16 April 2014

Our Ref: L01-7/WJW/KV

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Scottish Parliament
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COURTS REFORM (SCOTLAND) BILL

During the evidence session before the Finance Committee on the Courts Reform (Scotland) Bill, I was asked whether there was evidence for the proposition that the involvement of Counsel promotes the efficient resolution of cases. In that regard, I wish to draw attention to some research commissioned by the then Scottish Executive in 2007, and also to comment on certain evidence given to the Committee by the Bill Team.

I am conscious that the Finance Committee has already produced its report to the Justice Committee, and I apologise for not offering this additional material before your Committee had completed its work on the Financial Memorandum. In the circumstances, I am copying this letter to the Convenor of the Justice Committee for her information.

Role of counsel in efficient resolution of disputes

In 2007 the Scottish Executive published research undertaken by Elaine Samuels of the School of Social and Political Studies at Edinburgh University into the working of the personal injury procedure in the Court of Session. The report is titled "Managing Procedure: Evaluation of New
Rules for Actions of Damages For or Arising From Personal Injuries in the Court of Session (Chapter 43).

In the conclusions of that work at Paragraph 11.82 the author wrote this:

"The success of Chapter 43 in general and of the Pre-trial Meeting in particular, was found to depend on the quality of the relationships between the main practitioners. Because judicial case management played no central role in Chapter 43, trust assumes a decisive role. As we have seen case flow management requires that players play the same game and abide by the same rules, usually without the guidance or supervision of a referee. If they do not then both parties will invariably arrive at the door of the Court having conformed to the requirements of the procedure but having successfully negotiated their way around those provisions that might expedite settlement. The number of main players in personal injury practise in the Court of Session is small. If members of this community abide by the same rules but are not playing the same game, their moves are at least predictable. Counsel may also play a role in moderating the adversarial position that agents take in personal injury actions and drawing both sides into a single community of practise, if not of interest. Whether the same conditions could be obtained in the Sheriff Court is open to question."

Comment on evidence from the Bill Team

I would also like to add some additional comments on two matters arising from the evidence given to the Finance Committee by the Bill team. The first comment relates to the assumption that no additional sitting days will be required in the sheriff court. The second concerns the evidence by Jan Marshall that one driver for the reforms is the question of disproportionate costs.

Impact of the reforms on sitting days required in the sheriff court

During the evidence session before the Finance Committee, Mr. Brown questioned the proposition that cases could be transferred into the sheriff court without increasing the number of sitting days. Jan Marshall’s response was that “it must be borne in mind that things will be done differently ...” (p. 3912 of the Official Report). Ms Marshall correctly reflects the expectation, following from key recommendations of the Civil Courts Review, that cases should, in the future, be managed in quite a different way from the way that they are currently managed. This was also stressed by Sheriff Principal Mhairi Stephen in her evidence to the Justice Committee. In
particular the Civil Courts Review made the following recommendations (see Volume 1, Chapter 5 of the Civil Courts Review):

(i) With the exception of certain specified types of action (including personal injury actions), all actions in the Court of Session and sheriff court should be subject to judicial case management. This would differ from the current arrangements under which, as a general rule (though a rule subject to exceptions and qualifications), the progress of cases is in the hands of the parties (paras 48, 49, 72).

(ii) A docket system should be introduced in the Court of Session and the Sheriff Court – ie that all cases should be allocated to a judge or sheriff prior to the first case management hearing and there should be a presumption that the case would thereafter be dealt with by that judge or sheriff (paras. 44, 73). In making this recommendation, the Civil Courts review observed that: “The benefits of expeditious decision making, consistency of approach and experience in the particular field are fundamental to successful case management” (para. 44). It also observed: “We agree with those respondents who regarded judicial continuity as critical to efficient case management” (para. 73).

These are reforms which I support. Active case management is one of the reasons for the success of the Commercial Court in the Court of Session. But the immediate question which arises in the context of the Financial Memorandum is whether it is realistic to proceed on the assumption that additional judicial resources will not be required as a result of these changes. On the face of it, active judicial case management is likely to require more judge time. It may require more sitting time, but – just as significantly – it is liable to require judges to spend more time in advance of hearings preparing for those hearings. I recognise that if this is the case it is not a direct impact of the Bill, but the intention to change the way that business is conducted in our civil courts is an intrinsic feature of the Civil Courts Review and it would be unrealistic to consider the financial implications of the shift of business to the sheriff court without regard to that consideration.

