Justice Committee
Courts Reform (Scotland) Bill
Written submission from Simpson and Marwick

Simpson and Marwick’s expertise and market-leading position in dispute resolution is well known. We provide legal advice and representation across all key sectors – personal injury, professional indemnity, commercial litigation, employment and family law. Our in-house advocacy unit provides unrivalled and cost-effective access to all courts in Scotland.

We are supportive of the key aim of modernising the operation of the courts. Lord Gill accurately describes the current structure as slow, inefficient and expensive. We will address key aspects of the Bill below.

1. Increase in privative jurisdiction from £5,000 to £150,000

Section 39 of the Bill seeks to increase the privative jurisdiction of the sheriff court from the current level of £5,000 to £150,000. We welcome that proposal, subject to the need for sufficient judicial discretion to remit complex matters to the Court of Session and subject also to adequate resourcing of the sheriff courts – particularly the proposed specialist personal injury court – to deal with the influx of litigation.

The current privative limit of £5,000 is seriously outdated. It is a rare action for personal injuries which is raised with a sum sued for of under £5,000. A decreasing number of commercial disputes concerns sums under £5,000. Raising such disputes in the Court of Session incurs unnecessary expense for all parties. There is a public interest in promoting access to justice. Access is improved by lowering the costs incurred. The costs are lowered where disputes are litigated at the appropriate level, with an appropriately trained and resourced judiciary.

There is a plethora of specialist personal injury law firms in Scotland. They ought to be well capable of providing advice and representation for their clients in sheriff courts, without the necessity to instruct counsel.

There are two caveats to our support for the proposed increase. First, it must be allied to a robust discretion for sheriffs to remit cases of complexity to the Court of Session. A case of low value may nonetheless encompass legal complexity. Equally, it may represent a test case in which the value may not reflect its importance. Sheriffs must be provided with an unfettered discretion to remit as they deem appropriate.

Secondly, access to justice and the swift resolution of disputes will only occur if the sheriff courts are adequately resourced to deal with much higher volumes, allowing court time for both interlocutory matters and substantive hearings, as well as adequate writing time for sheriffs.
2. Establishment of a specialist Scotland-wide court

We welcome the provision in Part 1, Chapter 4 Section 41 which provides the power to confer all-Scotland jurisdiction for specified cases – with particular emphasis on the establishment of a specialised personal injury sheriff court (subsection (1)).

Whilst arguably, there is already a specialised personal injury court operating within the Court of Session, it is recognised that the suggested increase in the privative jurisdiction limit to £150,000 will ensure that the right level of cases are heard before sheriffs with specialised in personal injury work. We also agree with the intention to allow a similar specialised personal injury court to be established in Glasgow or indeed in other parts of the country if necessary.

We also consider that the introduction of the Bill provides a welcome opportunity for further judicial specialisation amongst sheriffs. Sections 34 to 37 permit the Lord President to decide which categories of cases within the sheriff courts may be heard by judicial officers who specialise in that category. Subject to appropriate time and resource being made available for judicial training, and subject to the volumes of cases for any category being raised and heard in the sheriff courts, we welcome such categories extending to cover disease actions, clinical negligence and commercial disputes. This is a not an exhaustive list but there are some obvious categories of actions for which a greater degree of judicial specialism would be desirable. The introduction of the commercial courts in the Court of Session and in certain sheriff courts, and the efficient proactive case management by the allocated judges assigned to the commercial division, is an example of the benefits gained by judicial specialism.

In relation to lower value claims that may not require a specialised sheriff it is, of course, entirely appropriate that these cases can be raised in the appropriate local sheriff court.

With one eye to the future, in the event that the Bill receives Royal Assent further consideration should be given to the existing chapter 36 rules presently governing personal injury procedure in the sheriff court under ordinary procedure. At present these rules largely mirror the Chapter 43 rules operating in the Court of Session. However there is one notable difference; in chapter 36 the timetable provides that parties are obliged to conduct a pre-proof conference (PPC) with PPC minutes to be lodged in advance of the proof diet. There is no obligation on parties to meet and the conference can be held by telephone. In our experience most PPCs are conducted over the telephone. Under chapter 43 procedure in the Court of Session, parties are obliged to meet in person at a pre-trial meeting (PTM). We would suggest that in the event a specialised personal injury sheriff court is established, it would greatly aid settlement discussions and allow the parties to focus on what issues remain in dispute if the sheriff court timetable obliged the parties to conduct a meeting to discuss settlement.

