Taylor Review

Review of Expenses and Funding in Civil Litigation in Scotland

Consultation Paper

November 2011

FOREWORD

I have pleasure in introducing the consultation paper for the Review of Expenses and Funding of Civil Litigation in Scotland.

I hope that you will respond to the questions which we pose. Please do not feel that you must respond to every question. There may be particular issues which interest you and you should feel free to limit your answers to such areas. Conversely, if none of the questions permit you to say what you feel is important, please tell us what concerns you and how those concerns might be addressed.

Many people have assisted me in the work to date and I am most grateful to them. Some have urged that there is little wrong with the expenses and funding regimes as they presently exist. Others have said that a more radical approach needs to be taken. When speaking to lawyers since I started this project, there has been one theme which has come to the fore more than others. That is the impossibility of being able to advise clients how much the litigation is going to cost them should they proceed and be unsuccessful. In response to a client's very reasonable question, it has been suggested that it is no longer acceptable for a solicitor to answer with the traditional words, "How long is a piece of string?" Thus many of the questions in this consultation paper have been formulated to test opinion on different ways in which greater predictability of judicial expenses might be attained. This is one aspect of the broader issue of affordability and how different means of funding may secure access to justice.

The Scottish Civil Courts Review recommended that the small claims and summary cause procedure should be replaced with a new simplified procedure. I understand that the Scottish Government has accepted that recommendation. The Review also recommended that there should continue to be two separate tables of expenses; one for actions below £3,000 and another for actions between £3,000 and £5,000. Until the new procedure is known, it is very difficult - if not impossible - to design a regime dealing with judicial expenses. That is why there is little reference to cases with a value under £5,000, which is the present summary cause limit.

I have also tried not to re-open areas for debate which were explored during the progress of the Scottish Civil Courts Review. This exercise is not intended to provide those who did not favour the recommendations of the Scottish Civil Courts Review with an opportunity to revisit their objections.

The normal period for consultation is three months. However, given that Christmas and New Year fall within the normal period, I ask that responses, in electronic or traditional form, are received by us no later than Friday 16th March 2012.

Sheriff Principal James Taylor
November 2011

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GLOSSARY

Aarhus Convention	The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus, Denmark, on 25th June 1998.
ABI	Association of British Insurers.
Acts of Sederunt	Type of delegated legislation passed by the Court of Session to regulate civil procedure in the Court of Session, the Sheriff Court and administrative tribunals, and published as statutory instruments.
After the event ("ATE") insurance	Insurance by one party against the risk of having to pay an opponent's judicial expenses, where the insurance policy is taken out after the event giving rise to court proceedings.
APIL	The Association of Personal Injury Lawyers.
Before the event ("BTE") insurance	Insurance that was in place before the occurrence of the event giving rise to the claim. The insurance covers the legal fees of the insured, and may also cover an opponent's expenses (in the event of the insured being ordered to pay their opponent's expenses).
Compensation Recovery Unit	A part of the Department of Work and Pensions that recovers (i) amounts of social security benefits paid as a result of an accident, injury or disease, where a compensation payment has been made and (ii) costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims.
Compensure	An after the event ("ATE") insurance scheme set up by the Law Society of Scotland in 1997, but no longer functioning.
Conditional fee agreement ("CFA")	An agreement between lawyers and their clients in England and Wales, by which lawyers are paid a success fee in the event of the client's claim succeeding. Success fees are calculated as a percentage of lawyers' legal fees and not on the amount recovered by the client.
Contingency fee	A lawyer's fee calculated as a percentage of the amount recovered by the client, with no fee payable if the client loses.

Contingency legal aid fund ("CLAF")	A fund which grants funding to chosen applicants, where the receipt of funding is conditional on the applicant agreeing to pay a percentage of any amount awarded (e.g. as damages) back into the fund.
Costs capping	A mechanism whereby judges impose limits on the amount of future costs that a successful party can recover from the losing party.
Damages based agreement ("DBA")	An agreement under which a lawyer's fee is calculated as a percentage of their client's damages if the case is won, but no fee is payable if it is lost. Commonly referred to as a contingency fee agreement.
Legal expenses insurance ("LEI")	Insurance that covers a person against his or her own legal fees, including disbursements, and/or the expenses of an opponent in litigation. Legal expenses insurance includes both BTE and ATE insurance.
LPAC	The Lord President's Advisory Committee on Solicitors' Fees.
McKenzie friend	A lay person who may provide reasonable assistance to a party litigant in court proceedings.
Multi-party action	An action where a number of potential litigants have closely related or similar claims arising from the same event.
"No win, no fee"	An agreement between a client and a lawyer that the lawyer will only be entitled to payment should the client be successful. In Scotland such agreements are usually in the form of speculative fee agreements.
One way costs shifting	A regime under which the opponent pays the claimant's expenses if the claim is successful, but the claimant does not pay the opponent's expenses if the claim is unsuccessful.
Party litigant	A litigant in civil proceedings who conducts his or her own case.
Protective Expenses Order ("PEO")	A court order which limits a litigant's liability to pay the expenses of a successful opponent to a particular sum.
Qualified one way costs shifting	A one way expenses shifting regime that may become qualified in certain circumstances, such as where the claimant has acted unreasonably, or where the resources available to the parties are grossly unequal.

Review of Civil Litigation Costs	A fundamental review of the rules and principles governing the costs of civil litigation in England and Wales, conducted by Lord Justice Jackson in 2009. The *Review of Civil Litigation Costs: Final Report* was published in December 2009.
Satellite litigation	Litigation concerning the costs or expenses of the action and not the substance of the dispute itself.
Scottish Civil Courts Review	Review of Scotland's civil courts, chaired by the Rt. Hon. Lord Gill and concluding in the publication of *The Report of the Scottish Civil Courts Review, Volumes 1* and *2* in September 2009.
SLAB	The Scottish Legal Aid Board.
Small claims procedure	Civil procedure in Scotland for payment, delivery, repossession and implement of obligations, where the value of the claim does not exceed £3,000.
Speculative fee agreements	An agreement between lawyers and their clients in Scotland by which clients are only required to pay legal fees if the litigation is successful. Should they be unsuccessful, clients may still be liable for the expenses of their opponents.
Success fees	Fees that may be paid by successful parties to their lawyers following a speculative fee agreement (Scotland) or as part of a conditional fee agreement (England and Wales). Success fees are calculated as a percentage of legal fees, and not on the amount recovered by the client.
Summary cause procedure	Civil procedure in Scotland for monetary claims above £3,000 but not exceeding £5,000.
Summary assessment of costs	The assessment of costs by a judge in England and Wales, made at the conclusion of the hearing.
Tender	An explicit, unqualified and unconditional offer by the defender to pay the pursuer in settlement of an action a specified amount, together with the judicial expenses to date.
Tables of Fees	Tables that regulate the amount of solicitors' fees for litigation which may be recovered as judicial expenses.
Taxation	The scrutiny of a successful party's expenses in litigation by an auditor of court.

Third party funding	The funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the sum recovered; and (ii) the funder is not entitled to payment should the claim fail.

CHAPTER 1: INTRODUCTION

1.1 This Review has been established by the Scottish Government to conduct an independent inquiry into the expenses regime of civil litigation in Scotland and its funding in the context of the recommendations of the Scottish Civil Courts Review.[1] The recommendations of the Scottish Civil Courts Review relevant to the cost and funding of civil litigation in Scotland have been collated and are to be found in Annex B. This Review has also been asked to take into consideration the response of the Scottish Government to the report and recommendations of the Scottish Civil Courts Review.[2] The Executive Summary of the Scottish Government's response is to be found in Annex C.

1.2 The specific terms of reference of the Review are:

- To consult widely, gather evidence, compare our expenses regime with those of other jurisdictions and have regard to research and previous enquiries into costs and funding, including the Civil Litigation Costs Review of Lord Justice Jackson[3];
- To consider issues in relation to the affordability of litigation; the recoverability and assessment of expenses; and different models of funding litigation (including contingency, speculative and conditional fees, before and after the event insurance, referral fees and claims management);
- To consider the extent to which alternatives to public funding may secure appropriate access to justice, and pay particular attention to the potential impact of any recommendations on publicly funded legal assistance;
- To have regard to the principles of civil justice outlined in Chapter 1, paragraph 5 of the Civil Courts Review;
- To consider other factors and reasons why parties may not litigate in Scotland;
- To report with recommendations to Scottish Ministers, together with supporting evidence within 18 months of the work commencing.

1.3 The principles of civil justice to which this Review should have regard were outlined in the Report of the Scottish Civil Courts Review[4] and may be summarised, as follows:

- The civil justice system should be fair in its procedures and working practices.
- It should be accessible to all and sensitive to the needs of those who use it.

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[1] Scottish Civil Courts Review (2009), *Report of the Scottish Civil Courts Review*. http://www.scotland.gov.uk/Publications/2010/12/17153314/7

[2] Scottish Government (Nov 2010), *Response to the Report and Recommendations of the Scottish Civil Courts Review. http://scotland.gov.uk/Publications/2010/11/09114610/0*

[3] LJ Jackson (June 2009), *Review of Civil Litigation Costs: Preliminary Report* http://www.judiciary.gov.uk/NR/rdonlyres/D2C93C92-1CA6-48FC-86BD-99DDF4796377/0/jacksonvol1low.pdf and (December 2009) *Review of Civil Litigation Costs: Final Report.* http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf

[4] *Report of the Scottish Civil Courts Review Vol 1*, p 2.

- It should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice.
- It should ensure that justice is secured in the outcome of dispute resolution.
- It should make effective and efficient use of its resources by allocating them to cases proportionately to the importance and value of the issues at stake.
- It should have regard to the effective and efficient application of the resources of others.

The Scottish Civil Courts Review had regard for these principles in its consideration of Scotland's civil courts and made its recommendations mindful of these principles. It is the intention of this Review to do similarly.

1.4 The principle of proportionality was key to many of the recommendations of the Scottish Civil Courts Review. Given its remit to examine the cost of litigation, the work of this Review is directly concerned with issues of proportionality. Hence, the principle of proportionality that this Review adopts is deserving of further elaboration at the outset. The Scottish Civil Courts Review considered that proportionality cannot be calculated simplistically by weighing the monetary value of a civil litigation against the legal fees and outlays that are generated.[5] Proportionality should take into account other factors, such as the relative importance of the claim to the individual and the public interest issues that it may generate. This requires that some room for discretion remains on a case by case basis.

1.5 The Scottish Civil Courts Review also acknowledged that there is an irreducible level of expenses below which many cases cannot go, whatever the monetary value of the case. It observed that this was generally accepted by solicitors for defenders and pursuers alike.[6] This Review is in agreement with the position taken by the Scottish Civil Courts Review with respect to proportionality. While it adheres to the principle that resources should be allocated and applied proportionately by all sectors in Scotland's civil justice system, it is mindful that proportionality is not a straightforward calculation.

1.6 The Scottish Civil Courts Review dealt with a number of issues relevant to the cost and funding of civil litigation in Scotland. It also made recommendations on these issues, both directly and indirectly, such as its recommendations for case management, judicial specialisation, simplified procedure and procedures to enhance efficiency. It is not the intention of this Review to revisit these recommendations. Nor is it in the remit of the Review to undertake a major review of publicly funded legal services. The Scottish Government has recently published its plans for the future of legal aid, with the aim of putting expenditure onto a sustainable footing by 2014-15.[7] This Review is charged with considering whether and how any alternatives to public funding may secure appropriate access to justice. It is also required to assess the potential impact of any of its

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[5] *Report of the Scottish Civil Courts Review Vol. 2*, pp 75-76.

[6] In personal injury cases, for example, a Table of Fees had been set up under the voluntary pre-action protocol by agreement between solicitors for defenders and pursuers.

[7] The Scottish Government (October 2011), *A Sustainable Future for Legal Aid.*
See http://www.scotland.gov.uk/Resource/Doc/359686/0121521.pdf

recommendations on publicly funded legal assistance. Hence, this Consultation will invite views on a restricted number of issues with regard to publicly funded legal assistance.

1.7 The Scottish Civil Courts Review identified considerable concerns about the arrangements for taxing accounts of expenses. It made a number of recommendations in that regard and these can be found in Annex D. It is not the intention of this Review to make further recommendations in relation to the arrangements for the taxation of accounts of expenses. While additional points regarding taxation have been raised in submissions made to this Review, these are matters for the consideration of the Scottish Government.

1.8 The Scottish Civil Courts Review did recommend that further consideration be given to a number of matters. These included judicial expenses, the implications for Scotland of the recommendations following Lord Jackson's Review and, in particular, the recoverability of after the event insurance premiums and success fees.[8] The Scottish Civil Courts Review gave its endorsement to the introduction of specific procedures for multi-party actions in Scotland and made recommendations with regard to the funding of, and expenses in, multi-party actions. The Scottish Government has specifically requested this Review to consider options for the funding of multi-party actions. The above issues, together with the new issues raised by the Scottish Government's remit to this Review, are examined and opened for consultation in the following Chapters of this Consultation Paper, as follows:

Chapter 2 Access to Justice

Chapter 3 The Cost of Litigation

Chapter 4 Further Enhancing the Predictability of the Cost of Litigation

Chapter 5 Protective Expenses Orders

Chapter 6 Referral Fees

Chapter 7 Before The Event Insurance

Chapter 8 Speculative Fee Agreements

Chapter 9 Damages Based Agreements (Contingency Funding)

Chapter 10 Third Party Funding

Chapter 11 Alternative Sources of Funding

Chapter 12 Scotland's Litigation Market

Chapter 13 Special Cases and Concluding Remarks

1.9 To assist in the consultation process, the Review proposes to have public meetings in Aberdeen, Dumfries, Edinburgh, Glasgow and Perth as well as more focused meetings. If you wish to attend one of these or to meet with the Review Team to discuss the issues raised

[8] See Chapter 8.

in this consultation, please contact Kay McCorquodale, Secretary to the Review, at enquiries@taylorreview.org or on 0131 244 7357.

CHAPTER 2: ACCESS TO JUSTICE

2.1 The Scottish Civil Courts Review dealt with access to justice primarily in relation to party litigants, that is, those appearing in court without legal representation. It made its recommendations with regard to promoting public legal education, self-help services, in-court advisers and McKenzie friends[9] with a view to helping persons without legal representation navigate their way through the court process effectively.[10] In its treatment of access to justice, the Scottish Civil Courts Review acknowledged that its recommendations were particularly directed at litigants involved in cases of low monetary value, where the cost of legal representation would be disproportionate to the value of the case. Indeed, the expenses regime in low value cases had been designed to allow individuals to raise actions and defend them without bearing the cost of representation and by reducing the risk of liability in its expenses regime.

2.2 While parties in Scotland are as a general rule permitted to represent themselves in court, not all wish to do so. Nor may it be desirable for them to do so. Besides the impact that party litigants may have on the smooth running of the court, the presence of unrepresented parties in litigation where other parties are legally represented may generate concern as to equality of arms, which is an aspect of the right to a fair hearing under Article 6(1) of the European Convention on Human Rights.[11] Access to justice is more complex than access to the courts: while self-representation permits access to the courts, it may not be effective, thereby denying access to justice.[12] One of the guiding principles informing the conduct of this Review is that the outcome of dispute resolution should be a just one. In a largely adversarial system, this depends heavily on equality of arms. Hence, the affordability of legal advice and representation is of prime concern to this Review.

2.3 Lord Woolf identified the cost of litigation as one of the fundamental problems facing the civil justice system in England and Wales.[13] He observed that the unaffordable cost of litigation constituted a denial of access to justice. In their empirical study on what people in Scotland do and think about going to law, Genn and Paterson found that the survey population expressed *"a pervasive feeling that obtaining legal advice was hugely expensive"*, and cited several examples of respondents who had failed to pursue their case through the courts largely on the grounds of cost. This was strongly felt when individuals were contemplating action against powerful institutional defenders, whom they perceived to have considerable resources.[14]

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[9] See Act of Sederunt (Rules of Court of Session Amendment No. 4)([Miscellaneous) 2010 SSI 2010/205 which regulates the provision of lay support to party litigants in the conduct of proceedings.

[10] *Report of the Scottish Civil Courts Review Vol. 2*, Ch 11, pp 9-22.

[11] See B Kennelly et al in Lester, Pannick and Herberg (2009), Human Rights Law and Practice LexisNexis: *"The right to a fair hearing requires that everyone who is party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place that party at a substantial disadvantage vis a vis his opponent. This is the principle of 'equality of arms' and involves striking a 'fair balance' between the parties."*

[12] E Samuel (1999), *In the Shadow of the Small Claims Court: The impact of small claims procedure on personal injury litigants and litigation,* Scottish Executive.

[13] Lord Woolf (1995), *Access to Justice: Interim Report.*

[14] H Genn and A Paterson (2001*), Paths to Justice Scotland: What people in Scotland do and think about going to law,* Oxford: Hart, p 98.

2.4 Fieldwork interviews in Genn and Patterson's study were conducted in 1998. There is little in the way of hard evidence since then as to how the cost of litigation impacts on the decision making of potential litigants. If a problem remains, it may go beyond only the cost of legal representation. It may include the fear of liability for expenses should a potential litigant be unsuccessful and/or the fear of failure to recover expenses (whether fully or in part) should they be successful. It may also include a concern about incurring court fees either in raising or defending an action in the civil courts. In short, we do not know the extent of the problem, how different elements involved in the cost of litigation are contributing to the overall problem, who is facing the problem and how this may differ by case type. This is a considerable handicap but time and resources do not permit a full enquiry into such issues in the context of this Review.

2.5 In the meantime, there have been major changes in Scotland to legal procedures, to legal aid and to other means of funding cases, which are likely to have made an impact on access to justice. Although the jurisdiction level of small claims procedure has risen considerably in the intervening years, from £750 to £3,000 in 2008, the number of actions initiated under small claims procedure in 2010-11 was still far less than 21 years ago (34,386 compared with 87,285).[15] For whatever reason, fewer individuals now choose to pursue or defend their case in court notwithstanding the benefits that small claims procedure offers, such as the guarantee that minimal expenses will be awarded against them should they be unsuccessful.

2.6 At the same time, there have been major changes to civil legal aid in Scotland. As of April 2011, the Scottish Legal Aid Board ("SLAB") has responsibility for monitoring the availability and accessibility of legal services in Scotland, including by reference to any relevant factors relating particularly to rural or urban areas, and for giving advice to the Scottish Ministers regarding this.[16] A rise in the upper disposable income threshold from £10,306 to £25,000 (now £26,239) was introduced in April 2009, together with the introduction of tapered contributions for those with disposable incomes between £10,306 and £25,000. The financial eligibility criteria are set out in full in Annex E. The Scottish Government reported in October 2011 that this has resulted in over 70 percent of the population of Scotland being eligible for civil legal aid with those with higher levels of disposable income paying a contribution.[17] It has been said, however, that the level of the contribution payable may in some instances deter potential litigants from proceeding. It is not yet known what impact these changes to legal aid eligibility have made on access to justice, although SLAB is in the process of collating relevant information. Access to justice has always been interested in that stratum of the population that does not qualify for legal aid on financial grounds and yet is unable to afford the cost of litigation itself, or who do qualify for legal aid on financial grounds but are unable to afford the contributions required. Access to justice is also concerned with those who are unaware of their entitlement to legal advice and assistance and with those for whom legal aid is not available,

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[15] *Report of the Scottish Civil Courts Review Vol. 1*, p 286 and http://www.scotland.gov.uk/Publications/2010/12/17153314/7

[16] Section 141 of The Legal Services (Scotland) Act 2010 asp 16.

[17] The Scottish Government (October 2011), *A Sustainable Future for Legal Aid.*

for example, for claims falling within the small claims procedure.[18] What is not yet known are the constituents of these groups and what kinds of cases they may be deterred from pursuing or defending.

2.7 In the meantime, options for funding litigation, such as speculative fee arrangements,[19] are now being employed where once they were rare. They have reportedly increased access to justice, particularly for pursuers in personal injury actions. Even so, there are reports that some cases are not being pursued because they do not fit neatly into the requirements for running actions under speculative fee agreements. More information is needed as to how new options for funding litigation are impacting on access to justice.

2.8 One issue that requires further consideration is the relationship between access to justice and access to litigation. Certainly, access to civil justice may mean access to legal advice as well as access to legal assistance, such as negotiation. It may also mean access to mediation or mediated negotiation. It may be observed that the same agencies that formulate their policies in terms of increasing access to justice have at times decried the 'litigation explosion'. In England and Wales, for example, the present U.K. Government has recently described the unifying thread that unites all of its legal reforms as its ambition to "*equip people with the knowledge and tools required to enable them to resolve their own disputes, by working problems through in a non-adversarial manner…..What we are ultimately aiming for is a shift from a culture where we look to the law to resolve conflicts to one where we take more responsibility for addressing them ourselves in the first instance. The prize is a less litigious society and one where justice is affordable for those who do need to litigate.*"[20] The impact of before the event ("BTE")[21] insurance on litigation in Germany has likewise been described in seemingly contradictory terms. From one perspective, BTE insurance has been credited with broadening access to justice in Germany. From another, it has been seen as responsible for creating a 'litigation explosion' in the German courts.[22]

2.9 Reforms are now being introduced in England and Wales to address what has been perceived as a compensation culture, albeit the existence of a compensation culture is contentious.[23] The evidence available for Scotland is of particular significance. In the three years between 1 April 2008 and 31 March 2011, the number of claims registered by the

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[18] It should be noted that in view of its proposal for a single simplified procedure for all actions up to £5,000, the Scottish Civil Courts Review recommended that legal aid should be available, subject to the usual tests, for all types and values of proceedings under its proposed simplified procedure, *Report of the Scottish Civil Courts Review:* Recommendation 203.

[19] See Chapter 8.

[20] Ministry of Justice (2010), 'Foreword', *Solving disputes in the county court; creating a simpler, quicker and more proportionate system,* http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf

[21] Before the event insurance is a type of insurance where cover is in place before the occurrence of the event that gives rise to a legal claim. It covers the pursuer's or defender's legal fees, and possibly those of its opponents in the event of an adverse award of expenses.

[22] B Hess and R Hubner (2010), 'Germany' in C Hodges, S Vogenhauer and M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective,* Oxford: Hart, p 358.

[23] By R Moorhead, in particular. See, for example, his posting of September 13, 2011 on *Lawyer Watch*: http://lawyerwatch.wordpress.com/2011/09/13, 'Compensation Culture FactCheck in Perspective'.

Compensation Recovery Unit[24] in England increased from 728,164 to 892,463, an increase of 23 percent. In the same period, however, the number of claims registered in Scotland increased from 36,417 to 38,819, an increase of only 7 percent. What is perhaps of greater importance is that the number of claims made with respect to all liabilities in Scotland and England was considerably lower in Scotland than would be expected for a country with one tenth of the population (5.2 million in Scotland compared with 51 million persons in England). Over a 3 year period in Scotland (from 2008-11), the total number of claims for clinical negligence in Scotland was one thirtieth of all claims made in England (1,194 compared with 29,388), the total number of claims for employer liability in Scotland was one twelfth of all claims for employer liability made in England (17,235 compared with 211,488), the total number of claims for motor liability in Scotland was one twenty fourth of all claims made in England (76,740 compared with 1,904,298), and the total number of claims for public liability in Scotland was one fifteenth of all claims made in England (15,844 compared with 236,801).

2.10 It is more than ten years since the ground breaking *Paths to Justice Scotland*[25] found that only 26 percent of the Scottish population reported experiencing one or more problems or events for which a legal remedy was available. This was compared to 40 percent in England and Wales in a study of England and Wales which the Scottish research had replicated.[26] Genn and Paterson discounted the possibility of a lower incidence of justiciable problems in Scotland and attributed the substantial difference between the two jurisdictions in the reporting of justiciable events to Scotland's social structure and culture.[27] They also found that even where justiciable events were identified in Scotland, there was no involvement of a formal court, tribunal, ombudsman, mediation or other dispute resolution processes in 90 percent of events. More recent evidence gathered from the Compensation Recovery Unit, as noted above, suggests that there has been little change. If so, what should be sought in Scotland in its current round of reforms to the civil justice system may be quite different from the remedies now sought in England and Wales.

2.11 Evidence recently available from Civil Judicial Statistics Scotland 2010-11[28] presents a picture of declining litigation at all levels of court and for all procedures. In the Court of Session, there were 5,176 first instance cases initiated in 2010-11, 16 percent fewer than in 2009-10 although only 3 percent fewer than in 2008-9. In the sheriff courts, there were 92,308 cases initiated in 2010-11, a fall of 17 percent since 2009-10 and a fall of 27 percent since 2008-9.

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[24] The Compensation Recovery Unit (CRU), part of the Department of Work and Pensions, recovers amounts of social security benefits paid as a result of an accident, injury or disease, where a compensation payment has been made and costs incurred by NHS hospitals and Ambulance Trusts for treatment from injuries from road traffic accidents and personal injury claims.

[25] H Genn and A Paterson (2001), *Paths to Justice Scotland,* Oxford: Hart, Chapter 8 and p 258.

[26] H Genn (1999), *Paths to Justice,* Oxford: Hart.

[27] For discussion as to how judiciable events become claims, see pioneering work of W Felstiner, R Abel and A Sarat (1981), 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming', *Law and Society Review* pp 631-49.

[28] Scottish Government (2011), *Statistical Bulletin: Crime and Justice Series: Civil Judicial Statistics,* http://www.scotland.gov.uk/Publications/2011/10/19142210/0

2.12 The number of ordinary cause cases initiated in the sheriff courts in 2010-11 fell by 20 percent since 2009-10 and by 28 percent since 2008-09. The fall in ordinary cause cases initiated over the past three years has mainly been accounted for by a 44 percent decline in the number of ordinary procedure cases initiated between 2008-9 and 2010-11 and which exclude family, personal injury and commercial cases. This has been attributed by the Scottish Court Service in part to the Home Owner and Debtor Protection (Scotland) Act 2010[29] and in part to an increase in the number of insolvencies that may deter some creditors from raising a debt action where there is little prospect of recovery. There has been little change in the number of family cases going through the sheriff courts in the past three years. Despite a 19 percent decrease between 2009-10 and 2010-11, the number of personal injury actions initiated under ordinary cause procedure in 2010-11 was still higher than in 2008-09.

2.13 Summary cause actions in the sheriff courts exhibited a similar pattern, with the number of cases initiated in 2010-11 (23,799) falling by 13 percent since 2009-10 and by 27 percent since 2008-09. Unlike ordinary cause procedure, the number of personal injury actions, comprising 10 percent of all actions raised under summary procedure in 2010-11, increased by 22 percent from 2009-10 to 2010-11.

2.14 The pattern of litigation in Scotland, and its changes over time, cannot be attributed to the cost and funding of litigation alone. Culture and social structure play their part, as do prevailing economic conditions, legal institutions and the availability of alternatives to the civil courts for dispute resolution. What this Review must address is the extent to which the cost of litigating and the availability of funding are responsible for restricting access to the courts when litigation is both desired and required.

Question for discussion

1. ***What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?***

[29] asp 6.

CHAPTER 3: THE COST OF LITIGATION

3.1 It has been suggested that one of the main difficulties facing potential litigants who are considering whether to embark upon a litigation, is their ability to predict what the litigation is likely to cost and, therefore, whether they can afford to proceed. There are three potential sources of cost that must be paid for by a party to a dispute:

- court fees;
- solicitors' fees including outlays;
- expenses payable to an opponent.

3.2 The Scottish Civil Courts Review considered that it is reasonable for those who engage in litigation to be required to contribute to the cost of providing and administering the court system, and for fees to be structured in a way which bears some relation to the actual costs of providing the facilities or processes being used. It considered that in principle fees should not be set at levels or structured so as to create a disincentive to litigation or restrict access to the court for people on low incomes.[30]

Solicitors' fees and outlays

3.3 Civil litigation may be funded by the party, in which case it is known as self-funding, or by a third party such as an insurance company, a trade union, a professional body, or a commercial concern.

3.4 Litigation which is self-funded is subject to the same rules and arrangements which apply to the funding of other legal services. A letter of engagement must be sent by the solicitor to the client at the earliest practical opportunity upon receiving instructions, specifying such matters as an outline of the work to be done and an estimate of the total fee including VAT and outlays or, as is more likely in litigation, the basis upon which the fee will be charged, for example the solicitor's hourly charge out rate.[31] Where an hourly rate is specified, and that is accepted in writing, a client is entitled to have the solicitor's account scrutinised by an independent person, namely the auditor of court, in a process known as taxation.[32] The auditor can assess whether the time charged is reasonable but cannot vary the agreed hourly rate. Rules of court and case law provide the auditor of court with principles to be applied in the taxation of a solicitor's account relating to litigation.[33]

3.5 Parties are also liable to pay any outlays incurred by their solicitor on their behalf during the proceedings. These may be significant and, most commonly, comprise fees chargeable by counsel and expert witnesses. Experts cover all manner of skills ranging from hand-writing experts through to surgeons, forensic accountants and many other disciplines.

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[30] *Report of the Scottish Civil Courts Review*, Chapter 14 paragraph 166.
[31] Solicitors (Scotland) (Client Communication) Practice Rules 2005.
[32] Solicitors (Scotland) Act 1980 (c.46) s 61A.
[33] Rule 42.7 of the Rules of the Court of Session; Act of Sederunt (Solicitor and Client Accounts in the Sheriff Court) 1992 SI 1992/1434 e.g. *Tods Murray WS v McNamara* 2007 SLT 687.

Their use as witnesses is an increasing factor in the conduct of litigation. This, in turn, gives rise to a consequent increase in the cost of litigation to the parties and the public purse. Indeed, the Scottish Legal Aid Board expressed concern to the Scottish Civil Courts Review about the mounting costs associated with the employment of experts.

3.6 It can therefore be seen that potential litigants will have some difficulty in assessing how much they may have to pay their own lawyers unless they make suitable provision to limit their liability in some way, for example by agreeing a fixed fee.

Expenses payable to an opponent

3.7 While it may be possible to estimate, and even cap, the amount of a party's liability in fees and outlays to his or her solicitors, it is very difficult, or indeed impossible, to predict the amount of judicial expenses likely to be payable to an opponent should the party be unsuccessful. Likewise, it is very difficult to estimate the amount of expenses that a party may recover from their opponent in the event of success.