I recognise that the Civil Courts Review observed that proactive management by a judge with knowledge of the case may facilitate settlement or limit the scope of substantive hearings resulting in savings to the parties and the court (para. 44). But as the wording of the Review implies, this can be no more than a possibility. My own impression is that active case management is unlikely to result in a saving of judicial time, particularly if account is taken of the time which judges will require to prepare for hearings. It is worth noticing that, in its very recently published Interim Report on the “Making Justice Work 1” Rules Rewrite Project, the Scottish Civil Justice Council Rules Rewrite Working Group stated that “docketing has the potential to be resource heavy, requiring judges to be allocated at reasonably short notice and may
make managing the caseload of a court more difficult" (para. 81). The Working Group suggests that this aspect of the Civil Courts Review proposals will require to be considered further.

This is a factor which should be taken into account along with the matters referred to in the written evidence to the Finance Committee from the Sheriffs' Association. You will recall that the Association in a short submission made the following observations:

"... we are concerned that the pressure of increased business in the courts taking on work resulting from court closures has been underestimated. We are also concerned that the abolition of corroboration and the move toward a reduction in the level discretion afforded to the crown in relation to marking cases is likely to result in a significantly greater increase in the number of prosecutions than is currently estimated. We suspect that the budget for the Personal Injury court ... is unrealistic given the anticipated number of cases. We also consider that the projections for the Sheriff Appeal Court may not reflect the level of cases which will require to be heard."

*The cost of litigation*

Jan Marshall identified “disproportionate costs” as one of the drivers for the proposed reforms. I would like to offer some observations on this aspect of the matter. These observations should, of course, be read in the context of my own evidence accepting that an increase in the exclusive competence of the sheriff court would be justified, but which suggests that the appropriate level would be £30,000 (a figure consistent with the recent increase in Northern Ireland).

(a) As I observed in my own evidence to the Finance Committee, to an extent there is a fixed cost in running a case which means that inevitably as one gets to the lower-value end of the cases, the ratio of what the case costs to run to the value of the case will be greater. The level at which costs are regarded as “disproportionate” is to some extent a value judgment, but the data which is available does not, I would suggest, justify the proposed increase in the exclusive competence to £150,000. I comment in more detail on that data below.

(b) It will be appreciated that running a case in the sheriff court also has costs attached to it. It would be wrong to assume that simply because a case is being dealt with in the sheriff court it will necessarily be cheaper to conduct than if the same case is conducted in the Court of Session. Whether that will or will not be true will depend on the nature of the case and on how efficiently the case is dealt with in the respective forums. A complex case is just as complex whether it is being dealt with in the Court of Session or in the sheriff court. If expert evidence is required for the case to be properly disposed of, then that evidence is required irrespective of forum. In considering any statistics on costs which
have been derived from a cohort of cases in the sheriff court and a cohort of cases in the Court of Session it will be necessary to bear in mind that the two cohorts may not be comparable. And the Justice Committee has before it a body of evidence to the effect that the way the sheriff court currently deals with contested litigation can be inefficient, with consequent additional costs.

(c) A difference between a case in the sheriff court and a case in the Court of Session is that in the sheriff court any solicitor may appear, whereas in the Court of Session rights of audience are restricted to advocates and solicitor advocates. The Financial Memorandum identifies two savings which it is said may follow from cases being dealt with in the sheriff court rather than in the Court of Session: firstly, it is said that: “[t]he fees charged by general solicitors are significantly lower than advocates and that reduced cost should flow directly to those appellants who fund their cases personally”; and, secondly, it is said that “these reduced fees will flow through as a direct saving on the Legal Aid Fund”: para. 85. This is a significant over-simplification of the position.

(1) **Savings to litigants who fund their cases personally.** The fees charged respectively by an advocate and by a solicitor vary greatly, depending on the level of experience and expertise of the lawyer and other factors. It cannot be assumed that the fee which a solicitor would charge to his client for a particular piece of work will be lower than the fee which an advocate would charge for the same work (leaving aside any issues of relative expertise and the benefits of instruction of counsel). Sheriff Principal Taylor’s Review of Expenses and Funding of Civil Litigation in Scotland reports (para. 22) that the six or seven solicitors’ firms that are predominantly instructed in commercial actions in the Court of Session are likely to charge their clients £300 or more per hour and that the average rate charged by solicitors in personal injury actions in the Court of Session is between £200 and £220 per hour, although he also reports figures of £200 - £275 per hour as the “going rate” for commercial actions and for personal injury cases £150 - £175 per hour and, in many instances, less. The Law Society of Scotland’s survey *Benchmarks and Cost of Time 2012* identified the hourly expense rate for all

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1 So, for example, when the Chief Executive of the Scottish Legal Aid Board stated in evidence to the Justice Committee that “the average cost for reparation and personal injury cases in the Court of Session is £30,000 to £40,000 whereas in the sheriff court you are talking about £4,000 to £8,000” (1 April 2014, p. 4486), he was right to add: “You have to be careful with these comparisons”. The Board may, as I understand the position, impose conditions on the grant of legal aid, including conditions as to forum. If that understanding is correct, the Board would be able to control, when granting legal aid to a pursuer to raise proceedings whether the case may be raised in the Court of Session. On that basis, the cohort of cases supported by the Board in the Court of Session would be likely to be quite different in character and complexity from the cohort of cases supported by the Board in the sheriff court. Put shortly, the Board will presumably only grant a pursuer legal aid for a case which is to be raised in the Court of Session if the Board considers that raising the case in the Court of Session is justified.