3. Civil jury trials

We disagree with sections 61 to 69 which provide for civil jury trials in certain sheriff courts. Whilst we understand that the intention is to introduce a procedure similar to
that operating in the Court of Session, we consider that there is a significant imposition on the public in terms of time (and on the public purse in terms of cost) which is not justified by way of reintroducing civil jury trials in the sheriff court. In our view jury trials bring the potential for inconsistency of awards and can lead to confusion on the part of both pursuers and defenders when advising on the true value of a claim, given inconsistencies between judicial awards and jury awards. Uniformity and certainty is preferred by both pursuers and defenders. In *Kirsty Mae Hamilton v Ferguson Transport (Spean Bridge) Limited* and *Gilbert Dennis Thomson v Dennis Thomson Builders Limited* [2012] CSIH 52 these issues were considered by a five judge bench, chaired by the then Lord President (Hamilton); juries are now provided with judicial direction on appropriate banding of awards to consider during their deliberations. In our view, if a jury needs to be provided with judicial direction to achieve consistency awards then effectively their function becomes redundant.

We note that the proposal is in essence to lift the rules governing jury trials in the Court of Session into the Bill and therefore the provisions will largely reflect the language and procedures currently set out in the Court of Session Act 1988. However in practice, in our experience, the existing chapter 43 procedure in respect of jury trials provides evidence of additional delays. If either party asks the court to appoint a jury trial then the proof diet assigned in the initial timetable is discharged and a jury trial in scheduled for approximately one year after the date of the proof. Consequently this means that it can take up to two years from calling the summons to date of trial – cutting against the principle of encouraging streamlined and efficient case managed litigation. We would also suggest that this is contrary to improving access to justice and discourages the aim of improving an efficient, streamlined civil court system fit for modern day litigation.

If jury trials are to be available in the specialist personal injury court then we would welcome:

1. The conventions in relation to material that could be provided to a jury should be relaxed further so that documents such as the Judicial College Guidelines can be made available;
2. The jury should be required to give reasons for the basis of their decision and award; and
3. The appeal process should be revised to allow judges the opportunity to correct decisions which can clearly be shown to be either ill-considered or inappropriate.

4. **Simple procedure**

Section 77(1) of the Bill states that the Scottish Ministers may provide that, in certain categories of simple procedure cases, no award of expenses may be made, or any expenses awarded may not exceed a prescribed sum. Section 77(5)(a) provides that an order under subsection (1) does not apply to cases in which the defender (i) has not stated a defence; (ii) having stated a defence, has not proceeded with it, or (iii) having stated a defence, has not acted in good faith as to its merits.

The provision of section 77(5)(a)(ii) has the effect that when a defender states a defence, whether that be on liability or quantum, and subsequently offers settlement of the claim, he is unable to rely on the provision restricting the award of expenses.
This can discourage settlement of claims as it may be in the defender's interest to run a defence at proof, rather than settle a claim. It might also be in the defender's interest to allow decree to pass rather than to enter a defence on quantum and be subject to an adverse finding in expenses.

The provisions proposed are the same as those which currently exist for the treatment of expenses in small claim cases. In his report on the Review of Expenses and Funding of Civil Litigation in Scotland, Sheriff Principal Taylor recommended that the court should have a discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. He recommended (at chapter 4, paragraph 21) that this should be reflected in the rules for the new simple procedure. The proposed rules do not allow for the discretion recommended by Sheriff Principal Taylor.

We believe that in order to avoid the difficulties currently encountered by defenders who have stated a defence in a small claim but choose not to proceed with it, it is in the interests of both justice and efficiency to make provision for the court to have discretion to restrict awards of expenses in simple procedure, in line with Sheriff Principal Taylor's recommendation.

Simpson and Marwick
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