3.8 The general rule in Scotland is that "expenses follow success." In Maclaren on Expenses, the principle is laid down upon the authority of a number of cases that *"if any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created, unless there is something in his own conduct that gives him the character of an improper litigant in insisting on things which his title does not warrant."*[34]

3.9 In exercising its discretion in awarding expenses, the court will look at all the circumstances of the case. Exceptions to the general rule may be made if, for example, the case was not necessary,[35] or where a successful party's conduct has been unreasonable or improper. Unreasonable conduct can include raising an action more appropriate to another forum[36] or making unfounded allegations which prolong the litigation unnecessarily.[37] Where a party found liable in expenses is legally aided, it is likely that the court will modify the expenses to be paid to a fixed sum or to nil.[38] The lodging of a tender may also affect an award of expenses in that if a pursuer is not awarded a greater sum than that offered in the tender, the pursuer is likely to be found liable for the defender's expenses from the date of tender.[39]

3.10 Solicitors' fees for litigation which may be recovered as expenses are regulated by Act of Sederunt which prescribes regulations and tables for both the Court of Session and the sheriff court.[40] The Tables of Fees are made under statutory authority by the Lord President on the advice of his Advisory Committee on Solicitors' Fees ("LPAC"). They relate to the charges made by Scottish solicitors in the conduct of the action and not to work

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[34] J A Maclaren (1912), *Expenses in the Supreme and Sheriff Courts*, p 21.
[35] *Paterson v North of Scotland Milk Marketing Board* 1994 SLT 781.
[36] *McIntosh v British Railways Board* 1990 SC 338.
[37] *Ramm v Lothian and Borders Fire Board* 1994 SC 226.
[38] Legal Aid (Scotland) Act 1986 section 18; Rule 42.6 of the Rules of the Court of Session.
[39] Note that the *Scottish Civil Courts Review* has recommended the introduction of pursuers' offers. See Recommendations 107 and 109.
[40] Rule 42.16 of the Rules of the Court of Session; Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 SI 1993/3080.

carried out by non-solicitors[41] or foreign agents.[42] Submissions on changes to the rules on solicitors' fees may be made to the Lord President at any time by any interested party including the Law Society of Scotland, the Rules Councils and litigants. The Lord President is likely to refer any such submission to LPAC for advice.

3.11 A solicitor can choose to charge on a time and line basis using the quarter hourly rate specified in the Table of Fees, which is currently between £35 and £40 depending on the nature of the work.[43] Alternatively, a solicitor may choose to use the block fees stipulated in the Tables of Fees which are based upon the same quarter hour rate together with an estimate of how long the particular item of work will take in the average case. This method of charging is less time consuming and hence more popular. It is not possible to elect to charge part of an account on a block fee basis and part on a time and line basis. Ultimately, it is for the auditor to determine the reasonableness of the items in the account.

3.12 The level of solicitors' fees for litigation in the Court of Session and the sheriff court which may be recovered as expenses are generally reviewed annually. The Law Society of Scotland makes a submission, usually in December, to LPAC. The Committee, currently chaired by Lord Carloway, comprises the Auditor of the Court of Session, a representative nominated by the Faculty of Advocates and three solicitors from different geographical locations with experience of Court of Session and sheriff court practice, nominated by the Law Society of Scotland. There is no sheriff, no sheriff court auditor or lay representatives on the committee. One respondent to our request for identification of issues expressed concerns that LPAC does not include any consumer representation.

3.13 The Law Society of Scotland's submission to LPAC proposes increases to the hourly rate and other fees in the Table of Fees and usually includes requests on matters concerning the court rules and tables of fees. The submission is founded on the annual Cost of Time Survey prepared by the Law Society of Scotland. The Law Society of Scotland presents its submission at a meeting of LPAC, which then meets as often as necessary to consider the submission. A memorandum is then sent by LPAC to the Lord President with its recommendations. Amending Acts of Sederunt are drafted and agreed and typically come into force on 1 April.

3.14 A link to the LPAC webpage is available, as of June 2011, on the Scottish Courts website. With effect from the current round, the Law Society of Scotland's submission, minutes of LPAC meetings and the memorandum will be available to the public on the LPAC webpage.

3.15 The Scottish Government is currently consulting on the creation of a Scottish Civil Justice Council to replace the existing civil rules councils of the Court of Session and sheriff court, and with an additional policy role to make recommendations for the improvement of the civil justice system.[44] It is proposed that the body should have a judicial chair,

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[41] *Smith v Highland Council* 2010 SLT 2.

[42] These may be treated as an outlay; *Scottish Lion Insurance Co, Ptnrs* 2006 SLT 606.

[43] Rule 42.16 of the Rules of the Court of Session Chapter I; Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions)1993 SI 1993/3080 Chapter III.

[44] The Scottish Government (September 2011), *Consultation on the Creation of a Scottish Civil Justice Council*.

appointed by the Lord President, and that membership should include members of the judiciary and the legal profession, persons with experience and knowledge of consumer affairs and the lay advice sector, and persons able to represent the interests of particular kinds of litigants, for example, businesses or employees. It has been suggested to this Review that the annual review of solicitors' fees for litigation in the Court of Session and the sheriff court, which may be recovered as expenses, is a matter that could potentially form part of the functions of the proposed Civil Justice Council.

3.16 In the absence of a fixed costs regime, the amount of a solicitor's fees that may be recovered by a successful litigant from their opponent is, therefore, generally based on the amount of work done in preparing for and conducting the litigation. This can be contrasted with the situation in Germany where both court fees and recoverable lawyers' fees are calculated as a percentage of the value of the claim. The advantages of the system are seen to be that it is structured so as to remove any incentive for lawyers to exaggerate the value of claims; litigation costs are moderate and the costs of litigation are predictable.[45]

3.17 The principle behind the system is that the higher level of recoverability in high value claims will subsidise that for lower value claims. However, as in the rest of Western Europe and North America, the growing trend in Germany is for specialisation. This may lead to imbalances among specialist firms representing commercial clients and those firms representing clients of all kinds.[46] Nor is it open to those firms to compete for more clients by lowering fees to less than the statutory level. In addition, the European Commission's competition laws are likely to contribute to a trend towards the deregulation of solicitors' fees. [47]

3.18 Another approach that may be adopted is for solicitors to prepare accounts of expenses on a 'pure time' basis. Accounts could be calculated with information derived from solicitors' work in progress reports. The recoverable rate would be pre-determined and the principle of party and party recovery maintained. This approach would reflect the changes made in working practices and would allow a greater level of recovery for cases which require a substantial amount of work to be done at the beginning of a case, such as commercial actions. It would provide a greater correlation between expenses recovered and fees incurred although it would result in greater expense for the losing party.

3.19 The Civil Justice Advisory Group ("CJAG") of the Scottish Consumer Council in a report in 2005[48] concluded that one of the aspects of the legal system that was in need of review was the way in which lawyers' remuneration is assessed and, in particular, its impact on the costs recoverable in litigation. The analysis of the costs of proceedings submitted to the CJAG indicated that one of the problems in controlling the costs of legal proceedings, whether publicly funded or otherwise, is that lawyers are essentially paid

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[45] Scottish Consumer Council – Civil Justice Advisory Group (CJAG) (November 2005), *The Civil Justice System in Scotland – a Case for Review?* p 74.

[46] Hess and Hubner (2010), *op cit*, p 352.

[47] *Ibid,* p 354.

[48] Scottish Consumer Council – Civil Justice Advisory Group (CJAG) (November 2005), *op cit*. The CJAG of the now Consumer Focus Scotland repeated in 2011 that this issue was still in need of review. See Consumer Focus Scotland – CJAG (January 2011), *Ensuring effective access to appropriate and affordable dispute resolution*.

according to the amount of work they actually do. One submission to this Review commented that the current system, which is governed by actual work undertaken subject to the test of reasonableness, is the fairest system to all parties involved in a litigation. It considers that in view of the fact that there is undoubtedly a basic cost to the client regardless of the value of the claim and, indeed, in many low value cases the complexities arising require substantial work and investigation to be undertaken, any system of proportionality, in any form, should be resisted.

Questions for discussion

2. ***Should solicitors' fees for litigation be recovered as expenses on the basis of time expended, value of the claim or some other basis?***

3. ***Is LPAC, as currently constituted, an appropriate body to review the level of fees for litigation which may be recovered as expenses? If not, what alternative body should carry out this function and what should be its composition?***

Recovery of outlays

3.20 Unlike for solicitors, there is no corresponding Table of Fees for counsel or for fees charged by experts. Submissions made to the Scottish Civil Courts Review argued that increases in counsel's fees, rather than solicitors' fees, were responsible for the rising cost of litigation. The Scottish Civil Courts Review supported the introduction of a judicial Table of Fees for counsel in the Court of Session, as well as in the sheriff court, for those cases in which sanction for the employment of counsel is given.[49]

3.21 One early submission to the Review suggested that if statutory tables of fees are to be retained and extended to all branches of the legal profession, including counsel, one might go further and include set rates of remuneration for the recovery of fees for expert witnesses. Currently, auditors of court in the taxation of accounts of expenses in the sheriff court may determine what a fair and reasonable charge is for a skilled witness. Such sums are recoverable provided it can be demonstrated by the party that it was necessary to employ a skilled person to make investigations to enable that person to produce a report and/or give evidence.[50] In the Court of Session, the test of necessity has been replaced by one of reasonableness. Where it is reasonable to employ a skilled person to make investigations or to report for any purpose, any charges for such investigations and reports and any attendance at proof or jury trial are allowed in addition to the ordinary witness fee. Certification by the court that a witness is a skilled witness and that it was reasonable to employ them is required before any fees or charges can be allowed.[51] The Auditor's sole function is to assess the remuneration to be paid to a witness who has been certified.

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[49] *Report of the Scottish Civil Courts Review:* Recommendation 185.

[50] Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992 SI 1992/1878.

[51] Rule 42.13 of the Rules of the Court of Session.

3.22 In England and Wales, expert evidence is restricted to what is reasonably required to resolve the proceedings. No party may call an expert witness or put in evidence an expert's report without the court's permission. The court may direct that the evidence on a particular issue is to be given by a single joint expert only. The court also has the power to limit the amount of the expert's fees that a party may recover. Where a single joint expert is appointed, the court may give directions on fees and may cap the amount that may be paid by way of fees and expenses.[52]

3.23 The trend towards greater reliance on expert evidence may also give rise to inequality of arms. Submissions made to this Review indicate that, in general, the more money spent on expert witnesses, the higher the prospects of success for the instructing party. If a party is unable to instruct their chosen expert due to a concern about the amount of expenses that they may recover, that party may be disadvantaged if their opponent has no such concerns.

3.24 In the sheriff court, if a party wishes to instruct counsel and recover the cost of doing so, the court must allow a motion certifying the case as suitable for the employment of counsel. The test appears to be whether the employment of counsel is appropriate by reason of circumstances of difficulty or complexity, or the importance or value of the claim.[53] Such a motion is not normally enrolled until the conclusion of a significant hearing at which counsel has appeared. That may not be until after the proof itself has taken place. On one view, there is nothing in the rules which would prevent the motion being enrolled at an earlier stage in the proceedings. It can sometimes be a surprise for a litigant to arrive in court for a proof to discover that counsel has been instructed by the opposition and an even bigger surprise to learn that, in the event of the litigant being unsuccessful, they may require to pay the opposing counsel's fee. In that event it is difficult for the litigant's solicitor to advise their client what their likely exposure to expenses may be in the event that they are unsuccessful. It is also the case that the party instructing counsel cannot be sure if the court will certify the case as suitable for the employment of counsel until after counsel has been instructed and the liability to pay counsel's fee has been incurred.

3.25 One way in which greater certainty and transparency might be introduced is for motions to approve the employment of counsel to be made at the time that a party decides to instruct counsel. In the event that counsel was instructed without such prior certification, the fee incurred to counsel prior to any subsequent certification would not be recoverable. In such a model it is a moot point whether the court should have power to retrospectively sanction the use of counsel, for example, to frame the initial writ. One possible objection to such a procedure might be that the court will not have a clear idea of the complexity of the case without there having been a substantive hearing. On the other hand, the court is sometimes asked to hear motions for certification of counsel after the case has settled. In such circumstances, the court has not had the benefit of a substantive hearing but nonetheless manages to determine the issue.

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[52] Part 35 of the Civil Procedure Rules ("CPR").

[53] The Hon Lord Macphail (2006), *Sheriff Court Practice (3rd edition), paragraph 12.25*

3.26 The Scottish Civil Courts Review recommended that there should be a table of fees for counsel.[54] It is likely that any such table will provide for bands setting out levels of fee within which counsel of a given experience might charge. At the time of certification, as described above, it would be possible for the court to stipulate the amount of counsel's fee that would be recoverable in the event that the litigant instructing counsel and seeking certification had an award of expenses in their favour. It would also be possible for the court to determine whether the case was suitable for the employment of junior counsel, junior and senior counsel or senior counsel appearing alone.

3.27 In the Court of Session a litigant requires to instruct at least a junior counsel or a solicitor advocate. Whether senior counsel is instructed is a matter within the discretion of the litigant. In the event of senior counsel being instructed and the litigant subsequently having an award of expenses made in their favour, the litigant will normally be able to recover senior counsel's fee. It has been suggested that in some cases senior counsel is instructed when the complexity of the case does not warrant such instruction. Despite this, the Review has been informed that it is almost unheard of for the Auditor of Court to disallow senior counsel's fee at a taxation. One way in which greater predictability might be introduced is to require a litigant to obtain the sanction of the court in advance of senior counsel being instructed, should they wish to instruct senior counsel and recover senior counsel's fee. As set out in the previous paragraph, it would also be possible for the court to set the level of senior counsel's fee which would be recoverable.

3.28 The Review has been informed that the cost of litigating has increased considerably in recent years. It has also been informed that one of the reasons for the increase is the fees which are charged by expert witnesses and subsequently allowed by the relevant auditor of court. As with the instruction of counsel in the sheriff court, a litigant who wishes to recover the fee charged by an expert witness requires to have the court certify that it was reasonable to instruct the expert. Such certification is not usually sought until the end of the litigation. It may be thought that greater transparency and predictability would be introduced if the motion for certification of an expert witness was made prior to the instruction of the expert. It would also be possible for the court to impose a maximum amount which a litigant could recover in respect of an expert witness fee should the litigant have an award of expenses made in their favour. It must be accepted that in certain types of case a pursuer will require to instruct an expert witness prior to initiating proceedings, for example, in an action for professional negligence. At the first case management conference the court would have the opportunity to approve, or otherwise, the expert witness fees already incurred.

3.29 It could be said that the procedure set out in paragraphs 3.25 to 3.28 above would increase the number of motions and thus the cost of a litigation. However, the Scottish Civil Courts Review proposed that there should be a system of active judicial case management with a case being allocated to a judge or a sheriff prior to the first case management hearing together with a presumption that, wherever practicable, all procedural and substantive hearings in the case will thereafter be dealt with by that judge or sheriff.[55] A discussion on

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[54] *Report of the Scottish Civil Courts Review:* Recommendation 185.

[55] *Report of the Scottish Civil Courts Review:* Recommendation 50.

the instruction of counsel and expert witnesses could form part of that case management function.

3.30 It has been submitted to this Review that another factor that may increase the cost of litigation in Scotland is the practice of counsel charging a commitment fee. In normal circumstances a fee is only due for work done. However, in some circumstances, counsel may charge a fee where a hearing settles or is discharged to reflect the fact that counsel have kept their diaries free from other engagements and were unable to accept alternative instructions. That fee may then form part of the judicial expenses payable by the unsuccessful party to the litigation.

3.31 The Guide to the Professional Conduct of Advocates provides that where instructions have been given and accepted, an Advocate is entitled to charge an appropriate fee for the work instructed even if the case is subsequently settled or the diet is discharged. In addition, where the solicitor knows, or ought in the circumstances reasonably to be aware, that Counsel, in order to comply with his or her obligations, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged.[56] In practice this means that the instructing solicitor should continue to include counsel's fee in the account for consideration at taxation and that it is for the Auditor to consider whether the fee charged by counsel is appropriate in the circumstances.[57]

3.32 The practice of counsel charging a commitment fee, which then forms part of the judicial expenses payable by the unsuccessful litigant, was approved by the Court of Session in *Jarvie v Greater Glasgow Primary Care NHS Trust.*[58] In that case Lord Carloway said:

> *"It is reasonable that an unsuccessful party bear at least a proportion of fees payable to counsel in respect of a cause due to start on a Tuesday when it is abandoned on a Friday. Conventionally, abandonment on Friday afternoon would normally have merited perhaps a fee for the first day (enhanced) even for a four-day proof. Whether more than that would be allowed would be a matter for the Auditor to determine in all the circumstances. In this case, for an eight-day diet, he has allowed fees for two days. That would appear to be entirely in keeping with modern practice especially against a background where he has also allowed preparation fees for the proof in addition. In assessing reasonableness, the Auditor has taken into account the fact that counsel: "would have picked up other work, whether advocacy or written, after the two days". In so saying, he is not attempting to assess damages or the loss suffered by the actual counsel in the case or even by a hypothetical counsel. He is having regard to this factor in determining overall reasonableness in the context, which he has already noted, that he has to have some regard, not only to the interests of the parties, counsel and agents, but to the "wider public interest in the costs of litigation". He is striking a balance on a scale containing these, and many other, factors."*

3.33 In England, counsel's fees for a trial (proof) consist of a brief fee and refreshers. A brief fee is an agreed fixed fee that covers all the pre-trial preparation and attendance on the first day of the trial. A refresher is an agreed fixed fee for each subsequent day of the trial

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[56] Guide to the Professional Conduct of Advocates 2007, paragraph 9.11.
[57] Court of Session Practice Note No. 5 of 1996.
[58] [2006] CSOH 42.

which includes the ongoing preparation before and after each court day. The modern approach taken by the courts is to apportion the brief fee when a case settles early. Where it settles at court, or on the day before the hearing, the court will give no disallowance of any of the brief fee for that reason alone.[59]

3.34 Concern was expressed to this Review about the practice of counsel charging a commitment fee. It was suggested that this adds to the overall cost of litigation and gives counsel an incentive to delay settling the action. It was pointed out that solicitors are not entitled to charge a commitment fee although they too may have kept their diaries free of other engagements. Another submission disputed that a commitment fee does provide counsel with such an incentive. The Review was also informed that it has been the practice of many counsel not to charge for preparation on the basis that any element of preparation is built into what they may charge per day. If commitment fees were not to be allowed, counsel may have to review the basis upon which they charge and may instead charge both a preparation and a commitment fee. This could result in the concept of brief fees, or something similar, being introduced to Scotland.

Questions for discussion

4. ***Is the test currently applied by the sheriff court in sanctioning the instruction of counsel appropriate? If the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied?***

5. ***What test should the court apply when considering a motion for certification of an expert witness - should it be necessity, reasonableness or some other test?***

6. ***In the sheriff court, should counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of counsel?***

7. ***In the Court of Session, should senior counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of senior counsel?***

8. ***Should the presiding judicial office holder assess what would be a reasonable fee for counsel in any account of expenses? If so, at what point in the proceedings should that assessment be made?***

9. ***From when should the fees of an expert witness be a competent outlay in a judicial account of expenses?***

10. ***Should the presiding judicial office holder assess what would be a reasonable fee for an expert witness in any account of expenses? If so, at what point in the proceedings should that assessment be made?***

11. ***Is it reasonable for counsel to be entitled to charge a commitment fee and, if so, should that be prescribed or left to the discretion of the Auditor?***

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[59] *London & Oriental Homes Ltd v Hope (trading as Dawson Estate Agents)* December 11, 2007, unrep., Lewison J.

Recovery of judicial expenses

3.35 Where expenses are awarded in any cause, there are three different bases available for the taxation of expenses: (1) party and party, (2) solicitor and client, client paying, and (3) solicitor and client, third party paying. In practice by far the commonest mode of taxation between parties to a litigation is party and party. A court order awarding expenses without qualification implies taxation on that basis.

3.36 Expenses taxed on a party and party basis means that only those expenses as are reasonable for conducting the litigation in a proper manner are allowed. The Table of Fees set out in Rule of Court 42.16 of the Rules of the Court of Session apply to Court of Session actions unless otherwise specifically ordered, for example, where the court considers that an award of expenses on the sheriff court scale is more appropriate.[60] In the sheriff court there are two scales of expenses, namely, the ordinary cause scale and the summary cause scale. Tables of fees are attached to the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions)1993.[61] Since an award of expenses on a party and party basis is limited to expenses that were reasonably incurred without reference to what clients have actually paid their solicitor, it is unlikely that clients who have been awarded expenses on this basis will be able to recover the full costs incurred by them in the litigation.

3.37 In exceptional circumstances, such as where the court disapproves of a party's unreasonable conduct, the court may award expenses on a solicitor and client basis. This allows for the recovery of costs by reference to what clients have actually paid their solicitor. This therefore allows a much higher rate of recovery than an award on a party and party basis. Expenses awarded on a solicitor and client, third party paying basis, for example an insurance company or a trade union, is not so generous as where the client is paying, but is more generous than a party and party basis.

3.38 Some of the early submissions to the Review expressed concerns that the present arrangements for recovery of judicial expenses are unsatisfactory. In particular dissatisfaction was expressed with the level of recovery of solicitors' fees, especially in commercial cases, which was said to be poor compared to the level of recovery in England and Wales. In Scotland, it was reported that the recovery of expenses is likely to be no more than two thirds of the sum expended and can sometimes be as low as 50 percent. In England and Wales the level of recovery is usually 80 percent or higher.

3.39 One submission informed the Review that this gap in recoverability can sometimes deter clients from litigating at all or, where they do, leave them with a deep feeling of unfairness and dissatisfaction with the process. This outcome is most profound where clients successfully defend claims pursued against them, particularly claims that they regard as vexatious or, at the least, unmeritorious. The fact that litigants have been completely successful in defending the claim is often scant consolation when they assess the costs they have incurred in reaching that stage and the sum that they will have to fund themselves. It was submitted that if the gap between recoverable and irrecoverable costs

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[60] *Gordon v Strathclyde Buses Ltd* 1995 SLT 1019.

[61] Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions)1993 SI 1993/3080.

widens too far, the risk will grow of pursuers exploiting defenders' reluctance to incur substantial costs and lead to "blackmail" litigation such as that, which we are told, is widespread in certain parts of the US, where claims with little merit are pursued in the hope that defenders will simply offer an early settlement to buy off the costs risk.

3.40 Another submission to the Review commented that it is difficult to explain to successful litigants why the percentage recovery through awards of judicial expenses can be quite modest, particularly in circumstances where the actions of the defender are perceived to be a stalling tactic. It was suggested that the fact that the defender might be liable for only half of the pursuer's costs may be responsible for them maintaining a defence longer than they would have if they were facing the prospect of meeting a larger liability of the pursuer's expenses.

3.41 It was suggested in one submission that a system in which at least 80% to 90% of costs were recoverable and where accounts could be taxed and enforced within a matter of weeks from judgment would be much more attractive to potential litigants, although that would probably involve a complete redrafting of the Table of Fees. However, according to the submission, since the work done by solicitors in preparing a case has changed significantly with developments in technology, the Table of Fees, as it now stands, no longer accurately represents work undertaken in the preparation of a case.

3.42 Another submission suggested the shortfall recoverable from an opposing party compared to the agent/client recovery arises in two specific areas, namely pre-litigation and proof preparation work. It suggested that a change to the recovery of fees in connection with these areas would go some considerable way to reducing the imbalance between the two modes of taxation. It suggested that, as far as the pre-litigation fee is concerned, there should be a recovery of expenses on a similar scale to the voluntary Pre-Action Protocol scales for personal injury cases. With regard to proof preparation work, it suggested a substantial increase in the fee recoverable to remunerate solicitors adequately for basic preparatory work together with a separate discretionary fee chargeable where proof preparation is of an extensive or unusual nature.

3.43 In its consideration of the level of fees for litigation in the Court of Session and the sheriff court, LPAC applies certain principles, one of which is that no particular classes of action ought to be paid at higher rates than others. In recognition of the fact that the gap between party and party and agent and client fees can be most acute in commercial actions in the Court of Session, it is understood that the Law Society of Scotland, in its submission for the 2008 increase, proposed a separate table of fees for commercial actions in the Court of Session. This was to bring the current Table of Fees into line with the charging practices adopted by some solicitors practising in commercial litigation and was intended to make the Court of Session a more attractive forum for commercial litigation, based on an enhanced hourly rate for solicitors conducting commercial actions.

3.44 LPAC did not consider that the case for differentiating between fees in commercial actions and other types of litigation had been made out. Not all commercial work is raised as a commercial action. LPAC thought it wrong in principle for a party to be able to recover a higher level of expenses simply because of the general classification of the case. It did not consider that a sufficiently strong case had been made out for remunerating solicitors at a

higher level for commercial work as distinct from other equally complex areas of litigation, such as medical negligence.

3.45 In addition, LPAC was not persuaded that the level of recovery of fees in commercial actions acted as a significant disincentive to raising such actions. If a particular case deserved increased remuneration, an additional fee could be applied for. So far as competition with other jurisdictions was concerned, comparisons with the practices of the courts in London, where there is a large body of international commercial work conducted, were not thought to be of significant assistance in determining what was appropriate in Scotland. Although some parties no doubt elected to conduct their litigation in London, the level of recovery in Scotland relative to the solicitor's actual charges was not thought to play a significant role in this. It was considered that no change should be made to introduce a separate Table of Fees. However, the Law Society of Scotland was asked to make further representations on specific items for block fees to cover work carried out only in commercial actions.

3.46 On this basis, the Law Society returned to the matter in its submission for the 2009 increase. The proposal that the hourly rate for commercial action work should be higher than for commercial and other types of case raised as ordinary actions or otherwise was again rejected. However, LPAC agreed that special provision should be made for the inclusion of block fees for specific items of process which were unique to the commercial actions, such as Procedural Hearings; Statements of Facts or Issues/Note of Proposals for Further Procedure and Witness Summaries. This enables solicitors to recover their fees for these additional items of work where they elect to charge on a block fee basis.

3.47 The Scottish Civil Courts Review considered that the current tables of fees, and their operation, should be reviewed to address the concerns about recovery rates, the extent to which these may act as a barrier to access to justice, and their impact on whether parties choose to litigate in Scotland.[62] In particular the Review recommended that there should be a significant increase in the block fee for pre-litigation work to reflect work properly and reasonably carried out in connection with investigation and intimation of the claim, discussions on settlement and compliance with a pre-action protocol where applicable[63] and that LPAC should review the adequacy of the block fee for proof preparation.[64]

3.48 The Scottish Civil Courts Review also suggested that a tariff-based system for judicial expenses would be worthy of more detailed consideration.[65] This might be applied to all litigations or to only some types of action. Such a system could provide for separate tariffs of judicial expenses designed to produce different recovery rates according to the value and/or complexity of an action. The base line or reference point could be the hourly rate for solicitors provided in the respective tables of fees for party/party awards of expenses in the Court of Session and for ordinary actions in the sheriff court. The Scottish Civil Courts Review recommended that the privative jurisdiction of the sheriff court should

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[62] *Report of the Scottish Civil Courts Review*, Chapter 14 paragraph 66.
[63] *Report of the Scottish Civil Courts Review*: Recommendation 183.
[64] *Report of the Scottish Civil Courts Review*: Recommendation 184.
[65] *Report of the Scottish Civil Courts Review*: Recommendation 188.

be extended to all actions with a value of less than £150,000.[66] Thus a tariff-based system could provide that in actions with a value of less than £150,000, the amount which could be recovered by the party in whose favour expenses were awarded might be the level of party/party expenses set out in the respective tables. In an action with a value between £150,000 and, say £500,000, the amount which could be recovered might be the level provided in the tables enhanced by, say, 25 percent. For actions with a value of more than £500,000 the amount which could be recovered might be the level provided in the tables enhanced by, say, 50 percent. There would be an assumption that the applicable tariff would be determined by the value of the action. However, it would be open to parties, or any one party, to move the court to provide, due to some exceptional circumstance, that a different tariff should apply.

3.49 A system could be based on the stage of qualification of the fee earner handling the case. In England and Wales, the costs system identifies different rates depending on the grade of fee earner and the location of the service provider. Given the limited geographical extent of Scotland, the latter may not be appropriate. With regard to the stage of qualification of the fee earner, the system in England and Wales sets out four guideline rates. Band A sets out a guideline hourly rate for solicitors with over 8 years qualified experience, Band B for solicitors or legal executives[67] with over 4 years qualified experience, Band C for other qualified solicitors or legal executives and Band D for trainees and paralegals.[68] In Scotland, the rate specified in the Table of Fees applies to all solicitors from second year trainees up to senior partners. No effort is made to match the experience of the solicitor with the case or their expertise, for example, their status as an accredited specialist.

3.50 It might be possible to create a tariff-based system based on both the value/and or complexity of the claim, together with the stage of qualification and level of expertise of the fee earner handling the case. Such a system would require auditors to adopt a more interventionist approach in their assessment of accounts of expenses. This, in turn, would require the judiciary to be robust in their support of auditors' decisions. It has been suggested to the Review that this is not the case at present.

Questions for discussion

12. ***Should the level of fees recoverable by the successful party in a commercial action be greater than in other types of action and, if so, what is the justification?***

13. ***Should a tariff-based system for assessing the level of recoverability of judicial expenses be introduced? If so, how might such a system be structured?***

14. ***Should any table of fees provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor and/or for an accredited specialist to recover at a higher rate than a solicitor without accreditation?***

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[66] *Report of the Scottish Civil Courts Review*: Recommendation 20.

[67] A Fellow of the Institute of Legal Executives.

[68] Guideline hourly rates issued by the Supreme Court Costs Office. See http://www.judiciary.gov.uk/publications_media/general/guideline-hrly-rate.htm

Additional fee

3.51 One procedure that can be used to attempt to narrow the gap between party and party and agent and client expenses is to seek an award of an additional fee. This practice is particularly common in commercial actions. Motions for an additional fee should be made at the same time as a motion for expenses, normally at the conclusion of the proceedings. This makes it more difficult for an unsuccessful litigant to predict what their likely exposure to judicial expenses may be. In the Court of Session, the court may determine an application for an additional fee itself or, more usually, remit it to the Auditor of Court to determine whether an additional fee should be allowed. Where the court allows an additional fee, the Auditor may assess it by way of a percentage uplift on the solicitor's taxed account. In the sheriff court, unlike the Court of Session, the sheriff determines the application, together with the appropriate percentage increase.

3.52 In making a decision, certain criteria are taken into account namely:

- the complexity of the cause and the number, difficulty or novelty of the questions raised;
- the skill, time and labour, and specialised knowledge required, of the solicitor or the exceptional urgency of the steps taken by him;
- the number or importance of any documents prepared or perused;
- the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause has been carried out;
- the importance of the cause or the subject-matter of it to the client;
- the amount or value of money or property involved in the cause;
- the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.[69]

3.53 The decision to award an additional fee, and under which head, is a matter within the discretion of the court.[70] Its purpose is to enable the solicitor of the successful party, having satisfied one or more of the above criteria, to recover more than would otherwise be recoverable on his or her account of fees. If awarded the amount due on a party and party basis may, theoretically, exceed the amount of an agent and client account.

3.54 In one submission the observation was made that additional fees are only exceptionally granted and that they, in turn, require investment of further legal cost to pursue. The Review has been informed that in the sheriff court, whether a motion for an additional fee will be granted is unpredictable. One submission reported that there is little consistency between the practice of sheriffs in the granting of an additional fee, even within

[69] Rule 42.14 of the Rules of the Court of Session; Article 5 of Schedule 1 to Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993 SI 1993/3080.
[70] *McKie v Scottish Ministers* 2006 SC 258.

the same sheriff court. Another submission observed that sheriffs are given little or no guidance on the percentage increases which may be appropriate.

Questions for discussion

15. ***Is the ability to request an additional fee a reasonable procedure for regulating the recoverability of judicial expenses?***

16. ***If the concept of an additional fee is retained:***

a. at what stage in the proceedings should a motion for an additional fee be made?

b. should motions for an additional fee, and the percentage increase, be determined by an auditor of court or by the member of the judiciary hearing the motion?