2 The reference to “appellants” should, presumably, be a reference to litigants.
solicitors as £156. These figures may be compared with the rate which the Scottish Government and the UK Government currently pay to Standing Junior Counsel, namely £120 per hour. The instruction of counsel may, from the perspective of the privately paying client, be cost-effective for certain tasks, particularly having regard to the level of expertise which counsel may bring to bear. Whether the instruction of counsel is or is not, in any given case, more expensive to the privately paying client than representation by a solicitor will depend on the circumstances of the case (including the rate which the solicitor would charge if he or she were to undertake the particular work which is undertaken by counsel)\(^3\). In any event, as the Committee will appreciate, in relation to personal injury cases in the Court of Session, most pursuers do not fund their cases personally – they have the benefit of representation on a “no win no fee” basis.

(2) **Savings to the Legal Aid Fund.** I gave evidence to the Finance Committee on this issue. I note that when the Chief Executive of the Scottish Legal Aid Board gave evidence to the Justice Committee, he accepted the uncertainties attendant on estimating savings to the Board although he affirmed that there would be savings. It is important, when reading his evidence, to appreciate that the Legal Aid Board currently funds a relatively small proportion of personal injury cases in the Court of Session – normally, those in which, for one reason or another, solicitors and counsel are not prepared to accept instructions to act on a speculative basis. These include some of the more complex cases, particularly clinical negligence cases. The Chief Executive stated: “Without any doubt, there must be savings, because if you take a significant number of cases out of the Court of Session and they do not require counsel in the future, we will save money”: 1 April 2014, p. 4464. The qualification which I have emphasised is important: the more complex cases are likely to justify the instruction of counsel in any event. The question is what proportion of the personal injury cases currently supported by the Board in the Court of Session are cases in which sanction for counsel would be refused if they were in the sheriff court – one might presume that if the case did not merit being dealt with in the Court of Session (and accordingly by counsel), the Board would not have granted legal aid for the pursuer to raise proceedings in the Court of Session under the current regime. There is a possibility that an increase in the exclusive competence of the sheriff court might increase applications for legal aid in relation to personal injury cases, and the burden

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\(^3\) It should be noted that the Financial Memorandum is discussing, at this point, the costs to the client of funding his own legal expenses. Different considerations apply in relation to the costs which are recoverable from another party under an award of expenses. Those costs are subject to control under the relevant statutory provisions. Under the current provisions, a fee to counsel is presently recoverable in sheriff court proceedings only if the sheriff has granted sanction for counsel. That rule is a blunt instrument for the control of costs, which inhibits the flexible use of counsel in the sheriff courts.
on the Legal Aid Fund, if this were to unravel the present arrangements under which solicitors and counsel are prepared to act speculatively in personal injury cases.

(3) There is one other point which I should make arising from the evidence to the Justice Committee of the Chief Executive of the Scottish Legal Aid Board. He stated that: “If you compare one case that a solicitor is taking to another identical case that a solicitor and junior counsel in the Court of Session are taking, you can see that we will save a substantial amount of money – on the basis that they are both done properly – because we are paying for fewer people to do them”: 1 April 2014, p. 4484. It would be wrong for the Committee to get the impression from this evidence that where solicitor and counsel are both instructed, there is duplication of work. In such a case, solicitor and counsel each perform complementary and essential functions. If counsel is not instructed, the functions which counsel would otherwise perform require to be carried out by the solicitor himself. I recognise that, in many cases in which counsel is instructed, both solicitor and counsel will be present in court, but, following a ruling made by my predecessor last year, that is not required unless that is necessary for the proper conduct of the case or in the interests of the client.

(d) It is evident from Mr. Rogerson’s evidence to the Justice Committee on 25 March 2014 that the insurance industry supports the proposal to increase the exclusive competence of the sheriff court to £150,000 essentially because this would result in a significant volume of personal injury cases being displaced to the sheriff court, where the pursuers would not have the benefit of automatic sanction for counsel and where insurers would not, accordingly, require to meet counsel’s fee as part of an award of expenses if the defender is liable (or if the case is settled on the basis that the pursuer’s expenses will be met). It may well be that a consequence of the shift of this cohort of cases to the sheriff court without automatic sanction for counsel would be that the recoverable expenses in individual cases, where counsel is not instructed, would be lower. In considering this justification for the proposed increase in the exclusive competence of the sheriff court, it would, though, be appropriate to have regard to the following considerations.

