Justice Committee

Courts Reform (Scotland) Bill

Supplementary written submission from the Faculty of Advocates

I refer to the evidence which I gave before the Committee on this Bill. I enclose a copy of a letter which I have sent to Mr Gibson following upon evidence which I gave to the Finance Committee on the Bill. This makes additional observations relevant to the proposal to increase the exclusive competence of the sheriff court to £150,000.

Remit from the Sheriff Court to the Court of Session

During my evidence to the Justice Committee you asked me what the current rule is for remit from the Sheriff Court to the Court of Session. The current statutory provision is section 37(1) of the Sheriff Courts (Scotland) Act 1971. This provision empowers the Sheriff or the Sheriff Principal to remit to the Court of Session any Ordinary Cause brought in the Sheriff Court, subject to three qualifications: (1) that the value of the cause exceeds the limit of prohibitive jurisdiction of the Sheriff Court, currently £5,000; (2) that the Sheriff or Sheriff Principal is moved to remit the case by any of the parties to it; and (3) that the Sheriff or the Sheriff Principal is of the opinion that the importance or difficulty of the cause makes it appropriate to remit it. The question was considered in the Full Bench case of Mullan v Anderson 1993 SLT 835. The Court considered that “importance” is to be given a wide meaning and includes importance to the parties. Perhaps importantly, from a decision to remit or not to remit, an appeal lies to the Court of Session.

Clause 88(2) of the Bill replicates that test for cases which are not within the exclusive competence of the Sheriff Court as redefined within the Bill (ie cases which do not contain an order for value for more than £150,000). However, in a case which is within the exclusive competence of the Sheriff Court as redefined in the Bill, the position is quite different. In such a case, the Sheriff may request the Court of Session to allow the proceedings to be remitted to that Court only if the Sheriff considers that there are “exceptional circumstances” justifying such a remit. The implication is that even if the case is one which could properly be remitted on the grounds of its importance or difficulty, the Sheriff would have no power to request the Court of Session to allow a remit unless the Sheriff also considered that there were “exceptional circumstances” which justified the remit. Further, in such a case the Court of Session may allow the proceedings to be remitted only “on special cause shown”. There is accordingly a double hurdle which requires to be surmounted before a case may be remitted if it is within the exclusive competence of the sheriff court as defined in the Bill: the Sheriff must be satisfied that there are “exceptional circumstances”; and the Court of Session must be satisfied that there is “special cause”. These two hurdles fall to be applied irrespective of the importance or difficulty of the proceedings.

The question of appeal is also significantly altered by the Bill. A decision of the Sheriff in relation to remit of a case within the exclusive competence of the Sheriff Court is final: clause 88(10). There is no appeal against such a decision. Even a decision in a case which is above the exclusive competence to refuse a remit or to
grant it is appealable not to the Court of Session itself but to the Sheriff Appeal Court. The effect of these provisions is, in a case within the exclusive competence of the Sheriff Court, to leave the matter entirely to the discretion of the Sheriff at first instance. The Court of Session is given no power to control the exercise of this discretion, other than, perhaps, by was a petition for judicial review of the Sheriff’s decision.

As you will appreciate from the Faculty’s written evidence, the Faculty would propose that the Court of Session should have the power to call in a case. It seems to the Faculty that if the purpose is to allow the Court of Session to some extent to “dine a la carte” that would a valuable power which would allow the Court of Session to exercise its role in the supervision of the Sheriff Court, and its responsibilities for the development of the law. But even if that proposal were not to be accepted, the remit provisions in the Bill are too narrowly framed.

These provisions must of course be understood against the background of the provision of Clause 39 defining the exclusive competence of the Sheriff Court. I will not rehearse again the Faculty’s position on this. The combined effect of the increase in the exclusive competence of the Sheriff Court to £150,000 with a very significant restriction of the power of remit would, in the Faculty’s view, serve neither the interests of litigants, nor the wider aims of justice.

It is worth dwelling for a moment not only on the scale of the increase of the monetary level of the exclusive competence of the Sheriff Court but also the way in which the exclusive competence is defined. It would appear to give the Sheriff exclusive competence in any civil proceedings in which an order of value is sought which does not exceed £150,000. This would appear to have the consequence that in proceedings in which a number of orders are sought, for example orders for reduction, interdict and declarator, as well as an order for value, then notwithstanding the nature and significance of the other orders sought, if the order for value is less than £150,000 the case must be heard in the Sheriff Court, and will be subject to the very restrictive provisions for remit. Indeed it would appear, on one reading of the Clause as drafted, that if the action contains a number of separate pecuniary claims, and only one of them is less than £150,000, the same would apply.

Judicial Review

At the end of my evidence to the Justice Committee I made some remarks about the provisions on judicial review. Perhaps I may be permitted to amplify those. I would first remark on the importance of the judicial review jurisdiction of the Court of Session. It is a fundamental feature of the rule of law that decisions of public bodies should be subject to control, on grounds of lawfulness, by the Supreme Court of Scotland. One of the measures of the health of a modern constitutional democracy is the practical ability of individuals who are aggrieved by the State to secure a remedy.

The second preliminary remark which I would offer is that the incidence of judicial review applications in Scotland is low. The number of cases is in absolute terms small. In 2010-11 342 Judicial Review Petitions were initiated in the Court of Session. By contrast, in 2011 18,811 applications for permission to apply for judicial
review were made to the Administrative Court in England and Wales. These figures are not strictly comparable. As I will explain in a moment there is reason to believe that the introduction of a permission or leave stage may in fact increase the number of applications. The point which I would make at this stage though is that the incidence of judicial review in Scotland is, having regard to this country’s population, low. This is consistent with evidence in relation to other types of litigation reported by Sheriff Principal Taylor in his review published in September 2013. There may of course be many reasons for this – one of which may, indeed, be a matter of concern – but it does not suggest that the number of judicial review cases in Scotland should be regarded as a particular problem either for the Court system or for respondents.