Interest on judicial expenses

3.55 One submission to the Review commented that parties to a litigation should be entitled to recover interest on judicial expenses. It suggested that interest should run not from the date of the final court order but from the date of intimation of the Account of Expenses until payment of the agreed or taxed expenses. Another submission pointed out that some parties to a litigation will often delay in making proposals for settlement of an account of judicial expenses and allow a taxation to be fixed in the knowledge that they can delay making payment without any financial penalty.

3.56 Although it is competent for a court to award interest on expenses, including properly incurred outlays, from a date prior to the date of the final order, the courts have adopted a practice that interest will be awarded only if there are exceptional circumstances justifying such an award. In considering whether or not special circumstances exist, the court has regard to the particular facts of the case.[71] The Scottish Civil Courts Review supported the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred.[72] The courts in England and Wales do have the power to award interest on costs.[73] Interest on costs runs from the date of the judgment unless a rule or Practice Direction makes different provision or the court orders otherwise.[74] The rate of interest is as specified under section 17 of the Judgments Act 1838[75] or section 74 of the County Courts Act 1984[76], which is currently 8%.

3.57 The Scottish Government consulted on a draft Interest (Scotland) Bill in January 2008. Clause 8 of that Bill contained a clause which provided that where a party to a litigation is entitled to recover fees and outlays from another party, statutory interest should be payable on those expenses from the dates when they were paid. This clause was based

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[71] *Phillips v Upper Clyde Shipbuilders* 1990 SLT 887 and *Presslie v Cochrane McGregor Group Ltd* (No. 2) 1999 SLT 1242.
[72] *Report of the Scottish Civil Courts Review*: Recommendation 187.
[73] Civil Procedure Rules 1998 SI 1998/3132, Rule 44.3(6)(g).
[74] Civil Procedure Rules 1998 SI 1998/3132, Rule 40.8.
[75] c.110.
[76] c.28.

on a proposal made by the Scottish Law Commission in its Report on Interest on Debt and Damages.[77] Some responses to the consultation pointed out that the proposal did not take account of actions funded on a speculative basis whereby fees are not paid until there is a formal award of expenses. It was suggested, instead, that interest should run on judicial expenses from the date of decree for the taxed amount or the date on which the account was agreed by the parties. Statutory interest was defined in the draft Bill as 1.5 percent per year over the official dealing rate. This can be compared with the judicial rate of interest which fluctuates over time and is currently 8 percent. As Lord Hodge recently identified, there has been a *"clear mismatch between the judicial rate and market rates in recent years."*[78]

Question for discussion

17. ***Should a litigant be entitled to claim interest on an award of judicial expenses and, if so, from what date and at what rate?***

[77] Scottish Law Commission (2006), *Report on Interest on Debt and Damages*, Report No. 203.
[78] *Farstad Supply AS v Enviroco Limited* [2011] CSOH 153.

CHAPTER 4: FURTHER ENHANCING THE PREDICTABILITY OF THE COST OF LITIGATION

Fixed expenses

4.1 One way in which to introduce an element of predictability into the cost of litigation is to fix the amount of expenses that may be recovered from an opponent in the event of success. In Scotland, the block fees stipulated in the Tables of Fees regulate the level of solicitors' fees for litigation. Fixed fees are also a feature of small claims procedure in the sheriff court. Section 36B of the Sheriff Court (Scotland) Act 1971 provides that no award of expenses is to be made in a small claim in which the value of the claim does not exceed a sum, prescribed by Order, which is presently £200.[79] The Order also provides that in a small claim in which the value of the claim is £1,500 or less, the sheriff may award expenses not exceeding £150 and where the value of the claim is greater than £1,500, the sheriff may award expenses not exceeding 10 percent of the value of the claim.

4.2 The above provisions are qualified by the terms of Small Claim Rule 21.6.1, however, which provides that the restriction in recoverable expenses does not apply in a number of situations, one of which is where the defender, having stated a defence, has not proceeded with it. Therefore, if a defender in a small claim at first considers that he has a good defence and states a defence to the court, but subsequently realises that the defence is unlikely to succeed, he cannot benefit from the restriction should he decide to settle the claim. The pursuer in such circumstances is entitled to recover expenses on the higher summary cause scale. This provision was possibly enacted to discourage defenders from putting forward a defence to the court as a time wasting tactic. However, even a defender who in good faith mistakenly thinks he has a defence to a claim is not entitled to the restriction and could find himself liable to pay fees of several hundred pounds should he decide not to proceed with the defence and try to settle with the pursuer.

4.3 In England and Wales, in cases dealt within the small claims track (normally cases up to and including a value of £5,000), no costs order is made unless court protocol is breached or there has been an application for an injunction or an order for specific performance, in which event no more than £260 in solicitors' costs may be recovered. New cost capping rules, which apply to Road Traffic Accident cases where the personal injury element of the claim is less than £10,000, came into force in England and Wales in April 2010.

4.4 Costs predictability was introduced into the Patents County Court in October 2010 by way of scale costs. In such proceedings the amount or value of the claim must not exceed £500,000.[80] Subject to certain limited exceptions, the court will not order a party to pay total costs, including outlays, any success fee[81] and any insurance premium, of more than £50,000 on the final determination of a claim in relation to liability and no more than

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[79] The Small Claims (Scotland) Order 1988; SI 1988/1999.

[80] The Patents County Court (Financial Limits) Order 2011 SI 2011/1402 and The Patents County Court (Financial Limits)(No. 2) Order 2011 SI 2011/2222.

[81] See Chapter 8.

£25,000 on an inquiry as to damages or an account of profits.[82] Additional sums may be awarded where a party has behaved unreasonably. Costs recovery is further limited by the Costs Practice Direction which sets a maximum amount of costs which can be recovered for each stage of the action. For example, the maximum sum recoverable for preparing witness statements in a claim in relation to liability is £5,000 and experts are capped at £7,500. The intention is to make litigation more accessible to parties, especially small and medium sized businesses, and to reduce their overall exposure to legal costs if unsuccessful.

4.5 Guidance on the operation of the regime was provided by Judge Birss QC in *Westwood v Knight*[83] who said:

> *"The purpose of the limits is to aim for certainty for litigants…The correct approach must be to apply the limits if they can possibly be applied, recognising however that in the end the court always has a discretion as to costs (CPR 44.3) and that includes as to the amount of costs. It is a discretion which in my judgment will very rarely (if ever) be exercised to exceed the limits set by Section VII. For one thing specific exceptions are provided for (r 45.41(2)). Furthermore to exercise a discretion on a wider basis in all but the most rare and exceptional case would undermine the very object of the scale in the first place. For the scale to give a measure of certainty to litigants, it has to [be] possible to be sure that the limits will apply well before any costs are incurred and most likely before any action has even commenced. Before they embark on litigation to enforce their intellectual property rights (or defend themselves) the potential users of the Patents County Court system need to be able to make a prediction in advance as to their likely costs exposure. Their legal advisers need to be able to say with confidence that the costs capping provisions can be relied on."*

He explained that the caps are to be applied in the following way:

- The winning party needs to produce a costs schedule, which summarises their costs by reference to each of the stages.
- The judge will then carry out a summary assessment[84] of each stage. If the sum assessed for that stage is lower than the maximum given in the table, then that will be the assessed figure. If it is higher, then the maximum will be used.
- Once all the stages have been assessed, the figures for each stage are added up. If the sum is less than £50,000, that sum will be awarded. If it is higher, then the award will be £50,000.
- The successful party is also entitled to VAT on top, if appropriate.
- The successful party is also entitled to interest, and may ask for it to run from the date of their solicitors' bills.

4.6 With respect to fast-track cases (cases up to a value of £25,000) in England and Wales, LJ Jackson, in the Final Report of his Review of Civil Litigation Costs,[85]

[82] Section VII of CPR Part 45.
[83] [2011] EWPCC 11.
[84] See paragraphs 4.13 to 4.26.
[85] LJ Jackson (2009), *Review of Civil Litigation Costs: Final Report*, Ministry of Justice.

recommended capping the recovery of pre-trial costs of any non-personal injury fast track case at £12,000. He considered the limits on personal injury fast track claims separately, and made recommendations for capping them according to specific case type. He did not recommend the introduction of a general scheme of fixed costs for cases over £25,000, that is, cases proceeding by way of multi-track procedure.[86]

4.7 The issue of extending fixed recoverable costs in England and Wales is presently under consideration.[87] The proposed reforms complement, and should be read in the context of 'Common Sense – Common Safety'[88] which recommended expanding the fixed costs scheme for Road Traffic Accident personal injury claims to other areas of personal injury, including clinical negligence, as well as extending the upper limit for Road Traffic Accident claims to £25,000.

4.8 LJ Jackson identified some difficulties in the practicalities of setting fixed costs for different cases at different procedural stages, which were grounded in a tension between the need for certainty and the need to compensate solicitors adequately for their work. Fixed costs also raise issues with regard to access to justice, particularly in cases where a substantial inequality of arms is to be found.[89] In cases where solicitors are not adequately compensated for their work, fixed costs may also impact on the quality of their services.

Questions for discussion

18. ***Should the court have a discretion to restrict recoverable expenses in a small claim even in cases where a defender, having stated a defence, has decided not to proceed with it?***

19. ***Should more cases in Scotland come under the scope of a fixed expenses regime? If so, what types of case should be included?***

Costs shifting

4.9 Costs shifting is where one party to a litigation is ordered to pay another party's costs. Costs shifting usually operates on a loser pays basis, so that the unsuccessful party is required to pay the successful party's recoverable costs.

4.10 One way of increasing the ability to predict the cost of litigation is to introduce a rule that each party in a litigation should bear their own expenses. The rule may be qualified, however, so that the court has a discretion to award expenses in the event that a) a tender (either a defender's tender or a pursuer's offer to settle) has not been beaten and b) that one of the parties has conducted the litigation in an unreasonable manner. In addition, parties

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[86] LJ Jackson (2009), *Final Report, op cit,* Chapters 15 and 16.

[87] Ministry of Justice (2010), *Solving disputes in the county court; creating a simpler, quicker and more proportionate system.* See http://www.justice.gov.uk/downloads/consultations/solving-disputes-county-courts.pdf
The consultation closed in June 2011.

[88] Lord Young of Graffham (2010), *Common Sense – Common Safety,* HM Government.

[89] M Galanter (1974), 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law and Society Review, 9.1.*

need not bear their own expenses in all types of litigation and under all circumstances. In Scotland expenses are not usually recovered from the losing party in cases dealt with by employment tribunals,[90] although it has been reported to this Review that there has been a recent increase in the number of such awards granted.

4.11 As a general rule, there is no award of expenses in family actions involving children. Concern has been expressed to this Review, however, that family actions consume a disproportionate amount of the legal aid budget. Cases proceed at great length and at considerable cost. It is said that family cases involving children would never be conducted in the same manner if the parties were at risk of having to pay some of the expenses. At a time when the Scottish Government is required to make savings and the legal aid budget is under pressure,[91] it has been suggested that it would be fairer if some of the funding presently allocated to family actions was directed to other types of litigation.

4.12 The introduction of a rule that each party bears their own expenses can be advantageous in that it may dispense with the extra costs that are incurred in the taxation of expenses and the judicial time spent in determining expenses issues. It may also eliminate the type of satellite litigation that has arisen in England and Wales where the expenses themselves are the subject matter of the action. However, the proposal for a qualified one way cost shifting regime in England and Wales, as recommended by LJ Jackson, and now a provision in The Legal Aid, Sentencing and Punishment of Offenders Bill currently before the UK Parliament,[92] has been criticised by many on the grounds that it is as likely to lead to as much satellite litigation as it was designed to eliminate.[93]

Question for discussion

20. ***Should each party to a litigation in Scotland bear their own expenses? If so, in what types of litigation? Should the rule be qualified and, if so, in what circumstances? In particular, is the general rule in family cases appropriate?***

Summary assessment of expenses

4.13 Prior to the new civil justice regime introduced by the Civil Procedure Rules in England and Wales in 1999, it was considered that an effective system for non-compliance with rules, directions and orders was required in order for the new regime to work and that costs had an important part to play in this respect. However, costs orders may be ineffective if they do not bite until the end of the case, when they can be lost amongst all the other orders for costs. It was therefore recommended that the courts should assess costs on

[90] In 2008/9, 367 awards of expenses were made across the UK out of 151,000 claims accepted by the Tribunals during this time. The highest award was £25,000 and the average was £2,470.

[91] The Scottish Government (October 2011), *A Sustainable Future for Legal Aid.*

[92] See http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/2012205.pdf

[93] The qualified one way costs regime has been designed to make after the event insurance ("ATE") premiums redundant. Much of the satellite litigation generated by conditional fee agreements has concerned the cost of success fees and ATE premiums that were made recoverable from the losing side in 2000.

an interlocutory application and order them to be paid immediately.[94] This is known as summary assessment of costs. Such a procedure is not presently available in Scotland.

4.14 The power of summary assessment is given to the court by rule 44.7 of the Civil Procedure Rules. This is supplemented by the Costs Practice Direction which sets out the general rule as to when summary assessment is appropriate, that is:

- at the conclusion of the trial of a fast track claim when all the costs of the case will be assessed;
- at the conclusion of any other hearing which has lasted not more than one day when the costs of the application or the matter dealt with will be assessed; or
- in certain Court of Appeal hearings.[95]

4.15 Notwithstanding the terms of rule 44.7, the courts have held that there can be a summary assessment where the hearing lasts longer than one day.[96] However, the general rule will not apply if there is a good reason why costs should not be summarily assessed.[97] For example, the issue of costs cannot be dealt with summarily where the assessment of costs requires consideration of complex legal arguments or where there is insufficient time. The court will also not summarily assess costs in certain defined circumstances such as where the receiving party is a child,[98] an assisted person or a Legal Services Commission funded client.[99] There is no restriction or cap on the amount of costs which can be summarily assessed.

4.16 To assist the judge in making a summary assessment of costs, each party intending to claim costs must submit a written statement of these costs in the prescribed form to the court. A copy must also be intimated to the party against whom an order for costs may be sought as soon as possible, but not later than 2 days before a fast track trial or 24 hours before the date fixed for the hearing. The statement of costs claimed must show separately:

- the number of hours to be claimed;
- the hourly rate to be claimed;
- the grade of fee earner;
- the amount and nature of any disbursement to be claimed;
- the amount of solicitor's costs to be claimed for attending or appearing at the hearing;
- the fees of counsel to be claimed in respect of the hearing; and

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[94] *Civil Justice Quarterly 19 (*April 2000), 'Case Comment: Summary Assessment of Costs', pp 101-104.
[95] Costs Practice Direction ("CPD") paragraph 13.2.
[96] *Q v Q (Family Division: costs: summary assessment)* [2002] All ER (D) 07 (Jul).
[97] CPD paragraph 13.2.
[98] CPD paragraph 13.11(1).
[99] CPD paragraph 13.9.

- any VAT to be claimed.[100]

Failure to comply with these provisions, without a reasonable explanation, will be taken into account by the court in deciding what order to make about costs.[101]

4.17 The time allotted by the court for dealing with the issue of costs on a summary basis is short. It may be no more than a few minutes. This means that any arguments a party wishes to raise must be presented in such a way as to allow the court to deal with them quickly. In addition there is no obligation on either party to put the other party on notice as to the points they wish to raise. A judge is likely to take a broad brush approach to the assessment of costs since the procedure does not require a reasoned judgment in respect of each item that is challenged.[102] Should the judge consider that there is insufficient time to deal fully with the assessment of costs, and that a further hearing is required, the judge will frequently order that the party against whom the costs order is to be made should make an interim payment on account.

4.18 Following summary assessment, the paying party will usually be required to make payment within 14 days of the judgment or order specifying the assessed sum to be paid, although the court may specify a later date for payment.[103] There are no special procedures for appealing the making of a summary costs order.

4.19 The court is provided with a table of solicitors' hourly rates for guidance when summarily assessing costs. This divides fee earners into four categories and divides the country into various regions. These are broad approximations only. The designated civil judge may supply more exact guidelines for rates in that particular area. The costs estimate provided by the paying party may also be of assistance since the hourly rate should be determined by reference to the rates charged by comparable firms. There are no recommended rates for counsel.

4.20 One commentator has observed that the major impact of the summary assessment rules has been to change lawyers' approach. Since a decision, or decisions, on costs does not await the end of the case, the costs orders made become key factors in determining the course the litigation will follow. Summary assessment, it is said, gives rise to greater transparency in the costs of litigation and brings home to the parties the financial consequences of the litigation at an earlier stage.[104]

4.21 Another commentator has observed that the summary assessment of costs has led to parties feeling the "pain" as soon as an unconsidered application or ill advised resistance to an application has been determined. In his view,"*Solicitors cannot conceal from their clients the failure and its consequences, and the client cannot discount the consequences as postponed until after*

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[100] CPD paragraph 13.5.
[101] CPD paragraph 13.6.
[102] *Bryen & Langley v Boston* [2005] EWCA Civ 973.
[103] CPR rules 3.1(2)(a) and 44.8.
[104] A Briggs (Nov 2000), *Woolf: Is It Working? Summary Assessment of Costs.* http://www.mayerbrown.com/litigation/article.asp?id=538&nid=258

any subsequent trial. Parties are more cautious and sensible, and unnecessary court business is avoided."[105]

4.22 One submission to this Review commented that the Scottish system would benefit from a summary assessment of expenses procedure as it would give greater relevancy to adverse expenses awarded at procedural hearings. Another submission from a solicitor, with experience of the summary assessment of costs procedure in England and Wales from the viewpoint of both claimant and defendant, reported that the procedure is very effective in focusing minds. It also helps the cash flow of the legal firm.

4.23 In LJ Jackson's Review of Civil Litigation Costs in England and Wales, summary assessment was an issue that arose with some frequency. LJ Jackson found that views as to the usefulness of the summary assessment procedure were strongly held and polarised. Those in favour of the procedure considered that it offered the benefits of:

i. speed and cost – it represented a swift and efficient method of resolving the issue of costs after a trial or hearing. The procedure was likely to be cheaper than a detailed assessment (taxation) and avoided unnecessary delay. There was usually an immediate order at the conclusion of the hearing with no further argument. The receiving party then received reimbursement almost immediately.

ii. raising awareness – it brought the issue of costs to the fore as costs could be addressed throughout the proceedings (i.e. at interim hearings). It followed that a greater awareness of the costs being incurred should encourage settlement discussions.

iii. promoting reasonable behaviour – as the costs of interim applications are dealt with at the conclusion of the interim hearing, any applications which are unreasonable or lack merit attracted immediate costs consequences for the paying party. This focused the minds of the parties and discouraged the use of tactical (meritless) interim applications.

iv. the trial judge's knowledge – the trial judge is well placed to conduct a summary assessment of costs at the end of a trial as the judge is fully immersed in the intricacies of the case.

4.24 LJ Jackson also identified the drawbacks of summary assessment:

i. the procedure is arbitrary, rushed and inconsistent. Some of the consultees considered the procedure as "rough and ready", often conducted at the conclusion of the hearing when insufficient time is available for a satisfactory assessment. There was concern that there appeared to be an inconsistent approach to summary assessment by the judiciary giving rise to inconsistent outcomes.

ii. inexperience and a lack of information. The trial judge undertaking the summary assessment and the counsel arguing it may lack the requisite costs expertise.

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[105] G Lightman (July 2003), 'The civil justice system and legal profession – the challenges ahead', *Civil Justice Quarterly 22,* pp 235-247.

Furthermore they may not have the necessary information to address adequately the process of summary assessment.

iii. the procedure increased costs due to the preparation required and its associated costs.

iv. a reluctance to criticise counsel's fees. Barristers were often reluctant to criticise the amount of their opposite number's fees on summary assessment. This reluctance on the part of barristers increased the difficulty for the judge in doing justice to both parties.[106]

4.25 In his Final Report LJ Jackson concluded that summary assessment is a valuable tool which has made a substantial contribution to civil procedure, not least by deterring frivolous applications and reducing the need for detailed assessment proceedings. He concluded that the summary assessment procedure should be retained and improvements should be made in order to meet the criticisms which had been expressed. For example, he recommended that if any judge considers that he or she lacks the time or the expertise to assess costs summarily at the end of a hearing then the judge should order a substantial payment on account of costs and direct a detailed assessment.[107]

4.26 In the event that it was thought that there was merit in introducing such a procedure to Scotland, it is likely that members of the judiciary would require training.

Questions for discussion

21. ***Should a procedure for the summary assessment of expenses be introduced into the civil courts in Scotland?***

22. ***If a procedure for summary assessment was introduced, in what circumstances should the summary assessment of expenses take place and should it be restricted to any particular types of action?***

Budgeting for Expenses

4.27 Most businesses do not embark upon a project without an idea of what the project will cost should it be unsuccessful. A budget is created for the project. Perhaps litigation should be no different.

4.28 Lord Justice Jackson referred to an article by Professor John Peysner[108] and made the following comments:

> *"He (Peysner) pointed out that project management involved a defined project and the teamwork necessary to achieve the project. He observed that a "project" was a defined task with a beginning and an end, made up of a series of separate activities, each of which absorbs*

[106] LJ Jackson (2009), *Review of Civil Litigation Costs: Preliminary Report,* Chapter 52.
[107] LJ Jackson (2009), *Review of Civil Litigation Cost: Final Report,* Chapter 44.
[108] J Peysner (2004), 'Predictability and budgeting' *Civil Justice Quarterly* 23, pp 15-37.

time and money, but which can occur in parallel or subsequently. He concluded that this was akin to litigation and as such litigation was suitable for project management.

Professor Peysner observed that the creation of project management tools for the litigation project did not need to be highly technical. He concluded that the key was to break down the steps in the project, for example taking witness statements, attaching a price or cost to the step by using average hours from a database, multiplied by an appropriate fee earner rate. He pointed out that modern case management systems produce this type of information automatically. These discrete steps could then be aggregated to produce a complete schedule. At the end one would be left with a costed overall project plan."[109]

4.29 In order to address the issue of managing litigation expenses, there has been a pilot scheme operating in the Mercantile Court and the Technology and Construction Court (TCC) in Birmingham since 2009. In terms of the pilot, solicitors are required at the outset of an action to submit to the court a schedule of the expenditure which they estimate they will incur. It is said that this enables the judge to properly manage the expenses of the litigation. The concept is referred to in England and Wales as 'Costs Management'.

4.30 In a paper delivered at a Conference in London on 20 October 2011 on 'Costs and Litigation Funding', Edward Pepparall, a barrister, wrote:

"At its simplest, costs management involves the sharing of the budgets which good lawyers prepare for their clients. Sharing budgets in this way gives the parties an unprecedented amount of information as to their opponents' likely costs. It also gives litigants an opportunity to comment upon and shape their opponents' spending plans.

Critically it also ensures that the judge understands the costs consequences of case management decisions. The judge questions the parties about their spending plans and can then approve or disapprove their budgets.

Costs management is not about reducing lawyers' incomes. It is about providing the parties with greater certainty as to the costs of their case and ensuring that cases are managed proportionately and efficiently."[110]

4.31 One of the judges involved in the pilot, Judge Brown QC, stated:

"The Costs Schedules are wonderful tools for both Costs and Case proper management – indeed essential. They are most effective when the cost paying customers are present at CMCs (case management conferences). Perhaps most importantly, it ensures that clients (they are the court consumers, customers and users not the lawyers) know how much they are at risk for if they are 'unsuccessful' (and in some quite astonishing cases I have had even what their own lawyers bills are as they do not appear to have been told!). I believe that most appearing in front of me at CMCs have better been able to make a Cost benefit analysis of their litigation due to the exchange of cost schedules and the court giving some guidance at that stage. I have had two cases settle within the week of a CMC. In another case, the

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[109] LJ Jackson (2009), *Preliminary Report,* p 493.

[110] E Pepperall (2011), 'Costs Management and the Pilot Schemes'. Unpublished paper presented at Conference on *Costs and Litigation Funding,* held in London on 20 October 2011 and sponsored by Law Assist.

barrister said the parties were now equipped for mediation without further expenditure in preparing the case towards trial – he said that as a mediator himself the exchange of such costs schedules was the first thing he suggested before any mediation. "[111]

4.32 LJ Jackson was sufficiently impressed that he initiated the rolling out of the Birmingham pilot to all Mercantile Courts and TCCs. Practice Direction 51G came into force on 1 October 2011 and creates a national pilot. A copy of the Practice Direction forms Annex F.

Question for discussion

23. ***Would there be any benefit in introducing a procedure of submitting schedules of expenditure similar to the pilot scheme operating in the Birmingham Mercantile Court and TCC?***

Judicial case management

4.33 One submission to the Review has identified the need to look beyond the court rules in relation to awards of expenses and consider whether judges are using those rules with sufficient flexibility and discretion in their management of cases. It reports that Scottish judges are reluctant to impose expenses penalties on litigants who delay unreasonably in progressing their claims/defences, miss court deadlines or fail to comply with reasonable orders. It was said that these delays or missed deadlines can result in mounting costs for opponents, but rarely result in meaningful sanctions.

4.34 The matter of effective sanctions for non-compliance with rules or court orders was addressed by the Scottish Civil Courts Review which recommended that where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the court to impose such sanctions as it considers appropriate.[112] The Review set out a non-exhaustive list of suggested sanctions that it considered the court should be entitled to impose.[113]

Question for discussion

24. ***Apart from imposing sanctions, what other powers, if any, should be made available to the courts to promote predictability and certainty of judicial expenses?***

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[111] As quoted by E Pepperall, above.

[112] *Report of the Scottish Civil Courts Review*: Recommendation 127.

[113] *Report of the Scottish Civil Courts Review*: Recommendation 128. Also see Recommendations 129 and 130.

CHAPTER 5: PROTECTIVE EXPENSES ORDERS

5.1 One way in which litigants may seek to restrict their potential exposure to adverse expenses is to apply to the court for a protective expenses order ("PEO"). The effect of such an order is to limit a litigant's expenses to a particular sum, which may in some cases be nil, thus ensuring that the litigant's liability to pay the expenses of an opponent or any third party will be limited, whatever the outcome of the case. A PEO can be applied for at any stage of the proceedings and provides a degree of certainty and predictability in relation to a litigant's potential exposure to an opponent's expenses.

5.2 The courts in England and Wales have, for some time, been developing case law on protective costs orders ("PCOs"). The leading case is *R (Corner House Research) v The Secretary of State for Trade and Industry*[114] in which the Court of Appeal laid down guidelines which should be taken into account by the court in deciding whether to make a PCO. These are:

(1) A PCO may be made at any stage of the proceedings, on such conditions as the Court thinks fit, provided that the court is satisfied that: (i) the issues raised are of genuine public importance; (ii) the public interest requires that those issues be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in doing so.

(2) If those acting for the applicant are doing so *pro bono*, this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, at its discretion, to decide whether it is fair and just to make the order in light of the considerations set out above.[115]

5.3 English case law has continued to develop with departures made from the *Corner House* guidelines in certain cases. The effect is to widen the circumstances in which PCOs are considered appropriate. For example, case law has established that judges have a wide discretion in deciding whether a case raises questions of general importance or public interest; the requirement that the claimant should have no private interest in the outcome of the litigation has been doubted and PCOs have been granted in a number of cases where the claimant's lawyers were not acting on a *pro bono* basis. In addition, the Court of Appeal has held[116] that the usual principles on the granting of PCOs set out in *Corner House* need to be modified in environmental cases to ensure compliance with the access to justice provisions of the Aarhus Convention.[117] It found that in environmental cases, the conditions at

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[114] [2005] EWCA Civ 192.

[115] [2005] EWCA Civ 192 at paragraph 74.

[116] *R (on the application of Garner) v Elmbridge Borough Council* [2010] EWCA 1006.

[117] The United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Adopted on 25 June 1998 in Aarhus, Denmark.

paragraph (1) (i) and (ii) above need not apply as the Directives implementing the Aarhus Convention are based on the premise that it is in the public interest that there should be effective participation in the decision making process in significant environmental cases.

5.4 One issue that awaits determination is whether there should be an objective or a subjective test to determine the amount at which a PCO should be assessed. The subjective approach takes into account the applicant's means while an objective approach relies on whether a member of the public would consider the costs of a challenge prohibitively expensive. The Supreme Court considered the issue and concluded that the balance seemed to lie in favour of an objective approach but, given the uncertainty, decided that the matter should be referred to the Court of Justice of the European Union for a preliminary ruling.[118] That ruling is awaited.

5.5 PEOs are a recent development in the Scottish courts. Lord Glennie considered in *McArthur v Lord Advocate*[119] that it was competent for the Scottish courts to make a PEO although he was not persuaded on the facts of that particular case that it was appropriate to do so. He endorsed the guidelines laid down by the Court of Appeal in the *Corner House* case.

5.6 The first PEO in Scotland was granted in 2010 in the case of *McGinty v Scottish Ministers.*[120] This was a judicial review in an environmental case which, it was agreed by both parties, raised issues of genuine public importance and the public interest required that those issues be resolved. Lady Dorrian followed the *Corner House* guidelines and was satisfied that it was fair and just to make an order. She capped the petitioner's liability for the respondent's expenses at £30,000. She also ordered that, in the event of success, the petitioner's recovery was to be limited to that of a solicitor and one senior counsel acting without a junior to reflect modest representation.[121]

5.7 A second PEO was granted in January 2011 in *Road Sense and William Walton v Scottish Ministers*,[122] which was a statutory review of the Scottish Government's consent to the construction of the Aberdeen Western Peripheral Route. In that case the PEO was set at £40,000 with a reciprocal cap permitting the respondent to recover the taxed expenses of a solicitor and senior counsel acting without a junior.

5.8 In *Road Sense,* Lord Stewart considered the meaning and domestic application of the access to justice provisions contained in Article 10a of Directive 85/337/EEC on the assessment of environmental impacts ("the EIA Directive"). Article 10a was inserted by Article 3(7) of the Public Participation Directive 2003/35/EC ("the PPD") and implements the Aarhus Convention, which stipulates that signatory states shall ensure access to justice for the public and establish procedures for doing so which shall "provide adequate and

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[118] *Edwards & Anor, R (on the application of) v Environment Agency & Ors* [2010] UKSC 57.
[119] 2006 SLT 170.
[120] 2010 CSOH 5
[121] *"The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation and must arrange its legal representation…accordingly." R (Corner House Research) v Secretary of State for Trade and Industry,* [2005] EWCA Civ 192.
[122] [2011] Env.L.R .22.

effective remedies… and be fair, equitable, timely and not prohibitively expensive."[123] The PPD implements, in part, this requirement and aims to improve public participation in the making of certain decisions affecting environmental matters.

5.9 The Scottish courts have always had a discretionary power, exercisable after the event, to modify the amount of expenses payable by an unsuccessful party. For example, a legally aided party who is not required to pay a contribution towards their expenses will frequently, at the conclusion of the case, have their liability for expenses modified to nil. However, Lord Stewart pointed out that the European Court of Justice has ruled that after-the-event modification is not Article 10a of the EIA Directive compliant as it does not have the required specificity, precision and clarity.[124] He also had sympathy with a supplementary argument, that uncertainty as to the expenses outcome is in itself a powerful disincentive to participation. This is not consistent with the purposes of the legislation. The substantive hearing in this case failed.[125] An appeal is scheduled to be heard by the Inner House in this case in December 2011.

