Court of Session

Scottish Civil Courts Review

A response by the Association of Personal Injury Lawyers

March 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 171 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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Preamble

APIL welcomes the Civil Courts Review as a unique opportunity to shape the legal system for the benefit of the people of Scotland. APIL represents only the interests of injured people. Personal injury pursuers are one of the most significant groups of pursuers in the court system for cases which are genuinely litigated, that is where a legal defence is stated which raises issues in fact and law, as opposed to say, a debt action, where the courts and legal process are used simply as a recovery vehicle.

APIL's remit relates only to personal injury law (including medical negligence) and our response is limited to this area of law and practice. We note that the remit of the review is for **improvement** in access to justice. Our response is predicated on the fact that public funding for the justice system is not unlimited and that blue sky proposals for its complete dismantling and reconstruction are simply unrealistic. We therefore examine the current system, its strengths and weaknesses, and believe we make positive, affordable and achievable recommendations which will benefit injured people.

Wherever possible we have attempted to underpin this submission by reference to research and evidence. Where this is absent, we have access to the extensive experience of our practitioner membership base.

Why does the personal injury compensation process matter?

There were 2,806 major or fatal injuries to workers in Scotland in 2006/07[1]. A further 2,921 people were killed or seriously injured on Scotland's roads in 2006[2]. These are just some of the many injuries which people in Scotland suffer each year.

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[1] HSE provisional 2006/07 statistics, http://www.hse.gov.uk/statistics/regions/tables/reginj.xls

[2] p.156 DfT "Road Casualties Great Britain 2006" published September 2007, http://www.dft.gov.uk/162259/162469/221412/221549/227755/rcgb2006v1.pdf

In those cases where the injuries were caused by another person's negligence, the injured party can claim compensation for their pain and suffering and financial losses incurred directly as a result of injury.

Full and just compensation without litigation?

APIL believes that people injured as a result of other people's negligence should be entitled to full and just compensation. Achieving this without litigating is the best outcome for pursuers and society as a whole, but this is not currently realised because of the way in which insurers handle claims. Pursuers are often forced to raise proceedings because defenders or their insurers do not make realistic offers to settle cases. This is reflected in the fact that the vast majority of litigated cases settle before proof, with defenders paying pursuers' expenses.

A study[3] of over 2,000 litigated cases run by one pursuers' firm over a three year period to December 2007 showed that pre-litigation offers were made in only a fifth of cases and that on average, each of these cases settled for more than twice the amount of the original offer. In no case did the offer amount to more than the damages awarded. In over half the cases in the study, insurers simply did not respond to correspondence, failed to indicate a position on liability or failed to take other action in relation to the claim. While there may seem a superficial attraction in the mantra "litigation should be a last resort" this cannot be in the public interest against the background of a systemic culture of under-settlement.

APIL fully supports the pre-action protocol and argues for its extension. It is frequently suggested that the purpose of the protocol is to avoid litigation. This is not the APIL view.

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[3] Reported in "A Breach of Protocol" by Graeme Garrett, in The Journal published by the Law Society of Scotland, February 2008

The purpose of the protocol is to enable the injured person to receive proper compensation at an early stage. This means properly informed and properly valued settlement of individual claims, which in turn provides savings to the insurance industry and reduces pressure on court resources. We make no apology, however, for saying that it is the former which at all times must be the primary interest with the latter savings advantageous by-products. If insurers cannot deliver proper compensation when they have been given the opportunity to do so, they must expect litigation with the extra costs which that will necessarily entail. If the pre-action protocol is viewed by the industry merely as the preliminary stage of the familiar ritual of step by step increased offers, it has nothing of value for the Scottish public. Arguments about the cost of litigation and its proportionality should be viewed against this background.

The relative positions of the parties

The civil justice system needs to take into account the relative positions of parties in personal injury cases. Pursuers are usually one time users of the system, with no understanding of legal concepts such as strict liability and contributory negligence, let alone European regulations or how damages should be calculated. In contrast, most defences are handled by insurers who deal with hundreds of claims on a daily basis and have the substantial legal and financial resources of large companies behind them.

Improvements to the current system

APIL argues for a civil justice system which does everything it can to deal with claims efficiently and reasonably. Improvements which can be made to the current system to achieve this include:

- making the pre-action protocol compulsory and introducing strict sanctions for non-compliance;
- the re-introduction of pursuers' offers;
- amending the expenses rules to encourage pre-litigation settlement.

The need for a robust court structure

It is also important to retain a robust court structure to ensure a just outcome in those cases which do not settle and in which recourse to the court becomes necessary. It is widely accepted that the Coulsfield Rules (Chapter 43 of the rules of the Court of Session) work very effectively in the Court of Session. No work should be transferred into the sheriff court unless and until the Coulsfield Rules are replicated there for ordinary causes, and adequate resources are made available. At present, the sheriff court is not equipped to deal with any significant influx of cases. We also believe that the Coulsfield Rules should be extended to all personal injury cases, including summary cause.

Independent legal advice

Access to specialist independent advice and representation is critical in ensuring that individuals have access to justice: for people injured as a result of another person's negligence, this means receiving fair compensation.

APIL has recently passed evidence to the Financial Services Authority, which regulates insurers, to show that some insurers have been contacting personal injury victims directly and settling their claims for less than they are worth. This practice of "third party capture" is common in motor cases where the insurer can easily obtain the injured third party's details from their own policy holder. If early offers of settlement are refused, some insurers then offer to arrange medical reports or to refer injured people to the solicitors with whom they have commercial arrangements before trying again to settle the claim. There is an inherent conflict of interest in this practice. Pursuers need independent legal advice to ensure they receive fair compensation.

The cost of litigation

Insurers argue that third party capture cuts out disproportionate costs incurred by pursuers' solicitors. Pursuers' costs are, though, an inherent part of a fault based system which requires pursuers to prove their claim, especially where liability is routinely denied. Insurers' complaints should be seen in their true context: that their own litigation behaviour often drives up the very costs they complain about. Furthermore, the costs they complain about are amongst the lowest in the developed world[4].

[4] "US Tort Costs and Cross Border Perspectives: 2005 Update" Towers, Perrin and Tillinghast shows that UK tort costs are 0.7% of GDP, which is lower than Switzerland, Japan, Belgium, Spain, Germany, Italy and the US, the same as France and higher only than Poland and Denmark.

Chapter 1 - Introduction

The civil justice system and early resolution of disputes

We agree in principle that the civil justice system should be designed to encourage early resolution of disputes, preferably without resort to the courts. At the moment systemic attempts by insurers to under-settle claims leave personal injury pursuers little choice but to raise proceedings.

The key features of a system designed to encourage early resolution of personal injury disputes would address these attempts to under-settle claims by:

- enabling access to, encouragement to use, and funding for, independent legal advice for all parties;
- providing for early exchange of information and full disclosure of documents to enable early decisions to be made, with enforceable sanctions for non-compliance;
- ensuring access to rehabilitation for the injured person to minimalise the effects of the injury and thereby mitigate the loss;
- putting in place an expenses structure which encourages early settlement at the full value of the claim;
- ensuring an efficient court process which penalises poor behaviour prior to and during litigation.