(1) As I observed in my evidence to the Justice Committee, the current arrangements enable pursuers in personal injury cases, if they raise proceedings in the Court of Session, to obtain the benefit of representation by counsel effectively free to them. The STUC, the EIS, the Police Federation, Clydeside Action against Asbestos and others have given written evidence to the Justice Committee about the benefit to their members of being able to access the skills of the independent bar in this way. That is possible because counsel’s fee is automatically recoverable as part of an award of expenses in the Court of Session – and counsel are therefore willing to act on a speculative basis. As a result, if the pursuer is successful, counsel’s fee will be met by
the defender – or, more usually, the defender’s insurer. The defender’s insurer will only have to bear counsel’s fee if the insurer takes the view that the pursuer’s claim has sufficient merit that the case should be settled, and if the case has not been settled at an early enough stage to avoid counsel’s fee. Procedural steps can be taken to encourage early settlement before such fees are incurred – for example the enforcement of compulsory pre-action protocols – and I would strongly support such steps. But if personal injury cases are moved en bloc to the sheriff court without the automatic sanction for counsel in those cases which currently applies when they are raised in the Court of Session, the virtues of the present arrangements are likely to be lost. Either pursuers will have to meet the cost of instructing counsel themselves from any settlement or award or they will not have the benefit of representation by counsel.

(2) The essential driver for the proposed increase in the exclusive competence of the sheriff court is the volume of personal injury actions litigated in the Court of Session which settle at relatively low values. So far as non-personal injury cases are concerned, I am aware of no substantial criticisms of the choices which litigants make in choosing to bring cases in the Court of Session. In particular, I am not aware of evidence that commercial clients are choosing to bring cases in the Commercial Court which are not appropriate to that Court. The data which have been relied upon to justify the increase in the exclusive competence are focused almost exclusively on personal injury cases.

The data

The data which is available does not, I would suggest, support the proposed increase in the exclusive competence.

(a) The example given by the Scottish Government in its Consultation Paper which preceded the Bill was as follows (para. 30): “In relation to low value claims (where the sum sued for is less than £10,000) the pursuers recovered expenses exceeded the damages awarded in 81% of cases in the Court of Session. This proposition could not reasonably be taken to justify an increase in the exclusive competence to £150,000.

(b) In a dataset which was made available to the Civil Courts Review, “the median value of total expenses was £15,697 compared with a median settlement value of £11,500; that is total expenses were 36% of the settlement value. Put another way, total expenses were 36% higher than the settlement value (damages) in more than 50% of all cases litigated in
the Court of Session” (para. 112). There are a number of observations which I would offer on this proposition.

(i) The dataset was very small – comprising 93 Court of Session cases. The Civil Courts Review itself recognises (p. 70, fn 19) that it should be treated with care and that there is no guarantee that the cases are representative of the general population of personal injury actions proceeding in the Court of Session or the sheriff court. I attach an actuarial report which was obtained by the Faculty from Dr. John Pollock and which comments on this dataset.

(ii) The figures relied on for the proposition that “in more than 50% of all cases litigated in the Court of Session” total expenses were 36% higher than the settlement value are the median figures from that very small dataset. It is instructive that the median settlement figure in the dataset in question is £11,500. In other words, the issue of disproportionate costs is focused on cases which settle at a very low figure – a very long way indeed short of the £150,000 proposed by way of the exclusive competence of the Court.

(iii) In its written evidence to the Justice Committee, the Forum of Scottish Claims Managers stated (para. 9) that “Where there was a compensation payment to the Pursuer of £50,000 or less, the payment for the Pursuer’s legal costs was more than the settlement the Pursuer received in 53% of cases”. It would be reasonable to assume that the 53% of cases referred to are likely to have been at the lower value end of the spectrum of cases in this dataset. It should be borne in mind that, in the dataset of personal injury cases referred to in my written evidence to the Justice Committee, some 70% of cases settled at less than £20,000.

(c) I recognise that the Civil Courts Review also contains information (para. 113) which seeks to relate the settlement values to the sums sued for. The key passage in the Review states that: “Total expenses were just 15% of the mean settlement value (£178,000) in actions where £150,000 or more was sought, 92% of the mean settlement value (£21,457) in actions where £100,000 to £149,999 was sought, 111% of the mean settlement value (£14,961) in actions where £50,000 to £99,999 was sought, 159% of the mean settlement value (£7,6254) in actions where £20,000 to £49,000 was sought and 222% of the mean settlement value (£3,275) in the small number (6) of actions initiated in the Court of Session where under £20,000 was sought. Where the sum sought was less than £150,000, therefore, the total cost of litigation was likely to be 100% or more of the settlement value of the claim. Where the sum sought was less than £50,000, the total cost of litigation was likely to be more than 150% of the average value of the settlement.” I offer the following observations on this information:-
(i) These statistics were, as I understand it, derived from the same small dataset which I have mentioned above. The cases were all personal injury cases. For reasons particular to that type of case, the sum sued for may be well above the ultimate figure at which the case is settled. The information should not be generalised to other types of case.

