

Justice Committee

Courts Reform (Scotland) Bill

Written submission from Compass Chambers

1. The proposed increase in the exclusive competence (privative jurisdiction) of the sheriff court from £5,000 to £150,000

Although we have no difficulty with the general proposition that the exclusive competence should be increased, there are a number of fundamental objections with the current proposals:

1) *The level.*

The figure of £150,000 is far too high, particularly in the context of personal injury claims. To some well-paid people £150,000 might not be a particularly high sum of money, but to most working people in Scotland it is a fortune. To put this in perspective, research released by Aviva Insurance on 30 May 2012 has shown that the average life savings for most families is £1,128, with 24% having no savings at all (<http://www.aviva.co.uk/media-centre/story/16936/family-incomes-rise-and-savings-grow-but-so-do-deb/>).

According to the Office for National Statistics publication “Measuring National Well-being – Personal Finance 2012”, the median household income is £419 a week (£21,788 a year) or £359 a week after housing costs (£18,688 a year).

It is important to remember that litigants in Scotland have always had the right to bring their claim in the Court of Session, which includes automatic sanction for the employment of counsel (see further below). Raising the exclusive jurisdiction by a factor of 30 is going to remove that historic right in all but a handful of cases.

In practical terms, an exclusive jurisdiction of £150,000 means that a parent whose child is killed by the fault of another will not have access to the Court of Session, nor to advice from counsel (see further below). Unfortunately, it will also discriminate against the low paid, because it is less likely that their loss of earnings will bring the value of the claim over £150,000. Since women are more likely to work part-time or in less well paid jobs, this will have a discriminatory effect.

This then raises the question as to the methodology used in fixing on £150,000 as the limit for the exclusive jurisdiction. This is explained in Chapter 4 of the SCCR Report and is based on very limited data provided by one set of solicitors with strong connections to the insurance industry. Indeed, footnote 19 specifically states that “The data provided should be treated with care... there is no guarantee that the cases handled by this respondent’s firm are representative of the general population of personal injury actions proceeding in the Court of Session or the sheriff court”. Indeed, one might question why apparently low value claims are not being resolved quickly and cheaply by the firm in question – is it because they are less efficient than other firms in compromising claims, or is it because there is some legal or factual difficulty in the claims that make them difficult to settle?

Even if the data was more robust, there is a more fundamental difficulty with the methodology that has been applied to it. This is because there has been a reliance on the sum sued for – which is a purely notional sum that often has no relation to the true value of the claim – as opposed to the settlement value, which is (or should be) the true value of the claim.

When the settlement values are analysed, it becomes apparent that the costs become disproportionate for claims worth less than about £20,000. That would indicate that the exclusive jurisdiction should be set at or around £20,000. This is still a 400% increase on the existing level and would lead to a very substantial number of personal injury cases being removed from the Court of Session. Even this level may be on the high side, given that the only reason why a £20,000 case would require significant resources to resolve would be because there was some legal or factual difficulty in the case.

2) *Equality of arms.*

The danger of a high privative jurisdiction is that it effectively excludes most members of the public from access to an independent referral bar. This will not be a problem for insurance companies or rich individuals, but for most people access to an independent referral bar is only possible if the reasonable cost of that is recoverable from the wrongdoer. The problem will be particularly acute for those living in remote or rural areas, where the local solicitor is unlikely to have any particular expertise in a specialist area such as personal injuries work. Traditionally, such a person would have access to the expertise of specialist personal injury bar at no cost to the individual.

Extra weight has been added to this consideration by the abolition in the Enterprise Act 2013 of the protection from health and safety legislation that has existed since Victorian times. One of the unfortunate consequences of that Act is that employees injured at work can no longer rely on the extensive framework of statutory protection dating back to the Factories Act. These proposals will mean that in most cases the employee will be refused the assistance of counsel in pursuing what is now a more difficult claim.

3) *How the privative jurisdiction is calculated.*

At present, the privative jurisdiction is calculated by reference to the apparent value of the claim at the time litigation is commenced (*Coyle v William Fairey Installations Ltd* 1991 SC 16). However, in Chapter 4 of the SCCR Report, at paragraph 128, it is recommended that where the sum awarded is less than the privative jurisdiction (exclusive competence) then the general rule should be that expenses should be awarded on the sheriff court scale. This would mean, for example, that in a case worth £200,000 where there was 50% contributory negligence, expenses would be awarded on the sheriff court scale. An even starker example is a similar case where difficulties on liability mean that the pursuer accepts a discounted offer of £100,000 to allow for the significant risks of losing the case altogether. That pursuer would only be entitled to expenses at the sheriff court scale, whereas if liability was not in dispute (and so the case was simpler), he or she would be entitled to Court of Session expenses.

2. The proposed creation of “summary sheriffs”

We are in favour of this proposal.

3. The proposed Personal Injury Court

We are in favour of this proposal subject to the following important considerations:

1) The sheriff court in its current form is simply not equipped to deal with the influx of civil claims generally and personal injury claims in particular that will follow a significant increase in the privative jurisdiction. At present litigants have a choice of whether to raise their claim in the Court of Session or the Sheriff Court. The fact that they almost invariably choose the Court of Session over their local Sheriff Court demonstrates the inadequacies of the current set-up. Hearings on evidence are usually set down for only one day, which is never enough to conclude the case. There are then continuations of the hearings that can last for months or even years. This is inconvenient for parties, witnesses, lawyers and the sheriff. It is therefore essential that a specialist Personal Injury Court is set up before there is any increase in the privative jurisdiction.

