Justice Committee

Courts Reform (Scotland) Bill

Written submission from Thompsons Solicitors and Solicitor Advocates

“The Defenders in virtually all personal injury cases are, in reality, insurers. There is thus what Lord Justice Jackson described as an asymmetric relationship between the Pursuer and the Defender. In many cases there is a true David and Goliath relationship.”

(Taylor Review of Expenses and Funding of Civil Litigation in Scotland)

If Section 69 of the Enterprise and Regulatory Reform Act has stolen David’s sling; the Court Reform (Scotland) Bill, as currently drafted, will tie the straps of his sandals together.

The Bill creates certain significant disparities in terms of access to justice; principally because it takes a “one size fits all” approach to personal injury litigation together with a dogmatic attitude towards key aspects of the court process. Nevertheless, we believe that with a few simple amendments, introducing a more nuanced and balanced approach to key matters, the Bill is capable of delivering the package of reforms recommended by the Civil Justice Review but in a way that is fairer to victims of injury and disease that will work on a practical level.

This submission is in three parts for ease of reference:

- Part 1 – A summary of our concerns and proposals
- Part 2 – A discussion of the general “themes” at the heart of Civil Court reform
- Part 3 – A more detailed discussion of our concerns

Each Part has been drafted to be read as a free standing document

PART 1

A summary of our concerns and proposals

Our concerns

1. Will the new system and, in particular, the personal injury court cope?
   - Has the number of cases that will flow into the new court been underestimated?
   - Does the court have the staff resources, IT and systems to cope with the veritable tsunami of cases?
   - Will the cases run as efficiently and without wasting court time as currently works so successfully at the Court of Session?
2. In access to justice terms, does the proposed structure achieve a fair balance in the David v Goliath relationship such that victims of accident and injury have a fair opportunity to secure a just outcome through litigation?

- Workplace cases – has any account been taken of the “game changing” nature of Section 69 of the Enterprise Act and should workplace cases be treated differently?
- Employment of Counsel - Have the proposals gone too far and is there not a fairer way of ensuring the “proportionate” use of Counsel by victims?
- Simple procedure and Summary Sheriffs – have the following words of Kenny MacAskill been forgotten: “The small claims court is not suited to help those involved in personal injury litigation. It is in recognition of that fact that such cases will be removed from the small claims procedure.” [Parliamentary Answer 3SW – 4224]

Our proposed amendments

1. Systems

- The new court must be ready for at least 90% (and not 70%) of personal injury cases being removed from the Court of Session.
- The staff, IT and systems, particularly including systems such as electronic motions currently being used in the Court of Session, must be employed in the new specialist court and there is a compelling argument that the specialist court should be housed in the Court of Session building.

2. Workplace cases

- All workplace cases should be capable of being raised at the specialist personal injury court irrespective of their financial value.
- Parties should have the automatic right to employ Counsel in all workplace cases before the specialist personal injury court.

3. Counsel in other cases

- Parties should have an automatic right to employ Counsel in all fatal cases and in all cases with a value of more than £20,000.

4. Simple Procedure and Summary Sheriffs

- The Simple Procedure is wholly inappropriate for personal injury cases
- Any personal injury cases proceeding before a Summary Sheriff should follow the specialist rules which are currently being used under Chapter 34 of the Summary Cause Rules.
5. Statutory Instrument/Order

- To ensure flexibility, the types of cases (workplace accidents) which may be heard at the specialist personal injury court irrespective of their value; limits for automatic sanction for Counsel; and other relevant matters should be set from time to time by Order.

PART 2

A discussion of the general “themes” at the heart of Civil Court reform

Access to justice and legal representation

Access to justice is about more than having your day in court. In relation to personal injury matters, access to justice is also about having access to legal advice and representation. The Scottish Government’s research paper, “In the Shadow of the Small Claims Court” (copy attached), found that in the Small Claims Court “Access to justice has been reduced by restricting access to [legal] advice”. Legal advice and representation must be appropriate for the type of case and there must be parity and equality of representation – if the Defender uses Counsel, the victim must have that right.

Funding – victims rely on legal cost recovery, insurers do not

Victims of personal injury rely on recovering their legal costs from the defender at the end of a case. Accordingly, the representation that they receive is determined entirely by the Rules of Court. If the Rules of Court say that a victim cannot raise their action in the specialist personal injury court, then the victim cannot do so. If the victim does not have automatic sanction to employ Counsel, the victim may not use Counsel. Insurers, on the other hand, as Sheriff Taylor has commented, do not rely on legal costs recovery. In short, insurers can afford to employ Counsel to represent them whenever they wish. As the Scottish Government research paper shows, experience tells us, and logic leaves in no doubt, insurers, with their deep pockets, will employ Counsel before the specialist personal injury court and unless the court rules permit victims to do the same, they will be fighting with one hand behind their back. In the post Section 69 of the Enterprise Act world, this shall turn an exceptionally difficult task into an impossible one.

Why victims of accident and injury raise court actions

Before a court action is raised, every injury case will have gone through the detailed Pre-Action Protocol involving in-depth discussion with insurers. Victims only require to raise a court action if an insurer has refused to settle a good case or have offered too little compensation or made no offer at all. This important issue should be remembered when consideration is being given to the issue of whether the legal costs of a court action that the insurer requires to bear at the end of a case is “proportionate”.

