

RESPONSE PAPER

to

CONSULTATION PAPER ON THE CIVIL COURTS REVIEW



THOMPSONS
S C O T L A N D

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SUMMARY OF RESPONSE TO THE REVIEW CONSULTATION PAPER

The Review:-

- is too judicially centred and exclusive.
- is selective and unfair in its composition.
- process is confused.
- identifies that the problem with civil courts is the criminal courts over which it has no remit.
- fails to recognise the legal basis and framework within which the Review must take place.
- does not place fatal injury and disease at its core.
- does not adequately recognise health and safety and the role of the civil courts.
- may lead to devaluing of personal injury and disease cases to an administrative exercise and not as a matter of civil right.
- has no basis for the implied criticism of the Court of Session and its handling of cases for personal injury.
- gives rise to a perception of bias.
- appears to be treating our justice system as a commodity.
- has not fully recognised the obligations in terms of Article 6 of ECHR.
- has failed to identify the Articles 6 and 14 questions in respect of levying fees for the use of our courts and as a policy contrary to justice.
- has failed to consider the question of the funding of litigation in the context of Article 6 and policies and practices contrary to justice.
- has failed to recognise the full impact of the personal injury market in respect of claims companies, success fees and solicitor agreements.
- has entirely failed to recognise the role of trade unions.
- has also failed to adequately reflect Scots Law and its authorities in many of the issues which it covers.

RESPONSE PAPER

CONSULTATIONS ON THE CIVIL COURTS REVIEW

1. General Comments

1.1 While we welcome the review of our civil courts system with the objective of improving the administration of justice in Scotland, we have reservations in the manner in which it has so far been conducted.

1.2 We are concerned with its composition and therefore its direction and emphasis. While judges are very much part of our civil courts, so too are others. Yet, the Review is judicially dominated and therefore it seems will inevitably be conducted from that perspective. There are 3 members of the Project Board all of whom are judges. There are 3 judges on the Policy Group. We cannot understand why, for example, the Law Society of Scotland or the Faculty of Advocates were not invited to be members of either. On the Policy Group, there is a Queens Counsel, an Advocate and a Solicitor but we do not know why and how they were selected. We wish to know the basis upon which that was done and why the Law Society of Scotland and the Faculty of Advocates have been excluded. We are otherwise left with the impression that their exclusion and the inclusion of others suits a particular agenda.

1.3 There are also the users of the civil courts. One group with a vested interest is the Scottish Consumer Council which sits on the Policy Group.

This is to the exclusion of other bodies who represent users, and often major users, of our civil courts system whether that be from the world of commerce, insurance, law centres, specialist groups and trade unions. It cannot, by any stretch of the imagination, be said that the Consumer Council represents their interests. Their cases are not consumer cases. If users representatives are to be included then a fair representation of them should be on the Policy Group. To only select one gives rise to suspicion of special treatment and gives that particular group undue influence in pursuing its own agenda. It therefore devalues the Review which should rest principally on fairness. We regret to say the suspicion on our part, and that of many of our clients, of bias of one group against others remains and is a fundamental concern in our, and their, approach to the Review. That cannot be in the interests of the Review and, ultimately, the administration of justice in civil courts in Scotland.

1.4 We also find difficulty in understanding the Review process. A Consultation Paper has been issued. It raises questions for discussion and answer. However, there are those on the Policy Group who have already answered these questions and, it seems, irrespective of what views are expressed to the Review. For example, the consultation paper asks the question as to whether the system of levying court fees affects access to justice. But the Scottish Courts Service, represented on the Policy Group, has issued a Consultation Paper (see below, paragraph 4.8) on extending such a system of funding of our civil courts system. One also wonders what the position of the Scottish Courts Service

and that of other government officials is on the Policy Group when contributing to it while outside the Review carrying on with policies and measures which will have a fundamental effect on our civil courts system irrespective of then being the subject of the Review. The Review deals with commercial actions and the issues surrounding them. However, the Cabinet Secretary for Justice has initiated another process by setting up the “Business Experts in Law Forum” which is clearly all about commercial actions. Where does that stand in relation to the Review?

1.5 The Review is, essentially, a political process. It has been set up by the previous Minister for Justice and will report to the Cabinet Secretary for Justice (and to Paul Cackette, the Senior Official of the Scottish Government Justice Directorate, who is on the Policy Group and who is taking a proactive role, for example, visiting and reporting on the Personal Injury Assessment Board system in the Republic of Ireland). Yet there is a Judiciary Bill which is reaffirming, by statute, the independence of the judiciary from the political process. That is not only with regard to judicial decisions but the very operation of our courts including our civil courts. Indeed there is a structure being set up under that Bill for this to be carried out by the Chief Executive and a Policy Board presided over by the Lord President. It seems that we will have a process of the Lord Justice Clerk seeking to radically alter the civil courts system (and that means every aspect of it including the territorial jurisdiction of the courts) but where does that leave the Lord President and the structures in terms of the Judiciary Bill?

1.6 Finally, it is recognised that the problem with the administration of justice is not so much our civil courts but in our criminal courts. In discussing the problem of the priority given to and the take up of judicial resources by the criminal courts element of the Scottish legal system the foreword to the Consultation document states that:

“unless that problem is dealt with effectively it is probable that any proposals for civil justice reform will have only the most limited practical significance”

1.7 The proportion of judicial time taken up by criminal work is directly at the expense of civil work. Procedural reforms previously brought into the High Court have, from the figures prepared from the Consultation Document, failed to curb the increasing appetite of the criminal courts to consume judicial time and resources. In a situation where, to quote the Consultation Document [paragraph 4.4] *“The civil and criminal courts of Scotland are not separate institutions”* surely considering and investigating reform of the civil court part of the system is a “back to front” exercise which is likely to end in failure – but only after a large amount of the precious time of judges, practitioners, politicians and others intimately involved in the system has been wasted. Indeed the problem of the criminal courts seems to be so acute that the problem will not be solved simply by the bringing into place of further reforms within criminal law court processes and certainly not by carrying out a wholesale reform of our civil law courts. What is clearly needed is a philosophically based consideration of the part to be played by criminal law in the ordering of society, what criminal sanctions should apply in a modern society and whether existing criminal

sanctions and outcomes are appropriate. A better balance also has to be struck between criminal rights and civil rights. The question of loss of liberty is a serious matter but so is loss of life before our civil courts. These questions have to be considered against the background of the European Convention of Human Rights and Fundamental Freedoms and they are also, by their nature, questions for political debate which deserve a far wider consideration well beyond the remit of the Review or, for that matter, judges.

