Justice Committee

Courts Reform (Scotland) Bill

Written submission from Brian Fitzpatrick, Advocate

Background:

I called to the Scottish Bar in 1993. Prior to qualifying as an Advocate I trained and thereafter was employed as a qualified solicitor at Digby Brown, Glasgow and L& L Lawrence, Glasgow, both specialist firms with a substantial caseload of personal injury (PI) cases, primarily for ordinary citizens and mostly for working people, trades unions and their members. My practice is predominantly one of acting for pursuers mostly in the Court of Session. I took a break from professional practice in 1996 until summer 1997 and again from autumn 1998 until returning to full-time practice in autumn 2003 after public service as Head of Policy in the Dewar administration and then as MSP for Strathkelvin and Bearsden. During those years I did not resign my membership of the Faculty of Advocates but I did not practice. My practice nearly exclusively is as specialist Counsel acting (predominantly) for workers or victims of road traffic accidents. I have a particular interest and recognized expertise in workplace and road traffic cases particularly cases of catastrophic injury resulting in head and brain injury and spinal cord injury cases. While the formal legal position is that I act for “the pursuer” it should be borne in mind that in most but the most modest PI cases personal injury affects the victim but also her wider family. I regularly am instructed also for pursuers who lack legal capacity due to their youth or as a result of injuries suffered. Pursuer’s solicitors often will instruct Counsel regardless of where the “split” in their practice as between pursuer/defenders instructions might arise but solicitors for insurer/defenders (perhaps in defence of the valuable assets of acquired know-how based on past cases) tend not to so readily instruct Counsel seen or perceived to be expert in acting for pursuers. In almost every case I undertake the defender will be defended by a well-resourced insurer or by a public authority such as local government, Scottish Ministers, the health service, the UK Government or the like. The paucity of the availability of civil legal aid for proceedings in the Court of Session means that, like most PI Counsel, I have only limited experience of acting in legally aided cases in the Court of Session. Civil legal aid is rarely granted for cases under £50,000 to proceed in the Court of Session and is largely irrelevant to consideration so far as PI cases in that Court are concerned. The great preponderance (90%+) of cases in which I appear are ones where I am instructed speculatively for the Pursuer. The great preponderance of those cases (90%+) result in an extra-judicial settlement or a judicial decision (at first instance or on Appeal) in favour of the Pursuer. It should be borne in mind that such (not uncommon) success rates reflect the reality that many such cases proceed on the basis of breach of the criminal law by either other road users or employers. Civil liability (and the securing of damages) mostly turns on establishing the civil proof of such breaches. Speculatively funded actions operate as a “filter” against ill-founded or misconceived cases being brought. Few Counsel could sustain the financial consequences (or reputational damage) arising from a steady string of ill-founded (and therefore likely unsuccessful) cases. Like many
practicing Counsel I do stand ready to take instructions speculatively) in cases giving rise to interesting or novel points of law even where the anticipated prospects of success might seem poor. Scotland’s jurisprudence (since even before the era of *Donoghue v Stevenson*, itself a Poor Law case that made its way through the Court of Session all the way to the House of Lords and which is regarded globally as the *fons* of the modern law of negligence) has been developed on the back of such cases.

I have been a member of Unite since 1986. I am a member of Justice and Justice Scotland as well as Liberty, SCOLAG and the Muir Society. I regularly lecture on the law and practice relating to head, brain and spinal cord injury (not just to lawyers but to bodies including Victim Support, Child Brain Injury Trust and Headway). I am a past Trustee and Board Member of the Head Injuries Trust for Scotland.

For the purposes of this respectful submission to the Committee, my comments are restricted to: the exclusive competence of the Sheriff court; the creation of the judicial office of ‘summary sheriff’; the proposed national specialist personal injury court and the need for protection and support of civil jury trial; judicial specialisation and the introduction of a ‘simple procedure’.