One size does not fit all

Why should workplace cases be treated the same as other injury cases and subject to exactly the same rules, procedures and the same considerations about matters
such as sanction to employ Counsel? Particularly because of the impact of Section 69 of the Enterprise Act, is there not a compelling case to treat workplace cases differently?

**Automatic Sanction v Discretion**

As a case progresses, parties may require the authority of the court to take certain steps. The authority may be granted in one of two ways: It may be pre-existing/automatic because the Rules of Court specifically sanction the step; or, the party may require, on a case by case basis, to seek the authority of the court. In the latter case, the issue will be entirely down to the discretion of the Judge/Sheriff who hears the application. The Bill, as currently drafted, relies heavily upon discretion for important issues relating to access to justice. Victims of accident with cases of a value of less than £5000 do not have the automatic right to have their case heard at the specialist personal injury court but apply to the discretion of the court to do so and parties may apply to the discretion of the court to employ Counsel, for example. Some matters are too important to rely upon the discretion of the court. Further, as quoted at paragraph 3.12 of the independent analysis to the Bill’s consultation response *“One judiciary respondent commented however: “an application to remit a case is a discretionary remedy and can take up considerable time and expense”. The judiciary respondent strongly advised against relying too heavily upon discretion.*

**Value is an arbitrary and unfair basis for distinguishing between workplace cases**

All workplace cases are going to be complex in law and difficult to succeed because of Section 69 of the Enterprise Act. The difference in the level of access to justice open to victims of workplace accidents, as the Bill is currently drafted, will be substantially different depending upon whether the value of the case is more or less than £5000. However, the value of a workplace case can be substantially influenced by something as simple as whether or not a victim received sick pay. It is not at all uncommon to have two victims suffer virtually identical injuries in almost exactly the same circumstances but find one case has a significantly higher value purely because of wage loss. Value should play no role in whether the victim of a workplace accident may have their case heard by the specialist personal injury court. That right should be automatic.

**PART 3**

**A more detailed discussion of our concerns**

**Will the specialist personal injury court cope with the level of business?**

The Financial Memorandum assumes that 70% of cases currently being run in the Court of Session will fall to be heard by the specialist personal court. In our submission, this is a significant underestimate. This figure of 70% was arrived at by looking at the “sum sued for” in cases before the Court of Session. The sum sued for is always higher than the settlement value of a case. If a party sues for a sum above the exclusive limit of the Court of Session but his case settles for less than that figure, he will face a stiff sanction in terms of cost recovery. The question is not,
therefore, what percentage of cases currently have a sum sued for exceeding £150,000 but rather how many cases currently before the Court of Session settle for less than £150,000. Based upon our statistics, this is likely to be a figure of at least 90%. We understand that other organisations such as APIL and the Faculty of Advocates have offered evidence which also supports a figure of around 90%.

There is no point in creating a specialist personal injury court of it is not able to cope in terms of resources, and staff, with the case numbers. Resourcing and staff should err on the side of caution; and should expect to be required to handle 90% of the personal injury cases that are currently before the Court of Session.

The approach of the Court of Session to personal injury cases has been widely hailed as a success. The success is down to the specialist Rules of Court (Chapter 43); but only in part. It is also down to the specialist “back room” court staff who ensure that the cases are handled efficiently and to the systems and IT which ensure that very little judicial time is spent dealing with personal injury cases.

Statistics show that over 98% of personal injury cases will settle without a judge ever having had any involvement with the case at all, including the need to hear motions or other procedural matters.

For the specialist personal injury court to be a success, it must aim to achieve the same 98% figure. To do so, it is essential that not only the Rules of Court currently used in the Court of Session are replicated but the specialist court is staffed to the same level as the Court of Session and has the same IT and systems available to court users. These systems include electronic Court Rolls and, most importantly, E-Motions which means that motions only require to take up court time if they are opposed or the court itself specifically asks to be addressed on the point.

E-Motions play a particularly important role in ensuring very little court/judicial time is taken up with personal injury cases. They do not currently exist in the Sheriff Court where a lot of time is still taken up with unnecessary court appearances even in personal injury cases. It is essential to the core aims of the Bill to avoid the court process being “slow, expensive and inefficient” that the E-Motion system is adopted in the specialist personal injury court.

Section 69 of the Enterprise Act

Before the introduction of Section 69 of the Enterprise Act, the law was based on a socio-economic policy acknowledged and accepted throughout Europe which recognised the significant imbalance in the relationship between an employer and an employee.

The policy was summed up clearly and succinctly in a recent judgment of Lord Drummond Young in the case of Cairns v Northern Lighthouse Board & Another [2013] CSOH 22. A copy of the relevant section of the judgment is attached as an appendix. It is a policy that recognised that when it comes to selecting work equipment, instituting systems of maintenance, providing training and all issues relating to health and safety, all of the power lies with the employer and the employee has very little ability to influence the situation. Accordingly, the law was
based upon a system of strict and presumed liability such that where a worker suffered an injury, the employer had to explain away what happened and if they could not do so, they required to pay compensation. Practically, this meant that the vast majority of victims of workplace accidents receive compensation and it ensured that the burden of proof was where it ought to lie given the difference in power between the employer and employee relationship. Section 69 of the Enterprise Act has completely reversed that situation. Now, to succeed in a claim, it is the employee who must prove their case at common law. They must, for example, prove what the employer knew and ought to have known, what systems the employer ought to have had in place and what the employer did wrong. This is a heavy burden indeed. The practical effect of Section 69 of the Enterprise Act is that many victims of workplace accidents who previously would have had a right to compensation will no longer be able to succeed in a claim; and every victim of workplace injury will find it substantially harder to prove their case. Real case examples are provided at the appendix to this submission.