(ii) The final two sentences in the quotation above should be read in light of the data upon which they are founded. They should not be read as suggesting that for any personal injury case where the sum sought was less than £150,000 the total expenses were likely to be 100% or more of the settlement value of the claim. The comparisons which are made in the body of paragraph would appear to be between mean total expenses and mean settlement values within each range. The headline proposition is more likely to be true for cases which settle at a lower value within the range and, conversely, is less likely to be true for cases which settle at a higher value within that range.

(iii) It is noteworthy that the point at which total expenses are liable to exceed the settlement value in this dataset appears to occur somewhere between settlement values of £14,961 and £21,457. In other words, if the removal of lower value cases from the Court of Session is to be justified on the grounds of disproportionate cost and one were to treat an excess of total expenses to settlement value as a good proxy for disproportionate cost, the aim should, on this dataset, be to fix the cut off somewhere between £14,961 and £21,457 in terms of the settlement value of the case. The point can perhaps be seen conveniently, as I observed in my evidence to the Finance Committee, by looking at the “Average Value of Settlement” column in Table 3 at page 18 of the SPICE Briefing.

The Bill Team’s evidence was that the appropriate figure to use in order to set an appropriate level of exclusive competence is not the settlement value, but the sum sued for. Even if that were to be correct, the data which I have mentioned above would not support an exclusive competence figure of £150,000. But I do not agree with the approach of the Bill Team in this respect. It is correct that, as a matter of practicality, the exclusive competence identified in the statute will need to be set by reference to the sum sued for. But in fixing upon the appropriate figure, it is necessary to bear in mind that, as I observed in my evidence to the Justice Committee, the overall package of reforms includes measures which are designed to ensure that, whatever figure may be identified as the appropriate exclusive competence limit, cases which are in reality worth less than that limit are not pursued in the Court of Session. I refer to the provisions in clause 89 and to
the intention which has been expressed to adopt a rule that where a pursuer is awarded a sum less than the exclusive competence of the sheriff court, expenses should be awarded on the sheriff court scale unless the pursuer can show cause why it was necessary to raise the action in the Court of Session: Civil Court Review, para. 128. If those measures can be expected to operate robustly, then it would be appropriate to use data on historic settlement values as an appropriate starting point. I recognise that it would be sensible to build in a margin above the relevant settlement value, and that it is a matter of judgment what margin requires to be adopted. The figure of £30,000 which I have suggested is materially higher than the figure of £10,000 mentioned in paragraph (a) above or the figure of £11,500 mentioned in paragraph (b). In the cohort of personal cases described in my evidence to the Justice Committee, almost 50% settled at less than £10,000 and 70% at under £20,000.

(d) A factor which might, perhaps, have an impact on the exclusive competence figure which is selected is the figure which may be expected to divert enough personal injury cases into the sheriff court to justify the creation of the proposed national personal injury court. If the essential basis for the proposal is a need to populate the national personal injury court (which

(1) This would emphasise the point that non-personal injury cases should be looked at differently – there is no reason why there should not be a different exclusive competence for different classes of case (that is, for example, as I understand it, the position in England and Wales).

(2) It would also reinforce the case for seeking to replicate the arrangements which currently pertain for personal injury cases in the Court of Session under which pursuers are able to utilise the services of counsel – in effect, for allowing counsel to follow the cases.

Yours sincerely

[Signature]

W. James Wolffe, Q.C.

cc. Christine Grahame MSP, Convenor, Justice Committee, Scottish Parliament
21 May 2013

Your Ref: Carole Ferguson-Walker
Our Ref: JP/IA/FoF/A/CivilCourts/Review.2

Strictly Private and Confidential

Richard Keen QC
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Dear Mr Keen

Civil Courts Review

In the preparation of this report I have reviewed statistical data and accompanying policy guidance forming part of the Scottish Civil Courts Review ("the Gill Review"). I am additionally provided with data provided by a major Scottish law firm on a confidential basis, and a report with associated statistical analysis provided by the Association of Personal Injury Lawyers (APIL).

The purpose of this report is:

1) To provide an analysis of the quality of the statistical data contained within the Gill Review, particular relating to estimates of number of cases lost from the Court of Session on any increase in the privative jurisdiction level.

2) To review the additional data provided by the anonymous law firm and to use these data to provide an estimate of the impact on the Faculty of Advocates of proposals of the Gill Review to raise the privative jurisdiction of the Court of Session to £150,000 from £5,000; and exclude sanction for Counsel in cases under £150,000 except in 'exceptional' circumstances.