**Summary**

- The proposal to provide for an exclusive competence of the sheriff court of £150,000 to all intents and purposes will end the Court of Session as a court of first instance for personal injury claimants. The proposal is predicated on a decerniture in that sum. Any solicitor instructed by a PI client who might secure damages but subject to a significant deduction for any contributory negligence will need to carefully consider even the raising of cases with a value considerably in excess of the proposed limit. A claim of potentially £350,000/£400,000 but a real risk of such a percentage deduction might be caught by the scope of such a significant upwards shift. (The case of Anthony Stephen Tortolano, 2013 S.C 313 is but an example). £150,000 as a cut-off point will remove nearly ALL PI work from the Court of Session. A pursuer with the prospect of finding jurisdiction elsewhere in the UK might be well advised to seek to forum shop. Workers and injured persons in Northern Ireland and England & Wales are only excluded from the higher courts at much lower levels (£30,000 - £50,000).

- The Sheriff Court is an unattractive forum for pursuers. As a matter of routine, PI cases in the Court of Session are allocated four consecutive days (and more on application) and those days are only infrequently changed (usually for sound reasons). The priority of any Sheriff Court is the prompt dispatch firstly of summary criminal business. It is notoriously difficult to secure the allocation of diets longer than single days and in many Sheriffsdoms cases needing more than one day are eeked out over the Court calendar. Many Sheriff Courts, particularly outside the larger population centres, lack proper libraries, waiting rooms for the separation of witnesses and meeting areas (all readily available in Parliament House). Much of the current Sheriff Court estate would struggle to have readily
available facilities to accommodate civil jury trials. Scottish Courts in a sense gets an unquantified subsidy in respect of the readily accessible facilities available to parties’ advocates via the Advocates Library having such proximity to the Court of Session. Solicitors-advocate have replicated such facilities there in the SSC and WS facilities. Unlike in days of yore, it is now a matter for comment if an allocated case cannot proceed on the day fixed in the Court of Session. That the proposals indicate the Government do not intend to appoint additional sheriffs to deal with the cases excised from the Court of Session (almost all and not, as has been suggested, around two-thirds) must be a fundamental concern if Parliament is interested to ensure that victims of personal injury and their families (sometimes carers) do not suffer the further assault of having a good system removed to be replaced by an under-resourced and inadequate alternative. A worker, already out-of-pocket and with ongoing expenses may feel pressured into accepting an inadequate extra-judicial settlement when met with the information that Court days will be staggered and no definite end date for proceedings is known and such proceedings might be heard by a Sheriff with only limited (if any) PI experience. Cases involving younger head and brain injured persons might initially appear to be of modest or moderate value and we are still only developing an understanding of the particular needs of such victims. Unless there are robust arrangements protecting the transfer of such cases, on being identified as more complex than thought, institutional inertia will militate against deserving cases being transferred either to the Court of Session or the proposed national specialist Court.

- PI cases, even of moderate value (under £20,000) can often require access to good technology both for case management and the proper presentation of evidence. Any 21st Century court reform should recognise the likely need for significant IT investment and secure access to such technology not just for the Court and its members and officials but also for parties and their advisers. Technology in our sheriff courts requires significant improvement and investment, the proposals do not appear to contemplate any transfer from the Court of Session resources and estate but only £10,000 has been identified as a proposed IT update. As government “guesstimates” of likely IT costs go that low figure suggests a risible estimate has been happened upon given recognized budgetary constraints. Civil juries are an important part of our civil justice system and proper provision for the leading of evidence are needed in respect of civil jury trials.

- The expected savings, as identified in the Financial Memorandum, are misleading, as they fail to take into account the amounts recovered by the Scottish Legal Aid Board (SLAB) in personal injury cases.

- The proposal for a specialist PI court pays insufficient attention as to whether that national specialist court does not, in fact, already exist in the Court of Session, particularly given the welcome effects of the procedures under Chapters 42 and 43 of that Court’s procedures. Specialist sheriffs are a welcome and necessary
pre-requisite to any substantial transfer of such business. Many of the current Sheriff Court judges are drawn from former prosecutors or criminal defence lawyers with little or no background in PI (as Sheriffs routinely acknowledge on and off the Bench).