2. The Basis and Framework for Reform

2.1 The Scottish Civil Courts Review Consultation Paper of November 2007 sets out the remit of the Review announced by the then Minister for Justice, Cathy Jamieson on 12 February 2007. The remit is as follows:-

To review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods, having particular regard to

- *the cost of litigation to parties and to the public purse;*
- *the role of mediation and other methods of dispute resolution in relation to court process;*
- *the development of modern methods of communication and case management; and*
- *the issue of specialisation of courts or procedures, including the relationship between the civil and criminal courts;*

and to report within 2 years, making recommendations for changes with a view to improving access to civil justice in Scotland, promoting early resolution of disputes, making the best use of resources, and ensuring that cases are

dealt with in ways which are proportionate to the value, importance and complexity of the issues raised.

2.2 At paragraph 1.15 of the consultation paper, views and comments are welcomed on the principles which underpin its work.

2.3 It is our view that the remit must be based on and work within the framework of fundamental principles in our society and law. We refer to our letter of 13 August 2007 when we stated that an area of concern is human rights compliance with the existing and proposed procedures.

2.4 Our democratic society and the rights of its citizens are founded on the European Convention of Human Rights and Fundamental Freedoms (ECHR). The pursuit of these rights by individuals has been available since 1964 before the European Court of Human Rights. Since 1998, with the passing of the Human Rights Act 1998, cases can be brought before our national courts.

2.5 The State, including the Scottish government and Scottish Parliament, are bound by these rights (for the Scottish Parliament and Scottish Government see Sections 29 (2) and 57 (2) of the Scotland Act 1998).

2.6 It therefore follows that any reform of our law and our legal system must not only have regard to these rights but must be founded on them.

2.7 The rights are:

For example

- *The right to life (Article 2)*
- *The right to a fair trial (Article 6)*

- *The right to a respect for private and family life (Article 8)*
- *Prohibition of discrimination (article 14)*
- *Protection of property (Article 1, Protocol [No1] to the Convention)*

2.8 We are concerned that the “headline” principle in the remit which is one of cost of litigation to the parties and the public purse will be unfettered and it is not recognised that such a principle must conform to these rights and, if necessary, be restricted by them. These rights are not defined in terms of costs.

2.9 The remit also has within it a formula or equation to be applied in allocating resources to categories of cases or individual cases; the resources are to be weighed against the value, importance and complexity of issues raised. Again, we are concerned that such a formula will not be applied in the context of the above rights. The rights are values in themselves and very often a monetary assessment cannot be applied. They are also important irrespective of their complexity. They are important by definition.

2.10 The consultation paper and therefore Review so far does not however seem to be taking into account these rights as a framework within which the remit is set. It does not even mention them as a category of cases with which our civil courts have and should be concerned especially since 1998. Other categories are mentioned such as family actions, commercial actions and personal injury actions. The only reference to ECHR is in relation to Article 6 on two

very specific matters regarding compulsory mediation and jury verdicts.

2.11 The Review, if it does so ignore these rights, will be flawed. In purporting to carry out this remit, it may lead to conclusions which do not, or if they do only coincidentally, reflect these rights. As we also stated, these rights are a framework within which the Review should take place. To have only a principle of cost and the “equation” of value, importance and complexity whether by judges, politicians and other interested groups there will be a risk that not only will such rights not be promoted but, however unwittingly, that those rights will in fact be breached.

3. Death from Injury and Disease

Article 2 of ECHR states that everyone’s right to life shall be protected by law.

3.1 This article is one of the most fundamental rights of ECHR. This is not surprising as we would all recognise irrespective of Article 2 that whatever else we may or may not have, our very life and those of others is of the highest value. There is no mention of Article 2 in the Consultation Paper. There is not even any mention of fatal accidents or diseases. We must assume that these are covered by the general term “personal injury” in the consultation paper.

3.2 By failing to address Article 2 and in any event fatal accidents and diseases and assume that they come under the catch all of “personal injury”, it is clear that the review is not placing them at the core of it’s review.

3.3 Yet fatal injuries, diseases and resulting deaths occur with monthly if

not daily frequency: on our roads, at work, in hospitals, at home and to members of the public. An opportunity now presents itself, and so far missed by the review, to consider how our civil courts should address the many breaches past and present that lead to loss of life both to the dying and their families. The review should consider how the full resources of the court, and that of our Supreme Court, should be applied to these cases. This involves all aspects of our courts from litigant care, handling, management and resolution. It should also be considering civil juries, not just generally, but as a potential best means for the impact of such cases to be fully appreciated on our behalf by ordinary members of the public and not judges.

The Role of the Civil Case

3.4 The review should also appreciate that restitution is only one of the concerns of those affected. Their first question is how and why the accident or disease occurred. Another question is what lessons can be learned so that they or their loved one have not died in vain. If the review cannot address such questions then any conclusions it comes to will be inadequate in so far as these cases are concerned (and the requirements of Article 2 of ECHR) to the detriment of those whose civil rights have been most affected.

3.5 It may be said that we have Inquiries to answer such questions under the Fatal Accident and Sudden Deaths Inquiry Act (Scotland) 1976. Not all deaths will qualify under that Act and/or there may be no entitlement to an Inquiry because the Lord Advocate has so decided. The only avenue open to

such persons will be a civil case. Indeed, in respect of deaths which have occurred in the care of the State (and that would include medical negligence) the availability of a civil action could be a factor precluding such an Inquiry (see *Emms –v- Lord Advocate* [2007] CSOH 184 *Lady Smith, Kennedy and Black –v- Lord Advocate and Scottish Ministers* [2008] CSOH 21 *Lord Mackay and R (Takoushis) –v- Inner London Coroner* [2006] 1 WLR 461). A civil case, as it currently stands, is geared towards restitution and will in turn in most cases fail to answer those questions.

3.6 As for those cases for which an Inquiry will be held in terms of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, we had asked in our letter of 28 June 2007 as to whether these were to be covered by the review – we were informed on 16 July 2007 that they were not. There has recently been announced a review by Lord Cullen of the 1976 Act. Inquiries are a civil process, take place in our Sheriff Court and to which not inconsiderable resources are applied. One would have thought that any review of our civil courts system would have involved the 1976 Act or, as has been done on criminal business, made comment on it. It is also not clear as to the Review position with regard to the Inquiries Act 2005. It is another means by which Inquiries are conducted into deaths and/or injuries. The Stockline Inquiry is now underway and falls under this Act. A Hepatitis C Inquiry will be taking place in the near future which too will fall under this Act. Again no comment is made on such Inquiries which invariably require members of the senior judiciary to preside. Lord Cullen’s review provides for consideration of the

relationship between a 76 Act Inquiry and other Inquiries (it is presumed that Inquiries 2005 are meant). One would have thought that the Review would have considered the relationship between such Inquiries and the civil cases which often follow.