3) To estimate the level to which the privative jurisdiction would need to rise to achieve the policy goals of the Gill review.

4) To provide an analysis of the quality of the statistical data contained within the Gill Review, relating to relative costs in the Court of Session and the Sheriff Court.

Continued-
1. Background

The Gill Review identifies the perceived problem that there is a great pressure of business in the Court of Session. The key proposal in the Review is the likely major transfer of litigation from the Court of Session to the Sheriff Court, which would flow from an increase in the jurisdiction of the Sheriff Court to cases involving sums sued for up to £150,000. To accommodate such an extension it is proposed that a National Personal Injury Court would be established to be based in Edinburgh. It is a matter of some concern to the Faculty of Advocates that the involvement of Counsel in such cases would be reduced both at a professional level and as a matter of wider public concern.

I note that when considering the responses to the Consultation that those acting for pursuers felt that the Court of Session should be the court of first choice, given the expertise available, the success of new procedures in reducing delay and the economies of scale involved. The opposite view was held by those acting for defenders, who felt that low value claims being litigated in the Court of Session involved disproportionate costs. They were of the opinion that there should be a significant increase in privative level of the jurisdiction of the Sheriff Court.

The consultation document based upon the Gill Review dated 26th of February 2013 makes it clear that sanction for counsel in the Sheriff court will be an ‘exceptional’ event. At paragraph 41 it states,

"It should still be possible to be granted sanction for counsel in the Sheriff court, but not all cases (and particularly low value, straightforward disputes) will merit the employment of counsel and this should only be available exceptionally, where the subject matter of the case is truly complex. Many solicitors feel that they have the expertise and the experience to conduct even the most complex cases, for example personal injury cases involving catastrophic injury."

On the basis of these remarks it is clear that any transfer of cases between the Court of Session and the Sheriff Court will have a marked impact on the Faculty of Advocates and this report attempts to estimate the extent of this impact by a consideration of the numbers of cases that are likely to remain in the Court of Session if the privative jurisdiction level is increased to £150,000.

Continued-
2. Review of the approach taken in the Gill Review

The most important components of such an analysis are that there are a sufficiently high number of cases considered, making the analysis meaningful, and that these are representative of the population of cases as a whole. It is also important that there be access not just to information about the sum ‘sued for’, but also to the sum for which the case ultimately settled. The settlement level presumably more accurately reflects the true value of the case.

To this end the Gill Review has attempted to calculate the potential diminution in court business from a sample of 93 Court of Session cases from a three to four year period. The data were sourced from information provided by a respondent to the consultation who acts for defenders (in both the Court of Session and the Sheriff Court). The footnote states that these cases were drawn ‘essentially randomly’ from files but acknowledges that the firm involved may not be representative of the general population of litigated personal injury cases. The Review team had access to the amount sued for, and the amount that the case eventually settled for. From this information a ‘settlement ratio’ was calculated, as the ratio of settlement amount to the amount sued for. That ‘settlement ratio’ is then applied to the all cases raised in two single week periods in 2007, for which only the sums sued for values are known.

The report is unclear, but it appears that about 70% of the sample is made up of Personal Injury cases. At paragraphs 131 and 132 of Chapter 4, the report observes that 23% of actions raised by summons in the Court of Session contained claims for £150,000 and over and 13% sought no monetary order, summing to 36%. It then concludes that 36% of cases presently pursued in the Court of Session would continue in that court. There appears to be two weaknesses in this approach. Firstly, it is not clear to me, although it may be correct, that those cases involving no monetary order should necessarily be aggregated with those claims for £150,000 or over. Secondly, no account has apparently been made for the settlement ratio for these cases, which is identified in Table 3a as being 48%. Presumably the inference from the data used in the review is that less than 18% of cases of this type would in fact remain in the Court of Session.

It should be noted that the sample size from which inferences were made is small. The population from which the sample is taken is over a period between 2004 and 2007 where there will have been many thousands of cases in the Court of Session. Inferences made from analysing just 93 of these will not necessarily be a good reflection of the characteristics of the population as a whole.

Continued-
3. The impact of an increase in the privative jurisdiction level – a separate analysis.

As discussed in the previous section a more robust data set from which to make reliable inferences would be large compared to the population of litigated cases, be taken from an appropriate time period and ideally include the actual information on settlement amounts, rather than rely on an indirect calculation through a settlement ratio, which varies substantially across the value spectrum of cases as a whole.

