Justice Committee
Courts Reform (Scotland) Bill

Written submission from Westwater Advocates, Edinburgh

We are a multi-disciplinary stable of practicing advocates with ten senior counsel and thirty-eight junior counsel specialising in legal representation in the all levels of courts and tribunals including the Supreme Court, the Court of Session and the sheriff court and would wish to make the following response to the call for evidence to the Justice Committee.

The privative jurisdiction of the sheriff court

[1] We note that the aim of the proposed increase in the level of the privative jurisdiction of the sheriff court from £5,000 to £150,000 is said to be part of the aim of making the resolution of civil disputes for the people of Scotland more accessible, affordable and efficient. What particularly concerns us is that in our belief this proposal would appear to have the opposite effect in all three aims and that in particular it does not provide for litigants an increased access to justice or any tangible savings in financial terms or in efficiency. We are aware that it is a policy objective of the Bill that cases are heard by an appropriate level in the court structure and that it is important for the right cases to be heard by the right courts but we do not believe that clause 39 of the Bill dealing with exclusive competence achieves this object.

[2] The level set at £150,000 representing the value of the order sought, exclusive of interest and expenses, would seem to us to be unnecessarily high and would exclude the Court of Session dealing with the majority of personal injury actions, contractual disputes involving individuals, cases involving the determination of rights in property and commercial cases unless these are remitted there in terms of clause 88. Whereas there may be arguments that can be advanced in relation to a multiplicity of small scale actions being presently raised in the Court of Session, particularly those where the sums being sought are less than £5,000 in value we cannot see that the arguments advanced in favour of the £150,000 level are valid and can be said to be putting forward in the interests of the litigators in the Scottish Courts.

[3] At present it is said that 64% of the general actions and 26% of commercial actions raised in Court of Session are in respect of sums of under £150,000 and that by removing these cases to the sheriff court the Court of Session will be returned “to its proper role in dealing with the most complex and important cases and the development of Scots law.” We cannot agree with this proposition for a number of reasons. £150,000 represents an amount in excess of the average value of most Scots homes, several times the level of the average working Scots wages and a sum equivalent to many times the median income level of most Scots households. To persons who have suffered personal injuries which have an impact on their earning capacity or need for personal services being rendered, to families who have suffered the loss of a child or parent, to businesses or individuals who have been adversely affected by losses occasioned by contractual breaches and for those requiring
aliment or ho have rights determined in respect of their homes, the sum of £150,000 is indeed an extremely significant amount and to suggest that dealing with actions where a lesser amount has been concluded for is not the proper role of the Court of Session and that the court should only be concerned with more complex and important cases would seem to be a misunderstanding of the essential nature of the nature and importance of the Court of Session in a relatively small jurisdiction and a population of about 5.2 million. To have a privative jurisdiction of the lower courts set at £150,000 would also seem to require some proper thought as to why the level is significantly different from that set in England and Wales and in Northern Ireland.

[4] It is perhaps significant that the reasons why the litigating public of Scotland are currently well served by the Court of Session are considered. To have the present centralisation of litigation based in Edinburgh results in significant economies of scale in that it is here that the majority of practitioners, court administrators and judges are situated. The physical facilities for the effective administration of justice tend to be in Edinburgh and Glasgow and the majority of practitioners in personal injury and commercial law are in those cities. Some play is made in the memorandum that, for instance, 98% of Chapter 43 personal injury actions in the Court of Session settle before proof and that this is the main reason for the popularity of that court being chosen as a venue for personal injury litigation. This however overlooks the fact that these actions invariably have an equality of arms in that the advocates and solicitor advocates mainly involved in the pre-trial meetings which cause such actions to settle are all skilled and experienced practitioners who are well used to effective negotiation and in dealing with each other – the advantages found in “a single community of practice”. We are therefore surprised by what is said in relation to settlements being reached in terms of paragraph 94 of the Memorandum in respect of “the advocacy skills of counsel are rarely being deployed in these cases” – we feel that such a statement devalues and demeans the training and skills of advocates and solicitor advocates and fails to understand the nature of the pre-trial process. We not deny that certain experienced solicitors are able to conduct negotiations to the same capability of counsel but would point out that most solicitors feel that the specialist skills of counsel are advantageous in the conduct of negotiations, particularly where the other party in the action has deployed the same.

It is perhaps worth pointing out that the cost to the public of the present system is minimal in that the 98% settlement rates include cases where settlements were reached in excess of £1 million as well as cases which might be regarded as “unimportant” in monetary terms, that legal aid applies to only a minimal number of cases and that many cases (including those involving accidents at work) are frequently conducted on a “no win, no fee basis” with no uplift of fees when cases are successfully litigated.

[5] The equality of arms argument applies throughout the whole range of litigation. Outside of the main cities there are numerous smaller firms of solicitors who rely on an independent referral bar to provide advice and to conduct litigation in numerous types of action including in personal injury matters where the services of specialist members of the bar can currently be engaged and where defendants in such actions, often insurance companies or industrial concerns, can afford to employ in-house and advocate assistance and representation and this effectively excludes such pursuers from representation. We also believe that the present system serves well the people of Scotland and deals well with individuals, trade union members, the inured and
insurers alike. It is important to note that at present there is (and we understand will remain) a right of automatic sanction for counsel (and sanction for solicitor advocates) in the Court of Session. We believe that this sanction is of especial importance where cases involving complex areas of law and evidence such as medical negligence are involved.