That is not the only consequence of Section 69. The UK health and safety Regulations are mainly based upon, but not identical to, European Directives. There is therefore a European Law dimension to all of this. The UK Government may be in breach of European Law and may therefore face “Francovich damages” claims. Victims may seek to argue that because Section 69 is in breach of European Law, they cannot be denied the right to rely on the health and safety Regulations. Victims may seek to argue that if they cannot rely upon the Regulations, they may rely upon the European Directives as either “directly applying” to them or in some way setting the common law standards that an employer must meet to provide a safe place of work. In short, no-one currently can predict how the courts will deal with the fall out of Section 69 of the Enterprise Act. The years ahead will see many complex legal arguments being advanced and test cases being taken. Every workplace case has the potential for these arguments.

Summary Sheriffs and Simple Procedure is no place for workplace cases. All victims of workplace cases should have the right to have their case heard at the specialist personal injury court with the automatic sanction to employ Counsel.

Finally, on this point, a raft of health and safety Regulations were introduced to the UK in 1992, the Scottish Courts played a major and proud role in defining what those Regulations meant. The Scottish courts were therefore at the forefront of developing and shaping the law. The majority of the leading cases were argued by specialist Scottish Counsel before Scottish courts. Those cases include English v North Lanarkshire Council [1999] SCLR 310. The Scottish courts were able to play a major role in developing the law because we had expert judiciary assisted by high quality legal argument from specialist Counsel. That proud legacy will be lost in the years following Section 69 of the Enterprise Act unless all workplace cases may be heard by the specialist personal injury court with the benefit of automatic sanction to employ Counsel.

---

Proportionate automatic sanction to employ Counsel

We submit that there should be automatic sanction to employ Counsel in the following cases:

- All work related cases before the specialist personal injury court
- All fatal cases
- All other personal injury cases with a value exceeding £20,000

There is a drive to ensure that legal costs are “proportionate”. There is no doubt that the cost of Counsel can considerably increase the amount an insurer requires to pay at the end of a case. The way Counsel is paid at present is currently very different to solicitors. Solicitors are paid in relation to a table of fees. The table of fees sets and controls the maximum a solicitor can be paid. There is no such table of fees for Counsel. Their fees are open ended and without any real control mechanism. Introducing a table of fees for Counsel could ensure that Counsel’s fees are predictable and sufficiently proportionate.

Simple Procedure is wholly inappropriate for any personal injury case

As the Bill is currently drafted, personal injury cases with a value of less than £5000 will be heard by Summary Sheriffs. The Rules also envisage that Summary Sheriffs shall deal with matters under special Rules called “Simple Procedure”. These Rules will involve a heavy level of judicial input because they require judicial intervention to force parties towards settlement. Currently, no personal injury cases are heard at the Small Claims Court. In a written parliamentary question, the Cabinet Secretary for Justice, Kenny MacAskill, said “The Small Claims Court is not suited to help those involved in personal injury litigation. It is in recognition of this fact that such cases will be removed from the Small Claims Procedure”. Currently, all personal injury cases with a value of less than £5000 follow the Summary Cause procedure but with specialist personal injury Rules (Chapter 34), mirroring those Rules at the Court of Session.

It is not clear whether the Bill envisages a change to the current arrangement whereby personal injury cases with a value of less than £5000 will require to follow the Simple Procedure, which would appear to far more closely follow the Small Claims Procedure, or whether they will be heard by Summary Sheriffs using the current specialist personal injury Rules.

The Scottish Civil Courts Review acknowledged the significant success of the specialist personal injury Rules at the Court of Session. Under the heading “The success of Chapter 43 procedures for personal injury actions” it stated “There is general agreement that the Chapter 43 reforms (in the Court of Session) have been successful bringing settlement dates forward and reducing the amount of judicial time spent on personal injury actions in the Court of Session. Research commissioned by the Scottish Executive provides evidence to prove this”.

7
The success of Chapter 43 has resulted in specialist personal injury Rules being introduced to the Sheriff Court Ordinary Procedure (Chapter 36) and the Summary Cause court (Chapter 34). Those Rules have also been widely accepted as a success and the specialist Rules for Summary Cause personal injury cases was overhauled and reintroduced as recently as September 2013.

Anything other than having specialist personal injury Rules to be used in relation to cases heard by Summary Sheriffs would be a significant retrograde step and would also serve to suggest that the significant time and effort spent introducing new specialist personal injury Rules to the Sheriff Court was a waste of time.

Thompsons Solicitors & Solicitor Advocates
18 March 2014
APPENDIX 1

Examples of successful cases under the Health and Safety Regulations which would be very unlikely to succeed following Section 69 of the Enterprise Act.