5.10 In October 2010 the Court of Session Rules Council agreed a draft set of rules in relation to the establishment of a procedure for PEOs in environmental cases. This set of rules represented the first stage of an intended two-stage process for the introduction of PEOs and was meant to comply with the requirements of the PPD. The European Commission was provided with a copy of the draft rules but indicated that it was not content with the approach taken. In particular, it was not content with continuing to allow judicial discretion in assessing whether a limit should be placed on an individual's liability to expenses and, if so, the level at which the limit should be set. It considered that the courts should apply a prescribed limit, capable of being lowered but not increased, in a particular set of proceedings and that it would be reasonable to set that limit at a figure of £25,000.[126] Those rules have not yet been made. The Scottish Government is currently considering the detail of proposals for consultation.

5.11 The Report of the Scottish Civil Courts Review recommended that an express power should be conferred upon the court to make special orders in relation to expenses in cases raising significant issues of public interest. It suggested that the model proposed by the Australian Law Reform Commission for making a public interest costs order could usefully be adapted for introduction in Scotland.[127] The Scottish Government, however, does not consider that the adoption of that model would provide the level of certainty required by the European Commission as it does not, for example, provide for an automatic capping of expenses. It has indicated that it supports a wider codification of the rules on PEOs, to avoid the "haphazard and inconsistent development of costs regimes in particular types of action."[128]

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[123] Article 9, paragraph 4.
[124] *Commission v Ireland* C-427/07 [2010] Env. L.R. 8.
[125] *William Walton v Scottish Ministers* [2011] CSOH 131.
[126] Minutes of the Meeting of the Court of Session Rules Council 14 February 2011.
[127] *Report of the Scottish Civil Courts Review*: Recommendations 155 and 156.
[128] Scottish Government (Nov 2010), *Response to the Report and Recommendations of the Scottish Civil Courts Review,* paragraph 175.

5.12 LJ Jackson in his Final Report recommended that one way costs shifting should be introduced for judicial review.[129] He considered that it was the simplest and most obvious way to comply with the UK's obligations under the Aarhus Convention in respect of environmental judicial review cases. In addition he thought it undesirable to have different costs rules for environmental judicial review and other judicial review cases. He also considered that it is not in the public interest that potential claimants should be deterred from bringing properly arguable judicial review proceedings by the very considerable financial risks involved. In his view the PCO regime is not effective to protect claimants against excessive costs liability. It is expensive to operate and uncertain in its outcome. In many instances the PCO decision comes too late in the proceedings to be of value.

5.13 The UK Government, as part of the process of developing a workable costs protection for claimants, considered possible alternatives to PCOs. It consulted on the possibility of moving to qualified one way cost shifting in England and Wales as part of a wider consultation on its response to LJ Jackson's recommendations.[130] The consultation paper set out the UK Government's view that PCOs provide better protection against an adverse costs order in environmental judicial review cases than qualified one way costs shifting. The UK Government also considers that it is reasonable to require a claimant to pay something towards the costs of an unsuccessful case, even if that is a relatively small amount. It is currently consulting on cost protection for litigants in environmental judicial review claims.[131]

5.14 The issue of costs in environmental litigation in the UK has been raised by the European Commission and the Aarhus Compliance Committee. The Commission adopted a reasoned opinion on 18 March 2010 which set out its view that the current rules on costs for environmental challenges do not ensure compliance with the PPD. The Commission referred the matter to the EU Court of Justice on 6 April 2011. The Aarhus Compliance Committee also concluded that the UK is not in compliance with its obligation to ensure access to justice in environmental matters and recommended that the UK review its system. The UK is asked to report to the Committee again in February 2012.

5.15 It appears to be the intention of the Scottish Government to promote rule changes to regulate the award of PEOs in the judicial review of, and first instance statutory appeals to the Court of Session against, decisions of public authorities falling within the scope of the PPD. One submission to this Review commented that if PEOs are granted in cases outside the environmental field then that has the potential to impose a heavy burden on Government authorities, for example COSLA and NHS boards, in a time of economic constraint. In their opinion there should be one PEO regime for environmental cases that is Aarhus compliant and another, less rigorous regime, for PEOs in other public interest cases. In the meantime it remains open to the courts to make PEOs in such cases as they deem appropriate.

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[129] LJ Jackson (2009), *Final Report,* Chapter 30.

[130] Ministry of Justice (2011), *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response.*

[131] Ministry of Justice (Oct 2011), *Cost Protection for Litigants in Environmental Judicial Review Claims: Outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention*, Consultation Paper CP 16/11.

Questions for discussion

25. ***Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?***

26. ***Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?***

CHAPTER 6: REFERRAL FEES

6.1 Solicitors may be referred cases by a variety of different bodies, such as employer and trade organisations, trade unions, Citizens Advice Bureaux and companies set up specifically to manage claims. Frequently, the arrangement will involve payment of a fee by the solicitor, known as a referral fee. Referral fees are particularly associated with the funding of litigation by before the event ("BTE") insurers and claims management companies. Cases may also be referred to solicitors in return for a payment in kind, such as the provision of legal or training services.

Scotland

6.2 With certain limited exceptions, lawyers in Scotland are prohibited from sharing fees with unqualified persons and from paying commission or referral fees to third parties (such as estate agents, mortgage providers and doctors) for the introduction of business. Practice rules issued by the Law Society of Scotland principally prohibit arrangements to pay commission for the introduction of business on a case by case basis.[132] In the Law Society of Scotland's view, clients should be free to choose their own solicitor and legal work should not be commoditised by being sold on to solicitors who are prepared to pay for it. In its opinion, referral fees are unlikely to enhance the quality of legal services since referrals may be sold to the highest bidder and not necessarily to those firms providing the best service. They may also be a potential threat to the independence of the profession whose overriding duty is to act in the best interests of the client.

6.3 Nevertheless, there are features of the Scottish system that bear some resemblance to referral fees. Solicitors in Scotland are entitled to pay for the cost of marketing or promoting their practice. They may also pay a fee to be included on a panel to which referrals will be made, provided that the fee is not expressed as a specific sum per referral or as a percentage of the fees chargeable for referred business. A flat fee is not in breach of the rules and may be reviewed periodically.

6.4 There is little information as to how these fees operate in Scotland, the fields in which they operate and how they are negotiated. There is anecdotal information to suggest that the payment of fees, whether or not they are referred to as "referral fees," is commonplace, even if they are not made on a case by case basis. The Review has been advised that the fee for joining a panel is sometimes paid in instalments, which are closely correlated with the flow of instructions. The Review is also given to understand that on other occasions solicitors only pay a fee to the referrer if they are successful in pursuing or defending the claim. The referral fee, if it may now be so described, is then paid to the referrer out of the judicial expenses that are recovered by the successful litigant.

6.5 It is also understood that a number of solicitors' firms offer free advice and representation to clients and, in return, receive a regular flow of other types of remunerative work from the client. For example, it is said that some Trade Unions will only refer their members with potential personal injury claims to particular legal firms if those firms are

[132] Law Society of Scotland Practice Rules 2011 Rule 9.2.

prepared to provide free advice and representation to the Trade Union and its members in employment law matters. Payment in kind currently breaks no professional rules. On one view there is no difference between a solicitor paying a sum of money in return for a referral and providing a free legal service in one area for a referral in a different area.

England and Wales

6.6 Solicitors in England and Wales have been entitled to pay referral fees since 2003, subject to certain conditions and safeguards. The lifting of a ban against referral fees followed a report by the Office of Fair Trading ("OFT") in 2001. In the context of its express intention of bringing all professions, including the legal profession, fully subject to competition law, the report expressed concern that the restriction of referral fees in England and Wales might be hampering the development of competition between solicitors, as well as an online market place. In the OFT's view, this was to the detriment of clients who were less likely to obtain the quality and price of legal services that best met their needs.[133]

6.7 The Council of The Law Society of England and Wales resolved in 2003 that it would be in the public interest to allow referral fees, provided that such payments were disclosed to clients.[134] A ballot of Law Society members in 2004, however, found that 73 percent of respondents were in favour of reinstating the ban and, as a consequence, the Law Society undertook a review of the impact of lifting the ban, including a survey of the experiences of clients.[135] In 2005, it decided that, for the time being, it would not reintroduce a prohibition on referral fees but would instead issue guidance to the profession.

6.8 LJ Jackson considered the operation of referral fees in England and Wales in his Review of Civil Litigation Costs.[136] Submissions to LJ Jackson focused on referral fees in relation to personal injury cases. It was reported to him that referral fees ranged between £250 and £900, with the going rate for a fast track personal injury claim being between £600 and £900. If solicitors were to operate profitably, it was suggested that they required to recover the referral fees paid by them.

6.9 Those in favour of referral fees pointed to the need for enhancing competition, increasing access to justice and providing quality services, all of which were facilitated by referral fees. For example, the Claims Standards Council ("CSC"), a trade association representing claims management companies, argued that referral fees are a form of marketing costs, providing solicitors with a cheaper and more effective mechanism for marketing their services than engaging in direct marketing to the public. In its view, claims management companies were responsible for promoting access to justice since they increased awareness of the right of those who had suffered accidents to claim compensation and members of the public felt more comfortable talking to their representatives about a potential claim than to solicitors. Lastly, since claims management companies required high standards of service from the solicitors to whom they referred cases, the CSC argued that

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[133] Director General of Fair Trading (2001), *Competition in Professions.*

[134] Solicitors Code of Conduct 2007 Rule 9.

[135] *Report by the Research Working Group of the Legal Services Market in Scotland* (2006), pp 63-4.

[136] LJ Jackson (2009), *Review of Civil Litigation Costs: Final Report,* Chapter 20.

their intermediary role between solicitors and potential clients was ultimately to the benefit of claimants.[137]

6.10 Others argued that claims management companies and referral fees were redundant. They neither promoted competition nor access to justice. Any injured person could find details of local personal injury lawyers from the internet. Instead, referral fees were responsible for shunting injured persons to those firms of solicitors that could pay the highest referral fees. Some observed that referral fees did not promote quality services. They argued that some firms of solicitors may be required by their low profit margins to under-prepare and to settle cases for low values so as to achieve quick results. District judges expressed their concern that solicitors were frequently far removed from their clients geographically and the quality of their work was substantially diminished by the high referral fees that they paid. A representative of the Insurance Fraud Bureau reported that rather than increasing access to justice, thousands of pounds were being paid out by solicitors to claims management companies for claims that turned out to be manufactured.[138]

6.11 Personal injury lawyers appeared to be strongly opposed to referral fees. One specialist personal injury firm reported that it was frequently being asked to take over the conduct of serious injury claims that started off in the hands of panel solicitors and commented on the inadequacies of preparation, investigation and communication with clients.[139]

6.12 In terms of competition, LJ Jackson was unequivocal and saw no benefits to be gained from allowing referral fees. Nor did he see a ban on referral fees as inconsistent with European competition law. He found himself in disagreement with the OFT, which had maintained that arrangements for referral work were likely to enhance competition between solicitors by providing an incentive to maintain high standards of service so as to invite repeat custom. In the OFT's view, one of the major concerns in the market for legal services is that individual consumers know little about, and have little opportunity to assess, the quality of services of legal services providers. This deficit was addressed by claims management companies and other sources of referral work, which in its view were far better placed to assess the quality of services provided than individual consumers.[140] In LJ Jackson's view, however, cases were mainly referred to the highest bidder, which neither matched cases to solicitors, nor required solicitors to compete with each other for clients on price and quality. Rather, solicitors were competing to see who could pay the highest referral fee, which was beneficial to no-one except those in receipt of referral fees.[141]

6.13 In more general terms, LJ Jackson considered that referral fees added no commensurate value to the litigation process. Instead, solicitors were required to cut corners to cover the referral fee and make a profit on the case, to the detriment of the client, the solicitor and the public interest. Nor did he accept that referral fees were necessary for

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[137] *Ibid,* pp 197-8.
[138] *Ibid,* pp 199-202.
[139] *Ibid,* p 202.
[140] OFT's position is set out on p 203 of LJ Jackson's *Final Report.*
[141] *Ibid,* pp 203-4.

access to justice: the availability and identity of solicitors conducting personal injuries work could be publicised through the Law Society, the APIL website and by other similar means. He also considered it offensive and wrong in principle that personal injury claimants should be treated as a commodity, with BTE insurers *"auctioning off the personal injury claims of those whom they insure."* He found it equally unacceptable that claims management companies were buying in claims from other referrers and then selling them on at a profit. He found what he perceived to be the commoditisation of claims, (as represented by the industry's description of strong cases that are ready to be pursued as "oven ready"), distasteful. It was even more abhorrent when claims management companies not only received referral fees, but also took a slice of the damages from the claimant.[142]

6.14 As far as a solution to the problem was concerned, LJ Jackson found considerable disagreement. Some doubted whether the 'clock could be put back'. Others predicted an inevitable abuse of the system if a ban on referral fees was to be introduced. Despite this, LJ Jackson recommended that the payment of referral fees for personal injury claims should be banned. If his primary recommendation was not accepted, he recommended that referral fees should be capped at a modest figure, around £200. If either of these recommendations was accepted, LJ Jackson proposed that serious consideration should also be given to the question whether referral fees should be banned or capped in other areas of litigation.

6.15 The Ministry of Justice was initially hesitant over introducing a ban on referral fees and LJ Jackson's recommendations were not reflected in The Legal Aid, Sentencing and Punishment of Offenders Bill. This was despite Lord Young's report that had also identified the likelihood that there was no correlation between the payment of referral fees and the quality of work achieved.[143] The Ministry of Justice appeared to have taken its lead from the Legal Services Board's paper on referral fees,[144] which indicated that although there were issues around transparency of referral fees that were of importance for consumer confidence, there was insufficient evidence of consumer detriment to justify a ban. It advised that this could be addressed by invoking more proportionate forms of regulation to provide transparency.

6.16 On 9 Sept 2011, the Ministry of Justice announced that it was to seek a ban on referral fees in relation to personal injury cases. The provisions were inserted into The Legal Aid, Sentencing and Punishment of Offenders Bill, in time for its third reading in the House of Commons on 2nd November 2011. The policy objectives and intended effects of the new provisions are: *"to cease payment for gaining access to personal injury claimants; to reduce incentives to excessive litigation, especially weak or unnecessary claims; to reduce the overall level of legal costs involved in personal injury cases, and hence in the process to reduce insurance premiums".*[145] As the Under-Secretary of State for Justice later said, referral fees with regard

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[142] *Ibid,* pp 204-6.

[143] Lord Young (2010), *Common Sense, Common Safety,* in which he argued that the higher fees remitted by those who secure the referral work only meant that the balance left to cover the cost of providing legal services was diminished, to the detriment of the client.

[144] Legal Services Board (May 2011), *Referral fees, referral arrangements and fee sharing: Decision document.*

[145] See http://www.justice.gov.uk/downloads/publications/bills-acts/legal-aid-sentencing/referral-fees-ia.pdf

to personal injury claims are being addressed because they are *"one of the symptoms of the compensation culture in this country."*[146]

6.17 Following its campaign to ban referral fees, the Association of British Insurers (ABI) welcomed the announcement[147] - as did the Law Society of England and Wales, although it went on to express disappointment that the ban was not to be extended immediately into areas beyond personal injury, for example, conveyancing.[148] Others have expressed disappointment that the ban has not been extended into other areas such as employment law and divorce.[149]

6.18 Questions have also been raised as to how the ban is to be formulated and implemented. Writing recently in the New Law Journal, Dominic Regan has pointed out that there is likely to be much discussion over what constitutes a referral fee and has questioned whether payment in kind, rather than hard cash, can be considered in the same way or can be subject to the same principled objections. As an example, he cites the free legal advice given by one firm of reparation solicitors to charities that cater for those suffering from industrial disease. In his view, these services were responsible for generating case referrals, *"in as noble a manner as I can think of."*[150] The UK Government has already acknowledged that there is no universally accepted description of a referral fee. Its position on how it intends to enforce the ban on referral fees reflects these difficulties.[151]

6.19 In the amendments to The Legal Aid, Sentencing and Punishment of Offenders Bill that introduce a ban on referral fees, there is no attempt to prohibit payments in kind – only monetary payments. The provisions of the Bill, with respect to referral fees, focus on ensuring that the ban is not circumvented by payments that appear to be made for services rendered, such as advertising, when what is actually being paid for is the referral of cases.[152]

6.20 The Legal Aid, Sentencing and Punishment of Offenders Bill is currently before the House of Lords. As the provisions of the Bill now stand, a breach of the new rules on referral fees will be dealt with as a regulatory offence. At the debate in the House of Commons on 1 November 2011 the UK Government argued against creating a criminal offence on the grounds that it would provide a "very blunt instrument". As the Under-Secretary of State for Justice said:

> "*One would have to prove beyond reasonable doubt that consideration had changed hands for the referral of a potential claimant, but the grounds for determining whether something was or was not a referral fee could be blurred. It would be very difficult to convict in many cases on the basis of the complexity of those arrangements.*"[153]

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[146] See http://www.theyworkforyou.com/debates/?id=2011-11-01d.822.0

[147] See http://www.abi.org.uk/Media/Releases/2011/09/ABI_welcomes_ban_on_referral_fees.aspx

[148] See http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=442838

[149] See, for example, Alan Beith MP: http://www.theyworkforyou.com/debates/?id=2011-11-01d.822.0

[150] D Regan (16 Sept 2011), 'The death of referral fees?' *New Law Journal.*

[151] See http://www.justice.gov.uk/news/press-releases/moj/newsrelease090911a.html

[152] See http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0235/amend/pbc2352510a.3607-3613.html

[153] See http://www.theyworkforyou.com/debates/?id=2011-11-01d.822.0

For this reason, the UK Government has considered that a regulatory offence, whereby *"the principle of what is happening can be looked at by the regulator and a view can be taken,"* is a more appropriate means of enforcement.[154]

6.21 A number of regulators have been identified by the UK Government, including the Financial Services Authority, the Claims Management Regulator, the General Council of the Bar and the Law Society of England and Wales. They are tasked with ensuring that there are appropriate arrangements for monitoring and enforcing the restrictions.

Questions for discussion

27. ***Should lawyers be permitted to pay a sum of money to a third party in return for referrals or instructions for other business?***

28. ***Should lawyers be permitted to provide legal or other services to a third party at no cost to the third party in return for referrals or instructions for other business?***

29. ***Should lawyers be permitted to make payment to a company, or some other body, either in money or by some other consideration, in order to have their name placed on a panel for the purpose of securing a flow of instructions in litigation?***

30. ***Should the answers to questions 27, 28 and 29 be different, please explain why the situations should be distinguished.***

31. ***In the event that payment for referrals, whether by money or provision of services, is permitted, should there be a limit upon the value of the referral fee or services provided?***

[154] *Ibid*. The amendment to new clause 18 seeking the criminalisation of referral fees was tabled by Jack Straw MP and rejected by 302 votes to 208.

CHAPTER 7: BEFORE THE EVENT INSURANCE

The market for BTE insurance

7.1 Expenditure on legal expenses insurance, including before the event ("BTE") and after the event ("ATE") insurance,[155] has increased greatly over the past decade. Latest information for the UK, which relates to 2008, puts the combined premium income from ATE and BTE legal expenses insurance at £568 million, representing more than a 500 percent increase since 1998.[156]

7.2 The Scottish Civil Courts Review considered the advantages and disadvantages that might flow from the greater use of BTE legal expenses insurance in Scotland and consulted on whether legal expenses insurance, including BTE and ATE insurance, should play a more significant role in the funding of litigation in Scotland. While legal expenses insurers, including the Legal Expenses Insurance Group, responded to the Scottish Civil Courts Review Consultation Paper by providing general information about the range and types of cover available, Scotland-specific data was unavailable. Some respondents queried the extent of the BTE legal expenses insurance market penetration in Scotland and suggested that it was less developed than in England and Wales, but no information was offered in support.

7.3 Information as to the role that BTE insurance currently plays in the funding of litigation in Scotland remains unclear. There are no published studies that relate solely to Scotland or provide figures that are broken down by constituent parts of the UK. Indeed, since insurance is a matter reserved to the Westminster Government for the purpose of contributing to the preservation of common markets for financial services across the UK, [157] there might be little incentive to do this. BTE insurance providers also operate on a UK wide basis but collect and collate their data quite differently, although the Association of British Insurers is now trying to remedy this.[158]

7.4 Research conducted in Scotland in 2001 found that just 1 percent of respondents who had incurred legal expenses had been supported by legal expenses insurance.[159] It is not known how many BTE insurance policies were held in Scotland at that time or what proportion of the adult population held them, although BTE insurance policies did increase by more than 500 percent in the UK between 1998 and 2008. By contrast, 21 million legal protection policies were issued in Germany in 2008 and 42 percent of the population (81 million adults and children) was covered by them. Germany accounted for 45 percent of the

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[155] After the event insurance is a type of insurance where cover is taken out after the occurrence of the event that gives rise to court proceedings. It covers the risk of having to pay an opponent's legal expenses in the event of an adverse expenses award.

[156] RIAD International Association of Legal Expenses Insurance (2010), *The Legal Protection Insurance Market in Europe.* Claims expenditure in 2008 was 78 million Euros (approx £58 million) and administrative costs over the same period were 270 million Euros (approx £202 million).

[157] Head A3 of Schedule 5 to the Scotland Act 1998 (c.46).

[158] Communication with the Association of British Insurers (ABI).

[159] H Genn and A Paterson (2001), *Paths to Justice Scotland,* p 172.

total premium income of legal expenses insurance in Europe in 2008, compared with the UK, which accounted for 10 percent.[160]

7.5 BTE legal expenses insurance is commonly incorporated into a household (buildings and contents) policy. It may be offered as an add-on to household or motor vehicle insurance policies and can also be attached to travel insurance. A single policy holder may therefore be covered by BTE legal expenses insurance in duplicate, or even triplicate. Of the 25 million households in the UK in 2010,[161] it has been estimated that approximately 10-15 million have BTE insurance cover.[162] According to a 2008 Mintel Report, 22.7 million adults had taken out BTE legal expenses insurance, either as an add-on to their household, to their motor insurance, or both.[163]

7.6 BTE legal expenses insurance may also be bought on a stand-alone basis, although this is exceptional in the UK. It may be taken out by individuals or businesses to cover the policy holder against any future risk of incurring legal expenses in making or defending a civil claim. A typical BTE insurance policy reimburses the whole litigation cost, including adverse expenses awards. As of 2007, just one firm provided a stand-alone policy for legal expenses insurance and had only 1000 policy holders.[164] By July 2011, several companies were advertising stand-alone BTE legal expenses insurance, although it is not known how many policies have been purchased. In Germany, by contrast, BTE legal expenses insurance is primarily taken out on a stand-alone basis.[165]

7.7 Trade unions, which traditionally fund members in their actions against employers and meet defenders' expenses if they lose, also provide a form of BTE insurance. In addition BTE legal expenses insurance has been extended to small and medium enterprises (SMEs). Abbey Legal Protection, for example, offers bespoke stand-alone BTE insurance to property owners, the construction industry and companies with intellectual property interests.

7.8 Where legal expenses insurance is incorporated into the policy, its cost is not known to customers. Where it is an add-on, the cost of BTE legal expenses insurance to the policy holder may be less than £25 per annum, and frequently far less.[166] By contrast, the cost of stand-alone BTE legal expenses insurance, as provided by its one UK provider in 2007, was

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[160] RIAD International Association of Legal Expenses Insurance (2010), *op cit*. Note that these figures include both BTE and ATE insurance. The UK market is also underestimated since it does not include Lloyds, which accounts for 20% of the UK legal expenses market.

[161] See http://www.statistics.gov.uk/Articles/Social_Trends/social-trends-41-households.pdf

[162] Information provided by insurers to LJ Jackson (2009), *Review of Civil Litigations Costs, Preliminary Report.*

[163] *Ibid*, 13.2.3. Many individuals are likely to hold more than one BTE insurance policy.

[164] FWD (2007), *The Market for 'BTE'Legal Expenses Insurance*, p 52. (Prepared for the Ministry of Justice). See http://www.justice.gov.uk/publications/docs/market-bte-legal-expenses-insurance-a.pdf

[165] M Kilian (2010), 'LEI: Preconditions, Pitfalls and Challenges. Experiences from the world's largest expenses insurance market'. Paper presented to the 8th LSRC Research Conference, Cambridge 2010.

[166] FWD (2007), *op cit*, p 15. Companies charging for legal expenses cover typically charged between £13 and £22 in association with motor policies, and between £15 and £19 in association with household insurance. The costs of a typical £20 BTE motor insurance policy to the customer were broken down to its constituent parts: 95 pence Insurance Premium tax, £1 underwriting, £11 administration £1 marketing and literature and £6 profit. The major sources of profitability for insurance companies are the referral fees of solicitors and medico-legal reporting agencies, which subsidise the cost of the policy to insurers.

£250. In Germany, where the uptake is higher and a variety of stand-alone products have been created, it may cost between 100 EUR for a basic stand-alone policy to over 400 EUR for a comprehensive policy with a low excess.[167]

7.9 While BTE legal expenses insurance policies are relatively inexpensive, their cover is limited. Most have a limit of £50,000 in legal expenses, although a number of companies have more recently been setting their limit of insurance cover at a maximum of £100,000.[168] The standard add-on to a motor insurance policy tends to be limited in scope. It typically assists motorists in a road traffic accident involving their own vehicle, but only where there are good prospects of a claim succeeding.[169] BTE legal expenses insurance cover, when provided as part of a household insurance policy, may cover employment and contract disputes; personal injury; property protection; tax protection; jury service and certain aspects of legal defence, such as a civil claim under section 13 of the Data Protection Act 1998.[170] However, some areas of litigation, such as family and matrimonial, are usually excluded. A product aimed at matrimonial disputes has very recently emerged in the UK, however, and some quite different products are being developed in Germany and Spain.[171]

Solicitor choice and BTE

7.10 One concern of BTE insurance policy holders is that once a claim under a BTE legal expenses insurance policy is initiated, BTE insurers frequently insist on referring the claim to their appointed panels of solicitors. This therefore restricts choice and limits competition. Following its investigation of BTE insurance, concerns as to the restrictive practices of insurance companies precluding consumers from choosing their own solicitors were articulated by Consumer Focus, which recommended *"at the very least, we would wish to see some degree of independence in the initial determination of whether a case is meritorious."*[172] It noted that regulation in Germany precludes in-house lawyers from making an initial assessment of this nature whereas some insurance companies in the UK employ in-house solicitors to make this assessment. Equally, policy holders may not know of the relationship between insurance companies and the panels of solicitors that they use. Where they do know, research in England found that they may feel a lack of control and be left with the suspicion that solicitors had the insurers' interests paramount.[173]

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[167] M Kilian (2010), *op cit.*

[168] See FWD (2007), *op cit*, p 15.

[169] Response of the Legal Expenses Insurance Group to *The Scottish Civil Courts Review Consultation Paper.*

[170] c.29.

[171] As of August 2011, ARAG has sold a legal expenses policy in the UK alongside a pre-nuptial agreement. Its product, 'Divorce Legal Solutions' covers the cost of mediation, issuing or responding to a petition, divorce proceedings up to final decree, as well as ancillary relief, and provides indemnity up to £500,000. See http://www.arag.co.uk/index.asp?m=93&s=155&ss=373&t=Divorce+Legal+Solutions. In Germany and Spain, products are available which do not depend on the existence of a pre-nuptial agreement, but are quite different from each other in terms of the level of indemnity that they offer and the waiting period (since marriage) that they require.

[172] L Bello (2011), *In Case of Emergency: Consumer analysis of legal expenses insurance,* Consumer Focus. See http://www.consumerfocus.org.uk/files/2011/08/In-case-of-emergency.pdf

[173] P Abrams (2002), *In Sure Hands? Funding Litigation by Legal Expenses Insurance: The Views of Insurers, Solicitors and Policyholders.*

7.11 Under the Insurance Companies (Legal Expenses Insurance) Regulations 1990,[174] a legal expenses insurance contract must allow the insured person the freedom to choose a lawyer to defend, represent or serve his interests in any inquiry or proceedings. Insurance companies have generally interpreted the Regulations to mean that freedom of choice only applies from the point proceedings commence, and not to any pre-litigation inquiry. In 2003, this was the subject of examination by the Financial Ombudsman Service, which concluded that *"in the absence of clear guidance from the courts …we would not require an insurer to offer the policyholder a choice of solicitor at the start of the claim."*[175]

7.12 A recent High Court decision has been seen as a major success for policy holders in the long-running battle over the extent to which BTE insurers can fetter their insured's choice of solicitor. [176] In finding for the claimants, a firm of solicitors, against two insurance companies, Burton J held that the insurers were not entitled to reject a policyholder's choice of a non-panel solicitor because the solicitor would not accept payment of their rates. He found that insurers' rates can only be used as a "comparator." Burton J also held that the insurers could not refuse cover where an insured instructed a non-panel firm on the insurer's rates, but then transferred the case to another firm that rejected those rates. He could see no basis upon which the Regulations could be interpreted so that the freedom of choice of the client is limited to one selection at the outset.

7.13 In Germany, insurers 'steer' customers to those firms that have signed favourable remuneration agreements with the insurance industry, for example, by informally recommending them, waiving the excess if favoured firms are instructed, or by arranging first contact with them through a free telephone helpline. Twenty percent of all lawyers undertaking legal expenses insurance work in Germany have entered a remuneration agreement with insurance companies there.[177]

Reviews and research

7.14 LJ Jackson considered that the Insurance Companies (Legal Expenses Insurance) Regulations 1990 should be amended to allow claimants the right of choice of solicitor as soon as a letter of claim is sent on their behalf to the opposing party. In practice, he was confident that many would be content to proceed thereafter using the same panel solicitors. However, in view of the submission of BTE insurers that the present panel arrangements were necessary to keep costs down, LJ Jackson cautioned that before any such amendment was considered, it was necessary to consider its impact on BTE insurance premiums. While placing on record his support for an amendment, he did so on condition that the impact of such an amendment on premiums would turn out to be modest. He therefore did not make this the subject of a recommendation in his final Report.

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[174] SI 1990/1159.

[175] See http://www.financial-ombudsman.org.uk/publications/ombudsman-news/26/legal-expenses-26.htm The European Court of Justice recently affirmed the insured's right under the Directive to choose his own lawyer, even where a large number of other insured have also suffered loss as a result of the same event and wish to make claims: see *Eschig v UNIQA,* Case C-199/08.

[176] *Baxter and Webster Dixon LLP V Equity Syndicate Management Ltd v Motorplus Ltd.*

[177] M Kilian (2010), *op cit.*

7.15 Many respondents to the Scottish Civil Courts Review reported that even where BTE insurance policies were held, policy holders were often unaware of their cover. This was exacerbated by the variability between different providers as to the terms and conditions of their policies. Policy holders were therefore required to read the small print and, even when they did so, they did not know when and how to use BTE insurance cover. Indeed, some respondents argued that premiums remained low precisely because the benefits of the policies were not being utilised. They observed that if BTE legal expenses insurance was to be instrumental in extending access to justice, market penetration was insufficient. It needed to be supplemented by public legal education. If public legal education was successful in promoting the take-up of BTE legal expenses insurance in the funding of litigation, some feared that there would be a profound rise both in the price of premiums and in the number of legitimate claims rejected.