3.7 In any event by fatal accident inquiries being disconnected from the civil courts review and hived off into another review, the impression is that once again the review in fact has little to do with Article 2 questions, that civil actions arising out of death are only about compensation and even at that have to be categorised under the heading “personal injury” and need no special attention.

Injury and Disease

3.8 Article 2 is not only about the aftermath of a fatal accident or disease but also the protection of life. Article 8 is also concerned with the right to physical integrity. Clearly a personal injury affects a persons physical integrity and very often irrevocably so.

Prevention

3.9 Apart from Article 2 and Article 8, it must be recognised as a matter of policy that it is better for all concerned that the injuries do not happen in the first place. The question has to be asked as to whether a civil courts system which is geared solely to restitution and which does not address the conduct which gave rise to the injury and the lessons to be learned is a missed opportunity. It is appreciated that the protection of life and physical integrity can be left to the relevant legislation leading to the appropriate sanctions most notably under

the Health and Safety At Work Act 1974. We would have to recognise, however, that such measures are not seen as criminal but regulatory (see *Transco PLC –v- HM Advocate 2005 ISC para 15*). There are also serious questions as to whether this regulatory regime is an effective method of enforcing health and safety having regard to the difficulties of enforcement, prosecution and resources. In any event one would have thought that to regard a civil court system in respect of personal injury as having objectives of prevention allied with restitution can only help prevent such injuries. It could complement the 74 Act regime. As well as achieving greater protection for Scottish Citizens, it would also lessen the costs to our civil courts, employers, insurers, the NHS and our society.

3.10 Irrespective however of whether or not civil litigation in the personal injury context should have a preventative dimension, the fact is that it does have that dimension. There are numerous examples of personal injury cases which have resulted in improvements in health and safety. There is a passing acknowledgment to this possibility in the review at paragraph 1.13.

3.11 By way of example, Unison, a union whose members are in the public sector including the NHS, took civil actions for “needlestick injuries”. This is where auxiliary nurses came into contact with spent needles which had not been disposed of properly. The injury which they sustained would be a pricked finger or hand. It would be minimal and insignificant. The risk however was that through the needle they may have been infected with a Hepatitis or HIV

infection. It would take several months to know whether they are clear or not. There would be the worry over those months. The risk of HIV was minimal but Hepatitis more so. In terms of the review, we have no doubt that such a case falls within the category of “low value” personal injury. The value may be between £1000 and £1500. Yet by the union taking these cases and pursuing them consistently and with every NHS trust, the problem was identified including the worst culprits and measures were implemented. Monitoring continues but the cases have drastically dropped.

PIAB and Sheriff Court

3.12 If these cases had proceeded under a Personal Injuries Assessment Board then the health and safety dimension would have been lost and the cases converted into a compensation processing scheme. If they had been removed to the Sheriff Court, including Summary Cause, then the signal would have been given by doing so that the cases are devalued, and so would the health and safety dimension. They would simply be perceived as cases to be disposed of as expeditiously as possible. (For future cases the signal is already there by the change in the £5000 limit in the Court of Session (Statutory Instrument 2007 No. 507))

3.13 Indeed if most, if not all, personal injury cases are hived off to a specialist Sheriff Court away from the Court of Session, this would, in our view, relegate their importance notwithstanding Article 2 and Article 8, remove them from the core of civil cases and effectively line them up to be dealt with with only compensation in mind

and very much as an administrative exercise. Indeed, there is a concern that if a PIAB system would be appropriate for low value cases then there would be no logical reason as to why that remit could not be increased. Any Sheriff Court specialisation would be very much an interim step towards that conclusion.

3.14 This would very suitably dovetail with the insurance industry’s dumping down of claims handling and reliance on Colossus software (see “A Breach of Protocol” by Graeme Garrett Journal of the Law Society of Scotland Vol 52 no. 2 Feb 2008). It should be noted that, although not explicitly stated in the Consultation Paper, the PIAB, in the Republic of Ireland, applies to all cases irrespective of value. It would certainly be an objective of the insurance industry that such a system was replicated in Scotland and in England and Wales.

Disease Cases

3.15 There is also no distinction made in the Review between accident cases on the one hand and disease cases on the other. While both types of case can be categorised as “personal injury” they are two very different kinds of cases on their facts, medical causation, liability and quantum. The differences between disease cases and accident cases has been recognised by the Scottish Law Commission in its “Report on Personal Injury Actions: Limitation on Prescribed Claims” of December 2007, scotlaw.com no. 207. We refer, by way of example, to paragraph 2.58 in the report.

3.16 There is one very specific category of disease cases which constitute a very large volume of cases in the Court of Session and have done so

historically since the early 90's. These are cases of loss, injury or damage arising out of asbestos exposure. Up to the late 80's, most asbestos cases were in the Sheriff Court. The Sheriff Court was entirely inadequate in dealing with the issues arising in such cases and the level of damages was extremely low especially in fatal cases. We transferred all of these cases into the Court of Session throughout the 1990's. There was an increase in the quality of judicial determination. (See, for example, the case of *McManus Executrix –v- Babcock Energy Ltd (Outer House)* 1999 SC 569 and 2000 SLT 655). A Petition had also been presented to the Petitions Committee of the Scottish Parliament and an investigation was thereafter conducted by the Justice Committee to improve the procedures in the Court of Session for asbestos cases. Constructive discussions took place between the successive Lord Presidents and Convenor and Deputy Convenor of the Justice Committee. This led to improvements including By Order Roll by Lord Mackay for traditional procedure asbestos cases and also accelerated the implementation of the Coulsfield proposals leading to Chapter 43. Asbestos cases were now specifically identified on the Summons and the Court of Session has been, and is still, sensitive to the issues arising in these cases, especially the priority given to a case where life expectancy is limited. One also has to wonder what the Sheriff Court would have made of the substantive issues affecting asbestos cases such as the insolvency of one of the major insurers, the determination of British Shipbuilders liabilities and the impact of cases such as *Fairchild –v- Glenhaven Funeral Services Ltd (HL)* House of Lords [2003] 1 AC 32, *Barker*

–v-Corus UK Ltd (HL) House of Lords 2 AC 572 and more recently *Rothwell –v- Chemical & Insulating Co Ltd (HL)* House of Lords [2007] 3 WLR 876. The foregoing is apart from the legislative changes which have taken place and the reception of these by the courts: Damages (Scotland) Act 1993, Social Security (Benefits) Act 1997 (which affected all personal injury cases but where change was initiated by the impact of asbestos cases commencing with a Select Committee Inquiry at Westminster and subsequent Report), the Compensation Act 2006 (Section 3), the Family Law (Scotland) Act 2006 and the Rights of Relatives (Damages) (Mesothelioma) Scotland 2006. The efficiency and the adaptability of the Court of Session to even pending legislation is illustrated in the case of *Thomas Dow –v- West of Scotland Shipbreaking Company Limited & Others* [2007] CSOH 71. The Scottish Government has announced future legislation to deal with the case of Rothwell. Substantial advances have been made for such demanding and meritorious cases that this should be built upon rather than put in jeopardy. The Review has not identified any of the above and therefore has failed to appreciate the progress and demands of such cases and does not come up therefore with any good reason for displacing all or any of them to the lower courts.