*Michael Adamson*

Michael was a 29 year old electrician. He suffered a fatal electrocution in the course of his employment in August 2005. He was employed by Mitie Engineering Services. The accident occurred during the construction of a retail outlet in Dundee. He touched a cable labelled “not in use”. The cable was however live and when Michael came into contact with it he was fatally injured.

Michael’s family saw justice because they were able to rely on the Electricity at Work Regulations 1989. If they could not rely on the regulations, they would not have been compensated for the loss of a son and brother.

*The Electricity at Work Regulations 1989*

**Regulation 4 - Systems, work activities and protective equipment**

(3) Every work activity, including operation, use and maintenance of a system and work near a system, shall be carried out in such a manner as not to give rise, so far as is reasonably practicable, to danger.

This regulation is an example of presumed liability. The employer was bound to pay compensation unless the employer could establish a defence that they had done everything reasonably practicable. They were unable to prove that defence in this case.

*The position post Section 69 Enterprise Act*

To succeed the deceased’s family would require to prove that the employer, or ought to have known, that a live cable was labelled not in use or they failed to institute a system which prevented such an occurrence. There would very little prospects of establishing these points and the case would be likely to fail.

*Hill v Northside Limited [2012] CSOH 187*

Mr Hill suffered very serious injuries at work. He was a roofer and slater. He fell from scaffolding during the course of his employment, suffering injuries resulting in incomplete tetraplegia. The accident occurred as he was descending from the scaffolding using a portable ladder. The ladder was not fixed or in any other way secured. Mr Hill and the ladder fell to the ground, causing the serious injury.

Injuries were so severe that damages were agreed at £1,896,000. The court held that there was no liability at common law. There was however liability under the Work at Height Regulations 2005.
It is clear that if it was not for the Work at Height Regulations he, a man whose injuries were so serious and life altering that damages were agreed at £1.9million, would not have received any compensation at all.

The Working At Height Regulations 2005

Regulation 8 - Requirements for particular work equipment

Every employer shall ensure that, in the case of—

(e) a ladder, Schedule 6 is complied with.

SCHEDULE 6 REQUIREMENTS FOR LADDERS

5. A portable ladder shall be prevented from slipping during use by—

(a) securing the stiles at or near their upper or lower ends;

(b) an effective anti-slip or other effective stability device; or

(c) any other arrangement of equivalent effectiveness.

This is an example of strict liability. There is no defence. The employer must comply with Schedule 6 and Schedule 6 says that the employer must ensure that a ladder is prevented from slipping during use. An employer cannot avoid liability under the Regulations.

The position post Section 69 Enterprise Act

This case would be extremely difficult. The employee would require to lead evidence to establish that the design of the ladder was such that it was inappropriate for use in the particular area in relation to training and previous complaints about the ladder. There was no such evidence in the case.

George Hardie

George Hardie suffered fatal injuries as a result of being struck by a fork lift truck within the Halls of Broxburn factory where he was employed. The accident occurred in circumstances where it was very difficult to blame the driver of the fork lift but there was a very clear breach of Regulation 17 of the Workplace (Health, Safety and Welfare) Regulations 1992 which places an absolute obligation on employers to separate vehicular and pedestrian traffic.

It is clear that if Mr Hardie’s widow could not have relied upon the regulations, she would have been denied all compensation.

The Workplace (Health, Safety and Welfare) Regulations 1992

Regulation 17 - Organisation etc. of traffic routes
(1) Every workplace shall be organised in such a way that pedestrians and vehicles can circulate in a safe manner.

The position post Section 69 Enterprise Act

There were no grounds for criticising the forklift driver. To succeed, the deceased’s family would require to lead evidence to show that the employer knew, or ought to have known, that allowing pedestrians and forklifts to be in the same area would give rise to injury. This would only be possible through evidence about previous complaints and previous accidents or complex expert evidence about lines of vision, blind spots etc. There was no evidence in the case relating to previous complaints or accidents.

George Baillie

Mr Baillie died as a result of an accident at work. He was working on scaffolding. A scaffolding board snapped under his feet and he fell to his death. The victim’s son obtained compensation because of the terms of both the Work at Height Regulations 2005 and the Construction (Design and Management) Regulations 2007 which both proceed on a strict liability basis. If the son could only rely on common law, he would not have sued his father’s employer.

The Working at Height Regulations 2005

Regulation 8 - Requirements for particular work equipment

Every employer shall ensure that, in the case of—...

(b) a working platform —

(i) Part 1 of Schedule 3 is complied with; and

(ii) where scaffolding is provided, Part 2 of Schedule 3 is also complied with;

Schedule 3, Part 1

Stability of working platforms

4. A working platform shall—

(a) be suitable and of sufficient strength and rigidity for the purpose or purposes for which it is intended to be used or is being used

This is an example of strict liability. The definition section of the Regulations confirms that a “working platform” includes scaffolding. There is no defence to an employer. The employer must comply with Schedule 3 and Schedule 3 says that the platform must be of suitable and sufficient strength and rigidity. Further, case law establishes that the recurrence of the accident is enough evidence itself that the platform was not sufficiently strong.
The Construction (Design and Management) Regulations 2007

**Stability of structures**

28.(2) Any buttress, temporary support or temporary structure must be of such design and so installed and maintained as to withstand any foreseeable loads which may be imposed on it, and must only be used for the purposes for which it is so designed, installed and maintained.