Having identified the necessity of accessing more robust data, I have subsequently been provided with such a dataset by a firm of personal injury solicitors. The firm is required to remain anonymous as the information is commercially sensitive. I do not know who the firm is for example. The sample size in this case is 1,001 cases over two years. For more general inferences to be made about Court of Session cases in Scotland, the sample analysed should be representative of the population of cases raised in the Court of Session during the time period from which they are sampled. Ideally a random sample would be taken, including cases from a number of firms to minimize the risks that the cases provided by just one firm are not representative of cases brought forward. While this was not possible, the large sample size of cases from firm X in relation to the total number of cases during the sampling period gives confidence in the inferences which are drawn. I am assured that the firm in question deals with a broad range of claims, which are a good representation of the population as a whole. The sample size is much larger than that considered by the Gill Review and for this alone I would consider it to be an improved basis for assessing the impact of changes made in the Court of Session more generally.

The proportion of litigated cases settling for more than £150,000 was 7% in the two years under consideration. This is the sum awarded and not the sum sued for and it is not clear to me whether the amounts are adjusted for cases where no award or a reduced award was made because the action failed on liability or where there was a deduction for contributory negligence. Within the Court of Session not all cases will presumably require the same level of involvement by Counsel but there is no information on the time spent in matters of different value and so the analysis must proceed on the basis of the numbers of cases alone.

Continued-
Richard Keen QC

The Table below sets out the percentage of cases remaining in the Court of Session, if the privative jurisdiction is set at different levels. This is presented graphically for 2011 and 2012 separately. It can accordingly be seen that the removal of business from the Court of Session will be significant. It can also be seen that even a relatively small change in the privative jurisdiction level will have a large impact upon the number of cases processed by the Court of Session.

<table>
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<tr>
<th>Privative Jurisdiction</th>
<th>Cases Remaining if Privative Jurisdiction Set</th>
<th>2011</th>
<th>2012</th>
<th>2011 and 2012</th>
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<tr>
<td>£5,000</td>
<td>100%</td>
<td>100%</td>
<td>100%</td>
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<tr>
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<td>12%</td>
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<tr>
<td>£150,000</td>
<td>7%</td>
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</tbody>
</table>

Percentage of Cases Litigated in Court of Session if Privative Jurisdiction Changed (2011)

Continued-
I have also been given sight of a response to the consultation by APIL. A copy of that is attached as an appendix. That report proceeds on the basis of a much smaller sample size (53 cases) than is presented in this report, but is useful as a cross check on the broad conclusions. From their small dataset they estimated that 96% of cases would be removed with a £150,000 privative limit (Law firm X – 93%), and 88% of cases would be removed with a £50,000 privative limit (Law firm X – 81%). Whilst more comparator information would be helpful it is reassuring that the APIL review, examining a smaller dataset made up from cases from a number of firms of solicitors, supports the inferences that were drawn above from Firm X’s data on the impact of the proposed rise in the privative jurisdiction level.

Continued-
In conclusion, an analysis of a much larger data set than was used in the Gill Review suggests that raising the privative jurisdiction level from £5,000 to £150,000 will reduce the number of personal injury cases in the Court of Session by around 93%. Given the proportion of cases raised which are personal injury cases, the impact on the Faculty of Advocates will be profound. This calculation assumes that the profile of cases considered from 2011 and 2012 will be representative of cases going forward, and that the cases from the anonymous firm do not differ in a systematic way from the cases handled by other firms (that is, that these cases represent an essentially random sample of the total population of cases). If this is the case then the large sample size means that any error, in a statistical sense, in this estimated proportion will be small. A consideration of information collated by APIL supports the estimates that were made.

4. The level to which the privative jurisdiction would need to rise to achieve the policy goals of the Gill review

On the basis of the analysis in this report, if the public policy goal is (as per the Gill Review) to remove 64% of personal injury cases from the Court of Session, then I would estimate that this can be achieved by raising the privative jurisdiction to a point within a range from £10,000 to £20,000.

5. The Relative Costs in the Court of Session and the Sheriff Court

The Gill Review also attempts to compare the costs of litigation in the Court of Session to the Sheriff Court. The analysis implicitly assumes that any cases moved from the Court of Session to the Sheriff Court would thereafter be subject to the lower average costs currently reported in the Sheriff Court. This would assume that the nature and volume of work involved for the underlying cases are similar in both courts (for cases of similar value). This may not be the case and I suggest that you give this some consideration. From a lay perspective one might expect that cases litigated in the Court of Session may well involve issues of liability or evidence that are more complex than those litigated elsewhere, even for a given level of sum sued for. It is not clear to me whether the statistics concerning settlement amounts adjust for those cases where there was no award, as the case failed on liability, or cases where there was a restricted award because of contributory negligence. This could distort the averages relative to the sums sued for to a meaningful extent, and the impact on the averages for the Court of Session and the Sheriff court could also differ.
There is substantial reporting of comparison of cases, the awards made and the expenses involved, between the Court of Session and the Sheriff courts in the Gill Review. The underlying data however is not available, only measures of central tendency are given; averages and medians. If measures of variability in the underlying data were available then one could consider whether the apparent differences in costs, between the Court of Session and the Sheriff court, were significant in a statistical sense. This is important given the small sample involved and the potential unrepresentative nature of the cases supplied by the respondent involved. That is not to say that I am doubting that there are differences in the expenses that are considered, just that without the underlying data it is not possible to confirm the extent of these differences with a degree of statistical confidence. Some specific comments on the various tables are as follows:-