Chapter 43

3.17 The Review recognises that the Chapter 43 (Coulsfield) rules have been a success. This is also recognised in the Evaluation carried out by Elaine Samuel for the Scottish Executive, Evaluation of New Rules for the actions of damages

for or arising from personal injuries in the Court of Session (Chapter 48) February 2007. It is recognised that for all personal injury cases they take up little judicial time, cases are now heard at the end of 13 months rather than several years (there are also no longer endless disputes on pleadings). The judiciary, court staff and those representing parties in the Court of Session have built up a good working knowledge of the rules and practice on a day to day basis. There is an inbuilt dynamic which gives critical flexibility to the rules guided by Lady Paton. All the Review can say is that such cases take up administrative time. They would, with respect, take up administrative time wherever they were. In any event, if the Scottish Court Service achieves its full funding objective, such administrative time will be paid for. It seems to us that the major objection pointed up in the Review is that the Supreme Court should not deal with small claims of any kind. We do not agree that “small claims of any kind” are all the same. A claim, for example, for loss and damages arising out of pleural plaques is not the same claim as loss of a sum arising out a breach of contract for £7000. They may both have the same monetary value but are vastly different in human terms in the value which we would attach to either of those cases. In any event, personal injury cases of lower value are being removed from the Court of Session. This is by the Statutory Instrument (S. I. 2007 No. 507) which came into force in January 2008. If, notwithstanding this, the Review still concludes that small claims are in fact in excess of this then we wish the Review to spell out what criteria are to be applied in determining what is a small claim. It seems from the Review

that this is monetary value. However the remit also refers to complexity and importance as well as value. If these are to be additional tests then we would wish the Review to define specifically what cases would be acceptable to the Supreme Court. Finally, we would wish the Review to justify its conclusion with reference to ECHR Articles 2, 8, Article 1 Protocol 1 and Article 6.

Quality of Justice

3.18 It is disappointing that the Review discusses personal injury cases in the Court of Session primarily from the point of view of how they are processed. The quality of justice in the Court of Session has to be fully recognised in personal injury cases. The Court of Session has presided over 25 years of innovation in the quantification of damages. For example, heads of claim such as loss of capacity on the labour market; The Actuarial Tables for use in Personal Injury Cases (most recently the 6th Edition Ogden); loss of pension rights; increases in compensation for injury by reason of loss of congenial employment and greater recognition of psychiatric damage have all taken route in our system faster and wider than would have been the case if the attempts to seek these damages had been restricted to the Sheriff Court. What Lord Hope of Craighead, the Senior Scottish Judge in the House of Lords, has said in relation to developments in personal injury law is illuminating:

“The law in this field used to be simple. One need look no further back than the start of the second half of the last century [1950]. There were few reported cases on damages and there was little attempt at detailed analysis. Statutory intervention was largely absent. But all that has now changed. As a result the law in this field

[personal injury] is now so complicated that almost every question relating to quantum of damages requires research....The law does not stand still....This field especially it is constantly on the move. The case law continues to build up, the statutory rules are changed and the value of money alters". [Foreword to "Personal Injury Damages in Scotland" S.A.Bennett]

3.19 On liability, litigation in the Court of Session has resulted in a substantial proportion of the leading decisions on the interpretation of the European Union derived health and safety regulations emanating from Scottish as opposed to English Courts. As is said in the preface to the 28th edition of "Redgraves Health and Safety" (the leading source text book for personal injury lawyers)

"Redgraves can continue its tradition of referring to the many important Scottish decisions which are often of great value to practitioners".

3.20 This important factor cannot be ignored in reviewing what cases are properly litigated in the Court of Session. We would also be in no doubt that many of such cases would otherwise be described as "low value" as per the Review.

3.21 The question, as with disease cases, again has to be asked if a system is recognised and demonstrated to be working well, why there should be any question of it being changed? It seems that a solution is being sought for a problem which does not exist.

Perception of Bias

3.22 We have another serious concern which we raised in our letter of 20 June 2007. Lord Gill had made statements on whether personal injury cases should be

retained in the Court of Session in a Law Society Journal contribution of April 1995. Under the section "Expedition", third paragraph thereof, he referred to there being 2032 action of personal injury. He went on to state:

"Such actions were already pending at the beginning of the year. I will not attempt to analyse the figures more deeply but I can say that it is my clear impression, and that of most of my colleagues, that many of these personal injury litigations have no place in the Court of Session. They are important to the Pursuers, of course. But most of them raise no question of law. Many of them are worth no more than some few thousand pounds on full liability. If such actions do not settle, the Court Hearing then far exceeds their true value. Is this an appropriate use of the specialist resources of the Supreme Court?"

3.23 It is clear that Lord Gill has already expressed a view on this subject. There is a concern therefore, irrespective of the Review, that Lord Gill has already made up his mind with regard to many personal injury cases in the Court of Session.

3.24 Lord Gill, in 2 appeal cases before him, declined to preside over the cases because of his remarks (*Gould –v- Glasgow City Council* and *Wilson –v- Glasgow City Council*).

Commercial Actions

3.25 There is also a great deal said in the Review about commercial actions. It is quite appropriate that the problems of commercial actions should be addressed. However a concern would be that commercial actions would be considered appropriate to the Court of Session but personal injury cases would not (and that would include abolishing jury trials).

3.26 If, by way of example, on the one hand we had an elderly person who was knocked down on a pelican crossing whose injuries, such as a broken leg, amounted to less than £10,000 and on the other hand had an action for a large company at £100,000 arising out of a straightforward breach of contract (the large company having a turn over well in excess of that) it seems to us that the review is contemplating the £100,000 case remaining in the Court of Session and the £10,000 case being relegated to the Sheriff Court (and no jury). It is implied in such an equation that the elderly persons civil case is less important than the commercial case. There would in giving such attention and priority in allocation of resources to commercial actions be a question of Protocol 1, Article 1 being given precedence as against rights under Article 2 and Article 8. There would also be a question of Article 14 by way of discrimination between these two kinds of cases.

