Introduction

I am an advocate with more than 34 years of court experience in the field of personal injuries (P.I.). I believe that I am among the most experienced Scottish practitioners in this field of law. I am recognised as possessing tier 1 skills in P.I. law by Chambers Legal Directory. I appear for both pursuers and defenders. I have appeared in the Sheriff Court, the Court of Session and the House of Lords (as it then was). I regularly give seminars regarding developments in the field of P.I. law. I still have a busy Court of Session practice. I am approaching retirement and by the time this legislation reaches implementation, I expect that I will have retired, thus my personal/financial interest in the outcome of this consultative process is minimal.

I submitted a personal response to the Scottish Civil Courts Review (SCCR) during the consultation process. In my response I was in favour of comprehensive modernisation of the civil courts. Among other things, I argued for an all-Scotland P.I. Court, based in Edinburgh. When the SCCR published their report I was delighted to see that they were in favour of an all-Scotland P.I. Court. I attended Lord Gill's public announcement and presentation of the report in the W.S. Library. During his presentation he emphasised that the recommendations were inter-dependant and that individual recommendations should not be "cherry picked" out of the recommendations. Lord Gill has repeatedly re-affirmed this during numerous public appearances when discussing the report. It is stated in paragraph 27 of the Memorandum that the Scottish Government was persuaded of the benefits of implementing the recommendations as a package. Given these expressions of support for the integrated solution which included the establishment of an all-Scotland PI Court based in Edinburgh I was utterly astonished when the draft legislation was published, that the PI Court was not an integral part of the scheme of reform, but instead appeared to be some vague future aspiration to be created at some unspecified future date by ministerial order. The omission of a specific provision creating the all-Scotland PI Court in Edinburgh is all the more surprising when paragraphs 99 and 101 of the memorandum are examined. In paragraph 99 it is stated:"The Scottish Government accepts that there are economies and efficiencies of scale that accrue through centralising personal injury litigation in the Court of Session" In paragraph 101 it is stated "The Scottish Government has agreed that it is important for Scotland to retain a central court of expertise around which there is a professional cluster of expert practitioners and associated infrastructure and this will be an acceptable replacement for the current virtually unrestricted access to the Court of Session even for low value personal injury actions".

The failure to provide for the establishment of an all-Scotland PI Court based in Edinburgh simultaneously with (or in advance of) the implementation of an increase in the exclusive competence of the sheriff court and the rest of the measures recommended by the S.C.C.R., will remove or reduce access to justice for a large number of Scottish citizens injured by the fault of a wrongdoer. These people include
people who have suffered very serious injuries. This is exactly the reverse of the remit of the SCCR which was to increase access to civil justice for the people of Scotland.

The fallacy behind the reasoning seeking to justify the unprecedented increase in the exclusive competence of the sheriff court is that the importance of a case is directly related to its’ monetary value. This is not true either for P.I. cases or for other types of cases, whether judged from the point of view of the cases' importance to the litigants or from the point of view of the importance of the legal principles emerging from the case.

I will give some brief examples of how the rigid reliance on monetary value will operate, devaluing the importance of cases in a capricious and discriminatory way.

- Two young children are killed by a truck being driven recklessly. The driver would be tried on indictment in the High Court where he would be automatically entitled to be represented by counsel (paid out of public funds). In contrast the deceased children's parents would be compelled to sue the wrongdoer in the sheriff court (because the value of the case would be below £150,000) without the benefit of automatic sanction for the employment of counsel, which the wrongdoer enjoyed in the High Court. In addition (if the all-Scotland P.I. court is not created) the parents will not be able to have their damages assessed by a jury, an entitlement they would have enjoyed in the Court of Session.

- An unemployed or retired individual has his right arm amputated by reason of the fault of a wrongdoer. Without a claim for wage loss his claim may be worth less than the exclusive competence financial limit and he would not automatically be entitled to the services of counsel. In contrast somebody who is employed but sustains the same injury would be entitled to raise his action in the Court of Session with automatic sanction for counsel.

There are many more real-life examples that I could give, which would demonstrate how financial limits have no relationship with importance and can lead to unfair treatment and discrimination against certain categories of litigant, particularly in P.I. cases.

Automatic sanction for the employment of counsel in an all-Scotland P.I. Court would address these problems of unfairness and discrimination and I would respectfully suggest that the committee recommend this.

I consider it important to draw the Committee’s attention to some of the material in the memorandum that is either untrue, unrepresentative, idiosyncratic or speculative.

- In paragraph 79 the one reason for seeking to remove P.I. cases from the Court of Session is stated as follows: “Too many straightforward, low value cases are being considered too high up the system by judicial officers who are over qualified to deal with them. Those judicial officers should be hearing more complex cases which are currently being held up by straightforward, low value cases.” This is a misrepresentation of what actually happens in the Court of Session. The truth is that on average in fewer than 3 x P.I. cases per
week, the papers are actually placed before any judge for a hearing on evidence. In most instances these 3 or less cases settle before he/she had had a chance to read the papers. In some weeks all cases settle without any hearing on evidence. The net result is that there is little or no judicial time spent by judges on hearing P.I. cases of whatever value, because the skilled and experienced legal teams on each side of PI cases manage to settle them in all but a tiny number of cases. I would suggest that the committee calls for the actual figures or examines the Rolls of Court to verify these matters.