- Little regard has been paid to the “culture” and approach of PI practice in the current arrangements. In contrast to the Sheriff Court, a very high percentage of PI cases are resolved with none or little need for judicial intervention or Court time. PI practitioners, advocates, solicitors-advocate and solicitors, often anecdotally acknowledge the utility of a measure of detachment brought to the resolution of disputes by Counsel who of course advance their client’s interests fearlessly and without favour but in a culture where the controversial areas are sought to be identified with a wide measure of agreement where that might be achieved. That should be mirrored in the Sheriff Court. The anecdotal evidence is that it is not. No significant research has been done on the unintended consequences in a breakdown or departure from that culture. If there is any “bottle-neck” in Court of Session cases it tends to be in cases around £20,000 where an insurer is minded to take a “punt” on an unreasonable defence standing the limited exposure on the damages sum itself. Most pursuers rarely can indulge the taking of a “punt” in what is, in contrast, for most a “once in a lifetime” event. There appears to have been no research on whether an increase to £150,000 risks extending any such “bottleneck” to cases up to that amount or perhaps given my remarks on contributory negligence to cases of even greater monetary value.

- The proposed ‘simple procedure’ is wholly inappropriate for personal injury cases for reasons already identified in research, and by Justice Secretary, Mr. Kenny MacAskill. Its adoption would lead to real injustices being routinely played out in our courts.

- These proposals risk unexpected and detrimental consequences so far as Scottish victims of personal injury are concerned.

An increase in the exclusive competence of the sheriff court from £5,000 to £150,000

1. This increase would remove almost all PI cases from the Court of Session closing it off as a court of first instance for the victims of personal injury. The assumption appears to be that catastrophic cases will continue to be dealt with in the Court. No soundings or evidence appears to have been taken from the likely sources of such cases. There are great advantages to legal advisers in having a centre of excellence for PI work and litigation. It seems likely that the proposed national personal injury Court might wholly displace the Court of Session even in cases with a value OVER £150,000. Scotland’s developing jurisprudence will be fragmented and might reasonably be expected to be reduced from what is already a fragile base. The Court of Session, acknowledged across the UK and internationally as a highly prestigious forum with
decisions often relied upon across the UK on many important issues involving workplace health and safety and the approach to damages in a changing world, will be denuded of such inputs.

2. £150,000 exponentially exceeds the position in other nearby jurisdictions. In England and Wales, the county court has jurisdiction up to £50,000. In Ireland the jurisdiction of the circuit court has been increased recently to 60,000 euros for personal injury actions. Scottish victims of personal injury will be placed in a significantly disadvantaged position both in respect of access to representation and the standard and procedures of the Court dealing with their case.

3. It is wholly unclear how the £150,000 figure was happened upon and what reliance might be placed upon it.

4. Younger victims of serious head or brain injury (as instances only) deserve special consideration. The medical position in such cases often is unclear and the prognosis guarded at best. It may be necessary to institute proceedings to secure immediate expenses and to get some form of interim payment by agreement or award by the Court. Unless robust arrangements are in place under any new Court arrangements to secure and promote the ready transfer of such cases younger pursuers face particular risks of being under-compensated. Sheriffs are no more nor less territorial nor professionally jealous than other experienced professionals. Where the policy purpose seems to be directed towards PI cases NOT being raised or determined in the Court of Session in the absence of such robust protections and promotion of such transfers applications to do so likely will be refused. There is a real risk of injustice being worked on some of our most vulnerable citizens.

Resourcing

5. Criminal cases remain the driver and focus of the Sheriff Court. That position might be expected to be maintained or even gather speed in coming years. There is already an increase in the number of criminal cases being dealt with in the sheriff court (be that from extended powers or prosecutions being "marked down"). The proposed changes in the Bill will add to those pressures. Crime always will be given priority so the most likely persons to carry the costs in terms of impacts such as delay, cancellation and rescheduling will be the victims of personal injury. That is a double injury but this time perpetrated not by a wrongdoer but the Government. If the proposed changes to the criminal law on corroboration secure Parliamentary approval, a likely result will be that there will be more criminal cases being prosecuted and going to trial in the sheriff courts. The programme of Sheriff Court closures inevitably mean additional pressure on remaining sheriff courts. Yet the Financial Memorandum indicates that there are to be no extra sheriffs. With a measure of generosity, the Sheriff Court already is a somewhat creaking system. With a proposal that only two sheriffs are to be allocated to the national specialist court, the day to day business of that court will be seriously affected by any case of any duration beyond mere hours and minutes. An informed but self-interested Insurer (with cases running across the Court's yearly calendar) might seek to
be dilatory to his advantage in weeks when it is clear cases will not get going for want of a presiding Judge being available. The ready availability of judges to be drafted in for outer house business in the Court of Session has and does avoid such dilatoriness. It would be a gross error for Parliament to assume that the UK’s financial services industry will act otherwise than in its own interests.