Justice as Commodity

3.27 We are also extremely concerned at the potential implication and message in the setting up of an Expert Group announced by the Cabinet Secretary for Justice called the “Business Experts in Law Forum” which has as one of its goals, the improvement of our legal system so that businesses choose Scottish legal services, use our courts to litigate and for dispute resolution if necessary. The Review Consultation Paper itself also states at paragraph 4.29 that there is:

“an argument that a successful commercial Court with a high degree of expertise could be beneficial to the Scottish economy. It would

support specialist commercial law firms to enable the continued development of commercial law in Scotland. It would attract business outside Scotland seeking quick and reliable resolutions of disputes and, for Scottish business, would develop and support confidence in litigating in Scotland.”

3.28 What seems to be envisaged by that is quite simply startling. It would suggest that cases between large companies (which may be of no fundamental importance to the companies themselves given their size) should be attracted by some means to come before the Scottish Courts. This is not about justice but about treating our court system as an international commercial commodity. It would be manifestly wrong to displace cases in our Supreme Court to make room for cases which otherwise have nothing to do with Scotland or Scottish citizens other than financial gain. One also has to wonder whether this also lends weight to the concern that personal injury cases will be displaced to make room for such cases.

4. Article 6 Issues – the Law and Policy

Article 6 states:-

That everyone is entitled to a fair and public hearing within reasonable time by an independent, impartial tribunal established by law.

4.1 There are two references to Article 6, ECHR in the Review. The first of these is to be found at paragraph 5.26 in relation to mediation and whether making it compulsory would be in breach of that Article (*Halsey –v- Milton Keynes NHS Trust 2004, EWCA (CW) 576 and dicta of*

Lord Justice Dyson). The second is at paragraph 6.3 and the contention that jury trials offend against Article 6 because the jury gives no reasons for its award and that a jury may give a verdict based on irrelevant considerations.

Mediation

4.2 In relation to mediation, we would have expected a judicially led Review to have concluded whether or not compulsory mediation was in breach of Article 6. The question, surely, cannot be left open? Further, in a situation where it is acknowledged by the statistical evidence that the vast majority of personal injury cases raised in the Court of Session settle without the need to run in Court the idea of compulsory mediation can be seen at best as an unnecessary and indeed costly exercise and, at worse, as an attempt to “commercialise” the litigation process. The Court of Session under the chapter 43 Coulsfield procedures works as a settlement mechanism because practitioners at Solicitors Advocate and Counsel level have a strong working knowledge of the law and procedures in this area. Any mediator brought in to such cases could not and would not have that knowledge. They would therefore not bring any “added value” to the settlement process and the cost of involving a mediator would simply be another expense which the Agents and others who, in effect, fund such cases would require to bear until at least conclusion of the case. Even that assumes that such expenses of mediation would be recoverable in the event of success in the case. That seems far from certain and disputes over that issue

would be likely to unnecessarily prolong the expenses recovery process at the end of a case.

Civil Jury Trials

4.3 In so far as the question of jury trial is concerned, the Review, surprisingly, has failed to recognise that there are a number of cases which have dealt with the question and it has been authoritatively determined in the Inner House case of *Heasman –v- J M Taylor & Partners 2002 SC 326* that civil jury trials were not in themselves inherently unfair in terms of Article 6 (1). Lord Coulsfield held that:

*“there is little difficulty in concluding that the procedures followed in a civil jury trial are adequate to give the assurance that the jury are directed to the proper questions. Trial by jury is, in the absence of some special circumstances, trial by an impartial and independent tribunal. The matters in controversy in the pleadings are defined by the pleadings. The issue (and counter-issue, if there is one) specify a question or questions for the jury to answer. The heads of damages, and the sums sued for, which set a maximum for the award, are also set out in the issue. The questions in the issue are often posed in general terms, but the court has the power to direct that the issue should include a special question or questions, if circumstances make it appropriate to do so. The jury are given directions by the judge as to the law to be applied and the proper approach for them to take. The jury does not give reasons but as a general it is possible to see what view the jury have taken of the evidence, and in that context the absence of reasons can be regarded as it was in *R v Belgium*, as inherent in the system and acceptable.”*

4.4 There are also dicta by Lord Johnston and Lord Hamilton which agree with Lord Coulsfield and indicate that potential improvements can be made to the conduct of jury trials in light of Article 6. None of this means that they

should be abolished and indeed the contrary. Other cases are *Sandison –v- Graham Begg Ltd 2001 SC 821*, *Gunn –v- Newman 2001 SC 535*. It is also interesting to note the case in the criminal context of *Transco PLC –v- HM Advocate 2004 SLT 995*. In our view any potential objection to jury trials in terms of Article 6 is unfounded and the Review should

and should have recognised that as a matter of law. We have already spoken of the need for civil jury trials in the cases of death from injury and disease. Indeed, it was through the awards of juries in a number of cases that led to it being found that judges were out of date for awards for distress, anxiety, grief and loss of companionship (Section 1 (4) Damages (Scotland) 1976) which led to a long overdue increase in these awards. The civil jury trial represents the involvement of the citizen in the workings of the civil court system. It has been recognised in such cases as *Girvan v Inverness Farmers Dairy (No.2) (1996 SC 134)* that a civil jury made up of ordinary men and women is more likely to have a grasp of the value of money and the appropriate amount of compensation in a case than a judge sitting alone would have. As Lord McCluskey stated in that case:-

“Twelve jurors from different walks of life and with different incomes and needs might be thought to be better placed as to understand the value of money than a judge such as myself”.

4.5 However there are other issues in relation to Article 6 which have not been discussed in the review.

PIAB

4.6 One of these relates to denial of access to the courts. This is a similar

issue as to that of mediation. In chapter 2 Access to Justice at paragraph 2.19, the Personal Injury Assessment Board is discussed:-

“Other jurisdictions have made more radical changes to how they deal with certain kinds of claims of lower value by taking them outside the formal court structure, for example, the Republic of Ireland has established the Personal Injuries Assessment board (PIAB) and the Private Residential Tenancies Board. The PIAB came into being for compensation in cases involving employers’ liability on 1st June 2004 and for claims arising from motor accidents on 22nd July 2004. All claims for personal injury (excluding medical negligence) must now be submitted to the PIAB for assessment. It is said that the new process delivers compensation without the legal costs and experts’ fees that add, on average, more than 46% to the cost of a claim. It also reduces the time take from approximately three years under the court system to nine months.”

4.7 Such a proposal raises the question of denial of access to the court “taking them outside the formal courts structure” and on the same basis as compulsory mediation, would seem to offend against Article 6. An additional breach would be the obvious denial of legal representation. The review should conclude whether or not it regards the PIAB as contrary to Article 6.