- In paragraph 80 the author states “The Court of Session is currently flooded with low value claims”. In my experience this is not the situation. I suggest that in the majority of PI cases the sum sought as damages is in excess of £150,000 and it is in only a small minority of cases that the sum sued for is less than £20,000. I would invite the committee to call for specific figures in this matter.

- In paragraph 81 the author states “Some 85 personal injury proofs are scheduled every week in the Court of Session but only a handful ever proceed”. This figure is used as the basis for a contention that: “some court users are being discouraged from using the Court of Session because they believe that the Court is so crammed with personal injury actions that other business will be delayed sometimes for months until a proof date may be found.” It may be true that when scheduling cases for a hearing when they are first raised, the court administration schedules 85 cases per week, but this occurs about a year before the date for the hearing. The court administration is aware (as are all court users) that 98% of P.I. cases settle without any judicial involvement at all, so the delaying effect of this volume of cases is virtually nil. Most of the remaining 2% of cases settle within 7 days of the proof hearing and only a tiny minority of that 2% appear on the list of cases published on Thursday of every week for hearing the following week (The Rolls of Court). I have checked the lists of cases in the Rolls of Court for the 4 week period from 11th February until 4th March and the actual average figure of PI cases scheduled for a hearing the following week was 7, as opposed to the 85 referred to in the memorandum. In most of these 7 cases the judge does not read the papers until the case is allocated to him/her a few minutes before the hearing, so even if most of the 7 cases settle "at the door of the court", it is only minutes of (or no) judicial time that are lost. In my view the assertion that “85 personal injury proofs are scheduled every week in the Court of Session” misrepresents the true position which can be seen in the lists of cases published in the Rolls of Court which detail the number of cases set down for a hearing the following week. The Rolls of Court are published on the Scottish Courts website and the committee can check the accuracy of my information by consulting them. I consider it important that the committee should be aware of this apparent misrepresentation. When the proper figures are examined, the assertion that “some court users are being discouraged from using the Court of Session because they believe that the Court is so crammed with personal injury actions that other business will be delayed sometimes for months until a proof date may be found”, would seem to be little more than uniformed speculation based on a mixture of misleading information and apparently anecdotal evidence from unknown sources about unknown potential litigants who it is claimed are being "discouraged" from
litigating in the Court of Session. I would suggest that the committee should seek clear evidence and statistics on this matter.

- The question of judicial time spent on P.I. cases is also referred to in paragraph 92. It is asserted that "the amount of judicial time spent on personal injury actions in the Court of Session, the amount of judicial time spent on procedural business and the amount of administrative work involved in dealing with personal injury actions was considerable". This is in conflict with the working of the chapter 43 rules which exclude judicial management of cases and result in PI cases having little or no judicial time spent on procedural business, unless a party seeks to do something which would involve a motion for the court to pronounce some kind of order. Once again, I would suggest the committee should obtain proper facts and figures for this questionable assertion.

- The matter of disproportionate costs is dealt with in paragraphs 83 and 84 of the memorandum. The information considered as the basis for the assertions in the memorandum is invalid, because it does not (and probably could not) take account of a complete change in the financing of PI litigation which has occurred over the past 5 years. Almost all PI cases raised in the Court of Session today are funded on a speculative basis. Legal aid to raise a low value PL action in the Court of Session is never granted unless the case raises exceptionally difficult points of law. Nowadays the only cases funded by legal aid are those raising exceptionally difficult points of law, medical/professional negligence cases and high value PI cases. Cases in the latter two of these categories will not be included in the proposals for exclusive competence but will remain in the Court of Session. In these circumstances questions regarding public funding of straightforward PI cases worth £150,000 or less in the Court of Session, do not arise anymore. The current situation is that PI pursuers do not have to pay anything for counsel's fees, which are recovered (if the action is successful) from the wrongdoer's insurers. Counsel does not recover any fees at all if the action is unsuccessful.

- More recently, the faculty of Advocates has relaxed the rule requiring counsel to have an instructing solicitor present in court for all appearances. This will lead to a significant reduction in the daily cost of hearings involving counsel. Obviously no account could be taken of this in the memorandum but the effect of this change renders many of the observations by Sheriff Principal Taylor to be invalid. This change goes some way to allowing Advocates to compete with other legal service providers (solicitors and solicitor advocates) on a level playing field price wise. Any rule such as a rule requiring sanction for the employment of counsel restricts advocates from competing fairly in the market for legal services. Such a rule is thus illegal under the competition legislation. If any rule requiring sanction for the employment of counsel is part of the legislation or the rules promulgated under the legislation, such rule will be challenged as illegal inasmuch as it is a restraint on competition. For this and the other reasons I have mentioned, I would respectfully suggest that the committee ensure that pursuers are automatically entitled to the services of counsel in any specialist P.I. Court. I was recently informed that the rates for Scottish counsel were roughly half the rates charged by English counsel.
It may be appropriate to point out that in England there is no requirement to obtain sanction from the court for the employment of counsel in any P.I. case in any court. This means that a resident of Carlisle suffering from a certain injury will be able to be represented by counsel in Carlisle Crown Court but the Scottish Government will create a situation where a Scottish citizen living just 15 miles from Carlisle and suffering from the same injury cannot have similar representation as of right. It is surprising that a Scottish Government should embark on reducing its' citizens entitlements to representation while English citizens continue to enjoy such entitlement even after the Woolf and Jackson reforms.

