Justice Committee

Courts Reform (Scotland) Bill

Written submission from Lawford Kidd, Personal Injury Solicitors

I am writing as senior partner of Lawford Kidd, and accredited personal injury specialist recognised both by the Law Society of Scotland and the Association of Personal Injury Lawyers. I was also involved with the Civil Justice Committee of the Law Society in connection with their submission on the Bill.

I wanted to draw the Justice Committee’s attention to one specific aspect of the Bill and that relates to the sanction of counsel (either advocate or solicitor advocate), in the Sheriff Court under the new court structure.

Proposal

In the Court of Session only counsel or solicitor advocates can appear for parties. For the reasons I outline below, I propose that the Bill should provide automatic sanction for counsel in the Sheriff Court in the following circumstances:

(a) all cases with a value above £50,000;
(b) all industrial disease cases;
(c) all clinical negligence cases;
(d) all cases involving fatalities.

Equality of Arms

Insurers will always have expert lawyers instructed to defend personal injury actions. The firms are generally centralised in Edinburgh and Glasgow and will have the insurers’ full resources at their disposal. In order to ensure equality of arms, it is essential that claimants have access to expert advice. At present the Bill will only allow sanction for counsel with the consent of the court. However, in order to obtain that consent there will have to be an initial hearing. It is inevitable that in almost all cases insurers will contest such sanction because of the additional cost to them.

The result of the court structure change will mean that a claimant who in the past has had the facility of expert advice from counsel in cases worth above £5,000 will only have such expert advice automatically in cases worth above £150,000! This is a wholly unacceptable restriction on access to justice and the only beneficiary will be insurers.

The importance to claimants of expert advice

It should also be remembered that insurance companies have considerable experience when it comes to civil actions. They instruct solicitors in court actions on a daily basis. Claimants, on the other hand, are generally pursuing a court action for the first time. Without access to expert advice, claimants would be at a significant disadvantage. Claimants are already at a financial disadvantage relative to the financial resources of insurance companies. To deprive claimants of automatic
access to expert advice would put them at a tactical disadvantage as well. This is clearly unacceptable.

At the present time, a claimant can ensure that he receives appropriate expert advice, even if his solicitor is not a specialist in personal injury work. This is particularly significant if the lawyer practices outwith central areas of Scotland where he may only deal with a few personal injury claims but is providing a service for a local client and also a valuable contribution to his own practice costs. Many local solicitors have been under severe financial pressure due to cutbacks in legal aid and the recent recession. It is entirely appropriate that they continue to be able to handle these cases and take expert advice. Under the present Court of Session regime they could put a court action in the Court of Session and be paid for the advice of counsel. The new Bill only provides for use of counsel with the approval of court. This will create significant uncertainty unless the Bill allows provision for automatic sanction for counsel at an appropriate financial level and in particular cases.

**Why automatic sanction for counsel is necessary**

The Bill ought to have a provision providing automatic sanction for counsel at a certain financial level and in certain types of case. This should not be left to the discretion of the court because of (a) the uncertainty for claimants (and indeed defenders); and (b) the massive amount of court time which will be required to deal with motions for sanction for counsel. Judicial time is costly. Significant savings can be made if the Bill clarifies the position regarding sanction for counsel.

The Scottish Parliament has done a magnificent task in supporting the victims of Asbestos disease. Very few asbestos cases are currently pursued in the Sheriff Court because of their complexity. It would be ironic if the new Act provided a windfall for those insurers dealing with asbestos claims by removing claimants’ access to expert advice in the pursuit of asbestos disease compensation.

When the Bill was introduced to Parliament I was asked to appear as a representative of the Civil Justice Committee on BBC Newsdrive at 5.30pm on the 7 February 2014. When interviewed the main focus of the presenter was to enquire why a claimant was being deprived of access to the advice of counsel under the new Bill. I could only agree that I felt this was unfair.

I will be very happy to provide the Committee with any further information.

David Sandison
7 March 2014