Proportionality and value for money as the basis for the review's recommendations

The principles and assumptions discussed in paragraphs 1.11 to1.14 of the consultation paper need to be set in context if they are to be used as a basis for the development of the review's recommendations.

We welcome the fact that the review recognises that the monetary value of a case should not be the only factor in determining the extent of the resources to spend on it[5] but we urge caution in relation to proportionality.

Costs of legal proceedings are inextricably linked to the behaviour of the parties as well as the processes necessary to establish the facts of a case. We have already noted that in a fault based system certain steps need to be taken to establish fault. In addition, evidence needs to be produced to show the extent of the loss. The burden of proving a case rests on the pursuer and there is inherent cost in doing this.

Increasingly, insurance companies use computer programmes to calculate solatium. The advantage for insurers is that such programmes introduce consistency and can be used by claims handlers with limited experience. The programmes can make transactional costs lower and damages more predictable. We believe they also lead to lower damages for injured people.

We understand that one such programme, Colossus, which is used by Norwich Union and the Motor Insurers' Bureau among others, calculates damages on the basis of settlements in previous cases and does not take in to account awards made by the courts. Settlements are generally lower than court awards as parties take into account factors such as the risk of litigation and the emotional and financial cost of taking cases to court and often accept lower amounts than they could receive at court as a result. Calculations made on the basis of previous settlements do not therefore reflect the value of awards that the court would make. Low offers are made in vast numbers of cases in the hope that they will be accepted. It is clear that settlement software drives litigation and increases expense. If insurers choose to drive up litigation expenses because they believe it is ultimately in their commercial interests to do so, they should not then be able to use the argument of proportionality to unfairly restrict pursuers' recovery of expenses.

[5] Para 1.13 of the Civil Courts Review Consultation paper

Chapter 2 – Access to Justice

Public legal education

Public legal education is a critical part of improving access to justice. It is important that the public know that they have a right to be safe, to claim compensation if they are injured through no fault of their own, and that they know where to go for specialist advice. This last point is particularly significant given that it is increasingly common for insurance companies to capture third party claims, as referred to earlier.

Party litigants and court based advice services

In-court or self-help services are not appropriate in personal injury cases. To bring any personal injury claim, a person needs to have an understanding of the law of negligence and knowledge of how to obtain and understand medical evidence. A lay person can not be expected to navigate these issues, which arise in even the most straightforward personal injury case, without advice let alone the many cases in which detailed health and safety legislation and complex case law is relevant.

We note and agree with Elaine Samuel's comment that

> "*The expectation that low value claimants can either proceed without legal advice, or that they seek and receive low cost advice by the voluntary sector, does not apply in reality in personal injury claims.*"[6]

In this respect, we welcomed the Scottish Government's decision to remove all personal injury cases from the small claims court and also welcomed the remarks of Kenny MacAskill, the Cabinet Secretary for Justice, who recognised these concerns when he spoke about personal injury cases as follows:

[6] Para 12.7 "In the Shadow of the Small Claims Court: the impact of small claims procedure on personal injury claimants and litigation" Elaine Samuel, Department of Social Policy and Edinburgh Centre for Social Welfare Research, university of Edinburgh, Published by the Scottish Office 1998

"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."[7]

We hope the review also adopts this approach and recognises the need for adequate funding mechanisms to ensure that everybody can have access to such independent legal representation. The fact that parties to proceedings are professionally represented benefits not only the individual litigant, but also the court and the civil justice system itself.

A new method for dealing with low value cases

We do not think that there needs to be a new method for dealing with low value personal injury cases. The nature of personal injury claims means that cases that at first may appear to be low value turn out to be worth significant sums as injuries are more serious than first suspected or do not resolve as expected, causing both solatium and damages for patrimonial loss to increase.

The Personal Injuries Assessment Board (PIAB) in the Republic of Ireland is one example of an extra judicial body which determines the level of personal injury awards and was referred to in the review's consultation paper. The introduction of PIAB was a reaction to a particular set of circumstances which do not pertain to Scotland.

The board is a statutory body which assesses quantum in cases where liability is not in dispute. Pursuers must apply to the board with details of their case before going to court. If the potential defender admits liability, the board will assess quantum. If liability is disputed, the claim can proceed to court.

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

APIL strongly objects to the PIAB process as inequitable and believes it can leave pursuers with less compensation than they are entitled to.

PIAB is designed to be lawyer free and pursuers are encouraged to make claims without the help of a solicitor. This is a flawed system because it presupposes that unrepresented pursuers can navigate the PIAB process alone. In fact 90 per cent of PIAB applicants have opted to have legal advice, even though they cannot recover the cost of this from the defender[8]. In effect, the costs have been transferred from the insurance industry to the pursuer.

PIAB also assumes parity between the parties, when in reality there is a huge inequality of arms as most pursuers will not have made a personal injury claim before and most defenders are insured. First time pursuers are therefore pitched against experienced claims handlers with the backing of very well resourced insurance companies.

PIAB regularly issues press releases claiming it has made cost and time savings.
In February 2006, however, the Department for Constitutional Affairs (as it was then) published research which said, in relation to PIAB, that the "*results of these changes will not be seen for a number of years*."[9]

It is therefore too soon to properly assess the impact of PIAB. We are, however, sceptical about its efficiency. PIAB takes on average seven months to determine the value of a claim, from the defender admitting liability[10]. If liability is not admitted or if either party does not accept the award then they have to start separate court proceedings.

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[8] Para 4.1, "A Cost-Benefit Analysis of the Personal Injuries Assessment Board" Dr Vincent Hogan, December 2006 http://www.piab.ie/pdf/CostBenefitAnalysis.pdf
[9] p. 44, "The funding of personal injury litigation: comparisons over time and across jurisdictions" Paul Fenn, Alastair Gray, Neil Rickman and Yasmeen Mansur, University of Nottingham, University of Oxford and University of Surrey, February 2006
[10] p.20, PIAB Annual Report 2006, http://www.piab.ie/pdf/AnualReport2006_English.pdf

By comparison, all issues in a case are resolved in the Court of Session in a maximum of ten months[11] from the lodging of defences and are often settled much earlier.

[11] A Report on the Chapter 43 PI Procedures for the period 1st December 2007 to 31st December 2007 is published for the Court of Session Personal Injury Users' Group and shows that personal injury proofs diets are within ten months of the lodging of defences.

Chapter 3 – The cost and funding of litigation

Legal expenses in litigation

There are inherent costs in all litigation. These are unavoidable if cases are to be properly prepared. Levels of expenses are dependant on the way that a case is conducted. The failure by insurers to put forward realistic pre-litigation offers inevitably results in proceedings and increased costs. Complaints about proportionality have to be seen in this context.

We believe that people who do not understand how litigation can be funded may be deterred from making personal injury claims by the perceived cost. Once people have consulted specialist solicitors, they will have a better understanding of how the claims process works and how it can be funded. Education about where to go for specialist advice is therefore the key to ensuring that the fear of the cost of litigation does not deter people from making genuine claims.