6 In the Court of Session evidence is recorded (albeit in antiquated format). In the Sheriff Court parties need to instruct and pay for a Shorthand writer. The proposed reforms likely will see the Court of Session turned into essentially an appellate Court in PI cases. Appeals need access to the evidence. It is unclear if the proposed £10,000 for IT encompasses a move away from the 19th Century that is the shorthand recording of evidence.

7 Little attention appears to have been given to the impacts of the proposals on the court fees presently charged by the Court of Session. At present, PI claimants subsidise the operations of the Court generally. The PI fees charged greatly exceed the recoveries made in the Commercial Court’s fees yet litigants in that Court already enjoy an elective procedure, segregated Judges and a segregated Court procedure. Given the trends towards the commodification of access to civil justice a “fees-based” approach seems the likely future pattern. It has not been made clear if the shortfall on PI fees will be made up by the Government or, more likely, the fees charged to other Court users will require to be significantly increased. As a matter of principle, it is wrong that citizens seeking redress and reparation for well-founded claims should be placed in a less advantageous position than a well-funded commercial litigant pursuing a commercial debt.

8 Paragraph 97 of the Financial Memorandum on anticipated savings on counsel’s costs of £1.2 million per annum is misleading and wrong. Almost 90% per cent of legally-aided PI and medical negligence cases are successful, meaning the expenses incurred in those cases are recovered from the other side and are NOT a charge on the taxpayer. That “other side” mostly is a private sector insurer indemnifying an employer or motorist who is ordered to pay damages by the Court as the civil consequence of circumstances that otherwise might merit a criminal prosecution. So far as the NHS is concerned it is respectfully submitted that it is wrong, in principle, to take into the reckoning any “saving” under this guise when the payment of damages must arise from an acceptance by the NHS or determination by the Court that a particular practitioner or NHS Board has been guilty of negligence.

9 Paragraph 96 of the Financial memorandum states that that SLAB paid out £4.9 million. In the absence of knowing what sums were paid IN from successful recoveries that figure is meaningless and most likely misleading.

10 Insufficient weight is given to the principle of “equality of arms” as an aim for our civil justice system. Most PI pursuers are “once-in-a-lifetime” litigants. Insurers get the daily and accumulated benefits of acquired know-how and dealings in a vast range of cases and share such information and resources. To that extent, “equality of arms”
likely always will be a laudable ambition with the aim being one of attempting to arrive at a position where ordinary people with meritorious claims can access suitably qualified lawyers who have the right advice to help them gain the right settlement or to litigate and get a judicial award as soon as possible. It must be recognised that the availability of counsel is an important asset in facilitating early settlement. The Scottish Bar brings the benefit of years of experience in case preparation, case pleading and presentation, which levels the playing field with defenders backed by the financial services industry. Even the current Westminster government’s civil justice reforms do not propose removing the ready access to Counsel contemplated by the Bill.

11. A test as to the grounds for Sanction for the employment of Counsel based on cases that are identified as “truly complex” cannot be maintained and would thwart that ambition. Nearly ALL cases would fail that test. Nearly all successful PI litigants would be refused the recovery of their costs in instructing Counsel. Counsel who could not recover their fees quickly would cease acting speculatively not least at the behest of their bank managers. Sheriff Principal Taylor is right to advise that the test for granting sanction for the employment of counsel ‘should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied’. That test most likely can only be made at the completion of the proceedings. Even there likely will be a deleterious effect so far as securing speculative representation is concerned

Specialist court

12. If Parliament is minded to ignore the existing availability of the Court of Session as a specialist PI court there are sound reasons for introducing a national specialist PI court. Since 1999, The Scottish Government (regardless of the political hue of the administration) has made clear its policy commitment that new public bodies should be presumed to be located OUTSIDE Edinburgh. If there is to be a national PI Court, it is respectfully submitted that the Court should include the use of a specialist court in Glasgow. Workplace accidents particularly remain concentrated on the larger population centres.