Many of the cases in the Court of Session are immigration or asylum cases. One of my members obtained information, by way of a freedom of information request, in relation to the awards of expenses (which may be regarded as a useful proxy for success) in relation to petitions in this field. In 2009, of 158 petitions, 76 resulted in an award of expenses against the Advocate General. In 2010, of 201 petitions, 101 resulted in an award of expenses against the Advocate General. It may be that a proportion of the cases in which no award was made or in which expenses were awarded on a “none to or by” basis also involved at least partial success. Given what is at stake, this may reasonably be regarded as rather a high success rate. And, as you will appreciate, the mere fact that a case was unsuccessful does not mean that it was either unarguable or without merit. Of course, any responsible public authority will concede a petition if it is well founded at an early stage, and it follows that a disproportionate number of cases which proceed to a hearing the petitioner will lose. This should not be taken as a basis for suggesting that, in Scotland, there is a serious problem of unfounded applications to the Court.

Notwithstanding these considerations, I support the introduction of a statutory time limit for judicial review proceedings. I recognise that, in appropriate cases, the passage of time may be a reason for refusing a petition. Expedition is, generally speaking, in the interests of justice, and in public law cases delay may have an adverse impact on good administration. At present the control which the law exercises in relation to judicial review petitions on the basis of the passage of time is based on the common law of mora. The doctrine of mora was developed in the context of private law cases. Certain features of the law, as it was developed in the context of private law cases, do not apply readily in the context of public law. Furthermore, procedurally the mora plea is usually considered at the same time as the other parts of the case – in other words, a case will not normally be disposed of on grounds of delay before the Judge has also addressed the merits.

In these circumstances a statutory provision introducing a time limit specifically for applications to the supervisory jurisdiction is, in my view, justified. That said, it is important that any time limit that may be introduced should be flexible enough to be capable of accommodating the many different types of case which may be pursued by way of an application to the supervisory jurisdiction and that the period fixed should not operate as a barrier to access to justice. There are some types of case (for example cases involving challenges to legislation whether delegated or primary) where a time limit may be difficult to apply meaningfully. There must always be the opportunity for the Court to allow a case to proceed notwithstanding that it has been brought out of time. It will be particularly important that the Court exercises that
power in full recognition of the public interest in having the legality of Government action, and indeed in appropriate cases legislation, properly tested and adjudicated upon in the Courts. There are also important practical considerations bearing on the appropriateness of a three-month time limit which is proposed in the Bill, to which other witnesses have referred. In particular, it may be difficult to accommodate a pre-action protocol within the proposed timescale. The aim should be to identify a period which acts as incentive to reasonable expedition while not presenting a practical barrier to the Courts in these important cases. Three months is very significantly shorter than other statutory time bars.

So far as the application regarding introduction of a leave provision is concerned, the starting point, I would suggest, is to be clear about the purpose of introducing such a provision. As I mentioned above, it is not evident that there is currently a serious problem of unfounded cases being brought before the Court. Indeed, on one view, there is less public law litigation in Scotland than one might reasonably expect. There are, though, certain structural reasons for introducing a leave provision, which are particular to certain types of case. The *Eba* case (*Eba v Advocate General 2012 SC (UKSC) 1*) introduced into our law a test for judicial review of decisions of the Upper Tribunal which in England can be dealt with as a threshold or preliminary matter at the leave stage but which is more difficult to apply readily in the different procedural context in Scotland, without a leave or permission stage.

There may be paradoxical effects of introducing a leave provision. Litigants may be very much more ready to apply for leave than to instruct the raising of a petition. If the application for leave is refused then the only cost to the litigant has been the cost of applying for leave. On the other hand if the application is granted, the petitioner has at least the confidence that a Judge considers the matter to be sufficiently arguable to justify a petition being raised. This would not necessarily be a bad thing. It will however be key that legal aid should be made available in appropriate cases for leave applications. Further, one would expect that if a Judge grants leave then provided the other criteria for legal aid are met, it would be difficult to see why legal aid would then be refused.

I do have some concerns about the “real prospect of success” test which is proposed in the Bill. My concerns are twofold. Firstly, it may be that this is to pitch the requirement for leave too high. That very much depends on how individual judges assess the question of “real prospect” – a concept which is capable of meaning different things to different people. If it is intended to mean something more than that the case is arguable, then this would be to set too high a threshold at the outset of the litigation. Quite separately, there is in the field of public law a public interest in cases involving serious questions about the legality of government action or indeed of legislation being resolved by the Courts. For this reason, as I understand it in England and Wales a case may be given permission not only on the basis that the application has a real prospect of success but also because of the importance of the issues involved: eg *R (Gentle) v. Prime Minister* [2006] EWCA Civ 1078.

I would be glad to offer further information on these – or any other – aspects of the Bill if that would be useful to the Committee.
W. James Wolffe, Q.C.
16 April 2014

Letter to Kenneth Gibson, MSP, Convenor, Finance Committee

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\(^1\). 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”\(^2\); 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

---

\(^1\) 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.
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 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

---

\(^3\) 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.
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 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 136% 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.

W. James Wolffe, Q.C.
16 April 2014