7.16 The findings of a recently conducted research study of BTE policy holders, which was sponsored by Consumer Focus, concur with responses to the consultation of the Scottish Civil Courts Review. BTE products are complex, and their inclusions and exclusions are not standard.[178] It observed that in their recent reports, both LJ Jackson and Lord Young had called for a package of reform that included the wider promotion of BTE insurance as a way of reaching those who might not otherwise have access to justice. Consumer Focus argued that in order for BTE insurance to promote access to justice, it would need to be "*more clearly explained, more consistent in what it offers, better promoted and give customers more choice over their legal representation*."[179]

7.17 It has also been said in submissions to this Review that the limits on the sum insured under BTE legal insurance policies are too restrictive. They are typically limited to £50,000, to include both the client's expenses and any adverse expenses award made in the event of an unsuccessful claim. It was said that it is frequently necessary to top up funding by entering into a speculative fee agreement and to take out an ATE legal expenses insurance policy mid-way through proceedings, when the premium is higher than it would have been if it had been taken out when proceedings were raised. It has also been reported to this Review that BTE insurers may be intrusive and may make unreasonable demands on their panel solicitors during the course of the proceedings. There may also be concerns with regard to exclusions, with insurers declining to cover the claimant because of the expiry of unreasonably short time limits or any other conditions that have been imposed.

7.18 Others have acknowledged that the use of panel solicitors can benefit clients due to their perceived expertise in the handling of such claims. While there may be restrictions imposed by BTE insurance companies, they argued that these are secondary to the services that BTE insurance can provide potential litigants who do not meet the financial criteria for legal aid and who cannot themselves afford to pay for litigation. Under these circumstances, such individuals can make an informed choice as to whether they wish to fund their litigation using their BTE insurance policy, or not litigate at all.

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[178] Bello (2011), *op cit.*

[179] Consumer Focus (2011), 'Millions confused by legal expenses insurance'. See http://www.consumerfocus.org.uk/news/millions-confused-by-legal-expenses-insurance-reveals-new-report

Recommendations of Reviews

7.19 In his Final Report, LJ Jackson recommended that positive efforts should be made to encourage the take up of BTE insurance by SMEs in respect of business disputes and by householders as an add-on to their household insurance policies. The issue of compulsory insurance was considered by him, but dismissed. He was particularly concerned by the conflict of interests that this proposal would generate in a system where the insurer funds both sides of a litigation.

7.20 Mandatory insurance has also been considered in The Netherlands and rejected because of the undue burden that it would put on government in a number of respects: to guarantee access for all; to supervise premiums; to supervise compliance of insurers with a regulatory framework; and to provide safeguards for those who do not take out insurance cover.[180] The Netherlands concluded that direct funding by governments through legal aid might be the cheaper option.

7.21 In Scotland, the Scottish Civil Courts Review concluded that while BTE legal expenses insurance could "play a valuable role as part of a mixed economy of funding for legal advice and litigation", it did not wish to see it made compulsory or promoted at the expense of the legal aid system. It therefore recommended that the Scottish Government should explore with insurance providers the scope for improving public awareness of legal expenses insurance and increasing its voluntary uptake.

Questions for discussion

32. ***Do BTE insurers adversely influence the conduct of the litigations which they are funding?***

33. ***Is it appropriate for a lawyer in the direct employment of an insurance company to assess whether a policy holder's claim falls within the terms of the policy?***

34. ***Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage?***

35. ***Should BTE insurance be encouraged and, if so, what suggestions would you make to address some of the criticisms levelled against it?***

[180] P Van der Grinten, 'The Netherlands: Policy Observations' in C Hodges, S Vogenhauer and M Tulibacka (eds) (2010), *The Costs and Funding of Civil Litigation: A Comparative Perspective*, Hart: Oxford, p 425. In the Netherlands, over 2 million households have a BTE policy and 1.4 million policies are sold in relation to motor insurance.

CHAPTER 8: SPECULATIVE FEE AGREEMENTS

8.1 Under speculative fee agreements, clients are only required to pay their solicitors' fees if the litigation is successful. Solicitors in Scotland have always been entitled to enter into a speculative fee charging agreement with clients on whose behalf litigation is conducted. Acting on a speculative basis has been seen as offering access to justice for members of middle income groups, who are neither eligible for legal aid nor able to fund their litigation privately.

8.2 Following the introduction of section 61A of the Solicitors (Scotland) Act 1980[181] solicitors may agree to act on a speculative basis in three different ways. Firstly, they can agree to accept party and party expenses from the other side with an uplift payable by their client of up to 100 percent of the fee element payable by the other side, in the event of success.[182] Secondly, they can agree to accept agent and client expenses in the event of the case being successful, without any percentage increase. This will cover work done before the start of the litigation together with any other work carried out by the solicitor which the auditor considers to be fair and reasonable. Thirdly, solicitors may enter into a written fee agreement with clients with a stated hourly rate and an allowance for a percentage uplift of the success fee based on an account prepared on a solicitor and client basis. Although a client is not able to dispute the agreed hourly rate, any fee may be challenged on the grounds that the number of hours worked is disputed or excessive, the work charged was not instructed or not done, or that the fee is not fair and reasonable.[183]

8.3 It has been commented that speculative fee agreements may offer solicitors incentives that are not always in the best interests of the client. Although no specific reports have been made to this Review, there may be potential conflicts of interests between solicitor, counsel and client when litigation is funded under speculative fee agreements.[184] These are only enhanced when agreements have been made to an uplift. At present, there is no regulation of the provisions made under section 61 A, although they may be subject to audit at taxation on the overall reasonableness of the fee, as described above.

8.4 Should they be unsuccessful, clients may still be liable for the expenses of their opponents under a speculative fee agreement. After the Event ("ATE") insurance may be taken out to cover litigants against this risk, although the premium is not recoverable from the unsuccessful party but must be absorbed either by clients or by solicitors.

8.5 Research published in 1998 to examine the funding of personal injury litigation in Scotland found that speculative fee agreements were relatively rare.[185] However, by 2009, a large proportion of actions for personal injury and damages in Scotland were reported to be

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[181] Section 61A into the Solicitors (Scotland) Act 1980 (c.46) was inserted by section 36 of Tthe Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40).

[182] Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992, SI 1992/1879 and Act of Sederunt (Rules of the Court of Session Amendment No. 8)(Fees of Solicitors in Speculative Actions) 1992 SI 1992/1898.

[183] A Paterson and B Ritchie (2006), *Law, Practice and Conduct for Solicitors,* Chapter 10.

[184] For example, see George Moore QC http://www.casecheck.co.uk/tabid/1438/default.aspx?article=George+Moore+QC+speculates+on+conflicts%20401

[185] J Blackie et al (1998), *Funding Issues in Personal Injury Litigation,* Scottish Office, CRU.

funded on the basis of speculative fee agreements of one kind or another. This is despite the failure of Compensure, an ATE insurance scheme set up by the Law Society of Scotland,[186] the reportedly high cost or unavailability of ATE insurance premiums in Scotland and the fact that success fees and ATE insurance premiums are not recoverable.

Success fees

8.6 Little is known about the range of success fees charged in Scotland under speculative fee agreements. The Review has been informed that, in practice, most solicitors charge uplifts of less than 100 percent. Indeed, some may charge none. Where fees are recovered as part of a global settlement the ability to calculate the recovered fees element may be problematic.

8.7 The nearest equivalent in England and Wales to the Scottish speculative fee agreement is a conditional fee agreement ("CFA"). The Conditional Fee Agreements Order 1995[187] likewise provided that the maximum increase that lawyers could claim for "advocacy or litigation services" in a successful case was 100 percent. The intention was that the payment to solicitors of success fees in successful actions would compensate solicitors for not receiving any fee at all in unsuccessful actions. The Law Society of England and Wales also recommended that a voluntary cap should be applied to ensure that the total deduction for success fees would not be greater than 25 percent of the damages recovered by the litigant. This provision was incorporated into the Law Society's model CFA agreement. On the principle that success fees are to pay for the loss of some cases, the Law Society also provided guidelines to solicitors and barristers as to how to assess risk, while preserving a cap on success fees at 25 percent of damages to ensure that claimants' damages would not be decimated by the success fees that they were required to pay. Once legislation was introduced in England and Wales in 2000 to provide for the recoverability of success fees (see paragraph 8.13 below), claimants were no longer in need of protection with regard to the preservation of their damages, and the model and guidelines were abolished. LJ Jackson's recommendations with regard to recoverability (see paragraphs 8.14 - 8.16 below) have been oriented to returning to the pre-2000 status, whereby claimants and lawyers were subject to the discipline that paying success fees out of damages imposes.

8.8 It is also not known how success fees are assessed and charged in Scotland and whether they are modified by an assessment of the risk, the complexity of the case, the value of the claim or the damages recovered. There is anecdotal information to suggest that some solicitors' firms may treat different clients differently. So, for example, solicitors may be under an obligation, in terms of their agreement with a trade union or an insurance company from whom cases are referred, not to charge their members or customers success fees. If success fees are then taken only from the damages recovered by clients not funded by a union or insurance company, it may be said that these clients cover the risks of all clients funded by speculative fee agreements.

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[186] See D Hartley (2002), 'Conditional Fee Agreements Insurance: Lessons of Scotland - an Insurer's Perspective,' *Journal of Personal Injury Law 4*, 399-404.
[187] SI 1995/1674.

After the event insurance ("ATE")

8.9 The capacity of speculative funding to promote access to justice may depend on the availability of reasonably priced and proportionate ATE insurance. There is anecdotal information to suggest that the cost of ATE insurance premiums in Scotland is higher than in England and Wales. In some cases, and particularly in clinical negligence cases, it has been reported to this Review that the cost of an ATE insurance premium, which is only available to a few practitioners, can rise to 40-60 percent of the sum sought. Since the premium will not be recoverable, and since many claimants would neither be willing nor able to assume the risk of paying their opponents' expenses, the cost of the premium for potential pursuers may be prohibitive.

8.10 Several explanations have been put forward for the high cost of ATE insurance premiums. Some have attributed it to the size of the Scottish litigation market. Others have attributed it to the fact that solicitors do not buy ATE premiums in low risk situations in Scotland, precisely because they are not recoverable. Indeed this, together with the lack of appropriate risk assessment, was responsible for the failure of the Law Society of Scotland's initiative in 1997 to provide reasonably priced ATE insurance through Compensure.

8.11 By virtue of the high cost and non-recoverability of ATE premiums, it has been reported that ATE insurance is unlikely to provide a solution to the problem of funding low value actions: the lower the expected compensation, the lower the cost-benefit of an ATE insurance premium. Nevertheless, pursuers with lower value claims may not be able to risk the alternative of proceeding without ATE insurance, given their potential liability to pay the other side's judicial expenses should they lose. ATE policies are also said to be not straightforward to operate. For example, insurers may scrutinise the circumstances that led to a claim on the policy, and disputes may arise as to the reasonableness of continuing to proceed with a claim.

Recoverability of success fees and ATE insurance premiums

8.12 The Scottish Civil Courts Review considered the introduction of recoverable success fees and ATE insurance premiums in Scotland and whether that would broaden access to justice. It noted that several investigations, including the Jackson Review of Costs and Funding of Civil Litigation, were presently underway in England and Wales, and were likely to throw some light on the issue. It concluded that it would therefore be premature to recommend any changes to the current regime in Scotland before LJ Jackson reported.

8.13 In 1998, the Lord Chancellor's Department stated its intention to withdraw legal aid, including advice and assistance, from all personal injury actions (excluding medical negligence) and many other categories of civil actions that involved monetary claims, and extending CFAs to replace legal aid funding except in those cases which were in the public interest (such as housing claims and judicial review).[188] Following consultation, it was considered that CFAs may be more attractive to claimants if their ATE insurance premium and success fees were recoverable from the losing party. This was partly based on the view

[188] Lord Chancellor's Department (1998), *Access to Justice with Conditional Fees.*

that subtracting them from damages may be a denial of a claimant's rightful compensation and partly on the need to compensate for the withdrawal of legal aid. The Access to Justice Act 1999[189] extended the provisions of the Courts and Legal Services Act 1990[190] to cover all civil cases except those involving welfare of children issues, as well as proceedings, such as arbitration.[191] It also provided for the recoverability of ATE insurance premiums and success fees.

8.14 LJ Jackson found widespread agreement that the recoverability of ATE insurance premiums and success fees has had far reaching effects on the cost of litigation in England and Wales. He concluded that while their recoverability had promoted access to justice for claimants, they had massively increased the costs burden upon defendants. He was of the view that the prevalence of claims management companies and the operation of the insurance industry with respect to ATE insurance both had to be considered in the context of recoverable success fees and ATE insurance premiums. At the same time, the insurance industry was conducting a wave of satellite litigation in relation to recoverable ATE insurance premiums and success fees, which was responsible for increasing the cost of litigation.[192]

8.15 LJ Jackson recommended that success fees should no longer be recoverable in England and Wales. Since success fees, where charged, would then be taken from damages, this would give claimants a financial interest in controlling the costs incurred on their behalf. To regulate the amount taken from damages and to compensate for this, he recommended a cap on success fees set at 25 percent of the damages (other than for future care and loss) in personal injury cases and a 10 percent increase in general damages. This would revert to the voluntary cap recommended by the Law Society of England and Wales prior to the implementation of the Access to Justice Act 1999 (see 8.7 above). He also recommended that the maximum success fee that a lawyer may agree with a client under a CFA should remain at 100 percent of base costs.

8.16 Likewise, LJ Jackson recommended the abolition of ATE insurance premium recoverability in personal injury, clinical negligence, judicial review and defamation cases, as well as the self-insurance element by membership organisations, equivalent to the ATE insurance premium. At the same time, he recommended a one way costs shifting regime whereby defendants pay the successful claimants' costs, but each side bears its own costs when claimants lose. This would benefit claimants by eliminating the risk of losing and thereby making ATE insurance redundant. It would also benefit defendants, who would no longer be required to reimburse ATE insurance premiums, which they had calculated to be considerably greater than the judicial costs recovered when they were successful. To ensure that a one way costs shifting regime did not encourage frivolous litigation, LJ Jackson also recommended that it be qualified, with exceptions made on behaviour grounds in cases

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[189] c.22

[190] c.41

[191] Zander (2003), 'Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?' *DePaul Law Review,* p 634.

[192] Litigation where there is no dispute between parties as to liability or damages, but only with regard to costs. See, for example, *Callery v Gray (No. 1)* [2002] 1 W.L.R. 2000, *Callery v Gray (No. 2)* [2001] 1 W.L.R. 2142 and *Halloran v Delaney* [2003] 1 W.L.R. 28.

where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings; and on financial means grounds whereby the "very wealthy" would be at risk of paying costs.

8.17 Responding in March 2011, the Ministry of Justice accepted Lord Jackson's recommendations and stated its intention of abolishing the general recoverability of ATE insurance premiums, including the cost of trade unions and other membership organisations of insuring themselves, and success fees from the losing side.[193] This would enable England and Wales to return to the position it was in during the early 1990s, when CFAs were first allowed in civil litigation. It accepted LJ Jackson's package of reforms, but made one change to his key recommendations by allowing for the recoverability of ATE insurance premiums to cover the cost of expert reports in clinical negligence cases. This would provide a means of funding expert reports and ensuring that meritorious claims could be brought by those who cannot afford to pay for experts' fees upfront. The Ministry of Justice also did not follow LJ Jackson's recommendation that a qualified one way costs shifting regime be applied to a number of cases, and advised that the new regime would not be extended beyond personal injury actions, (which includes clinical negligence cases), at this stage. These provisions were introduced into the House of Commons on 21 June 2011 as part of the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-11.[194]

8.18 As a consequence of the withdrawal of recoverable success fees and ATE insurance premiums in England and Wales, other changes are being made to promote access to justice. Besides the introduction of a one way costs shifting regime for personal injury cases, these include a cap on success fees at 25 percent of damages and a 10 percent increase in general damages.

Questions for discussion

36. ***Are there any aspects of speculative fee agreements that require regulation?***

37. ***What should be the maximum uplift for success fees in Scotland?***

38. ***Should there be a cap on success fees as a percentage of damages? If so, at what percentage and at what level and heads of damages?***

39. ***Should success fees be recoverable in Scotland? If so, under what circumstances?***

40. ***Should ATE insurance premiums be recoverable in Scotland? If so, under what circumstances?***

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[193] Ministry of Justice (2010), *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales,* Consultation Paper 13/10, Cm 8947 and Ministry of Justice (2011) *Reforming Civil Litigation Funding and Costs in England and Wales- Implementation of Lord Justice Jackson's Recommendations – The Government Response,* Cm 8041.

[194] Clause 41 prevents the recoverability of a success fee from a losing party under a court's costs order. Clause 43 of the Bill repeals section 29 of the Access to Justice Act 1999 and disallows recoverability of the ATE premium. *Subsection (1)* of the Bill inserts a new section 58C into the Courts and Legal Services Act 1990 and limits the recoverability of insurance premiums to certain clinical negligence proceedings, allowing recovery of the premium to the extent that it relates to the costs of an expert report.
See http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0205/2012205.pdf

41. ***If success fees and ATE insurance premiums remain irrecoverable in Scotland, is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees and insurance premiums? If not, what are the alternatives?***

CHAPTER 9: DAMAGES BASED AGREEMENTS ('CONTINGENCY FUNDING')

9.1 Contingency funding refers to a type of no win/no fee agreement under which a lawyer's fee is calculated as a percentage of the client's damages if the case is won, but no fee is payable if it is lost. In recent years, many have begun to refer to this mode of funding as a damages based agreement ("DBA"), to distinguish it from a fee based agreement where the lawyer may recover an agreed uplift of fees on success.

9.2 DBAs are commonplace in the USA, most frequently in personal injury cases, although they can also be found in a wide variety of other cases. Their method of calculation varies, but they are usually calculated as a percentage of the award or negotiated settlement, frequently with a sliding scale according to the stage at which the case is concluded.

9.3 A DBA, whereby a solicitor or an advocate undertakes work in return for a share of the proceeds of the settlement of a claim, is void and unenforceable in Scotland. Such agreements are thought to be contrary to the interests of both the public and the legal profession. The rule has been reviewed several times. The Royal Commission on Legal Services in Scotland, which reported in 1980,[195] was persuaded by the argument that DBAs may encourage unethical behaviour, while the Law Society of Scotland's response to proposals on contingency fees was described as "lukewarm"[196] when the matter was considered during the passage of the Legal Services (Scotland) Act 2010.[197]

9.4 The rule in Scotland applies only to solicitors and advocates. Other parties, such as a solicitor acting in the capacity of a director and shareholder of a company hired to assist in pursuing a claim, may agree to fund or handle a claim in return for a percentage of any sum that might be awarded. Thus, a client may be advised by a solicitor that he has a good personal injury claim. When the issue of funding the expenses of pursuing the claim is raised, the solicitor may indicate that he is not allowed to enter into a damages based agreement with the client. However, he could then refer the client to a claims management company of which the solicitor is a director and shareholder, and which operates from the same offices as the solicitor. The client could then be introduced by the solicitor to a member of staff of the claims management company and enter into a damages based agreement with the company. The company would in turn instruct the solicitor, whom the client first met, to pursue the client's claim. If the claim is successful the solicitor is paid for his services out of the fee to which the claims management company is entitled. The solicitor may also participate in the balance of the claims management company's fee through his shareholding in the company.

9.5 By setting up claims management companies that then refer cases to them, solicitors may therefore be able to share the benefits that DBAs offer claims management companies. Accordingly, the rule against a solicitor entering into a damages based agreement can be easily

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[195] *Royal Commission on Legal Services in Scotland* (The "Hughes Commission") (1980), Cmnd 7846.
[196] See http://www.scotland.gov.uk/Resource/Doc/254431/0096875.pdf
[197] asp 16.

and successfully circumvented. On one view, if a rule that prohibits lawyers from sharing in the proceeds of settlement of a claim can be easily circumvented, it should be repealed. Alternatively, if the rule gives valuable protection to members of the public, it should govern all parties who offer to pursue personal injury, or other claims, on behalf of members of the public.

9.6 We understand that arrangements the same as or similar to the above are not unknown in Scotland. Such arrangements do enable potential litigants to access a source of funding when they may not otherwise be able to do so. Indeed, the Inner House in *Quantum Claims Compensation Specialists Ltd. v Powell* held that it may be of considerable importance to claimants to obtain assistance of this kind if they are to vindicate their claims. [198]

9.7 Concern was expressed during the passage of the Legal Services (Scotland) Act 2010 as to the lack of regulation of claims management companies operating in Scotland. Where claims management services are offered by a firm of solicitors, they are regulated by the Law Society of Scotland. Where the claims management company employs a solicitor, that solicitor is also regulated by the Law Society of Scotland. Otherwise, the services of a claims management company operating in Scotland are unregulated. This can be contrasted with the position in England and Wales where claims management companies are regulated by the Claims Management Services Regulator who, amongst other matters, sets and monitors standards of competence and professional conduct, and ensures that arrangements are made for the protection of users. [199]

9.8 As part of its consideration of the regulation of legal services in Scotland during the passage of the Legal Services (Scotland) Act 2010, the Scottish Government considered whether there is a need for regulation of claims management companies operating in Scotland. It reported little objective evidence of malpractice in Scotland but acknowledged that there is some unease amongst professional and consumer bodies about the lack of regulation of the claims management industry, and the potential to exploit that to the detriment of the consumer. [200] The Scottish Government concluded that the limited evidence available did not justify the expense to the taxpayer of establishing a new regulatory framework. It considered that the fact that legal aid is still available for personal injury cases in Scotland appeared to have inhibited the widespread growth of claims management companies - unlike the position in England. The then Minister for Community Safety advised the Justice Committee of the Scottish Parliament that it *"might be appropriate to consider the regulation of claims management companies in tandem with the issue of contingency fees and no-win, no-fee cases, because consideration of such a scheme would, by definition, involve an analysis of how claims are managed and pursued in Scotland at the moment."* [201] That consideration forms part of the remit of this Review.

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[198] *Quantum Claims Compensation Specialists Ltd. v Powell* 1998 SC 316.

[199] See the provisions of the Compensation Act 2006 c.29.

[200] Scottish Government (Dec 2008), *Wider Choice and Better Protection: A consultation paper on the regulation of legal services in Scotland*, Chapter 9. See http://.scotland.gov.uk/Publications/2008/12/29155017/0

[201] Scottish Parliament – Justice Committee Official Report 12 January 2010.
See http://www.scottish.parliament.uk/s3/committees/justice/or-10/ju10-0202.htm#Col2598

9.9 Those respondents to the Scottish Government's consultation who were in favour of regulation considered that it would create a level playing field in the business area and address the issue of cross-border inconsistency. It was also considered that regulation would promote good practice. Those opposed to regulation thought that whilst the introduction of the conditional fee arrangement in England and Wales had probably increased access to justice for genuine claimants, it appeared, ironically, to have encouraged fraudulent claims and also took up vast amounts of time in arguments about costs and the level of success fees.[202]

9.10 In its consultation paper the Scottish Government proposed three options for regulation. First – do nothing. Second – regulation by a non-departmental public body ("NDPB"). Third – introduce a regulatory framework similar to that which exists in England and Wales. In choosing to do nothing, the Scottish Government did acknowledge that there was a risk that unscrupulous service providers could operate unregulated with little consumer protection and that dubious service providers could move to Scotland to avoid the regulation in England and Wales.

9.11 Potentially significant developments in the legal services market are about to take place. Alternative Business Structures are likely to be approved during the course of 2011;[203] the budget for legal aid is to be reduced[204] and the UK Government has announced its intention to ban referral fees in England and Wales.[205] These could lead to significant changes in the structure of the claims management market. These developments, in turn, require that further consideration be given to whether claims management companies operating in Scotland should be regulated.

9.12 There has been an increasing interest in damages based funding in England and Wales, where it is "unlawful and contrary to professional ethics" in contentious business.[206] Barristers are also not permitted to act on the basis of such agreements.[207] However, DBAs are permitted for non-contentious business, including proceedings in all tribunals other than the Lands Tribunal and the Employment Appeal Tribunal. Growing interest in this mode of funding has been attributed partly to the satellite litigation that has grown up around CFAs and the recoverability of success fees. CFAs have been criticised for their lack of transparency while DBAs are, purportedly, something everyone can understand. Alternative models and other funding options have also been sought in view of the perceived risk of CFAs no longer being available in the event of the non-recoverability of success fees and ATE insurance premiums.[208]

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[202] Analysis of the Responses to the Consultation on the Regulation of Legal Services in Scotland. See http://www.scotland.gov.uk/Publications/2009/10/29090306/11

[203] Journal of the Law Society of Scotland (October 2011) '*ABS regime slips to the New Year*'.

[204] The Scottish Government (October 2011), *A Sustainable Future for Legal Aid.*

[205] See Chapter 6.

[206] Section 59 of the Solicitors Act 1974 and Rule 2.04 of the Solicitors' Code of Conduct 2007.

[207] Rule 405 of the Code of Conduct of the Bar of England and Wales.

[208] *The Lawyer* (10 November 2008). The context of this remark was with regard to a Claims Process Consultation Paper, published by the Ministry of Justice. In response to a proposal to remove the recoverability of ATE insurance premiums from cases that settle, 20% of respondents were of the view that the ATE market might

9.13 It was in this context that the Civil Justice Council published its Paper *The Future of Litigation - Alternative Funding Structures* in June 2007. If the ATE insurance market were to cease to offer its current range of protection to potential litigants, the Civil Justice Council observed that more vulnerable citizens (who might previously have qualified for legal aid) would be *"left without access to justice, or will be steered towards using the services of claims managers whose charging method is to take costs from damages recovered*."[209]

9.14 In their report to the Civil Justice Council of November 2008, Moorhead and Hurst observed that multi-party actions and higher value cases may benefit from the introduction of DBAs, although it had the potential to restrict access to justice in low value cases.[210] Nevertheless, they found that lower value claims were frequently cross-subsidised by damages based recoveries in higher value cases, on a "swings and roundabouts" basis. They found that DBAs in the US were not generally extravagant, and they did not necessarily promote high rates of litigation, frivolous claims and a litigation culture. Nor was there evidence that they generated improper incentives. They concluded that DBAs could operate effectively in England and Wales. If there was no cost shifting, contingency funding may provide a cleaner and less complicated model since it would wipe out the need for summary and *ex post facto* costs assessment, as well as most satellite litigation around costs. However, they saw merit in retaining some aspects of costs recovery in a DBA funding regime.[211]

9.15 DBAs were given considerable attention by LJ Jackson, who first looked to the experience of employment tribunals, where litigation in England and Wales is frequently funded on this basis. He observed that personal injury lawyers and a number of other groups were opposed to DBAs, but strongly suspected that this was because of their satisfaction with the present CFA regime. Once that regime is changed by the withdrawal of the recoverability elements of CFAs and the introduction of a 10 percent increase in general damages, he found it likely that some claimants would benefit from a DBA. He therefore recommended that solicitors and counsel should be permitted to enter into DBAs with their clients, who should take independent advice to ascertain the benefits of a DBA. Clients should have other forms of protection, such as that contained within the regulations that the Ministry of Justice proposes to introduce with respect to DBAs in tribunal proceedings. He also recommended that DBAs must state at the outset how any adverse costs orders will be met and that costs should be recoverable from opposing parties on the conventional basis and not by reference to the DBA.

9.16 The Ministry of Justice agreed with most of LJ Jackson's recommendations for DBAs and welcomed them as a useful additional form of funding for claimants. It considered that DBAs should be capped at 25 percent of damages (excluding for future care and loss) in personal injury cases. Successful claimants should recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants, as is the case for claims funded by

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collapse if the proposed reforms were introduced, 20% thought it would adapt, and 40% predicted that there would be a considerable increase in ATE premiums if the proposal was adopted.

[209] Civil Justice Council (2007), *The Future of Litigation- Alternative Funding Structures.*

[210] R Moorhead and P Hurst (November 2008), *Contingency Fees: A Study of their operation in the USA – a Research Paper informing the Review of Costs,* Civil Justice Council.

[211] *Ibid.*

CFAs. The costs recovered from the losing side would be set off against the amount due under the DBA, reducing the amount payable by the claimant to any shortfall between the two. It was not persuaded, however, that there should be a requirement for a claimant to obtain independent legal advice in respect of a DBA.

9.17 Clause 42 of The Legal Aid, Sentencing and Punishment of Offenders Bill amends section 58AA of the Courts and Legal Services Act 1990, which currently provides that DBAs are enforceable only when they relate to employment matters. The effect of the Clause is to enable persons providing advocacy services, litigation services or claims management services to use DBAs in most types of civil litigation cases where it is currently possible to use a CFA. Thus, it would be possible to use a DBA in personal injury or commercial actions, but not in criminal or family proceedings. Like CFAs, the amount of the payment that lawyers may take from damages is to be capped at 25 percent of damages (excluding for future care and loss).

9.18 DBAs may have some advantages over speculative (fee-based) funding. Unlike speculative funding which may incentivise solicitors towards adopting an approach that is most cost effective for them, DBAs may incentivise solicitors to seek the best possible financial outcome for their clients. This usually matches the best possible outcome from their client's point of view, although that may not always be the case. For example, some clients might prefer an earlier, rather than a higher value, settlement, particularly where their current needs are high or their life expectancy is short, while their solicitor's preference may be to 'hold out for more'. Hence, contingency funding may also lead to a conflict of interest between solicitors and their clients.

9.19 Should a conflict of interest arise in either a speculative or a contingency funding arrangement, it could be argued that the conflict is more transparent to the client under a DBA than under a speculative fee agreement. It has also been argued that DBAs err on the side of proportionality, while speculative agreements provide lawyers with a built-in incentive to increase their costs. This is particularly the case where success fees are recoverable from the other side, as is presently the position in England and Wales.[212]

Questions for discussion

42. ***Should the law be changed to allow solicitors and counsel to enter into DBAs?***

43. ***Should claims management companies continue to be entitled to enter into DBAs?***

44. ***If DBAs are permitted in Scotland:***

- ***a. is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees?***
- ***b. should there be a cap on the percentage of the damages that lawyers are entitled to charge?***

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[212] M Zander (Spring 2003), 'Will the revolution in the funding of civil litigation in England eventually lead to contingency fees?' *DePaul Law Review.*

c. *should the percentage recoverable under a DBA be applicable to all heads of loss?*

d. *should there be an increase in the level of damages awarded? If so, by what percentage and how is this to be achieved?*

e. *what forms of protection may be required for clients entering into such an agreement?*

45. *If the current prohibition on solicitors and counsel entering into DBAs is retained, should steps be taken to prevent its circumvention by the formation of a claims management company in which solicitors are directors or shareholders?*

46. *Should there be regulation of claims management companies operating in Scotland? If so, what are the mischiefs to be addressed and how should regulation be achieved?*

CHAPTER 10: THIRD PARTY FUNDING

10.1 Third party funding is the provision of funds by individuals or companies that have no other connection with the litigation. In this sense, the Legal Aid Fund, legal expenses insurance,[213] Trade unions and professional associations all provide third party funding. With the exception of a party who is in receipt of civil legal aid,[214] there is no obligation to disclose to the court, or to an opponent, how the litigation is to be funded. In England and Wales a party who wishes to claim an additional liability, such as a percentage increase or an insurance premium, in respect of a funding arrangement,[215] must give any other party information about that funding arrangement.