13. Pursuers must have available to them the option of a civil jury trial. A citizen’s right to seek jury trial is a proud Scottish tradition. It should be remembered by all concerned that Proofs in the Court of Session being heard by Judges only is a departure from what is the default position that, save where a defender shows special cause, a pursuer is entitled under the Court of Session Act to apply for a civil jury to decide her case. Juries have played a key role in the development of our law on PI and, particularly in recent years, have been acknowledged by the Appeal Court as providing a welcome corrective or augmentation of judicial decisions. The availability of civil jury trial has played a significant part in securing awards more reflective of the actual losses suffered by victims of personal injury. While the Court must always act fairly and impartially between the parties to a litigation it should not be assumed that all parties are in the same position. PI litigation is one instance of litigation where there can be a right or a wrong answer and there can be a “good guy” and a “bad guy”. Leaving aside
the issues of conduct and tactics (which always will be subject to the Court’s oversight) it is suggested that a pursuer with a well-founded claim should be protected and supported by our Parliament. Most defenders with well-founded defences will be supported and assisted by well-resourced defenders. Parliament should be loathe to undermine civil jury trial and should seek greater clarity as to what steps are to be taken to protect and promote civil jury trial be it in the Sheriff Court or the national personal injury Court. Such protection will have necessary consequences for resources, accommodation, support staff and the Sheriff Court estate.

Specialisation of sheriffs

13. Specialist sheriffs will be needed if victims of personal injury are not to get third rate treatment at the hands of our justice system. Most Court of Session judges will have spent part of their professional life dealing with PI cases from one side or the other or both. PI work is highly complex. Increased EU and UK regulation demand familiarity and capacity with a burgeoning black letter and case law jurisprudence. The Sheriff, particularly in more rural locations, often needs to be a generalist. A generalist determining a complex PI case is an appeal in waiting: Carol Kennedy v Chivas Brothers Limited, [2013] CSIH, 57.

An issue also arises as to where that specialist band of Sheriffs is to be got. In the immediate years, expert solicitors, solicitors-advocate and Counsel might provide the “pool”. The implications for the junior end of the Junior Bar in Scotland of these changes are dire. It is highly unlikely that very junior Counsel will be able to attract work immediately on qualifying in cases valued at £150,000 and upwards. This is not mere self-interest. There is a substantial public interest in having a robust and independent referral Bar. The Scottish Bar in the last 20 years has divested itself of a reputation as a public school ghetto. Most advocates now come to the Bar after a number of years as solicitors. Qualifying for the public office of Advocate is expensive. Intrants are unpaid during their training. There are inevitable delays in payment on qualifying and securing work. Only persons of considerable private means might bear the sustained costs of establishing a reputation such as to be routinely instructed in cases of over £150,000 sufficient to generate an income. The public school “ghetto” will be rebuilt. Scotland’s legal system and the administration of justice will be impoverished by the return to an exclusion of persons of modest means from training and qualifying and practicing as Advocates. In the 21st Century we would be returning our independent referral Bar to the 19th Century.