This is also an example of strict liability. The definition section of the regulations confirms that “a structure” includes scaffolding. There is no defence. The scaffolding must be maintained as to withstand any foreseeable loads imposed upon it. The occurrence of the accident establishes that it could not withstand a foreseeable load of someone standing on it.

**The position post Section 69 Enterprise Act**

This case would fail. It would be necessary to prove that an employer knew, or ought to have known, that the scaffolding board was weak. Given that the defect was latent, this could not be done.

**John Smyth**

Mr Smyth suffered catastrophic injuries in the course of his employment. He was working on a barge. A coupling on a crane which was moving a steel beam overhead failed and beam fell, striking Mr Smyth on his head. He suffered a severe brain injury and has been rendered quadriplegic. His, and the lives of his whole family, have been shattered. Compensation exceeding £2 million was obtained because Mr Smyth could rely on the Provision and Use of Work Equipment Regulations and the Work at Height Regulations. He would not have received any compensation at all if the regulations could not be relied on.

**The Working at Height Regulations 2005**

**Regulation 10 - Falling objects**

(1) Every employer shall, where necessary to prevent injury to any person, take suitable and sufficient steps to prevent, so far as is reasonably practicable, the fall of any material or object.

(2) Where it is not reasonably practicable to comply with the requirements of paragraph (1), every employer shall take suitable and sufficient steps to prevent any person being struck by any falling material or object which is liable to cause personal injury.

This is an example of presumed liability. The case succeeds unless the employer can establish the reasonably practicability of defence. The employer required to show that they did everything that was reasonably practicable to avoid the accident. The employer could not no establish the defence.
The Provision and Use of Work Equipment Regulations 1998

Regulation 5 - Maintenance

(1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair

This is an example of strict liability. An employer must maintain work equipment. If work equipment fails then the occurrence of the failure proves the lack of maintenance and the case succeeds. There is no defence to a Regulation 5 case.

The position post Section 69 Enterprise Act

This case would fail. To succeed, the employee would require to prove that the employer knew, or ought to have known, that the coupling would fail. Given that it was a latent defect, this could not be established.

Steven Smillie

Mr Smillie was employed within the laundry operated by Lothian NHS and which provided laundry facilities to all of the hospitals across the Lothians and Borders in Scotland. His right arm was traumatically amputated as a result of being dragged into an unguarded mangle (a mechanical laundry aid consisting of two rollers to stretch and dry sheets). He obtained compensation because he could rely upon Regulation 11 of the Provision and Use of Work Equipment Regulations 1998 which places an absolute duty on employers to guard dangerous parts of machinery. If this regulation was not in force and could not have been relied upon, he would not have received any compensation.

The Provision and Use of Work Equipment Regulations 1998

Regulation 11 - Dangerous parts of machinery

(1) Every employer shall ensure that measures are taken in accordance with paragraph (2) which are effective—

(a) to prevent access to any dangerous part of machinery or to any rotating stock-bar

(2) The measures required by paragraph (1) shall consist of—

(a) the provision of fixed guards enclosing every dangerous part or rotating stock-bar where and to the extent that it is practicable to do so

This is an example of strict liability. There is no defence. The regulations state that the employer must ensure that dangerous parts of work equipment are guarded. There was no guard and the case therefore had to succeed.
The position post Section 69 Enterprise Act

This case would be extremely difficult. To succeed, the employer would require to prove, firstly, that the employer knew that the dangerous part of the machinery was not guarded and that the lack of guard was such that in terms of the work being carried out at the workplace, this could lead to an employee being injured. If the court took the view that the employer could not have foreseen that an employee would come into contact with the dangerous part of the machinery, whether there was a guard or not, the case would fail. If the court took the view that the employer did not know about the lack of guard, the case would fail. Proof of when, and how, the guard came to be removed would be essential. None of these facts were known to the employee.

Graham Meldrum

Graham Meldrum suffered fatal injuries in the course of his employment. He was working as an HGV delivery driver at the time of his death. He was delivering food to a supermarket. The tailgate of his HGV was defective. It swung open unexpectedly and crushed Graham Meldrum’s head causing a horrific and extremely painful death. We acted on behalf of his partner, Karen Thomson, and their six children. The family were compensated because they could rely on Regulation 5 of the Provision and Use of Work Equipment Regulations 1998. They would not have received any compensation under common law.

The Provision and Use of Work Equipment Regulations 1998

Regulation 5 - Maintenance

(1) Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair.

This is an example of strict liability.

The position post Section 69 Enterprise Act

This case would fail. To succeed, it would necessary to prove that the employer knew that the tailgate was defective. The defect was latent and there was no evidence at all prior to the accident that there was anything wrong with it. There was no evidence the deceased’s family could have led to prove the necessary facts.

Berry

Mr Berry was only in his 40s when he suffered serious brain damage, a heart attack and organ damage from a devastating electric shock while working on the site a music festival. He was operating a crane installing portable buildings. Changes were made to the design of the site and one location was directly under overhead, live power cables, from which he received the shock. The cables did not appear on any plan and little had been done by the festival organisers to ensure the site was safe.
Mr Berry is now immobile, unable to speak or communicate and in need of constant care. His family was only able to obtain an interim payment from his employer in order to fund specialised care at home because The Lifting Operations and Lifting Equipment Regulations impose strict liability, meaning that their claim for compensation was bound to win. Without this, they would not have been able to move him out of the rehabilitation unit he had been in for over a year.

