Review of Expenses and Funding of Civil Litigation in Scotland

Report

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REPORT OF THE REVIEW OF EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND

FOREWORD BY SHERIFF PRINCIPAL JAMES A. TAYLOR

The Report of the Scottish Civil Courts Review ('SCCR') was delivered to the Scottish Government in September 2009, The Review having started its work in April 2007. In the course of the SCCR's deliberations, the Review of Civil Litigation Costs under the chairmanship of Lord Justice Jackson was announced but was not due to report until the end of 2009. Lord Justice Jackson was appointed to undertake a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales. The SCCR, correctly, took the view that what might be recommended in England and Wales in relation to the costs regime south of the border, could have considerable implications for the conduct of litigation in Scotland. Accordingly, the SCCR decided not to address the issue of litigation expenses in detail, anticipating that they would form the subject of a further Review. I was therefore delighted to accept the invitation of the Scottish Government to chair the Review of Expenses and Funding of Civil Litigation in Scotland. I ought to declare that I was a member of the Board of the SCCR. I am informed that the implementation of any recommendations made by me will form part of the Scottish Government's Justice Strategy and its Making Justice Work programme.

At the outset of the consultation process it became clear that a number of respondents considered that this Review presented an opportunity to try to revisit those aspects of the SCCR which were not to their liking. They will be disappointed with the terms of this Report. I have assumed that the recommendations made by the SCCR have been implemented. Over the course of this Review, I also received guidance from many who have responded to the Consultation Paper, and who have written and spoken with me. This Report has been designed to reflect and address their concerns, particularly with regard to the impact of affordability on access to justice. I hope they will not be disappointed.

My remit required me to have regard for *inter alia* the terms of the Civil Litigation Costs Review of Lord Justice Jackson and how his recommendations, as implemented by the UK Government, may impact on litigation in our jurisdiction. Thus there is inevitably much reference in my Report to what was recommended for England and Wales but that is for contextual purposes. I have not deferred to what has been implemented south of the border. I have started from the premise that any similarities, or differences, between Scotland and England and Wales with respect to problems raised by the costs (an English term of art) or expenses (a Scottish term of art but with the same meaning) of civil litigation cannot be assumed. Indeed, they may be purely coincidental.

One of the problems addressed by Lord Justice Jackson was the imbalance in a litigation between parties who had entered into a conditional fee agreement and those who had not. He found that this imbalance had been introduced into England and Wales in 2000 by The Access to Justice Act 1999, which made provision for the recoverability of the solicitor's success fee and the After the Event insurance premium from unsuccessful opponents. The equivalent in Scotland to a conditional fee agreement is a speculative fee agreement but it

differs in that any success fee to which the successful party's solicitor is entitled to receive is not, and never has been, recoverable from the unsuccessful opponent. Any After the Event insurance premium paid by those entering into a speculative fee agreement in Scotland is also not recoverable. Thus in Scotland, there was, and is, no such imbalance as had been identified by Lord Justice Jackson with regard to conditional fee agreements.

In Lord Jackson's view, the recoverability regime in England and Wales had a number of flaws which he sought to address. Amongst them, it placed on unsuccessful opposing parties a costs burden which, in his view, was both excessive and could amount to a denial of justice.[1] The UK Government agreed with Lord Jackson's analysis and introduced a full package of reforms to redress the imbalance. At that time, it stated:

> *"The current regime, with recoverable success fees and after the event insurance premiums, allows claims to be pursued with no real financial risk to claimants and with the threat of excessive costs to the defendant.....These civil justice reforms will restore a much needed sense of proportion and fairness to the existing regime, not by denying access to justice, but by returning fair balance to the system."*[2]

It is in my opinion important to consider the different contexts in which Lord Justice Jackson's Review and mine required to be conducted. That context has inevitably had an influence on the recommendations and how they fall to be implemented by government. Besides the difference in our respective recoverability regimes, there is a perception held by some politicians and sections of the media that there is a compensation culture in England and Wales. Whether there is or not is a matter of some debate, which I do not propose to join. However, it is worth repeating from the Consultation Paper what the statistics disclose the position in our jurisdiction to be.

In the three year period between 1 April 2008 and 31 March 2011, the number of claims registered by the Compensation Recovery Unit in England increased from 728,164 to 892,463, an increase of 23 per cent. In the same period, the number of claims registered in Scotland increased from 36,417 to 38,819, an increase of only 7 per cent. 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). This pattern was displayed quite dramatically over a range of cases. Over the three year period in Scotland, 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).

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[1] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), pages 108 - 112

[2] http://www.docstoc.com/docs/140269288/civil-justice-reforms-full-package

One explanation might be, for example, that doctors in Scotland are much more careful than their English counterparts and that Scottish drivers are more careful than are the English. I very much doubt that to be the case. My conclusion at the initial stages of this Review was that even if a 'compensation culture' had taken hold in England and Wales, the data for Scotland did not disclose evidence of its appearance in Scotland.

Data recently made available for 2011-12 by the Scottish Government's first issue of *Civil Law Statistics*[3] presents a picture of declining levels of litigation in Scotland's civil courts over the past three years, which confirms my initial position. A total of 85,256 civil cases were initiated in 2011-12, a decrease of 35 per cent from 2008-9 when 131,633 civil cases were initiated. Even claims arising from road traffic accidents fell by nearly 20 per cent between 2009-10 and 2011-12. The data on civil litigation provide a check on current perceptions of litigation and, more specifically, they challenge the belief that a compensation culture has taken hold in Scotland. This is consistent with the findings of research undertaken in this area.[4] One is left with the conclusion that there is a different culture in Scotland, as opposed to England and Wales, when it comes to litigation.

Another contextual difference to which I wish to refer is the position with regard to legal aid. The Scottish Government has no intention of withdrawing the benefit of civil legal aid from the Scottish people, albeit there is a desire to make the Scottish Legal Aid Board the funder of last resort.[5] This falls to be contrasted with the position in England and Wales where legal aid has been withdrawn from a large majority of civil cases.

One of the main themes which emerged from the consultation process in this Review could be summarised as the impact which expenses have on access to justice. That impact manifests itself in a variety of ways. From the evidence available to the Review, one of the main concerns for potential litigants is what the cost will be to them should they lose the action. Not only will they require to pay their own legal costs but also those of their opponents. While they may be able to come to an arrangement with their own lawyers, any adverse award of expenses is almost impossible to predict with any accuracy. I considered this to be a reasonable and genuine concern which I have sought to address in a number of ways.

Personal injury litigation formed 76 per cent of all cases initiated in the General Department of the Court of Session in 2011-12 and 11 per cent of all cases raised under ordinary cause and summary cause procedures in the sheriff court. ATE insurance against an adverse award of expenses in a personal injury action is available to clients of some solicitors at reasonable cost, but is not universally available on such terms. It is not within my gift, or that of the Scottish Government, to ordain that After the Event insurance should be available at reasonable cost to all. Thus another route was required to address the concerns of potential pursuers of being almost bankrupted by an adverse award of expenses. The defenders in virtually all personal injury actions are, in reality, insurers. There is thus what Lord Justice Jackson described as an asymmetric relationship between the pursuer and the

[3] Scottish Government, *Civil Law Statistics in Scotland 2011-12* (2012)
[4] H Genn and A Paterson, *Paths to Justice Scotland: What people in Scotland do and think about going to law* (2001)
[5] The Scottish Government, *A Sustainable Future for Legal Aid* (2011)

defender. In many cases there is a true David and Goliath relationship. It is also clear from the statistics available that insurers standing behind defenders rarely recover any expenses from an unsuccessful pursuer in personal injury litigation. Thus part of the solution which I have recommended to address the concerns about an adverse award of expenses is that in personal injury litigation there should be qualified one way costs shifting, whereby an unsuccessful pursuer will not be liable for the expenses of the defender apart from in exceptional circumstances. Such exceptional circumstances include the court finding the pursuer to have been fraudulent in bringing the action or having conducted the action in a manner which is considered by the court to have been an abuse of process. Few pursuers need be concerned in this respect. Even if the pursuer fails to beat a tender lodged by the defender, in which circumstances the pursuer would ordinarily be liable for at least some of the defender's expenses, the pursuer will have some protection; I have recommended that any adverse award of expenses will be limited to 75 per cent of the damages awarded to the pursuer by the court.

Another part of the solution is to address the pursuer's liability to pay his or her own lawyers. This forms part of the funding aspect of the Review. I have recommended that all barriers to lawyers entering into agreements in terms of which the lawyer is entitled to a percentage of the damages awarded should be removed. If implemented, it means that lawyers will be able to enter into 'no win no fee' arrangements with their clients which are presently widely available to pursuers through a claims management company. These agreements are known as damages based agreements. The faintly ridiculous situation which presently exists, whereby solicitors form claims management companies and refer work to themselves in order to circumvent the present barriers, should be in the past. There should be no such barriers. As Lord Neuberger, President of The Supreme Court, pointed out in the Harbour Litigation Funding First Annual Lecture, one can also look at the issue from a philosophical standpoint. He said *"access to the courts is a right, and the State should not stand in the way of individuals availing themselves of that right."*

To provide protection to the public, I have recommended that there should be a cap on the percentage of the award of damages which the lawyers can take and that this should be on a sliding scale in which the percentage reduces as the award increases.

It is often said that in Scotland there is no meaningful right of access to the courts unless one is sufficiently poor to qualify for legal aid (albeit the present upper limit for disposable income is £26,239) or very rich. It has been said that the law may look impressive but is empty of all practical meaning. A recent letter to the Financial Times commented: *"Worse still, those in the 'excluded middle' have no choice but to accept 'out of court' settlements on all manner of insurance and negligence cases."*[6] That will no longer be the case, at least in the context of personal injury litigation, should my recommendations be implemented.

Lawyers in Scotland have always been able to enter into speculative fees agreements whereby an enhanced fee will normally be charged in the event of success. Such arrangements are largely unaffected by my recommendations save that I have

[6] Letters to the Editor, *Financial Times* (June 8/9 2013), page 12

recommended that the public should receive further protection by means of a cap on the damages that may be taken, identical to that recommended in respect of damages based agreements.

Some might argue that the protection afforded by imposing a cap in both damages based agreements and speculative fee agreements is unnecessary. There is merit in such an argument but I have not been persuaded by it. By creating the 'fiction' of a claims management company, some solicitors who specialise in pursuing personal injury cases already offer some form of 'no win' no fee agreement in terms of which the solicitor is rewarded by reference to the size of the award of damages. We were unable to find any evidence that the public considered that they were being badly treated thereby. To the contrary, the evidence suggested that the public liked the simplicity of such agreements and the protection which they afforded. Some of these agreements required that the pursuer should pay up to 25 per cent of the total damages awarded regardless of the size of the award of damages. Yet there were no complaints.

Solicitors who offer such types of agreement may not welcome the cap which I recommend as it will entitle them to a considerably smaller proportion of the award of damages than is presently paid by some members of the public to their affiliated claims management companies. Furthermore, even if I was persuaded that the market should be left to regulate the percentage which a solicitor can take from an award of damages, one doesn't know what the future legal landscape in Scotland will look like after the advent of alternative business structures. Thus I do not recommend that the terms of a damages based agreement should be left to market forces. I believe that the cap, which is on a sliding scale, has been set at levels which are fair to the client and also provide reasonable remuneration to the lawyer. It is important that lawyers of ability continue to make themselves available to represent the interests of those with personal injuries.

In my opinion the measures recommended in the foregoing paragraphs will enable pursuers to assert their legal rights in personal injury cases without fear of being financially ruined by the expenses of the process. The price which has to be paid is that a relatively modest percentage of the damages requires to be sacrificed by the pursuer. It also means that personal injury claims, save in exceptional circumstances, should not require funding by the Scottish Legal Aid Board.

That market forces are at play is quite clear. Solicitors informed me that members of the public have become aware of the type of agreements which are available and often phone round firms of solicitors to obtain competitive quotes. This is a welcome development, perhaps as a result of television advertising. Several firms disclosed to my Review their normal terms of business on a confidential basis. These terms included what their affiliated claims management companies took as a percentage of the damages in a damages based agreement. This was often in the order of 20-25 per cent of the damages recovered. Standing that the average award of damages in a personal injury (road traffic and work related) sheriff court ordinary cause action is £9,511 and the average solicitor's fee in an award of judicial expenses in such cases is in the order of £4,980, such firms would have been much better remunerated had they offered a speculative fee agreement in which they were entitled to a success fee of 100 per cent of the judicial expenses. Market forces, and the

public's liking for the simplicity of damages based agreements, dictated that such firms offered an agreement which resulted in a much lower remuneration for the firm.

Not all forms of litigation disclose an asymmetric relationship between pursuer and defender and therefore there should be costs shifting in the normal way in such circumstances. However, steps can, and in my opinion should, be taken to improve predictability of the cost of litigating and thus access to justice. These steps should in some real measure minimise the concern that one's opponent's legal expenses consist of any number which then requires to be doubled. In the sheriff court, in all actions subject to active judicial case management, I have recommended that a motion for sanction for the employment of counsel should be made at the start of the proceedings or, at a later stage, on cause shown. I have also made similar recommendations with regard to expert witnesses in both Court of Session and sheriff court actions subject to active judicial case management.

There is presently a facility for a successful litigant to move the court to award an additional fee which can be more than 100 per cent of the fee assessed as due by the Auditor of Court under the Table of Fees. The motion for an additional fee is normally made at the conclusion of the action, with the potential to throw any budget for expenses into disarray. I have recommended that motions for an additional fee in cases which are actively case managed should be made at the outset of the proceedings to avoid one party being unpleasantly surprised by not only losing the action but having to pay to the successful party in respect of judicial expenses twice as much, or more, as may have been anticipated at the time the litigation was being conducted.

I have also recommended that, as a pilot scheme for commercial actions in the Court of Session and the sheriff court, the court should be able to make summary awards of expenses, a procedure which has proved very popular with those solicitors who responded to the Consultation Paper, or with whom we met, and who have experience of summary assessment of expenses in England and Wales. Also, as a pilot for commercial actions in the Court of Session and in one of the sheriff courts where commercial procedures have been available for some time, such as Glasgow, I have recommended that the courts in Scotland should become more involved in the management of the expenses of an action. This has proved popular with several members of the English judiciary. This will require solicitors to prepare estimates of the likely expenses of an action at its outset. All of these measures should go a long way towards enabling a party to make a reasonable estimate of what an adverse award of expenses might be in the event that the party is unsuccessful in the action. Thus a party should be able to make an informed decision as to the potential costs and benefits of proceeding with litigation.

There was one issue which brought uniform complaint from lawyers and their clients. It was the level of expenses which, in Scotland, the successful party can recover from the unsuccessful party in a judicial account of expenses. This problem was said to be particularly acute in commercial actions where pursuers often had a choice of raising the action in Scotland or in England and Wales. In the latter jurisdiction, the successful party was able to recover over 80 per cent of the actual costs incurred in commercial actions. In Scotland, it could be less than 50 per cent. I was informed that the recoverability of expenses was seldom the sole reason why litigants chose to raise proceedings south of the border but

it was often an influencing factor. Some commercial clients considered that the recovery rate in Scotland was so low that in cases which were not of high value, there was no financial merit in proceeding with the action. Such a situation also represents a denial of access to justice and requires to be addressed. Furthermore, a drift of litigation away from Scotland has potential adverse consequences a) for the development of Scots commercial law and b) for the Scottish economy. I have made recommendations which I consider will address the problem. It is also worth emphasising that removing the barrier from lawyers who may wish to enter into a damages based agreement will benefit not just personal injury pursuers. It will also enable commercial clients, where appropriate, to negotiate a damages based agreement with their lawyers. This represents a further improvement in access to justice.

The SCCR recommended that there should be new simplified procedures for both small claims and summary cause actions. Several parties were critical of the Consultation Paper in that it did not refer to the expenses regime in small claims and summary causes. There was a reason for that omission. It is impossible to devise a system of expenses until one knows the procedure to be adopted. One cannot put the cart before the horse. What did strike me from the data which we recovered is that judicial expenses in defended summary causes are often disproportionately high in relation to what is at stake. Accordingly I recommend that whatever the simplified procedures might be, there should be a system of fixed expenses in all small claims and summary causes save for cases involving personal injury. Every litigant will then know what their maximum liability will be to the successful party should they lose the action and also the maximum which they will be able to recover from the unsuccessful party should they win the action. An informed decision can then be made as to the cost benefit in proceeding with an action. Fixed expenses regimes tend not to be popular with solicitors. That is because they are associated with what are thought to be unrealistically low awards of expenses. I was struck by the popularity with solicitors of the County Court Patent Procedure in England whereby the maximum damages which can be recovered is £500,000 but the maximum liability in judicial expenses should one lose is £50,000. It demonstrated that fixed expenses regimes can work and still provide reasonable remuneration for, and be popular with, lawyers. The fixed expenses just require to be properly assessed before being fixed.

Aside from the problems created for litigants in relation to the predictability of their liability for expenses, there is little doubt from the evidence placed before the Review that there is a problem in finding finance to obtain the necessary medical reports to enable a decision to be made as to whether there are reasonable grounds to bring proceedings for clinical negligence. This difficulty arises before proceedings are raised. Without medical reports from experts in the relevant field, it is impossible to assess if there has been clinical negligence and if the negligence has caused the damages complained of. This represents a serious denial of access to justice. After the Event insurance premiums are usually so high that they have been an unrealistic option and may remain so, despite the likely reduction in their cost following the proposed introduction of a qualified one way costs shifting regime. Before the Event insurance cover can be of assistance, as can legal aid. However, I am satisfied that there is a gap in the market. One means of filling that gap is a Contingent Legal Aid Fund which is more fully explained in the body of the Report. Before I could recommend the establishment of a Contingent Legal Aid Fund for the limited purpose of

covering the costs of expert reports in clinical negligence cases, it will be necessary to undertake some financial modelling. From the various discussions which I had with English barristers and an economist who had been retained by the Bar Council, I am satisfied that there are reasonable grounds for believing that the modelling will produce a positive result. This Review did not have the financial resources to instruct such modelling and I therefore have urged the Scottish Government to undertake such modelling as is necessary to determine the viability of such a Contingent Legal Aid Fund.

Several of the recommendations which I have made involve what might be referred to as an incremental approach. For example, I recommend the establishment of pilot schemes. This may be thought to be a rather over-cautious approach. However, if there is one lesson to be learned in this jurisdiction from the various attempts to reform the issue of legal costs in England and Wales, it is that predicting how lawyers will react when the financial dynamics and incentives are altered is very difficult. I thus recommend caution to avoid the satellite litigation which has bedevilled the courts of England and Wales. I am also reassured by the implementation of one of the SCCR's recommendations regarding the establishment of a Scottish Civil Justice Council. It will be the task of the Council to monitor any implementation of the recommendations which are contained herein and to move quickly should there be unintended consequences of a damaging nature. Not least, the introduction of alternative business structures in Scotland may have implications which are unpredictable. For example, my recommendations in relation to Third Party Funding were fraught with difficulty since the impact of alternative business structures in Scotland is an unknown quantity. It is the role of the Council to keep a watchful eye on this, as well as other recommendations.

In Chapter 13, I raise an issue which is outwith my remit and thus upon which no questions were asked in the consultation paper. Accordingly, I make no recommendations other than to suggest that there should be a debate on how Scotland's professions are regulated. Has the time come to regulate an individual activity, such as litigation or insolvency, rather than the individual profession, such as solicitors or accountants?

In this foreword, I have sought to explain that while my starting point may be different from Lord Justice Jackson's, my recommendations do not always differ. Even if the recommendations are expressed in similar language, the means by which Lord Justice Jackson's recommendations have been implemented in England and Wales by the UK Government may cause them to have a different effect to what I intend. For example, like Lord Justice Jackson, I have recommended that lawyers should be able to enter into damages based agreements with clients. I suspect from the terms of his Report that Lord Justice Jackson anticipated that damages based agreements would be used by solicitors to fund personal injury litigations. It is certainly my intention that they should be used for this purpose. However, given the way in which his recommendations have been implemented, as more fully set out in my Report, I think that it is highly unlikely that solicitors in England and Wales will offer damages based agreements to personal injury claimants, other than in high value cases. Thus the recommendation in the two Reports may be similarly worded, but the implementation south of the border will probably lead to a result which I do not endorse for this jurisdiction.

Another reason to be cautious when making comparison of the two Reports is that two recommendations may be the same but have been introduced for different reasons. For example, both Reports recommend that qualified one way costs shifting should apply in personal injury cases. Lord Justice Jackson's recommendation may be seen as intending to remove an additional layer of cost from defendants while preserving a personal injury claimant's protection against a potential liability for an adverse award of costs. My recommendation is intended to provide a personal injury pursuer with protection against a potential liability for an award of expenses while removing from them an additional layer of cost, the After the Event insurance premium. While we both start from a position of imbalance in our respective jurisdictions, the imbalance that I found in Scotland is quite different from that which Lord Justice Jackson found in England and Wales because we have started with quite different recoverability regimes.

On occasion, I appear to have arrived at a radically different conclusion than Lord Justice Jackson, such as with regard to referral fees. More careful inspection, however, may reveal that Lord Justice Jackson's recommendation with regard to the prohibition of referral fees in England and Wales differs little from current practices in Scotland's referral market. Once again, our apparent differences reside in our quite different starting points. Hence, considerable caution must be exercised in comparing the two Reports.

Some may find that the Report does not make light reading. I readily acknowledge that resort has been made to technical terms that the lay reader may not find easy going. To apologise, however, would be disingenuous. The technical terms employed here have specific meanings in the legal context in which they are used and are not necessarily the same as in common use. These meanings may even be strictly defined by the law in the respective jurisdictions in which they are employed. A Glossary is contained in the Report to provide readers with a guide to these legal terms of art.

I wish to record my thanks to members of the Reference Group who were very generous with their time for which they received no remuneration. I also appreciated their wise counsel on a large number of issues. There is always a risk when recommending change that there will be unintended consequences. The input from the members of the Reference Group has considerably reduced that risk.

Lastly, I would like to place on record my thanks to the Review team. The SCCR Review team at times had a complement of nine. This Review team never numbered more than four at any one time. That notwithstanding, we have been able to undertake a very thorough consultation process with four public meetings and many private meetings and discussions with a broad spectrum of interests. The internal debate has at times been lively and I consider the Report is the better for that.

THE CHAIRMAN, REFERENCE GROUP AND REVIEW TEAM

The Chairman

Sheriff Principal James A. Taylor

Sheriff Principal Taylor graduated BSc and LLB from Aberdeen University and thereafter was in private practice in both Aberdeen and Glasgow, latterly as the head of litigation in McGrigors, now merged with Pinsent Masons. In 1993 he became one of the first solicitor advocates. In 1998 he was appointed to the shrieval bench sitting first in the Sheriffdom of Lothian and Borders at Edinburgh and from 1999 as a commercial sheriff in Glasgow. In 2005 he was appointed as Sheriff Principal of the Sheriffdom of Glasgow and Strathkelvin. He was one of the Board of four for the Scottish Civil Courts Review. He retired as Sheriff Principal in April 2011. He is a visiting Professor of Law at the University of Strathclyde and had the honorary degree of Doctor of Laws conferred on him by the University of Glasgow in 2013.

The Reference Group

Ronnie Conway

Ronnie Conway graduated M.A. (Hons) and LLB, from the University of Glasgow. He is a managing director of Bonnar Accident Law. He is an active civil practitioner in the sheriff courts and the Court of Session and qualified as a solicitor advocate in 2008.

Ronnie was a member of the Sheriff Court Rules Council between 1997 – 2009, and is a current member of the Law Society of Scotland's Civil Justice Committee, having joined in 1997.

He is the author of *Personal Injury Practice in the Sheriff Court* (Third Edition, 2011), writes the Personal Injury Chapter of Green's *Lawyers Factbook 2013*, and is a member of the Editorial Panel of Green's *Litigation Styles*. Ronnie is also the current Scottish Co-ordinator of the Association of Personal Injury Lawyers (APIL).

Gemma Crompton

Gemma Crompton is a Policy Manager at Consumer Futures. Previously, she was Policy Manager at Consumer Focus Scotland, with responsibility for its legal services policy from 2009 until 2012. Gemma's role was to promote the interests of consumers in the development of legal policy, with a particular focus on access to justice. She provided policy support to the work of the Civil Justice Advisory Group, chaired by the Right Honourable Lord Coulsfield, which published its final report in 2011 on the proposals of the Scottish Civil Courts Review. Until the end of 2012, Gemma also led on the legal capability workstream of the Scottish Government's Making Justice Work programme.

Gemma was previously employed as a policy development assistant at the Scottish Legal Aid Board and as a legal assistant at the Judicial Studies Committee.

Joyce Cullen

Joyce Cullen joined Brodies in 1981 and was appointed as a partner in 1986. She has led the firm's Litigation and Employment departments and served as Chairman from 2004 to April 2013. Joyce is the firm's Independent Client Review Partner.

She is a Solicitor Advocate with extended rights of audience in the civil courts and is accredited by the Law Society of Scotland as a specialist in Employment Law. She is Convener of the Law Society's Employment Sub-Committee and serves as a member of Signet Accreditation's examining committee for commercial litigation.

She undertakes dispute resolution work across a wide range of contentious matters, specialising in commercial and employment litigation, professional negligence and regulatory disputes, representing public and private sector clients. She has a particular interest in alternative dispute resolution techniques.

Shona Haldane QC

Shona Haldane called at the Bar in 1996, following a career as a solicitor in the litigation department of a large commercial firm. Since calling at the bar, Shona has practiced in the fields of professional negligence, catastrophic injury and, in her capacity as a standing junior to the Advocate General, in public law cases on behalf of the UK Government. She acts for both pursuers and defenders, and has experience of being instructed in both privately and publicly funded litigations.

Shona took silk in 2010 and sits on a number of Faculty committees including the Board of Assessors. She is also involved in advocacy skills training on behalf of the Faculty. Shona has appeared regularly in the Inner and Outer House of the Court of Session, as well as the sheriff court, various tribunals and the House of Lords.
Joyce is recognised as one of Scotland's most highly-regarded litigators and is ranked as a leader in her field by leading independent legal directory Chambers and Partners, 2012, specialising in business dispute resolution.

Ian Johnston

Ian Johnston has been employed by Aviva for 37 years. He has undertaken a large variety of roles all of them relating to the handling of injury and liability claims in Scotland. Ian is currently employed as Senior Claims Manager in Aviva's Bishopbriggs office with responsibility for the technical quality of the claims handling by a large number of the claims staff employed there.

In the past, Ian was an extensive user of the court system running many cases to proof or jury trial. He has been a member of the Forum of Scottish Claims Managers since its inception almost 10 years ago. For four years he was chairman of the Forum and led negotiations with the Law Society of Scotland which resulted in the voluntary Pre-Action Protocols.

Gordon Keyden

Gordon Keyden was admitted as a solicitor in Scotland in 1978 having studied law at Durham University and then at the College of Law, London where he passed the English Bar examinations. He has been a Partner in Simpson & Marwick, based in their Edinburgh Office, since 1980 and in addition to being Head of Personal Injury Litigation he is also the firm's Finance Partner and a member of the firm's Strategy Board. His practice is mainly insurance based personal injury litigation with a particular emphasis on catastrophic injury claims.

He is a former member of the Court of Session Rules Council and a member of the Court of Session Personal Injury and Inner House User Groups. He sits on the Law Society of Scotland's Civil Justice Committee and is a member of the Law Society of Scotland's Accreditation Panel in Personal Injury. He is a member of the Forum of Insurance Lawyers and of the International Bar Association.

Lindsay Montgomery CBE

Lindsay Montgomery is Chief Executive of the Scottish Legal Aid Board. His background is in Government Finance, Audit and public administration. He has worked in several government departments, including the Scottish Office and HM Treasury. Prior to joining the Scottish Legal Aid Board he was Director of Resources at Scottish Natural Heritage, a non-departmental public body.

Lindsay is a member of a range of bodies/groups involved in the administration of the justice system in Scotland and legal aid. These include the Scottish Government Justice Board and the Making Justice Work Programme Board. He is a member of the newly formed Scottish Civil Justice Council. He was a member of the Policy Group which advised Lord Gill's review of the Civil Courts. He is a leading member of the International Legal Aid Group. Other roles include membership of the Public Service Reform Board, the Public Procurement Reform Board and Chairman of the Central Government Procurement Supervisory Board. He is Chairman of the Non Departmental Public Bodies Chief Executives' Forum and is also Deputy Chairman of Scotland's Charity Regulator OSCR.

Stewart Mullan

Stewart Mullan manages a legal fee consultancy from offices in Perth and Livingston. Having initially trained as a cost accountant, Stewart was employed by the Law Society of Scotland. The gamekeeper then turned poacher moving to Nightingale & Bell Solicitors, a firm with a large 'reparation' practice. During this period Stewart gained extensive experience in judicial accounting ranging from the sheriff court to the House of Lords. In partnership with former colleagues at the Law Society of Scotland, Stewart next formed Mullan's Law Accountants, one of the first independent Law Accountancy firms.

Nowadays Stewart maintains his links with Mullan's as a Consultant. For the past ten years he has been a member of the Law Society's Professional Remuneration Committee. In this role he has participated in various working parties considering Pre-Action Protocol fees, commercial fees in the sheriff court and the Law Society submission on fees to the Scottish Civil Courts Review. He is a founding and active member of the Association of Independent Law Accountants with a specific remit to improve training and skill levels.

Stewart lives in Perthshire with his wife Marion and their two cats in a cottage chosen for its proximity to the local golf course.

Professor Alan Paterson OBE

Alan Paterson is a Professor of Law and Director of a think tank specialising in access to justice, legal services and the judiciary entitled the Centre for Professional Legal Studies at Strathclyde University Law School, Scotland. Alan is also the Chair of the International Legal Aid Group and currently serves as research adviser to the Scottish Legal Aid Board. He chairs the Legal Services Group of Citizens Advice Scotland and is the Vice Convenor of the Joint Standing Committee for Legal Education in Scotland.

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Sheriff Wendy A Sheehan

Sheriff Wendy A Sheehan was admitted as a solicitor in 1991, accredited by the Law Society of Scotland as a family law specialist in 1998 and accredited as a family law mediator in 1994. She is a former Convenor of and trainer for CALM ('Confidential and Local Mediation') and an accredited arbitrator, Secretary and trainer for the Family Law Arbitration Group (Scotland). She has written for Butterworths Family Law Service and is a regular contributor to Family Law Conferences. She was appointed as a part time sheriff in 2005 and as a full time sheriff in Glasgow in 2011 where she is a specialist sheriff dealing with family, adoption and children's referral cases.

Andrew Smith QC

Andrew Smith QC has been a member of the Faculty of Advocates since 1988, took silk in 2002, and called to the English Bar in 2006. In his time at the Faculty, Andrew has been a member of various Faculty committees and has gained wide experience of practise in all fields (criminal and civil) in all courts in Scotland and many in England. He has made a number of appearances at first instance and on appeal in Scotland, and has appeared in the House of Lords and the Supreme Court.

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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.
Act 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.
Ad factum praestandum	A court order which requires the fulfilment of a non-monetary obligation.
Ad interim	In the meantime.
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.
Aliment	Financial support of a spouse or child enforceable by law.
APIL	The Association of Personal Injury Lawyers.
Auditor of court	A person responsible for scrutinising, amongst other matters, judicial accounts of expenses incurred in civil litigation.
Before the Event ('BTE') insurance	Insurance that was in place before the occurrence of the event giving rise to the court proceedings. 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).
Caution	Security for the expenses of an action.
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 of injuries from road traffic accidents and personal injury claims.

Compensure	An After the Event 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.
Contingent 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.
Costs shifting	The ordering that one person is to pay another's expenses. Costs shifting usually operates on a "loser pays" basis, so that the unsuccessful party is required to pay the successful party's recoverable expenses.
Damages based agreement	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.
Decerniture	A decree or sentence of a court.
Dominus litis	A person who has an interest in the subject matter of the litigation and, through that interest, controls and directs it.
Ex proprio motu	On the court's own initiative.
Forum non conveniens	Where the court, although having jurisdiction, is not the appropriate court for the matter in dispute.
In hoc statu	For the time being, at this stage.
Inner House	The appellate level of the Court of Session.

Interlocutor	A formal order made by a court containing its decision.
Insolvency Practitioner	An accountant or solicitor, qualified in terms of the Insolvency Act 1986 to act as liquidator or supervisor in relation to a company unable to pay debts, or as trustee or supervisor in relation to an individual unable to pay his or her debts.
Judicial Review	A remedy whereby the Court of Session may review and if necessary set aside or rectify the decision of public officials or bodies where no other form of appeal is available.
Jurisdiction	The power of a court to entertain particular cases as determined by factors such as location, or the value or type of the case, or the residence or domicile of a person.
Legal expenses insurance ('LEI')	Insurance that covers a person against his or her own legal fees, including outlays, and/or the expenses of an opponent in litigation. Legal expenses insurance includes both BTE and ATE insurance.
Lord Advocate	The senior Law Officer responsible for the prosecution of crime and investigation of deaths in Scotland, and the principal legal adviser to the Scottish Government.
Lord Ordinary	The title of a judge sitting in the Outer House of the Court of Session hearing a case at first instance.
LPAC	The Lord President's Advisory Committee on Solicitors' Fees.
Maintenance and Champerty	Maintenance is the support of litigation by a stranger without just cause. Champerty is a form of maintenance where support of litigation is by a stranger who has a financial interest in the outcome.
Motion	An application made to the court for an order during the course of 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.