Court fees, although already significant and expected to rise, are just one of the outlays incurred in a personal injury action. As disbursements are usually recovered by successful pursuers, it is the initial funding of these rather than the ultimate responsibility for these which may act as a disincentive to pursuing a claim. At the moment, however, we believe that there are mechanisms in place (whether through legal aid, insurance or solicitor-funded disbursements) for most pursuers to be able to overcome this barrier.

One aspect of funding which concerns us is that counsel's fees are not routinely allowed in the sheriff court. We welcome the fact that a decision on whether counsel's fees will be allowed in a sheriff court case will shortly be made at the beginning of the case rather than at the end but believe that, as in the county court in England and Wales, the use of counsel should be routinely sanctioned in the sheriff court.

The involvement of counsel in a case can lead to a fresh perspective being taken, perhaps because counsel has a particular expertise or simply because he or she has not been so involved from the outset. Counsel's involvement can therefore lead to the narrowing of issues between the parties and potentially to earlier settlement of the case.

APIL argues that solicitor-advocates should be afforded similar status to counsel in the sheriff court. There is no current provision for solicitor-advocates to appear as such in the sheriff court, which seems anomalous in view of the purpose of introducing the role of solicitor-advocates in the first place.

Recovery and taxation of judicial expenses

Transactional costs which are not paid for by the party at fault must be paid for by the victim. This effectively reduces an injured person's compensation. As long ago as 1880, Lord Blackburn said the purpose of damages was to "put the party who has been injured… in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation."[12] To achieve this, pursuers must be able to recover the full costs of obtaining their compensation. We therefore believe that it is time for the Scottish courts to allow full recovery of solicitor and client expenses, third party paying. Full recovery of these expenses would encourage insurers to come to an early settlement, ensure that the pursuer is able to recover the actual cost of litigation and uphold the principle that the "polluter pays".

We also believe that it is appropriate for auditors of court to be salaried employees, recruited from practitioners, rather than recovering a percentage of the taxed expenses.

[12] *Livingstone* v. *Rawyards Coal Company* (1880) 5 Appeal Cases 25

Access to legal advice/legal aid and access to justice

Access to independent legal advice is critical in maintaining access to justice and maintaining legal aid enables those who might otherwise not be able to afford it to receive this advice. The benefit to the public in allowing people who would not otherwise be able to afford to pursue their case (because of the risk of having to pay the defenders costs if they lost) far outweighs the cost to the Scottish Legal Aid Board (SLAB). The net cost to the SLAB of all reparation cases is minimal, as the board recovers 73 per cent of the amount spent[13]. Legal aid should be therefore be preserved in personal injury cases and other forms of funding must be available for those who do not qualify for legal aid. APIL and the SLAB have worked closely over the past two years to bring in administrative improvements to the legal aid scheme, to the benefit of both public and practitioners.

Speculative fees, legal expenses insurance and recoverability of after the event insurance premiums

The wide availability of speculative fees, backed up by after the event (ATE) legal expenses insurance if necessary, facilitates access to justice. This form of funding allows people who cannot afford to fund a case privately to have access to advice, representation, and, if necessary, to the courts. This is particularly important in personal injury cases where the pursuer may be out of work or had to incur additional expenses as a result of the injury.

Legal expenses insurance can play a role in allowing access to justice, and can be useful in some circumstances. It is not, however, appropriate or necessary in all cases and should not be promoted as the one and only answer to the “middle income trap”.

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[13] p.20, Scottish Legal Aid Board Annual Report, 2006/07, http://www.slab.org.uk/annual_report_2006_2007/Annual_Report_2006_2007.pdf

Before the event (BTE) insurance can benefit individuals if the cover provided is sufficient for them to get the advice they need from the solicitors they choose, who will act in their best interests, without having to pay extra money on top of the insurance premium.

In reality, however, BTE insurance often has a relatively low indemnity limit, meaning that it does not offer policy holders sufficient protection in the event of making a claim. It can also limit the policy holder's choice of solicitor, give the insurer control over proceedings by regulating expenditure on the work to be done, and give the insurer contractual rights which overrule normal client/solicitor privilege.

In addition, BTE insurance is often sold as an add-on to other cover, such as household or motor policies, at a price which is subsidised by referral fees paid by solicitors on the insurers' panels[14]. Such panel arrangements can give rise to problems as solicitors have a commercial interest in ensuring a good relationship with the insurer which may conflict with the client's best interests. Furthermore, panel solicitors can often not provide the best advice for people who have been severely injured, as they do not necessarily have the specialist knowledge within their firm to deal with complex or high value cases.

We do not believe that after the event (ATE) insurance premiums should be recoverable in Scotland. The introduction of recoverable ATE premiums would be likely to lead to an undesirable increase in 'satellite litigation' in relation to expenses, similar to that which is now prevalent in England and Wales, and which increases overall costs and prolongs already stressful cases for clients.

[14] para 4A.II.4, "The Market for 'BTE' Legal Expenses Insurance" FWD Marketing, Prepared on behalf of the Ministry of Justice, July 2007, http://www.justice.gov.uk/docs/market-bte-legal-expenses-insurance.pdf

We attach[15] a list of recent cases which have been heard in England and Wales to demonstrate the extent of the current costs litigation there, which has sprung from the recoverability of after the event insurance premiums and success fees.

[15] At appendix A

Chapter 4 – The structure and jurisdiction of the civil courts

Demarcation of civil and criminal courts

We agree that the conduct of the civil business of the court is adversely affected by the pressure of criminal business, that some judges and sheriffs should be designated to deal with civil business and that the sheriff courts should be separated into civil and criminal divisions. Criminal business is given priority over civil cases. This causes delay and disruption to civil cases, especially in the sheriff court. A clear demarcation would prevent this.

Specialisation within the civil court

APIL believes that there should be a greater degree of specialisation within the civil courts. Judges and sheriffs who are familiar with a particular area of law can deal with cases more efficiently than those that are not. Personal injury cases make up a large proportion of civil court cases in Scotland and represent a complex area of law. We believe it makes good economic sense to have specialist judges and sheriffs in this area. Better quality, more consistent decision making would result.

The Court of Session and sheriff court

Specialist personal injury practitioners favour the Court of Session over the sheriff court as it is a centre of excellence. It provides access to a specialised bar, specialist agents and a specialised court. Furthermore, we are told by English practitioners that Court of Session decisions are influential in England and Wales, particularly in interpreting European based statutory regulation[16].

The Court of Session delivers high quality and consistent decisions which cannot be guaranteed in the sheriff court. Unlike sheriffs, most judges in the Court of Session have a background in personal injury law and have a better grasp of the subject.

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[16] We will forward relevant examples to the Civil Courts Review shortly.

The Court of Session is more reliable in terms of timings of hearings, which is important if expert witnesses are to attend court, and it is also possible to get a proof of four days or longer listed on consecutive days.

We are well aware of the view that there are too many personal injury actions being raised in the Court of Session. We believe, however, that the practice of issuing cases in the Court of Session brings benefits because decisions are consistent, well reasoned and delivered efficiently; the centralised system means that resources can be used cost-effectively; and access to specialist counsel means that cases are more likely to be pursued or defended only when there are reasonable prospects of success.