[6] We are therefore of the view that if it is thought desirable to remove the lowest value cases from the Court of Session that an effective privative jurisdiction level should be set at a level which would take into account the alleged disproportionate cost levels and we would suggest that £10,000 or £15,000 be appropriate, i.e. twice or three times the present level. Even at this level might well exclude cases involving complex legal issues because these can arise in comparatively low value cases (such as the renowned “snail in the ginger beer” litigation).

[7] Other arguments that we feel are relevant to consideration of the transfer of all cases where less than £150,000 is sought are:

(a) what the effect in expenses will be of a significant award of say, £125,000 or where a degree of contributory negligence is found;

(b) what the effect of the Enterprise Act 2013 will be – traditionally the Court of Session has regarded its role as the proper implementation of safety and other legislation and the effective development of the common law

(c) where the resources are available to the sheriff courts to effectively deal with the influx of cases will be – we understand that waiting times for proofs in the Court of Session is now within weeks and that cases tend to be completed within the allocated diet rather than the situation which we have all experienced in the sheriff court where cases often fail to start when they are due to and diets are often continued on with delays between hearing days amounting to several months or even in excess of one year

Summary sheriffs

[8] We have no objection to the creation of summary sheriffs in principle but worry if they are to be regarded as a lesser paid, less qualified and expected to provide and “inferior” level of justice accordingly.

The proposed specialist personal injury court

[9] We are generally in favour of this proposal but would seek to put forward the following caveats to the proposal and would re-iterate our concerns as to the proposed privative jurisdiction level.

[10] We regard the continuance of a unqualified sanction for the employment of counsel to be of considerable importance here not only in relation to personal injury actions but also in relation to all actions raised within the privative jurisdiction level other than actions involving sums less than £5,000 as at present. This is particularly important given the existence of the specialist personal injury bar and will enable parties to obtain advice, assistance and representation throughout the case and will
enable solicitors to employ counsel without fear of failing to recover their costs (which, given the existence of the present “no win no fee” arrangements do not result in successful litigants suffering any diminution of their awarded damages). Our experience suggests that the employment of independent counsel do tend both to result in better awards of damages to pursuers, an avoidance of actions running to proof where the prospects of success are minimal and the effective settlement of actions at an early stage. A doubt as to whether sanction for counsel will be granted at the end of a case or the need to move for it at the start of the case will act as a discouragement to even seek sanction whereas the continuation of an automatic right will mean that the “equal playing” field can be properly perpetuated. Fees for counsel in Scotland have tended to be moderate compared with sister jurisdictions elsewhere in Britain and an effective taxation of accounts and scale levels of the Scottish Legal Aid Board have made sure that the levels of fees are indeed moderate. It has been remarked several times by lawyers elsewhere that the level of counsel representation and advice in Scotland is cost effective and that our legal system already functions with a minimum of waste. Continuing with the assistance of counsel is, we feel, part of that cost effectiveness.

[11] The existence of a specialist personal injury court is also of importance given that the level of judicial input in the Court of Session in such cases has always been high and it is therefore important that a similar level of judicial expertise be available. It is also importance that the organization of that court be better than our experience of the sheriff court generally and that proper diets be allocated and adhered to for the convenience of sheriffs, court personnel, lawyers and most especially for clients and their witnesses. We consider that it would be curious to set up a specialist personal injuries court without the specialist personal injury bar being involved and this will be especially important when cases involving unlawful death, medical negligence and industrial disease are considered and in cases where civil juries are to hear actions. It is, however, imperative that the specialist personal injury court be properly set up and running for a period of time and any problems identified and tackled before the privative jurisdiction levels are increased, whether to £150,000 or any other sum since we foresee that a radical restructuring of procedures, administration and organization be put into effect to avoid the faults seen in the present sheriff court structure and experienced by practitioners and litigants alike. This is especially important where currently diets for proofs are being allocated in the sheriff court on the basis of one day at a time with continuations often being allocated over a one year or later period whereas in the Court of Session the current waiting period for four day or longer diets is now down to periods of several weeks only.

Judicial specialization

[12] We consider that this will be inevitable although there is something to be said in favour of local sheriffs being able to deal with a wide variety of local cases. We think it important that any sheriffs allocated to hear cases in the personal injury court have an appropriate prior experience in said actions.

The sheriff appeal court

[13] We recognize that such a structure may well be inevitable although we would point out that given the existence and expertise of the existing Inner House of the
Court of Session this may be regarded as an expensive and not altogether necessary innovation.

**Proposed changes to Judicial Review**

[14] Whereas we are not convinced that some of the proposed changes are absolutely necessary, we have no further comments to make.

**Proposed “simple procedure”**

[15] We can see merit in the proposed single ‘simple procedure’ in cases for £5,000 or less but would await more detailed proposed rules before commenting on whether this procedure would in fact result in making litigation for what were formerly small claims and summary cause actions in reality any easier to pursue and defend.

**Proposed new procedures for civil and criminal appeals**

[16] We have no specific comment to make on these other to remark that we are generally in favour of them.

**Proposed merger of the Tribunal Service and Scottish Court Service**

[17] We have no specific comments to make on this.

Andrew Hajducki QC on behalf of Westwater Advocates
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