**The Lifting Operations and Lifting Equipment Regulations 1998**

**Regulation 8 - Organisation of lifting operations**

(1) *Every employer shall ensure that every lifting operation involving lifting equipment is—*

(a) properly planned by a competent person;
(b) appropriately supervised; and
(c) carried out in a safe manner

This is an example of strict liability. The employer must ensure that the operation is planned, supervised and carried out in a safe manner. The operation was not planned or supervised. Separately, the occurrence of the accident established that is was not carried out in a safe manner.

**The position post Section 69 Enterprise Act**

This case would be difficult. It would be necessary to prove that the employers knew of the overhead cables. There was no evidence to that effect.

**Simon Litherland,**

Council blacksmith diagnosed with asthma after being exposed to fumes from metalworking fluids.

The case succeeded on the basis of the employer’s failure to prevent or adequately control the exposure of employees to substances hazardous to health under The Control of Substances Hazardous to Health Regulations 1988 – 2002. (COSSH Regulations)

**The Control of Substances Hazardous to Health Regulations 2002**

**Regulation 7 - Prevention or control of exposure to substances hazardous to health**

(1) *Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled*

This is an example of strict liability. The employer must ensure exposure is prevented or adequately controlled. The occurrence of the injury establishes that
exposure was not controlled. To succeed the employee need only prove that the substance in question is hazardous to health.

The position post Section 69 Enterprise Act

This case would have been very difficult and would probably have failed. In the absence of strict liability under the regulations the victim would have to prove not only exposure but also that the employers should have foreseen that this particular exposure to fumes was at such a level and in such circumstances that it was negligent.

Mary Sharp

A school catering assistant who sustained serious burns to her ankles while using an industrial fryer. The practice in the workplace was to recycle oil by heating it slightly to make it easier to empty it into a plastic container. On the day of the accident, the oil was hotter than expected and it melted through the container and caused serious burning injuries to her ankles.

The Judge found there had been a breach of regulation 4(1) of the Provision and Use of Work Equipment Regulations because the plastic container was clearly unsuitable for the purpose it was used.

The Provision and Use of Work Equipment Regulations 1998

Regulation 4 - Suitability of work equipment

(1) Every employer shall ensure that work equipment is so constructed or adapted as to be suitable for the purpose for which it is used or provided.

This is an example of strict liability. The container was not suitable. The employer had no defence.

The position post Section 69 Enterprise Act

This case would be unlikely to succeed. It is important to note that the the container was not ‘defective’. Instead, in terms of the Regulations it was ‘unsuitable’ which is a different matter. To succeed the victim would require to prove that the employer knew the container was unsafe. This would require evidence about previous complaints, previous accidents or complex expert evidence. The container had been used for years without any previous accidents. The victim would be very unlikely to produce the necessary evidence to succeed.

Susan Harrison

A refuse collector suffered a back and knee injury collecting waste. She tried to swing a bag from the ground to above shoulder height to place it into the refuse lorry. The bag unexpectedly contained a broken concrete slab and soil. It was extremely
heavy and the victim sustained an injury which caused her to be absent from work for many months and left her with permanent pain and weakness in her back.

The Judge found that there was a breach of the duty to reduce the risk of injury from a manual handling operation to the lowest level reasonably practicable under The Manual Handling Regulations.


**Regulation 4 - Duties of employers**

(1) *Each employer shall—*

(a) *so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured;*

This an example of presumed liability. The employer must pay compensation unless they can establish the defence that they did everything that they reasonably practicably could have done to avoid the accident. They could not do so in this case.

**The position post Section 69 Enterprise Act**

The victim would require to prove that the employer knew, or ought to have known, that the pursuer would be injured. The unexpected weight was however a hidden ‘trap’. The case would almost certainly not have been successful if there was no breach of statutory duty
"There are economic reasons for taking such an approach, and indeed for making the protection afforded by such legislation applicable to all employees whether or not they are employees of the person in breach of the legislation. The underlying economic theory is that the cost of workplace accidents is part of the cost of production of a good or service, and the most efficient way of absorbing that cost is by passing it to the ultimate consumer as part of the price of the product. In this way the cost can be insured against efficiently by the employer, with the premiums being reflected in the price. This is much more efficient than expecting employees to insure against the possible cost of injury through an accident at work; such a course would require a multiplicity of policies, and would not cater well for employees on short term contracts, or those who simply chose to spend their income on other things. Moreover, strict liability has a further advantage over fault based liability in that it acts as an incentive to reduce the incidence of hazardous activities; the employer knows that if the risk of injury eventuates he will be liable, and thus is encouraged to take steps to reduce the frequency with which the risk is incurred. Strict liability also encouraged employers to do their utmost to ensure the least possible risk to the employee’s health and safety. These economic reasons can perhaps be supplemented by the moral argument that those who consume goods or services should pay a proper price for it, including the cost of compensating those injured in the production of the good or service in question. For all of these reasons, strict liability has become the norm in the European Union inspired legislation governing health and safety at work."
Legal Studies Research Findings No.18 (1998)