Elaine Samuel's report on the effect of the Coulsfield Rules notes:

> *"Case-flow management … comes at a price for court staff. In the Court of Session this involved the appointment of a dedicated personal injury clerk. Each of the dedicated personal injury clerks who served in this capacity over the period of the research was given the opportunity to develop an expertise and knowledge …This afforded them the opportunity to develop and refine instruments for supporting and monitoring Chapter 43. It also allowed them to deal efficiently with an increased volume of throughput. This could only be achieved in the Court of Session, however, with specialisation, training and continuity of its staff. Vesting control over the pace of procedure in the court requires nothing less."*[17]

The current system operating within the Court of Session for personal injury cases is working well. A limited amount of judicial time is actually spent on these matters as very few cases reach proof and specialised staff take responsibility for an increased number of desk-based tasks.

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[17] p. 34 "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

In contrast, there are already a number of difficulties in the sheriff court. A sample of 2,840 litigated cases which concluded in 2007 or 2008 showed that 60 per cent of personal injury cases settled for less than £5,000[18]. The recent increase in the privative limit means that these cases must now be raised in the sheriff court. The effect of this change on the sheriff court is not yet known. Raising the privative limit further at this stage would put increased pressure on a sheriff court system which already needs to be improved.

We do not therefore think that it is appropriate for more cases to be heard in sheriff courts, nor do we think that regional centres need to be established. If, however, the review takes the view that reform is necessary and that fewer personal injury cases should be raised in the Court of Session, it is essential that the beneficial characteristics which encourage practitioners to raise cases in the Court of Session are replicated in the lower courts.

Improvements to the current system

We believe that the review could make improvements to the current system without making radical changes to the court structure. There is a strong case for clinical negligence cases to be heard exclusively in the Court of Session due to their especially complex nature. There is also a need for the introduction of an amended procedure for remitting cases to the Court of Session when this is the more appropriate forum. The sum sued for should not be the defining criterion: complexity should be the determining factor.

We also believe that the Coulsfield Rules should be extended to summary causes.

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[18] 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.

APIL believes that there is a place for appeals to the Sheriffs Principal as this provides an inexpensive remedy in appropriate cases. There is no need for re-organisation of the court on a geographical basis which has stood the test of time.

In addition, whilst the reliance on part time sheriffs and temporary judges gives the court flexibility, the nature of their employment means they are likely to be less well trained and experienced than their permanent colleagues and it would therefore be preferable to avoid their use if possible.

Finally, we do not think that there needs to be another level of civil court or tier of business.

Chapter 5 – Principles for reform to civil procedure and key procedural issues

Overriding objective

We do not think that an overriding objective or statement of value would add any value to the court process.

The Coulsfield Rules work well in the Court of Session and we believe that the use of these rules in the sheriff court for ordinary causes will improve practices there. An overriding objective would not improve the operation of these rules. Consideration does need to be given to the rules for summary causes. Attention is needed, however, in relation to the details and not the overriding philosophy of the court.

We believe that the English and Welsh experience supports this perspective. A review of the Woolf reforms there, shortly after they were implemented said

> *"…litigators like clear structures. They want timetables and example letters, provided that both can be adapted where necessary."*[19]

The 33 page summary of the report also comments on greater specialisation, lack of sanctions, expert evidence, case management and costs and numerous other issues: it makes no mention of the overriding objective.

Alternative dispute resolution including mediation

While there may be a role for mediation in certain types of reparation case, it should not be assumed that it is appropriate in all cases, and therefore should not become the procedural model.

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[19] p. iv, "More Civil Justice? The impact of Woolf reforms on pre-action behaviour" Research Study 43, Summary, Tamara Goriely, Richard Moorhead and Pamela Abrams, published by the Law Society and Civil Justice Council 2002

In cases where there is an ongoing relationship between a pursuer and defender, mediation can be a valuable tool. It must, however, remain as just that: one of the tools available to help settle the dispute.

We therefore welcomed the Sheriff Court Rules Council's decision to exclude personal injury actions from a new rule to introduce compulsory mediation for cases in the sheriff court and note that during a consultation regarding this issue, insurers were also concerned about giving mediation a central role.

Mediation is costly and adds an extra layer of expense to the process of making a claim. The pre-trial meetings under the Coulsfield Rules do, in effect, provide a successful form of mediation. By that stage in the action, the issues have been clearly focussed and the evidence gathered.

Furthermore, despite the claims of its proponents, the actual achievements of mediation in effecting settlement are in fact very modest[20].

Mediation should therefore be available to the parties as a means of alternative dispute resolution if parties agree. It should not, however, be made compulsory and there should be no sanction in expenses for not considering or attempting mediation.

Modern communication

Measures such as installing plug sockets in public/advocates' areas of courthouses, enabling wireless internet (Wi-Fi) in all areas of the Court of Session and other courts, ensuring all courts have video-conferencing facilities and introducing a system for electronic filing of documents could all improve access to the civil courts.

[20] "Monitoring Publicly Funded Family Mediation; Report to the Legal Services Commission" Davis and Ors. 2000

Court control and case management

We believe that case-flow management, which allows the court to have control of the pace of litigation, is appropriate in personal injury cases. We do not think that personal injury cases would benefit from judicial case management which would be prohibitively expensive.

An evaluation of Chapter 43 of the rules of the Court of Session points to the work of Lord Coulsfield's working party which recommended their introduction and says:

> *"Since the main obstacles to achieving early settlement frequently lay in obtaining and co-ordinating expert reports and other evidence at an early stage, the Working Party was of the view that, unlike commercial cause, early case management hearings would bring no great advantage to the Court or to its users for most personal injury actions raised in the Court of Session."*[21]

The same report says the rules have been successful in bringing forward the settlement of cases[22].

Furthermore, judicial case management is resource intensive. It requires judges or sheriffs to spend vast amounts of time on each case. The Glasgow Sheriff Court has been operating a pilot personal injury scheme[23] for cases over £10,000 which involves judicial case management since April 2006. 260 cases have passed through the pilot in almost two years and specialist sheriffs have spent an average of one and three quarter hours dealing with each case, even without any proceeding to proof.

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[21] p. 34 "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, 2007

[22] Ibid p.167

[23] The Glasgow Sheriff Court's response to APIL's request for information, from which these figures about the scheme have been obtained, is attached at appendix B

6087 personal injury cases were raised in Scottish Courts last year[24]. If all cases needed such attention, over 10,500 judicial hours would need to be spent on personal injury cases. In stark contrast, most cases raised in the Court of Session and following the Coulsfield procedure do not go before a judge and most do not proceed to proof, and thus do not use any judicial time at all.

Other issues

The court day of 10am to 4pm (with an hour for lunch) limits the amount of time that can be spent hearing cases. We propose that the court day be extended from 9.30am to 4.30pm to allow the court an extra 20 per cent of operating time each week. This will be particularly helpful in the sheriff court which must now deal with all cases with a value of under £5,000.