Obtemper	To obey, usually a decree or order of a court.
One way costs shifting	A regime under which the opponent pays the pursuer's expenses if the action is successful, but the pursuer does not pay the opponent's expenses if the action is unsuccessful.
Ordinary cause procedure	All sheriff court civil actions other than small claims, summary causes and summary applications, are ordinary actions subject to the Ordinary Cause Rules 1993 in the First Schedule to the Sheriff Courts (Scotland) Act 1907. A claim for £5,000 or more must be by an ordinary action.
Outer House	The part of the Court of Session which exercises a first instance jurisdiction.
Pactum de quota litis	A contract for a share of the litigation.
Party litigant	A litigant in civil proceedings who conducts his or her own case.
Petition	A writ by which civil court proceedings are initiated in which some administrative order of the court is required for something to be done which requires judicial authority.
Precognition	A formal statement of a witness taken or written by another person.
Precognosce	To take a precognition.
Privative jurisdiction	Exclusive jurisdiction where the dispute may be decided by only one court.
Probabilis causa litigandi	Sufficient grounds for commencing legal action.
Proof	A hearing of a case by a judge at which evidence is led orally or by affidavit.
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 ('QOCS')	A one way expenses shifting regime that may become qualified in certain circumstances, such as where the pursuer 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.
Sist	To stop proceedings from continuing in the meantime.
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.
Solatium	The damages sought and awarded in actions for personal injury or death of a relative, primarily for pain and suffering.
Speculative fee agreements ('SFA')	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 under 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 expressed as a percentage of the sum recovered; and (ii) the funder is not entitled to payment should the claim fail.

CHAPTER 1 INTRODUCTION

The remit of the Review

1. In his Report of the Scottish Civil Courts Review, the then Lord Justice Clerk, the Rt Hon Lord Gill, recommended that a review be undertaken into the costs and funding of civil litigation in Scotland. On 4 March 2011, the Minister for Community Safety, Fergus Ewing MSP, announced that such a review was to be undertaken under my chairmanship. The remit of the Review is as follows:

> To review the costs and funding of civil litigation in the Court of Session and Sheriff Court in the context of the recommendations of the Scottish Civil Courts Review, and the response of the Scottish Government to that review. In undertaking this review, 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;
>
> - 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);
>
> - 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;
>
> - have regard to the principles of civil justice outlined in Chapter 1, paragraph 5 of the Civil Courts Review;
>
> - consider other factors and reasons why parties may not litigate in Scotland; and
>
> to report with recommendations to Scottish Ministers, together with supporting evidence within 18 months of the work commencing.

2. The Scottish Civil Courts Review identified a number of matters for further consideration, including judicial expenses and the implications for Scotland of recommendations made by Jackson LJ in his Review of Civil Litigation Costs in England and Wales.[1] These matters have been addressed by this Review.

[1] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009)

3. It is not within the remit of the Review to undertake a major review of publicly funded legal services. The Scottish Government published its plans for the future of legal aid in 2011, with the aim of putting expenditure onto a sustainable footing by 2014-15.[2] This Review is charged with considering legal aid only with respect to how alternatives to public funding may secure appropriate access to justice.

The Reference Group and the Review Team

4. The Review of Expenses and Funding of Civil Litigation in Scotland began its work in May 2011. In carrying out the Review, I have been assisted by a Reference Group comprising individuals with particular knowledge and expertise in various aspects of civil litigation, and legal and research support has been provided by a Review Team.

5. In November 2011, we published a Consultation Paper on the Review's website http://scotland.gov.uk/About/Review/taylor-review. Responses were requested by 16 March 2012. We received 71 responses from a broad spectrum of consultees. All of the responses, apart from those which are confidential, were published on the Review's website.

6. During the consultation period the Review Team and I held a number of meetings with interest groups, practitioners and the judiciary. We also undertook a fact finding visit to gather information regarding the costs management regime which was in place in the Mercantile and Technology and Construction Courts in Birmingham. Meetings also took place in London with representatives from law firms, economists, legal expenses insurers, the Civil Justice Council, the Ministry of Justice, Professor Dame Hazel Genn, QC and Lord Justice Jackson. In the course of the Review, we held eight meetings with the Reference Group in order to discuss the various topics and issues which have been examined by the Review. Details of the various visits undertaken and meetings held are provided in Appendix 1.

Principles underpinning the Review

7. The principles of civil justice to which this Review has had regard were outlined in the Report of the Scottish Civil Courts Review 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.
- 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.

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

- It should have regard to the effective and efficient application of the resources of others.

8. The Scottish Civil Courts Review had regard to these principles in its consideration of Scotland's civil courts and made its recommendations mindful of these principles. In considering the expenses and funding of civil litigation in Scotland this Review has done the same.

Form and content of the Report

9. The Report contains Chapters 2 to 13 with their associated Annexes and one Appendix.

10. Chapter 2 is concerned with the cost of litigation as it relates to judicial expenses. Specifically, this Chapter examines the recovery of judicial expenses and interest on judicial expenses.

11. Chapter 3 is concerned with the cost of litigation with regard to outlays. Specifically, this Chapter contains proposals in relation to counsels' fees and the fees of expert witnesses.

12. Chapter 4 is concerned with the issue of predictability. In this regard, this Chapter contains proposals for fixed expenses, summary assessment of expenses, and expenses management.

13. Chapter 5 contains proposals regarding Protective Expenses Orders.

14. Chapter 6 is concerned with Before the Event insurance.

15. Chapter 7 is concerned with speculative fee agreements and After the Event insurance.

16. Chapter 8 contains proposals regarding qualified one way costs shifting.

17. Chapter 9 contains proposals for damages based agreements.

18. Chapter 10 contains proposals regarding referral fees.

19. Chapter 11 is concerned with alternative sources of funding. Specifically, this Chapter contains proposals relating to third party funding, legal aid for family actions, self-funding schemes, and *pro bono* funding.

20. Chapter 12 contains proposals in relation to the special procedure for multi-party actions which was recommended in Chapter 13 of the Report of the Scottish Civil Courts Review.

21. Chapter 13 contains proposals for the regulation of civil litigation in Scotland.

22. A full list of the recommendations which have been made can be found at the end of this Report.

Acknowledgments

23. In the Foreword, I extended my thanks to the members of the Reference Group who have been of enormous assistance to me. They have played an important role in helping to develop the recommendations for reform. Their expertise has been an invaluable resource. However, the recommendations that have been made are mine alone.

24. The Review Team and I would also like to extend our thanks to the many individuals and organisations who responded to the consultation and who made time to meet with us. Their input has been of great assistance in identifying and understanding the issues, and in providing information and ideas which have aided in the formulation of the recommendations contained in my Report.

CHAPTER 2 COST OF LITIGATION – JUDICIAL EXPENSES

RECOVERY OF JUDICIAL EXPENSES

1. One potential cost that must be paid by a party to a dispute is the judicial expenses due to an opponent should the action be unsuccessful. In our Consultation Paper we identified two potential mischiefs in relation to the recovery of judicial expenses. The first was the lack of predictability in what an award of expenses might amount to. While it may be possible to estimate the amount of a party's liability in fees to his or her solicitor, it is very difficult, or indeed impossible, to predict the amount of judicial expenses likely to be payable to an opponent should the action be unsuccessful. I suggested in the Foreword to the Consultation Paper that, perhaps, it was no longer acceptable for solicitors to be unable to give a meaningful answer to their clients when asked how much a litigation is going to cost should they proceed and be unsuccessful. The corollary is that it is equally difficult to estimate the amount of expenses that a party may recover from his or her opponent in the event of success.

2. The second mischief identified was the gap between what a successful litigant has to pay his or her solicitor and what is recovered from the unsuccessful litigant by way of judicial expenses. That is my starting point. The majority of respondents to our Consultation Paper considered that failure to obtain full recovery was in itself a deterrent to all litigants who have to fund their own action. It was said that increasing the percentage of actual costs incurred which are recoverable would significantly reduce the barrier to pursuing or defending litigation that is caused by the current system.

3. One respondent identified that the considerable difference between the actual cost of litigation and what can be recovered has a major impact on the affordability of litigation, particularly in a lengthy and/or complex litigation. That respondent would like to see recoveries at a realistic level, thought to be in the region of 80%, particularly (although not exclusively) in commercial actions. A realistic recovery level would mean that the successful party would not be penalised in expenses and, furthermore, the prospect of recovery at a commercial rate may put real pressure on parties to focus on the issues at an early stage and encourage early settlement.

4. There was no universal agreement that the present arrangements for recovery of judicial expenses are unsatisfactory. Indeed, one respondent to our Consultation Paper considered that the costs of litigation have to be kept within reasonable limits and that, on one view, the Scottish system achieves this as a generality. In this respondent's view, allowing "*so called full recovery will not assist if the object remains to keep such bounds fenced. It will drive up the cost of litigation and further deter the private individual or small business from taking action*."

5. I consider it necessary to consider the mischiefs in the context of different types of litigation.

Commercial litigation

6. Dissatisfaction was expressed with the level of recovery of solicitors' fees particularly in commercial actions. One firm of solicitors referred to an average recovery rate of around 50% which was said to be responsible for significant difficulty in the solicitor/client relationship since clients who have been successful find it particularly difficult to understand why they are not entitled to recover all of the fees which they have incurred. Another respondent advised that currently the level of recovery of the successful party in a commercial action can be as low as 35%. As one firm of solicitors pointed out, *"There is no doubt that commercial clients wish to see a closer correlation between work done and charged to the client, and that recoverable upon litigation success, than is the case at present…..Whilst the rule in principle is that 'expenses follow success,' the reality is quite different due to the disparity between actual expenses and the level of recovery. The disparity between actual and recoverable costs upon success is a constant source of complaint for clients. At times, it acts as a disincentive to litigate, and therefore presents an access to justice issue. Also, the current level of irrecoverability of costs often pushes clients to settle claims at lower levels than is merited."*

7. Another respondent stated that it is recognised by the judicial system that the resolution of commercial disputes benefits from a distinct approach. For Scotland to remain a forum for the resolution of commercial disputes, recovery of expenses has to be set at a commercial level. This concern was repeated by another respondent who stated that if the percentage recovery is significantly less in Scotland for commercial expenses than it is in England, then banks and companies involved in such litigation are not likely to want to litigate in Scotland. One of the aims of the commercial procedure is said to be to provide a service to clients which encourages them to litigate in Scotland rather than in London. We are aware of at least one financial institution with its headquarters in Scotland that chooses to litigate in England.

8. With these concerns in mind, we asked in our Consultation Paper whether the level of fees recoverable by the successful party in a commercial action should be greater than in other types of action and, if so, with what justification. We noted that the Lord President's Advisory Committee on Solicitors' Fees ('LPAC') had previously considered the issue but 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.

9. Only 11% of respondents considered that the level of recovery ought to be greater in commercial actions. Their justification was that commercial actions are generally more demanding of lawyers' time and specialist knowledge, and are more complex. As one respondent explained:

> *"Some commercial actions are of a high value and complex nature. They require a significant amount of work which would not be covered by the block fees currently set [in the Tables of Fees] for actions in the sheriff court and the Court of Session. The quarter hourly rate recoverable after preparation of a detailed account is wholly inadequate to cover the cost of the work done. Commercial clients demand and expect a partner to be closely involved in many of their cases, often supported by a team of solicitors and other fee earners, who contribute to the progress of the action at an appropriate level. The cost of the partner's time alone is*

generally significantly greater than the amount recoverable following taxation of a judicial account."

10. Other respondents, whilst expressing a concern about using general classification of a case as determinative of the level of expenses to be recovered, were equally concerned that the lack of commerciality and practicality of the current system creates a perception of Scotland as being an archaic and uncommercial environment within which to litigate.

11. One respondent considered that it is not necessarily the level of fees, that is, the rates that should be greater in commercial actions, but rather the scope of work recoverable. For example, there should also be greater recoverability around witness statements and productions.

12. The majority of respondents (67%) did not consider that the level of fees recoverable by the successful party in a commercial action should be greater than in other types of action. It was contended that commercial actions are no more complex than, for example, clinical negligence and severe brain injury cases. Other actions may demand the same level of skill, knowledge, experience, expertise and work as commercial actions. Indeed, it was said that commercial actions do not have a monopoly on disputes which are complex, important or require specific expertise. Whilst it is undoubtedly the case that in commercial actions irrecoverable fees are often significant, it was maintained that this is not exclusive to commercial actions.

13. Various suggestions were put forward by respondents as ways of bridging the gap between the cost of a litigation and the amount recoverable as judicial expenses in commercial actions. For example, it was suggested that there should be a specific block fee table for commercial actions in the Court of Session to reflect the different way such cases run, and the same should apply in sheriff courts that have a different procedure for commercial actions. It was said that there is a clear precedent for such a table in personal injury actions in both the Court of Session and the sheriff court. Another suggestion put forward was that all actions should be the subject of a tariff system based exclusively on block fees and subject to upward or downward variation based on relevant factors. Such a system would automatically weight proceedings and commercial action expenses would reflect this.

14. One respondent suggested that the level of fees recoverable in every case should reflect the time expended by the solicitors working on the case. This may involve a team (always subject to reasonableness), the rates actually being charged to the client for the work done (again subject to reasonableness) and the importance of the matter/value of the claim. Additional factors which should be taken into account might be the novelty of the case (in relation to legal arguments) and the importance of the matter to the client.

Personal injury litigation

15. The problem of under-recovery was said not to be confined to commercial actions or other high-end litigation, such as claims for clinical negligence, in the Court of Session. A representative organisation in the personal injury field commented that there is often a gap between what is recoverable from the defender in a successful case and what it has cost for

the case to be pursued. It added that whilst lawyers acting on behalf of injured people have worked hard to make the system work, the gap in recoverable expenses can be a barrier to access to justice for injured people. Several respondents representing trade union interests told us that the judicial expenses recoverable by successful pursuers in personal injury cases were only 60% of the actual cost of the litigation. Some argued that on the basis of the 'polluter pays' principle, this was unsatisfactory and that there should be full expenses recovery.

16. This view was opposed by a firm of solicitors specialising in defender personal injury work who contended that the existing system has stood the test of time and reflects an accurate and reasonable basis for the recovery of expenses from the unsuccessful party. As it explained, the successful party can currently choose whether to prepare a detailed account or a block fee account.[1] It may also apply to the court for an additional fee. In addition, should it choose to use the block table then the auditor has the discretion to increase these fees, if the successful party can demonstrate just cause. Given this range of options the gap in relation to recovery is, in its view, eliminated or at worst a small one. It considered that there is clearly enough flexibility within the table of fees, as they are presently constructed, for the successful party to recover an appropriate amount of expenses. In particular, in relation to the recovery of expenses in the sheriff court, it disagreed with the contention that a shortfall exists in regard to the recovery of expenses from the unsuccessful party. Indeed several other respondents, who are associated with acting for pursuers, did not think that actions for personal injuries were being raised in England and Wales in preference to Scotland where a pursuer had a choice of jurisdiction.

Gap in recoverability

17. Full expenses recovery is not achieved in virtually any type of litigation in Scotland. It is not by accident nor due to the greed of lawyers that this situation arises. It is a matter of longstanding policy. In the First Lecture in the Implementation Programme of his proposed reforms, Jackson LJ said:

> *"It has for many decades been accepted that a successful litigant does not recover all of his own costs from the other side. Thus throughout the twentieth century a successful claimant always expected to pay out some part of his damages to make up the shortfall in costs recovery. The fact that both parties have some costs liability, even if they win, has for long been accepted as imposing a necessary discipline in litigation."*[2]

In the Tenth Lecture of the Implementation Programme, Jackson LJ reiterated:

> *"Full costs recovery is not and never has been a principle of civil justice. On the contrary, it is an urban myth of recent origin. The principle of restitution is embedded in the law of damages, not the law of costs."*[3]

---

[1] See paragraph 28

[2] Jackson LJ, 'Legal Aid and the Costs Review Reforms,' First Lecture in the Implementation Programme (5 September 2011)

[3] Jackson LJ, 'Why Ten Per Cent?' Tenth Lecture in the Implementation Programme (29 February 2012)

18. The position is the same in other jurisdictions. For example, one of the principles underpinning the expenses regime in New Zealand is that the recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceedings. In Ontario, Canada, the court may award costs on a partial, substantial or full indemnity basis. In the Netherlands, there is a history of no costs shifting, (the successful litigant does not recover any of its legal costs from the unsuccessful litigant), but that has changed over time and the amount recovered in a standard case is between 50% and 75%. Therefore the position which is said to exist in Scotland is not very far removed from some other jurisdictions. Further details of other jurisdictions are set out in Annex 1.

19. It would appear that there are few jurisdictions where the successful litigant is able to effect a full recovery from the unsuccessful litigant of the total sum paid in legal fees and outlays to vindicate the successful litigant's rights. However, the position in Scotland is complicated by what happens in England and Wales, given that in many commercial actions the pursuer has a choice between the jurisdiction of the Scottish courts and those of England and Wales. Scotland cannot be looked at in a vacuum. We were informed that in England and Wales, at least in commercial actions, successful litigants may recover over 80% of their legal costs from the unsuccessful litigant.

20. In order to be able to assess whether there is indeed a gap between a party's liability in fees to his or her solicitor and what is recovered in judicial expenses, it is necessary to know what the true charge to the client amounts to. There must be a top line from which the recovered judicial expenses fall to be deducted in order for there to be a gap. In commercial actions the top line is what the client is billed. However, the evidence which we have collected tends to suggest that in actions for personal injury, the client is not charged on this basis. Instead, the information which we have been given is that the majority of personal injury actions are funded by the pursuer entering into some form of 'no win no fee' arrangement with their solicitor. The arrangements are more fully discussed in Chapters 7 and 9 dealing with speculative fee agreements and damages based agreements. It is therefore difficult to know how the figure of 60%, being the recovery rate referred to in paragraph 15 above, has been calculated.

21. In personal injury actions it is not the client who is making payment unless a speculative fee or damages based agreement has been entered into. Where this is the case the client may have to pay a success fee or a percentage of the damages recovered to his or her solicitor or claims management company. That, however, has been represented to us as a payment to reflect the risk being taken by the solicitor in agreeing not to charge a fee should the action be unsuccessful and for funding the outlays in all actions. Furthermore, we have also been informed that there is competition between firms of solicitors to gain personal injury work, which suggests that the present arrangements enable solicitors to undertake the work at a profit. In discussion with solicitors who usually act for pursuers in personal injury actions, we have been informed that some solicitors with such a practice no longer think in terms of hourly rates. Taking all of this into account, it is likely that the successful pursuer in a personal injury action will be unaware of any gap between actual and judicial expenses. On the other hand, the successful litigant in a commercial action is acutely aware of the gap and has so informed us.

22. We have also taken the opportunity to canvass the views of law accountants. One firm advised that the six or seven solicitors' firms that are predominantly instructed in actions under the commercial procedures in the Court of Session are likely to charge their clients £300 or more per hour. The average rate charged by other firms for commercial actions is in the region of £225 - £250 per hour. By contrast, the average rate charged by solicitors in personal injury actions in the Court of Session is between £200 - £225 per hour. Another firm of law accountants advised that the 'going rate' for commercial actions is between £200 - £275 per hour whereas for personal injury actions it is likely to be between £150 - £175 per hour and, in many instances, less. The exception is for high value cases or those of difficulty or complexity, such as clinical negligence cases, where the rate is likely to be around £200 per hour. On this evidence alone, it can be concluded that there is a considerably greater gap in recoverability in relation to commercial litigation than personal injury litigation.

23. Furthermore, I am of the view that the cost of litigating requires to be proportionate to the value of what is at issue in the litigation whether measured in purely financial terms or otherwise. The Forum of Scottish Claims Managers provided us with data for 2012 as to the sum at which personal injury litigations (road traffic accident and work related injuries) settled; the sum awarded by the court; and the amount paid to the pursuers' solicitors in judicial expenses. In the Court of Session the average sum sued for in 1,096 cases examined was £153,319; the amount paid to the pursuer in damages averaged £46,952; and the legal fees, including counsel's fees but excluding other outlays, was £12,017. The legal fees therefore represented 26% of the sum awarded or for which the pursuer settled. In ordinary procedure in the sheriff court, the average sum sued for in 1,332 cases examined was £25,278; the amount paid to the pursuer in damages averaged £9,511; and the legal fees as already defined amounted to £4,980 per case. The legal fees therefore represented 52% of the sum awarded or for which the pursuer settled. The percentage will be higher in the sheriff court in part because there is a minimum amount of work which requires to be undertaken regardless of the value of the case. However, it is my view that the level of fees paid cannot be said to be disproportionately low and some would consider the level to be disproportionately high, particularly in the sheriff court.

24. In its submission to the Scottish Civil Courts Review ('SCCR'), the Professional Remuneration Committee of the Law Society of Scotland drew attention to what they perceived as a number of problems with the current arrangements for recovery of judicial expenses:[4] in particular the amount payable for pre-litigation preparation and negotiation and the block fee for proof preparation. The SCCR accordingly recommended that there should be a significant increase in the block fee for pre-litigation work and that LPAC should review the adequacy of the block fee for proof preparation.[5] The pre-litigation block fee has been increased for Court of Session actions with effect from 5 November 2012.[6] As far as the block fee for proof preparation is concerned this matter was reviewed by LPAC

[4] The submission is included among the consultation responses published on the Review's pages of the Scottish Court Service website: http://www.scotcourts.gov.uk/civilcourtsreview/publications.asp

[5] *Report of the Scottish Civil Courts Review* (2009), Recommendations 183 and 184

[6] Act of Sederunt (Rules of the Court of Session Amendment No.4)(Fees of Solicitors) 2012 SSI 2012/270

and increased from 1 April 2011 for the sheriff court[7] and from 1 January 2012 for the Court of Session.[8]

25. At the meeting of LPAC in January 2013, The Law Society submitted i) that the pre-litigation block fee should be increased in the sheriff court ordinary cause table of fees in line with the increase for Court of Session actions and ii) that the hourly rate for solicitors when calculating judicial expenses in both the Court of Session and sheriff court should be increased by 10%. If these submissions find favour and are implemented, it will make any argument that the proportionality between the sum awarded and judicial expenses is out of alignment even harder to maintain in personal injury litigation. Looked at from the perspective of proportionality, the figures do not, in my opinion, support an argument that there is a need for a significant increase in recoverable judicial expenses in personal injury litigation. In addition I consider that the revisals to the tables of fees made in implementation of the recommendations of the SCCR should go a long way to narrow such gap as might exist between what would be a reasonable chargeable rate and what can be recovered in judicial expenses in personal injury litigation. In any event, it is too early to make further recommendations until the revisals have been in operation for some time. This is something which the Civil Justice Council for Scotland should monitor.

26. From the evidence that has been made available to us, it is clear that Scotland is losing commercial work to England and Wales and one of the factors causing this drift is the low level of recoverability of judicial expenses in Scotland compared with that jurisdiction. There is no evidence of any such drift in personal injury litigation and some personal injury practitioners went out of their way to convince us of that. There is also evidence that clients are prepared to pay commercial lawyers a premium hourly rate. The level of recoverability should reflect this. Solicitors doing commercial work are able to command a higher fee than those undertaking, for example, personal injury work. This is because, as a generality, commercial litigation is more complex than personal injury litigation. As Jackson LJ commented:

> *"Personal injuries litigation is generally fairly straightforward. The injuries suffered by claimants are often distressing. The correct computation of the damages due is always a matter of vital importance for the claimant and is often vital for his/her family as well. Nevertheless, despite the emotional content and importance of every case, the general run of personal injury cases is not hugely challenging work for skilled and specialist lawyers or paralegals to carry out. Furthermore, the great majority of personal injuries work is indeed carried out by lawyers and paralegals who specialise in this area. Organisations such as APIL have done much to promote specialist skill and expertise in personal injuries work."*[9]

There is tacit recognition of the accuracy of the first sentence in the above quotation in the different procedures for commercial and personal injury litigation in Scotland. When the present rules for commercial actions were introduced in 1994, a system of active case

[7] Act of Sederunt (Rules of Solicitors in the Sheriff Court)(Amendment) 2011 SSI 2011/86

[8] Act of Sederunt (Rules of the Court of Session Amendment No.7)(Taxation of Accounts and Fees of Solicitors) 2011 SSI 2011/402

[9] Jackson LJ, *Review of Civil Litigation Costs: Final Report (2009)*, Part 6, Chapter 26, paragraph 1.3

management was introduced. This means that a bespoke procedure is devised for each litigation.[10] On the other hand, when the procedure for personal injury actions was revised in 2003, a system of case flow management was introduced in recognition of the more formulaic nature of personal injury litigation.[11]

27. I therefore consider that commercial actions require to be treated differently to other types of action. As a generality, the gap between what is paid and what is recovered is greater in commercial litigation than in other types of litigation. Steps require to be taken to close the gap between what the successful litigant pays to its solicitor in legal fees as a matter of contract and what it recovers from the unsuccessful litigant in judicial expenses. In my opinion the goal should be a recovery rate of, on average, between 80% and 90% in commercial litigation. That is consistent with the position in other jurisdictions but, most importantly, in England and Wales.

Addressing the mischief

Basis of recovery of judicial expenses

28. In order to address the mischief identified in relation to commercial actions, it is necessary to examine the present system for calculating judicial expenses. There are two bases which a successful litigant can use to prepare a judicial account of expenses. These are known as i) a detailed account and ii) a block fee account. Both bases use the same quarter hourly rate. The difference is perhaps best illustrated by example. The table of block fees provides for a lump sum as a fee for the work done from the commencement of proceedings to the stage of the open record. Not surprisingly, this is known as the block "Instruction Fee." Block fees reflect the average value of the work done under each heading. The alternative means of making up a judicial account to reflect this work is to set out all the meetings, letters and phone calls etc. that have occurred in the time from the commencement of proceedings to the stage of the open record. A discrete charge is then made for each item based upon the same quarter hourly rate. The latter means of preparing an account is much more time consuming. Should the paying party consider that the items of work charged in an account are unreasonable, he can request the auditor of court to tax the account and thereby assess whether the charges are reasonable.

Is time expended an appropriate yardstick?

29. We asked in our Consultation Paper whether solicitors' fees for litigation should be recovered as expenses on the basis of time expended, value of the claim or some other basis.

30. Just over a third of respondents considered that solicitors should be remunerated on the basis of time expended. It was thought that recovery based purely on time expended would increase the level of recoverable fees upon success. It would also apply a pressure upon solicitors to ensure that they only carry out work that is reasonably necessary since, if they do work which the auditor of court deems to be irrecoverable, the client will be alerted

[10] Rules of the Court of Session, Chapter 47
[11] Rules of the Court of Session, Chapter 43

to the fact. It was suggested by one respondent that time spent can be measured by reference to solicitors' work in progress reports.

31. Other respondents, whilst agreeing with the principle of recovery of expenses on a time expended basis, suggested that this should be subject to a test of reasonable necessity and/or proportionality. They suggested that if there is a concern that the losing party will pay a higher level of expenses to his or her opponent using a time based system, then the remedy would be to cap the rates of recovery at different levels of experience of the lawyer involved in order to impose a ceiling. This would meet criticisms of the present system, namely, that it does not properly reflect the way work is performed and delivered to clients, and nor does it closely enough reflect the fees charged to clients.

32. Those respondents who were not in favour of recovery on a time expended basis warned that such a system would reward inexperience and inefficiency and would make the likely level of recovered expenses less certain.

33. Using the value of the claim as a basis for the recovery of solicitors' fees for litigation was favoured by only one respondent. Almost half of the respondents considered that value should not be a determining basis as value is not necessarily indicative of the legal complexity of a case and therefore the work that is required. Using value as the basis of remuneration would, it was thought, be impossible in cases where monetary awards are not the primary remedy sought or, indeed, are not sought at all. This would include the majority of public law cases in which some form of declarator is the usual remedy sought.

34. Other bases suggested by respondents for the recovery of solicitors' fees included a system based on actual work done subject to the over-riding governing factor of reasonableness. This could take account of the time actually taken against the benchmark of what is reasonable, which guards against rewarding the slow, inexperienced, incompetent or inefficient solicitor.

35. Several respondents considered that the current tables of fees system was appropriate in that it provides relative certainty and simplicity in formulating accounts. It was thought to be generally fair and reasonable and retains sufficient flexibility to cover most circumstances. However, one respondent considered that the current means of assessment of fees by the tables of fees is outdated and unhelpful. The disparity between the method of assessing and drawing up a judicial account of expenses as opposed to preparing a fee invoice for a client was reported to be difficult to explain to clients as there is little correlation between the two. Judicial accounts take time to prepare as they differ so much from the manner in which most clients are billed.

36. Many of those respondents who were in favour of the tables of fees system of calculating judicial expenses considered that the current tables ought to be revised. In particular there was a concern that the level of the hourly charge is far too low for civil litigation work. As one respondent observed, "*it is our belief that few practitioners recognise a rate of £140 per hour as equating with the rate typically charged for court litigation*." That rate is based on the Law Society of Scotland annual Cost of Time Survey for 2011. The hourly charge out rate in the 2012 Survey amounts to £156 per hour. The Cost of Time Survey is a research exercise on what the average solicitor in Scotland charges. All firms in Scotland are

invited to participate but the majority of the large commercial firms do not make a return. This inevitably results in the hourly rate being understated as the commercial firms tend to have a higher charge out rate than other firms. It was said by one respondent that if the rate is wrong, then the research commissioned by the Law Society of Scotland is also wrong.

37. Another respondent considered that although the Cost of Time Survey is an excellent piece of source material and the information contained within it is well researched and accurate, few practitioners recognise the current rate per hour as equating with the rate typically charged for court litigation. It was suggested that in fixing the hourly rate, it is necessary to adjust the calculation and apply a weighting of somewhere in the region of 10% to the rate. Having regard to the 2011 results approved by the Law Society of Scotland this would result in an hourly rate of around £160 per hour, with a consequent increase of around 10% on the block fees. Indeed, at the meeting of LPAC in January 2013, as referred to in paragraph 25 above, the Law Society of Scotland submitted that the hourly rate for solicitors when calculating judicial expenses in both the Court of Session and the sheriff court should be increased by 10%.

38. We are urged by commercial litigators to allow commercial litigants to recover judicial expenses based on the model used in England and Wales. This is, as we understand it, a pure time charge. The hourly rate to be applied is not determined by reference to a table of fees but to the rate for which the successful litigant has contracted. Normally, the agreement between solicitor and client provides for different rates to apply for fee earners of different experience. The result is that should, say, the pursuer be successful, the hourly rates to be recovered in a judicial account are the rates that the pursuer has agreed to pay its solicitor. If the defender is successful, the rates at which it can recover will be the rates which the defender has agreed with its solicitor. There could be a wide discrepancy between what the two parties have agreed to pay their solicitors. The losing party could therefore be required to pay an hourly rate in judicial expenses well in excess of what it has agreed to pay its own solicitor. Accordingly, there is room for one of the parties to be prejudiced. For example, if small and medium sized enterprises ('SMEs') litigate with a FTSE 100 company, the former may have used lawyers who have much lower charge out rates than the latter. That may be all that the SME can afford. The proposal urged upon us would mean that should the SME be unsuccessful in the litigation, it will have to pay the higher rate for which the FTSE 100 company contracted. Many would consider this to be unfair. It could constitute a barrier to justice. As a consequence of Jackson LJ's Review, 'proportionate costs' are defined in the amended Civil Procedure Rules in England and Wales.[12] This may go some way to ameliorate the potential injustices of the system. I doubt it will remove them.

39. Whether the system set out in the previous paragraph survives much longer in England and Wales is open to debate. In a lecture given in May 2012, Lord Neuberger of Abbotsbury, the then Master of the Rolls said:

[12] CPR Rule 44.3(5) inserted by the Civil Procedure (Amendment) Rules 2013 SI 2013/262

> *"hourly billing at best leads to inefficient practices, at worst it rewards and incentivises inefficiency. Moreover, it undermines effective competition in the provision of legal services, as it 'penalizes . . . well run legal business whose systems and processes enable it to conclude matters rapidly.'*[13] *It also penalises the able, those with greater professional knowledge and skill, as they will tend to work at a more efficient rate. In other words, hourly billing fails to reward the diligent, the efficient and the able: its focus on the cost of time, a truly moveable feast, simply does not reflect the value of work….In conceptual terms, hourly billing crucially confuses cost with value…An approach to litigation costs based on value-pricing rather than hourly-billing is one that urgently needs to be worked out and applied. Rather than treating time as the commodity which is being sold, we should be adopting an approach where skill and experience are the commodities which are sold."*[14]

It would be unfortunate if, in Scotland, we moved to a model for assessing judicial expenses in commercial actions which has started to be discredited in the jurisdiction from which we imported it. On the other hand, I fully endorse the view that if we are to retain commercial litigation in Scotland, we must not discourage litigants by making the level of recovery of judicial expenses uneconomically low, as I accept it is at present. I see much merit in devising a system which rewards efficiency, skill and experience.

Tariff-based systems

40. The SCCR suggested that a tariff-based system for judicial expenses would be worthy of more detailed consideration as a means of addressing the concerns about recovery rates, and the extent to which these may act as a barrier to access to justice.[15] One such system was proposed in its Report, based on the value and/or complexity of the action.[16] In our Consultation Paper we suggested that 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. We asked whether a tariff-based system should be introduced for assessing the level of recoverability of judicial expenses and, if so, how might such a system be structured.