The Committee may not be aware that figures for court fee income in the Court of Session over the years 2010/11 and 2011/12 show that the total fee income from PI cases (approximately £2,000,000) was more than the total fee income from all the other types of case put together. As mentioned previously, the vast majority of P.I. cases require little or no judicial input and minimal administrative input. This is in sharp contrast with commercial cases which require a high degree of both judicial and administrative input. It is therefore clear from the available figures of income, that PI cases subsidise all the judicial and administrative activities in all the other fields of law by a huge margin. The PI court fees are met by multi-national insurance companies in more than 99% of PI cases. It follows that a large proportion of the activities in the Court of Session are being subsidised by these multi-national insurance companies. No provision seems to have been made to take account of the huge loss of subsidy which will happen with the exclusion of the bulk of P.I. cases from the Court of Session. Either court fees for the cases remaining in the Court of Session will have to increase by a substantial amount or the services and facilities will have to be reduced. Either way this will be a deterrent to the hoped for new business in the Court of Session.

Paragraph 94 of the memorandum states:
"The Scottish Government does not, however, believe that its proposals will interfere with access to justice. Furthermore, as up to 98% of personal injury cases settle in the Court of Session, the advocacy skills in court of counsel are rarely being deployed in these cases. Experienced solicitors are likely to be equally capable of conducting negotiations leading to a settlement as counsel".

This comment betrays a fundamental misunderstanding of the process of negotiation and assessment that is an essential part of the settlement process. During settlement negotiations both sides have already prepared their cases. They will refer to all the statements and reports assembled for the case during such preparation. Many years of experience in court hearings teaches advocates that witnesses often depart from their statements and experts can change their views during cross-examination. Skilled counsel uses their years of court experience to assess which elements of the witness statements are likely to prove or be rejected and which parts of their experts evidence are likely to prevail. If counsel on the other side is equally skilled they will adopt the same approach and take a discriminating view of their evidence. In this way (both sides compromising to some extent) the gap
between the parties’ positions is narrowed and a compromise is reached. It is the skills acquired during many years of dealing with evidence in court hearings which enables the participants in settlement negotiations to assess the strengths and weaknesses of their cases and thus what concessions to make to their opposite number. It is the utilization of these skills which leads to such a high settlement rate. Furthermore the reference to advocacy skills indicates a complete lack of understanding of the nature of the range of skills an experienced advocate must possess. It is not simply skill in asking questions of witnesses; it encompasses an ability to analyse facts and circumstances and apply them to the legal issues in any given case. This is another aspect of the skill used in negotiations. I would extend an open invitation to members of the committee to attend one of my settlement meetings in order for them to see what I have just referred to in a real context.

- In paragraph 87 the memorandum states: “it is hoped that higher quality work will be attracted to the Court of Session and the reputation of Scots law will be enhanced”.

This “hope” is little more than pure fantasy. The only area of Scots law which has acquired an international reputation for excellence, is the law of personal injuries. Scottish P.I. cases are cited worldwide. This has been a result of the combined skills of practitioners and judiciary. The legislation will dismantle this combination. In P.I. and other areas of law in the Court of Session, the acquisition of skills by advocates is a gradual process of learning by experience. The experience is obtained over years by involvement in increasingly difficult and valuable cases. Rarely (if ever) is an inexperienced advocate let loose on a complex or valuable case. The skill and experience is acquired by appearing in precisely the type of cases which will be removed from the Court of Session. With the disappearance of this category of case and an inability to get instructions (and thus income) in complex and valuable cases, a career in advocacy will become unattractive to those entering the profession and the pool of skilled advocates available as a resource to the citizens of Scotland will gradually wither and disappear. The "hope" of attracting "higher quality work" (whatever that is) flies in the face of all current experience. For example, tax advice is invariably sought from English counsel because Scotland does not have a pool of skilled tax counsel. When there is a choice to raise an action in London or Edinburgh, in every case I have ever heard of (except P.I. cases), the client chose London. This was not because of the fallacious suggestion that the Court of Session was crowded out with P.I. cases, but because of the availability of specialist counsel and solicitors in London. The inevitable decline in the pool of specialist counsel and solicitors which will occur by reason of the process I have outlined will make the Court of Session less attractive to those with a choice of where to litigate rather than more attractive as is “hoped” in the memorandum. The end result will be the eventual cessation of the Court of Session as a court of first instance.

I would be happy to give evidence to the Justice Committee if they consider I could assist in any way.