[24] Scottish Court Service's response to APIL's request for information, attached at appendix C

Chapter 6 – Working methods of the civil courts

Pre-action protocols

Pre-action protocols should not be expected to lead to pre-issue settlement in all cases, but are a useful tool if followed. They encourage early exchange of information so that all parties can have an understanding of the issues in a case, and settlement fees can be pitched so that there is an incentive for both parties to settle prior to litigating. The personal injury pre-action protocol fees, for example, are set so that the protocol fee is slightly greater than the equivalent judicial fee in the early stages of procedure, and the insurer gets the benefit of not having to instruct his own solicitors.

The exception to this is personal injury cases which are under the summary cause limit, when it may be more economical for insurers to wait until proceedings are raised to tender a reasonable offer. This will either lead to personal injury victims accepting offers which do not sufficiently compensate them for their injuries or to cases which are capable of settling being raised to force a reasonable offer to be made.

As already stated our members' experience is that not all insurers currently abide by the voluntary pre- action protocol for personal injury claims and only make reasonable offers once proceedings have been issued. This situation can only be expected to get worse in personal injury cases under £5,000 now that they must be raised as summary causes.

Formalising pre-action behaviour by way of making the pre-action protocol compulsory and introducing sanctions for non-compliance would encourage all parties to consider pre-action steps seriously, ensure that court proceedings are not raised unnecessarily and reduce settlement times, as long as there are appropriate fee structures. Due to the advantages that the pre-action protocol can bring, we believe that it should be extended, appropriately adapted if necessary, to higher value cases: at present, it is only designed for cases up to £10,000.

A single set of civil procedure rules in the Court of Session and sheriff court

The introduction of the Coulsfield Rules for ordinary personal injury causes in the sheriff court is welcome and expected significantly to improve the procedure in cases heard there. Now that cases up to the value of £5,000 fall within the summary cause procedure, we urge that careful consideration is given to adapting the Coulsfield Rules for use in these cases.

There are obvious advantages of a single procedure for all personal injury actions across different courts. Procedural rules and practices will generally be interpreted by the Court of Session and followed without difficulty in the sheriff court.

The Coulsfield procedure does not require the significant investment of judicial time which is necessary under rule 8.3 of the summary cause procedure, which places an obligation on the sheriff to seek to settle the case at the first hearing. If this rule is applied in practice in personal injury actions, every defended case will require an allocation of at least a half hour. As the rule change was only introduced in January 2008, it is too early to say whether this, and the subsequent disruption of the sheriff court timetable, is occurring or whether the rule is simply ignored in practice. Either alternative is unsatisfactory in a modern court system.

The Coulsfield procedure would also address the inevitable timetabling issues which will be thrown up in summary cause personal injury cases, such as problems in obtaining evidence in time to lodge it within the required 28 days of the Rule 8.3 hearing.

Amendments to current arrangements

We do not think that a single initiating document for all types of action or courts would be beneficial as it would have to be so general as to be rendered meaningless.

It would, however, be beneficial to parties and to the court if defences were required to be in a standard format and substantively state the defender's case. In personal injury cases, the pursuer is required to set out his case in detail, but the defence can be generic, which means that the issues in dispute cannot be narrowed down.

Routine procedural matters

Under the Coulsfield procedure, there is no need for designated judges and sheriffs to deal with routine procedural issues, as the rules themselves make provisions as to how to deal with these matters, and many procedural matters are dealt with by court staff.

Court control of hearing length

We believe that practitioners are best placed to judge the length of time necessary for a hearing, as they are familiar with all the issues in a particular case, as well as the witnesses who will give evidence.

Written arguments

We agree that there is a greater place in hearings for written submissions, although the extent to which these are appropriate should be decided on a case by case basis.

Evidence

APIL welcomes the full and early exchange of evidence in all cases. Parties can only make a fair assessment of their chances of success in a case when they have seen all relevant evidence. Early exchange of evidence can therefore lead to the early resolution of cases. All parties must, however, abide by the same rules in relation to evidence. For example, defenders are increasingly able to recover pre-accident medical records and so pursuers should be placed in a similar position in relation to, for example, the recovery of records of previous accidents.

It is neither practical nor necessary in personal injury cases for the court to have increased control over the use of experts. Most personal injury cases raised in the Court of Session do not go before a judge and there are already a number of cases which involve only one medical expert. The court has control with regard to expenses and this ensures that experts are not unnecessarily instructed.

Pursuers' offers

APIL believes that pursuers' offers ought to be re-introduced. They are highly effective in focusing the parties' attention early in proceedings. The sanction for failing to beat a pursuer's offer could either be an uplift on fees or the imposition of penal interest.

Civil Jury Trials

We believe strongly that civil jury trials should be retained. Civil jury trials keep judges in touch with public expectation about levels of damages and allow ordinary people to be involved in the administration of justice in Scotland. This view reflects that of Lords Marnoch, Abernethy and Johnston who, in *Shaher* v. *British Aerospace Flying College Ltd*[25], said

> *"as Lord Hope of Craighead makes clear [in the case of Girvan v. Inverness Farmers' Dairy 1998 SC (HL)] … the "overall philosophy" of Scottish practice is that the assessment of damages is first and foremost a matter for a jury. We, ourselves, might go further and suggest that it is this very philosophy which gives to awards of damages in this area their essential legitimacy. These awards, as it seems to us, should in the end reflect the expectation of the society which the legal profession serves and represents, rather than be simply an invention of that profession."*

[25] 2003 S.L.T. 791 at para 6

Written judgments

Whilst written judgments should not be required in all cases, we believe that all non-written judgments should be recorded and transcribed. It is imperative to have an accurate record of the reasoning behind decisions so that appeals can be contemplated if necessary and judges and practitioners can take the reasons in to account when considering future cases. Written judgments or a transcript can also be required in relation to recoupment of benefits by the Compensation Recovery Unit.

Sanctions

Whilst we think that there are already sufficient sanctions for non-compliance with court rules, properly enforced sanctions for non-compliance with the protocol would be necessary if abiding by this were to become compulsory.

Party litigants

The court should be able to exercise its discretion in relation to apparently unmeritorious cases brought by party litigants.

We also believe that the court should be able to exercise its discretion where a party litigant asks that a person without a right of audience address the court on his or her behalf.

Multi-party litigation

APIL does not believe that rules to allow for multi-party actions should be introduced in Scotland. Although, in 1996, the Scottish Law Commission drafted rules for such actions, it was not able to suggest a workable solution to the funding difficulties that such actions would face. Multi-party actions are, in effect, brought in Scotland using the existing rules and work well. The Piper Alpha litigation is a good example of this.

Appendix A - Details of recent cases relating to costs in England and Wales

Assignment of CFA to a new firm

Jenkins v Young Brothers Transport Ltd (June 2005: Master Campbell). Counsel for the defendant "admitted very frankly that he was advancing an unabashedly and unashamedly technical objection to the costs of [the claimant and claimant's solicitors]". It failed. The CFA was held to be valid.