41. The use of tariffs to quantify legal work and to determine entitlement to the recovery of expenses is common, particularly in countries that model their judicial systems on British principles, such as Canada and Australia. The systems used vary widely with some involving a very small number of scales that do not take account of the work undertaken or resources used to any great extent. Where the parties are agreed that a tariff-based system should operate then such a system can operate efficiently and is easily understood.[17]

42. It was pointed out to us by some respondents that a tariff system already exists in Scotland through the block fees in the tables of fees, with the possibility of an additional fee if one or more of the relevant criteria are present. To an extent, that analysis is correct but

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[13] Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (2010), page 151

[14] Keynote address given by Lord Neuberger to the Association of Costs Lawyers' Annual Conference 2012 (11 May 2012)

[15] *Report of the Scottish Civil Courts Review* (2009), Recommendation 188

[16] *Report of the Scottish Civil Courts Review* (2009), Chapter 14, paragraphs 61-64

[17] See Annex 1 at pages 39 to 40 for further details of the models adopted by other jurisdictions.

the block fee table does not address all of the problems to which our attention has been directed.

43. The advantages of a tariff-based system for judicial expenses are seen to be that it would introduce certainty and would achieve the required balance between the interests of parties. One respondent observed that a tariff could limit excessive expenses being charged in actions of low value, thereby achieving a degree of proportionality. Another commented that it would not be appropriate for every type of case since cases with a low monetary value, such as public law judicial reviews, often prove to be complex. The value of the claim may have little effect on the complexity of the action. Although it has the advantage of certainty, it was considered that a tariff-based system may result in the successful party being unable to recover perfectly legitimately incurred fees. There would therefore need to be flexibility built into the system so as to allow either party to apply to the court for their recoverable expenses to be set in accordance with a tariff which is not necessarily that envisaged for the case by reference to monetary value. There may well be cases which are complex, difficult and of great importance to the client, and which require a substantial amount of preparation, expertise and time spent on them, but which are of relatively modest monetary value. There may be a case of particular importance to the public. In the circumstances, the work and preparation for the case may require to be done by a specialist solicitor or by senior or junior counsel. The conclusion reached was that there would need to be an ability to move from one tariff to another, or to allow for an additional fee or other form of increase.

44. Just under half of the respondents were not in favour of a tariff–based system for assessing the level of judicial expenses. The main objection was that a tariff based on value is too broad an approach and does not necessarily correlate with the work done. Nor does it give sufficient weight to the complexity of a matter or to the importance of the issues to the parties involved. There was also a concern that there was a significant risk of generating disputes about expenses by creating a more complex structure and trying to pigeonhole cases at the outset into one tariff or another, which will inevitably be contentious. One respondent commented that a tariff-based system would be inappropriate for personal injury actions where the damages recovered can be significantly lower than the sum sued for, often because of contributory negligence or other issues that may arise regarding causation.

Additional fee

45. The present system permits solicitors to apply to the court for an additional fee. Such a motion should be made at the same time as the motion for expenses which is normally at the conclusion of the action. In making a decision to grant or refuse a motion for an additional fee, certain criteria are taken into account which are the same in both the Court of Session and the sheriff court. They are:

- 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. [18]

46. In the Consultation Paper we asked whether the ability to request an additional fee is a reasonable procedure for regulating the recoverability of judicial expenses. Almost three quarters of respondents considered that the ability to make such a request is a reasonable procedure. In the view of one respondent, "*it is the best that has been so far devised and has stood the test of time without much substantial criticism*."

47. One respondent voiced caution and suggested that the procedure should only apply to cases which are genuinely exceptional in accordance with the existing court rules. It should not be used as a routine mechanism whereby parties attempt to close the gap between the recoverable expenses and the true costs of the litigation. Another considered that in many cases it is an extreme approach to resolve a perceived problem. If an additional fee is awarded, the increase can be as much as 140%, perhaps more – that is more than doubling the recoverable fee. In that respondent's opinion this seems an extraordinary means to redress the problem of under-recovery, which would be quite unnecessary if recovery of a reasonable fee meant what it said and a flexible approach to recovery was adopted.

48. Several respondents, whilst approving the notion of an additional fee, suggested that improvements could be made to the actual procedure. In particular, concern was expressed at the lack of consistency both in the granting of the percentage increase and the actual percentage allowed, particularly in the sheriff court. The difficulty was said to be that judges and sheriffs have a broad discretion in relation to the granting of an additional fee. One respondent considered that the criteria that are taken into account in making a decision should be narrowed. Another respondent suggested that it would be appropriate for an additional fee to be applied to specific steps or stages of process rather than to the expenses of an entire cause. It would then be appropriate for parties to apply for an additional fee for a particular step of process at the conclusion of that step.

49. Not all respondents were in favour of the concept of an additional fee. Indeed one described the current additional fee system as "*unfair and results in a grotesque distortion of the fee recovery market*." It was not the intention of additional fee awards to bridge the gap between the solicitor and client expenses and judicial expenses. Instead, the respondent maintained that the purpose of an additional fee is to recognise that there are particular

[18] Rules of the Court of Session Rule 42.14; Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993 SI 1993/3080, Article 5, Schedule 1

litigations in which the work undertaken by the solicitor, on a party and party basis, is not fully remunerated or rewarded by the standard rates laid down in the tables of fees. The employment of such a system undermines the ability of parties, whether successful or unsuccessful, to be in possession of any meaningful information or to make an informed decision on the question of economic settlement. Another respondent considered that the additional fee procedure is "*too blunt a tool to be effective, both in recovery of expenses and in challenging the level of an account*." It was suggested that the relative lack of guidance for when an additional fee should be granted leads to a lack of consistency when it is awarded. It was said that additional fees are regularly granted in commercial actions but the percentage increase varies wildly. The criteria taken into account are also difficult to apply.

50. As motions for an additional fee are normally made at the conclusion of the proceedings, this makes it more difficult for unsuccessful litigants to predict what their likely exposure to judicial expenses may be. We also asked in the Consultation Paper, in the event that the concept of an additional fee is retained, at what stage in the proceedings should a motion for an additional fee be made? Half of the respondents considered that the motion should be made at the end of the proceedings on the basis that it is only at that point that the court will know the outcome of the case and how it has been conducted. Other respondents considered that parties should have the option of seeking an additional fee before the additional work to which the motion relates has actually been carried out. Some respondents were of the view that a motion for an additional fee should be made at any time during the life of the court action, to give certainty to both parties as to the potential costs involved in running the action. Another suggested that a motion should be made at least by the stage of the closing of the record (or its equivalent). This would enable the judge to determine the issue on the pleadings.

51. The determination of an application for an additional fee differs between the Court of Session and the sheriff court. In the Court of Session the court may determine the motion itself or, more usually, remit it to the Auditor of Court. Where the court allows an additional fee, the Auditor may assess the percentage increase on the solicitor's taxed account. In the sheriff court the sheriff determines the application and the appropriate percentage increase. In our Consultation Paper we asked who should determine motions for an additional fee and the percentage increase.

52. The majority of respondents considered that both the motion for an additional fee and the percentage increase should be determined by the member of the judiciary hearing the motion as they will have had the benefit of having either heard or been involved in the case and will therefore have a better understanding of whether the issues are such as to warrant an additional fee. It was observed by one respondent that the procedure will be much improved by a judicial case management procedure, as recommended by the SCCR, where there will be more judicial involvement with the management of expenses. However, several respondents identified the need for guidance to be given on the percentage increase, coupled with the need for additional judicial training.

53. A minority of respondents considered that motions for an additional fee, and the percentage increase, should be determined by an auditor of court. One respondent was of the view that in the Court of Session the Auditor has the most experience in determining the

increase to be applied as he is likely to see a greater number of cases in which an additional fee is sought, than would an individual judge. The Auditor will also have the full case papers and solicitors' files, which an individual judge will not have.

54. The same number of respondents considered that a motion for an additional fee ought to be heard by a member of the judiciary, with the auditor determining the increase to be applied. It was thought by one respondent that this provides a level of judicial authority in the determination of the motion itself, together with an expedited mechanism for ascertaining the level of the increase in a more considered manner by the auditor of court.

55. Several respondents thought that the present system is adequate and does not require to be interfered with. Indeed one respondent was of the view that the existing systems in the Court of Session and the sheriff courts work well, even though they are different. The differences were said to reflect the different experience and qualifications of the Auditor of the Court of Session compared with almost all sheriff court auditors. Other respondents considered that there should be a consistent system in the Court of Session and the sheriff court to determine the level of an additional fee.

Solicitor's experience

56. Another way to bridge the gap between fees charged and expenses recovered is to adopt the position in England and Wales where the recovery of costs reflects the different fee rates charged by solicitors in different locations and at different stages of qualification. In the Consultation Paper we asked whether any table of fees should provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor. Just over a quarter of respondents considered that this should be the case. Several thought that this would allow the judicial recoverability of fees to reflect more accurately the charging structures which solicitors apply to their clients. One respondent, with experience of litigation in England and Wales, was of the view that a more experienced solicitor should recover at a higher rate because less time will be spent on a particular task. It was pointed out that the amount of work carried out by solicitors of different grades is frequently subjected to scrutiny by the courts in England and Wales to ensure that there is a cost efficient distribution of tasks.

57. Another respondent considered that a system based on the value and complexity of the claim, together with the level of fee earner, may be a preferred option. However, it was acknowledged that this will require a considerable change in the approach of the judiciary and auditors to expenses since under the current system, judges are of necessity generally very detached from the commercial costs of litigation. It was said that auditors are also limited in their exposure to commercial litigation as most commercial litigation expenses are agreed by negotiation – primarily to meet clients' demands for certainty and speed of resolution of expenses at the conclusion of a case. Accordingly, it was suggested that a significant investment in training for all engaged in the expenses process would undoubtedly be required if any changes were to be implemented effectively.

58. Just over half of all respondents considered that any table of fees should not provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor.

There was a concern that this may lead to more experienced solicitors dealing with cases of low value or importance. It may also lead to solicitor practices employing more experienced solicitors to maximise return, to the detriment of the junior profession. One respondent pointed out that the commercial reality is that many firms employ non-legally qualified staff to carry out work. Due to the commercial agreements that exist with work providers and organisations and the current economic conditions, it was necessary to run cases this way to ensure that the practice is economically viable.

59. Another respondent pointed out that a particularly well-funded party may decide to utilise solicitors who are in effect over qualified for the work in hand, in the knowledge that the ultimate cost will fall upon the losing party. It would also reward a party with greater resources at the outset as, if they choose to employ a senior partner, they will be entitled to recover more in judicial expenses than a party who, either for reasons of cost or client relationships, chooses to instruct a more junior solicitor. There was also a concern that it will introduce unnecessary complexity into the assessment and recovery of fees. Several respondents considered it unnecessary as the present ability to seek an additional fee already provides a mechanism for reflecting experience in an award of expenses.

60. Other respondents offered a qualified response. For example, it was suggested that there is merit in this approach in a detailed account, for example, where a more experienced solicitor has been required to deal with a specific aspect of the case, but not in an account prepared on a block fee basis.

61. As far as accredited specialists are concerned, only a few respondents considered that any table of fees should provide for an accredited specialist to recover at a higher rate than a solicitor without accreditation. It was pointed out that it is not commonly the case for solicitors' firms to be able to charge higher rates for accredited specialist solicitors to their clients. Accordingly, the introduction of a higher rate for accredited specialists would appear to create an artificial platform for recovery of expenses which does not reflect the true charging arrangement between parties and their solicitors. In many cases, even if the case is deemed to be within the accredited specialist's field, it is also not apparent that the fact of accreditation would necessarily have been of any relevance to the handling of the case. Another respondent commented that it was uncertain that there is sufficient faith amongst solicitors as to the robustness of the system of accreditation for a distinction to be made on this basis, particularly as the system is not externally validated.

62. Subject to the possibility of there being a full costs recovery in commercial actions, as described in paragraph 72 below, I do not consider that any table of fees should provide for a more experienced solicitor to recover at a higher rate than a newly qualified solicitor. Nor do I consider that any table of fees should provide for an accredited specialist to recover at a higher rate than a solicitor without accreditation. Such a system would result in greater uncertainty in the assessment of judicial expenses. Although it would reflect more accurately the way in which fees are rendered to a client, I do not consider it just that a party should meet the expenses of an opponent who has chosen to employ an experienced or accredited solicitor when the case might not merit that.

Narrowing the gap in commercial litigation

63. As I indicated in paragraph 27 above, I consider that commercial actions require to be treated differently to other types of action and that steps require to be taken to close the gap between what the successful litigant pays to its solicitor in legal fees as a matter of contract and what it recovers from the unsuccessful litigant in judicial expenses. The issue is how to increase recovery in a fair and transparent manner.

64. The present system for assessing judicial expenses makes no differentiation, save for the facility to seek an additional fee, between an action for £100,000 and one for £10,000,000. While the sum sued for can never be the sole arbiter of how important or complex the litigation might be, the question still requires to be asked whether it is correct that a lawyer should recover the same by way of judicial expenses regardless of the issues and amount at stake.

65. One way of addressing this issue is to have the motion for an additional fee and the percentage increase determined at the outset of the action, and for that percentage to be capable of variation as the litigation progresses, but not with retrospective effect. The percentage increase would apply in equal measure to accounts of expenses for each party to the litigation. It would be for the parties to agree on the appropriate percentage, if any, and to inform the court at the first preliminary hearing or case management conference which percentage has been agreed. That agreement would then be incorporated into an interlocutor, always providing the court is prepared to endorse what the parties have agreed, which I anticipate would be the norm. In the absence of agreement, the court should determine the appropriate level of the additional fee at the first preliminary hearing or case management conference as part of its case and expenses management responsibility. Few parties enter into a commercial litigation expecting to lose and pay the other side's judicial expenses. There should therefore be a community of interest in assessing a percentage increase which is fair to all concerned. I therefore do not anticipate that this exercise will take up much court time.

66. The present criteria for awarding an additional fee are set out in paragraph 45. The manner in which these criteria are expressed reflects the fact that the decision regarding an additional fee is presently made at the conclusion of the proceedings**. I recommend that the present criteria for awarding an additional fee should be revised for commercial actions. This would involve listing a number of criteria to include i) complexity ii) specialised knowledge or skill iii) whether there is any legal precedent for the issues iv) urgency v) likely volume of paperwork or electronic material vi) number of parties with a distinct interest vii) net value of the claim viii) commercial status of the parties and ix) expert witness requirements. To assist the court, I recommend that each of these criteria should be given a weighting and solicitors required to complete a pro-forma setting out their assessment of the case under each of the criteria when arriving at their view on the level of additional fee which should apply.**

67. It was not suggested to us that we should canvass views on whether the criteria for assessing whether an additional fee should be awarded ought to be reviewed and accordingly we did not include a question on this in the Consultation Paper. Accordingly

the criteria set out in paragraph 66 above are not suggested to be exhaustive and should be a matter for further discussion. I am, however, persuaded by the number of adverse comments made to me in the consultation process that the importance of the case to the litigant should no longer be one of the criteria which the court should have regard to when determining motions for an additional fee. As was frequently said, it is difficult to think of a case the outcome of which is not important to a litigant. I also consider it essential that the level of additional fee be kept under review as the litigation progresses. For example, should the action become less complex, perhaps because a breach of contract, previously disputed, has been accepted, any percentage increase should thereby be reduced. Any such variation would not have retrospective effect.

68. If effect is given to the Law Society of Scotland's submission to LPAC at their meeting in January 2013 that the detailed table hourly rates for judicial expenses be increased by 10%, the hourly rate for solicitors will effectively be just under £160 per hour. An additional fee percentage increase of 100% results in an hourly charge of nearly £320. I therefore consider that the maximum additional fee percentage increase should be 100%. It would be in only a few cases that I would expect such a maximum increase to be granted. In my opinion, providing for an additional fee percentage increase of no more than 100%, taken with the recommendation in paragraph 78 below, goes far enough to close the gap between judicial expenses and the charge made to the client in commercial litigation.

69. I considered whether I should recommend that there be a tariff-based system. We looked at a number of options, varying from three to seven bands of tariff. We also considered the compulsory use of a rewritten block fee table, which put solicitors in charge of a litigation budget that would include all aspects of the conduct of the litigation, including advocacy. Ultimately I came to the view that the present system of an additional fee, with the assessment made at the beginning of the action, was more flexible and easier to understand than the alternative systems which we considered. The concepts are also familiar to those involved in the judicial system. This approach also does not require a case to be slotted into narrow fixed tariff bands. On one view what I suggest is indeed a tariff-based system as the cases which are most complex and demanding of greater time and care will be at the higher end of the tariff with the more straightforward at the lower end with some warranting no additional fee at all. It could be considered that what is suggested is a tariff-based system in which there are 100 tariffs with a differential of 1% between each band.

70. One potential criticism of this approach is that solicitors and their clients will not be open in dealing with the issue of an additional fee if the decision falls to be made before the result of the litigation is known. It was said that parties will seek to obtain some tactical advantage when dealing with the issue. That may be so but it seems to me that unless judicial expenses are to be calculated on the same basis for all litigations (which I find unattractive and unfair) or the additional fee is assessed at the conclusion of the litigation (which renders predictability impossible), some decision has to be made at an early stage of the litigation when parties might still be playing cat and mouse. From the comments made, and my own experience, the greater iniquity is the lack of predictability. Decisions as to the level of judicial expenses which will fall to be recovered therefore have to be made early in the proceedings.

71. It has also been said that making the decision on the level of judicial expenses that fall to be recovered at the outset of the litigation will result in satellite litigation. I doubt that for a number of reasons. Leave of the court will be required before such a decision can be appealed *ad interim*. The court has in the past made it clear that appeals on questions of expenses, being discretionary decisions, should be severely discouraged. Leave to appeal is unlikely to be granted and, even if granted, the appeal will have little prospects of success.[19] There is no reason why the court should depart from this approach. I doubt that there will be significantly more appeals on the issue of expenses than at present. Furthermore, there are few, if any, appeals on the level of additional fee after assessment at the conclusion of the action. I can think of no reason why that should be any different just because the decision was made at a different point in the life of the litigation.

72. Provision for an additional fee percentage increase of no more than 100% will not, however, satisfy the aspirations of many of those commercial litigators with whom we spoke. They aspire to a system which more closely mirrors the model in England and Wales, as described in paragraph 38. It is essentially one of what is sometimes referred to as full costs recovery. My concern that the losing party may end up paying the judicial expenses calculated at a rate well in excess of the rate which it had agreed to pay its own solicitors can be overcome if both parties agree that this model should be adopted and the court also agrees. In a commercial litigation it may be assumed that the litigants have a level of sophistication and experience that they need not be protected from the excesses which such a system may inflict. Furthermore, if it permits a level of recovery of judicial expenses which commercial litigants, as well as their lawyers, aspire to and which will cause them to find Scotland a more appropriate forum to resolve their disputes, so be it.

73. As I indicated in paragraph 17, full expenses recovery is in fact a misnomer. In Scotland it would still be within the power of the auditor of court to disallow certain items from a judicial account. For example, if a solicitor spent a wholly unreasonable length of time performing a particular task, the amount would fall to be reduced to a reasonable level by the auditor of court.

74. The English model also requires that fee earners of different levels of experience should be charged at different rates. That reflects how commercial clients are billed by their solicitors on both sides of the border. In England and Wales fee earners are divided into four categories. A similar structure would require to be used in Scotland. Such rates would be disclosed by the litigants in the estimate of expenses which they will require to lodge as part of the expenses management regime which is outlined in Chapter 4. It would be open to the auditor of court to assess whether certain activities were carried out by an appropriate level of fee earner as is the case in England and Wales. For example, a partner would not be entitled to charge his hourly rate to carry out photocopying.

75. We have been advised that commercial lawyers rarely use the block table of fees, as described in paragraph 28, since as presently framed, the blocks of work do not fully reflect the work which requires to be undertaken in many commercial litigations. For example, no

[19] Macphail, *Sheriff Court Practice* (3rd edition), paragraphs 18.51 and 18.117

provision is made in the block table of fees for the work required to prepare for a preliminary hearing. It is beyond the scope of this Review to prepare detailed tables of fees. However, I consider that the block table of fees should be revised and expanded to better reflect the nature of the procedure which a commercial litigation may follow. That would encourage solicitors to use a block table which enables a judicial account to be prepared much more quickly and further assists in the predictability of expenses.

76. The concepts which underpin the block table and indeed the calculation of fees in a detailed account have certain inherent flaws. If a detailed account is prepared, it relies primarily upon a time charge. An account based upon the block fee model is less open to criticism on this ground since there is less reliance on hourly rates as most heads of recovery are made up of a pre-estimate of the number of hours which should be taken to perform a particular task. A pure reliance upon time is not the best approach for the reasons set out by Lord Neuberger in his speech in May 2012 referred in paragraph 39. Charging by the hour does nothing to encourage efficiency, although the auditor of court can always tax off any time charge which he considers excessive. That may prevent excessive charging but it does not encourage, nor reward, efficiency.

77. Encouraging efficiency makes sense and should be a part of any system used to calculate the expenses which a losing party in a litigation will require to meet. For example, in most cases it will be necessary to precognosce witnesses. At present the fee for taking a precognition in the sheriff court for defended ordinary actions is £66.50 per sheet, even when expenses are being assessed on the block fee basis. The longer the precognition, the greater is the payment to which the solicitor becomes entitled. It would be more sensible if the charge for the first page was higher and gradually tapered to a nominal cost for the latter sheets of the precognition. There is no encouragement or inducement to make the precognitions short and to the point, whilst still containing all the necessary details. All litigation lawyers will have seen precognitions which could be halved in length without losing any of their utility. Forcing the party paying the judicial expenses to challenge such a charge before the auditor adds only expense, delay and further uncertainty. It would be better that it was addressed by the tables of fees. I have referred to the fee for taking a precognition but there are other examples in a similar vein.

78. In summary, **I recommend that the concept of an additional fee should be retained for commercial actions with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. To facilitate predictability I further recommend that any application for an additional fee should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. I recommend that the block table of fees should be framed to more fully reflect the procedure in commercial actions and should be designed to incentivise efficiency. In addition there should be an option available to parties and the court whereby the hourly rates used in the calculation of judicial expenses are the hourly rates which the solicitors for the successful party have charged their client.**

Other actions subject to active judicial case management

79. **I recommend that the concept of an additional fee should be retained for all other litigations subject to active judicial case management with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. To facilitate predictability, I further recommend that any application for an additional fee should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. I recommend that the existing block tables of fees should be revised with a view to incentivising efficiency.**

Actions subject to case flow management

80. Personal injury actions are subject to case flow management, one of the aims of which is to minimise court appearances. I therefore do not recommend that any motion for an additional fee should be made at the outset of a litigation in such actions. Most cases subject to case flow management will not call in court until the action is well underway and may not call before the morning of the proof. Any earlier calling would necessitate a court hearing for the specific purpose of determining the issue of an additional fee. I do not consider this to be warranted. That view was informed by discussions which I had with, and representations made by, a number of personal injury practitioners. I have commented elsewhere that personal injury actions tend to be fairly straightforward, which is why they lend themselves to case flow management. It is therefore easier to predict the likely size of an adverse award of expenses. Furthermore, virtually all defenders in a personal injury action are backed by an insurance company which will still require to make an appropriate reserve. Should an underestimate be made, however, the consequences are less serious to an insurer than to most litigants**. I recommend that the issue of whether there should be an additional fee in actions subject to case flow management, such as personal injury actions, should be resolved at the conclusion of the proceedings, as is the case at present. The maximum percentage increase should be 100% as I consider such an increase to be sufficient in a personal injury case which is subject to case flow management. I do, however, recommend that the block tables of fees for personal injury actions should be revised, as for the other tables of fees, to provide an incentive for efficiency.** The example of the fee for taking a precognition set out in paragraph 77 above applies equally to personal injury actions.

Motions for an additional fee

81. There was considerable criticism by consultees of not just the concept of an additional fee but also the operation of the system. It was said that there was no consistency amongst members of the judiciary in how they dealt with such motions and there was no maximum increase**. I therefore recommend that the Judicial Institute for Scotland should include in its training programme guidance as to how to approach motions for an additional fee**. I am of the view that the system in the sheriff court is to be preferred and that the member of the judiciary dealing with the case should determine the percentage increase. It could be argued that consistency is more likely to be achieved by having fewer people making decisions on what the percentage increase should be and perhaps also

whether there should be an increase. Leaving it to the Auditor of Court and the sheriff court auditors, for whom the Auditor will be responsible when the SCCR recommendations are implemented, might be the best way of achieving consistency. The other side of the coin is that in the sheriff court, the auditor may not be a lawyer and may therefore not appreciate the complexity of a litigation. **On balance I recommend that for actions subject to judicial case management the member of the judiciary in whose docket the case is placed should determine whether an additional fee is appropriate and what the percentage increase should be. For actions subject to case flow management the member of the judiciary hearing the motion should determine whether an additional fee is appropriate and what the percentage increase should be.**

Family actions

82. Family actions are inevitably complex as they tend to involve strong emotions and arise during periods of great stress for individuals. Unfortunately, the distinctive nature of family actions can often result in the parties conducting the litigation in an unreasonable manner. Various respondents suggested that such unreasonable behaviour might be caused by an inequality of arms between the parties, or by one or both of the parties being in receipt of legal aid.[20] Respondents also noted that this type of behaviour has the ability to needlessly increase the expense of an action. Ensuring that expenses are kept to a reasonable level is important for those involved in a family action, as well as for the public purse in instances where the litigants are in receipt of legal aid. However, it is also important to consider the level of recovery of expenses upon the conclusion of an action.

83. The usual position in Scotland is that expenses follow success. However, given the nature of family actions, a degree of flexibility has been applied by the courts in order to take account of the different types of family actions and the manner in which the parties conduct the litigation.

Actions for divorce

84. Prior to 1985, the rule for the recovery of expenses in actions for divorce was that a husband was liable for his wife's expenses. This rule was abolished by section 22 of the Family Law (Scotland) Act 1985,[21] which provides that expenses are within the discretion of the court. In practice, the general position is that the unsuccessful party is liable for the other side's expenses. However, this can be departed from due to the conduct and resources of the parties involved.

85. In *Little v Little*[22] Lord President Hope said that the rule that expenses follow success should not be applied in its "full rigour" to disputes about financial provision on divorce. Instead, he noted that:

> *"There is much to be said….for the view….that the parties' conduct rather than the result itself should be the principal criterion upon which to proceed."*

[20] See Chapter 11, page 246
[21] c. 37
[22] 1990 SLT 785

86. This approach has been followed in subsequent cases. In *Whittome v Whittome*[23] the Lord Ordinary awarded the wife in a divorce action three-quarters of her expenses having regard to the fact that she was partly successful, that her conduct throughout the litigation had been generally reasonable, and that it was reasonable that she should seek an award of expenses due to the effect that such an award would have on the respective assets of the parties. However, in *Adams v Adams*[24] the Lord Ordinary held that the decisive question was why the parties had to go to proof at all. In that case the pursuer, (the wife), had insisted on points of principle at proof on which she was ultimately unsuccessful. In making an award of expenses against her, the Lord Ordinary stated that he did not regard the impact of an adverse award as a decisive consideration in the case.

87. In *Sweeney v Sweeney*[25] the Inner House set out the principles that ought to apply in relation to awards of expenses in actions for financial provision on divorce: (1) the rule that expenses follow success is not irrelevant to disputes about financial provision on divorce, but should not be applied in its full rigour; (2) the mere fact that a claimant succeeds in obtaining an award of expenses modestly higher than a judicial or extra-judicial offer will not ordinarily entitle the successful party to an award of expenses of the process; (3) the conduct of the parties in the litigation is of relevance; (4) where one party takes the other to proof on an issue or issues on which he is unsuccessful with the result that the other party secures an award significantly greater than any outstanding offer, expenses may well be awarded. In that particular case it was also observed that the award of expenses would not disrupt the financial provision made as the defender was able to meet them without undue hardship.

Actions involving children

88. In actions involving children, although the normal rule is that no expenses are due to or by either party, judges have shown that they are willing to exercise their discretion in such cases.[26] In *AB v BB*[27] Lord Bannatyne held that in the circumstances of that case a finding of no expenses due to or by either party was not appropriate. He found that when the pursuer's complete success in the action, and the defender's unreasonable behaviour were taken together, it did justice to the positions of the parties for expenses to be dealt with other than by the normal rule. As such, he found the defender liable for one-third of the expenses of the action.

89. In the Consultation Paper we asked whether the rule that each party to a litigation in Scotland should bear their own expenses is appropriate. Five respondents considered that it is appropriate in family actions. Two respondents were of the opinion that making an award of expenses against a party in family actions is not appropriate as the ultimate issue is often the welfare of children. A further respondent noted that, in divorce actions, matrimonial assets are a 'capped pot of funds.' Therefore, it would not be appropriate to

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[23] 1994 SLT 130
[24] 1997 SLT 150
[25] [2007] CSIH 11
[26] See *Whittome v Whittome* (No 2) 1994 SLT 130, and *Turner v Turner* 2009 GWD 32
[27] [2011] CSOH 198

make an award of expenses against either party as it would merely diminish these assets. Another respondent considered that the court should continue to have a discretion with regard to awarding expenses in family actions. However, the presumption should remain that each party pays their own expenses.

90. By contrast, seven respondents considered that the courts should move away from the general, expenses-neutral position. Three respondents noted that the general rule does not encourage parties to act reasonably or conduct the litigation in an efficient and expedient manner. Two respondents noted that litigants in family actions often deliberately delay matters. These respondents were of the view that the threat of an award of expenses may alter this type of behaviour. One respondent cited the case of *NJDB v JEG*[28] as a glaring example of how badly some family actions are conducted. However, in his opinion, the main reason for this is that the court rules do not adequately allow the judge to restrict the nature and extent of the proof.

91. Lastly, three respondents observed that the rule no longer applies in all cases. These respondents noted that the courts have slowly been moving away from the general rule in recent years, as is evidenced by the case law above. One respondent considered that, particularly in actions which are privately funded and have a clear outcome, the courts are willing to make awards of expenses in instances where one of the parties has acted unreasonably. Another respondent noted that the move away from the rule has led to a decrease in predictability. They stated that it is increasingly difficult for them to advise their clients on the likely outcome of any hearing on expenses following a family action. Two respondents pointed out that the courts tend to treat actions for divorce, and actions involving children, in differing ways.

92. As can be seen, recent case law suggests that in instances where one, or both, of the parties act unreasonably, the courts are willing to depart from the general rule that each party bears their own expenses in a family action. In actions involving divorce, the courts appear vigilant in applying their discretion by taking into account the conduct of the parties. By doing so, they are attempting to ensure that those involved conduct divorce actions in a more reasonable and efficient manner. The threat of expenses must be real, and the court's discretionary power to grant adverse awards of expenses against a party based on their conduct should motivate parties and solicitors to have more regard for efficiency and cooperation. Further, in actions involving children, judges have also shown a willingness to exercise their discretion to make adverse awards of expenses in instances where parties have acted unreasonably.

93. I do not consider that a recommendation from me is either appropriate or necessary in this respect. As has been noted from the cases referred to, the Scottish judiciary has been much more willing to exercise its discretion when called upon to make awards of expenses in divorce actions and actions involving children. Awards of expenses, particularly in cases in which one party has behaved unreasonably, are becoming more frequent. I consider such a move to be sensible. Although this will result in it being more difficult to predict the

[28] *NJDB v JEG* [2012] UKSC 21

expenses of a family action, I consider that this is outweighed by the fact that the power to make such an award may serve to temper the behaviour of the parties, and may contribute to a further reduction in the cost of family actions.

Review of level of fees for litigation

94. The Tables of Fees are made under statutory authority by LPAC. We asked in our Consultation Paper whether LPAC, as currently constituted, is an appropriate body to review the level of fees for litigation which may be recovered as expenses and, if not, what alternative body should carry out this function and what should be its composition.

95. More than half of the respondents considered that LPAC was an appropriate body to carry out this function. One respondent observed that it is a specialist body with considerable expertise in the particular field and which works reasonably well in keeping the Rules of the Court of Session and the sheriff court up to date and in constantly reviewing the charge out rates for party and party accounts.

96. One quarter of respondents, however, did not consider that LPAC was an appropriate body to review the level of fees for litigation which may be recovered as expenses. The majority of these respondents considered that LPAC's role should be taken over by the Scottish Civil Justice Council. In their opinion it was important for legal expenses reform to be dealt with in tandem with court reform. This was best dealt with by one body, the Scottish Civil Justice Council, which was to encompass a wide range of views and interests. In addition, it was thought that one body responsible for the creation of rules, policy and the review of fees would ensure consistency.

97. One respondent, however, was of the view that the Scottish Civil Justice Council as a whole would not be an appropriate body, but it might be appropriate for it to form a sub-committee to deal with this issue. Another respondent suggested that LPAC should be placed under the control of the Scottish Civil Justice Council. One respondent did not agree that the responsibility for the review of fees should be passed to the proposed Scottish Civil Justice Council as it is a very specialised area, better dealt with by those sitting on LPAC.

98. Other respondents suggested the creation of: a new body under the guidance of the Auditor of Court; a separate working party; or an independent office funded by a stakeholders' levy.

99. LPAC is chaired by a Judge of the Court of Session, currently Lord Burns, and its membership 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. Concern was expressed to us regarding the narrowness of the membership and, in particular, the fact that there is no consumer representation. We therefore asked in the Consultation Paper what should be the composition of the body charged with reviewing the level of fees for litigation which may be recovered as expenses.