Funding of Civil Courts

4.8 There is, in relation to Article 6, a more fundamental issue. In chapter 3, the Costs and Funding of Litigation under the Elements of Litigation and How They Are Calculated at paragraphs 3.8, 3.9 and 3.10 there is a discussion briefly of the system of civil litigants paying for the courts. Question 3, page 15, asks “Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?” However it would appear that

the question has already been answered. The Scottish Courts Service, on 11 February 2008 issued a Consultation Paper: "Consultation: Review of fees charged by the Court of Session, Sheriff Courts, Office of the Public Guardian, Accountant of the Court and High Court". The proposal is to increase the court fees paid by civil litigants to 78% of the costs and which the consultation paper states will be "a substantial step towards full cost pricing", that is, a system whereby the civil courts are fully paid for by those who use them. With that increase, they stated that there would be no further increase intended until 2011. In the meantime, the Civil Courts Review will have issued its conclusions in 2009 which will then enable the Scottish Courts Service to consider further increases in light of that.

4.9 Neither the review nor the consultation document have considered whether a system which rests on civil litigants paying for the courts offends against Article 6. Article 6 provides that every person is entitled to a fair and public hearing in the determination of his civil rights and obligations. The right to a fair hearing includes a right of access to the courts. There must be many civil litigants who when faced with payment of substantial sums of money to pursue their rights will not do so.

4.10 In addition, there is Article 14 of ECHR which states:

"the engagement of the rights and freedoms set forth in this convention shall be secured without discrimination on any grounds such as...property..."

4.11 The further question therefore arises as to whether the requirement to

pay discriminates against those who have the ability to pay court fees as against those who cannot. This would give a rise to a question also of a breach of Article 6 in conjunction with Article 14.

4.12 The issue may be all the more sharply focussed where the inability to pursue a civil right and the discrimination arises as between the opposing parties – one able to pay and the other not. There is also a final consideration as to whether in the adversarial context of many civil cases, there would be equality of arms.

4.13 Apart from Article 6, this principle of paying for our civil courts may also be in breach, in any event, of a constitutional rights at common law of universal access to the courts (*R –v- Lord Chancellor ex parte Witham* [1998] QB 575, QBD per Laws J. at 581 C– F 585, 586). The Lord Chancellor had sought to increase by Statutory Order the fees for issue of a writ and other process. Laws, J. stated:

"But the impost of court fees is, to my mind, subject to wholly different considerations. They are the cost of going to court at all, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers. In my judgment the effect of the Order of 1996 is to bar absolutely many persons from seeking justice from the courts."

4.14 All of the foregoing is apart from policy and political questions as to whether our society should subscribe to a principle which gives greater access to justice to those who can pay as against those who cannot.

4.15 The review must now consider these important questions and come to a view as to whether, in the above circumstances, there is a breach of Article 6 and Article 14 and/or the constitutional right of universal access to our courts. It should be able to do as it is a judicially led review. It cannot leave the matter open especially when its conclusions and recommendations regarding our civil courts will in fact be paid for not by the State but by civil litigants for whom it is reforming our civil courts.

4.16 Given that the intention is for civil litigants to pay for our civil courts and if the Review considers that there is no breach of Article 6, it is all the more incumbent that the Review analyse fully the costings and savings for its proposals. That in turn should be based on a proper and full financial analysis.

Party Costs and Funding of Litigation

Party/party expenses

4.17 In chapter 3 – the Costs and Funding of Litigation, party/party expenses as against agent/client expenses are discussed. It is recognised that there is a disparity between the two, the party/party expenses being less than agent/client expenses and often significantly so.

4.18 This means that where a party has been successful in respect of their civil rights, and in many cases recovered losses as a result of a breach of those rights, they should nevertheless suffer a loss in respect of expenses incurred in pursuing those rights. Correspondingly, the losing party gains in the conduct of litigation from the knowledge that there

are losses accruing to the opponent and at the end of the day by having a lower award of expenses against them. This, it would seem, would allow defences on the cheap and, indeed, with impunity.

4.19 The consequences of such a system is that, invariably, the deficit between the party/party expenses and agent/client expenses are met from the very property (the definition of property used in its ECHR sense, see below) which was the subject of the litigation.

4.20 The review does not discuss any of the above in the context of ECHR. The question has to be asked as to whether such a system offends against Protocol 1, Article 1 of ECHR:

“Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest subject to conditions provided for by law and the general principles of international law”

4.21 “Property” has a wide definition and includes economic interests and assets including heritable rights, claims to compensation or social welfare entitlement. There will be cases, especially combined with other costs (discussed later), whereby access to the courts is denied and thus contrary to Article 6.

4.22 Even apart from Article 6 and as a matter of policy it is difficult to see how such a system can be seen to be fair or otherwise justified.

Risks of Litigation

4.23 Chapter 3 also discusses the funding of litigation. One of the main problems in funding litigation is the

potential exposure to defenders costs in the event of the case being lost. Speculative arrangements, Before the Event insurance and After the Event insurance are discussed. There are a number of matters however substantially impinging on this area which are not discussed.

Claims Companies

4.24 Most notably, a major method of funding litigation for personal injury cases is omitted. These are contingency fee arrangements. This is where the legal services provider, in return for carrying the risks in the case including defenders costs, will take a percentage of the damages recovered in the event of success. This can be as much as 30% or 40%. There can also be sliding scales on the percentages dependant upon the stage of proceedings. Claims companies conduct cases on this basis. Solicitors are prohibited from entering into such arrangements although they are free to, and do, take instructions from claims companies. In addition to the 30 to 40%, it should also be noted that, on recovery, there will also be party/party expenses.

4.25 Claims companies exist and do conduct business in Scotland. There are also claims companies based in England who conduct business in Scotland. Indeed, it is now a fertile ground for such arrangements given the restriction now placed on claims companies in England and Wales by the Compensation Act 2006. The Act does not apply to Scotland (apart from Section 3 which has nothing to do with claims companies). Claims companies in Scotland are unlicensed and unregulated.

Solicitor Success Fees

4.26 In relation to solicitors, there is reference in paragraph 3.33 of when an action is successful the solicitor being entitled to an uplift of his fee of up to 100%. The Review is in error in stating that the enhanced fee is recoverable from the unsuccessful party. It is not. It should also be noted that the 100% uplift is on the judicial expenses i.e. party/party expenses. We find once again that the successful party will be paying (and as we indicate, out of the very property which is the subject of a civil right).

Solicitor Agreements

4.27 There are, however, other agent/client agreements not discussed in the Review. Although solicitors are prohibited from entering into contingency fee arrangements there is an analogous fee arrangement whereby in return for taking on the risks, often with insurance whether it be before or after the event, the solicitor undertakes to charge no more than a percentage of the damages. This can be 15-20% of the damages.