CFA formality requirements

Garret v Halton Borough Council and **Myatt v National Coal Board** (August 2005: Master Wright; upheld on appeal, see [2006] EWCA Civ 1017).
The majority of practitioners will be aware of these two cases. In *Garrett*, a failure to advise the claimant that law firm had an interest in recommending a particular after the event insurance policy rendered the CFA unenforceable as a breach of regulation 4(2)(e)(ii) of The Conditional Fee Agreements Regulations 2000 (the 2000 regulations). In *Myatt*, the solicitors asked their claimant client the wrong questions when trying to find out whether he had before the event (BTE) legal expenses insurance. The court held this was a material breach of regulation 4(2)(c) of the 2000 regulations and the CFA was held to be unenforceable. Worse came when the defendant/respondent looked for its costs of the appeal. *Myatt's* solicitors had profit costs in the region of £200,000 at stake over approximately 60 similar cases, and the defendant suggested that this was clearly the main driver for pursuing the *Myatt* appeal as it was unlikely that *Myatt* would have appealed to obtain reimbursement of his own disbursements in view of the amounts at stake. The court agreed and ordered *Myatt's* solicitors to pay 50 per cent of the defendant's costs of the appeals.

The majority of recent cost challenges, as evidenced by the reported cases below, refer to one or other or both of these cases as a means of questioning the validity of the CFA.

Brennan v Associated Asphalt Ltd [2006] EWHC 90052 (Costs) (May 2006: Chief Master Hurst, Senior Costs Judge: in October 2006).
In this case QM Solicitors unsuccessfully disputed the validity of the claimant's CFA on the basis that it fails to specify how much, if any, of the success fee related to the postponement of the payment of the claimant's solicitors' fees and expenses. While the court accepted this was a breach of the 2000 regulations, it was not material and the CFA was held to be valid.

Oduvbu v Dualeh [2006] EWHC 90059 (Costs) (July 2006: Master Rogers).
In this case solicitors for the defendant disputed the validity of the CFA on the basis that the claimant's legal executive had failed to make sufficient enquiries into the existence of BTE cover. The defendant solicitors also sought to discredit the claimant's legal representative's evidence, despite his 20 years experience in personal injury claim work. The tactics were unsuccessful. The CFA was held to be valid.

White v Revell [2006] EWHC 90054 (Costs) (September 2006: Master Wright).
The defendant sought to argue that the claimant's solicitors did not make sufficient enquiries of any BTE cover available. In relation to the DAS legal expenses BTE insurance policy which was available to him, the claimant had been seriously injured in a motorcycle accident and his solicitor advised that the DAS cover would in all likelihood, prove insufficient for his needs. The defendant's challenge failed. The CFA was held to be valid.

Fosberry v HMRC [2006] EWHC 90061 (Costs) (October 2006: Master Wright; upheld on appeal; [2007] EWHC 2249 (Ch)).
In this case, costs draftsmen (instructed by The Solicitor H. M. Revenue and Customs argued that first, the uplift identified in the CFA failed to comply with regulation 3(1)(b) of the 2000 regulations. The uplift purported to reflect time and delay risks that attached to the VAT appeal but failed to specify what element of the percentage applied to it. Second, the wording of the CFA failed to specify what would happen upon premature termination of the agreement under regulation 2(1)(c)(iii). These were found to be material breaches and the CFA was held to be invalid.

King v Halton Borough Council (November 2006: Chester county court, Judge Halbert, Lawtel 20/4/2007).
In this case, the claimant's solicitors successfully defeated the defendant's contention that they had failed to declare an interest in the ATE insurance policy sold to the claimant (the *Garrett* point).The judge commented, "this case is yet another example of the highly undesirable satellite litigation surrounding conditional fee agreements… there is no suggestion here that anything the claimant's solicitors ought to have done, on merit, to deprive them of their costs". The CFA was held to be valid.

Andrews v Harrison Taylor Scaffolding & Ors [2007] EWHC 90071 (Costs) (February 2007: Chief Master Hurst, Senior Costs Judge).
In this case, QM Solicitors, acting for the defendants, argued that the claimant's solicitors had failed to declare that the majority of its personal injury claims came from a particular source and that it had an interest in recommending that source's insurance product to the claimant. Failure to declare that interest (the *Garrett* point) was a found to be a material breach. The CFA was declared unenforceable.

Bevan v Power Panels Electrical Systems Ltd [2007] EWHC 90073 (Costs) (May 2007: Master Wright).
In this case QM Solicitors, acting for the defendants, argued that the claimant's solicitors had failed to make sufficient enquiries about BTE insurance (the *Myatt* point) and also, that although an oral explanation of the claimant firms' links with the ATE insurer was given, no written explanation was provided (a variation on the *Garrett* point). The defendant admitted this was a 'technical' breach argument. Both arguments succeeded and the CFA was declared unenforceable.

Kashmiri v Ejaz & Anor [2007] EWHC 90074 (Costs) (June 2007: Master Simons.
In this case, the claimant lost his housing disrepair claim. His solicitors then disputed the validity of the defendant's CFA on the basis that the solicitors had failed to make sufficient enquiries about BTE insurance (the *Myatt* point). The argument failed and the CFA was declared valid.

Foord v American Airlines Inc [2007] EWHC 90076 (Costs) (June 2007: Master Simons).
QM Solicitors, on behalf of the defendant, disputed the validity of the claimant's CFA on the basis that the claimant's solicitors had failed to declare that the majority of its personal injury claims came from a particular source and that it had an interest in recommending that source's insurance product to the claimant (the *Garrett* point). The argument failed. A declaration had been made to the client and the interest was such that the claimant solicitor was not obliged to offer the particular insurance policy. The CFA was declared valid.

Cochrane v Chauffeurs Of Birmingham (22 June 2007: London county court, Judge Lindsay QC, Lawtel: 20/8/2007).
The defendant successfully argued that the claimant's solicitors should have known that passengers in vehicles could often have the benefit of the driver's own legal expenses insurance and that enquiries ought to have been made in November 2004 when the claimant instructed her lawyers (the *Sarwar* and *Myatt* points). The claimant's solicitors had not made enquiries into the existence of any BTE cover owned by the driver (breach of the 2000 Regulations, 4(2)(c) and 4(2)(d) and the CFA was declared unenforceable as a consequence.

Myers v Bonnington (Cavendish Hotel) Ltd. [2007] EWHC 90077 (Costs) (July 2007: Master Rogers; an appeal to the Central London county court is listed for 4 February 2008).
In this case the defendant disputed the validity of the claimant's CFA retainer on the basis that the claimant solicitors did not make it very clear to Mr Myers that there was an obligation on them to recommend the Accident Line (AL) scheme (the *Garrett* point). The claimant was an established client of the firm and had already made a personal injury claim a few years earlier (he was aged 83 this time) and was well aware of the benefits of the AL scheme from that claim. The judgment is in favour of the claimant – the CFA held to be valid. This is subject to further appeal next month.

Utting v McBain [2007] EWHC 90085 (Costs) (August 2007: Master Campbell; upheld on appeal by Blake J, sitting with assessors, on 28 November 2007).
In this case, the claimant's CFA failed to state that part of the success fee which related to the charge for postponing receipt of JGR's fees was 0 per cent. The defendant argued that the percentage in question must be stated, irrespective of whether it is nil or a higher figure and that such breach is material. This argument was successful and the CFA was held to be unenforceable.