10.2 Third party funders may provide the full legal expenses of the proceedings, part fund them, or fund only the disbursements. Protection from adverse expenses is often provided. In some circumstances, the funder may provide no direct funding at all but only agree to cover a party's potential exposure to adverse expenses. Should the litigation be successful, some third party funders may also expect to make a profit by way of a return for their outlay and the risk attendant on their investment. This type of commercial enterprise may be differentiated from legal expenses insurance, which invests in litigation by way of a premium taken out prior to – or during – litigation. Like speculative and contingency funding, but unlike legal expenses insurance, third party funding is financed following the success of the action. However, unlike speculative and contingency funding where those who reap the rewards of success are the lawyers conducting the litigation, the interest of third party funders in the litigation is primarily a financial one.

10.3 Third party funders may calculate their success fee in a number of ways. It may be assessed by a percentage contingency fee, perhaps in addition to any expenses recovered from the other party. Other third party funding agreements may stipulate a return based on a multiplier of the investment provided.[216] The fee cannot be recovered as part of an expenses award and is therefore payable by the client out of the damages or other proceeds received following success.

10.4 There is no prohibition or restriction in Scots law on a litigation being funded wholly, or in part, by a third party. In *Quantum Claims Compensation Specialists Ltd v Powell,*[217] it was held that neither common law nor statute prohibited or curtailed an agreement by which a third party could fund litigation in return for a percentage of any compensation, even where the director of a third party funder happened to be a solicitor. Indeed, the Inner House held that if claimants are to vindicate their claims, it may be of considerable importance for them to obtain assistance of this kind by granting a percentage share of what is eventually recovered in return for the risk and expenditure undertaken.

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[213] This includes BTEs and ATEs, and is quite different from liability insurance, where the insurer has an interest in the outcome of litigation. Many personal injury, property damage and professional negligence claims are defended at the expense of the defender's liability insurance.

[214] Act of Sederunt (Civil Legal Aid Rules) 1987 SI 1987/492.

[215] Funding arrangement is defined in CPR Part 43.2 and includes conditional fee agreements which provide for a success fee, insurance policies or an agreement with a membership organisation.

[216] Civil Justice Council (2007), *The Future of Litigation- Alternative Funding Structures,* p 53.

[217] 1998 SC 316.

10.5 LJ Jackson scrutinised the provision of third party funding.[218] He identified the largest providers in the UK[219] who informed him that since third party funders invest in litigation, they must generate a profit while at the same time covering their costs with respect to 'won' cases (in so far as they are not recoverable from the other side) and 'lost' cases. This requires that they select cases with considerable care, quantified by some providers as at least 70 percent chance of success.[220] They also only select high value cases, with some taking on cases with a minimum value of £150,000 but others no less than £500,000 and even £25,000,000.[221] Since they are potentially liable for the other side's costs, they either require that ATE insurance cover is taken out or they may consider absorbing the liability of the opponent's costs under the funding agreement, at a high additional cost.[222]

10.6 In his Preliminary Report, LJ Jackson identified a sea change in England and Wales in the approach of the courts to third party funding.[223] Insolvency cases were commonly supported by it and there was a growing use of it in professional negligence cases. Third party funding was also increasingly employed in group actions, where the overall sums at issue were sufficient. Patent and IP cases were unattractive because of their legal and technical complexity, while construction cases were not suitable because of their technical complexities and the mass of claims and counterclaims. Commercial cases had been more commonly funded by third party funding since 2005 but it was infrequently used in the Commercial Court. LJ Jackson found that third party funding was not normally available in small business disputes because the sums in issue are modest, nor in defamation cases since the level of damages is generally too low. There was no third party funding for personal injury claims in England and Wales.[224]

10.7 Funders reported to LJ Jackson the benefits that third party funding may bring: it is likely to promote settlement, partly because defendants appreciate that claimants funded by third party funding are likely to see the case through, and partly because an independent party (the funder) has looked at the case objectively and assessed its prospects of success. Funders also reported, however, that they may wish to be involved in decisions and, failing that, could withdraw or refuse to extend funding.

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[218] LJ Jackson (2009), *Preliminary Report,* Chapter 15 and *Final Report,* Chapter 11.

[219] They include Allianz Litigation Funding, IM Litigation Funding, Claims Funding International Plc and Harbour Litigation Funding, though new providers were emerging, such as Therium Capital plc and 1st Class Legal Ltd, backed by hedge funds and an investment fund respectively.

[220] One provider reported that it had achieved a success rate of 78% over 53 cases.

[221] *The Judge* (2011) reports that funders typically look for 1. good prospects of settlement or win at trial 2. credit worthy defendants 3. a good ratio of costs to damages to ensure recovery of success fee 4. an understanding as to how any potential adverse costs exposure is to be funded. See http://www.thejudge.co.uk/index.php/third-party-funding

[222] A funder may receive in the region of 40% of the proceeds if the action is successful by accepting liability for any adverse costs in the absence of ATE insurance. LJ Jackson identifies *Stone & Rolls Ltd (in Liquidation) v Moore Stephens* [2009] 1 A.C. 1391 as a case in point.

[223] LJ Jackson noted that the present state of law England and Wales was summarised by Coulson J in *London & Regional (St. George' Court) Ltd v Ministry of Defence* [2008] EWHC 526 TCC.

[224] Rule 9.01(4) of the Solicitors' Code of Conduct 2007 prohibits a solicitor from acting in personal injury claims in association with a funder who will receive a percentage of the damages. A new Code of Conduct, which removes this prohibition and instead outlines principles that apply in the context of fee sharing and referrals, came into force on 6 October 2011.

10.8 In his Final Report, LJ Jackson concluded that third party funding was beneficial for 5 reasons:

- It provides some parties with the only means of funding litigation, thereby promoting access to justice
- It filters out unmeritorious cases, which is to the benefit of opposing parties
- It is better for a successful claimant to recover a substantial part of his damages than nothing at all
- It does not impose additional financial burdens upon opposing parties (unlike CFAs)
- It will become more important in England and Wales as a means of financing litigation if success fees under CFAs become irrecoverable.

10.9 LJ Jackson therefore recommended that:

- A satisfactory voluntary code, to which all litigation funders subscribe, should be drawn up. This code should contain effective capital adequacy requirements and should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation;
- The question whether there should be statutory regulation of third party funders by the FSA ought to be re-visited if and when the third party funding market expands;
- Third party funders should potentially be liable for the full amount of adverse costs, subject to the discretion of the judge.[225]

10.10 The Civil Justice Council in England and Wales formed a Working Party in 2007 to consider the proper regulation of third party funding. A Code of Conduct was drafted and was then revised following LJ Jackson's recommendations. In July 2010 a consultation on the Self Regulatory Code for Third Party Funding was opened inviting civil justice stakeholders to comment on a self regulatory code of conduct for third party funders, and the constitution of a self regulatory association. A summary of the responses was published in June 2011. Those responses are currently being considered with the intention of producing a final version of the Code.[226]

10.11 It is not known the extent to which third party funders are operating in Scotland and what kinds of cases they are funding. If third party funding were to become prevalent, then regulatory issues are likely to arise in this jurisdiction, as they have in England and Wales.

[225] LJ Jackson (2009), *Final Report*, Chapter 11: Recommendation 6.1.
[226] See Third Party Funding webpage of the Civil Justice Council: http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/third-party-funding

Questions for discussion

47. ***What are the risks/potential abuses involved in third party funding and how might these be addressed?***

48. ***If regulation is desirable, what form(s) should it take?***

49. ***Should a party to a litigation who has entered into a funding arrangement be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances?***

CHAPTER 11: ALTERNATIVE SOURCES OF FUNDING

Legal Aid

11.1 It is not the purpose of this Review to examine the current legal aid scheme in Scotland. The availability of legal aid as a source of funding litigation is an important element in securing access to justice. It is the Scottish Government's stipulated ambition to *"maintain a fair, high quality and equitable system which maintains public confidence at an affordable and sustainable level of expenditure. "*[227] Part of this means moving *"closer to a system in which legal aid is seen as 'funder of last resort'."*[228] It is not its intention to make major changes to the scope of legal aid. The Scottish Government is of the view *"that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society."*[229]

11.2 The Review considers that Scotland is fortunate in having an internationally respected legal aid system under which individuals who meet the eligibility criteria can obtain publicly funded legal assistance of some kind. A series of measures were taken between 2007 to 2011 reportedly resulting in over 70 percent of the Scottish population being eligible to qualify for civil legal aid. This includes those with higher levels of disposable income who are required to pay a contribution.[230] In 2010-11 the total legal aid expenditure in Scotland was £161.4 million. The majority of this expenditure is on criminal matters. However, the net expenditure on civil legal aid amounted to £52.1 million, an increase of 4.9 million from the previous year.

11.3 Legal aid in Scotland is available for virtually all types of civil dispute and can take the form of Advice and Assistance, Assistance by Way of Representation, or representation through legal aid. The Annual Report of the Scottish Legal Aid Board 2010-2011 records that applications for civil legal aid in Scotland remain historically high with a 20 percent increase in applications received in the years 2008-2009 and 2009-2010. There was, however, a 3.5 percent fall in applications and a 6 percent fall in the number of grants for all civil legal assistance made in 2010-11.[231]

11.4 Family actions currently constitute 60% of all civil legal aid applications.[232] The Review has been informed that some cases have the potential to generate high costs as there is often more than one legally aided party in such proceedings. The courts may order reports in relation to the welfare of children with the responsibility for meeting the costs associated with this frequently falling on the legally aided party. The presence of multiple parties within an action who are legally aided is a significant factor in leading to increased costs. The Review has been told that accounts paid by the Scottish Legal Aid Board where

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[227] The Scottish Government (October 2011), *A Sustainable Future for Legal Aid.*

[228] *Ibid.*

[229] *Ibid.*

[230] The current disposable income level for civil legal aid eligibility for the year commencing 1 April 2011 is £26,239.

[231] See http://www.slab.org.uk/publications/annual reports/index.htm

[232] Scottish Legal Aid Board (2011), Annual Statistics 2010-11, Civil Tables, p 3. http://www.slab.org.uk/publications/annual_reports/documents/Appdx3-Civillegalassistance.pdf

only one party in a family action is legally aided are around £1,000 less per account than those paid where more than one party in the action is legally aided.

11.5 In England and Wales the Ministry of Justice undertook a review of legal aid in 2010. The proposals for reform now form part of the Legal Aid, Sentencing and Punishment of Offenders Bill which is currently before the UK Parliament. The policy intention is to withdraw legal aid from all actions other than those specified as retained within the scope of legal aid.[233] Certain types of civil legal services[234] provided in relation to particular causes of action are specifically excluded, such as those in relation to personal injury or death, negligence, damage to property, conveyancing, defamation, breach of statutory duty and some welfare benefits.[235]

Question for discussion

50. ***Is a disproportionate amount of the civil legal aid budget allocated to family actions and, on any view, are there ways in which this might be reduced?***

Self funding schemes

11.6 A number of other options may be available for funding litigation. One alternative mechanism is the establishment of self funding schemes. A levy is payable out of the proceeds of successful litigations funded by the scheme. This levy is paid into the fund administered by the scheme so that successful litigations can fund future litigations. It follows that for the scheme to endure it requires a flow of successful litigations. Such funding mechanisms may have difficulty in attracting cases in which the prospects of success are high.

11.7 Two such self funding schemes are a Contingency or Contingent Legal Aid Fund ("CLAF") and a Supplementary Legal Aid Scheme ("SLAS") which cover a wide variety of funding options.[236] The essential difference between them is that once they have been established, a CLAF is an independent commercially run scheme that is intended to be fully self-financing, although not necessarily for profit, while a SLAS is built into an existing publicly funded legal aid fund and administered by the relevant legal aid authority. Both schemes rely to some extent on attracting the right range of cases through an effective merits filter.

11.8 No such schemes have ever been implemented in Scotland. In England and Wales, provision was made for a CLAF or SLAS system in the Access to Justice Act 1999[237] but this has not been brought into force.[238] Similar provisions were made in the Access to Justice

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[233] The Legal Aid, Sentencing and Punishment of Offenders Bill, Schedule 1, Part 1.

[234] Defined as encompassing advice, assistance and representation by legal professionals and also the services of non-legal professionals, including for example mediation and other forms of dispute resolution.

[235] Legal Aid, Sentencing and Punishment of Offenders Bill, Schedule 1, Part 2.

[236] See LJ Jackson (2009), *Review of Civil Litigation Costs Preliminary Report,* p 177.

[237] Section 28.

[238] See LJ Jackson (2009), *Review of Civil Litigation Costs Preliminary Report,* Chapters 18 and 19.

(Northern Ireland) Order 2003,[239] although options for the funding of damages claims remain under review.[240]

11.9 In Hong Kong a SLAS scheme, operated by the Hong Kong Legal Aid Department, was established in 1984. It provides legal representation to litigants whose financial resources are above the upper eligibility limit for legal aid, currently HK$260,000, but which do not exceed HK$1,300,000.[241] The scheme covers cases involving personal injury or death, employers' liability claims as well as medical, dental and legal professional negligence cases where the claim for damages is likely to exceed $60,000. The levy is ten percent in respect of cases that proceed to trial and six percent in respect of cases settled before trial. Costs recovered from unsuccessful parties are also paid into the fund. While the scheme was running profitably when covering only road traffic personal injury cases, its expansion in 1989 to incorporate employers' liability, clinical, dental and professional negligence cases has reduced its profitability. Since the SLAS is responsible for paying the costs of a successful opponent, a cautious approach is taken in assessing the merits of these categories of cases. In addition, the increasing trend for road traffic personal injury cases to be captured by non lawyer claims managers deprives SLAS of those cases with good prospects of success and has meant that the fund is now operating on lower volumes of cases which have lower prospects of success. [242]

11.10 Contingency based subsidised funding is also available in Quebec and Ontario, but is limited to supporting multi-party actions. CLAF style schemes, which operate independently of publicly funded legal aid schemes, are to be found in many Australian states although, unlike SLAS type schemes, they tend not to cover liability for adverse costs.[243]

11.11 In England and Wales, serious consideration was given to a wide range of CLAF and SLAS options by the Civil Justice Council, which reported in 2007 on the future of funding litigation and alternative funding structures.[244] The Civil Justice Council found that the established CFA market made it highly unlikely that an appropriate range of cases with differing prospects of success would be attracted to an independent self-funding CLAF scheme. It considered that as long as there was a strong ATE insurance market, which was fuelled by the recoverability of ATE insurance premiums, any self-funding scheme would attract only cases where the prospects of success were so low that solicitors were not prepared to enter into a CFA or where the ATE insurance premium was prohibitively high.

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[239] SI 2003/435.

[240] Access to Justice Review Team (2010), *The Agenda,* p 8. The NI Government has states that it intends to *"negotiate the introduction of a privately supported Contingent Legal Aid Fund or publicly administered Supplementary Legal Aid Scheme with a Fund that is sustained out of a levy on general damages in successful cases and out of which costs in losing cases are paid."* See http://www.courtsni.gov.uk/sitecollectiondocuments/northern%20ireland%20courts%20gallery/a2j/p_a2j_the_agenda.pdf, p 8. See also D Capper (2003), 'The Contingency Legal Aid Fund: A Third Way to Finance Personal Injury Litigation', *Journal of Law and Society, 30,* 1, pp 66- 83.

[241] Government of Hong Kong Legal Aid Department. See http://www.lad.gov.hk/eng/las/faq.html

[242] Civil Justice Council (2007), *Improved Access to Justice - Funding Options and Proportionate Costs; the future funding of litigation - alternative funding structures,* p 15.

[243] Civil Justice Council (2007), *op cit,* p 21 and Appendix 8.

[244] Civil Justice Council (2007), *op cit.*

Before a CLAF can start to operate it requires an initial injection of capital, sometimes referred to as seed funding. The Civil Justice Council observed that the provision of seed funding posed major problems for setting up a CLAF in England and Wales in the economic environment of 2007. The Civil Justice Council also concluded that the viability of a CLAF was compromised by the responsibility of such a fund to meet the costs of the successful opponent. The principle by which the award of costs follows success in England and Wales thereby constituted a major impediment to the viability of such a scheme.[245]

11.12 However, the Civil Justice Council took a quite different view with regard to a SLAS fund and recommended that such a fund should be established and operated by the Legal Services Commission.[246] The Civil Justice Council considered that a SLAS was preferable to a CLAF. In its opinion, a SLAS has no need for seed funding, is less vulnerable to only funding cases with low prospects of success and does not necessarily need to be viable on a year on year basis. The Civil Justice Council also saw significant administrative savings for a SLAS over a CLAF in that there is already in existence an administration and expertise in assessing the merits of any applicant's case. The Civil Justice Council therefore recommended that options for a SLAS, including options with regard to the nature of the levy to be exacted, be subject to financial modelling.[247]

11.13 LJ Jackson was initially attracted by self funding schemes, particularly if the CFA regime in England and Wales was changed. Like Zander,[248] he identified one of the advantages of such schemes as reducing the alleged temptation for unethical conduct on the part of lawyers since the self-interest of the lawyer to win a case is reduced. They may also provide funding for those individuals outside legal aid eligibility and are unable to proceed privately.[249]

11.14 The Bar Council's 'CLAF Group' submitted two discussion papers to LJ Jackson's Review in which it concluded that a CLAF could not take over from CFAs as a principal means of funding litigation because of the volume of funding that would be required to start up such a scheme.[250] It proposed a not-for-profit CLAF, which it called a 'Charitable Contingent Fund' (CCF), and suggested that this should be developed on a more modest scale at first as an additional funding resource rather than as an immediate replacement for CFAs. It also advised that more detailed work on a CLAF could not be commenced until the costs landscape was known following any legislative changes arising out of LJ Jackson's eventual recommendations.

11.15 Many of the recommendations made by LJ Jackson in his Final Report may have relevance for the viability of self-funding schemes. Such recommendations include, in particular, a one way costs shifting regime in personal injury cases and the withdrawal of recoverability of ATE insurance premiums and success fees under a CFA. These

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[245] Civil Justice Council (2007), *op cit,* pp 22-24.
[246] Civil Justice Council (2007), *op cit,* pp 25-52.
[247] Civil Justice Council (2007), *op cit,* p 11 and pp 25-52.
[248] M Zander (2007), *Cases and Materials on the English Legal System*, p 646, Cambridge University Press.
[249] While a SLAS could operate within the framework of any legal aid scheme and be subject to the same eligibility rules, most proposals for the provision of a SLAS are designed to operate outwith the eligibility rules of a legal aid scheme.
[250] The Bar Council (2009), *The Merits of a Contingent Legal Aid Fund: Discussion Paper* and *Second Discussion Paper.*

recommendations have been adopted by the UK Government as part of The Legal Aid, Sentencing and Punishment of Offenders Bill. Should they become law, they are likely to lower the risk that only cases with limited prospects of success will apply to self funding schemes for assistance. As LJ Jackson acknowledged, withdrawal of the recoverability of ATE premiums would reduce the need for a new funding system to replace CFAs. In this scenario, it was likely that solicitors would continue to enter into CFAs or damages based agreements. Thus a CLAF would still be vulnerable to mainly funding cases with limited prospects of success. The risk to any CLAF proposal was *"not simply a matter of statistics and economic modelling, but also involved an estimation of likely behaviour based on incentives."*[251] LJ Jackson therefore signalled caution in embracing CLAF type schemes for their ability to make a significant contribution to access to justice.

11.16 LJ Jackson also examined the arguments made by the Civil Justice Council in its recommendation that a SLAS be established.[252] Taking Hong Kong as an example and contrary to the view expressed by the Civil Justice Council, he found that a SLAS may require initial seed funding, even if it were to be grafted on to an existing legal aid scheme. This was because litigants funded under the Hong Kong SLAS scheme were outside the normal legal aid eligibility limits and the funding of these cases was strictly ring fenced to ensure no SLAS assets were redirected into the general legal aid fund. This conformed to LJ Jackson's position which, unlike the Civil Justice Council, held that SLAS should ring fence its assets and should not be used to expand public funding for the civil legal aid budget. In his view, whether there would be a need for a SLAS would depend on whether gaps existed in access to justice, following the implementation of his recommendations.

11.17 LJ Jackson therefore found scope for the operation of one or more CLAFs or a SLAS, but probably only as an alternative means of funding a minority of cases.[253] He did not identify what these cases were although he did identify the appropriateness of a SLAS type fund for the funding of multi-party actions. He recommended that financial modelling be undertaken to ascertain the viability of one or more CLAFs or a SLAS after, and subject to, any decisions announced by the UK Government in respect of the other recommendations in his report.

11.18 In its recent proposals for the reform of legal aid in England and Wales, the UK Government considered the establishment of a SLAS type fund in terms of which a levy is imposed on damages recovered by legally aided litigants.[254] In its Consultation Paper, it observed that legal aid in England and Wales is funded in its entirety through tax revenue and questioned the degree to which the state should assume responsibility for providing legal assistance in some civil and family matters. Several options designed to create alternative funding streams to supplement the legal aid fund were proposed. The UK Government noted LJ Jackson's recommendations to abolish the recoverability of success

[251] LJ Jackson, *Final Report*, p 140.
[252] LJ Jackson, *Final Report*, p 141.
[253] LJ Jackson, *Final Report*, pp 140-1.
[254] Ministry of Justice (Nov 2010), *Consultation Paper on Proposals for Reform of Legal Aid*, Chapter 9, pp 134-7.

fees from opponents together with a 10 percent increase in general damages awards.[255] It noted that if LJ Jackson's recommendations were introduced without any changes to the legal aid scheme, legal aid would be a more attractive funding mechanism than CFAs since claimants would be able to retain all of the damages awarded and would also benefit from the 10 percent increase in general damages awards. A SLAS that drew on a percentage of general damages set at a level commensurate with the level of a CFA success fee would re-balance the system so that a traditional legal aid scheme would not become a more attractive funding option than privately funded CFAs.

11.19 Respondents to the Consultation Paper were uncertain how viable such a scheme would be, particularly in view of the UK Government's proposals to remove a significant number of cases from the scope of legal aid. There were concerns, too, as to how the initial set up costs would be generated. Doubt was expressed whether a SLAS would attract a sufficient number of strong cases to ensure its viability. Having considered the responses to the consultation, the UK Government has made provision in the Legal Aid, Sentencing and Punishment of Offenders Bill[256] for a SLAS, whereby a percentage of certain damages obtained by a successful legally aided claimant may be required to be paid to a prescribed person, such as the Lord Chancellor.

11.20 The UK Government also examined what scope there was to generate additional revenue for the legal aid fund by securing the interest raised by monies that solicitors hold on behalf of clients in general client accounts.[257] Under the Solicitors Account Rules 1998, in England and Wales any interest on money held in a separate designated client account is the property of the client and must always be paid to that client. However, there is also provision for a general account, whereby a solicitor pools the funds of clients in an interest bearing account that can usually achieve a higher rate of interest. Under the Rules, the solicitor is not required to pay interest to a client if the amount calculated is £20 or less, or if the solicitor holds a sum of money not exceeding a specified amount over a specified period. So, for example, a solicitor may hold £1,000 for up to 8 weeks in a clients' general account without paying interest or £20,000 for up to 1 week. The Consultation Paper documents various schemes in other jurisdictions by which interest from general accounts has been channelled to public interest work, such as legal aid. It also proposes two variants of a scheme by which interest from pooled clients' accounts could be generated and used to supplement legal aid funding. Neither scheme would be to the detriment of clients, who would continue to receive the same interest as under current arrangements.

11.21 In its response to the Consultation Paper, the UK Government signalled its intention not to pursue the scheme at this time.[258] It observed that the amounts generated by schemes of this kind depended on the state of the economy generally, as well as the prevailing interest rates. It further accepted that the practice of pooling clients' funds into one general account helped firms secure better rates and services for themselves and their clients, and

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[255] The UK Government observes that following the withdrawal of recoverable success fees, successful claimants will be responsible for paying their own lawyer's uplift. It was concerned that this would make legal aid more attractive than pursuing the case under a conditional fee agreement and took measures to address this.

[256] Clause 22(3).

[257] Ministry of Justice (Nov 2010), *Consultation Paper on Proposals for Reform of Legal Aid*, Chapter 9.

[258] Ministry of Justice (June 2011), *Reform of Legal Aid in England and Wales: the Government Response*, pp 244-6.

commended those firms that used monies generated from general accounts to fund *pro bono* services and charitable work.

Questions for discussion

51. ***Should a CLAF or SLAS be introduced in Scotland? If so, which is preferable?***

52. ***If such schemes were to be introduced, what types of litigation should be covered?***

53. ***If such schemes were to be introduced, what should be the minimum and maximum disposable income of successful applicants?***

54. ***Should such schemes be liable for payment of the expenses of successful opponents?***

***Pro bono* funding of litigation**

11.22 The legal profession has a long tradition of providing free advice as a means of providing access to justice and meeting otherwise unmet legal need. The provision of such advice is an adjunct to, and not a substitute for, a proper system of funded legal services.

11.23 Solicitors may agree to act on a *pro bono* basis, that is, free of charge, or may restrict the fees charged for litigation. A legal charity, LawWorks Scotland, was launched on 10 March 2011 with the aim of increasing access to *pro bono* legal services for members of the public. The charity was set up by solicitors and other interested parties from the charity sector with support from the Law Society of Scotland and seed funding provided by the Scottish Government. With the support of LawWorks, a well established London based organisation, LawWorks Scotland will co-ordinate, develop and encourage the provision of *pro bono* legal services in Scotland. Services currently provided are restricted to the provision of advice and do not include representation.

11.24 The Faculty of Advocates has established a Free Legal Services Unit to provide free legal advice and representation in deserving cases for those who cannot afford the legal help which they need, and who cannot obtain assistance from any other source. Applications for assistance come through advice agencies[259] and are considered by the Faculty's Management Committee whose decisions are final. Advice and representation is provided by advocates who have volunteered to join the Free Legal Services Panel. The Unit seeks to ensure that any advice and/or representation provided will be of the same quality as if the case were funded.

11.25 Examples of court proceedings where representation was provided by both counsel and solicitors free of charge include *Clarence Bvunzai v Glasgow City Council* [260] where the court commented: *"The willingness of counsel and solicitors to provide their services reflects the best traditions of the legal profession, and was of great assistance to the court."* Lord Malcolm

[259] Accredited advice agencies include Edinburgh University Legal Advice Centre, Citizens Advice Scotland, Scottish Child Law Centre, Law Wise Law Clinic, Scotland Shelter, Ethnic Minorities Law Centre, Strathclyde University Law Clinic and Cassus Omissus.
[260] [2009] CSIH 93.

commented in *Capacity Building Project v The City of Edinburgh Council* [261] that it was good to see the Faculty's *pro bono* scheme involved in the case, in which the court had benefitted from the careful submissions of advocates on both sides, supported by the preparatory work of the instructing solicitors. In that case, the provision of *pro bono* legal advice played a vital role in preserving community use in a neighbourhood centre.

11.26 Where a litigant has been advised and successfully represented on a *pro bono* basis, no claim for expenses can be considered by the court.[262] In England and Wales the courts have the power in a civil case to make an order obliging an unsuccessful party to make a payment to a charity prescribed by the Lord Chancellor,[263] if a party in the proceedings was represented by a legal representative who did not charge for his or her services.[264] It has been contended by one commentator[265] that the availability of such orders is inherently beneficial in tackling unmet legal need. This is because they promote equality by requiring unsuccessful litigants to pay costs rather than benefitting from an opponent who has secured *pro bono* representation. In addition, such orders can generate additional funds for future *pro bono* activities. The costs orders may also act as a disincentive to litigation and encourage early settlement.

Questions for discussion

55. ***What further steps, if any, should be taken to promote pro bono funding of litigation and by whom?***

56. ***Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a pro bono basis and, if so, to whom should such a payment be made?***

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[261] [2011] CSOH 58.

[262] *Clarence Bvunzai v Glasgow City Council, op cit.*

[263] Prescribed charity means the charity prescribed by order made by the Lord Chancellor. The charity must be a registered charity which provides financial support to persons who provide, organise or facilitate the provision of legal advice or assistance free of charge – section 194 of the Legal Services Act 2007 c.29. That charity is currently the Access to Justice Foundation.

[264] Section 194 of the Legal Services Act 2007 (c.29).

[265] E Boffey (May 2010), 'On Level Ground?' *Journal of the Law Society of Scotland,* p 9.

CHAPTER 12: SCOTLAND'S LITIGATION MARKET

12.1 It is the Scottish Government's desire to make Scotland a forum of choice for litigation and to ensure Access to Justice for all Scotland's population.[266] An important part of the remit of this Review is therefore to consider the factors and reasons why parties may not choose to litigate in Scotland.

12.2 The Justice Secretary established a Business and Experts Law Forum in 2008 with a remit to see what could be done to enable and encourage businesses, so far as appropriate; to choose Scotland as the seat of their business and legal activities; to look to Scottish lawyers for their advice; and to look to the Scottish courts as their dispute resolution forum of choice. The Forum identified a number of reasons why businesses may choose to litigate in the English rather than the Scottish courts in its Report.[267] These include:

- Harmonisation: increasing harmonisation of Scots and English Law makes it more difficult to distinguish and promote Scots Law where there is a choice between the systems.
- Size: the judiciary and lawyers in England and Wales will often have a greater depth of experience in specific areas of law.
- Global recognition: a legacy of the British Empire is that English law has been successfully exported and embedded across the world, giving it unique global recognition.
- Geographical/ logistical barriers: parties may be reluctant to commit to a case being heard in Scotland due, for example, to a perception that there may be travel difficulties.
- Delays: perceived delays (whether actual or not) in obtaining dates for debates and proofs and in receiving judgments were identified by businesses as a particular concern and an area in which Scotland compares unfavourably to some other jurisdictions.
- Specialisation: Although many commercial disputes are now heard by specialist judges and sheriffs, other disputes involving businesses will still be heard by judges and sheriffs who may have little or no expertise in the legal fields involved.
- Case management: The effective use of case management was identified by businesses as a key factor in ensuring that cases are concluded efficiently and with reasonable speed.
- Language: The procedural terms used by the Scottish courts are distinctive and historic, but arguably alienate those unfamiliar with Scots law. They may hinder the

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[266] F Ewing MSP, the then Minister for Community Safety, when announcing this Review on 4 March 2011.
[267] BELF (2008), *Report by the Business Experts and Law Forum.*
See http://scotland.gov.uk/Publications/2008/10/30105800/2

creation of an impression among businesses (both local and international) of the Scottish courts as modern, accessible and user-friendly.

- Expenses: The levels of recovery of expenses available in Scotland are in many cases lower than those available in England, creating a financial disincentive to litigating in Scotland.