In the Shadow of the Small Claims Court
The Impact of Small Claims Procedure on Personal Injury Litigants and Litigation
Elaine Samuel

ISBN 0-7480-7119-9 | Publisher The Scottish Office

This research examined the impact of small claims procedure on personal injury claimants and personal injury litigation at different stages in the life cycle of low value personal injury claims. The study was commissioned in 1994 and involved cases dealt with between June 1993 and October 1994 in 5 sheriff courts. The study involved 90 interviews with personal injury claimants and litigants, defenders, lay and legal advisers, and sheriffs. Almost half of the interviewees were party to 20 specific personal injury actions raised under small claims procedure and many of the cases were observed in court at different hearings. The impact of small claims procedure was examined at 6 stages of the claim and specific problems relating to personal injury claims were identified. Small claims procedure was assessed in the light of these findings and potential avenues for change in the handling of low value personal injury actions were suggested. The research was conducted by Elaine Samuel at the Centre for Social Welfare Research, Department of Social Policy, University of Edinburgh.

Main Findings

Small claims procedure made an impact on low value personal injury claims from the time they were initiated up until the time they were heard in court.

- The impact of small claims procedure extended to claims beyond its own remit of £750.
- Personal injury claimants found it difficult to assess the legal basis of their claim without legal advice.
- Small claims procedure was responsible for limiting the availability of legal advice and assistance to personal injury claimants.
- Advice agencies were unable to provide personal injury claimants with legal advice and assistance.
- Both assisted and unassisted personal injury claimants found it difficult to negotiate a settlement when the value of their claim fell within the remit of small claims procedure.
- Unassisted personal injury litigants were often unaware of the legal basis of their action and found preliminary hearings both intimidating and unhelpful.
- Unassisted personal injury litigants found it difficult to pursue their action at full (proof) hearings, and were rarely successful when they did so.
- Unassisted claimants were particularly vulnerable in personal injury litigation because they were more likely to come face to face with litigation and reparation specialists in court.
- Sheriffs were reluctant to play an interventionist role where one party was legally represented, as was usually the case in personal injury litigation.

Though small claims procedure reduced access to advice, negotiation and other pre-litigation assistance, it did provide some claimants with the opportunity to litigate by reducing financial risk.

Background to the study
Small claims procedure was introduced into the Sheriff Court in 1988 to replace standard summary cause procedure for actions under £750. In keeping with the aims of small claims procedure elsewhere, it was to be cheap enough so as to present litigants with minimal financial risk and simple enough to use without legal representation. Expenses are therefore limited to a ceiling of £75 and legal aid is not available for representation under small claims procedure in Scotland. 1

Prior to the introduction of small claims procedure, Scottish Courts Administration made a commitment to monitor its implementation on the understanding that some changes may be needed in the light of litigant and court experience. The inclusion of personal injury actions within the remit of small claims procedure had been recognised as potentially problematic from the start. 2 It was decided to include personal injury actions in small claims procedure, however, while keeping them under surveillance in the course of monitoring the overall impact of small claims procedure implementation.

The impact of the new legislation was the focus of a detailed research study 3 in which concern was raised about the inclusion of personal injury actions in small claims procedure. Unrepresented individuals were reported to experience difficulties in establishing their case in court, while the £75 ceiling on expenses was said to be too low to reimburse victims for the cost of expert witnesses, medical reports and other requirements of successful litigation. However, the study was unable to engage in more systematic investigation of personal injury litigation since too few actions were raised under small claims procedure in the study courts during the research period. In particular, the views of personal injury litigants had not been canvassed.

The current research was commissioned to address the appropriateness and impact of small claims procedure specifically upon personal injury litigation.

The aims of the research were:

- to identify problems (if any) relating specifically to the handling of personal injury actions under small claims procedure,
- to identify the impact of small claims procedure on recourse to personal injury litigation,
- to suggest what changes, if any, are required to resolve any identifiable problems.

Information was collected from different sources to examine the impact of small claims procedure on personal injury claims at different stages in case proceedings.

Findings

Making Personal Injury Claims

One of the basic requirements of small claims procedure is that it is accessible to complainers without recourse to professional legal advice. The decision to take legal action, however, requires making an assessment as to the legal basis of the claim. The research found that most victims were not aware of the basic principles of reparation law, such as duty of care, fault/negligence, harm and causation, to make this decision unaided. The decision to take legal action also involves making an assessment of what courses of action are open. Few of those who had raised personal injury actions under small claims procedure were aware of its existence prior to seeking legal advice, let alone the implications of small claims procedure for risk and expenses.

Seeking Advice

Personal injury claimants with low value injuries had great difficulty in accessing legal advice. Lay advice centres usually referred personal injury victims to legal advisers. The quality of legal advice received depended on claimants funding or referral. Solicitors in private practice were reluctant to take on low value personal injury claimants because defenders were restricting the expenses component of out of court settlements to the small claims ceiling of £75. This was having an impact on claims well above the summary cause ceiling of £1500. Legally aided clients were usually offered no more than initial advice under Advice and Assistance. clients funded through legal expenses insurance or trade union cover fared better, however, since solicitors were able to absorb the cost of taking

on low value personal injury cases as long as the sources of their referral continued to supply
them with more highly valued cases.