Dole v ECT Recycling Ltd [2007] EWHC 90086 (Costs) (September 2007: Master Rogers).
The claimant was a bus passenger when she was injured. She did not take advantage of the bus company's BTE insurance to fund her claim. The defendant solicitors argued that failing to advise the claimant of the possibility of her taking advantage of the BTE insurance, referred to in a defendant's insurer letter, was a failure to comply with 4(2)(c) of the 2000 regulations. It was held there was no breach and the CFA was declared valid.

Barlow v Perks [2007] EWHC 90087 (Costs) (October 2007: Master Rogers).
The claimant's personal injury claim was transferred to another law firm when his first firm of lawyers ceased doing personal injury work. The second firm was not on the panel of the claimant's LEI. The claimant was never asked in terms whether he objected to the transfer, nor was there any communication as to the transfer of the benefit of any BTE insurance which the claimant had. The claimant was never told that the BTE insurance was unavailable to him because the new firm was not on the panel He was given only two options: personally underwrite the costs or enter into a CFA. This was a material breach of regulation 4 of the 2000 regulations and CFA was declared unenforceable.

Elstone v Knowles [2007] EWHC 90089 (Costs) (November 2007: Deputy Master Rowley).
In this case the defendant argued that the claimant's CFA was unenforceable because the claimant solicitors had failed to inform the claimant of any interest they had in recommending the claimant's purchase of ATE insurance from Accident Line Protect (the *Garrett* point). The argument failed and the CFA was declared valid.

Birmingham City Council v Crook & Crook & 9 Ors [2007] EWHC 1415 (QB) (The Hon Mr Justice Irwin, sitting with assessors Master Wright and Mr Gregory Cox)
In this case, Birmingham City Council admitted that its housing stock was so awful that it invariably loses any housing disrepair claims brought against it. McGrath & Co in Birmingham had brought a large number of such claims against the council and had devised a standard CFA to use in such cases. Birmingham Council decided to mount a challenge to the validity of that standard CFA, arguing in the main, that by failing to advise claimants to take advantage of public funding for their claims, this was a material breach of the CFA Regulations. McGrath had advised on public funding as an option, but also pointed out the problems of doing so. McGrath & Co had also taken out a precautionary contentious business agreement (CBA) with the claimant when the Council challenged the CFA, which was expressed to be relevant or enforceable if the CFA was unenforceable. The Council's solicitors alleged the CBA was unenforceable. The court held that the advice on public funding was sufficient and so the CFA was valid. It also held that as the CBA was only ever intended to operate if the CFA was unenforceable, then since the CFA was enforceable, the validity of the CBA was academic.

Belton v Hayton Coaches, 14 September 2007.
The district judge held that the indemnity principle still applied to CFA 'lites' and as the CFA in question did not impose upon the claimant a liability to pay costs, then the CFA was unenforceable.

Meaning of terms agreed

Brierley v Prescott [2006] EWHC 90062 (Costs) (March 2006 : Master Gordon-Saker).
The claimant's CFA was written to describe that it related to a claim against the defendant Hertz, the car hire company. However, the claim was complicated and the defendant's identity changed. While the court proceedings were amended, the CFA was not. Morgan Cole for the amended defendant argued that the CFA was unenforceable because it was described as relating to a claim against another defendant. The court rejected this argument, stating, "The intention of the parties is obvious. The 2002 agreement was to provide funding for the continuation of the claim which had been the subject of correspondence between [the claimant's solicitors] and Hertz for the preceding three years. There was only ever one "claim"." The CFA was held to be valid.

Disclosure of retainer details

Hutchings v British Transport Police Authority [2006] EWHC 90064 (Costs) (October 2006 : Chief Master Hurst, Senior Costs Judge).
QM Solicitors, instructed by the defendant authority, served a part 18 request which asserted that it was designed to "establish whether or not the claimant had the benefit of legal expense insurance and to clarify the relationship between the claimant's solicitors, the claims management company/insurance providers." It ran to 13 questions and the claimant's solicitors refused to answer them. QM argued that until they did so, their bill of costs should be assessed at nil. The Judge commented on QM's tactics: "there is no doubt that, in these proceedings, the attempt to obtain further information was a brash and ill considered attempt to uncover information which would enable the defendant to challenge the claimant's bill on a technical point, in the hope of being able to demonstrate that the CFA Regulations had not been complied with, and that therefore no costs at all were payable." He allowed that three of the original 13 questions ought to be answered by the claimant but refused to award to the defendant/appellant the costs of the hearing.

London & Cambridge Properties Ltd v Bradbury (2 February 2007, Kingston upon Hull county court, Judge Thorn QC)
In this case, the defendant/appellants sought to argue that they were entitled to disclosure of documentation showing that the claimant's solicitors had informed him as to the reasons for recommending the insurance and as to whether the solicitor had an interest in so doing, (the *Garrett* point), as required under the 2000 Regulations, 4(2)(e). The claimant solicitors maintained that the endorsement of the claimant's bill of costs, signed by the claimant's solicitors as officers of the court, indicating that the bill was accurate and complete was sufficient. The judge held that nothing led him to doubt the integrity of the firm's signature and he refused to go behind it. The defendant had no automatic right to disclosure of documents relating to that compliance; the burden of proof rested upon the defendant to show whether the conditions applicable to the agreement by virtue of section 58 of the Courts and Legal Services Act 1990 had not been sufficiently complied with.

Success fees

Cullen and Cullen v Dr Chopra [2007] EWHC 90093 (Costs) (December 2007 : Master Campbell).
In this case the claimants' solicitors served the notice of funding, with the letter of claim, on the defendant some eight months after the claimants had signed their CFAs, but some four months before proceedings were issued. At the conclusion of the claim the defendant argued that the claimant has a duty to inform a defendant of the existence of a CFA and a potential claim for additional liabilities during the pre-action protocol period. As the first funding information provided to the Defendant was in the letter of claim he argued that a success fee was only recoverable from the date when the funding information was served and that all success fees claimed before that date should be disallowed. The judge rejected this argument on the basis that it was common ground that the clinical negligence pre-action-protocol did not contain any requirement for notice of funding to be given pre-issue, still less did it specify a time at which this must be done and it was the intention of the CPR that notice of funding should be given on issue of the claim. The Practice Direction (Protocols) recommends that the notice is served before issue of proceedings, but only that – it is not mandatory. The defendant's technical challenge on the success fee **failed.**

Gloucestershire County Council v Evans and others [2008] EWCA Civ 21
(31 January 2008 : Lord Justice Buxton, Lord Justice Dyson, Lord Justice Lloyd and Master O'Hare sitting as an assessor)
Lord Justice Dyson opens his judgment with the weary comment that "Yet again, this court is concerned with an issue arising from the conditional fee agreement legislation." This case concerned a collective CFA (CCFA) where the basic charges were described as an hourly rate of £145 per hour and also included 'discounted charges' of £95 per hour which would be charged if the client lost the claim. The success fee was described as the "percentage of basic charges which the legal representative adds to the basic charges if the client wins the claim." The client 'won' the claim but the loser's solicitors claimed that the wording of the CFA (and this is a very brief paraphrase) meant that the success fee applied to both the basic charges and the discounted charges, in effect providing for a success fee of 290 per cent, thereby exceeding the permitted maximum of 100 per cent. The technical challenge could be viewed as laughable but the Law Society intervened, to ensure, ridiculous or not, it went no further. Discounted rate CFAs and CCFAs have survived no doubt to be challenged on another day.