4.28 It should also be noted that such feeing arrangements can be arrived at in what one would regard as even a straightforward case but where it can always be said that there is a risk of litigation. It also has to be said that if a case is difficult on liability then the solicitor may in fact not wish to enter into such an arrangement. There may also be insurance requirements which may limit the cases taken under such an arrangement or where the premium is

pitched so highly as to be prohibitive and have the same effect.

4.29 The overall effect of a contingency arrangement or the solicitor percentage arrangement is that, once again, these are met out of the very property which is the subject of the civil right. A court system which endorses the funding of court actions in this manner must on its own, or taken together cumulatively, with the disparity between agent/client and party/party expenses, be in breach of Protocol 1, Article 1 ECHR and Article 6.

England and Wales

4.30 In England and Wales a system has been adopted whereby agent/client costs are recovered on a party/party basis, there is a success fee recoverable from the defenders for the risk having been taken by the solicitors and there are also recovery of insurance premia. This obviously rests upon the principle that the party who is responsible for the breach of the civil rights should pay fully for the costs in remedying that breach and for the risk in doing so. There are, we understand, now no contingency fee arrangements in England and Wales and there is no-one in the market who does not offer 100% damages.

4.31 It would not be necessary to go as far as England and Wales, in our view, to meet what can only be described as the glaring shortfalls in the Scottish recovery system. It is also appreciated, as the Review points out, that there has been satellite litigation in England and Wales on the recovery system. However, we do consider that in the Scottish system there should be at least

agent client recovery (subject to them being reasonable) and that the restrictions posed by the rules of court should be removed. Insurance premia should also, in principle, be recoverable.

Insurance Premiums and Scots Law

4.32 The Review again has failed to recognise that a matter which it discusses, here recovery of insurance premia, has been considered by the Scottish courts. In *Alexander McNair's Executrix –v- Wrights Insulation Co Ltd (Oct 2003)* Lord Carloway regarded the issue as a narrow one. While it was considered that the taking out of an insurance premium was a step adopted, no doubt, quite reasonably and legitimately in certain situations to protect the economic interests of the client and possibly also the agent in a case pursued on a no win no fee basis, it was not a recoverable expense of process on a party/party taxation because it did not form part of the conduct of the cause in terms of the Rule of court (Rule 42.10.(1)).

Trade Unions

4.33 There is, finally, a somewhat insulting omission from the consideration for the funding for litigation. A major funder of civil cases in the Court of Session has, for decades, been trade unions. They merit only a passing mention and no questions are asked about them (although questions are asked about legal aid, speculative agreement, After the Event insurance and After the Event insurance). The speed, cost and efficiency of trade union assistance was recognised by the Inner House in *McIntosh –v- British Railways Board (No. 1) [1990] SLT page 637*. It

is surprising that a judicially led inquiry has failed to consider such a case. In any event, the role of the trade unions in our civil courts was more than fully set out in a letter to Lord Gill on 20 June 2007. Trade unions, despite the restrictive costs regime described above in Scotland, still guarantees its members, in a successful personal injury case, 100% of the damages. It is regrettable that a means of funding which ensures the fullest compensation to its members has been ignored. Far from being ignored, such a system of funding should be an objective of our civil courts system. It also has to be said that trade unions are not simply concerned with compensation but with the health and safety implications of any personal injury. None of the other systems of funding are.

APPENDIX

RESPONSES TO QUESTIONS FOR DISCUSSION FROM CONSULTATION DOCUMENT

Chapter 1

1. Early resolution of disputes is to be encouraged in general but it must be recognised that resort to the Courts, particularly in personal injury cases, is what prompts resolution of disputes. That that is the case is shown by the success of the Chapter 43 (Coulsfield Rules) procedure for personal injury cases in the Court of Session.
2. No. See paragraphs 2.1 to 2.11 of the Response Paper. The Review should be underpinned by the fundamental principles in the Response Paper.
3. Yes. See the Response Paper generally but particularly paragraphs 2.1 to 2.11, 3.1 to 3.11, 4.9 to 4.16, 4.27 to 4.29 and 4.33
4. We have reservations and concerns in the manner in which the Review has so far been conducted.

Chapter 2

1. Legal education is one matter but there also legal products which have and will be advertised more powerfully. Some of these will be not desirable and contrary to the public interest. We have in mind in particular claims companies who are unregulated and unlicensed but which have powerful marketing budgets. The undesirability of their products and the dangers presented by lack of regulation are considered in paragraph 4.24 and 4.25 of the Response Paper.
3. Not desirable. It is the experience of Pursuers Agents that unrepresented claimants get made lower settlement offers in personal injury cases by insurance companies than those who are legally represented. Equality of Arms is of the essence of “access to justice” – see Response Paper in particular paragraph 4.12.
4. Court based advice would require to be careful in not compromising the independence of the courts. Very often procedural and substantive issues can become mixed. Also the court giving advice would need to be careful that it itself may become a litigant if any such advice was found to be negligent.
5. The Review Paper has failed to recognise developments in the market in particular the influence of claims companies. We refer to the answer above and again to paragraphs 4.2 and 4.25.
6. No. See Response Paper and particularly paragraphs 3.12 to 3.14, 3.17, and 3.19 to 3.20.

7. The Review Paper has failed to recognise fully the other means by which knowledge of legal rights and services made available mainly through the laudable network of law centres and also through trade unions who have schemes for providing advice across a wide range of legal matters including criminal, family, consumer, property, tenant, wills and trust and executry.

Chapter 3

1. The question is so general as to be impossible to answer.
2. See paragraphs 4.8 to 4.33 of Response Paper.
3. Yes. See above but in particular paragraphs 4.8 to 4.16. Indeed it is our view that levying of court fees is unlawful.
4. No. See in particular paragraphs 4.17 to 4.22 of the Response Paper.
5. See text of the Response Paper.
6. The availability of legal advice and assistance and legal aid is one factor to be taken in to account in considering access to justice along with other factors set out in the Response Paper and alongside consideration of the other funding methods available to potential litigants. The continued availability of legal aid enables certain types of cases to be litigated – for example medical negligence and child injury cases where funding would otherwise be difficult or impossible to obtain.
7. Yes. In personal injury cases which are not straightforward on liability there can be difficulties in obtaining funding for litigation. See paragraphs 4.23 to 4.32 of Response Paper – particularly paragraph 4.28.
8. Speculative fee arrangements have enabled certain potential litigants who would not otherwise have funding available to them – for example through Trade Union funding or through legal aid to litigate. The Review has failed to understand fully the nature of speculative fee arrangements and what they mean for the civil litigant (see paragraphs 4.27, 4.28 and 4.29). The Review Paper has failed to consider trade union assistance and its nature and benefits (see paragraph 4.33).
- 9-10. There is little “before the event” insurance cover available in Scotland and it is unrealistic to expect that to increase. As regards “After the event” insurance premia see paragraphs 4.31 to 4.32 of Response Paper.