100. Respondents suggested that membership should include an independent law accountant, a sheriff court auditor, a sheriff, an economist and a representative from the

Scottish Legal Aid Board. In particular, several respondents considered that in order for there to be a more balanced body there should be a fair representation of the actual users of the court system to include not only legal professionals but representatives from the insurance industry, trade unions and consumer groups. Some respondents considered that there should be representation from commercial consumers of legal services, such as banks and insurance companies, as they require to meet findings of expenses on a regular basis.

101. As far as consumer representation is concerned, some respondents were against this on the basis that consumer representation is unlikely to be of particular assistance in the relatively technical function of assessing appropriate recoverability of expenses. Another respondent pointed out that although the desire to have a stakeholder's presence on LPAC, or any alternative to LPAC, is understandable, if the stakeholder presence looks to reduce the expenses recoverable, this will be responsible for creating a greater gap between the cost of litigation and the recoverable expenses. This, in turn, will increase the disincentive to litigate.

102. I agree that it is important for one body to be responsible for the creation of court rules and court reform policy, including the review of expenses. I consider that the Scottish Civil Justice Council is the appropriate body to carry out that role. **I recommend that the Scottish Civil Justice Council form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses. Membership should include the users of the system (such as the existing members of the Lord President's Advisory Committee on Solicitors' Fees), the funders of the system (by which I have in mind a representative of the insurance industry and also a representative of the Scottish Legal Aid Board), a sheriff court auditor, a sheriff, a law accountant, a lay person who may well be an economist and someone to represent the interests of the consumer.**

Scotland as the forum of choice for litigation

103. One consequence of the gap between the cost of a litigation and the amount recoverable as judicial expenses is that those litigants who have the option to do so may choose to litigate outside Scotland. We have been made aware of the disillusionment of clients in Scotland with the Scottish litigation system. We are also conscious of the Scottish Government's desire to make Scotland a forum of choice for litigation. We therefore asked in our Consultation Paper what steps could be taken to achieve this.

104. One respondent pointed out that the present forum of choice for litigation is currently not Scotland. This was said to be because of the difficulty in predicting what an award of expenses will amount to and the ability of a claimant in England and Wales to recover a significantly greater proportion of the legal costs incurred from the unsuccessful litigant. Indeed the majority of respondents referred to the gap in recoverability as being a disincentive to litigating in Scotland. One respondent noted that recoverability is a factor in the client's decision to litigate in Scotland or elsewhere, and observed that clients are choosing to litigate in England where the perception is that costs can be recovered at a more realistic level. In that respondent's opinion, parties should not be disadvantaged in relation to recovery when litigating in Scotland. For Scotland to remain a forum for the resolution of commercial disputes, the recovery of expenses has to be set at a commercial level.

105. Another respondent, a firm of solicitors, whilst acknowledging that recoverability is a factor in clients choosing to litigate elsewhere, did not agree that it is one of the fundamental factors in "*the potential drift of litigation to England.*" It observed that clients perceive litigation to be more expensive in England, so even though the percentage of recoverability may be higher, for example, 80%, it is 80% of a higher figure than it would be in Scotland. It reported that anecdotal evidence leaves "*little doubt that English litigation does cost more*" and many of its clients choose to litigate in Scotland as a result. It observed that clients choose to litigate in England for other reasons which were addressed by the SCCR. Another respondent was of the view that Scotland is already a cost effective place to litigate. While improving the level of recoverability may make some difference, it was observed that "*lower recovery cuts both ways*" as losing will be less expensive.

106. Some respondents did not agree that Scotland should be promoted as a forum of choice for litigation. One respondent was of the view that this aim is "inappropriate" and the basis of rules regulating litigation in Scotland should not be to encourage those from other jurisdictions to litigate in Scotland. Other respondents considered it unrealistic to promote Scotland as a forum of choice for litigants with no connection with Scotland. It was felt that Scotland cannot compete with an international legal centre such as London, which deals with contracts incorporating English choice of law clauses. They suggested that steps should instead be taken to promote Scotland as the forum of choice not only for individuals in Scotland but also for appropriate disputes involving companies incorporated in, based in, or carrying on business in Scotland.

107. I recognise that it may be difficult for Scotland to attract litigation which would, in ordinary course, be raised in another jurisdiction. I agree with the respondent who offered the view that to compete with international legal centres such as London will be a severe challenge. However, I am in no doubt that every country has an obligation to provide an efficient and cost effective judicial system which can determine civil legal disputes involving private individuals and entities who conduct business in the jurisdiction. The gap between the legal fees paid by a successful litigant and what can be recovered in judicial expenses from the unsuccessful litigant is only one consideration when a litigant has a choice of jurisdiction. But I am in no doubt that it is an important consideration. The measures I have recommended above, together with the recommendations made by the SCCR, ought to go some way towards achieving that aim.

INTEREST ON JUDICIAL EXPENSES

108. In the event that a party is liable to pay an opponent's judicial expenses, the question arises whether interest should run on the sum due and, if so, from what date and at what rate. Although it is competent for a court to award interest on judicial 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.[29] Three solicitors' firms advised us that they have successfully obtained payment of interest on expenses for clients from the date of decree. Another respondent commented that whilst an award of interest on expenses is competent, it is rarely enforced.

109. One firm of solicitors advised that the Extractor of the Court of Session will provide an extract decree for payment of expenses with interest shown at the judicial rate from the date of decerniture.[30] That firm confirmed that it has obtained extract decrees including interest from the date of decerniture in several cases in which it was necessary to challenge some of the Auditor's abatements by way of a Note of Objections.

110. The Scottish Government consulted on a draft Interest (Scotland) Bill in January 2008.[31] Clause 8 of that Bill contained a provision that where a party to a litigation is entitled to recover fees and outlays in judicial expenses from another party, statutory interest should be payable on those expenses from the dates when they were paid. This clause was based on a proposal made by the Scottish Law Commission in its Report on Interest on Debt and Damages.[32] 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% per year over the official dealing rate of the Bank of England.[33] The SCCR recommended the introduction of a power to award interest at the judicial rate on outlays from the date they are incurred.[34]

111. There was a universal acceptance by all respondents to our Consultation Paper that interest on expenses should apply in some respect. One respondent suggested that to do otherwise is to allow a non paying party the benefit of non payment at the cost of the successful party. Another party considered that expenses become a debt in the same way as any other unpaid sum and therefore interest should be claimed. Reservations were expressed by one respondent regarding interest charged on money that is reclaimed from consumers.

Applicable date

112. Of more concern to respondents was the date from which interest should be applied to an award of judicial expenses. Insurance companies and related organisations were in

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[29] *Phillips v Upper Clyde Shipbuilders* 1990 SLT 887 and *Presslie v Cochrane McGregor Group Ltd (No.2)* 1999 SLT 1242

[30] Date of decree

[31] Scottish Government, *Interest (Scotland) Bill: Consultation and Draft Bill* (January 2008)

[32] Scottish Law Commission, *Report on Interest on Debt and Damages*, Report No. 203 (2006)

[33] The Scottish Government consulted on whether there would be merit in reviewing again (but this time, separately) the existing approach to interest on damages for personal injury: The Scottish Government, *Civil Law of Damages: Issues in Personal Injury – A Consultation Paper* (19 December 2012), pages 46-47: http://www.scotland.gov.uk/Resource/0041/00411137.pdf. An analysis of the responses to the Consultation was published by the Scottish Government on 6 August 2013:
http://www.scotland.gov.uk/Resource/0042/00429742.pdf

[34] *Report of the Scottish Civil Courts Review* (2009), Recommendation 187

favour of there being a delay following taxation before a successful party can claim interest on an award of expenses. Some suggested interest should run from 28 days after expenses have been agreed or taxed, while others considered that interest should run from the date of taxation but should only be chargeable if the expenses are not paid within 28 days.

113. One respondent considered that interest should be applied from the date of the interlocutor granting expenses as that would encourage payments on account of undisputed sums prior to taxation. Alternatively, two respondents were of the view that interest should run from 14 days after intimation of an account of expenses as that would allow, or even encourage, offers of settlement to be made, or payment of some of the undisputed amount, in order to reduce the applicable interest. One respondent was of the opinion that interest on expenses should run from the date of agreement of the expenses but, if the account is taxed, interest should run from 28 days after taxation. Conversely another respondent suggested that interest should run from the date of decree or, if the expenses are agreed, 14 days thereafter.

114. Other suggestions made by respondents as to the appropriate date from which interest should be applied on an award of judicial expenses included: the date of the cause of action; the date of citation; the date of settlement; the date of the final interlocutor; the date of the award of expenses; the date of the interlocutor awarding the actual taxed expenses; 7 days from the date of taxation or agreement on expenses; 30 days from the date of taxation or agreement on expenses; and the date of intimation of the account of expenses with the court having a discretion to interfere where the account is manifestly excessive and the paying party is justified on insisting on taxation.

115. If interest were to be applied from the date of the final interlocutor this would encourage payments to account. It may, however, create an incentive for those receiving payment to delay lodging an account of expenses, as they will benefit from the accrual of interest during the period between the date of the final interlocutor and the lodging of the account of expenses. In the Court of Session, an account of expenses must be lodged not later than four months after the date of the final interlocutor.[35] If the party fails to comply with this time limit, he or she shall submit his or her account at any time with leave of the court but subject to such conditions (if any) as the court thinks fit to impose.[36] This, therefore, reduces the potential for any substantial delay. At present, in the sheriff court, there is no time limit for lodging an account of expenses. Instead the paying party may apply by motion for an order ordaining the party entitled to expenses to lodge an account of those expenses in process four months after the date of the interlocutor.[37]

116. We have also received representations that it would be inherently unfair to ask a party to pay interest on an unknown sum, which would be the position if interest were to apply from the date of the final interlocutor. The present system, however, does not take account of the fact that the work has already been carried out. When an account of expenses is submitted, the paying party will be in a position to assess which matters he or she intends

[35] Rules of the Court of Session, Rule 42.1(2)(a)

[36] Rules of the Court of Session, Rule 42.1(2)(b)

[37] Act of Sederunt (Sheriff Court Ordinary Cause Rules) SSI 1993/1956, Schedule 1, Rule 32.1A

to dispute and make a payment to account. This should be encouraged as it may take a number of weeks for a diet of taxation to be fixed following an account being submitted and there will be a further delay while parties await the auditor's report.

Comparative jurisdictions

England and Wales

117. The House of Lords held in the case of *Hunt v R M Douglas (Roofing) Ltd*[38] that interest on costs runs from the date on which the judgment is pronounced (the incipitur rule), or from the date the action is settled, rather than from the date of the certificate of taxation (the allocator rule). Lord Ackner gave the following reasons for his decision:

> *"1. It is the unsuccessful party to the litigation who, ex hypothesi, has caused the costs unnecessarily to be incurred… Since interest is not awarded on costs incurred and paid by the successful party before judgment, why should he suffer the added loss of interest on costs incurred and paid after judgment but before the taxing master gives his certificate? 2. Since…..payments of costs are likely nowadays to be made to lawyers prior to taxation, then the application of the allocatur rule would generally speaking do greater injustice than the operation of the incipitur rule. Moreover, the incipitur rule provides a further necessary stimulus for payments to be made on account of costs and disbursements prior to taxation, for costs to be more readily agreed, and for taxation, when necessary, to be expedited, all of which are desirable developments. Barristers, solicitors and expert witnesses should not be expected to finance their clients' litigation until it is completed and the taxing master's certificate obtained. If interest is not payable on costs between judgment and the completion of taxation, then there is an incentive to delay payment, delay disbursements and taxation."*[39]

The Court of Appeal has also held that the rule that interest applies from the date of judgment also applies to cases run under a conditional fee agreement.[40]

118. Despite the general rule that interest runs from the date the order for payment of costs is made, the court may order otherwise[41] and has the power to award interest incurred and paid prior to an order for costs being made.[42] Three respondents to our consultation were in favour of adopting the approach taken in England and Wales in respect of interest on costs.

Canada

119. In Ontario, interest is payable on a costs order from the date that the order is made. In Alberta, a "judgment debt," which includes costs, charges or expenses, bears interest from the day on which it is payable by or under the judgment until it is satisfied.[43] Where a party

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[38] [1990] 1 AC 398

[39] *Hunt v R M Douglas (Roofing) Ltd* [1990] 1 AC 398, pages 415 - 416

[40] *Simcoe v Jacuzzi UK Group Plc* [2012] WLR 2393

[41] CPR Rule 40.8(1). *Simcoe v Jacuzzi UK Group Plc* held that Rule 40.8(1) is ineffective in the County Court.

[42] CPR Rule 40.8(2) see also Lovells, *At What Cost? A Lovells' Multi-Jurisdictional Guide to Litigation Costs* (2010), page 76

[43] Judgment Interest Act R.S.A c. J-1 section 6

accepts a formal settlement the relevant date is the date of the acceptance of the offer not the date the costs are quantified.[44] Legislation prohibits pre-judgment interest being awarded on costs in the action.[45]

Australia

120. In New South Wales, interest is levied on costs from the date or dates on which the costs concerned were paid or such later date as the court may order.[46] However, in Victoria, costs carry interest from the time the judgment was given or, in the case of costs which are assessable by the Costs Court, from the date of the order of the Costs Court stating the result of the assessment or such other date as the Court orders.[47]

New Zealand

121. Whether or not interest is payable on costs is at the discretion of the court in New Zealand. However, in the case of *AFFCO NZ Ltd v ANZCO Foods Waitara Ltd (No2*), the court stated that it "*would clearly not be allowed in the run of the mill situation*."[48]

At what rate should interest on judicial expenses be awarded?

122. With regard to the rate of interest that should be applied to an award of judicial expenses, respondents to the consultation suggested a variety of rates. Several considered that the judicial interest rate, which is currently 8%, should apply. Three respondents, whilst in favour of the judicial rate applying, were of the view that this is conditional on the judicial rate being 'fair.' Two respondents suggested that if the judicial rate is too high it should be fixed at 1% over the official dealing rate. Another respondent considered that the current judicial rate is unfair as it has remained at 8% since 1st April 1993. In its view the court should be given discretion to award interest at the prevailing statutory rate or such other rate as the court deems appropriate.

123. A solicitors' firm which acts for pursuers in personal injury cases was of the opinion that the interest rate on judicial expenses has to be at a level which encourages early payment. It considered that it would not be commercially acceptable to be out of step with England and Wales regarding the award of interest on judgment debts. Another respondent considered that it is appropriate for there to be a small penal element, but also commented that interest on awards of expenses should be linked to commercial rates.

124. Insurance companies, related organisations and firms of solicitors who act for defenders in personal injury claims were of the opinion that the judicial rate is too high and the appropriate rate should be the prevailing bank rate. One respondent, representing the interests of consumers, considered the base rate should be applied but noted that for

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[44] Court of Queen's Been Costs Manual – Costs Between Parties, updated 17 January 2011
[45] Judgment Interest Act R.S.A c. J-1 section 2(2)(d)
[46] Civil Procedure Act (NSW) 2005, section 101(4) and (5)
[47] Supreme Court Act 1986 (VIC), section 101(1)
[48] *AFFCO NZ Ltd v ANZCO Foods Waitara Ltd (No2)* [2005] 17 PRNZ 676, per Ronald Young J as cited in Lovells, *At What Cost? A Lovells' Multi- Jurisdictional Guide to Litigation Costs* (2010), page 132

individuals it should be applied on a simple interest basis, rather than compound. Another respondent suggested that a rate set 2-3% above the base rate would be appropriate.

125. Two respondents suggested deferring consideration of the issue until the decision of the Inner House of the Court of Session in the case of *Farstad Supply v Enviroco Ltd*,[49] in the hope that the Inner House would provide guidance on the matter. In that case, Lord Hodge, the judge at first instance, noted that there has been "*a clear mismatch between the judicial rate and market rates in recent years*."[50] However, he saw no reason to depart from the judicial rate of interest in relation to post-decree interest and stated "*While interest in principle should be compensatory, I see no objection to a rate which is mildly penal as a means of encouraging prompt implementation by a defender of an award of damages by the court.*"[51]

126. The decision of the Inner House has now been reported and the decision at first instance upheld.[52] Lord Eassie, delivering the opinion of the Court, stated:

> *"… in our view it is plain that the mismatch between the judicial rate and interest rates prevailing in the financial world which has existed following the crisis of 2008 is a matter of concern. In the absence of a wider reaching reform of the law relating to the awarding of interest such as that canvassed by the Scottish Law Commission in its report, (which must be a matter for the Scottish Government and the Scottish Parliament), the responsibility for updating the current judicial rate, to meet that mismatch, falls to the Rules Council. It is for that council to consider - we would suggest urgently - the clear mismatch identified by the Lord Ordinary, which we ourselves would endorse, and which is widely recognised by all engaged in litigation before this court."*[53]

Comparative jurisdictions

England and Wales

127. Post-judgment interest runs at the rate provided in the Judgments Act 1838, which is currently 8% simple interest. A different rate may be applied if the court orders that interest should run prior to the order for costs being made.[54]

Canada

128. In Ontario, interest is awarded at the post-judgment rate,[55] which is the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the

[49] [2011] CSOH 153
[50] [2011] CSOH 153, paragraph 26
[51] [2011] CSOH 153, paragraph 28
[52] [2013] CSIH 9
[53] *Farstad Supply AS v Enviroco Ltd* [2013] CSIH 9, paragraph 31
[54] See *National Westminster Bank plc v Rabobank Nederland* [2008] 3 Costs LR 396 where the Commercial Court ordered a rate of 1% over the base rate to apply until the date of assessment by the costs judge. Thereafter the rate under the Judgments Act applied.
[55] Courts of Justice Act, RSO 1990 C. 43, s 129(1)

date of the order falls plus 1 per cent.[56] Rates are published quarterly and the current rate is 3%.[57] In Alberta, the rate of interest is prescribed each year and is currently 1.2%.[58]

Australia

129. In New South Wales, the rate of interest is dependent on the bank's interest rate rather than being fixed by statute.[59] From 1 January to 30 June in any year the rate is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced and from 1 July to 31 December it is 6% above the rate last published before that period commenced. However, legislation provides the court with the discretion to award interest at another rate.[60] In Victoria, as costs are considered a judgment debt, the penalty interest rate applies. This rate differs from other interest rates in Victoria due to the penalty element. It is fixed by the Attorney General and is only altered when there is a significant change in institutional rates. From 1 February 2010, this rate has been 10.5% per annum. This rate was last reviewed in June 2011 but no change was made.[61]

Recommendation

130. **I recommend that the courts should have the power to award interest on judicial expenses from 28 days after an account of expenses has been lodged.** This will encourage a paying party to make a payment to account, leaving only the items in dispute to be determined by the auditor of court.[62] Furthermore, a paying party should be aware of his or her liability within a reasonable period in order to make provision for the payment of expenses. The requirement in the Court of Session to lodge a judicial account of expenses within four months of the date of the final interlocutor provides protection against undue delay. There is no such time limit in the sheriff court. **I therefore recommend that an account of expenses in sheriff court actions must be lodged no later than four months from the date of the final interlocutor. If the party fails to comply with this time limit, leave of the court will be required to lodge the account late, subject to such conditions (if any) as the court thinks fit to impose.**

131. The applicable rate ought to be the judicial rate that is currently in force. I am aware that criticism has been made concerning the difference between the current judicial rate and market rates. However, I do not consider that there should be a divergence between the rate of interest payable on judicial expenses and the rate payable on awards of damages. Ultimately, the applicable rate is a matter for either the Scottish Government, by way of

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[56] Courts of Justice Act, RSO 1990 C. 43, s 127(1)

[57] http://www.attorneygeneral.jus.gov.on.ca/english/courts/3rd_Quarter_2012_CJA_Pre_Postjudgment_Interest_EN.pdf

[58] Judgment Interest Regulation, Alta Reg 215/2011

[59] Uniform Civil Procedure Rules (NSW) 2005 regulation 36.7

[60] Civil Procedure Act (NSW) 2005, section 105

[61] Department of Justice, *Penalty Interest Rates*, http://www.justice.vic.gov.au/home/fines+and+penalties/fines/penalty+interest+rates

[62] *Report of the Scottish Civil Courts Review* (2009), Recommendation 199

legislation, or the Rules Council (now the Scottish Civil Justice Council), as noted by the Inner House in *Farstad Supply v Enviroco Ltd*.[63]

[63] [2013] CSIH 9

ANNEX 1

Recoverability of Expenses – Comparative Research

Country	Is the recoverability of expenses provided for in a table or tariff?	What percentage of expenses are recoverable from the other side?
England and Wales	No, this is left to the discretion of the court. Costs may be assessed on a standard basis or an indemnity basis. In certain types of cases fixed recoverable costs may apply.	When costs are assessed on a standard basis parties usually recover 60-70% of expenses. [1]
Canada (Ontario)	This is left to the discretion of the court which may award costs or a partial, substantial, or full indemnity basis. Awards will usually be made on a partial basis. The Civil Rules Council in Ontario has set maximum hourly fees to be applied when assessing costs on an indemnity basis which increase with the level of qualification of the representative. These are, however, suggested maximum and, therefore, not binding on the court.	One commentator notes that "*there is no consistent percentage for partial or substantial indemnity awards*."[2] Another report suggests that awards made on a partial indemnity basis will generally amount to 60% of actual costs.[3] Awards made on a substantial indemnity basis are calculated at 1.5 times the rate used for an award on a partial indemnity basis.
Australia	Yes, scales of costs provide for the recoverability in all states excluding New South Wales. Indemnity cost orders may be made but these are rare.	It is estimated recoverability is approximately 50 – 70% on a party/party basis.[4] In New South Wales recoverability is 65-85%.[5]
New Zealand	Yes, a tariff system is used which is based on the complexity of the action and time bands for each procedural step.	The High Court Rules provide "*an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application*." [6]

[1] Lovells, *At what cost? A Lovells' multi jurisdictional guide to litigation costs* (2010), page 74
[2] C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation: A Comparative Perspective*, (2010), page 258
[3] Lovells, *op cit* (2010), page 45
[4] C Hodges et al, *op cit* (2010), page 201
[5] *ibid*
[6] New Zealand High Court Rules, Rule 14.2

South Africa	When assessing costs on a party and party basis recoverable costs are set out in a prescribed tariff which a taxing master will refer to when determining recoverable costs in a taxation. Costs may also be awarded on an attorney and client basis but this is usually only when the court wishes to express disproval of the losing party.	Often 50% of costs are recovered but awards made by the taxing master may amount to as little as 30%.[7]
The Netherlands	Costs that are shifted are calculated on the basis of a tariff, which was agreed upon by the bar and the bench. The rates are based on the value of the claim and the procedural steps taken. It is not legally binding but in practice it is rarely departed from.	In "bespoke lawyering" only 10% of actual costs may be recovered. However, in more standard work 50-75% of costs will be recovered. [8]
Italy	The court may exercise discretion but will generally apply fees set out in the legal tariffs.	In respect of lawyers' fees, the amount awarded by the court is usually considerably less than the actual fees. Recoverability may amount, in many cases, to less than 50% of the fees charged.[9]

[7] Lovells, *op cit* (2010), page 157
[8] C Hodges et al, *op cit* (2010), page 145
[9] Lovells, *op cit* (2010), page 133

CHAPTER 3 COST OF LITIGATION – OUTLAYS

1. Another potential cost that must be paid by parties to a dispute is any outlays incurred by their solicitor on their behalf in connection with the proceedings. These may be significant and, most commonly, comprise fees chargeable by counsel and expert witnesses.

COUNSEL'S FEES

2. Counsel's fees as a potential cost that must be paid by a party to a dispute can arise in two ways. Firstly, the instructing solicitor and counsel will enter into a private arrangement for the payment of counsel's fees. Such an arrangement is not viewed as contractual. Counsel's fees are instead viewed as an *honorarium* which means that counsel is not entitled to sue for his or her fees, at least unless the solicitor has claimed payment of them from the client and the client has paid them to the solicitor.[1] One respondent considers that the notion that counsel's fees are an *honorarium* bears no relation to the commercial reality of modern practice. However, this Review does not in any way seek to impinge upon counsel and solicitors' freedom to enter into such arrangements as they see fit.

3. Secondly, counsel's fees may form part of a judicial account of expenses which are recoverable from the unsuccessful party to a litigation. The mischief is said to be the impression created in the mind of the party paying the judicial account that counsel's charges are neither fair nor transparent and also that there is a lack of predictability. The problem with the second aspect will on occasion have its roots in the first aspect.

4. Whilst respondents to the Consultation Paper did not express any disquiet regarding the arrangements for the payment of counsel's fees described in paragraph 2, there was support for a table of fees for counsel as recommended by the SCCR.[2] Given the range of experience residing amongst members of Faculty, the wide variety of work undertaken by counsel and the range of complexity of cases, any table is likely to contain bands for the fees which counsel might charge.

The Sheriff Court

5. Predictability would be enhanced if the parties to a litigation in the sheriff court a) knew in advance if counsel was instructed by an opposing party and b) what the liability in respect of counsel's fees would be should there be an adverse award of expenses. It is possible that a party may not know until he or she arrives in court for a proof or other substantive hearing that the other side has retained counsel, be that junior or senior, or junior and senior. As one respondent commented:

> *"The current difficulty is where a party instructs counsel just days before a proof meaning the opponent's prior planning and budgeting for costs is rendered meaningless."*

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[1] The Faculty of Advocates, *Guide to the Professional Conduct of Advocates Fifth Edition* (2008), paragraph 9.2

[2] *Report of the Scottish Civil Courts Review* (2009), Recommendation 185

Further, given that the court is often moved to sanction the employment of counsel only after the hearing is concluded, the party instructing counsel will not know if counsel's charges will be recoverable should there be an award of expenses in favour of the instructing party.

Certification of counsel – the test

6. In our Consultation Paper we refer to the test that is currently applied in the sheriff court for granting sanction for the employment of counsel, namely, whether the employment of counsel is appropriate by reason of circumstances of difficulty or complexity, or the importance or value of the claim. We asked whether the test is appropriate. Less than half of respondents agreed that it is appropriate. Concern was expressed that the test is too discretionary, with the result that sheriffs often sanction the employment of counsel automatically. It was said that defining what is an important case is difficult as most cases are deemed by the parties as being important to them in some way. In addition, reference to value is not a wholly reliable guide as some cases of high value may be complex and difficult, while others may not.

7. Several respondents suggested that a general test of reasonableness should be applied, perhaps linked to proportionality, or reasonableness having regard to the difficulty and complexity of the cause, or the value of the claim. The test of 'reasonableness' can be contrasted with the test currently applied by the Scottish Legal Aid Board ('SLAB') in determining an application for the employment of counsel, namely whether it is 'appropriate' to do so in all the circumstances.[3] New tests were also suggested by respondents such as one related to the complexity of the case, the value of the claim, equality of arms and the potential recovery from the opponents' agents. One respondent suggested that a test of necessity ought to apply, that is, whether the instruction of counsel is necessary for the proper conduct of the case. Other respondents referred to a lack of consistency of decisions which leads to a dissatisfaction with the procedure. That may, however, be addressed by judicial training.

8. I am not persuaded that the current test is so fraught with difficulty that it ought to be radically changed. I consider it more important that the court should continue to have discretion to consider each case on its own merits. **I therefore recommend that the current test should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied**. I consider that a test based on necessity is too high. It is inevitable that when the test is broadly expressed, the likelihood of conflicting shrieval decisions increases. In my opinion, it is inevitable that the test must be broadly formulated.

9. The only additional factor which I consider should be taken into account when the court is called upon to determine a motion for sanction for the employment of counsel is that of equality of arms**.** In practice, I am sure that such is considered a relevant factor at present should the situation arise. However, during the consultation process, concern was expressed that in the new all Scotland shrieval personal injury court, pursuers may be

[3] *McAllister v Scottish Legal Aid Board* 2011 S.L.T 163

disadvantaged by defenders, backed by their insurers, instructing counsel regardless of whether the case is likely to pass any test for sanction. While I consider it unlikely that such a situation will arise in practice, **I do recommend that when deciding a motion for sanction for the employment of counsel, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them.** I do not consider it necessary for the tests used by the courts and SLAB to be aligned. SLAB approaches the issue of funding counsel's fees from a different perspective, namely, the effect on public expenditure.

10. With a broadly formulated test, it is to be anticipated that decisions either refusing or granting sanction for the employment of counsel in the sheriff court may be appealed. Whether counsel is sanctioned is a matter for the discretion of the sheriff.[4] Accordingly, leave to appeal is required.[5] Leave to appeal, when the decision under appeal is an exercise of the court's discretion, is normally refused as the test on appeal is very high. This is particularly so when the issue concerns expenses. However, it is in my opinion important that a body of case law is developed as to the circumstances in which the employment of counsel will be sanctioned by the court once the new privative limits of the sheriff court are introduced. Thus, in the early days of the new jurisdiction limits, sheriffs should be encouraged to grant leave to appeal in circumstances in which they might not otherwise do so in order for a body of jurisprudence to be developed which establishes what types of case ought to attract sanction.

Certification of counsel – timing

11. Of more concern to respondents is the timing of the motion for sanction for the employment of counsel. As one respondent observed:

> *"We do regard the issue of timing of request and approval as being the most important factor and also the one that has most impact on the cost of proceedings."*

A motion for sanction is normally enrolled at the conclusion of a significant hearing at which counsel has appeared. The common sentiment expressed by respondents is that sanction should be sought as early in the litigation process as possible. This would give both parties a greater degree of certainty as to the level of expenses being incurred by each side as the case progresses. It has been suggested to us that a sheriff may adopt a more rigorous approach when considering a motion for sanction if that motion is made at the start of the proceedings rather than at the end, when the sheriff is faced with a *fait accompli*. Some respondents suggested that sanction should be sought in advance of instruction. If that instruction was 'pre-action' then a motion should be enrolled at the start of the procedure. Another respondent cautioned that seeking sanction at the outset of a case is a subjective test. It would be hard to advise a client in advance whether sanction would be granted. Different decision makers may reach different decisions.

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[4] *Macphail's Sheriff Court Practice* 3rd Edition (2006), page 424, paragraph 12.25

[5] Sheriff Courts (Scotland) Act 1907 c. 51, s 27

12. We asked in the Consultation Paper whether in the sheriff court, counsel's fees should 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. The majority of respondents agreed that should be the case as it would create transparency and predictability of costs. One respondent added the proviso that where it is not possible to obtain sanction due to urgency, sanction should be sought at the first available opportunity and retrospective sanction sought with reasons as to why it ought to be granted, on cause shown.

13. Those respondents who did not consider this appropriate submitted that it is only at the determination of the case, or part of the case, that the sheriff can properly decide whether sanction for the employment of counsel is reasonable. One respondent was of the view that early refusal of sanction would create an inequality of arms and would seriously prejudice the outcome from the pursuer's perspective. It was submitted that it is also likely that if sanction were required at the outset of a case, the defenders' default position in many cases would be to oppose such an application, leading to a significant increase in court time and expense. Another respondent suggested that refusal of sanction for the employment of counsel ought to be *in hoc statu*[6] so that it would be open to review at a later stage without an appeal. The majority of the concerns can, however, be addressed where there is provision for retrospective sanction for work that has already been done. One respondent suggested that notice that counsel is to be instructed should be given to the other party to the action as soon as reasonably practicable if the instructing party wishes to preserve the right to recover counsel's costs.

14. As of 1 January 2012, and subsequent to the publication of the Consultation Paper, provision was made for sanction for the employment of counsel to be granted at the time of, or at any time prior to, the disposal of the proceedings.[7] Whilst this is useful in clarifying the situation I do not consider that it goes far enough as it is still open to a party to wait until the end of the case to seek sanction. Counsel's fees can represent a very significant proportion of the judicial expenses of a litigation. If greater predictability of the potential cost of a litigation is to be achieved in the sheriff court, it is important that a party knows whether their opponent is to instruct counsel and whether the court will sanction the employment of counsel. The advantage in providing greater certainty as to what an adverse award of expenses might amount to is, in my view, considerable in enabling a party to budget properly for a litigation. Furthermore, sheriffs are from time to time obliged to deal with motions for sanction when there has been no determinative hearing and the case has settled. They are able to do so.

15. **I therefore recommend that for cases proceeding under active judicial case management a motion for sanction for the employment of counsel should be made at the start of the proceedings or, at a later stage, on cause shown. Furthermore, I recommend that counsel's fees should be a competent outlay in a judicial account of expenses only from the date of an interlocutor sanctioning the employment of counsel. Where counsel**

[6] 'for the time being'

[7] Act of Sederunt (Sanction for the Employment of Counsel in the Sheriff Court) SSI 2011/404

is required to be instructed urgently, either before the raising of proceedings or during the proceedings, I recommend that parties may apply for retrospective sanction provided that the application for sanction is sought as soon as is reasonably practicable following the instruction of counsel, which will normally be at the next case management hearing. Any refusal of a motion will be *in hoc statu* and a new motion can be enrolled in the event of there being a change in circumstances. This recommendation also benefits the party instructing counsel as that party knows from the outset that, should they be successful in the action, their counsel's fees will be recovered in a judicial account. A further benefit is that parties will know the extent of the resources which their opponent is deploying in the litigation at an early stage in the proceedings. This will enable a party to review how they plan to present their argument to the court. Equality of arms will thus be easier to achieve. In addition it should be open to either party to enrol a motion for sanction to be removed where there has been a material change in circumstances. This would not have retrospective effect.