CFA and recovery of success fee in RTA's fixed costs cases

Two insurers in particular are refusing to pay the 12.5 per cent success fee on RTA fixed costs claims unless a copy of the CFA is disclosed. This is despite the N251 having been served at the outset and despite the cases of *Nizami v Butt* and *Coles v Mirror Newsgroup* being quoted every time.
One APIL member has found that if he issues part 8 proceedings he will succeed on this point, see *Wetzel V KBC Fidea* (SCCO) which is one of his cases, but it is still a live issue.

100 per cent success fee at trial

A number of members are reporting that where cases go to trial but settle early for what ever reason, but after the trial has started, the defendants are arguing that this is 'no trial'. This can include situations where a case is listed for a final hearing and on the day, the case is adjourned after preliminary arguments due to a lack of time to conclude. The claim is then subsequently settled before going back before the court. The claimant solicitor then claims a 100 per cent success fee but the defendants offer 12.5 per cent on basis that there was 'no trial conclusion'.

The relevant case is **Dahele v Thomas Bates & Sons Limited** [2007] EWHC 90072 (Costs) (SCCO) in which it was held that 'trial' means the 'date fixed for trial' and includes the settlement on that day. In *Dahele*, the claimant's solicitors successfully concluded a claim on behalf of a mesothelioma sufferer and then were challenged on their success fee on this basis. The challenge failed.

Costs estimates

Tribe v Southdown Gliding Club(1), Adam (2), King(3) [2007] EWHC 90080 (Costs) (June 2007 : Master Gordon-Saker)
In this case, the claimant had taken out ATE insurance with his CFA, provided by Accident Line Protect. Upon filing their allocation questionnaire (AQ), the defendants estimated that their costs would be £50,000. For evidential reasons, the claimant discontinued his claim, leaving the defendants entitled to their costs. The claimant's costs had amounted to around £30,000 by the time of discontinuance. The defendants submitted bills amounting to £244, 506, five times the amount suggested in the AQ. The claimant said he had relied on the estimate. His solicitor submitted evidence that she had not advised him to purchase top up ATE cover, because the AQ estimate suggested that the £100,000 cover he held was sufficient. The court took the view that the defendants knew the claimant had ATE insurance, and therefore understood the importance of providing an accurate estimate. The sums claimed were unreasonably high and the most they could recover from the claimant was £70,000.

Appendix B - Questions asked and answers received in relation to the Glasgow Sheriff Court Personal Injury Pilot

On 1 February 2008 APIL asked the Glasgow Sheriff Court for the following information in relation to the Glasgow Sheriff Court Personal Injury Pilot scheme:

1) The number of personal injury cases raised under the scheme
2) The amount of court dues paid in these cases
3) The number of these cases which proceed to proof
4) The average time between these cases being raised and proceeding to settlement or proof
5) The proportion of these cases which run on the day originally allocated for proof
6) The average amount of judicial time or number of hearings spent on these cases
7) How many accounts in these cases are taxed?

On 11 February 2008, the following information was gratefully received from Alan Johnston, Head of Civil Department, Glasgow Sheriff Court:

"By way of background the pilot scheme for personal injury actions raised in Glasgow Sheriff Court has been in operation since April 2006. The principal criterion for inclusion in the pilot is the value of the action. Currently any action over £10,000 qualifies for inclusion.

The action should be served and a notice of intention to defend and defences lodged in accordance with the rules. Once defences have been lodged parties will receive an invitation to participate in a case management conference at a specified time. The case management conferences are mostly conducted by means of conference call

facilities. The invitation also specifies the sheriff assigned to the case. Sheriffs Scott and Mitchell are the two personal injury sheriffs.

At the case management conference a timetable and procedures to be followed are agreed, this means that the options hearing requires to be discharged on joint motion of the parties with the agreed procedure being substituted. There is no need for the pursuer to lodge a record in process.

In answering the questions posed in the email, the data provided should be used with some caution as due to restraints within our case registration system, data on pilot cases cannot be readily extracted from our system. The system records data on the action type raised and I am unable to readily identify pilot cases.

The data provided has been extracted by using the date of the first case management conference.

Question 1

For the period 10 April 2006 to 5 February 2008, 260 cases have been included in the pilot.

Question 2

Unable to provide an exact figure, I would estimate a figure of £143.00 per case. This is based on the first papers lodged by parties (Initial Writ and Notice of Intention to defend) and a joint motion by the parties.

Question 3

No cases within the pilot have proceeded to Proof.

Question 4

Average time between cases being raised and disposed of is seven months.

Question 5

As stated above no proofs have proceeded.

Question 6

Average amount of judicial time is estimated at 1¾ hours. This figure is based on an average of each case being assigned three case management conferences and includes the Sheriff's preparation time for each conference.

Question 7

No pilot cases have had accounts taxed by the Auditor of Court. I can advise that no comparison has been made in relation to personal injury cases which run within and outside the scheme."

Appendix C - Questions asked of, and answers received from, the Scottish Court Service

Statistics requested from the Scottish Court Service, 1 February 2008

1) The number of personal injury cases raised in the Sheriff Court and Court of Session in 2007
2) The amount of court dues paid in these cases
3) The number of these cases which proceed to proof
4) The average time between a personal injury case being raised and proceeding to settlement or proof in both the Sheriff Court and Court of Session
5) The proportion of personal injury cases which ran on the day originally allocated for proof in both the Sheriff Court and Court of Session
6) The average amount of judicial time or number of hearings spent on personal injury cases
7) How many accounts in personal injury cases are taxed?

Response received from the Scottish Court Service, 10 March 2008

On behalf of the Court of Session the answers are as follows:

1. 2485
2. £1,212,743
3. 1
4. This information cannot be extracted from the CMS database. This would require a direct chargeable request to Delphi Computer Consultants.
5. Only 1 of 2485 cases went to proof
6. There is no facility in the CMS database for the recording of judicial time spent on cases. There are no hearings in Personal Injury cases. A hearing is a generic term and is not specific enough to be able to identify any particular diets within a case history.

7. Taxation of accounts are not a function of the Court of Session. These are carried out by Office of the Auditor of the Court of Session, which is independent of the Court of Session. This would require a direct request to the Auditor.

On behalf of the Sheriff Courts the answers are as follows:

1. 3602 (2007) also 4038 (2006) and 4400 (2005)
2. This data is not kept uniformly and is therefore not of reliable quality
3. This information is not held centrally or uniformly (i.e. would require manual compilation or a chargeable request to consultants for SQL)
4. This information is not held centrally (no end to end time recorded and would be chargeable as 3 above)
5. This information is not held centrally (no data held)
6. This information is not held centrally (no data held)
7. Same answer as the Court of Session above.