Chapter 4.

1. Yes, undoubtedly - see paragraphs 1.6 and 1.7 of the Response Paper.
2. Were there to be specific civil judges this would reflect, for example, the practices within the Commercial Court at the Court of Session.
3. Separation of the Sheriff Court and the Civil and Criminal Divisions might have the effect of cutting down unnecessary delays and avoiding the situation with priority given to criminal business causing disruption, delay and additional expense in civil cases of all types.
4. The Chapter 43 (Coultsfield Rules) do with personal injury cases in the Court of Session, provide what is in practice a specialist injury court. As per the Response Paper (see in particular paragraph 3.17) the research has shown that this works well.
5. See paragraph 3.17 of Response Papers. The concentration of specialist Solicitors, Solicitor Advocates and Counsel together with the knowledge of Court of Session judges working upon cases being dealt with under the Chapter 43 Rules makes the Court of Session the forum of choice where jurisdiction is concurrent. The factors of centralisation, speed and ease of litigation which were recognised by the Inner House in the case of McIntosh v British Railways Board (Number 1) (1990 SLT 637) lead to the Court of Session being appropriate and more practical as a litigation forum than the Sheriff Court for those who are funding the pursuit of personal injury cases.
6. The exclusive jurisdiction of the Sheriff Court should be extended no further.
7. It is not possible to see what the practical benefits of unification of the jurisdiction of the Court of Session and the Sheriff Court would bring as they would still require to be administered separately and the problem of the Sheriff Court being a “criminal court” would remain.
8. It is essential that the Court of Session retains a first instance jurisdiction particularly for personal injury cases. See paragraphs 3.18 to 3.21 of the Response Paper where the role played by the Court of Session in the development of interpretation of European Union derived regulations and in relation to quantification of damages is discussed. There would be far less certainty in personal injury litigation and a likelihood of a far larger number of appeals were the Sheriff Court to have exclusive jurisdiction at first instance in all cases. That would likely lead to a substantial increase in the cost of litigation. “Access to Justice” would be substantially eroded by such a measure.
9. The privative jurisdiction of the Sheriff Court should be retained at its current level.

- 11-12. The creation of a further tier of civil courts or a further tier of judiciary would appear likely to be a further administrative cost which would, no doubt, require to be borne by litigants generally.
17. A proposed “National Sheriff Court” would appear likely to be an unnecessary duplication of the Court of Session – albeit it would be seen as a poor relation of the Court of Session.

Chapter 5

1. As per the response document it must not be a question of whether there is an overriding objective/statement of philosophy or not but that the operation of the civil courts in Scotland and the rules of procedure associated therewith must be founded on and have regard to the rights set out in the European Convention of Human Rights and the priorities of Scottish citizens.
- 2-4. See paragraph 4.2 of Response Paper. Compulsory mediation is not necessary in personal injury cases.
- 7-8. As per the Response Paper (see particularly paragraphs 3.17 and 4.2) personal injury cases in the Court of Session have benefited greatly from the case flow management model adopted under the Chapter 43(Coulsfield Rules) procedure with the advantage to the Court that little judicial times involved in these cases passing through the Courts system. The rules provide for judicial intervention if necessary where timetabling of a case goes off the rails or where one party specifically seeks the intervention of the Court. Judicial case management on an ongoing basis in high volume litigation does not work. There is supposed to be judicial case management in the way that the court deals with summary cause actions. Some Sheriffs deal with matters as they are supposed to in terms of the Summary Cause Rules. Other do not for reason of lack of judicial time thereby leading to great uncertainty in the way solicitors have to approach preparation of such Summary Cause cases.

Chapter 6

- 1-3. The pre-action protocol for personal injury cases has been only of limited worth – see paragraph 3.14 of Response Paper – the protocol does not get past the approach of the insurance industry to make low offers which are only increased to realistic levels on litigation being commenced. The extension of the use of pre-action protocols in personal injury cases would work exclusively to the advantage of Defenders and would work to lessen access to justice for injured people.

4. The example of the Personal Injuries Assessment Board in the Republic of Ireland demonstrates that setting up a system whereby leave for proceedings to be brought requires to be sought is a retrograde step and represents a denial of access to justice in personal injury cases.
- 6-7. It would accord with common sense if court rules were the same across the Court of Session and Sheriff Court – although of course given the nature of the Sheriff Court it is very likely that such rules would be interpreted differently in one Sheriffdom from another. The document required to initiate personal injury proceedings at least should be identical between Sheriff Court and Court of Session.
8. The system of abbreviated pleadings under Chapter 43 of the Court of Sessions rules (Coulsfield procedure) works reasonably well but requires to be refined further to avoid the still prevalent problem of skeletal defences.
- 9-11. In personal injury cases routine procedural matters (unopposed motions) are dealt without appearance and therefore do not take up court time so it becomes “non routine” procedural matters or those where there is good reason for the motion enrolled by one party being opposed by the other, that require to be determined by the court and such cases often raise points that require determination by a suitably experienced judge. The proposed involvement of more junior judicial figures would lead to less certainty and the likelihood of more appellate work arising from those matters.
12. In terms of the automatically generated timetable under Chapter 43 procedure in personal injury cases a hearing of 4 days is automatically allocated. If the parties consider that to be inappropriate (and parties usually agree on this) then the matter is brought to the attention of the Court and a hearing of different length is sought. The Court largely therefore does not require to become involved in allocating the length of the hearing. The Court would prefer to be guided by the views of the parties in any event.
14. Chapter 43 procedure provides for earlier and wider disclosure of evidence than was previously the case under Ordinary Procedure
15. For the Court to determine the use of expert and other evidence would be an interference in the parties’ right to determine the way in which proceedings were presented to the Court and would represent an undermining of the right to a fair trial in terms of Article 6 of the European Convention of Human Rights.
16. A system of Pursuers’ offers should be introduced into the civil courts to bring “equality of arms” between the Pursuer and Defender. The Defender currently has the ability to lodge and rely upon a tender which penalises the Pursuer in expenses. A system of Pursuers offers should allow for the Court to likewise penalise the Defender in the event that a Pursuers offer is lodged with the Court where the

Defender is unsuccessful in the sense that the Court does not award less than the amount of the Pursuers offer.

17. As per the Response Paper civil jury trials are entirely compatible with the right to a fair trial and it is essential that they are retained and indeed that their use is increased (see paragraphs 3.3, 4.3 and 4.4 of the Response).

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