16. The SCCR recommended the establishment of a specialist personal injury court in the sheriff court.[8] In their responses to the Consultation Paper several pursuers' representatives, and solicitors who represent pursuers in personal injury actions, submitted that, in the event of a specialist personal injury court being created, there should be automatic sanction for the employment of counsel. Alternatively, at the very least, there should be a presumption in favour of the use of and sanction for counsel unless the defenders can argue special cause as to why counsel should not be used. One pursuer's organisation considered the use of counsel to be extremely important to the good and proper conduct of its members' cases. It pointed out that insurers use the best solicitors and members of the Bar and it always seeks to do the same on grounds of equality of arms. It considered it essential that the creation of a specialist personal injury court does not cause a reduction in the rights of its members and that it is therefore equally essential that there is the automatic right to sanction for counsel within the specialist personal injury court. One firm of solicitors referred to the fact that the employment of advocates and solicitor advocates in personal injury cases in the Court of Session is mandatory, with the result that a body of specialist pleaders, both advocates and solicitor advocates, with particular expertise in personal injury cases, has developed. It considered that a corollary of the establishment of a specialist court must be the continued availability of that body of specialist pleaders.

17. I am not persuaded that there ought to be automatic sanction for the employment of counsel in the specialist personal injury court nor indeed for any personal injury cases in the sheriff court. The decision on whether or not sanction should be granted should be within the discretion of the sheriff applying the test which I have recommended at paragraph 8 above. That will ensure a level playing field for all types of actions in the sheriff court. It will still be open to the pursuer's solicitors to represent to the sheriff at the commencement of the action, or later, why sanction for the employment of counsel ought to be granted based on, for example, the value of the claim or because it is reasonable to do so given the need for equality of arms. Some firms which represent the interests of pursuers in personal injury claims choose to raise many proceedings in the sheriff court while other firms prefer

[8] *Report of the Scottish Civil Courts Review* (2009), Recommendation 32

to raise proceedings in the Court of Session. The decision as to which court should be the forum seems, on occasion, to be based not upon considerations of the particular case but upon the business model of the firm of solicitors. The latter should not be a relevant factor in the decision to sanction the employment of counsel.

18. Those actions raised in the sheriff court are very often conducted by solicitors in a most efficient and competent manner. I do not accept the argument advanced by some respondents that, by definition, all personal injury claims are of such importance and value to the pursuer that counsel requires to be instructed in every case. No doubt some actions will be raised in the new forum which are not complex nor of any significant value. It would be disproportionate if sanction for the employment of counsel was automatically granted in such actions. I would also be concerned that sheriffs, faced with a motion for sanction in an ordinary non personal injury action of little complexity and value, would have advanced to them the argument that sanction for the employment of counsel was automatically granted in relatively low value cases in the specialist personal injury court and thus the test for sanction in any sheriff court action had thereby been reduced considerably. Such an argument could well be attractive. Counsel would therefore be instructed and sanctioned in sheriff court actions which at present are handled by solicitors in a competent manner. Thus, automatic sanction for the employment of counsel in the specialist personal injury court could have the effect of substantially raising the cost of all sheriff court actions and thereby significantly reducing access to justice. I therefore make no recommendation in this regard.

19. Concern was expressed by some respondents that introducing motions for sanction for the employment of counsel in every case would increase cost and add a further procedural layer to settling cases. It was said that some defenders will decide that as a matter of policy they will challenge every such motion. As a result such motions will take up a disproportionate amount of court time. Other respondents considered this unlikely as a body of jurisprudence will soon build up and parties will know when it is appropriate to oppose such motions.

20. In my judgement it is unlikely that defenders will adopt a policy of automatically opposing every motion for sanction. Apart from such an approach verging upon being an abuse of process, defenders will not wish to risk an adverse award of expenses being made against them should the motion be granted. It is also important to consider this issue in context which is that the recommendations of the SCCR have been implemented. In this respect, Recommendation 52 states that all cases which are not the subject of case flow management should be allocated to the docket of a sheriff and actively case managed. Any issue with regard to the suitability of the case for the employment of counsel could thus be dealt with, along with other matters, at the first, or subsequent, case management hearing.

21. Personal injury cases are subject to case flow management and would thus be exempt from the docket system. As indicated in paragraph 14, sanction for the employment of counsel can be sought at the time of, or at any time prior to, the disposal of the proceedings. To introduce a requirement that sanction for the employment of counsel ought to be made at the start of the proceedings or, at a later stage, on cause shown, will

undermine the underlying purpose of case flow management. In my opinion the balance favours the *status quo* being retained.

Assessment of fees – who should make this assessment and at what stage?

22. We also asked in the Consultation Paper whether the presiding judicial office holder should assess what would be a reasonable fee for counsel in any account of expenses and, if so, at what point in the proceedings should that assessment be made. The majority of respondents did not consider it appropriate for the presiding judicial officer to make the assessment. One respondent commented that the presiding judicial office holder, particularly in the case of sheriffs, is unlikely to have relevant experience of counsel's fees.

23. Just over half of those respondents who considered it inappropriate for the presiding judicial officer to make the assessment thought that the auditor of court was the most appropriate person. However, one respondent pointed out that in the less busy sheriff courts, where the employment of counsel is relatively unusual, auditors may have little or no relevant experience to apply to the assessment of counsel's fees. It was suggested that the parties or the auditor should have the option of referring the question of counsel's fees to the Auditor of the Court of Session who is best placed to continue assessing reasonable fees for counsel, especially since in a large number of cases, particularly personal injury cases, the action will not have been before the court. It was said that the Auditor is aware of prevailing market rates of remuneration for counsel and can provide a degree of objectivity and consistency in relation to the recoverability of all legal fees, including counsel's fees. The other respondents who considered it inappropriate for the presiding judicial officer to make the assessment thought that there should be a table of fees or a tariff system for counsel's fees.

24. Of those respondents who considered that the presiding judicial officer would be the appropriate assessor, it was suggested that there should be guidance limits on what can be recovered by way of judicial expenses. Two respondents suggested that in order to achieve consistency, a costs (or expenses) judge should be appointed in each sheriffdom.

25. **I recommend that for cases proceeding under active judicial case management in the sheriff court, the amount of fees for counsel which can be recovered as an outlay in a judicial account should be stipulated by the sheriff at the hearing to sanction the employment of counsel.** That will inform the other parties to the litigation of their liability to have to pay counsel's charges and the extent of that liability should there be an adverse award of expenses against them. The table of counsel's fees, as recommended by the SCCR, will be available to assist the court in this task. As noted elsewhere in this report, the trend in England and Wales is for the judiciary to become more involved in dealing with issues of costs. Our research has disclosed that this trend is well received by most litigants.

26. While it may be the case that Scottish judicial office holders will not have the requisite experience to deal with such issues initially, I consider that it is not a complicated subject and relevant experience will quickly be gained. The Judicial Institute for Scotland has also indicated a willingness to assist in this regard. Ultimately, it is a balance which has to be struck between the disadvantage of giving a further task to the judiciary and the benefit of greater certainty and transparency in relation to expenses. In the sheriff court, the

issue of whether counsel's fees are a competent outlay and the amount thereof can have a very significant impact on the judicial expenses of an action. In my opinion, the balance lies with the latter. It must be noted that this recommendation deals only with the fees to counsel that can be recovered in a judicial account. The freedom of counsel, solicitors and clients to agree how, and the level at which, counsel should be remunerated is not in any way affected.

27. For cases proceeding under case flow management in the sheriff court in accordance with Chapter 36 of the Ordinary Cause Rules, that is, actions for personal injury, the amount of counsel's fees which can be recovered as an outlay in a judicial account should be assessed at the end of the case, as at present. I consider that the benefit which would be obtained by any procedure which provides greater certainty with regard to counsel's fees is more than counterbalanced by the additional court hearings which would be required. Furthermore, from at least the pursuer's perspective in a personal injury case, the cost of counsel instructed by the defender is not of such significance given my recommendation in relation to qualified one way costs shifting.[9] In any event, the cost of counsel will be more predictable with the introduction of a table of fees for counsel. That does not, however, prevent a party, or his or her agents, from enrolling a motion at an earlier stage for the presiding judicial officer to stipulate the amount of counsel's fees which can be recovered as an outlay in a judicial account.

Court of Session

28. In the Consultation Paper we asked if the sanction of the Court of Session were to be required prior to the instruction of senior counsel, what test should be applied. Over half of the respondents considered that sanction should be required. Those who did not consider it necessary to seek sanction suggested that a motion seeking sanction will be costly and will create a further procedural layer to the litigation process resulting in delay. It was said that senior counsel will often be involved in providing advice at a pre-litigation stage. The cost of that advice would not be recoverable if prior sanction were required. Furthermore, it was suggested that it may be appropriate for immediate sanction for the employment of senior counsel to be granted in a Court of Session action once the privative jurisdiction of the sheriff court is raised to £150,000, as was recommended by the SCCR.[10] Other respondents suggested that the reasonableness of instructing senior counsel is best left to the taxation process.

29. The majority of those respondents who did consider that prior sanction for the employment of senior counsel was required were of the view that the same test should apply to junior counsel, senior counsel and solicitor advocates. New tests suggested were complexity, novelty of the real issue involved and the value of the case. It was said by one respondent that sanction should not be granted for the employment of senior counsel based solely on the basis of the potential value of the claim. Another respondent was of the opinion that the assessment of when and whether to instruct senior counsel in a Court of Session case varies from case to case and depends on many different reasons – for example,

[9] See Recommendation 46

[10] *Report of the Scottish Civil Courts Review* (2009), Recommendation 20

the importance to the client; the complexity of the legal issues; the volume of documents or number of witnesses; and the public profile of a case. It considered that if sanction were required it would be difficult to frame a "test" for this on the basis of complexity alone. It pointed out that in criminal legal aid cases SLAB requires to be satisfied of the "need" for senior counsel even in High Court cases and suggested that lessons can be learned from its experience.

30. In its response to the Consultation Paper, SLAB advised that requests for sanction to employ counsel are generally made prospectively in legally aided cases, with retrospective approval only being possible where there are good reasons given for the failure to apply for sanction timeously. SLAB's Civil Legal Assistance Handbook details the information that must be submitted with any request for sanction to employ counsel. SLAB considers that the guidance and tests used by it in assessing whether or not a case is suitable for the employment of counsel or senior counsel could be developed and used by the courts in determining whether or not a case is suitable for the employment of counsel.

31. Several respondents pointed out that in many cases where senior counsel is justified, employment of junior counsel in addition would not be justified, particularly with the instruction of counsel by an experienced solicitor. The court should therefore be invited to certify a cause as suitable for the employment of senior and junior counsel, or senior counsel alone.

32. We also asked in the Consultation Paper whether senior counsel's fees should 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. Over half of the respondents agreed that should be the case with several suggesting qualifications. For example, where it is not possible to obtain sanction due to urgency, sanction should be sought at the first available opportunity and retrospective sanction sought with reasons as to why it ought to be granted.

33. One respondent who considered that no prior sanction should be required was of the view that it would unduly fetter the discretion of a party to conduct the litigation in the manner it considers most suitable. Another respondent considered that parties should not be prohibited from instructing the more appropriate counsel by being required to make a motion for their sanction in advance. This is particularly the case given that solicitors do not have any option but to instruct counsel, or a solicitor advocate, in Court of Session cases. Another suggested that any refusal ought to be capable of review as the case progresses without the necessity of an appeal. In cases where there is an earlier refusal, backdating of a later award could be permitted.

34. One respondent considered that it is not the court's role to sanction the employment of senior counsel. Instead, any question whether the employment of a senior for a particular item of work in a given case was reasonable should be determined by the Auditor. It submitted that it has traditionally been part of the role of the Auditor to decide whether the employment of senior counsel for a particular task, or indeed in a particular case, was appropriate. Questions of complexity and difficulty, importance to the client, and the significance of the particular forensic task are all matters with which the Auditor is regularly

confronted, for example, in deciding on the quantum of counsel's fee. His ability to assess such matters is acknowledged, for example, in the current rule allowing a motion for an additional fee to be remitted to him.

35. The question in the Consultation Paper of whether the presiding judicial office holder should assess what would be a reasonable fee for counsel in any account of expenses and, if so, at what point in the proceedings should that assessment be made applies equally to the fees for both counsel and senior counsel in the Court of Session. The majority of respondents did not consider it appropriate for the presiding judicial officer to make the assessment, with just over half of those considering that the Auditor of Court is the most appropriate person given his experience in dealing with counsel's charges on a daily basis.

36. I do not consider that there is any need to obtain the sanction of the Court of Session before senior counsel's charges should be a legitimate charge in a judicial account. I therefore make no recommendation in that regard. There are several reasons for this. We have been told by authoritative sources that senior counsel are not being instructed in cases where such experience and expertise is not warranted. Thus, on one view, there is no mischief to be addressed. Further, once the recommendations of the SCCR have been implemented, only actions where the sum sued for is in excess of £150,000 or the case is of particular novelty or complexity will be raised in the Court of Session. The number of cases in which the employment of senior counsel would be inappropriate will therefore be significantly reduced.

37. That still leaves the issue of the predictability of what an adverse award of expenses might amount to. Clearly, senior counsel's charges will have a significant impact on that liability as indeed will the charges of junior counsel, for which, on any view, no sanction is required. One solution would be to mirror the recommendation which I have made in this regard to the sheriff court and require the court for cases proceeding under active case management to approve the fees which counsel can recover at the time counsel is instructed. However, there is a significant difference between the situations in the two courts. In the sheriff court, the sanction of the court is required if a party is to recover counsel's charges in a judicial account. A hearing is therefore required for this purpose. Since the case will require to be before the court in any event, it is placing a relatively minor additional burden to require the court to approve the level of counsel's fees. On the other hand, in the Court of Session, there does not require to be a hearing for the purpose of sanction and I have concluded that there is no need to introduce such for the employment of senior counsel. I would not wish to add to the cost of a Court of Session action by introducing a further hearing to deal with the extent to which counsel's charges should be recoverable.

38. I consider that an alternative approach can be adopted which may not provide the same degree of certainty but is nonetheless advantageous for budgeting for a litigation. **I recommend that in actions in the Court of Session, an instructing solicitor should be obliged to inform the opposing party that junior and/or senior counsel has been instructed.** This will then allow the other parties to better predict the potential claim for counsel's charges in any future judicial account.

39. Some respondents did represent to us that some counsel charge excessive amounts. I was informed that the level of counsel's fees is the sole issue between the parties at many taxations. This matter will be addressed by the introduction of a table of fees for counsel, as recommended by the SCCR.

Recoverable charges for counsel

40. We have been informed that in recent years there has been a trend for counsel and solicitors to seek to agree not just a daily rate, but also how counsel should be remunerated should the case settle before the action reaches a judicial determination. It is surprising that such agreement is not arrived at in every case. As was observed by Lord Penrose in *The City of Aberdeen Council v W A Fairhurst and Others,*[11] prior negotiation may be *"eminently sensible."* Even when such charges have been agreed, as was the position in *Fairhurst*, it does not follow that the agreed charges should automatically be recoverable in a judicial account of expenses. It is in this context that several respondents took issue with counsel's fees.

41. The Faculty of Advocates Guide to the Professional Conduct of Advocates[12] paragraph 9.11 provides in relation to fees for settled or discharged cases:

> *"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 obligations, has kept himself free from other commitments, a fee appropriate to the circumstances may be charged…..Relevant circumstances will include time spent in preparation and the extent to which Counsel has been unable to accept other instructions."*

42. The present position does not give rise to transparency. If there is no agreement between the instructing solicitor and counsel and the case settles just before the proof, counsel will sometimes seek to charge for preparation and also seek payment of a cancellation fee. Such charges are then sought to be recovered in a judicial account. A cancellation fee is sometimes referred to as a disappointment fee or, indeed, a commitment fee.

43. In the Consultation Paper we asked whether it is reasonable for counsel to be entitled to charge a commitment fee and, if so, whether it should be prescribed or left to the discretion of the Auditor. Three respondents referred to the difference between a commitment fee and a cancellation fee. One respondent represented to us that a commitment fee is a fee agreed in advance whereby counsel will be paid a particular sum in the event that a proof, for which he or she is instructed, does not proceed. In *The City of Aberdeen Council v W A Fairhurst and Others*[13] the court held that the commitment fee was a proper party and party charge and that this was the case even where counsel also charged a preparation fee. The Auditor allowed the fee and this was upheld by the court. A lengthy

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[11] 2000 SCLR 392

[12] The Faculty of Advocates, *op cit* (October 2008)

[13] 2000 SCLR 392

diet had been fixed a long time in advance and the successful party had given notice to its opponent of counsel's intention to charge such a fee when the diet was fixed and instructions issued.

44. This can be contrasted with the fee charged in *Jarvie* v *Greater Glasgow Primary Care NHS Trust*[14] which was a fee for a proof that was cancelled at short notice. In that event, just like the cancellation of any other obligation for which work (notably preparation work) may or may not have already been done, a fee will normally be due. It is not a question of whether counsel has been able to undertake other work after the cancellation, but of what is reasonably due on an objective basis as a fee for work instructed and then cancelled at a point when it might reasonably be anticipated that counsel would already have carried out work in preparation. In that case, Lord Carloway found that the charges in respect of counsel's appearance at the proof are, as a generality, entirely legitimate even on a party and party account, given the late abandonment of the cause. He stated:

> *"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."*[15]

Whilst such charges are presently allowed by the Auditor of Court in principle, we have been advised that the level of those charges recoverable from the paying party remains contentious at taxation.

45. It would therefore appear that for any one particular case, counsel is able to charge a commitment fee, a preparation fee and a cancellation fee in the event that the case does not proceed. Such charges will constitute a legitimate recoverable expense.

46. The distinction between a commitment fee and a cancellation fee is further confused by the use of the term "commitment fees" in The Civil Legal Aid (Scotland)(Fees) Amendment Regulations 2011[16] which provide that commitment fees are payable to counsel in limited circumstances in legal aid cases. They are prescribed and are equal to the daily

[14] [2006] CSOH 42
[15] *ibid,* paragraph 41
[16] SSI 2011/160

rate that may be applicable for the case. The rules for considering commitment fees in legal aid cases are: the hearing has been set down for eight days or more over consecutive weeks (not spread over the entirety of the case); proceedings settle on or before the first day; counsel is informed that the proceedings are to settle on or before the first day no more than two working days before the start of the hearing; and where the hearing is assigned for fewer than twelve days counsel cannot charge a fee for the first day of the hearing. The fee is limited to a maximum of 2 days for a hearing assigned for 12 days or more. A fee for one day is applicable in all other cases. The payment due is therefore, in effect, a cancellation fee, as defined by Lord Carloway in *Jarvie* v *Greater Glasgow Primary Care NHS Trust*.[17]

47. The reference in the question posed in the Consultation Paper more properly refers to a cancellation than a commitment fee. It is clear from the responses, however, that there is no uniform view between what constitutes a commitment fee and what constitutes a cancellation fee. Indeed, the expressions were used interchangeably.

48. It is clearly a matter between counsel, solicitor and client what fee the client should pay to counsel. Which elements of that fee should be recovered in a judicial account is a separate matter and is what comes within the remit of this Review. Just over half of the respondents did not consider it reasonable for counsel to charge a cancellation fee. Reasons given included a perception that it is in the interests of counsel to delay settlement until the last opportunity in order to maximise such fees. This was denied by a representative of the Faculty of Advocates who advised that parties normally wish settlement to be achieved before the Thursday afternoon in advance of the hearing commencing on the Tuesday morning, and counsel attempt to achieve that. It was also stated by respondents that the system is antiquated and at odds with the commercial practices adopted by solicitors; counsel should be expected to operate in a more commercial environment where they are not entitled to charge a commitment or cancellation fee but only to charge for work actually done. In addition, there was a suspicion in the minds of several respondents that cancellation fees amount to duplication of payment to counsel and as such were met with a sense of distrust by clients. It was said that they appear to increase the cost of litigation in Scotland where fees should, in principle, be payable only for work done, subject to taxation in the normal way.

49. One respondent submitted that:

> *"commitment fees as currently formulated are a product of the inefficient mechanism under which litigations currently operate and the way in which instructions to counsel are progressed. The practice owes more to the disorganisation of the system than any logical method of reward and is one of the key areas of complaint by parties who are involved. As a general principle these fees are contrary to the consumer interest and to the interests of any party requiring to meet payment, whether client or opposing party. In a situation where less than 2% of cases proceed to an evidence led proof, the notion that counsel should be entitled to a substantial fee for 'commitment', 'cancellation' or any other form of advance reservation is grossly inefficient."*

[17] [2006] CSOH 42

50. Several respondents pointed out that there is no provision or practice for a solicitor or solicitor advocate to charge a commitment fee so they questioned why counsel should be entitled to charge such a fee. Several of the respondent solicitor firms with solicitor advocates stated that they do not charge any commitment fees on behalf of their solicitor advocates either to their client or by way of recovery from a third party, as a matter of policy and transparency.

51. The Faculty of Advocates pointed out that counsel's work cannot be delegated to other persons and when instructed in a particular case, counsel has a duty to arrange his or her affairs so as to avoid a foreseeable clash of commitments. This frequently means that counsel turns work away on the basis that he or she requires to be available for a matter in which he or she is already instructed. In the event that the matter does not proceed, it was said that it was unlikely that counsel would obtain alternative employment for the period reserved. In the same way in which other businesses charge a fee as a result of a cancelled reservation, the Faculty considers that counsel is entitled to charge a commitment fee to reflect this arrangement. It was stressed to us by another respondent that counsel are not paid for work that they do not do. Even if the hearing had proceeded, counsel would still have undertaken written work, outside court hours, in order to maximise their income. Written work is therefore not a substitute for cancelled appearance work.[18]

52. As far as the method of calculation of a cancellation fee is concerned, the majority of respondents considered that the fees should be prescribed. Methods of prescription suggested are by a table of fees or by a sliding scale following the guidance provided by Lord Carloway in *Jarvie* v *Greater Glasgow Primary Care NHS Trust,*[19] namely, a one day cancellation fee should be allowed for a case that is set down for 4 days but which settles late on Friday afternoon prior to the Tuesday; and a two day cancellation fee should be allowed for a case set down for 8 days which settles within the same timescale. Another respondent suggested a sliding scale whereby no fee is payable if a case settles 3 working days before the hearing; 50% of the agreed daily rate is payable if it settles 2 working days before; and 70% of the agreed daily rate is payable if it settles one working day before. Another suggested that if a case settles on a Friday before a Tuesday hearing, counsel should be entitled to charge for half of the diet. Other respondents considered that, if allowed, cancellation fees should be left to the discretion of the Auditor of Court. Other suggestions included taking into account factors such as how long counsel had kept the date free and whether they had completed any work on the case.

53. Some respondents referred to the system in England and Wales of charging brief fees where counsel's brief fee covers a defined spell of preparation plus the first day of any trial.

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[18] The Faculty of Advocates provided the Review with data from 3 QCs and 3 advocates for cases that had been set down for hearing in 2012 and subsequently settled. Information was provided on the date of the hearing; the number of days it was set down for; the date on which the hearing had been entered in counsel's diary; the date that the case had settled; whether any other appearance work was taken on in its place and, if so, for how many days; and when the replacement appearance work had been entered in counsel's diary. From the data provided counsel were instructed to carry out replacement appearance work in only a limited number of cases. What the information did not provide was whether the settled case was replaced by written work.

[19] [2006] CSOH 42

That fee is agreed in advance. Anything beyond the first day of trial is charged as a refresher on an agreed daily rate. For a case in which several weeks of preparation are required, the brief fee may be delivered in tranches, for example, covering the four weeks before the trial plus the first day. A brief fee of £30,000, for example, would be deliverable in weekly stages at £7,500 per week. Should matters settle before the trial, then the tranches that have been paid are non-refundable. One respondent considered that if counsel in Scotland were to charge brief fees, these might well be greater than the fees charged on the current basis. He submitted that a brief fee is front loaded and may not always reflect the actual work done on the case.

54. Another respondent suggested that any party agreeing to pay a commitment fee to counsel should intimate that arrangement to the opposing party at the time when it is entered into if it is intended that the fee is to be recoverable as a judicial expense.

55. On one view the successful party should be able to recover in a judicial account the reasonable fees incurred to counsel for the reasonable time counsel has spent in preparing for the proof, debate or appeal. That is transparent and easily understood. It is also consistent with how solicitors and solicitor advocates are remunerated. Thus, the recoverable fee in a judicial account should reflect the time spent in court and any preparation which falls to be undertaken outwith court. I do not consider it appropriate for the basis upon which counsel is to be remunerated to be disclosed to the opposing party in advance of the litigation. For example, if the basis of remuneration of counsel representing a pursuer in a personal injury case was disclosed to the defender, such information could inform the defender of the perceived strength of the pursuer's case. It is sufficient for the opposing party to be informed that junior and/or senior counsel has been instructed.[20] The extent of recoverability will be determined by reference to the table of fees for counsel, as recommended by the SCCR.[21]

56. From the responses to our Consultation Paper, what seems to be controversial is the charge made by counsel when the case does not proceed either because settlement is reached or one of the parties abandons the action or the defence. If counsel has accepted instructions in a case and has marked his or her diary so that no instructions can be accepted in other litigations, it seems not unreasonable, on one view, that counsel should be entitled to a payment to reflect the obligation undertaken in relation to the case and the possibility that other work has been turned away to enable that obligation to be fulfilled. The position falls to be contrasted by the practice of solicitors and solicitor advocates who do not seek payment for such an element of work. This is on the basis that they are able to turn their attention to other litigations when a case does not proceed. It could reasonably be anticipated that counsel is similarly able to find other work to fill the void created by the case not proceeding.

57. It seems to me that both solicitor advocates and counsel should be on an equal footing when addressing how their charges should be treated in a judicial account. It also seems to me that both should be entitled to recover in a judicial account some payment to

[20] See Recommendation 23

[21] *Report of the Scottish Civil Courts Review (2009)*, Recommendation 185

reflect the disruption to their work plans created by a case not proceeding at short notice. Some guidance as to how this payment should be calculated can be obtained from the comments made by Lord Carloway in *Jarvie* v *Greater Glasgow Primary Care NHS Trust*.[22] **I therefore recommend that counsel and solicitor advocates should be entitled to recover a cancellation fee where a case settles within two working days of the first scheduled day of a hearing. The fee should be determined by the number of days for which the hearing was set down. It should be calculated as follows:**

Scheduled length of hearing	**Fee**
Up to 7 days	**1 day**
Up to 11 days	**2 days**
Up to 15 days	**2½ days**
16 days or more	**3 days**

I also recommend that equivalent provisions should apply if a case settles after a hearing commences. That is to say, the fee should be for one day if there are up to seven days of the hearing remaining; two days if there are up to eleven days remaining; and so forth.

58. **Save for fees to cover the three elements of preparation, appearance and cancellation, as provided for in the preceding paragraph, I recommend that counsel and solicitor advocates should not be able to recover any other payment. The concept of a commitment fee should play no part in a judicial account.** It will be a matter for private arrangement between the litigant and counsel or the solicitor advocate if a commitment fee should be paid at all. In the course of the consultation period and thereafter, we sought views from a number of lawyers as to how counsel should be remunerated in the event that a case settled at short notice. What I have recommended is at the generous end of the spectrum of views which we obtained. For the avoidance of doubt, I know of no evidence to support the view that counsel delays settling a case in order to enhance his or her fee and it is not my opinion that such occurs.

FEES OF EXPERT WITNESSES

59. The second set of outlays, in addition to counsel's fees, that a party is liable to pay is fees charged by expert witnesses that are incurred by their solicitor during litigation proceedings. The unpredictability of this expense has been highlighted to us. It has been observed that whilst it may be possible to estimate the cost of counsel employed by the other side, this cannot be done in relation to expert witnesses. It has also been suggested that the cost of litigating has increased considerably in recent years and one of the reasons for this is the level of fees charged by expert witnesses and subsequently allowed by the auditor of court. One respondent noted that the fees of experts and counsel during the last five years have increased "*well above the rate of inflation.*" This has also been said in discussion with people from various disciplines including law accountants.

[22] [2006] CSOH 42

60. It has not been possible to confirm these views by the available evidence. SLAB publishes statistics annually which display the cost of outlays, excluding counsel's fees, for cases receiving civil legal aid. These are set out in Annex 1 to this Chapter. It is reasonable to assume that fees for expert witnesses will be the main constituent of the outlays. The average value of outlays per case as a percentage of the average case cost was consistently between 25% and 30% in the sheriff court from 2004/2005 to 2011/2012, and between 29% and 34% in the Court of Session except for 2010/11 and 2011/12, when it dropped to 22% and 16% respectively. Since the average case cost in the Court of Session almost doubled between from 2009/10 to 2011/12, it is more appropriate to examine yearly changes in the case average cost of outlays. In the Court of Session, the average cost of outlays per case has remained steady over the past three years, at just over £2,000, having decreased quite dramatically from 2004/5 when it was £3,650 per case. In the sheriff court, the average cost of outlays shows no steady trend, but has fluctuated between £502 per case (in 2004/5) and £641 per case (in 2009/10). In 2011/12, the latest year for which we have figures, it was at £587 per case in the sheriff court. The SLAB statistics do not support claims that the level of fees charged by expert witnesses has increased considerably. However, due to the lack of statistics concerning privately funded cases on a year on year basis, neither can these data disprove claims that experts' fees are rising disproportionately.

Certification of an expert – The test

61. We asked in the Consultation Paper what test the court should apply when considering a motion for certification of an expert witness. At the time of publication of the Consultation Paper, in November 2011, separate tests existed in the sheriff court where the test was one of necessity, and in the Court of Session, where the test was one of reasonableness. As of 1 January 2012, reasonableness is the determining factor in both courts.[23]

62. Slightly less than half of the respondents favoured a straight test of reasonableness on the basis that it is well understood and gives the court ample discretion as to whether or not a witness should be certified. One respondent considered that a test of necessity is too restrictive since although an expert's view may be beneficial to both the party and the court, it may not be necessary for the determination of the cause. Other respondents suggested hybrid tests of reasonableness, proportionality and necessity in various combinations. One such respondent pointed out that several other jurisdictions have an underlying additional test of proportionality as part of the consideration of the reasonableness criterion.

63. As far as the test of necessity is concerned, it was suggested by two respondents that such a test may reduce the cost of expert evidence.

64. I consider that there ought to be a consistency of approach between both the sheriff court and the Court of Session. The recent amendment to the sheriff court rules replacing the test from one of necessity to one of reasonableness achieves that aim. I consider that test

[23] Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) SSI 1992/1878, Schedule 1, paragraph 1 as substituted by Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) SSI 2011/403

is well understood and provides the court with sufficient discretion to enable it to consider each case on its own merits. **I recommend that when assessing the reasonableness of instructing an expert and what that expert should be paid, the court should have regard to the proportionality of instructing the expert and his or her charges.**

Certification of an expert – Timing

65. Although not a specific question in the Consultation Paper, the stage at which certification of an expert witness takes place was of concern to a number of respondents. At present certification is not usually sought until the end of the proceedings. However, the majority of respondents who raised this issue were in favour of experts being certified prior to instruction, or at the earliest possible stage in the proceedings. It was considered that this would be in the interests of transparency as parties would know at an early stage if a party is instructing an expert or number of experts. Some respondents also considered that early certification would give litigants the certainty of knowing whether expert evidence in a particular field was expected by the court. It was thought that this may therefore reduce the number of experts instructed 'just in case'.

66. It was also submitted that early certification would avoid situations where the involvement of an expert only becomes known at the point of settlement between the parties, with settlement being conditional on expert witness' fees being paid in full. It was suggested that at the time of seeking certification an estimate of the expert's fees should be provided. This would further enhance transparency in the process.

67. Those opposing a move to early certification were particularly concerned with the increase in the number of hearings that would be required for certification to be granted prior to instructing an expert and the cost of such hearings. It was also a concern that this would present an opportunity for the other side to fetter a party's discretion in employing experts which they consider appropriate. One firm of solicitors, which acts for pursuers in personal injury cases, was concerned that defenders will be handed an irresistible opportunity to interfere with the running of the pursuer's case and have a say in how that should be done. It considered that, at best, it would be an unwarranted interference in the running of the pursuer's case and, at worst, it would hand the defenders an unfair advantage.

68. It must be borne in mind that since it is ultimately the court which makes the order, there is a limit to the impact the defender can have by opposing a motion for certification. Defenders will not wish to risk an adverse award of expenses being made against them for the unsuccessful opposition to a motion. There is no reason why a responsible pursuer should fear court input at an early stage.

69. Other reasons presented for opposing early certification were the possibility of disclosing information potentially prejudicial to a party's case during an opposed motion and the problems associated with the other side being alerted to whom the party is consulting. This latter concern can be addressed by granting certification for a witness in a particular practice area with no obligation to disclose the name of the expert.

70. When looking at the sheriff court we have to assume that the recommendations of the SCCR have been implemented. Therefore, there is a specialist personal injury court with an all Scotland jurisdiction and a privative jurisdiction of £150,000. Most personal injury actions will proceed under case flow management in accordance with Chapter 36 of the Ordinary Cause Rules, as at present. All other actions will be actively case managed.

71. It is important to bear in mind the mischief or mischiefs which any recommendation is designed to address. The real mischief in relation to expert witnesses is the inability of parties to predict what their liability might be in the event that the action or the defence is unsuccessful and there is an adverse award of expenses. In personal injury cases which are subject to the case flow management procedures of Chapter 43 of the Rules of the Court of Session and Chapter 36 of the Ordinary Cause Rules, I am not sure that this is as much a problem as in other types of litigation. The pursuer is likely to have an arrangement with his or her legal representatives whereby he or she is proceeding on a 'no win no fee' basis. Thus the pursuer may not have a great financial interest in the issue. The defender will almost certainly be an insurance company experienced in personal injury litigation. The insurer will wish to make proper reserve for expenses but a) should be able to make a reasonable estimate of the fees an expert will charge and which will be allowed by the auditor of court in a straightforward personal injury case and b) should the estimate turn out to be too low, the consequences will not be the same for an insurance company as would be the case for a private individual or small business. The insurance company will be able to fall back on greater resources in such circumstances.