Tables 3a and 3b – The samples are not large for either the Court of Session or the Sheriff court, and smaller still when the samples are subdivided into bands. The ratio of average settlement value to sum sued for appears higher in the Sheriff court for those cases with a sum sued for of less than £150,000 but without the underlying data it is not possible for me to say that these differences are significant in a statistical sense, or whether the nature of the cases under consideration are sufficiently similar to enable a valid comparison to be made.

Tables 4a and 4b and 5a and 5b - Paragraph 113 focuses on Table 4b, which provides information on the level of total costs and the proportion of average settlement values that they represent. The level of costs increases as the settlement value increases but decreases as a proportion of the settlement value, as one would expect. The same profile is evident in Table 5b, which gives the corresponding figures for the Sheriff court. Costs are higher in the Court of Session for all bands. The key parts of the Tables are presumably those for bands of sums sued for less than £150,000. The problem in comparing the ratios for the Court of Session and the Sheriff court is that the ratios are a function of the settlement award and the average level of settlement within each band is not the same for the two sets of courts. As an example 4b and 5b show that the ratio of average costs to average settlement is 92% for cases in the £100,000 to £149,999 band in the Court of Session and 48% in the Sheriff court, but the problem is that the comparison is confounded by the fact that the average settlement was £21,457 in the Court of Session and £34,625 in the Sheriff court. You would expect the percentage to be lower for the Sheriff court simply because for this band the average settlement figure is higher in the available sample. The same applies to the £50,000 to £99,999 band. Without the underlying data I cannot comment further but the manner in which cases have been banded and the higher settlement awards for the samples in the Sheriff court means that the inferences drawn from looking at the ratios, as is done in paragraph 113, are somewhat exaggerated. Costs appear to be higher in the Court of Session but the comparisons made using the aforementioned ratios are unreliable. I can consider this in more detail if required.

Continued-
Table 4g – This is only based on 8 cases, but has the benefit of the underlying data being published. The sample is very small and there is no detail on the mechanism used to ‘predict’ the corresponding expenses in the Sheriff court to comment on the validity of the inference that is made - that predicted Sheriff court expenses would be, for these cases, between 50% and 75% of Court of Session expenses.

Table 4f – This shows the proportion of cases where pursuers expenses exceeded the award of damages for cases where the sum sued for was under £10,000. It shows a much higher proportion in the Court of Session; although the number of cases is much lower (42 vs. 893). There is no information on the comparative position for higher bands of sums sued for, say £20,000 to £49,999.

To summarise matters I have some reservations about the data which has been used as the basis for comparing expenses in the Court of Session and the Sheriff court and it is not clear to me that one is necessarily comparing like with like, as the complexity may differ even for a given level of sum sued for. On face value the Review confirms the higher level of expenses in the Court of Session but some of the presentation of the statistics in the Annex is misleading. Without the underlying data however I cannot comment further.
6. Summary

- The calculations used in the Gill Review to evaluate the impact of a change in the privative jurisdiction level to £150,000 appear, on the basis of information available, to be flawed. They are based on a sample of only 93 cases. The number of cases settled for in excess of £150,000 is calculated indirectly, through a settlement ratio derived from this small sample. It also appears that the settlement ratio, estimated at 48%, has not been applied in the final calculations and so the estimate in the Review that 36% of cases would remain in the Court of Session seems to be a considerable overestimate.

- I have considered and analyzed a much larger data set of 1001 cases which were provided by an anonymous law firm for 2011 and 2012. This data set has the advantage of providing numbers of cases settling for given amounts, avoiding estimates being made through the application of a ‘settlement ratio’. From this dataset I estimate that 93% of cases would be removed from the Court of Session if the privative jurisdiction was raised to £150,000. This figure is similar to an independently derived figure provided by APIL.

- If the objective of the Gill Review is for only 36% of cases to remain in the Court of Session then an increase in the privative jurisdiction level to between £10,000 and £20,000 would seem appropriate.

- In addition to the review of the calculations for the number of cases lost to the Court of Session under the proposed changes, I have also reviewed parts of the report relating to the increased costs of litigation in the Court of Session relative to the Sheriff Court. I have some qualitative and quantitative concerns about some aspects of these comparisons.

I trust this information is of assistance. I would be pleased to answer questions arising from this report or to provide additional calculations if required.

Yours faithfully

Dr John Pollock
Fellow of the Institute and Faculty of Actuaries