**Negotiating Claims**

Like other cases, most personal injury claims are expected to be resolved out of court and through negotiation. The research found that unassisted claimants were at a distinct disadvantage in negotiating personal injury claims since they usually faced large bureaucracies and other professional legal representatives, such as insurance companies and local government. It also found that small claims procedure put legally assisted claimants at a negotiating disadvantage in low value claims, including those with a claim over £750. Negotiating power was reduced by the expenses ceiling on small claims procedure amongst privately funded clients, and by the ineligibility for legally aided representation under small claims procedure amongst legally aided clients. Claimants referred by legal expenses insurance companies and trade unions were in a stronger negotiation position since, as 'repeat players', their lawyers took a long term view with respect to each case. However, because resources are invested by both parties in personal injury cases at different points in time, small claims procedure gave defenders the upper hand even when pursuers, like defenders, were 'repeat players'.

**Raising a Personal Injury Action**

The decision to raise an action after failure to negotiate a settlement depended upon the kind of assistance being given to claimants, and the funding of that assistance. Where they were unassisted, some claimants were found to raise actions unaware of the legal basis of their claim. Where they were assisted, the decision to proceed was based on complex considerations of which clients were sometimes unaware. The research found that small claims procedure gave some risk averse claimants the opportunity to litigate. Some did so by lowering the value of their claim so as to fall within the remit of small claims procedure.

**The Preliminary Hearing**

Difficulties faced by unassisted litigants in personal injury cases were often exacerbated at the preliminary hearing. Party litigants did not know how to deal with legal procedures, they felt intimidated by the court and they usually faced specialist reparation lawyers acting on behalf of insurance companies and local government. Their needs were rarely met by procedural provisions to identify and clarify the matters in dispute. The practice by defenders of making 'standard defences' at the bar and the organisation and volume of court business were not conducive to the clarification of disputed issues. This was especially problematic for unassisted litigants where issues of liability and quantum were raised. The research found many unassisted litigants who grudgingly dropped their case or accepted what they believed to be a derisory offer as a result of their court experience.

**The Full Hearing**

Unassisted litigants were successful only under rare circumstances. Small claims procedure gave them no exemption from their ignorance of the law of delict, no assistance with their preparations for a proof hearing and no relief from the requirement to move quickly between cross-examining and being cross-examined. These difficulties were compounded by the fact that they usually faced experienced reparation lawyers. Sheriffs were more reluctant to take an interventionist role where one party was legally represented, as it usually was in personal injury actions. Lawyers acting on behalf of both pursuers and defenders reported serious difficulties in preparing for and conducting personal injury proofs under small claims procedure.

**Discussion**

The appropriateness of including personal injury actions within the remit of small claims procedure hinges upon the capacity of victims to pursue low value personal injury claims without legal representation, and to do so with some degree of success. This, in turn, depends upon the substantive law involved, the litigation skills required and the role played by the court in
proceedings. Small personal injury claims are likely to be as complex as higher value actions, partly because the value of a personal injury claim is 'at a distance' from the negligent acts or damaging consequences on which the claim is made. There are crucial nuances to personal injury law and litigation skills are required, particularly when claimants face reparations specialists. Where court proceedings are conducted according to the normative expectations of an adversarial system, the justice to which unassisted personal injury litigants have access under small claims procedure may be perceived as hollow. Because these features are normally present, personal injury actions do not easily 'fit' into small claims procedure.

The appropriateness of including all low value personal injury claims within small claims procedure also presumes that all personal injury victims are risk averse. This does not appear to be the case, particularly for members of legal insurance schemes and trade unions. Indeed, small claims procedure was found to impede out of court settlement amongst these groups.

**Conclusion**

Personal injury actions may not be the most difficult class of actions which reach the small claims court.

The impact of small claims procedure on personal injury claims is significant, however, because it is felt at all stages in the life history of a personal injury claim. While small claims procedure may have extended access to justice by removing the financial risks of litigation, access to justice has been reduced by restricting access to advice, negotiation and prelitigation assistance. This may be a more crucial component of 'access to justice' than the opportunity to litigate. It is suggested that personal injury claimants be offered an 'option of forum'. This would conform more closely to the consumer interests by which small claims procedure was originally driven, extend flexibility into the system, and promote access to justice at all stages in the life of a personal injury claim.

**About the study**

This study was commissioned in 1994 by The Scottish Office Legal Studies Research Group on behalf of Scottish Courts Administration to examine the impact on and appropriateness of small claims procedure for personal injury actions. The research was undertaken by Elaine Samuel and follows from a programme of research to monitor the implementation of small claims procedure in Scotland soon after the legislation came into force. Together with studies on personal injury litigation in court business and the funding of personal injury litigation, this study is also part of a research programme commissioned by The Scottish Office Legal Studies Research Group to examine personal injury litigation in Scotland.

The study was conducted between January 1994 and March 1995. 90 interviews were conducted with claimants and litigants, lay and legal advisers, defenders, sheriffs and other interested parties such as representatives of consumer groups, sheriff clerks and academics. 20 cases were chosen for intensive investigation and over 40 interviews were conducted around these 20 cases to provide the perspective of several parties to the action. 29 court proceedings of personal injury actions under small claims procedure were observed in five sheriff courts, including seven at full hearing.

---