72. The underlying principle of case flow management is to keep the number of court appearances to a minimum. Virtually every personal injury case will require an expert witness. To introduce a requirement that every expert witness requires to be certified by the court in advance of the expert being retained will therefore undermine the underlying purpose of case flow management. In my opinion the balance favours the status quo being retained. Certification of the expert should continue to be made at the conclusion of the proceedings.

73. Since cases proceeding under the ordinary cause procedure in the sheriff court will be subject to active judicial case management and will therefore be before the court from time to time, there should be little or no additional cost in having the court certify, in advance, that expert evidence is required in a particular field. It would be unreasonable to recommend that the expert should be identified as that could give rise to prejudice. The same applies to cases in the Court of Session that are subject to active judicial case management**. I therefore recommend that certification of an expert witness should be obtained prior to his or her instruction in cases proceeding under active judicial case management in the Court of Session and in the sheriff court or, where that is not possible, such as when an expert has to be instructed before the raising of the action, as soon as reasonably practicable after proceedings are initiated. In most circumstances, this will be at the first case management hearing. Any refusal of a motion will be *in hoc statu*. The test to be applied will be whether that instruction at that time was reasonable.**

When should experts' fees become a competent outlay?

74. We asked for views on when the fees of an expert witness should become a competent outlay in a judicial account of expenses. As with the instruction of counsel in the sheriff court, in order for an expert's fee to become a recoverable outlay, the court must certify that it was reasonable to instruct the expert. Such certification is not usually sought until the end of the litigation. A small number of respondents were of the view that this system should not be changed. Most respondents considered, however, that experts' fees should become a competent outlay from the date of certification, with a majority favouring a move to certification at an early stage. Some respondents expressly noted exceptions to allow the court to retrospectively certify experts reasonably instructed prior to litigation in order for these expenses to be a competent outlay.

75. Another suggestion made by a small number of respondents was that fees should be recoverable from the time the expert is instructed or the fees are incurred. The majority of these respondents noted that this would be subject to a test of reasonableness. One respondent said that it should be for the party objecting to the instruction to prove that the instruction was unreasonable or unnecessary.

76. Another respondent suggested that experts' fees should become a competent outlay at the end of the case whereas another suggested that it should be the date on which the expert's report is exhibited. Other respondents considered that no date should be set but instead the matter should instead be left to the discretion of the court.

77. **I recommend that for cases proceeding under active judicial case management in the Court of Session and in the sheriff court, expert witnesses' fees should be recoverable from the date of certification. For parties who seek retrospective sanction of expert witnesses instructed prior to the commencement of litigation, any fees reasonably incurred would become a competent outlay at this stage. Should a party fail to obtain certification as soon as reasonably practicable after proceedings are initiated, they should not be able to recover in a judicial account any fee charged by the expert witness during the period between when it would have been reasonably practicable to obtain certification and when it was achieved.** In most cases certification will occur prior to instruction of the expert. The ability to seek retrospective approval would not prejudice any party who has acted responsibly in obtaining appropriate reports in advance of litigation.

78. For cases proceeding under case flow management in accordance with Chapter 43 of the Rules of the Court of Session and Chapter 36 of the Sheriff Court Ordinary Cause Rules, that is, actions for personal injury, expert witnesses' fees should continue to be recoverable from the date of certification, that is, at the conclusion of the proceedings. That will not prevent a party, or his or her agents, from enrolling a motion for certification at an earlier stage in the proceedings should they wish to have the certainty of knowing that the expert witnesses' fees will be recoverable in a judicial account.

Assessment of fees – who should make this assessment and at what stage?

79. We asked in the Consultation Paper whether the presiding judicial office holder should assess what would be a reasonable fee for an expert witness in a judicial account of

expenses and, if so, at what point in the proceedings should that assessment be made. At present it is the auditor of court who, during the taxation of an account, assesses the remuneration to be paid to an expert witness who has been certified by the court. As this occurs after the conclusion of the action it may be difficult for a party to predict their liability for the fees of experts instructed by their opponent, should they be unsuccessful in the litigation. As one respondent observed, "*expert fees can vary significantly and therefore have the potential to drastically and unpredictably increase the cost of litigation*."

80. Just over half of the respondents considered that the presiding judicial office holder should not be involved in assessing what is a reasonable fee. One respondent commented that judicial office holders lack the relevant experience and noted that the differential fees that may be charged in different disciplines, within disciplines and in different parts of the country, would make judicial assessment problematic. Three respondents considered this would increase court time and one expressed concern that this would increase the expense to the client. Reference was made by one respondent to the "*strong likelihood of inconsistent outcomes."* Another respondent pointed to the need for judicial training in this area and commented that:

> *"Due to the huge variety of experts that are engaged in litigation from innumerable professions, it is difficult to know how such an assessment can be made fairly without considerable investment in training and awareness. It is also difficult to make comparisons between some experts from the same discipline – for example, a large accountancy firm charges considerably more than a sole high street practitioner and there may well be arguments as to what the 'reasonable fee' is in such circumstances."*

81. Of those respondents who did consider that the presiding judicial officer should assess the fees of expert witnesses, one respondent commented that this would ensure proportionality and reasonableness. Another respondent was of the view that auditors are generally reluctant to abate the expenses of expert witnesses whereas the presiding judicial officer may be less so, if the expenses have still to be incurred.

82. Other respondents were of the view that the presiding judicial office holder should only intervene where the parties have failed to agree or when one party considers the cost of a report is excessive. One solicitors' firm, although generally against the presiding judicial office holder making assessments of this nature, supported this in the context of summary assessment of expenses. Two respondents suggested that the determination should be made by a costs (or expenses) judge and the assessment of the fee undertaken by a costs assessment team.

83. The majority of those respondents who considered that the presiding judicial officer should not make the assessment thought that the auditor of court is the most appropriate person to do so. It was said by one respondent that the current system, whereby the auditor assesses the fees, "*provides consistency and predictability in decision making*." It must be borne in mind that this argument may not apply to assessments made in the sheriff court where there are a number of different auditors. Another respondent noted that in a large number of cases, particularly personal injury cases, the action will not have been before the court and the auditor would therefore be best placed to make the assessment.

84. While submitting that the assessment should be made by the auditor, one respondent thought that the judicial officer should give clear directions on the extent to which the expert should be involved in the cause, in both temporal and procedural terms. Another thought that there should be a right of appeal to the judicial officer from the auditor's decision.

85. As far as the timing of the assessment is concerned, a small number of respondents considered that this should occur either at the point of instruction of the expert or when the appointment is approved. This would provide greater certainty regarding the expenses that will be incurred throughout the case and the level of recoverability that can be expected. One respondent was of the view that when seeking certification prior to instruction, parties should be asked to provide an estimate of the expert's fees. If a higher fee is included in the judicial account, then it is for the party seeking to recover the fee to provide an explanation of why the estimate has been exceeded. It was noted that this procedure is followed by SLAB and is a requirement of many Before the Event insurance providers. Another respondent suggested that the assessment should be made as each fee is presented, which should be within 14 days of the individual piece of work being completed throughout the currency of the case.

86. The majority of respondents, however, were of the opinion that assessment of an expert's fee, whether by the judicial presiding officer or otherwise, should take place at the end of the case when the reasonableness of the work done can be assessed. One party submitted that this could be done either after the witness is heard or the case has settled, when the expert's contribution can then be assessed.

87. I have recommended in paragraph 73 that for cases proceeding under active judicial case management in the Court of Session and in the sheriff court, certification of an expert witness should be obtained prior to his or her instruction or, where that is not possible if an expert has to be instructed before the raising of the action, as soon as reasonably practicable after proceedings are initiated. Similarly, there seems no good reason why the court should not approve the fees which the party instructing the expert will be able to recover in a judicial account at the stage of certification. This would provide certainty for all concerned parties. **I therefore recommend that for cases proceeding under active judicial case management in the Court of Session and in the sheriff court, the amount of expert witnesses' fees that can be recovered as an outlay in a judicial account should be stipulated by the presiding judicial officer at the hearing for the certification of an expert witness.** That will inform the other parties to the litigation of their liability for payment of experts' fees and the extent of that liability should there be an adverse award of expenses against them. While Scottish judicial office holders may not initially have the requisite experience to deal with such issues, I do not consider it a complicated subject and relevant experience will quickly be gained. The Judicial Institute for Scotland has also indicated a willingness to assist in this regard. Ultimately, it is a balance which has to be struck between the disadvantage of giving a further task to the judiciary and the benefit of greater certainty and transparency in relation to expenses.

88. It must be noted that the above recommendation deals only with expert witnesses' fees which can be recovered in a judicial account. The freedom of solicitors and clients to

agree how experts should be remunerated is not in any way affected. This recommendation will not preclude a party from paying its expert witness a higher fee than that approved by the court and meeting the difference out of its own pocket. For example, in an action in which the sum sued for is £10,000 the parties may agree that expert evidence is required from a chartered accountant. The pursuer may intend to instruct a chartered accountant from a small provincial firm who proposes to charge £150 per hour. The defender may wish to instruct a chartered accountant from one of the big four firms at a rate of £400 per hour. The court may agree the case is suitable for the instruction of a chartered accountant as an expert but given the sum at stake and other relevant factors the court should have the ability to determine that a reasonable rate of recovery would be £150 per hour. That would not prevent the defender from continuing to instruct the chartered accountant at £400 per hour.

89. For cases proceeding under case flow management in accordance with Chapter 43 of the Rules of the Court of Session and Chapter 36 of the Sheriff Court Ordinary Cause Rules, that is actions for personal injury, the amount of expert witnesses' fees which can be recovered as an outlay in a judicial account should be assessed at the end of the case as at present. I consider that the benefit that would be obtained by any procedure which provides greater certainty with regard to expert witnesses' fees is more than counterbalanced by the additional court hearings that would be required. Furthermore, from at least the pursuer's perspective in a personal injury case, the cost of experts instructed by the defender is not of such significance given my recommendation in relation to qualified one way costs shifting.[24] That does not, however, prevent a party or his or her agents from enrolling a motion at an earlier stage in the proceedings for the presiding judicial officer to stipulate the amount of expert witnesses' fees which can be recovered as an outlay in a judicial account.

Table of Fees

90. One way in which expert witnesses' fees may be made more predictable is to introduce a table of fees for experts. This idea, or alternatively capping experts' fees, was favoured by a small number of respondents. It was suggested that a tariff system could be devised to accommodate the different types of experts used. This would provide certainty and consistency in the fees charged by expert witnesses. One solicitor, however, commented that in clinical negligence cases there may only be one or two experts in a particular field in the UK and if a table of fees is constructed for experts some of these experts may become "off-limits." A similar view was submitted by another party in relation to particular experts in the asbestosis field, whose charges may be very high. It was said that ultimately this would increase the gap in recoverability of expenses in this type of case.

91. One respondent was of the view that there is merit in professional bodies setting out a recommended level of charges for their experts when giving evidence in court or producing expert reports for the court. Separately, we have been advised that SLAB is considering introducing a series of indicative fees for experts which will vary depending on the discipline involved.

[24] See Recommendation 46

92. As noted by some respondents, there is a huge range of disciplines in which experts can be asked to give evidence. They range from highly specialised medical experts to the witness who gives evidence in relation to road conditions in a personal injury action. Within each discipline there will be a range of experience. Both these factors will have a bearing on the level of fee which the instructing party will require to pay. In some disciplines there are very few experts and this inevitably influences the fees which they can command. I am not persuaded that it will be practicable to construct a table of fees and were it practicable, it would have such wide parameters that it would not have much utility. I therefore make no recommendation in this regard.

Should the court have the express right to refuse to hear certain expert testimony?

93. At present the permission of the court is not required before expert evidence can be adduced. In addition, the court has no express power to limit the evidence that may be led. The only sanction available to the court in relation to expert evidence that is called unnecessarily is to refuse to certify the witness as an expert. The SCCR made recommendations in relation to expert evidence which will expand the role of the courts in this area.[25] A recent Supreme Court case clarifies that the court does have powers to "*intervene to discourage prolixity, repetition, the leading of evidence of unnecessary witnesses and the leading of evidence on matters which are unlikely to assist the court to reach a decision*."[26] It is worthy of note that the court's power would not appear to extend beyond discouragement.

94. We are aware of judicial disquiet in relation to the amount of court time taken in actions where the welfare of children is concerned, some of which is said to be as a result of expert witnesses being called to give evidence that is unnecessary. A number of recent cases have highlighted the problem in this area. In the case of *NJDB v JEG*[27] the cost at the stage of the appeal hearing in the Inner House, excluding judicial expenses, was estimated at about £1 million.[28] Evidence in that case was led over 52 days and included, as noted by the Supreme Court on appeal, "*several expert (or supposedly expert) witnesses*."[29] One article highlights that the sheriff, at first instance, was "*particularly disparaging of the contribution which the expert witnesses could have been expected to make*."[30] In the Inner House it was also noted that the Court had been informed that in cases of this kind such protracted proceedings are not uncommon.[31] The Supreme Court also observed in a later case, concerning adoption proceedings, that "*it is difficult to avoid the impression that further efforts require to be made to encourage active and firm judicial case management of family proceedings in the Sheriff Court*."[32]

95. A working group on family law has been set up by Lord Brailsford, the designated Court of Session Family Law Judge. The first changes to procedure emanating from the

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[25] *Report of the Scottish Civil Courts Review* (2009), Recommendations 117 – 122
[26] *NJDB v JEG* [2012] UKSC 21, per Lord Reed at paragraph 34
[27] *ibid*
[28] *NJDB v JEG* 2011 S.C. 191, per Lord President (Hamilton) at paragraph 2
[29] *NJDB v JEG* [2012] UKSC 21, per Lord Reed, at paragraph 7
[30] Denise Smith, 'Fought All The Way', *The Journal Online* (14 February 2011)
[31] *NJDB v JEG* 2011 S.C. 191, per Lord President paragraph 23
[32] *ANS and another v ML* [2012] UKSC 30

group can be found in amendments made to the Rules of Court.[33] These provide for enhanced judicial case management to address some of the concerns raised by the Supreme Court in *NJDB v JEG*[34] and *ANS and another v ML.*[35] In particular, in actions relating to parental responsibilities, the sheriff must fix a case management hearing at which the parties are obliged to provide the sheriff with sufficient information to enable the sheriff to ascertain, amongst other matters, the scope for joint instruction of a single expert. The sheriff also has the power to exclude reports and/or witnesses from proof. A similar power is available to the sheriff in adoption proceedings. It had been the intention of this Review to make recommendations in a similar vein. However, we have been overtaken by events. The concerns highlighted to us have been addressed and it not our intention to add anything further.

[33] Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No.2) SSI 2013/139 in force 3 June 2013
[34] *NJDB v JEG* [2012] UKSC 21
[35] [2012] UKSC 30

ANNEX 1

SCOTTISH LEGAL AID BOARD: CIVIL LEGAL AID EXPENDITURE 2004/5 TO 2011/12

2011-2012

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	13,900	8,163,000	2,365	587	25%	-5%
Court of Session	995	2,031,000	12,408	2,041	16%	-2%

2010-2011

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	13,301	8,223,000	2,238	618	28%	-4%
Court of Session	930	1,938,000	9,617	2,084	22%	+3%

2009-2010

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	11,911	7,633,000	2,192	641	29%	+7%
Court of Session	1,214	2,453,000	6,892	2,021	29%	-13%

2008-2009

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	11,838	7,071,000	2,029	597	29%	+6%
Court of Session	1,012	2,354,000	7,583	2,326	31%	-29%

2007-2008

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	11,834	6,654,000	2,044	562	27%	-9%
Court of Session	835	2,731,000	10,567	3,271	31%	+5%

2006-2007

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	10,928	6,762,000	2,056	619	30%	+14%
Court of Session	943	2,927,000	9,128	3,104	34%	+22%

2005-2006

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost	Average Outlays per Case % Change on Previous Year
Sheriff Court	10,765	5,865,000	2,070	545	26%	+9%
Court of Session	784	1,996,000	8,965	2,546	28%	-30%

2004-2005

Court	No. of Cases	Total Outlays (£)	Average Case Cost (£)	Average Outlays per Case (£)	Outlays as % of Average Case Cost
Sheriff Court	11,439	5,748,000	1,923	502	26%
Court of Session	746	2,723,000	11,227	3,650	33%

CHAPTER 4 PREDICTABILITY

1. This Chapter addresses ways in which the cost of litigation might be made more predictable. These include fixed expenses, summary assessment of expenses and costs management.

FIXED EXPENSES

2. Some jurisdictions have introduced regimes in which expenses are fixed, that is, where recoverability is limited to a prescribed figure, or where they are predictable, that is, where expenses are calculated by reference to a formula such as a specified percentage of damages. Expenses can also be capped at a pre-determined maximum figure. Fixed, predictable or capped expenses have been introduced for certain types of litigation in England and Wales. This enables both parties to estimate better the amount that will be recoverable in the event of success before any decision is taken to commence or defend proceedings. Germany[1] and Belgium[2] have fixed expenses calculated by reference to the amount in dispute. New Zealand categorises cases according to their complexity and significance, and specifies a fixed recovery rate for each category. Expenses are calculated by multiplying the allotted number of days by the applicable rate.[3]

3. Litigation can, however, be an inherently unpredictable business. Limiting recovery of expenses to a pre-determined amount may fail to meet the cost of work reasonably undertaken in pursuing or defending the proceedings. This will mean either that the successful party has to meet the cost himself or herself, or that the additional work will not be undertaken. Achieving predictability and certainty could therefore be at the expense of recoverability and flexibility.

4. This Chapter looks at the small claims procedure in the Scottish courts, which provides for predictable expenses. It then asks whether fixed or predictable expenses should be introduced for other types of litigation in Scotland.

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[1] For a full discussion of the German system see Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 55. Also Burkhard Hess and Rudolph Hubner, 'Germany' in Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs and Funding of Civil Litigation* (2010), Chapter 11

[2] For more information, see the European e-Justice Portal at:
https://ejustice.europa.eu/content_costs_of_proceedings-37-be-en.do

[3] New Zealand uses a scale system for High Court costs. Each case is allocated to one of three categories according to its complexity and significance. This generally occurs at an early case management conference. For each category, the court rules specify a fixed recovery rate. The rules also specify, in bands, the time it reasonably would take to complete a particular step, expressed as a number of days. Costs are calculated by multiplying the allotted number of days by the applicable recovery rate. The court has an overall discretion and can order increased costs or indemnity costs taking into account the nature of the proceedings and the parties' conduct. For a full discussion of the New Zealand system, see the account by Venning J available at http://www.aija.org.au/ac06/Venning.pdf

Small claims expenses

5. The small claims procedure in Scotland was introduced into the sheriff court in 1988. It was intended to be simple enough to use without legal representation, and cheap enough so as to present litigants with minimal financial risk. Recoverable expenses were therefore restricted from the outset, and legal aid was not available for representation.

6. Under the current rules, the following actions require to be raised as small claims:

- actions for payment of money not exceeding £3,000, other than actions in respect of aliment[4] and interim aliment, actions of defamation and actions for personal injury;
- actions *ad factum praestandum*[5] and actions for the recovery of possession of moveable property which include an alternative claim for payment of a sum not exceeding £3,000.[6]

7. In 2011-2012, most actions for payment (72%) initiated in Scotland were small claims.[7] Indeed nearly all small claims were actions for payment (92%).[8] Most of these (91%) were undefended.[9] The majority (64%) of actions for damages[10] raised in the Scottish courts were small claims.[11] Of these, 42% were defended.[12]

8. Personal injury actions were removed from the small claims procedure in 2007.[13] At present any action for damages for personal injury for up to £5,000 is dealt with under summary cause procedure, which has its own tables of recoverable expenses.[14]

9. The Scottish Civil Courts Review ('SCCR') recommended that the existing small claims and summary cause procedures be replaced by a new simplified procedure for claims for £5,000 or less.[15] It further recommended that there should continue to be separate tables of expenses for claims up to £3,000, claims between £3,001 and £5,000, and claims for

[4] Financial support of a spouse or child enforceable by law.
[5] Actions to compel the performance of an act, other than the payment of money.
[6] The Small Claims (Scotland) Order 1988 SI 1988/1999 as amended by The Small Claims (Scotland) Amendment Order 2007 SI 2007/496. The 2007 Order raised the small claims threshold from £750 to £3,000. It also removed personal injury actions from the small claims procedure and made the provisions for restricted expenses that are discussed in this Chapter.
[7] Scottish Government, *Civil Law Statistics in Scotland 2011-12* (2012), paragraph 3.10
[8] *ibid,* paragraph 6.5
[9] *ibid*, paragraph 3.11
[10] Not including damages for personal injury which are excluded from the small claims procedure.
[11] *ibid*, paragraph 8.2
[12] *ibid*, paragraph 8.4
[13] 2007 Order, Article 2
[14] Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and further provisions) 1993 SI 1993/ 3080. Chapter IV specifies tables of recoverable expenses for summary causes generally and summary cause personal injury actions.
[15] *Report of the Scottish Civil Courts Review* (2009), Recommendation 79

damages for personal injury.[16] Accordingly, the draft Courts Reform (Scotland) Bill provides for a new procedure to be known as "simple procedure."

10. In England and Wales the Civil Procedure Rules ('CPR') provide for a system of case management 'tracks', with different rules to ensure that cases are dealt with in a manner appropriate to their value and complexity. The small claims track is the normal track for claims with a value of not more than £10,000.[17] The fast track is the normal track for claims (other than small claims) with a value of not more than £25,000, where the trial is likely to last for no longer than one day.[18] The multi-track is the normal track for all other claims.[19] Defended claims are allocated to the appropriate track by the court, although reallocation to a different track is possible.[20]

11. Claims normally allocated to the small claims track are claims with a financial value of not more than £10,000;[21] personal injury claims for not more than £10,000 where damages claimed for the injury are not more than £1,000; and tenants' claims for housing repairs whose estimated cost is not more than £1,000.[22] The UK Government's stated aim is to further increase the small claims threshold to £15,000.[23] For road traffic cases, the Government has recently consulted on options for increasing the personal injuries damages threshold from £1,000 to £5,000.[24]

12. The only costs recoverable in small claims are the fixed costs attributable to issuing the claim,[25] court fees,[26] reasonably-incurred travelling expenses,[27] party's or witness's loss of earnings[28] and expert's fees (capped at £200 per expert).[29] The court can order further costs against a party who has behaved unreasonably,[30] but Jackson LJ found that this rarely happened.[31]

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[16] *Report of the Scottish Civil Courts Review* (2009), Recommendation 91
[17] CPR Rule 26.6(1), (3)
[18] CPR Rule 26.6(4), (5)
[19] CPR Rule 26.6(6)
[20] CPR Rule 26.5, 26.10
[21] The small claims threshold increased from £5,000 to £10,000 in April 2013.
[22] CPR Rule 27.1
[23] Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: The Government Response* (2012)
[24] Ministry of Justice, *Reducing the Number and Costs of Whiplash Claims: A Consultation on Arrangements Concerning Whiplash Injuries in England and Wales* (2012)
[25] £50-£110 depending on value and method of service: CPR rule 27.14(2)(a)
[26] CPR Rule 27.14(2)(c)
[27] CPR Rule 27.14(2)(d)
[28] Capped at £90 per day per person: CPR Rule 27.14(2)(e) and Practice Direction 27, paragraph 7.3
[29] CPR Rule 27.14(2)(f), and Practice Direction 27, paragraph 7.3. In proceedings for specific performance or an injunction the rules permit modest recovery in respect of the cost of legal advice, but Jackson LJ observed that such an award was extremely rare in practice.
[30] CPR Rule 27.14(2)(g)
[31] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), paragraph 3.2

13. The consequence is that in small claims parties usually bear their own costs. Jackson LJ found that most parties on the small claims track were unrepresented;[32] the costs they incurred were generally modest, and did not deter them from litigating.[33]

14. In Scotland the recovery of expenses in cases proceeding under the small claims procedure is restricted. No expenses are awarded where the claim's value does not exceed £200.[34] In any other small claim the sheriff may award expenses not exceeding £150 where the claim is for £1,500 or less, or not exceeding 10% of the claim's value for claims greater than £1,500.[35]

15. These restrictions do not apply to a defender who (i) has not stated a defence; or (ii) having stated a defence, has not proceeded with it; or (iii) having stated and proceeded with a defence, has not acted in good faith as to its merits. Nor do they apply to a party on whose part there has been unreasonable conduct in relation to the proceedings or the claim.[36] If these exceptions apply, the successful party is entitled to recover expenses on the summary cause scale, which is higher.

16. If, then, a defender states a defence to a small claim but decides not to proceed with it, the defender is liable for the pursuer's expenses on the summary cause scale. The court has no discretion to restrict expenses to those ordinarily recoverable under the small claims procedure. This is regardless of the defender's reasons for not proceeding with the defence, for example, because parties have agreed a settlement. The Consultation Paper asked whether the court should have such discretion.

Consultation responses

17. Of the 37 respondents who answered this question, 29 favoured giving the court discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. Only six considered that the court should not have such discretion, while two were ambivalent.

18. Among those in favour, a commonly cited reason was that defenders were frequently required to respond to a small claims summons on the basis of information inadequate to enable a proper assessment of their position. That a defender did not proceed with a defence therefore did not necessarily indicate dilatoriness. To allow recovery of summary cause expenses from the defender in these circumstances was unfair. Respondents tied this to the absence of compulsory pre-action protocols requiring parties to exchange information. Other respondents considered that the current rule could encourage defenders to go to proof rather than negotiate a settlement. A third reason focused on the lack of proportionality of expenses compared to the claim's value. Those who favoured giving the court discretion

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[32] *ibid*, paragraph 1.2

[33] *ibid*, paragraph 4.2

[34] Sheriff Courts (Scotland) Act 1971 c .58, s 36B 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. That sum is prescribed by article 4(2) of The Small Claims (Scotland) Order 1988 SI 1988/1999.

[35] *ibid*, Article 4(3)

[36] Sheriff Courts (Scotland) Act 1971 c. 58, s 36B(3)

differed widely as to the circumstances in which it should be exercised: for example, if the defence had been stated in good faith; if the pursuer had acted unreasonably; or only in exceptional circumstances.

19. Respondents who opposed giving the court discretion stressed the need to deter spurious or dilatory defences and considered that any restriction on recovery of expenses reduced the opportunity to obtain justice, particularly in road traffic cases which could involve a great deal of work. The defender put the pursuer to additional expense by stating a defence and should bear the cost of this. The Law Society of Scotland considered that there appeared to be no difficulty with the existing rule, which should be retained.

Discussion

20. The vast majority of respondents who answered this question considered that the court should 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. I agree. Small claims procedure is intended to be an informal procedure for low value claims, available to litigants at minimal cost. Almost inevitably the cost of obtaining legal representation will be disproportionate to the sum sued for. The current rules restricting the recovery of expenses reflect this. I consider that the court should have discretion to consider all the circumstances, including, in particular, the defender's reasons for stating and then withdrawing a defence. A defender who has not acted in good faith when stating a defence will continue to be liable for summary cause expenses, as will either party on whose part there has been unreasonable conduct. The court should not hesitate to invoke these exceptions in appropriate cases to penalise dilatory conduct.

21. **I therefore recommend that the court should have a discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. This should be reflected in the rules for the new simple procedure.**

Fixed expenses

Scotland

22. Other than in small claims procedure, Scotland does not have a system of fixed expenses as such. There are, however, pre-action protocols in personal injury, diseases and professional negligence claims. These are voluntary in nature although the SCCR recommended that compliance should be compulsory.[37] Fees for claims dealt with entirely under the protocols are split between a fixed instruction fee, the value of which depends on the value of the agreed settlement, and a completion fee, which is calculated as a percentage of the agreed settlement on a sliding scale basis with the percentage decreasing as the value of the settlement increases.

[37] *Report of the Scottish Civil Courts Review* (2009), Recommendation 102

England and Wales

23. For claims on the fast track, CPR Part 45 makes detailed provision for fixed and predictable costs. Costs attributable to three different proceedings are considered: fast track trial costs,[38] the pre-action protocol for low value personal injury claims in road traffic accidents ('RTA Protocol')[39] and scale costs for claims in the Patents County Court ('PCC').[40]

Fixed trial costs

24. Recoverable costs for preparing for and appearing at a fast track trial are fixed.[41] The same amount is payable irrespective of whether the trial is conducted by a solicitor or a barrister. The court can award a different amount only in specified circumstances, such as where a party's behaviour at trial was unreasonable or improper[42] or an additional legal representative is necessary.[43] It can apportion the amount awarded to reflect parties' respective degrees of success.[44]

Value of the claim	Amount of fast track trial costs which the court may award
No more than £3,000	£485
Over £3,000 but no more than £10,000	£690
Over £10,000 but no more than £15,000	£1,035
Over £15,000 (proceedings issued after 6th April 2009)[45]	£1,650

The RTA Protocol

25. A pre-action protocol for low value personal injury claims in road traffic accidents was introduced in England and Wales in 2010. It is currently undergoing significant amendment in light of a Report to the Prime Minister by Lord Young[46] and two Ministry of Justice consultations.[47] These amendments expand the scheme's scope while reducing the fixed costs recoverable under it.[48]

26. The RTA Protocol applies to all claims, other than small claims, where a claimant claims damages valued at no more than £10,000 as a result of a personal injury sustained by

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[38] CPR Part 45, Section VI
[39] CPR Part 45, Section III
[40] CPR Part 45, Section IV
[41] CPR Rule 45.37. This deals with the costs of an 'advocate', used here in its generic sense to mean a person exercising a right of audience as a representative of, or on behalf of, a party: CPR Rule 45.37(2)
[42] CPR Rule 45.39(7) and (8)
[43] An additional £345 can be awarded if the party's legal representative attends in addition to the advocate who conducts the trial, if the court considers that the legal representative's attendance was necessary: CPR 45.39(2)
[44] CPR Rule 45.38(2)
[45] The fast track threshold increased from £15,000 to £25,000 in 2009
[46] Lord Young of Graffham, *Common Sense – Common Safety* (2010)
[47] Ministry of Justice, *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System* (2011); and Ministry of Justice, *Extension of the Road Traffic Accident Personal Injury Scheme: proposals on fixed recoverable costs - Consultation response 27 February 2013* (2013)
[48] Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (hereafter "the RTA Protocol"). This sets out in detail Stages 1 and 2 of the process; Stage 3 is set out in Practice Direction 8B.

that person in a road traffic accident.[49] From 31 July 2013 the threshold will increase to £25,000 for accidents occurring after 1st April 2013. Also from July 2013, the scheme will be extended with the introduction of a new pre-action protocol to cover employers' liability and public liability claims up to £25,000.[50]

27. The stated aims are to ensure that the defendant pays damages and costs without the claimant being required to commence proceedings; damages are paid within a reasonable time; and the claimant's legal representative receives the fixed costs at each stage.[51] There are three stages[52], each with its own fixed recoverable costs.[53] The court may additionally allow a claim for specified disbursements, such as a medical report.[54] Taking into account the pending extensions of the scheme, fixed recoverable costs are as follows:

	Claims of £1,000-£10,000		**Claims of £10,000-£25,000**	
	Stage 1	Stage 2	Stage 1	Stage 2
Road traffic claims	£200[55]	£300[56]	£200	£600
Employers'/public liability claims	£300	£600	£300	£1,300

All claims at Stage 3	£250 legal representative's costs £250 advocate's costs[57]

For claims above £10,000 the cost of obtaining counsel's opinion on quantum may also be recoverable.

28. Rates are to be higher at Stages 1 and 2 for employers' and public liability claims to reflect the fact that this is a new regime for such cases and that they are perceived to be more complex than road traffic claims. Rates are no different at Stage 3.

29. A claim will exit the RTA Protocol in specified circumstances, including where the insurer denies liability, alleges contributory negligence, or fails to respond within specified

[49] RTA Protocol, paragraph 2.1. Certain claims are excluded, for example where either party is deceased or the defendant's vehicle is registered outside the UK: RTA Protocol, paragraph 4.5. Claims for vehicle-related damages are ordinarily dealt with outside the Protocol under industry agreements.

[50] Ministry of Justice, *op cit* (2013)

[51] RTA Protocol, paragraph 3.1

[52] Stage 1: the claimant's lawyer sends a completed claims notification form to the insurer. The insurer must respond within 15 days. If liability is admitted, the claim progresses to the next stage. Stage 2: the claimant's solicitor sends the insurer a 'settlement pack', including a medical report. There is then a 35 day period for negotiation. Any offer in settlement automatically includes, and cannot exclude, the fixed costs. If agreement cannot be reached, application is made to the county court to determine quantum. Stage 3: quantum is assessed on the papers, unless the court decides otherwise or either party requests an oral hearing.