2) In order to succeed, it is essential that the Personal Injury Court is able to rely on the continuing assistance of an independent specialist personal injury bar. At present, there is automatic sanction for counsel in the Court of Session and that should remain in the Personal Injury Court. It is perhaps worth explaining at this stage the role that counsel currently play in personal injuries cases, since it is rather unusual. When acting for pursuers, counsel almost invariably act on a “no win, no fee” basis with no uplift or “success fee”. They are simply paid at the end of the case out of the money recovered from the wrongdoer. It is generally accepted that recoverable fees are only about 2/3 of the costs actually incurred. The end result is that counsel accept instructions on the basis that they will only be paid if they win the case; that if they are paid it may not be for many months and often years; and when they are paid it is unlikely that they will be paid in full. We are not aware of any other trade or profession that works on such terms.

It is now fairly unusual for personal injury claims to be funded by legal aid and even where they are, in the vast majority of cases the sums paid over by the Scottish Legal Aid Board are recovered in full from the defenders’ insurers.

As a result, counsel offer exceptional value for money that has meant the costs of litigating personal injuries cases in Scotland has been significantly lower than in England (although we are not aware of this having translated into lower insurance premiums for Scots).

Counsel also offer an important role in weeding out weak cases, since they have an obvious self-interest in avoiding litigation for which they are unlikely to get paid. This may well go some way to explaining why there has not been the problem with fabricated claims – particularly for whiplash injuries – that have been so controversial in England recently.

It is widely acknowledged that the system of personal injuries litigation in Scotland is effective and efficient. This is recognised both in the *Report of the Scottish Civil Review* and also in the report *Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session (Chapter 43)*. As we understand it, the driver for change is not the service that is provided to those using the courts, but rather the administrative costs of having those actions within the Court of Session. Whether this does in fact result in any financial saving insofar as administrative costs are concerned is a separate matter. Suffice to say it explains the decision to move the business to a cheaper court, but does not explain the exclusion of counsel from the process. Indeed, there is a certain irony in setting up a specialist court and then excluding specialist practitioners from appearing in it.

The exclusion of counsel cannot be justified on cost grounds because personal injury litigation is almost entirely funded by the insurance industry with minimal cost to the public purse. Very few cases are backed by legal aid and even where they are, the costs are usually recovered. If a simple, low value claim is not resolved, that is because one or other party is acting unreasonably or without appropriate advice. This is precisely why it is important that both sides are properly represented and advised. Top quality legal advice is, in the longer term, extremely cost efficient.

When analysing the reasons for the success of procedure in the Court of Session (“Chapter 43 procedure”), we cannot improve on what was said at paragraph 11.82 of the report *Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session (Chapter 43)* referred to above, our emphasis added:

“11.82 The success of Chapter 43 in general, and of the Pre-trial Meeting in particular, was found to depend on the quality of relationships between the main practitioners. Because judicial case management played no central role in Chapter 43, trust assumes a decisive role. As we have seen, case flow management requires that players play the same game and abide by the same rules, usually without the guidance or supervision of a referee. If they do not, then both parties will invariably arrive at the door of the court, having conformed to the requirements of the procedure but having successfully negotiated their way around those provisions that might expedite settlement. The number of main players in personal injury practice in the Court of Session is small. If members of this community abide by the same rules but are not playing the same game, their moves are at least predictable. **Counsel may also play a role in moderating the adversarial position that agents take in personal injury actions and drawing both sides into a single community of practice, if not of interest. Whether the same conditions could obtain in the Sheriff Court is open to question.**”

It is perhaps significant that although Chapter 43 procedure has since been applied in the Sheriff Courts, this has not changed the current allocation of business between the Court of Session and the Sheriff Courts, suggesting that the author was correct in her prediction.

4. Judicial specialisation

We are in favour of this proposal

5. The proposed creation of a Sheriff Appeal Court

We are in favour of this proposal

6. Proposed changes to Judicial Review

We do not agree with the introduction of a three month time limit for judicial review claims. We appreciate that such a limit applies in England. However, we consider that there is a real risk that such a proposal will result in a reduction in access to justice. Although there is provision for the court to extend the time limit where it considers it 'equitable' to do so, there is considerable uncertainty about the circumstances where that would be appropriate. We would favour a slightly longer time limit of six months, with an equitable jurisdiction to extend that. We consider that would strike the correct balance between the rights of a person to challenge a decision affecting that person, and the need for certainty and finality in administrative decision-making.

We consider that the proposal to obtain leave is a sensible and proportionate measure. We do, however, consider that it is important to allow the petitioner an oral hearing before any decision to refuse leave is taken. Particularly if a three month time limit is introduced, the time for investigation, collation of information, consideration of the law and the drafting of a petition would be very short. The opportunity to expand on the petition before a decision on leave is made would be reasonable and not unduly onerous on court time. The right to an oral hearing before a different Lord Ordinary if leave is refused is not satisfactory. It is highly likely that it would be more difficult to persuade the second Lord Ordinary that his fellow judge had made a mistake.

7. The proposed "simple procedure" for cases worth £5,000 or less

We do not have sufficient experience of such cases to be able to comment on this proposal.

8. The proposed new procedures in relation to criminal and civil appeals

We are in favour of these proposals.

9. The proposed merger of the Tribunal Service and Scottish Court Service

We have no comment to make on this proposal.

Compass Chambers
11 March 2014