflected in the sheriff court so far as possible. This will add to the consistency and means that case law developed from the Court of Session could be more easily applied to the sheriff court.

Short hand writers

There is no longer any need for a shorthand writer in the sheriff court. The shorthand writer adds unnecessarily to the cost of pursuing an action in the sheriff court, and the function could easily be undertaken by using available technology. Shorthand writers are no longer used in the Court of Session for civil cases. Digital technology is increasingly accurate.

Recordings (to be later transcribed if the matter is appealed) could be used to accurately record proceedings, and significantly reduce court users' costs.

Allowing the new system time to work

Finally, we are concerned that if the new rules are implemented they should be given proper time settle down and not be disrupted by other newly introduced schemes or procedures. The new rules need to be given a chance to work. The hope is that there will be a big cultural change with the introduction of these rules, moving away from the many delays and adjournments which currently occur in actions dealt with in the sheriff court, to following a strict timetable. It is also hoped that the high number of cases which have settled in the Court of Session since the introduction of the new rules there can be replicated in the sheriff court.

It would be disruptive for new schemes to be tested in individual courts once the new rules have been implemented. It would also be disruptive if mediation, for example, was to be piloted against the background of these new rules. The rules are designed to be a stand alone procedure and should be given the opportunity to work as such without interference from other schemes.

NB: APIL has been unable to comment on the proposed new form P1 (Q5) as, at the time of writing, this had not yet been drafted.