[53] CPR Rule 45.18, table 6

[54] CPR Rule 45.19

[55] Reduced from £400 as of 30th April 2013 by s 3(b)(i) of the Civil Procedure Amendment Rules (Amendment No. 3) 2013 SI 2013/789

[56] Reduced from £800 as of 30th April 2013 by s 3(b)(ii) of the Civil Procedure Amendment Rules (Amendment No. 3) 2013 SI 2013/789

[57] CPR Rule 45.18, Table 6. Costs will therefore be £250 for a 'papers' hearing and £500 for an oral hearing. An increase of 12.5% is allowed where a London-based claimant instructs London legal representatives: CPR Rule 45.18(5)

time limits, or where the claimant gives notice that the claim is unsuitable for the RTA Protocol, for example, because there are complex issues of fact or law. If such notice is unreasonably given, the claimant receives no more than the fixed costs set out above. Claims which exit the RTA Protocol can then proceed as court actions.

30. From July 2013, costs for claims exiting the RTA Protocol will also be fixed, with the exception of employers' liability disease claims.[58] Previously an anomaly existed whereby costs for low value claims that exited the RTA Protocol could be lower than the fixed costs for claims proceeding within it. This could give the paying party a costs incentive to exit the RTA Protocol.[59] To rectify this anomaly, the new fixed costs for cases exiting the RTA Protocol will always be higher than RTA Protocol fixed costs.[60]

31. The figures for fixed recoverable costs for road traffic, employers' liability and public liability claims falling out of the RTA Protocol, based on an illustrative matrix produced by Jackson LJ, are shown in the table below.

	Pre issue £1,000-£5,000	**Pre issue £5,001-£10,000**	**Pre issue £10,001-£25,000**	**Issued – post issue pre allocation**	**Issued – post allocation pre listing**	**Issued– post listing pre trial**	**Trial - advocacy fee**
	Case settles before issue	**Case settles before issue**	**Case settles before issue**				
Road Traffic Accident							
Fixed Costs	Greater of £550 or £100+ 20% of damages	£1,100+15% of damages over £5,000	£1,930+ 10% of damages over £10,000	£1,160+ 20% of damages	£1,880+ 20% of damages	£2,655+ 20% of damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	n/a
Employer's Liability							
Fixed Costs	£950+ 17.5% of damages	£1,855+12.5% of damages over £5,000	£2,500 + 10% of damages over £10,000	£2,630+ 20% of damages	£3,350+ 25% of damages	£4,280+ 30% of damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	n/a
Public Liability							
Fixed Costs	£950+ 17.5% of damages	£1,855+10% of damages over £5,000	£2.370+ 10% of damages over £10,000	£2,450+17.5 % of damages	£3,065+22.5% of damages	£3,790+27.5% of damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	n/a

[58] Currently excluded pending further consideration by the Ministry of Justice. See Ministry of Justice *op cit* (2013), paragraph 95

[59] Paul Fenn, *Evaluating the low value Road Traffic Accident process*, Ministry of Justice Research Series 13/12 (2012), page 28

[60] Ministry of Justice, *op cit* (2013), paragraph 7.8

These figures include the fixed trial costs referred to in paragraph 24 above. The idea of the 'escape clause' referred to is that, in exceptional circumstances, detailed assessment of costs actually incurred can be sought. However, unless costs as assessed turn out to be at least 20% higher than the fixed costs, only the fixed costs will be awarded.[61]

32. The UK Government's stated policy objectives include reducing and controlling costs in these categories of litigation.[62] The stated reason for the recent reduction in costs was that solicitors now no longer pay referral fees, which were prohibited with effect from April 2013.[63] Claimants' solicitors criticised the RTA Protocol's expansion and the reduction in costs, arguing that it will no longer be cost-effective for solicitors to deal with claims worth less than £25,000 and that consequently claimants will be unrepresented.[64]

33. A limited evaluation of the RTA Protocol one year after its implementation was carried out for the Ministry of Justice by Paul Fenn of Nottingham University Business School. It found that the RTA Protocol average costs in low value road traffic claims had reduced by 3% to 4%[65] and that there had also been small reductions in general damages and delays before settlement.[66]

34. The UK Government has announced its intention to consult on the introduction of a similar protocol for dealing with mesothelioma claims on a fixed costs basis.[67]

The Patents County Court

35. The PCC was established in 1990 as an alternative to the High Court for less complex, lower value cases. Its jurisdiction includes patents, copyright, design rights, trade marks, passing off and database right, for claims up to £500,000.[68] Concerns about the cost and complexity of intellectual property litigation, particularly for small and medium sized enterprises, have driven a programme of reforms since 2009. The PCC now has a small claims track (for claims up to £5,000), a fast track (for claims between £5,000 and £25,000) and a multi-track. Cases are heard by a specialist full time judge, currently HH Judge Birss QC. Procedure is streamlined, with early and rigorous case management, and trials last no more than two days. More complex claims, such as those with many witnesses or requiring longer trials, are dealt with instead by the High Court.

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[61] Figures will again be increased by 12.5% for London cases.
[62] Ministry of Justice, *op cit* (2013), Executive Summary
[63] *ibid*, paragraphs 22-23
[64] See, for example, Association of Personal Injury Lawyers, *Extension of the RTA PI Scheme: Proposals on Fixed Recoverable Costs* (2013).
[65] Paul Fenn, *op cit* (2012)
[66] *ibid*, pages i-ii. The percentage reductions for mean general damages and average delay before settlement were 6% and 5-7% respectively.
[67] Written Ministerial Statement on Reforms for Mesothelioma Claims by the Parliamentary Under-Secretary of State for Justice (Helen Grant MP) dated 18th December 2012.
[68] Patents County Court (Financial Limits) Order 2011 SI 2011/1402, Patents County Court (Financial Limits)(No. 2) Order 2011 SI 2011/2222

36. Tables in Practice Direction 45 of the CPR specify the maximum amounts which may be awarded for each procedural step, for example, attending a case management conference or preparing witness statements.[69]

37. Following a recommendation by Jackson LJ,[70] overall costs are capped at a maximum of £50,000 for a final determination on liability, and at £25,000 for an inquiry as to damages or account of profits.[71] These are upper limits, not fixed costs. There are limited exceptions, for example where a party's behaviour amounts to an abuse of process.[72]

38. Guidance on costs was provided by HH Judge Birss QC in *Westwood v Knight*:[73]

> "*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 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.*[74] *For one thing specific exceptions are provided for. 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*."[75]

39. In that case HH Judge Birss QC explained that the costs caps are to be applied in the following way:

- The general rule that the unsuccessful party pays costs applies, subject to the court's discretion to make a different order.
- The successful party must produce a costs schedule breaking down their costs for each stage of the litigation.
- The judge will then carry out a summary assessment[76] of each stage. If the sum assessed for that stage is lower than the maximum figure specified in the applicable table in the Costs Practice Direction, then the assessed figure is to be used. If it is higher, then the maximum figure is to be used.

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[69] CPR Practice Direction 45, Table A (scale costs for each stage of a claim up to determination of liability) and Table B (scale costs for each stage of an inquiry as to damages or account of profits)

[70] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 24, paragraph 3.6

[71] CPR Rule 45.31

[72] CPR Rule 45.30

[73] [2011] EWPCC 11, applied in *Indigo Furniture Ltd v Futurelook Ltd* [2011] EWPCC 013, *Vernacare Ltd v Environmental Pulp Products Ltd* [2012] EWPCC 49.

[74] *sic*; now Section IV of Part 45

[75] *Westwood v Knight*, *op cit*, paragraph 20 (some references omitted)

[76] See paragraph 73 for definition of summary assessment

- 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.
- In addition the successful party is entitled to VAT, if applicable, and interest.[77]

40. The indication so far is that the reforms to the PCC have been a considerable success. The number of cases brought in the PCC has nearly doubled, apparently as a result of cases being brought which would not otherwise have been litigated at all.[78]

The Jackson Report

41. Jackson LJ observed that two types of fixed costs were possible: "Type 1" fixed costs calculated as a genuine attempt to estimate the successful party's actual (reasonable) costs; and "Type 2" fixed costs deliberately set at less than this.[79]

42. For Type 1, arguments in favour were that: ordinarily the claimant's lawyer, having recovered fixed costs, would seek no further payment from the claimant; certainty was introduced; and expensive hearings on costs were avoided. Arguments against were the difficulty of setting rates for each type of case and the need for regular review.

43. For Type 2, arguments in favour were that: some parties might perceive the risk of indeterminate costs liability on losing as worse than failing to recover some costs on winning; certainty was introduced; and parties who knew they would bear some of their own costs had an incentive for economy. Arguments against were that: it was unjust for the vindicated party to bear part of his or her own costs; and a wealthy party could grind down an opponent by generating irrecoverable procedural costs.[80]

44. Jackson LJ recommended that fixed costs be introduced for all fast track claims.[81] These would be 'Type 1' fixed costs.[82] His illustrative matrices comprise a fixed 'base fee' determined by the stage at which proceedings settled, plus a specified percentage of damages.[83] A solicitor could choose either to do the work in-house, or instruct counsel with whom the fixed costs would then be shared.[84] Jackson LJ considered that there was a high public interest in making fast track costs both proportionate and certain. Since personal injury claims constituted a substantial part of contested fast track claims, there was an

[77] *Westwood v Knight*, *op cit*, paragraphs 35-45
[78] Arnold J, 'Intellectual Property Litigation: Implementation of the Jackson Report's Recommendations,' Seventeenth Lecture in the Implementation Programme (12 February 2013)
[79] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 2, paragraph 3.6
[80] *ibid*, Chapter 2, paragraphs 3.08-3.13
[81] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 15, paragraph 7.1
[82] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 23, paragraph 1.1
[83] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), table 22.2
[84] *ibid*, Chapter 15, paragraphs 5.10-5.11

obvious public interest in tackling these first.[85] This approach has been reflected in the amendments to the RTA Protocol discussed above.

45. For costs in other fast track claims, Jackson LJ recommended an overall limit of £12,000[86] (inclusive of counsel's and experts' fees and other disbursements), with matrices of fixed costs for specific categories of case.[87] The figure of £12,000 reflects the fact that the fast track is designed for straightforward cases not exceeding £25,000. Jackson LJ's view was that costs must be proportionate, and was based on a judicial survey of costs and damages awarded in recent county court cases.[88]

46. For the multi-track, Jackson LJ considered it premature to embark on any scheme of fixed or scale costs for the time being (other than in the PCC, as discussed above). He recommended that this issue be revisited after experience of fixed costs in the fast track and capped costs in the PCC has accumulated.[89]

Northern Ireland

47. The county court in Northern Ireland hears claims in which the sum sued for does not exceed £30,000.[90] It has been described judicially as a court "*in respect of whose proceedings the costs and fees should be both moderate and ascertainable*."[91] It has a small claims jurisdiction for claims not exceeding £3,000. Personal injury actions are excluded. Small claims costs are generally irrecoverable.

48. The county court uses a system of fixed scale costs.[92] Current figures are shown below.[93] Supplementary provisions include a discretionary one-third uplift for specified categories of complex cases, such as asbestos claims, and an additional payment for hearings exceeding one day. Scale costs operate on the 'swings and roundabouts' principle, whereby in some cases lawyers are well paid for a case which did not involve a great expenditure of time and effort while in others they may have to do a great deal of work for modest reward.[94] The figures are periodically reviewed by the County Court Rules Committee. The 'guiding principles' on review include: the need for fair and reasonable remuneration of professional services (assessed by considering what might be achieved at taxation); comparison with any scales in England and Wales for comparable work; the need for

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[85] *ibid*, Chapter 15, paragraph 5.8

[86] £13,500 for London. See *ibid*, Chapter 15, paragraph 6.2 ;

[87] *ibid*, Chapter 15, paragraph 6.1. Two categories identified were road traffic claims not involving personal injury and housing repossession and disrepair cases.

[88] *ibid*, Chapter 15, paragraph 6.3

[89] *ibid*, Chapter 16, paragraphs 2.9-2.11. Jackson LJ also recommended that there be a scheme of 'benchmark' costs for bankruptcy and winding up petitions, which would be awarded unless the receiving party established an entitlement to a higher figure: *ibid*, chapter 23, paragraph 4.1-4.2.

[90] Increased from £15,000 in February 2013: the County Courts (Financial Limits) Order (Northern Ireland) 2013 (2013 No. 18)

[91] *Re C & H Jefferson (a firm)* [1998] NI 404, per Carswell LCJ at page 409

[92] County Court Rules (Northern Ireland) Order 1981 (1981 No. 225) rules 2(1), 3(1)

[93] Appendix 2 of the 1981 Order as amended by the County Court (Amendment) Rules (Northern Ireland) 2013 (2013 No. 19)

[94] County Court Rules Committee, *Consultative Document on Scale Costs* (2011), paragraphs 2.14

litigation costs to be as economical as possible consistent with proper remuneration for professional services; and maintaining proportionality between damages and costs.[95]

Solicitor's costs:

In actions where amount decreed (in the case of the plaintiff) and where amount claimed (in the case of the defendant)—	**As from 25/02/13**	**As from 25/02/14**
does not exceed £1,000	£527	£538
exceeds £1,000 but does not exceed £2,500	£1,114	£1,136
exceeds £2,500 but does not exceed £5,000	£1,583	£1,614
exceeds £5,000 but does not exceed £7,500	£2,052	£2,092
exceeds £7,500 but does not exceed £10,000	£2,345	£2,391
exceeds £10,000 but does not exceed £12,500	£2,580	£2,630
exceeds £12,500 but does not exceed £15,000	£2,814	£2,869
exceeds £15,000 but does not exceed £20,000	£3,800	£3,876
exceeds £20,000 but does not exceed £25,000	£4,170	£4,253
exceeds £25,000 but does not exceed £30,000	£4,600	£4,692

Counsel's costs:

In actions where amount decreed (in the case of the plaintiff) and where amount claimed (in the case of the defendant)—	**As from 25/02/13**	**As from 25/02/14**
does not exceed £1,000	£176	£180
exceeds £1,000 but does not exceed £2,500	£258	£263
exceeds £2,500 but does not exceed £5,000	£375	£383
exceeds £5,000 but does not exceed £7,500	£469	£478
exceeds £7,500 but does not exceed £10,000	£551	£562
exceeds £10,000 but does not exceed £12,500	£627	£640
exceeds £12,500 but does not exceed £15,000	£704	£718
exceeds £15,000 but does not exceed £20,000	£825	£842
exceeds £20,000 but does not exceed £25,000	£934	£953
exceeds £25,000 but does not exceed £30,000	£1,039	£1,060

Consultation responses

49. In the Consultation Paper we asked whether more cases in Scotland should come under the scope of a fixed expenses regime and, if so, what types of cases should be included. There were 47 responses. Of these, 21 respondents favoured the introduction of fixed expenses or were broadly supportive, 22 were opposed or broadly unsupportive and 4 were equivocal.

50. Insurers and their representatives (nine respondents in total) supported the introduction of fixed expenses. Six of these respondents specified a £25,000 upper threshold, either for the sum sued for or the agreed damages. Several referred to an analysis of data collected by the Forum of Scottish Claims Managers which indicated a lack of proportionality between agreed damages and expenses in lower value claims. For these

[95] County Court Rules Committee, *Consultative Document on Scale Costs: Summary of Responses and Proposed Way Forward* (2012), paragraph 3.8

respondents, proportionality was the foremost consideration. The majority of these respondents stressed the need for compulsory pre-action protocols with sanctions, if fixed expenses were to be effective. One cited the RTA Protocol in England and Wales as a good example of a fixed expenses scheme.

51. Of the solicitor respondents who answered this question, those in favour of fixed expenses (seven respondents) generally represented defenders. Their main reasons included: proportionality; predictability; capping of excessive costs; and promoting quicker and cheaper litigation. There was a wide spread of responses as to which types of case should be included in a fixed expenses regime. Suggestions included: small claims and summary causes; cases for which there was a set procedure, specifically personal injury cases; or cases up to a financial threshold, with figures from £15,000 to £50,000 suggested. One proposed a model in which expenses would be determined according to broad value bands. More equivocal responses considered that it would depend on the levels at which expenses were fixed, and that proportionality could also be addressed by capping the cost of particular items of work, such as taking witness statements and instructing experts.

52. A consumer group argued that fixed expenses should be introduced for all cases under the new simple procedure. This could be extended to cases remitted to the ordinary cause roll. It explained that exposure to ordinary cause expenses could lead a party to withdraw from the litigation, a major incentive for the party seeking the remit. Another respondent also favoured an increased use of fixed expenses in the sheriff court and under the new simple procedure, depending on the stage reached in the case. In its view an overall ceiling would help provide the necessary certainty in low value cases.

53. An environmental group argued that in the absence of one way cost shifting, cases under Part I of the Land Reform (Scotland) Act 2003[96] should either have fixed expenses or parties should bear their own costs. Access and community groups were more likely than landlords to be deterred from litigation by the fear of paying expenses.[97]

54. Two respondents, organisations who represent doctors, broadly supported fixed expenses. One considered that capped expenses in personal injury and clinical negligence actions of moderate value should be considered as a means of achieving greater certainty and deterring excessive expenditure. The other respondent considered that block fees already went some way towards predictability and that proportionality could be addressed by capping expenses in cases below a certain value, or by capping the cost of particular items of work.

55. The Scottish Legal Aid Board ('SLAB') considered that fixed expenses would make the processes associated with expenses quicker and easier. More accurate assessment could be made of the likely cost in advance of commencing litigation, a factor which SLAB could consider when assessing whether it was reasonable to grant civil legal aid. It anticipated a

[96] asp 2

[97] Part I of the 2003 Act establishes a right to be on land for recreational, educational and certain other purposes and a right to cross land, and imposes certain duties on local authorities in relation to access on and over land in their areas.

modest impact on the Legal Aid Fund for those cases in which a party who succeeded against a legally aided opponent could seek expenses from the fund.[98]

56. Neither the Law Society of Scotland nor the Faculty of Advocates supported the introduction of fixed expenses. The Law Society warned of the danger of importing law on costs from other jurisdictions where procedures were very different. In its opinion, fixed expenses would create an additional barrier impeding access to justice for members of the public. It highlighted the unequal impact of fixed expenses on different parties. Businesses could claim tax relief on legal fees and outlays and recover VAT whereas individuals who could not do so would find the net cost of litigation higher.

57. The Faculty of Advocates considered that while superficially attractive (since recourse to the Auditor of Court would be obviated), a fixed expenses regime would be a blunt instrument. The cost of any service that could not be provided within its confines would have to be met by the client, or not offered. This would impact on the economically weaker party. It concluded that if such an approach was thought appropriate, the more adaptable summary assessment model would be preferable.

58. The Society of Solicitor Advocates also warned of the danger of drawing comparisons with other jurisdictions. It pointed out that the fixed expenses regimes in England and Wales depended on specialist procedures. The Society did not support fixed expenses based on case value since, in its opinion, that was not the sole measure of the skill, time and effort spent in litigating a case.

59. Solicitor respondents who opposed fixed expenses (nine respondents) generally, though not exclusively, represented pursuers. Their reasons included: an irreducible amount of work required in running a case; value is not necessarily indicative of a case's complexity or importance, or of the time it requires; the unpredictability of litigation; fixed expenses would not drive correct behaviours or encourage settlement; inequalities of arms between pursuers and insurers would be exacerbated; and recovery of expenses should approximate actual expenditure. One firm thought that there might be other ways of offering greater certainty, such as tariffs. In its opinion, fixed expenses were best suited to small claims.

60. Trade unions (six respondents) opposed the introduction of fixed expenses for personal injury cases. Most considered that the party responsible for the injury should pay the full legal costs of the injured party. One respondent observed that a low value claim could be prohibitively expensive to litigate. With fixed expenses, employers would make proceedings more difficult and time consuming in the hope that trade unions would give up.

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[98] Under the Legal Aid (Scotland) Act 1986 c. 47, s 19, the court can award expenses out of the Legal Aid Fund to a non-Legally Aided party who has been successful against a legally aided party. The court must first consider making an award of expenses against the unsuccessful party himself. An award out of the Fund can be made only if the successful party would otherwise suffer financial hardship and the court considers it just and equitable that the award should be paid out of public funds.

61. Law accountants who answered this question (two respondents) opposed fixed expenses. One considered that this type of award rarely corresponded with the current test of reasonableness and created an inequality of arms. Fixed expenses generally worked to the pursuer's advantage in the early part of proceedings, with the pendulum swinging to the defender as matters progressed. The other respondent considered that fixed expenses would have a detrimental effect on the level of service provided to clients, once the agent passed the point of profitable remuneration.

62. Of the two financial institutions who responded to this question, neither favoured fixed expenses. Both stressed the need for recoverability to reflect actual expenditure. One pointed out that the fixed costs regime in England and Wales depended on the availability of the fast track procedure designed for procedural certainty and efficiency. In its opinion, fixed expenses should not be introduced without making corresponding procedural changes to identify suitable cases and deal with them in a straightforward, efficient and certain manner.

Discussion

63. This Chapter began by observing that litigation is inherently unpredictable. The work that turns out to be necessary may not correlate to the action's financial value. Inevitably there will be tension between the aim that expenses be predictable and proportionate, and the successful party's desire to recoup the cost of work reasonably undertaken in pursuing or defending the action. The current system of block fees, with the option of charging on a time and line basis where block fees would not provide adequate remuneration, seeks to combine a degree of predictability with the flexibility required by the unpredictability of litigation.

64. For lower value claims, as indicated in Chapter 2, paragraph 23, judicial expenses seem to be currently disproportionate to the sum awarded. The unsuccessful party faces paying expenses well in excess of the sum at stake. The fear of being liable for such expenses may impede access to justice in such cases.

65. One opportunity to address this arises with the introduction of the new simple procedure for claims for £5,000 or less. I consider that expenses under the new procedure need to be both proportionate to the value of the case, and predictable. This can be achieved by providing for a scheme of fixed expenses under the new procedure. It will be recalled that a similar rule already applies under the existing small claims procedure. Knowing in advance what their exposure to expenses will be enables parties to make an informed decision about whether or not to litigate. It may also give both parties an incentive for efficiency.

66. Much of the concern surrounding fixed expenses is premised on the assumption that fixed expenses must equate to low fixed expenses. As Jackson LJ recognised, that is not necessarily so. The success of the PCC shows that it is possible to set rates at a level that offers adequate remuneration for work reasonably undertaken while achieving a degree of certainty and proportionality. This does not mean driving down fixed expenses to as low a level as the market will bear. While much of the discussion in England and Wales has

focussed on the perceived need to reduce costs in certain categories of litigation, that has not been a feature of the landscape in Scotland.

67. Much of the debate in England and Wales has centred on personal injury litigation. I recommend elsewhere in this Report the introduction of qualified one way costs shifting in personal injury actions.[99] I do not propose that the introduction of fixed expenses for the simple procedure should extend to personal injury actions. In personal injury litigation the relationship of pursuer to defender is generally an asymmetric one. Defenders, generally insurers, public bodies and/or employers, are often 'repeat players' and invariably have legal representation. They are ready and able to invest significant resources in defending the litigation even if they know that this expenditure will be irrecoverable. This places pursuers of modest means at a clear disadvantage. To limit recoverable expenses to a predetermined amount would likely make it uneconomical for many pursuers to instruct legal representation. Research has shown that personal injury pursuers who are unrepresented are thereby placed at a significant disadvantage, even where the court procedure is intended for use by party litigants.[100] The increase in party litigants would also place a burden on court resources.

68. It might be argued that a similarly asymmetric relationship can exist in other low value litigation, such as housing cases. Experience shows, however, that in such cases the landlord (the pursuer) generally seeks to progress matters expeditiously, with a view to regaining possession of the property. The landlord therefore does not have the same interest in prolonging proceedings as may a defender in personal injury litigation.

69. **I therefore recommend that with the exception of personal injury actions, recoverable expenses in actions under the simple procedure should be fixed.** The formula to be used in calculating the amount of fixed expenses will be a matter for the Scottish Civil Justice Council to determine once the new rules of court for the simple procedure have been finalised.

70. I have also to consider how expenses should be dealt with in the event that a case raised under the simple procedure is remitted to the ordinary cause roll. A remit might be made, for example, because the court is persuaded that the issue is of sufficient complexity that full written pleadings are required. One possibility is that the party who is ultimately successful in the action should be liable for expenses on the ordinary cause scale. Another is that, notwithstanding the remit, expenses should continue to be fixed on the simple procedure scale. **I recommend that when a case is remitted from the simple procedure to the ordinary cause roll, the scale upon which expenses should be assessed should be a matter for the discretion of the court that allows the remit and should be determined at the time the remit is made.** This will ensure that both parties know the extent of their potential liability for, and ability to recover, expenses, which will enable them to make informed decisions about the litigation following the remit.

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[99] See Recommendation 46

[100] Elaine Samuel, *In the Shadow of the Small Claims Court: the impact of small claims procedure on personal injury claimants and litigation* (1998). Personal injury actions were subsequently removed from small claims jurisdiction: see paragraph 6 above.

71. Fixed expenses merit further consideration beyond the simple procedure. Here I note the experience of the PCC, where recoverable costs are capped. The PCC was created to serve the interests of small and medium sized enterprises by providing an affordable forum for intellectual property litigation. A review in 2009 identified two obstacles to achieving this aim: the fear of having to pay substantial, and unpredictable, costs if unsuccessful; and court procedures which were themselves costly since they were identical to those in the High Court. Changes both to the costs regime and to the procedure of the PCC were therefore needed.[101] This recognition resulted in the introduction of capped costs and expedited procedures, as outlined above. These reforms appear to have led to an increased use of the PCC, including for cases which would otherwise not have been litigated at all. Access to justice, particularly for smaller businesses, may thereby be enhanced.

72. I consider that the introduction of a similar scheme, with expedited procedures and capped costs, may produce similar benefits in Scotland. There is no reason in principle why this should be restricted to intellectual property cases. **I therefore recommend that a model along the lines of the Patents County Court should be introduced for cases proceeding under Chapter 47 of the Rules of the Court of Session (commercial actions).** If this proves successful, consideration should be given to extending the scheme to other courts.

SUMMARY ASSESSMENT OF EXPENSES

73. Another way in which an element of predictability may be introduced into the cost of litigation is to have expenses summarily assessed. Summary assessment is the procedure whereby the expenses of a hearing are dealt with at the conclusion of the hearing by the judge before whom the hearing has taken place. The procedure for an assessment of expenses at certain points in a litigation is claimed to be a useful tool in assessing the expenses incurred to date, hence increasing the predictability of the cost of a litigation. It is said to represent a quick and efficient method of resolving the issue of expenses at the conclusion of a particular step in the proceedings. In addition, it brings the issue of expenses to the attention of the parties which may lead to settlement discussions. It is also a means of addressing non-compliance with court rules and orders.

74. One former member of the senior judiciary has commented that:

> *"the encouragement of the court to make summary orders for payment of costs and summary assessments of costs has led to parties feeling the "pain" as soon as an abortive or unconsidered application or resistance to an application has met its fate. Solicitors cannot conceal from their clients the failure and its consequences, and the client cannot discount the consequences as postponed until after any subsequent trial. Parties are more cautious and sensible, and unnecessary court business is avoided."*[102]

[101] Intellectual Property Court Users' Committee, *Working Group's Final Report on Proposals for Reform of the Patents County Court* (2009)

[102] Sir Gavin Lightman, 'The civil justice system and legal profession – the challenges ahead' (2003), CJQ 235

Position in England and Wales

75. In England and Wales Rule 44.6(a) of the CPR provides the court with the power to make a summary assessment of the costs. This is supplemented by Practice Direction 44 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; and
- 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.[103]

76. Notwithstanding the terms of the Practice Direction, the courts have held that there can be a summary assessment where the hearing lasts longer than one day.[104] However, the general rule will not apply if there is a good reason why costs should not be summarily assessed.[105] For example, the issue of costs cannot be dealt with summarily where the assessment of costs requires consideration of complex legal arguments. The court will also not summarily assess costs in certain defined circumstances such as where the receiving party is a child,[106] an assisted person or a Legal Services Commission funded client.[107] There is no restriction or cap on the amount of costs which can be summarily assessed. We have been advised that since its introduction 13 years ago, the summary assessment of costs in fast track proceedings or following interlocutory hearings of a day or less in multi-track cases has become routine.

77. 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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[103] CPR Practice Direction 44, paragraph 9.2

[104] *Q v Q (Family Division: costs: summary assessment)* [2002] All ER (D) 07 (Jul)

[105] CPR Practice Direction 44, paragraph 9.2

[106] *ibid,* paragraph 9.9

[107] *ibid,* paragraph 9.8

- any VAT to be claimed.[108]

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.[109]

78. 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.[110] 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.

79. 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.[111] There are no special procedures for appealing the making of a summary costs order. However, since the entire basis for summary assessment is that it is intended to be a quick process which the court can deal with swiftly at the end of a hearing, appeals are positively discouraged. As Coulson J commented in 2011:

> *"It hardly needs to be said that applications to appeal which arise out of the precise methodology adopted by a judge on a summary assessment will often be counter-productive, and lead to additional costs being wasted on fruitless criticisms of the original summary assessment."*[112]

Furthermore, where a summary assessment order is appealed, there is no automatic stay of execution of the order.

80. For the purposes of summary assessment, the court is provided with a table of solicitors' hourly rates for guidance. 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 although figures are available for routine proceedings in the Queen's Bench and Chancery Division and in the Administrative Court for cases lasting up to an hour, and up to half a day, in respect of counsel up to 5 years call, up to 10 years call, and over 10 years call, which may provide a helpful starting point.

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[108] *ibid*, paragraph 9.5
[109] *ibid*, paragraph 9.6
[110] *Bryen & Langley v Boston* [2005] EWCA Civ 973
[111] CPR Rule 3.1(2)(a) and 44.7
[112] *Naylor v Monahan and Churchill Insurance* [2011] EWHC 1412 (QB)

81. Up until 1 April 2013, when carrying out a summary assessment the judges applied a two-stage approach, namely, a global approach followed by an item by item approach, following the guidance set out by Lord Woolf CJ in *Lownds v Home Office.*[113] The global approach indicated whether the total sum claimed was or appeared to be disproportionate, having regard to the considerations identified in the CPR. If the costs as a whole were disproportionate then the court had to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item was reasonable. If the global costs were disproportionately high, then the requirement that the costs should be proportionate meant that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner.

82. The test set out in *Lownds v Home Office* was considered by Jackson LJ, in his Review of Civil Litigation Costs in England and Wales, to be unsatisfactory as it did little to reduce costs to what most people would consider to be "proportionate." He concurred with the reasons given by Sir Anthony May, the then president of the Queen's Bench Division, in June 2009 when he said:

> *"I do not for a moment question the correctness of the Lownds decision as an application of the law and Civil Procedure Rules as they now stand. But the tension remains. I do think we should ask whether, in the expensive world of adversarial litigation, a litigant should be able to recover from a losing opponent costs which it was reasonable and necessary for the winner to spend, even though the resulting amount may be out of all proportion to the amount claimed or the amount recovered? Assessments which have to concentrate retrospectively on what the winning party has spent will always risk producing a disproportionate result….It is more important that a defendant should not be at risk of a grotesquely disproportionate costs order than that claimants should be enabled to conduct risk free litigation."*[114]

83. Jackson LJ recommended that "proportionate costs" be defined in the CPR. New CPR Rule 44.3,[115] which came into force on 1 April 2013, sets out the basis of assessment of costs. Rule 44.3(5) defines proportionate costs by reference to the sums in issue in the proceedings, the value of non-monetary relief, the complexity of the litigation, any additional work generated by the conduct of the paying party, and any wider factors involved in the proceedings, such as reputation or public importance. Further, costs which are disproportionate may be disallowed or reduced even if they were reasonably or necessarily incurred.[116]

84. Lord Neuberger, President of the Supreme Court explained that the point behind the new Rule was that:

> *"Parties and their lawyers must keep firmly in mind that they ought to expend no more than a proportionate amount of money in the pursuit of justice. If they wish to spend more, they*

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[113] [2002] 1 WLR 2450

[114] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 3, paragraphs 4.7 and 4.8

[115] Amended by Schedule to The Civil Procedure (Amendment) Rules 2013 SI No. 262 (L.1)

[116] CPR Rule 44.3(2)(a)

> *must appreciate that such sums will not be recoverable from their opponent. That is proportionality, proportionate costs, as between the parties.*
>
> *That is further emphasised by the fact that, even if the parties wish to pursue claims or defences at disproportionate cost at their own expense, the court may refuse to let them do so. Litigation must be conducted consistently with the need to ensure that all litigants are able to pursue their claims proportionately: dealing with cases justly requires the court, and parties, to focus on more than the individual case in front of them."*[117]

He declined to give guidance on what constitutes proportionality and how it is to be assessed before the new rule came into force, explaining that it would be "*positively dangerous"* for him to do so. He advised that the law on proportionate costs would have to be developed on a case by case basis which may mean a degree of satellite litigation while the courts work out the law.

85. As far as the procedure for summary assessment is concerned, Jackson LJ 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.

86. Drawbacks of the procedure identified were:

i. the procedure is arbitrary, rushed and inconsistent. Some of Jackson LJ's consultees considered the procedure as "rough and ready," often conducted at the conclusion of the hearing when insufficient time is available for a

[117] Lord Neuberger, 'Proportionate Costs,' Fifteenth Lecture in the Implementation Programme (29 May 2012)

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. 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.[118]

87. In his Final Report, Jackson LJ 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.[119]

Position in Scotland

88. Unlike the position in England and Wales, there is currently no procedure for the summary assessment of expenses available in Scotland. We asked in our Consultation Paper whether such a procedure should be introduced into the civil courts in Scotland.