Judicial tiers and ‘simple procedure’

14. The interconnections between specialist Sheriffs and the new tier of summary sheriffs is unclear.

15. According to the Policy Memorandum, the “simple procedure” rules will be based on a problem-solving or interventionist approach, closer to the inquisitorial approach
taken in some other jurisdictions. This approach is not appropriate for personal injury cases. To bring any personal injury claim, no matter how low-value or superficially straightforward, a person needs to have an understanding of the law of negligence, and some knowledge of how to obtain and understand medical evidence. Where determining PI cases, due consideration and respect needs to be accorded to the fact that the right to damages flows from a breach of the common law or indeed of a criminal statute. Problem solving or, indeed trying to identify a via media, may be wholly inappropriate where an innocent victim has suffered loss through the fault and negligence or statutory breach of a well–resourced defender. It would add injury to injury if the “breaching” defender was also able to decide to instruct legal representation at a cost to his policy holders or shareholders but the party suffering as a result of the breach had to take up the heavy burden of self-representation. A bullish Insurer might elect to instruct Counsel and bear the cost in order to deter or minimise claims. Applying the proposed simple procedure to PI Cases would be a wholly retrograde step. It cannot be assumed a case under £5,000 is not complex. Mrs. Kennedy’s case (see above) would have fallen under the simple procedure financial limit.

Unintended consequences

16. In general, the proposed changes proceed on the basis that they will represent an improvement on current arrangements. No PI practitioner of standing has suggested that that current Chapter 42 and 43 procedures of the Court of Session are not working effectively so far as pursuers are concerned. Many litigants, individuals and trades unionists, who otherwise could not contemplate the costs of securing the legal services of experienced and qualified specialist Counsel (and doing so running the risks of the other side’s costs) get access to Counsel on speculative terms. In contrast to the rest of the UK, Scottish Counsel instructed speculatively generally see their costs recovered from the unsuccessful defender only. The proposals are broadly silent on whether and why it is thought that position somehow might be maintained.

17. It seems sometimes to be suggested that excluding access to the Court of Session for most ordinary citizens seeking redress for PI breaches might allow that Court to develop and grow other expertise. It has been suggested more commercial work might, by that change, be attracted towards Scotland as a forum. It would be an odd result if Scotland’s Parliament allowed Scottish citizens to be disadvantaged in asserting their well-founded claims so that an untested and uninvestigated new source of judicial or legal activity for persons or corporations furth of Scotland might be attempted to be secured. It is not at all clear why taxpayers’ pounds should be spent to that end when the same taxpayers are being cleared from access to the nation’s highest court. It is unrealistic, in an era of global financial austerity to expect that there is a ready market for commercial litigation waiting outside Scotland for the simple measure of excluding most PI work from the Court of Session to be adopted before such work arrives in Scotland.

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18. The implications for the current Scottish senior judiciary of the significant contraction of the Court of Session has gone unexplored. The demographic make up of the Senators is not set out nor are their current workloads nor the likely impacts on judicial time of the excision of such a considerable body of work. Two new Senators have just been installed. On one hand the proposed increase in Sheriff Court resources is, at best, modest but on the other little thought seems to have been given to the effects on what our most senior Judges will be doing. It may well be that the proposals anticipate an increased appellate function (the appeal Court in part providing some additional “specialization” in those cases where the appellant has the resources or stamina to seek overturn of a flawed decision by a Summary Sheriff or Sheriff proper). That remains unclear.

19. The recent progress made as a result of decisions in civil jury cases (not just in fatal claims) in modernising our law of damages to properly reflect the true costs of the consequences of injury may be halted or reversed if civil jury trial is not only preserved but is not protected, promoted and resourced.

20. It may well prove necessary for Scottish legal advisers to consider advising a Scottish client with a good claim to consider whether she might not have jurisdiction elsewhere in the UK so that the £150,000 ceiling is avoided and recovery of Counsels’ fees might be better secured so that representation by Counsel might be secured.

20. PI Counsel tend to charge for their services on a broad hourly, half-day or daily basis. A moderate value PI claim can still be time-consuming, complex and demanding. Most PI Counsel are competent and conscientious. Litigants, and therefore society, benefit from the many cross-subsidies applied in such charges. Absent the fee income from moderate claims, where experienced Counsel are working only on demanding, high-value claims there is a significant risk that charges for such work will increase. Where Counsel are only to be instructed in lengthy (8 – 24 day) Proofs for claims over £150,000 much more serious consideration will need to be given to the practicability of accepting such instructions on a speculative basis. Pursuers with potentially high value claims face the problem that they have no or modest income at their point of legal need.

Brian Fitzpatrick
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