- Mediation: Although mediation is available in Scotland, it is still not as regularly utilised in commercial disputes as in other jurisdictions.

- Arbitration: Many commercial contracts contain provision for arbitration, but except in construction disputes, comparatively little commercial arbitration takes place in Scotland.

It should be noted that the Report was written prior to the enactment of the Arbitration (Scotland) Act 2010[268] and the establishment of the Scottish Arbitration Centre, the home of domestic and international arbitration in Scotland.

12.3 Submissions made to this Review have commented on the disillusionment of clients in Scotland with the Scottish jurisdiction. This is often manifested by contracts, which previously were written under Scots law, now incorporating an English law and jurisdiction clause. Clients are said to be concerned with expenses, lack of active case management and the low rate of recoverability of expenses. One submission to the Review commented on the difficulty for in-house solicitors to explain to their Management Board the problems encountered with foreseeability of outcome and expenses. Clients need to know their likely expenses exposure. This is said to be a particular problem in commercial actions in the Court of Session. Clients ask their solicitors why they should operate on the assumption that at best they will recover 50-60 percent of their expenses, particularly when the level of recovery is much higher in England and Wales.

12.4 The Review has been made aware of litigations that are now being raised in England but which could have been raised in Scotland. It was also informed that the banks, in particular, are keen to use the London courts.

12.5 Recommendations made by the Scottish Civil Courts Review, when implemented, will do much to make the Scottish legal system more efficient and effective. The concern regarding the "mismatch" of the level of expenses recovered and the actual cost of litigation is, however, fundamental to arresting any potential drift of litigation to England where the natural forum of the dispute is Scotland.

The impact of procedural changes in England and Wales

12.6 While this Review may look at the ways in which litigation can be incentivised to remain in or, indeed, transfer to Scotland, recommendations made by LJ Jackson which are being introduced in England and Wales could change the landscape for litigation in both jurisdictions.

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[268] asp 1.

12.7 One such change in England and Wales is the introduction of a qualified one way costs shifting regime for personal injury, including clinical negligence, actions following the withdrawal of recoverability of success fees and ATE insurance premiums. To compensate for their withdrawal, The Legal Aid, Sentencing and Punishment of Offenders Bill also provides for a ten percent increase in general damages.

12.8 As the Scottish Civil Courts Review observed in 2009, if a one way costs regime were to be introduced into England and Wales but not in Scotland, this would create a major disincentive to claimants to litigate in Scotland where there is a choice of jurisdiction, and unfairness where there is not.[269] A number of personal injury practitioners have voiced these concerns to this Review. The introduction of a one way cost shifting regime in England and Wales may cause some litigants, who would ordinarily litigate in Scotland, to conclude that it might be in their best interests to pursue their litigation in England. For this reason alone, it may be thought desirable to introduce to Scotland a one way cost shifting regime in personal injury cases.

12.9 One personal injury practitioner has observed that the English costs regime is already more favourable from the pursuer's viewpoint in that it carries no risk and the recovery of expenses is more generous than in Scotland. The Review was informed that almost all claimants in England have ATE insurance cover, the premium for which, at present, they will recover if they win. In his experience, however, the more favourable environment in England has never led to an exodus of personal injury cases from Scotland to England where the defender is a cross border entity. He cites a number of reasons for this: the unlikely prospect of the English Courts welcoming forum shopping from Scotland;[270] the higher damages awarded in Scotland in fatal cases; the retention of civil jury trials for personal injury cases in Scotland; and the efficiency and relative speed of the Chapter 43 procedure. He does not expect this to change following the introduction of a qualified one way costs shifting regime for personal injury actions in England and Wales. Indeed, he predicts that the qualified nature of the new regime is likely to lead to considerable and costly satellite litigation and that it will not be in a client's best interests to instruct litigation in England and Wales.

12.10 The Legal Aid, Sentencing and Punishment of Offenders Bill also enables persons providing advocacy services, litigation services or claims management services to use damages based agreements in England and Wales in most types of civil litigation where conditional fee agreements are presently allowed, as discussed in paragraphs 9.11 and 9.12 above. The question arises as to what impact this may have on litigation in Scotland.

Questions for discussion

57. ***What steps could be taken to make Scotland the forum of choice for litigation?***

58. ***Apart from the introduction of a tariff-based system as described in Chapter 3, what measures might be introduced to reduce the difference between the actual cost of a litigation and the amount recoverable as judicial expenses?***

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[269] *Report of the Scottish Civil Courts Review,* Chapter 14, paragraph 127.

[270] See *McShannon v Rockware Glass Limited* [1978] 1 All ER 625.

59. ***If a one way costs shifting regime is introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?***

60. ***If damages based agreements are introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?***

CHAPTER 13: SPECIAL CASES AND CONCLUDING REMARKS

Clinical negligence

13.1 The Scottish Civil Courts Review was made aware of special problems relating to medical negligence litigation. It was reported to the Review that there are only six accredited clinical negligence specialists in Scotland who act for claimants, that relatively few lawyers will take on these claims, and that nine out of ten claims that come to them do not then proceed. There were strong representations from lawyers that the remuneration in such cases should be the subject of review.

13.2 When clinical negligence cases do proceed, it was reported that they mostly proceed by way of speculative fee arrangements, with solicitors bearing the risk of outlays, and only being remunerated if the claim succeeds and judicial expenses are recovered. Lawyers told the Scottish Civil Courts Review that judicial expenses do not reflect the level of expertise required for these cases. Some also referred to the failure of their applications for additional fees, frequently on the grounds that their expertise was already a 'fait accompli' and was therefore deserving of no special treatment from the Court. Clinical negligence lawyers regarded the legal aid block rates for clinical negligence cases as nothing short of derisory. Speculative fee arrangements were therefore preferred. It should be noted, however, that the Scottish Legal Aid Board has reported that there has been an increase in the number of applications for civil legal aid for clinical negligence actions in the past three years.

13.3 Practitioners also reported that speculative fee arrangements presented particular difficulties in clinical negligence cases. An unsuccessful claimant in a clinical negligence case can be faced with adverse expenses of £25,000 to £100,000, so the need for protection against adverse expenses is crucial. ATE insurance is offered only once solicitors are able to predict that the claim has reasonable prospects of success. It can cost between £3,000 and £5,000 to carry out the necessary investigations to establish causation and negligence in clinical negligence cases. One consequence of this is that it is frequently not viable to pursue relatively low value claims. In addition the cost of ATE insurance can be prohibitive.

13.4 Under these circumstances, solicitors usually apply for legal aid if their clients meet the financial eligibility criteria, since an award of civil legal aid offers claimants some protection from adverse expenses. If a claimant is successful, judicial expenses are usually accepted by solicitors in lieu of a claim against the Legal Aid Fund. The problem remains, however, that not all meritorious claimants meet the financial eligibility criteria for civil legal aid. In that event, they may not be able to proceed with their claim because of the cost of making the necessary investigations to satisfy the ATE insurance provider and, even if available, the price of the ATE insurance premium itself may be prohibitive.

13.5 One submission to the Review reported a firm's experience of high ATE premiums being quoted for Scottish litigation. In one case, despite liability not being an issue, a premium of £8,000 was quoted.

13.6 The cost of ATE insurance in clinical negligence cases may therefore limit access to justice. This could be remedied by introducing recoverability of ATE insurance premiums in clinical negligence cases. It may be noted that the UK Government has made one change

to LJ Jackson's recommendation for the withdrawal of recoverability of ATE insurance premiums, namely, to allow recoverability of the premiums in clinical negligence cases but only in so far as they cover the cost of expert reports.

13.7 Defenders are likely to have a different perspective with regard to the current regime under which clinical negligence actions are litigated in Scotland. [271] A representative of one medical defence organisation has reported to the Review its "long held deep concerns" about the way in which costs are managed in clinical negligence claims in England and Wales, compared with its positive experience under the Scottish cost regime. It suggested that while the Review should consider conditional fee agreements and alternative funding arrangements, it should do so only to exclude them so as to avoid the perceived excesses that have arisen in England and Wales following the recoverability of ATE premiums, which LJ Jackson was asked to address. The organisation was of the view that while the wide availability of public funding may be costly in the short term, it was an efficient way of managing civil litigation in the longer term.

13.8 Another option is to take clinical negligence cases outwith the civil justice system and introduce a no fault compensation scheme, as presently exists in New Zealand, Norway, Sweden, Finland and Denmark. This has recently been proposed by the No Fault Compensation Review Group, which was commissioned by the Scottish Government under the chair of Professor Sheila McLean. While the Review Group proposed that the no fault scheme should cover all medical treatment injuries that occur in Scotland, it also recommended that claimants who fail to be compensated under the no fault scheme should retain the right to litigate, "based on an improved litigation system."[272] Thus, should the recommendations of the McLean Review Group be adopted, the need to address the problems identified in this Consultation Paper will remain.

Multi-party actions

13.9 The Scottish Civil Courts Review endorsed the recommendations of the Scottish Law Commission[273] and recommended that a special multi-party procedure should be introduced in Scotland.[274] The Scottish Government agreed with the findings of the Scottish Civil Courts Review, namely, that the lack of a multi-party procedure in Scotland can reduce access to justice, and increase expense and waste time, where multiple cases

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[271] We understand that the way in which clinical negligence claims are handled in Scotland differs across primary and secondary healthcare. The Central Legal Office provides indemnity through a mutual pooled scheme for the cost of clinical negligence claims brought against NHS Trusts and Health Authorities in Scotland. In primary care, MDOs (Medical Defence Organisations) provide an indemnity against the cost of clinical negligence claims brought against independent contractors such as GPs and dentists, as well as against private consultants.

[272] No Fault Compensation Review Group(2011), *Report and Recommendations.*
See http://www.scotland.gov.uk/Resource/Doc/924/0113803.doc

[273] The Scottish Law Commission (1994), *Multi-Party Actions: Court Proceedings and Funding, Discussion Paper No. 98;* (1994), *Multi-Party Actions: Report by the Working Party* and (1996), *Multi-Party Action, Report 154.*

[274] *Report of the Scottish Civil Courts Review*: Recommendation 157.

involving similar facts are litigated.[275] This Review has been requested by the Scottish Government to consider options for the funding of multi-party actions.

13.10 The Scottish Civil Courts Review considered funding issues arising out of its recommendation to introduce a procedure for multi-party actions, and made the following recommendations:[276]

- Where cases raise significant issues of public interest, an express power should be conferred upon the court to make special orders in relation to expenses.[277] Multi-party actions should be no different from other actions in this respect.

- The additional responsibility involved in managing a group action should be a specific ground for awarding an additional fee.

- Special funding arrangements for multi-party actions should be available, administered by the Scottish Legal Aid Board (SLAB), assisted by an advisory committee. In applying the test of reasonableness, SLAB should have regard to the prospects of success, the number of members of the group, the value of the claims, the resources of the proposed defenders and whether the proposed action raises issues of wider public interest that would justify the expenditure of public funds.

- Representative bodies should also be able to apply for funding, but should be required to meet a public interest merits test. The multi-party action fund would then have a broad discretion to determine whether it would be reasonable to make funds available, having regard to the resources of the organisation and the potential for the issues to be resolved by other means.

- Where multiple applications for civil legal aid are made by individuals raising the same or similar issues of fact or law, SLAB should have the power to refuse individual applications and invite them to apply to the multi-party action fund. SLAB should also have the power to limit funding to litigation of issues in common.

- The general rule that expenses follow success should apply, in principle, to multi-party actions. There would therefore be scope for an award of expenses to be made against the multi-party action fund.

13.11 In the USA, class actions are funded by way of contingency fees or damage based agreements (DBAs), where lawyers undertake the case on a no win/no fee basis and are entitled to charge a percentage of the amount recovered. Litigation is commonly funded by DBAs in those jurisdictions where each party bears their own expenses regardless of success or failure. The Scottish Civil Courts Review considered that it would be premature for it to make any recommendations as to the introduction of DBAs in Scotland when LJ Jackson's Review had, then, yet to report. It concluded that, in the meantime, multi-party actions could be undertaken on a speculative basis, which would allow for legal representatives to receive an uplift in their fees. It would then be open to them to apply to the court for an

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[275] Scottish Government (2010), *Response to the Scottish Civil Courts Review,* p 34.
[276] *Report of the Scottish Civil Courts Review*: Recommendations 173 – 182.
[277] For example, a Protective Expenses Order.

additional fee to recognise the additional responsibility involved in managing a group action. It recommended that this should be a specific ground for awarding an additional fee.[278]

13.12 The availability of contingency fees for multi-party actions was recommended by the Civil Justice Council in 2007, albeit as a last resort where alternative funding is not available.[279] Following the recommendations of LJ Jackson to allow DBAs more generally, Clause 42 of The Legal Aid, Sentencing and Punishment of Offenders Bill enables persons providing advocacy services, litigation services or claims management services to enter into DBAs in most types of civil litigation cases where it is currently possible to use a CFA.

13.13 One advantage of DBAs in multi-party actions is that the risk of being found liable in expenses could be spread amongst a number of parties, although in a protracted litigation each individual member of the group's liability might be considerable. The Scottish Law Commission looked at methods of funding multi-party actions,[280] particularly in relation to protecting parties against the risk of being found liable for expenses. It had considered a number of options: a contingency legal aid fund ("CLAF"), a class action fund, and legal aid. The Civil Justice Council[281] also examined a number of options for the funding of multi-party litigation including a CLAF and a Supplementary Legal Aid Scheme ("SLAS"). Both the Scottish Law Commission and the Civil Justice Council worked on the assumption that there would be no new government funding.

13.14 The Scottish Civil Courts Review recommended that special funding arrangements for multi-party actions should be introduced. Having observed that there had been savings in administrative costs in other jurisdictions where funding arrangements for such actions are administered by the legal aid authorities, it considered that on balance, it would be preferable to have special funding arrangements for multi-party actions to be administered by SLAB.[282] The Scottish Civil Courts Review noted that in some jurisdictions, such as Ontario, the fund is responsible for the opponents' costs in unsuccessful cases and provides assistance limited to disbursements. In other jurisdictions, such as Quebec, the fund pays for legal representation as well as disbursements.

13.15 Submissions to the Review suggested that the courts should be entitled to exercise their discretion to make a protective expenses order ("PEO")[283] in all types of multi-party actions including public interest actions, organisation actions and class actions.[284] This will provide an element of predictability for those bringing the action in relation to their potential exposure to an opponent's expenses.

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[278] *Report of the Scottish Civil Courts Review*: Recommendation 174.
[279] Civil Justice Council (2007), *The Future Funding of Litigation- Alternative Funding Structures.*
[280] Scottish Law Commission (1994), (1994) and (1996), *op cit.*
[281] Civil Justice Council (2008), *Improving Access to Justice through Collective Actions.*
[282] *Report of the Scottish Civil Courts Review*: Recommendation 175.
[283] See Chapter 5.
[284] For definitions, see *Report of the Scottish Civil Courts Review, Vol 2*, Chapter 13 paragraph 1.

Questions for discussion

61. ***Do clinical negligence claimants face particular difficulties in the funding of claims? If so, what measures might be taken to address these difficulties?***

62. ***In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?***

63. ***If DBAs are not recommended for multi-party actions, how else may lawyers be remunerated for the additional responsibility involved in such actions?***

64. ***Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?***

65. ***Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?***

Concluding Remarks

13.16 Representations were made both to the Scottish Civil Courts Review and this Review as to the special problems facing those who wished to raise clinical negligence actions and multi-party actions. These have been documented in this Chapter. This is not to discount any problems of affordability that other types of case may present to potential litigators in Scotland. It is hoped that respondents to the Consultation Paper will take the opportunity to inform the Review of any other cases , which it is appropriate for this Review to consider.

13.17 Access to the civil courts in Scotland does not depend on the cost and funding of litigation alone. Changes in the rates and patterns of civil litigation may depend on prevailing economic forces, social changes, legal institutions and the availability of alternatives to the civil courts for dispute resolution. This Review has examined those areas where funding and affordability have been identified as problematic, and has sought to consult on measures by which problems of funding and affordability could be addressed. It does not claim to present a comprehensive account of the problem areas, nor of the measures that may be employed to address them. This consultation paper is presented in the expectation that respondents will identify problem areas of concern to them and the Review, and suggest measures to address them.

Concluding Questions

66. ***In addition to the cases identified in this Chapter, are there any other cases that may require special consideration? If so, what are they and why?***

67. ***Can you suggest any means, other than those raised in this consultation paper, which would enable litigation to be more affordable?***

68. ***What other recommendations might this Review make to enable individuals to fund a litigation when they are not eligible for legal aid, have no BTE insurance cover or their cover is inadequate, cannot afford the ATE insurance premium and are not members of an organisation that meets its members' legal fees?***

Annex A

Members of the Reference Group and Review Team

Reference Group

Paul Brown, Legal Services Agency

Ronald Conway, Bonnar & Company

Joyce Cullen, Brodies LLP

Shona Haldane QC

Ian Johnston, Aviva Insurance

Gordon Keyden, Simpson & Marwick

Lindsay Montgomery, Scottish Legal Aid Board

Stewart Mullan, Legal Fee Management

Sarah O'Neill, Consumer Focus

Professor Alan Paterson, University of Strathclyde

Professor John Sawkins, Heriot-Watt University

Sheriff Wendy Sheehan

Andrew Smith QC

Review Team

Kay McCorquodale, Legal Secretary

Elaine Samuel, Researcher

Kirstyn Burke, Research Assistant

Annex B

Recommendations of the Scottish Civil Courts Review with Respect to Expenses and the Funding of Civil Litigation

A new case management model (Chapter 5)

Expenses under the new simplified procedure

91. There should continue to be separate tables of expenses. One would be for claims up to £3,000. Another would be for claims between £3,001 and £5,000, to include all housing cases regardless of the amount of any arrears. Finally, there would be a separate table of expenses for any action which includes a claim for damages for personal injury.

Judicial review and public interest litigation (Chapter 12)

Expenses in public interest litigation

155. An express power should be conferred upon the court to make special orders in relation to expenses in cases raising significant issues of public interest.

156. The model proposed by the Australian Law Reform Commission for making a public interest costs order could usefully be adapted for introduction in Scotland.

Multi-party actions (Chapter 13)

How should multi-party actions be funded?

173. The general rule that expenses follow success should apply, in principle, to multi-party actions. The recommendations that we make in Chapter 12 on awarding expenses in public interest cases should apply to multi-party actions which satisfy the wider public interest criteria.

174. The additional responsibility involved in managing a group action should be a specific ground for awarding an additional fee.

175. There needs to be a special funding regime for multi-party actions. On balance, we consider that it would be preferable to have special funding arrangements for multi-party actions to be administered by SLAB.

176. There should be scope, in appropriate cases, for an award of expenses to be made against the multi-party action fund that we propose.

177. Special criteria would need to be satisfied in order for financial assistance to be granted to a representative party. In particular, in applying the test of reasonableness, SLAB would have regard to the prospects of success, the number of members of the group, the value of their claims, the resources of the proposed defenders, and whether the proposed action raises issues of wider public interest that would justify the expenditure of

public funds. It would be helpful for SLAB to be assisted by an advisory committee in dealing with such requests for funding.

178. It should be possible for a grant of funding to be made on a conditional basis, for example, on a staged basis. The advisory committee should give advice to SLAB in relation to an initial request for funding, at the review stage, and also in relation to any offers in settlement.

179. If a person seeks public funding to bring a multi-party action then this would have to be by way of an application to the multi-party action fund. Class members who are not representative parties would be able to apply for legal advice and assistance.

180. It should be open to the multi-party action fund to limit funding to litigation of the common issues.

181. Where multiple applications for civil legal aid are made by individuals which raise the same or similar issues of fact or law, such that it would be desirable for these to be litigated under the multi-party action procedure, SLAB should have the power to refuse to grant legal aid on an individual basis, applying the reasonableness test, and to invite an application to the multi-party action fund for funding for a multi-party action.

182. Funding could be made available on a different basis for actions by representative bodies. An application for funding by a representative body would have to meet a public interest merits test. In addition, the multi-party action fund would have a broad discretion to determine whether it would be reasonable to make public funds available, having regard to the resources of the organisation and the potential for the issues to be resolved by other means.

The cost and funding of litigation (Chapter 14)

Judicial Expenses

183. There should be a significant increase in the block fee for pre-litigation work to reflect work properly and reasonably carried out in connection with investigation and intimation of the claim, discussions on settlement and compliance with a pre-action protocol where applicable.

184. The Lord President's Advisory Committee should review the adequacy of the block fee for proof preparation.

185. We support the introduction of a judicial table of fees for counsel in the Court of Session, as well as in the sheriff court for those cases in which sanction for the employment of counsel is given.

186. There should be a procedure for sanctioning the employment of a solicitor advocate in proceedings in the sheriff court. The fees of the solicitor advocate should be included in the judicial account as an outlay. The table of fees that we recommend for counsel should apply to solicitor advocates.

187. We support the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred.

188. A tariff-based system for judicial expenses would be worthy of more detailed consideration.

189. The cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland. Pending its establishment the Scottish Government should set up a Working Group on Judicial Expenses. In the meantime, the current judicial tables and their operation should be reviewed to address the concerns about recovery rates.

190. The outcome of Lord Justice Jackson's review and whether, in the light of his recommendations, the rule that expenses follow success may require to be modified in this jurisdiction, are matters that should urgently be addressed by the Working Group on Judicial Expenses.

Taxation

191. The offices of Auditor of the Court of Session and sheriff court auditors should be salaried posts, subject to the usual rules regarding public appointments. The status of the Auditor of the Court of Session as a member of the College of Justice should continue. Fees payable for extra-judicial taxations and assessments should be paid into public funds.

192. For sheriff court auditors, commissions should be granted only to those holding qualifications as solicitors or law accountants and with relevant skills and experience.

193. Greater use should be made of information technology so that taxations can take place by telephone or videoconference, with any necessary papers being filed with the auditor electronically.

194. Small claims and summary cause assessments should be carried out by the sheriff court auditor, not by the sheriff clerk.

195. The Auditor of the Court of Session should have a role as 'head of profession'.

196. The Auditor of the Court of Session should have jurisdiction over taxations in actions raised in the all-Scotland personal injury court.

197. Where a party wishes to recover counsel's fees, the account should be supported by detailed fee notes, disclosed to the paying party on request. If objection is taken to the reasonableness of counsel's fees, paying parties should specify what sum, in their view, would be appropriate. There should be a similar obligation where objection is taken to the fees payable to expert and other witnesses.

198. The procedure in the Court of Session whereby specific points of objection require to be intimated in advance of the diet of taxation should be extended to the sheriff court. The period of notice, which at present is three working days prior to the diet of taxation, should be lengthened.

199. It should be open to parties to agree elements of an account and to restrict the taxation to only those items of the account that are in dispute.

Speculative fee arrangements

200. In view of the in-depth reviews on costs and the operation of Conditional Fee Agreements currently underway in England and Wales, and the divergence of views as to whether introducing recoverability of success fees and After The Event premiums would improve access to justice, we consider it premature to recommend any changes to the current regime. This issue should be addressed as a matter of urgency by the Working Group on Judicial Expenses.

'Before the Event' legal expenses insurance

201. The Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance.

Legal aid

202. The Scottish Government should review its policy on the provision of legal aid for welfare guardianship and intervention orders under the Adults with Incapacity (Scotland) Act 2000, the provision of ABWOR in relation to proceedings before the Mental Health Tribunals, and the means testing of legal aid for representation in an appeal against a decision of the Mental Health Tribunal.

203. Legal aid should be available, subject to the usual tests, for all types and values of proceedings under the simplified procedure.

204. Where personal attendance at a court other than the party's local court is essential for the proper conduct of a substantive hearing, a party who is otherwise in receipt of legal aid should be able to claim reasonable travelling expenses.

Court fees

205. The relevant legislation should be amended to ensure that court fees and auditor's fees can be recovered from the losing party where the successful party is legally aided.

Annex C

Response of the Scottish Government to the Report and Recommendations of the Scottish Civil Courts Review

Executive Summary

Principles guiding reform

1. The Scottish Civil Courts Review (the Review) set out six principles under which it believed the system of civil justice should operate.

- It should be fair in its procedures and working practices.
- It should be apt to secure justice in the outcome of disputes.
- It should be accessible to all and sensitive to the needs of those who use it.
- It should encourage early resolution of disputes and deal with cases as quickly and with as much economy as is consistent with justice.
- It should make effective and efficient use of its resources, allocating them to cases proportionately to the importance and value of the issues at stake.
- It should have regard to the effective and efficient application of the resources of others.

These principles have informed this response to the Review's recommendations.

2. Such a system of civil justice — affordable, efficient and fair — is essential to the health of any nation. It is a pre-requisite for the achievement of the Scottish Government's core purpose, to focus public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth. A more efficient, affordable and fair system of civil justice holds public authorities to account and underpins the rule of law which, in turn, supports a fairer Scotland with stronger communities in which people are helped to live full lives and reach their potential.

3. The Scottish Government accepts Lord Gill's analysis of the problems facing Scotland's civil courts. The current system of civil justice has served us well for more than a century but there are now too many aspects of our civil courts that are in some respects and to differing degrees unsatisfactory, unaffordable or inefficient. Delays and excessive costs are unsatisfactory; the rising costs of the courts are unaffordable; rescheduled hearings are inefficient.

4. The fundamental shift set out by the Review is to a court system which is, to a much greater degree than before, properly managed – with cases being allocated to judges with the skills and experience to handle them appropriately and cost-effectively, and with greater control by the court of the progress of cases. This builds on the historic changes introduced by the Judiciary and Courts (Scotland) Act 2008, which confirmed the Lord President's role as head of the judiciary, giving him new responsibilities to ensure the efficient disposal of

business in the Scottish courts, and establishing the Scottish Court Service as a non-ministerial department under the chairmanship of the Lord President.

5. That constitutional settlement means it is not for the Scottish Government alone to deliver the reforms recommended by Lord Gill. The Scottish Government, the judiciary and the Scottish Court Service must each play their part, and this response has taken account of the response to the Review by the judges of the Court of Session.

Summary of response to key recommendations

6. The Scottish Government accepts the vision provided by Lord Gill and broadly accepts the detail of Lord Gill's recommendations.

7. In particular, the Scottish Government accepts the recommendation to allocate civil court business to appropriate judicial levels. The introduction of a more structured case allocation system to the courts of first instance is perhaps the most innovative of Lord Gill's proposals, being of a different character to traditional forms and structures of Scottish justice. Previously the choice of court was largely left to the parties, usually the pursuing party. The precise mechanisms of allocation will require public debate, but there is potential to reduce the costs to parties in dispute as well as to the public purse, and to achieve more locally delivered civil justice.

8. Appropriate case allocation is a necessary part of the key concept of a three-tier civil judicial hierarchy comprising senator, sheriff and district judge, with restricted rights of onward appeal across the tiers and the handling of much court business conducted at a lower level than at present. The creation of a third judicial tier and the changes to concurrent jurisdictions, with the sheriff court's privative jurisdiction greatly extended, are all recommendations with which the Scottish Government agrees in principle.

9. The Scottish Government agrees in principle that the sheriff courts could and should handle most of Scotland's lower value civil court business, and that the Court of Session should not handle business of low value unless this is justified by other factors, such as a wider legal significance. The Scottish Government is therefore minded to accept the proposed limit of £150,000 for the new privative jurisdiction of the sheriff court, subject to further modelling work.

10. The Scottish Government also agrees in principle that a specialised personal injury court be established as part of Edinburgh Sheriff Court.

11. The Scottish Government also agrees the need for an appropriate proper civil appellate structure which will include the introduction of early sifts based on permissions and tests of legal merit. These are essential features of an efficient legal system that is designed to ensure a proportionate deployment of available resources. The particular proposal for a sheriff appeal court to hear centrally administered summary criminal appeals and civil appeals administered in local sheriffdoms is attractive and it is agreed that such a

court would keep summary criminal and civil appeal business at an appropriate level in the system.[285]

12. The Scottish Government is supportive in principle of the introduction of a new judicial tier, but wishes to examine ways in which this might be improved, including how the mix of criminal and civil business might be handled. It wishes to avoid replicating in the proposed new district judge tier the tensions between criminal and civil business currently experienced in the Court of Session and the sheriff courts, which were strongly criticised by the Review.

13. The average workload of a district judge under the Gill proposals would comprise between 70% and 80% summary crime. This risks crowding out civil business, and may militate against third tier civil work being conducted in the informal, inquisitorial manner recommended by the Review.

14. There may be scope to adapt the model somewhat – for example by having a number of district judges who specialise in crime (as stipendiary magistrates do currently), with others specialising in civil work. This might involve more use of part time judges than is envisaged by the Review.

15. For this and other reasons the Scottish Government does not agree with the recommendation to eliminate all part-time judicial offices.

16. The Scottish Government supports the recommended approach to better case handling, with case docketing, more reliance on active judicial case management and the further development of case flow management procedures in other types of action. This will be largely for the judiciary and Scottish Court Service to take forward, although the Scottish Ministers will have an interest in the potential impact on the overall requirement for judicial office holders. Judicial case management and case flow management will have particular resource implications, for example for court IT systems.

17. The Scottish Government also agrees that new court rules should be developed with plainer language, providing appropriate consistency of practice across different courts.

18. The recommendations framing a new approach to handling cases are intertwined with the recommendations for designated specialist judges. The Scottish Government agrees these in principle and will take forward with the Lord President and the Judicial Appointments Board for Scotland consideration of the implications for appointment, training and conduct of judges at each level — and the consequential structure of judicial careers.

19. The Scottish Government supports in principle the recommendations that procedures for judicial review should be reformed and clarified, and that provision should be made for multi-party actions. The detail of these will require working out both in legislation and procedural rules.

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[285] http://scotland-judiciary.org.uk/27/484/The-response-by-the-Judges-of-the-Court-of-Session-to-the Scottish-Civil-Courts-Review 8

20. Lord Gill recommends the establishment of a Civil Justice Council, both to take forward the implementation of the report and to keep the civil justice system under review. The Scottish Government is not persuaded that a new non-departmental public body (NDPB) is required in the longer term, but agrees that arrangements need to be made, even before primary legislation is enacted, to drive forward the necessary organisational and procedural changes following the Review. It is working with the judiciary and the Scottish Court Service to put these arrangements in place.

21. Lord Gill makes various recommendations for greater investment in publicly funded user support services, including integrated and specialist advice services and a national mediation service. These investments, alongside the other proposed reforms, must be considered against competing demands for public funds in the current spending round. It is likely that any new or expanded support services will only be affordable if they are funded by efficiencies delivered through other changes introduced to the justice system. Subject to these financial constraints, the Scottish Government will consider carefully any recommendations of the Civil Justice Advisory Group led by Lord Coulsfield, which is examining ways to create and support user friendly dispute resolution processes for claims of low financial value, and how best to ensure access to justice, including through public legal education and alternative dispute resolution.

22.. The Scottish Government has agreed in principle to the establishment of a review of costs and funding of litigation, though a suitable chairman still has to be identified and the precise remit finalised.

23. A number of the Review's recommendations are already being taken forward, including:

- providing a basis for rights of audience for lay representatives in the Legal Services (Scotland) Act 2010;
- modernising arrangements for safeguarders in the Children's Hearings (Scotland) Bill;
- the implementation of Lord Penrose's recommended reforms to the handling of business in the Inner House;
- the codification by the Lord President of current practice on lay advisers (McKenzie friends); and
- preparation by the Court of Session Rules Council of new rules governing the award of protective cost orders in environmental cases.

How the Scottish Government will go forward

24. Over the coming months, the Scottish Government will prepare proposals for the legislation necessary for reform. Its proposals will be informed by detailed analysis of the likely impact of Lord Gill's recommendations on the three essential resource requirements of the civil courts — the estate, the judiciary and the administrative support. It also needs to consider the wider implications for court users and other justice organisations and interests.

25. This work will be jointly undertaken by the Scottish Government and the Scottish Court Service, consulting with others as required. It will focus on the key recommendations for procedural and structural reforms.

26. To date, the impact of Lord Gill's recommendations for structural reform on the required judicial complement have been modelled. Initial modelling of these recommendations demonstrates a requirement for a greater total number of judges but with scope for a small annual saving in judicial remuneration arising from the redistribution of court business. Further modelling work is underway, for example, taking account of the impact of judicial specialisation on the efficiency and flexibility of court programmes.

27. Initial estimates do not yet take account of the impact of the new approach to case management recommended by the Review. The way cases are managed is likely to have a much more substantial impact on costs than the level in the judicial hierarchy at which a case is taken. These procedural reforms will be led by the judiciary, who will be consulted as to the assumptions required to model their impact.

28. The Scottish Court Service will also need to prepare the operational programmes and infrastructure that will be required to deliver the reformed system, including workforce planning, facilities and estate management and the design of modern information and communication technologies.

29. The Scottish Government recognises that needs differ between urban and rural areas and this may result in variations between courts and areas in how access to justice is delivered fairly and effectively. Rural and island communities may benefit particularly from the better use of information and communication technology, and may also have different requirements for judicial deployment. Full account will be taken of these differences in planning for implementation of the reforms.

30. Reform of our civil courts cannot be progressed in isolation; it is part of the reform of the wider justice system. This will be co-ordinated through the Making Justice Work programme, which has been established by the Scottish Government. The detail of the programme is being developed, and it will operate under the overall stewardship of the Justice Outcomes Group established by the Scottish Government in June 2010.[286] These

[286] This group brings together representatives and advisors from across the Scottish justice system, ensuring the alignment of public services with the achievement of the Scottish Government's core purpose and strategic objectives. The remit of the group is to:

- identify priorities within the justice system to support the Scottish Government's National Outcomes;
- oversee the operation of a set of programmes linked to those priorities, taking an overview of outputs and whether the programmes are achieving the aims set for them;
- ensure that the programmes are focused on making a positive impact on the citizen as well as on justice;
- work in partnership to remove barriers to achieving the priorities and programme objectives;
- develop methods for aligning individual business plans and resource decisions to overall system needs and programme objectives;
- maintain a strong focus on costs, benefits and value for money;
- identify significant long-term changes in the justice environment and ensure these are factored into work in programmes and organisations; and
- encourage collective dialogue of significant current issues.

structures will help to consider the interaction between the reforms to the civil courts and other related developments, for example, arising out of Sheriff Principal Bowen's independent review of sheriff and jury procedures, and Tribunal reforms.

31. As mentioned previously, however, the reforms recommended by Lord Gill must be viewed in the context of the current pressures on public spending which will constrain the scope for additional investment, and at the very least will require that reforms are managed carefully and phased in over a period of years.

Annex D

Taxation Of Expenses

1. In practice a court does not generally determine liability for expenses in a fixed sum but finds a party entitled to expenses, such expenses to be taxed by the Auditor of Court. The Auditor is an independent person who reviews the judicial expenses of an action and determines what has been fairly incurred and what should be payable to the party who has an award of expenses in their favour.

2. The Auditor of the Court of Session is a statutory appointment made by the Scottish Ministers on the nomination of the Lord Advocate. The Auditor receives a stipend in relation to his appointment and is entitled to retain the fees payable in respect of taxations carried out by him, from which he defrays the cost of running his office. [287]

3. Auditors in the sheriff court hold a commission and are appointed by the Sheriff Principal. In most courts a sheriff clerk is appointed as the auditor, although in Edinburgh and Glasgow the commissions are held by independent practitioners. In the case of sheriff court auditors who are serving sheriff clerks, the fee fund dues payable in respect of judicial taxations are paid into public funds. However, the auditors are entitled to retain fees payable in respect of extra-judicial taxations or assessments, including accounts referred by SLAB.[288] Those auditors who are independent practitioners are entitled to retain the audit fees for all taxations or assessments undertaken by them.

4. The fees payable for judicial taxations are set by Act of Sederunt and are based on a percentage of the gross account as submitted, not on the value of the account as taxed. However, in practice, the paying party is only required to pay that part of the fee fund due to the auditor which is attributable to the expenses as taxed and found due. As Lord Glennie explained in *Honer & Honer v Wilson*:[289]

> "*In this way, the paying party is not prejudiced by the entitled party having inflated his claim (if he has); and indeed it acts as a disincentive to the entitled party to act in this way, since he knows that he will be left with the liability for such part of the fee fund dues as is attributable to the account of expenses submitted by him being excessive*."

5. There may, therefore, be a perception that the auditor has a financial interest in upholding or rejecting any points of dispute in relation to the account as the greater the overall amount of fees allowed then the greater the audit fee. In the Court of Session, where the Court may remit a motion for an additional fee to the Auditor for determination, there is a potential conflict. Since it is the Auditor who fixes the amount of the percentage increase, it could be said that he has a financial interest in deciding whether an additional fee should

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[287] The Court of Session etc. Fees Order 1997, SI 1997/688, as amended as at 1 April 2010, sets out the fees payable to the Auditor of the Court of Session.

[288] As from 30 April 2012, those sheriff court auditors who are employed by Scottish Court Service will be barred from undertaking private work.

[289] *Honer & Honer v Wilson* 2007 SLT 54.

be awarded and in its amount, as an increase in the gross account will result in a higher audit fee.[290]

6. Taxation of an account is only necessary where an agreement cannot be reached. In practice the majority of accounts are agreed and a taxation is not necessary. Where agreement is not reached an account of expenses must be lodged with the Auditor of Court for Court of Session actions within four months of the final interlocutor in the action that includes an award for expenses.[291] Failure to do so will require the leave of the court to proceed. The account should be intimated to the party found liable to pay the expenses, preferably within 10 days of the account being lodged. The Auditor will fix and intimate a diet for taxation. Three working days prior to that date the paying party must intimate any points of objection that it intends to make at the diet of taxation. The parties' representatives attend the taxation where the account is examined and representations made. For ordinary actions in the Court of Session, unless the award specifies otherwise, the scale upon which accounts between parties are taxed is 'Court of Session – party and party'.[292] In deciding whether a particular item should be allowed or not and in abating or increasing any amounts, the Auditor determines what is "reasonable for conducting the case in a proper manner."[293] The Auditor then prepares a report which stipulates the amount payable to the successful party.

7. If any party to the taxation wishes to appeal the amount they may object to the report of the auditor by lodging a note of objections within 14 days after the date of the report. Following intimation, the auditor has 14 days to reply and a hearing is then arranged.[294] The court can only interfere with the decision of the auditor if he misdirected himself in law or took irrelevant considerations into account or failed to take relevant considerations into account. The court cannot carry out a complete rehearing and substitute its own assessment.[295] The decision of the Lord Ordinary may be appealed with leave of the Lord Ordinary within 7 days after the date of the decision.[296]

8. In the sheriff court, unlike in the Court of Session, where an account of expenses awarded in a cause is lodged for taxation, there is no requirement to give written notice in advance of the diet of any items in the account to which objection is taken. Once the auditor has prepared his report, and where there are no objections, the matter is reported to the sheriff who approves the report and grants decree for the relevant amount. Where there are objections, a note of objections must be lodged either within seven days after the diet of taxation or, where the auditor has reserved his decision, within seven days after intimation of that decision. The sheriff must dispose of the objection in a summary manner with or without answers.[297]

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[290] *Ibid*.
[291] Rule 42.1(2)(a) of the Rules of the Court of Session.
[292] *McGregor v Ballachullish Slate Quarries* 1980 SC 1.
[293] Rule 42.10(1) of the Rules of the Court of Session.
[294] Rule 42.4 of the Rules of the Court of Session.
[295] *Tods Murray WS v Arakin Ltd* 2002 SCLR 759.
[296] Rule 38.4 (5) of the Rules of the Court of Session.
[297] Ordinary Cause Rule 32.

9. One submission to the Review expressed concerns about the complexity, lack of transparency and potential inconsistency of the taxation process. This echoes the findings of the Research Working Group on the Legal Services Market in Scotland in 2006.[298] In order to address the potential problem of the lack of a consistent approach in the taxation of accounts, the Report of the Scottish Civil Courts Review recommended that the Auditor of the Court of Session should have a role as 'head of profession' and should be able to issue guidance to sheriff court auditors on the interpretation of the rules of court and tables of fees as well as other aspects of practice and procedure.[299] Another submission to this review recommended further extensive training for sheriff court auditors and also recommended that a "mid-tier" form of Appeal be introduced in the sheriff court whereby a party could ask for a sheriff court auditor's decision to be reviewed by the Auditor of the Court of Session. Thereafter, if the party remained dissatisfied, the Note of Objections procedure could be instigated.

10. Another submission to this Review referred to the inefficiency of the taxation procedure, although acknowledged that the system has been substantially improved by the last two Auditors of the Court of Session. Nevertheless, clients still had to be warned that it may take six months or more to obtain a taxed account of expenses which can be enforced. Another submission referred to the taxation process as being a slow system in which the Auditor does not initially have to provide an explanation for the basis upon which he has taxed the Account. In addition, the costs of preparing and having Accounts taxed can act as a disincentive to recovering costs, which cannot be a good experience when compared to other systems. The Auditor does not provide the paying party with a copy of the taxed Account. Furthermore, the Auditor can allow the parties lodging the Account to submit certain material, e.g. a Counsel's Opinion, which the potential paying party has not seen. These points all make the system seem archaic, slow and potentially unfair.

11. Another submission commented on the lack of expertise amongst solicitors in relation to the whole question of expenses, the roles and responsibilities of auditors, the requirements of the relevant Rules and statutes, fee structures, and generally the way the expenses system operates.

12. The Scottish Civil Courts Review identified considerable concerns about the arrangements for taxing accounts of expenses. It therefore recommended that a greater use be made of information technology so that taxations can take place by telephone or videoconference, with any necessary papers being filed with the auditor electronically; where a party wishes to recover counsel's fees, the account should be supported by detailed fee notes, disclosed to the paying party on request. If objection is taken to the reasonableness of counsel's fees, paying parties should specify what sum, in their view, would be appropriate. There should be a similar obligation where objection is taken to the fees payable to expert and other witnesses; the procedure in the Court of Session whereby specific points of objection require to be intimated in advance of the diet of taxation should be extended to the sheriff court. The period of notice, which at present is three working

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[298] Research Working Group on the Legal Services Market in Scotland (2006), *Report.* A summary of the Group's findings can be found in the *Report of the Scottish Civil Courts Review:* Chapter 1, paragraphs 73 to 76.
[299] *Report of the Scottish Civil Courts Review*, Chapter 14 paragraph 87 and Recommendation 195.

days prior to the diet of taxation, should be lengthened; it should be open to parties to agree elements of an account and to restrict the taxation to only those items of the account that are in dispute.[300]

[300] *Report of the Scottish Civil Courts Review*: Recommendations 193, 197, 198 and 199.

Annex E

Civil Legal Assistance and Financial Eligibility Criteria

1. Legal aid in Scotland can take the form of Advice and Assistance, Assistance by Way of Representation, or representation through legal aid.

Advice and Assistance

2. Advice and assistance does not normally include the cost of representation in court or before a tribunal although there is limited scope for this in cases covered by the assistance by way of representation ("ABWOR") scheme. A grant of advice and assistance may be used to resolve issues without going to court, or to fund preliminary work to determine whether a potential litigant may have grounds to bring or defend a case, or may relate to a free standing legal problem upon which advice is sought.

3. A grant of advice and assistance is made by a solicitor, subject to whether there is a matter of Scots law involved and to financial eligibility criteria in relation to disposable income and capital.[301] Depending on the amount of disposable income the applicant may have to pay a contribution.[302] If property is recovered or preserved as a result of a grant of advice and assistance the amount of solicitors' fees and outlays may be deducted from that property subject to certain exemptions.[303]

Civil Legal Aid

4. An application for civil legal aid is made to the Scottish Legal Aid Board ("SLAB") which decides whether or not to grant it. In addition to financial eligibility criteria there are two "merits" tests: the claimant must establish a probable cause of action and SLAB must be satisfied that it would be reasonable, in the circumstances, to grant legal aid.[304] In assessing whether it is reasonable to grant legal aid in any particular case SLAB will take into account a number of factors including whether the prospects of success are poor or are such that a privately paying client would not be advised to incur the risk of litigating; and whether the prospects of recovery do not justify the use of public funds.[305] Civil legal aid is not available in certain civil proceedings including small claims proceedings.[306]

Financial Eligibility Criteria

5. At present the lower disposable income limit, below which a contribution from income is not payable, is £3,521 and the upper limit above which a person is ineligible on

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[301] Section 8 Legal Aid (Scotland) Act 1986 c.47.
[302] Section 11 Legal Aid (Scotland) Act 1986 c.47.
[303] Section 12(3) Legal Aid (Scotland) Act 1986 c.47.
[304] Section 14(1) Legal Aid (Scotland) Act 1986 c.47.
[305] See Scottish Legal Aid Board, (July 2011) *Civil Legal Assistance Handbook*, paragraphs 3.3 to 3.31.
[306] Schedule 2 Part II Legal Aid (Scotland) Act 1986 c.47.

grounds of income is £26,239. Since April 2009 there has been a system of tapered contributions. For disposable income up to £3,521 no contribution is required, for disposable income between £3,521 and £11,540 a contribution rate of 33% of the amount by which disposable income exceeds the lower income limit applies, between £11,540 and £15,743 a rate of 50% applies and between £15,743 and £26,239 a rate of 100% applies.[307] There is a sliding scale for payments of contributions by monthly instalments ranging from 20 monthly instalments for contributions up to £500 to 48 for contributions over £2,000. If the applicant finds these instalment levels unaffordable SLAB may, depending on individual circumstances, allow the applicant a longer period of time to pay the contributions.[308]

6. So far as disposable capital is concerned, the lower limit is £7,853 and the upper limit is £13,017.[309] Between these figures a contribution equal to the difference between total disposable capital and the lower limit is payable. In contrast to disposable income, legal aid may still be made available if capital exceeds the upper limit as SLAB has a discretion to allow legal aid in such cases if it is satisfied that the whole circumstances of the case, and the interests of justice, warrant the granting of legal aid. If the contribution comes from the applicant's disposable capital, it will normally have to be paid in a lump sum when legal aid commences.[310]

[307] Scottish Legal Aid Board (2011), Advice and Assistance and Civil Legal Aid Keycard 2011, p 14.
[308] Scottish Legal Aid Board (July 2011), *Civil Legal Assistance Handbook*, paragraph 2.13.
[309] Scottish Legal Aid Board (2011), Advice and Assistance and Civil Legal Aid Keycard 2011, p 15.
[310] Scottish Legal Aid Board (July 2011), *Civil Legal Assistance Handbook*, paragraph 2.13.

Annex F

Practice Direction 51 G – Costs Management in Mercantile Courts and the Technology and Construction Courts – Pilot Scheme

This Practice Direction supplements CPR Parts 29, 43, 44, 59 and 60.

General

1.1 This Practice Direction is made under Rule 51.2. It provides for a pilot scheme (Costs Management in Mercantile Courts and Technology and Construction Courts Scheme) to –

(1) operate from 1 October 2011 to 30 September 2012;

(2) operate in all Mercantile Courts and Technology and Construction Courts; and

(3) apply to proceedings in which the first case management conference is heard on or after 1 October 2011.

1.2 In this Practice Direction 'costs management order' means an order approving the costs budget of any party to the proceedings, after the court has made any appropriate revisions.

1.3 The court cannot approve costs incurred before the date of the first costs management order, but the court –

(1) may record its comments on those costs; and

(2) should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

1.4 Without prejudice to the court's general powers of management under rule 3.1, in any case proceeding before a Mercantile Court or a Technology and Construction Court in which the judge considers it appropriate to do so, or on the application of any party in accordance with Part 23, the judge may make a costs management order.

Modifications of Relevant Practice Directions

2. During the operation of the Costs Management in Mercantile Courts and Technology and Construction Courts Scheme –

Use of Costs Budgets in Case and Costs Management

(1) Practice Direction 29 is modified by inserting after paragraph 3A –

'Case management and costs in Mercantile and Technology and Construction Court cases

3B. In cases within the scope of the Costs Management in Mercantile Courts and Technology and Construction Courts Scheme provided for in Practice Direction 51G, the court will manage the costs of the litigation as well as the case itself, making use of case management conferences and cost management conferences in accordance with that Practice Direction'.

Estimates of Costs to be set out in detailed costs budgets

(2) Paragraph 6.4(1)(a) of the Costs Practice Direction does not apply to proceedings within the scope of the Costs Management in Mercantile Courts and Technology and Construction Courts Scheme.

(3) Section 6 of the Costs Practice Direction is modified by substituting for paragraph 6.5 the following –

'Costs Budgets in Mercantile Courts and Technology and Construction Courts

6.5 In proceedings within the scope of the Costs Management in Mercantile Courts and Technology and Construction Courts Scheme provided for in Practice Direction 51G, the estimate of costs must be presented as a detailed budget setting out the estimated costs for the entire proceedings in a standard template form, which substantially follows the precedent described as Precedent HB and annexed to that Practice Direction.'

Filing of Costs Budgets

3.1 Save where the court otherwise orders, as part of its preparation for the first case management conference, at the same time as filing its Case Management Information Sheet, each party shall file and exchange its costs budget substantially in the form set out in Precedent HB annexed to this Practice Direction.

(In Mercantile Courts cases see paragraph 7.7 of the Practice Direction under Part 59.)

(In Technology and Construction Court cases see paragraph 8.3 of the Practice Direction under Part 60.)

3.2 Each party should include separately in its costs budget reasonable allowances for –

(1) intended activities: e.g., disclosure (if appropriate, showing comparative electronic and paper methodology), preparation of witness statements, obtaining experts' reports, mediation or any other steps which are deemed appropriate to the particular case;

(2) identifiable contingencies, e.g., specific disclosure application or resisting applications made or threatened by an opponent; and

(3) disbursements, in particular court fees, counsel's fees and any mediator or expert fees.

Purpose of Costs Management

4.1 The court will seek to manage the costs of the litigation, as well as the case itself.

4.2 The objective of costs management is to control the costs of litigation in accordance with the overriding objective. (See rule 1.1.)

4.3 At any case management conference or pre-trial review, the court will have regard to any costs budgets filed pursuant to this Practice Direction and will decide whether or not it is appropriate to make a costs management order.

4.4 If the court decides to make a costs management order it will, after making any appropriate revisions, record its approval of a party's budget and may order attendance at a subsequent costs management hearing (by telephone if appropriate) in order to monitor expenditure.

4.5 Any party may thereafter apply to the court if that party considers another party is behaving oppressively in seeking to cause that party to spend money disproportionately on costs.

Discussions between Parties and Exchange of Budgets

5. A party submitting a costs budget to the court under this Practice Direction is not required to disclose it to any other party save by way of exchange. The parties should however discuss their costs budgets during the costs budget building process and before each case management conference, costs management hearing, pre-trial review or trial.

Revision of Approved Budget

6. In a case where a costs management order has been made, at least seven days before any subsequent costs management hearing, case management conference or pre-trial review, and before trial, a party whose costs budget is no longer accurate must file and serve a budget revision showing what, if any, departures have occurred from that party's last approved budget, and the reasons for any increased budget. The court may approve or disapprove such departures from the previous budget.

Keeping the Parties Informed

7. No later than seven days after the conclusion of any hearing, each party's legal representative must –

(1) notify its client in writing of any costs management orders made at such hearing; and

(2) provide its client with copies of any new or revised budgets which the court has approved.

Effect on Subsequent Assessment of Costs

8. When assessing costs on the standard basis, the court –

(1) will have regard to the receiving party's last approved budget; and

(2) will not depart from such approved budget unless satisfied that there is good reason to do so.

RESPONDING TO THIS CONSULTATION PAPER

This consultation paper can be viewed online on the Review website at http://scotland.gov.uk/About/taylor-review. You can telephone Freephone 0800 77 1234 to find out where your nearest public internet access point is. As the Review of Expenses and Funding of Civil Litigation in Scotland is independent of the Scottish Government this consultation will not appear in the 'Consultation' section of the Scottish Government website.

We are inviting written responses to this consultation paper by Friday 16th March 2012. Please send your response with the completed **Respondent Information Form** (see "Handling Your Response" below) to:

enquiries@taylorreview.org

or

Kay McCorquodale
Secretary to the Review
Review of Expenses and Funding of Civil Litigation in Scotland
Area 3G South,
Victoria Quay
Edinburgh
EH6 6QQ.

If you have any queries, please contact Kay McCorquodale on 0131 244 7357.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** which forms part of the consultation as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential and treat it accordingly.

Next steps in the process

Where respondents have given permission for their response to be made public (see the attached Respondent Information Form) and after we have checked that they contain no potentially defamatory material, responses will be made available to the public on the Taylor Review Website.

What happens next?

Following the closing date, all responses will be analysed and considered along with any other available evidence. Once the consultation period is completed Sheriff Principal Taylor will present a Report of recommendations to the Cabinet Secretary for Justice for consideration by Scottish Ministers.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Kay McCorquodale - contact details as above.

LIST OF QUESTIONS

CHAPTER 2: ACCESS TO JUSTICE

1. What are the main reasons relating to the cost of litigation that discourage potential litigants from court action?

CHAPTER 3: THE COST OF LITIGATION

2. Should solicitors' fees for litigation be recovered as expenses on the basis of time expended, value of the claim or some other basis?

3. Is LPAC, as currently constituted, an appropriate body to review the level of fees for litigation which may be recovered as expenses? If not, what alternative body should carry out this function and what should be its composition?

4. Is the test currently applied by the sheriff court in sanctioning the instruction of counsel appropriate? If the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied?

5. What test should the court apply when considering a motion for certification of an expert witness – should it be necessity, reasonableness or some other test?

6. In the sheriff court, should counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of counsel?

7. In the Court of Session, should senior counsel's fees be a competent outlay in a judicial account of expenses only from the date of an interlocutor certifying the case as suitable for the employment of senior counsel?

8. Should the presiding judicial office holder assess what would be a reasonable fee for counsel in any account of expenses? If so, at what point in the proceedings should that assessment be made?

9. From when should the fees of an expert witness be a competent outlay in a judicial account of expenses?

10. Should the presiding judicial office holder assess what would be a reasonable fee for an expert witness in any account of expenses? If so, at what point in the proceedings should that assessment be made?

11. Is it reasonable for counsel to be entitled to charge a commitment fee and, if so, should that be prescribed or left to the discretion of the Auditor?

12. Should the level of fees recoverable by the successful party in a commercial action be greater than in other types of action and, if so, what is the justification?

13. Should a tariff-based system for assessing the level of recoverability of judicial expenses be introduced? If so, how might such a system be structured?

14. Should any table of fees provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor and/or for an accredited specialist to recover at a higher rate than a solicitor without accreditation?

15. Is the ability to request an additional fee a reasonable procedure for regulating the recoverability of judicial expenses?

16. If the concept of an additional fee is retained:

    a. at what stage in the proceedings should a motion for an additional fee be made?

    b. should motions for an additional fee, and the percentage increase, be determined by an auditor of court or by the member of the judiciary hearing the motion?

17. Should a litigant be entitled to claim interest on an award of judicial expenses and, if so, from what date and at what rate?

CHAPTER 4: FURTHER ENHANCING THE PREDICTABILITY OF THE COST OF LITIGATION

18. Should the court have a discretion to restrict recoverable expenses in a small claim even in cases where a defender, having stated a defence, has decided not to proceed with it?

19. Should more cases in Scotland come under the scope of a fixed expenses regime? If so, what types of case should be included?

20. Should each party to a litigation in Scotland bear their own expenses? If so, in what types of litigation? Should the rule be qualified and, if so, in what circumstances? In particular, is the general rule in family cases appropriate?

21. Should a procedure for the summary assessment of expenses be introduced into the civil courts in Scotland?

22. If a procedure for summary assessment was introduced, in what circumstances should the summary assessment of expenses take place and should it be restricted to any particular types of action?

23. Would there be any benefit in introducing a procedure of submitting schedules of expenditure similar to the pilot scheme operating in the Birmingham Mercantile Court and TCC?

24. Apart from imposing sanctions, what other powers, if any, should be made available to the courts to promote predictability and certainty of judicial expenses?

CHAPTER 5: PROTECTIVE EXPENSES ORDERS

25. Should the power to apply for a PEO in Scotland be limited to environmental cases or should PEOs be available in all public interest cases?

26. Should limits be set on the level at which a PEO is made or should this be a matter for judicial discretion?

CHAPTER 6: REFERRAL FEES

27. Should lawyers be permitted to pay a sum of money to a third party in return for referrals or instructions for other business?

28. Should lawyers be permitted to provide legal or other services to a third party at no cost to the third party in return for referrals or instructions for other business?

29. Should lawyers be permitted to make payment to a company, or some other body, either in money or by some other consideration, in order to have their name placed on a panel for the purpose of securing a flow of instructions in litigation?

30. Should the answers to questions 27, 28 and 29 be different, please explain why the situations should be distinguished.

31. In the event that payment for referrals, whether by money or provision of services, is permitted, should there be a limit upon the value of the referral fee or services provided?

CHAPTER 7: BEFORE THE EVENT INSURANCE

32. Do BTE insurers adversely influence the conduct of the litigations which they are funding?

33. Is it appropriate for a lawyer in the direct employment of an insurance company to assess whether a policy holder's claim falls within the terms of the policy?

34. Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage?

35. Should BTE insurance be encouraged and, if so, what suggestions would you make to address some of the criticisms levelled against it?

CHAPTER 8: SPECULATIVE FEE AGREEMENTS

36. Are there any aspects of speculative fee agreements that require regulation?

37. What should be the maximum uplift for success fees in Scotland?

38. Should there be a cap on success fees as a percentage of damages? If so, at what percentage and at what level and heads of damages?

39. Should success fees be recoverable in Scotland? If so, under what circumstances?

40. Should ATE insurance premiums be recoverable in Scotland? If so, under what circumstances?

41. If success fees and ATE insurance premiums remain irrecoverable in Scotland, is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees and insurance premiums? If not, what are the alternatives?

CHAPTER 9: DAMAGES BASED AGREEMENTS ('CONTINGENCY FUNDING')

42. Should the law be changed to allow solicitors and counsel to enter into DBAs?

43. Should claims management companies continue to be entitled to enter into DBAs?

44. If DBAs are permitted in Scotland:

    a. is it reasonable to expect successful pursuers to contribute some of their damages towards payment of their legal fees?

    b. should there be a cap on the percentage of the damages that lawyers are entitled to charge?

    c. should the percentage recoverable under a DBA be applicable to all heads of loss?

    d. should there be an increase in the level of damages awarded? If so, by what percentage and how is this to be achieved?

    e. what forms of protection may be required for clients entering into such an agreement?

45. If the current prohibition on solicitors and counsel entering into DBAs is retained, should steps be taken to prevent its circumvention by the formation of a claims management company in which solicitors are directors or shareholders?

46. Should there be regulation of claims management companies operating in Scotland? If so, what are the mischiefs to be addressed and how should regulation be achieved?

CHAPTER 10: THIRD PARTY FUNDING

47. What are the risks/potential abuses involved in third party funding and how might these be addressed?

48. If regulation is desirable, what form(s) should it take?

49. Should a party to a litigation who has entered into a funding arrangement be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances?

CHAPTER 11: ALTERNATIVE SOURCES OF FUNDING

50. Is a disproportionate amount of the civil legal aid budget allocated to family actions and, on any view, are there ways in which this might be reduced?

51. Should a CLAF or SLAS be introduced in Scotland? If so,which is preferable?

52. If such schemes were to be introduced, what types of litigation should be covered?

53. If such schemes were to be introduced, what should be the minimum and maximum disposable income of successful applicants?

54. Should such schemes be liable for payment of the expenses of successful opponents?

55. What further steps, if any, should be taken to promote *pro bono* funding of litigation and by whom?

56. Should the Scottish courts have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented on a *pro bono* basis and, if so, to whom should such a payment be made?

CHAPTER 12: SCOTLAND'S LITIGATION MARKET

57. What steps could be taken to make Scotland the forum of choice for litigation?

58. Apart from the introduction of a tariff-based system as described in Chapter 3, what measures might be introduced to reduce the difference between the actual cost of a litigation and the amount recoverable as judicial expenses?

59. If a one way costs shifting regime is introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

60. If damages based agreements are introduced in England and Wales but not in Scotland, would this create an incentive to litigate in England and Wales?

CHAPTER 13: SPECIAL CASES AND CONCLUDING REMARKS

61. Do clinical negligence claimants face particular difficulties in the funding of claims? If so, what measures might be taken to address these difficulties?

62. In the event that DBAs are not otherwise recommended, should they be available for the funding of multi-party actions?

63. If DBAs are not recommended for multi-party actions, how else may lawyers be remunerated for the additional responsibility involved in such actions?

64. Should the funding arrangements for multi-party actions cover the payment of legal representation and disbursements?

65. Should the power to apply for a PEO in Scotland extend to multi-party actions and, if so, should there be any restrictions on their availability?

66. In addition to the cases identified in Chapter 13, are there any other cases that may require special consideration? If so, what are they and why?

67. Can you suggest any means, other than those raised in this consultation paper, which would enable litigation to be more affordable?

68. What other recommendations might this Review make to enable individuals to fund a litigation when they are not eligible for legal aid, have no BTE insurance cover or their cover is inadequate, cannot afford the ATE insurance premium and are not members of an organisation that meets its members' legal fees?

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

Title **Mr** ☐ **Ms** ☐ **Mrs** ☐ **Miss** ☐ **Other** ☐ **Please Specify**_____

Surname

Forename

2. Postal Address

Postcode	**Phone**	**Email**

3. Permissions. I am responding as

Individual ☐ / **Group/Organisation** ☐

Please tick as appropriate

(a) Do you agree to your response being made available to the public through the Taylor Review Website?

Please tick as appropriate ☐ **Yes** ☐ **No**

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

(a) The name and address of your organisation ***will be*** made available to the public through the Taylor Review Website

Are you content for your ***response*** to be made available?

Please tick as appropriate ☐ **Yes** ☐ **No**

The independent Taylor Review is preparing a report for the consideration of the Cabinet Secretary for Justice, which may lead to proposals from the Scottish Government for legislation. If you have agreed that your response may be made public, the Scottish Government may wish to contact you in the future, but they require your permission to do so. Are you content for the Scottish Government to contact you in relation to this consultation exercise?

Please tick as appropriate ☐ **Yes** ☐ **No**