Reasons for the introduction of a summary assessment of expenses procedure

89. Just under half of the respondents, including all those with experience of the system in England and Wales, considered that a summary assessment of expenses procedure should be introduced in Scotland. One such respondent commented that there is general agreement that summary assessment works well in England and Wales as it serves to make the parties more aware of the costs of litigation, which may promote settlement in some cases or, if not, may concentrate the parties' minds on the costs and risks of pursuing arguments without merit. Another identified the principal benefits as being (i) the immediacy of a decision (ii) the tactical benefits that may accrue both in relation to focusing parties' minds on the issue but also the ongoing risks, expense and strength of argument when proceeding (iii) the potential to restrict "time wasting" or frivolous motions (iv) the fact that the judge hearing the matter is undoubtedly in a better position to know what was justified or wasted in

[118] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 52
[119] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 44

relation to that hearing and (v) clients who litigate in England and Wales are used to this system and on the whole find it of benefit.

90. Another benefit of a summary assessment procedure identified by respondents is that it provides the judiciary with a management tool which may assist the administration of justice. One respondent considered that the procedure would assist in the process of client communication as parties will understand more readily the expenses implications as the case proceeds. Cost certainty was linked by one respondent to procedural certainty. In that respondent's opinion summary assessment of expenses would make the consequences of procedural delay or adopting an unreasonable position more immediate.

91. As far as settlement of claims is concerned, one respondent observed that one of the problems in settling cases is that either or both parties do not have realistic expectations of the amount of expenses payable at the end of the case. It considered that if greater flexibility was built into the system to allow any party to apply for summary assessment of expenses after a substantive hearing, that would focus the minds of both parties and would assist in the settlement of the claim. Another respondent was of the view that it makes the likelihood of recovery of expenses far greater for several reasons: (i) the amounts to be collected may be smaller and more affordable; (ii) there would be a "live" or "real time" sanction available to report back to the court if someone was not meeting their liability for payment, which could provide an incentive for payment that does not exist after the case is concluded; and (iii) it would help the cash flow of firms and SLAB.

92. One respondent explained how the procedure could work in Scotland:- before the motion, or short debate or proof, each side would give to the other a summary (usually no more than one side of A4) of the expenses it will claim if successful, including counsel's fees, solicitors' fees (broken down into what was done and the applicable hours and rates). After giving his or her decision, and if an award of expenses is made, the judge will hear brief submissions (usually no more than 5 minutes) based on these documents and fix a figure on a broad brush basis. If there is a difficulty, the judge can order that the matter of expenses be remitted to the Auditor of Court.

Reasons against the introduction of a summary assessment of expenses procedure

93. The majority of respondents (52%) did not consider that a procedure for the summary assessment of expenses should be introduced into the civil courts in Scotland with one respondent referring to it as a "retrograde step." Some suggested that the procedure, in fact, is not working well in England and Wales. One firm of solicitors, which practices predominantly in the personal injury field, pointed out that interim orders for expenses cannot be sustained due to financial agreements that exist between solicitors and insurance companies in the current commercial world. If expenses follow success, then it follows that they cannot be fully assessed until the conclusion of the case.

94. One respondent considered that the perceived benefits of such a scheme in acting as a deterrent to unreasonable litigants may also deter parties who have well-founded claims but do not have the resources to meet interim awards. An economically weaker party may be unwilling to make or oppose applications as a result of the risk of the immediate

expenses consequences. There would be an additional burden on parties' solicitors in advance of any hearing at which a summary assessment could be carried out as in addition to preparing for the hearing, statements of costs would have to be provided. This exercise in itself would be time consuming and expensive.

95. Of significant concern to a number of respondents was the amount of judicial and solicitor time that would be taken up if summary assessment of expenses is introduced in Scotland. One respondent considered that this would prolong the litigation process and result in an increased spend. In England and Wales there are certain safeguards built into the costs procedure, like hourly rates, to account for the additional time and expense of summary assessment. If introduced into Scotland, a wholesale movement away from the existing practice of block fees would be required. This concern was echoed by another respondent who pointed out that the method of calculation utilised in England and Wales is fundamentally different from the system used in Scotland. In England and Wales all work is ultimately calculated by reference to time and is measured by time inputs. Scotland employs a system based on "work done." It was contended that it is currently not possible, on a party and party basis, to produce accurate information of net values for summary consideration.

96. Several respondents referred to the current system in Scotland of seeking and enforcing interim awards of expenses throughout the course of the proceedings which, so they observed, serve more or less the same purpose as a summary assessment of expenses. However, it was recognised that, in practice, solicitors seldom enforce this type of interim award for practical reasons. Expenses may eventually be agreed on a global basis. Making up little accounts may be seen as unnecessarily time consuming if a large account is going to be made up in due course. Furthermore, enforcing small awards can have an irritating effect and may result in tit for tat retaliation in other cases involving the same solicitors.

Appropriate person to carry out an assessment

97. Several respondents considered that the Auditor of Court should continue to carry out the assessment of recoverable expenses as he is in the best position to consider what was reasonable in the circumstances of the case once it has been concluded. Furthermore, it was said that using auditors provides the parties with a more experienced assessor of expenses and avoids unnecessary diversion of valuable judicial time. One respondent considered that whilst the judge is best placed to decide upon whom the burden of expenses should fall, the assessment of the extent of that burden is better carried out by an independent party with expertise in that area. Judges were not considered to be equipped by experience to make this informed assessment. Nor was judicial training in this area necessary in the light of the experience and expertise available through the office of the Auditor. It was contended that a significant length of time would be taken to build up the experience necessary to operate such a system effectively. One consultee commented that the thought of judges carrying our assessments of expenses filled him with horror as "*judges do not know enough about expenses*."

98. Several respondents, who are in favour of judges carrying out summary assessments of expenses, emphasised a need for judicial training. However, it was recognised that increased specialisation and case management, as recommended by the SCCR, would assist

judges to become better acquainted by experience with the issues that would arise. Another respondent, however, did not consider that the introduction of such a procedure would be complicated or would require training.

Circumstances in which summary assessment is appropriate

99. As far as the circumstances in which summary assessment of expenses takes place, appropriate criteria suggested by respondents, which the court should have regard to, included the level of expense incurred, whether one party has been substantively successful, and if it was reasonable in the circumstances for a summary assessment to take place. Several respondents commented on the stage in the litigation process that summary assessment of expenses should take place. Several considered that the procedure should apply in relation to all interlocutory applications and to all applications on the Motion Roll. Another respondent considered that it should be restricted to long motions (e.g. summary decree, recovery of documents) and debates in the first instance, but could be extended to judicial review and proofs lasting one to two days. Several respondents envisaged the procedure being used in similar situations to that in England and Wales where summary assessment is limited to hearings of up to one day. If motions on limited topics (e.g. caution or commission and diligence) take slightly longer, judges should have the discretion (and be encouraged to use that discretion) to hear a summary assessment argument.

Types of action

100. We asked in the Consultation Paper whether summary assessment of expenses should be restricted to any particular types of action. The majority of respondents considered that there should be no such restriction. Two respondents considered that it should not apply to family cases, however, since awards of expenses are unlikely to be made in such cases. Another respondent suggested that the procedure should not apply in immigration cases. One respondent considered that the courts should have the power to disapply the procedure either on its own motion or on the motion of any party.

101. One respondent, with experience of the procedure in England and Wales, urged caution: "*There are significant issues that would require to be addressed in order for this process to work effectively in Scotland and to minimise the additional cost it would create. In particular, summary assessment requires judicial knowledge of expenses, court time to be allocated for consideration of expenses and requires a simple process which allows schedules of costs to be prepared quickly in advance of a hearing and allows judges to review schedules of expenses quickly following the hearing. These are not insignificant hurdles and significant changes would need to be made to the current procedure before summary assessment could be introduced effectively, including fixing hearings for a specific time, making the calculation of expenses more straightforward and training judges to assess expenses*."

102. Another respondent also sounded a note of caution. Should this Review recommend that summary assessment be introduced into the Scottish courts, an impact assessment of the strengths and weaknesses of the current model used in England and Wales should be carried out before implementation since such a process has no precedent in Scotland. This would reduce the risks of such a process adding unnecessary costs or delay. Another

respondent suggested that the introduction of the procedure should be restricted, assessed and, depending on its success, extended further.

103. The current system for summary assessment in England and Wales is not without its critics. One commentator observed that the combined experience of the litigators from Rowe & Mawe, solicitors, in 2000 suggested that many judges and advocates were tempted to see summary assessment as a "*rough and ready exercise in knocking down costs to a round figure which was plucked from obscurity to reflect their assessment of the proper preparation for an application*."[120]

104. As far as the introduction of a summary assessment procedure into the civil courts in Scotland is concerned, I consider that the reasons for and against such a procedure have been adequately identified by Jackson LJ in his Final Report, as narrated in paragraphs 85 and 86 above. Indeed these are reflected in the responses to our Consultation Paper. As one respondent pointed out, each of the drawbacks of summary assessment identified by Jackson LJ in his Report, and set out in paragraph 86 above, can be adequately addressed. Inconsistency is inherent in all discretionary judicial decisions, whether the decision is summary or otherwise. I am grateful to the Director of the Judicial Institute for Scotland, Sheriff T Welsh QC, for expressing a willingness to design a training module addressing the concept of summary assessment of expenses for relevant members of the judiciary. Training and guidance should keep inconsistencies to a minimum.

105. While the hearing of a motion for summary assessment will inevitably take up additional time for both the judiciary and solicitors and counsel alike, this would appear to me to be preferable to scheduling another hearing with the consequent requirement that all or most players must reconvene at some future time which may involve additional costs such as travelling expenses. All parties will be aware when a summary hearing of expenses will take place and therefore should be adequately prepared. The preparation and lodging of the expenses schedule will be of significant assistance in identifying the relevant issues with regard to the quantification of expenses. In any event, the same issues will require to be addressed at any future hearing. It is usually preferable that issues are addressed as proximate in time as is possible to their occurrence. There does not seem to be any good reason why counsel's fees should be criticised to any greater extent at a final assessment than at a summary hearing. Furthermore, the presiding judge will have the benefit of a Table of Fees for counsel as recommended by the SCCR.[121]

106. I conclude that the benefits of introducing such a system in Scotland outweigh the disadvantages. In addition to the foregoing, I was considerably influenced by the positive experiences of those solicitors to whom I spoke in the consultation process who practised in both Scotland and England. They were mainly commercial litigators and urged me to recommend that the concept of summary assessment of expenses be introduced in Scotland to at least commercial procedures. It seems to me that such an incremental approach has much to commend it. Introducing the procedure to a small, well defined set of actions will

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[120] A Briggs, *Woolf: Is It Working? Summary Assessment of Costs* (November 2000) http://www.mayerbrown.com/litigation/article.asp?id=538&nid=258

[121] *Report of the Scottish Civil Courts Review* (2009), Recommendation 185

enable the specialist judges dealing with commercial actions to be properly trained and then build up relevant experience. Many of the solicitors involved in commercial litigation in Scotland are already familiar with the concept from their positive experiences in London, in particular. This will give the initiative the best possible chance to work in Scotland. I consider that the introduction of such a procedure will enhance the speedy recovery of expenses and assist in retaining commercial litigation in Scotland where there is a choice of jurisdiction. Should it have the benefits which from the evidence before me I believe it has, it can then be extended to other judicial procedures.

107. **I therefore recommend that a procedure for the summary assessment of expenses be introduced as a pilot for commercial actions in the Court of Session and sheriff court.** I envisage that the procedure will follow the precedent of the summary assessment procedure in England and Wales. However, the exact details will be a matter for the new Scottish Civil Justice Council to formulate.

EXPENSES MANAGEMENT

108. Expenses management (or costs management as it is known in England and Wales) is another useful procedure for predicting the cost of litigation. This is the active control by the court of the incidence of expenses throughout the life of a litigation. In the Consultation Paper we suggested that it is no longer acceptable for questions of expenses to be left to the end of a litigation by which time the money has already been spent. Many respondents agreed with this position. Most businesses are unlikely to embark upon a project without some idea of what it is likely to cost. A budget is created for the project. Litigation should be no different. As HH Judge Simon Brown QC[122] said in a paper on costs management: "*Budgeting is universal; litigation is not a unique exception, particularly when one party is expecting another party to pay it 'reasonable and proportionate' legal costs at the end of the litigation between them.*"[123]

Position in England and Wales

109. Jackson LJ identified costs management as a necessary part of case management. In his Final Report, he referred to six propositions:[124]

(i) Litigation is in many instances a "project," which both parties are pursuing for purely commercial ends.

(ii) Any normal project costing thousands (or indeed millions) of pounds would be run on a budget. Litigation should be no different.

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[122] One of the judges involved in the costs management pilot in the Mercantile Court and Technology and Construction Court in Birmingham.

[123] HH Judge Simon Brown QC, 'Costs Management, What is it? A Woozle Hunt….' (7 April 2011). Paper delivered at a seminar hosted by the Practical Law Company in Birmingham

[124] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 40, paragraph 6.8

(iii) The peculiarity of litigation is that at the time when costs are being run up, no-one knows who will be paying the bill. There is sometimes the feeling that the more one spends, the more likely it is that the other side will end up paying the bill. This gives rise to a sort of "arms race".

(iv) Under the present regime, neither party has any effective control over the (potentially recoverable) costs which the other side is running up.

(v) In truth, both parties have an interest in controlling total costs within a sensible original budget, because at least one of them will be footing the bill.

(vi) The parties' interests may, in truth, be best served if the court (a) controls the level of recoverable costs at each stage of the action, or alternatively (b) makes less prescriptive orders (e.g. requiring notification when the budget for any stage is being overshot by, say, 20% or more).

110. Those principles led Jackson LJ to define the essence of costs management as being:[125]

(i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.

(ii) The court states the extent to which those budgets are approved.

(iii) So far as possible, the court manages the case so that it proceeds within the approved budgets.

(iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

111. Although the need for costs management was generally supported during the Jackson consultation process, concerns were also expressed. In his Final Report, Jackson LJ summarised the advantages and disadvantages of such a system:

> *"It must be accepted that costs management is an exercise which generates additional costs and which makes additional demands upon the limited resources of the court. These are two powerful negative factors. On the other hand, there are two powerful factors in support of costs management. First, case management and costs management go hand in hand. It does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur…..Secondly, …..costs management, if done properly, will save substantially more costs than it generates."*[126]

112. Jackson LJ also concluded that effective costs management is in the interests of clients. In particular he noted that non-commercial, first time litigants often are in no position to know what work needs to be done or to control expenditure. He therefore concluded that there needs to be some effective control over the costs which are expended on litigation.

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[125] *ibid,* paragraph 1.4
[126] *ibid,* paragraph 7.2

113. Professor Adrian Zuckerman has disagreed with Jackson LJ's conclusion, namely, that effective costs management is in the interests of clients. He has argued that clients need protection from their own lawyers and that the aim of costs management should be to protect clients from their own lawyers. As the client has to use an agent (a lawyer), the agent being paid by the hour has an economic incentive to complicate and protract the litigation process whereas the client has an interest in keeping costs down. Zuckerman argues that the client has no effective means of doing so because he depends on the lawyer to judge what the process requires. In his opinion, therefore, the system is doomed to failure for a combination of two reasons: firstly, it is fundamentally reliant on the very agents against whom it seeks to protect clients; and, secondly, court regulation is the wrong tool for counterbalancing lawyers' economic incentives to maximise hourly input. He considers that:

> *"Budgets are going to be devised by the very people who have a financial incentive to inflate them. Moreover, the higher the claimant's lawyers estimate their expenses, the more reason would the defendant's lawyers have to respond in kind. Clearly, lawyers would have no financial incentives to challenge each other's estimates, but on the contrary to adjust their own accordingly."*[127]

114. In order to test some of the proposals suggested in his Preliminary Report, Jackson LJ set up a voluntary pilot scheme in the Birmingham Mercantile Court and Technology and Construction Court ('TCC') which ran from 1 June 2009 until May 2010. The essence of the scheme was that, as part of its preparation for the first case management conference, each party produced a detailed budget setting out estimated costs for each stage of the proceedings. The court had the power to make a 'costs management order' approving the costs budget of any party, if appropriate, after making revisions. Where an approved costs budget later became inaccurate, the party was required to produce a revised budget, giving reasons for any increase, and the court could approve or disapprove any departures from the previous budget. When assessing costs, the court had regard to a party's last approved budget and would not depart from it unless satisfied that there was good reason to do so.

115. Anecdotal evidence of the pilot scheme in the Birmingham Mercantile Court and TCC was that parties filed budgets but neither side had any interest or desire to cut back the other's budget since that might only undermine their own budget.[128] One solicitor involved in the pilot scheme, however, reported:

> *"Clients like it because it provides a more sophisticated project management and gives a far greater <u>impression</u> (emphasis added) that the estimate is robust. Anyone involved in litigation knows that uncertainty regarding costs is the biggest turn off for the potential litigant and because of this fear of possible costs, people will go to extraordinary lengths to avoid litigation, including paying out money which they in no way owe."*[129]

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[127] Adrian Zuckerman, 'The Jackson Final Report on Costs: Plastering the Cracks to Shore up a Dysfunctional System' (2010) CJQ 29(3), 263-283

[128] Richard Langley, 'Costs Calamity' (16 November 2012) 162 NLJ 1424

[129] James Baxter, 'Costs and case management' (8 April 2011) 161 NLJ 1

116. Following the recommendations made by Jackson LJ in his Final Report, a costs management pilot scheme was launched in all TCC and Mercantile Courts on 1 October 2011.[130] Its purpose, as stated by Jackson LJ in the introduction to the questionnaires distributed to participants, was to ascertain (a) the benefits and disadvantages of costs management; and (b) how the process might be improved for the benefit of court users. The objective of the scheme itself was to manage the litigation so that the costs of each party were proportionate to the value of the claim. The judge assessed and discussed with the parties whether an individual case was suited to a costs management approach and should form part of the pilot. If it was, the parties submitted and exchanged detailed budgets for their estimates of costs in the case. Like the voluntary pilot scheme in the Birmingham Mercantile Court and TCC, the court had the power to make a costs management order. When assessing costs, the court had regard to a party's last approved budget and would not depart from it unless satisfied that there was good reason to do so.

117. At the invitation of Jackson LJ, the Centre of Construction Law and Dispute Resolution at King's College, London was asked to monitor the pilot. The summary of results in the Final Report[131] concluded that solicitors in general had a mixed opinion of the pilot. Significant concerns were expressed that it increased costs due to the time taken to comply with it. This was despite the fact that filling out the budget form only took between two and three hours for most respondents, with only one solicitor taking over five hours. However, feedback from costs draftsmen and other sources indicated that in London, at least, the process could take considerably longer, although that was not borne out by the questionnaires received. Another concern was the difficulty of predicting costs accurately at the early stages of litigation. In addition, it was pointed out that the work required can change as the case progresses and costs also depend on how difficult the opponent is.

118. Solicitors interviewed appeared to acknowledge that the budget form would become easier to deal with once familiarity with it increased. They also highlighted that the pilot did assist with early attention to costs, that this allowed their clients to better understand their potential liabilities (including their potential liability to the other party if they did not win) and could also assist with settlement. In relation to the judges' views, they generally appeared to believe that the pilot encouraged proportionality of costs to the value of the claim. They also considered that the current scheme worked well and that it therefore did not require much improvement. Other advantages identified were that it aided case management as well as controlling future costs. Feedback received towards the end of the pilot was more critical as the extra burden on case managing judges became clearer, the procedure having added significantly to the time taken in case management.

119. The Final Report concluded that *"costs management is a new discipline that requires skill and practice, but which can be learnt."* It further concluded that *"the costs management procedure effectively shifts the focus of costs control from retrospective, as it used to be, to prospective, with the court focusing upfront on how much should be spent (or at least recovered) in the litigation."*[132]

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[130] CPR Practice Direction 51G

[131] Nicholas Gould, Christina Lockwood and Claire King, *Costs Management Pilot: Final Report* (1 May 2013)

[132] *ibid*

Positive factors of costs management included more certainty both to the other side's costs and as to the likely overall costs at the beginning of the litigation.

120. The Final Report indicated that the majority of solicitors who provided feedback acknowledged the benefits of costs management as being:

- it makes the parties focus on the issues early on, and more thoroughly analyse what is necessary to prosecute the action;
- it helps to focus on the costs of the future conduct of the case;
- it informs the parties about each other's budgets for the litigation and provides an insight into the opponent's tactics;
- it introduces a degree of certainty to the planned amount of work and costs for the client, and provides a strong incentive to keep within the budget;
- it may avoid lengthy detailed assessments of costs at the end of the litigation; and
- it informs the parties about the cost of not settling at an early stage and thus can encourage settlement.

The research findings of the Pilot suggested that the overall effect of costs management is likely to bring down the total costs of the litigation.

121. As far as clients are concerned, the Final Report concluded that it is too early to say how clients really feel about the new regime. It pointed out that some might find to their surprise that their cost recovery is limited. However, many will welcome the importance now placed on the cost recovery implications and the increased information, which provides for a better assessment of the settlement options during the proceedings and generally more transparency about costs.

122. A compulsory costs management pilot was introduced for defamation actions in October 2009 and ran in its original form until 30 September 2011 when some revisions were made to address issues that arose in the first two years.[133] The pilot was trailed as a mandatory costs management process at the Royal Courts of Justice and Manchester Civil Justice Centre. The objective of the pilot was to manage the litigation so that the costs of each party were proportionate to the value of the claim and the reputational issues at stake and so that the parties were on an equal footing. Parties were required to prepare early costs budgets and exchange them in discussions with the other parties. The court approved or disapproved the budget at each stage of the proceedings.

123. These pilot schemes have assisted in formulating rules[134] to implement the extension of costs management to all multi-track cases commenced on or after 1 April 2013, unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders, with

[133] CPR Practice Direction 51D

[134] The Civil Procedure (Amendment) Rules SI 2013/262 (L.1) inserting section II Costs Management into CPR Rule 3 and CPR Practice Direction 3E

the exception of the Admiralty and Commercial courts and such cases in the Chancery Division as the Chancellor of the High Court may direct and such cases in the TCC and Mercantile Courts as the President of the Queen's Bench Division may direct. An exemption has been made for cases in the Chancery Division, the TCC and Mercantile Courts where the sums in dispute exceed £2 million, excluding interest and costs, except where the court so orders.[135] The Amendment Notice[136] issued by the Chancellor of the High Court and the President of the Queen's Bench Division explains that the purpose of the exemption was to avoid inappropriate "forum shopping" for high value claims given that costs management is not automatic in the Commercial and Admiralty courts. That exemption is to be reviewed and it has been reported that Ramsay J, the judge in charge of implementing the Jackson reforms, has said that, in his view, such exemptions should not exist.[137] In any event, the exemption ensures that judges have discretion to apply costs management in the TCC and Mercantile courts regardless of the value of the claim.

124. The Rules and Practice Direction that govern the new costs management regime contain some more onerous requirements than those governing the pilots. For example, parties who fail to exchange and file budgets can generally only recover from the other side the court fees they have paid. In addition, the recoverable costs of completing the required Form will generally not exceed the higher of £1,000 or 1% of the approved budget. All other recoverable costs of the budgeting process must not exceed 2% of the approved budget. The emphasis is on parties agreeing costs budgets where possible. The court will only review and amend them, if necessary, where they are not agreed.

125. It has been said that of all the Jackson reforms *"Perhaps the most revolutionary change is the requirement for parties to set, share and agree budgets at the very start of the court process."*[138] HH Judge Simon Brown QC has pointed out that:

> *"Costs management does require a cultural shift in attitudes to litigation and budgetary training by civil litigators, if firms are to survive and thrive as they have done in the mercantile courts. The days of putting in a bill at the end of a case based on a multiple of billable hours x £x per hour and expecting to be paid are over. Nobody in this country using the ordinary civil courts can afford it."*[139]

Many large firms of solicitors already have sophisticated cost systems which are used to record costs and some have cost budgeting systems. For example, it is reported that Eversheds has designed a client costs calculator which is a software tool that allows a budget to be built up from the start of any matter and for performance against budget to be measured and reported periodically.[140] Other software products have been developed to

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[135] Costs Budgeting Direction amending CPR Rule 3.12 (1)

[136] Costs Management in the Chancery Division and the Specialist Lists in the Queen's Bench Division: Amendment to CPR Rule 3.12(1)

[137] Rachel Rothwell, 'Judicial tension over costs budgeting,' *The Law Society Gazette* (13 May 2013)

[138] Catherine Bowman, 'Injured feelings: Jackson reforms,' *The Law Society Gazette* (11 December 2012)

[139] HH Judge Simon Brown QC, 'Costs control' (6 & 13 April 2012) 162 NLJ 498

[140] Tracey Stretton, 'An altered state' (14 October 2011)161 NLJ 1409

assist solicitors in their budget preparation. One commentator has said that these additional requirements will likely be hugely onerous for smaller firms.[141]

126. Jackson LJ recognised that the evidence available to him suggested that a modest number of solicitors, a far smaller number of barristers and an even smaller number of judges, possessed the necessary skills to carry out costs management, but concluded that:

> *"effective costs budgeting is a skill which all lawyers could acquire, if they are prepared to give up time to being trained; effective costs management is well within the abilities of all civil judges, if properly trained..."*[142]

The pilot schemes have shown that the production of costs budgets requires a new discipline for all involved in the process – solicitors, counsel, counsel's clerks and judges. Professor Dominic Regan, who was appointed by Jackson LJ to oversee and report upon the Birmingham Mercantile Court costs project, reported that many judges were criticised for being "*inept*" and for not having "*a clue about costs management."* Responding to that criticism, he praised HH Judge Simon Brown QC's approach and commented that Judge Brown taught himself and could teach others.[143] Judicial training in costs management was provided in advance of the implementation of the new Rules.

127. When assessing the amount of costs, the Rules provide that the court will have to apply the new proportionality test to the costs budget.[144] As Mr Justice Ramsay has stated:

> *"the judge carrying out costs management will not only scrutinise the reasonableness of each party's budget, but also stand back and consider whether the total sums on each side are "proportionate" in accordance with the new definition. If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter if the parties choose to press on and incur costs in excess of the budget, they will be litigating in part at their own expense. It will be important for judges to apply the test consistently and for parties and their lawyers to be aware of the impact on recoverable costs."*[145]

128. One costs lawyer has warned that a new practice of "budget brinkmanship" could emerge from the introduction of costs management. In his opinion, "*there is scope to use the budgets as a way of understanding and potentially influencing the decisions of the opposing side in how to tackle the case. A high budget for expert reports, for example, could suggest a well-built case, while a low provision for counsel fees could imply that the other side is not anticipating heavy involvement from barristers."*[146]

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[141] Catherine Bowman, 'Injured feelings: Jackson reforms,' *The Law Society Gazette* (11 December 2012)
[142] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 40, paragraph 7.16
[143] Dominic Regan, 'Ready for Take Off?' (10 December 2010) 160 NLJ 1720
[144] CPR Rule 44.3(5) as described in paragraph 83
[145] Mr Justice Ramsay, 'Costs Management: A Necessary Part of the Management of Litigation' (29 May 2012), Sixteenth Lecture in the Implementation Programme
[146] Neil Rose, ''Budget brinksmanship' set to become litigation tactic,' *Litigation Futures* (4 December 2012)

129. Getting the budget wrong could be potentially disastrous. The first decision under the costs management pilots was issued in *Henry v News Group Newspapers Ltd*,[147] a case under the defamation costs management pilot. In that case the budget for disclosure and witness statements was approved at £23,737 whereas the final amount claimed was £316,447. The senior costs judge held that a party who had exceeded her budget by £292,710 should not be able to recover the excess from the other side because she had failed to comply with the relevant Practice Direction. He found no good reason for the claimant to depart from the court-approved budget.

130. The judgment was subsequently appealed. The Court of Appeal, whose decision was published on 28 January 2013,[148] allowed the appeal on the basis that it was satisfied that there was good reason to depart from the appellant's budget. It concluded that:

> *"the failure of the appellant's solicitors to observe the requirements of the practice direction did not put the respondent at a significant disadvantage in terms of its ability to defend the claim, nor does it seem likely that it led to the incurring of costs that were unreasonable or disproportionate in amount. In other words, the objects which the practice direction sought to achieve were not undermined. In those circumstances a refusal to depart from the budget simply because the appellant had not complied with the practice direction would achieve nothing beyond penalising her. That might encourage others to be more assiduous in complying with the practice direction in the future, but to penalise the appellant for that reason alone would be unreasonable and disproportionate."*

131. The Court of Appeal did, however, refer to the differences between the pilot schemes and the final Rules which:

> *"Read as a whole they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake."*

Accordingly, the Court of Appeal indicated that the need to get the budget right, and revise it regularly, was more important under the new Rules.

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[147] [2011] EWHC 90218 (Costs)
[148] [2013] EWHC Civ 19

132. The High Court issued a similar warning in *Murray & Anor v Neil Dowlman Architecture Ltd,*[149] the first application to amend a budget previously approved by the court prior to the new Rules coming into force. In that case Coulson J said:

> *"In my view, in an ordinary case, it will be extremely difficult to persuade a court that inadequacies or mistakes in the preparation of a costs budget, which is then approved by the court, should be subsequently revised or rectified…..The courts will expect parties to undertake the costs budgeting exercise properly first time around, and will be slow to revise approved budgets merely because, after the event, it is said that particular items had been omitted or under-valued. I also agree that any other approach could make a nonsense of the whole costs management regime….I am not persuaded that the absence of prejudice alone would be sufficient (either in this case or more widely) to justify the revision of an approved budget. The whole basis of the recent amendments to the CPR is the emphasis on the need for parties to comply with the CPR, and the court orders made under it. It will, I think, no longer be possible in the ordinary case for parties to avoid the consequences of their own mistakes simply by saying that the other side has not suffered any prejudice as a result."*

Position in Scotland

133. Although litigation solicitors in Scotland are used to advising their clients on the likely expenses of a litigation at the outset of proceedings and throughout the course of a litigation, there is no procedure in the Scottish courts equivalent to the procedure of costs management currently in force in England and Wales. In our Consultation Paper we asked if there would be any benefit in introducing such a procedure. Just under a third of respondents considered that there would be benefit in doing so. The Sheriffs' Association commented that commercial court sheriffs, in particular, see merit in this proposal because of the case management benefits and the fact that the parties would be much better informed about their potential exposure to expenses. One firm of solicitors, with a cross-border practice, commented that a procedure for submitting expenses schedules has a number of potential benefits. It would require both parties to give some thought at the outset of a litigation as to what it might cost and what the expenses consequences might be depending on whether their clients win or lose. It might also assist judges in managing expenses issues, particularly if some form of procedure for summary assessment of expenses were to be introduced.

134. One respondent suggested that the procedure would encourage transparency and hopefully result in clients acting sensibly, with a full understanding of the potential cost. It was pointed out that judges and counsel tend not to discuss expenses with agents, which was viewed as counter-productive. It was suggested that it would be helpful for judges, sheriffs and counsel to be involved more closely with the expenses of an action since expenses are a huge issue for clients and can have a bearing on the outcome of a case. Another respondent suggested that the adoption of such a procedure in the Scottish courts would encourage cost benefit analysis by parties throughout the litigation, ensure better planning of the steps in a litigation and assist the court in making case management

[149] [2013] EWHC 872 (TCC)

decisions. A regular focus on expenses, it was said, will encourage reasonable behaviour, promote early resolution of cases and assist in promoting the predictability and certainty of judicial expenses.

135. Just under half of respondents did not consider that there would be a benefit in introducing a procedure for submitting schedules of expenditure in the Scottish courts. The main reason against its introduction was that expenses in Scotland are considered to be relatively predictable. Indeed one firm of solicitors, which mainly represents insurers, suggested that experienced litigation lawyers should be able to advise their clients without difficulty as to likely expenses, both at the outset of proceedings and throughout the course of those proceedings. It was said that regular reviews and advice given on the likely overall cost of any action is something all of its lawyers are trained and experienced in. One insurer informed the Review that it requires its instructed solicitors to provide advice on anticipated expenses in each case and reviews of files have shown that they are clearly able to provide an accurate estimate of likely expenditure throughout the lifecycle of a case. A member of the judiciary agreed that agents in Scotland with "*a modicum of experience*" are generally quite capable of estimating the likely cost of a litigation, depending upon what stage it reaches.

136. Other concerns expressed included the time and effort required to produce schedules. One firm of solicitors, with a cross-border practice, pointed out that their colleagues in England had found this to be burdensome. Another respondent considered that it would introduce an "*overly burdensome and onerous, not to say laborious additional and, of itself, expensive procedure into the litigation process*" and that there was a real risk that this would increase the overall legal spend to both parties involved in any litigation.

137. One respondent was concerned with the ability of the parties to "*comment upon and shape their opponents' spending plans*". It was pointed out that litigants may wish to undertake certain investigations without disclosing them to their opponent and considered that they ought to be free to do so whilst complying with the requirements of the court in relation to case management. This level of intervention and disclosure during the course of proceedings was thought to be inappropriate. It was suggested that often the reasonableness of a particular course cannot be properly assessed until the conclusion of a case and what, at an early stage in the case, might seem an unreasonable or unnecessary cost, may turn out to be eminently justifiable. In conclusion, the respondent stated that, "*the preparation of schedules of expenses for submission to the court and intimation to the opponent will only serve to increase further the costs of litigation and may impede the running of the litigation in the best interests of the client*."

138. Several respondents considered that there may be substantial difficulties if the procedure were to apply to personal injury cases. One respondent was of the view that there may be a risk that either side may try to maximise or inflate expenses to try to deter the other side from litigating. In addition, at the outset of a case, it would be difficult to predict what amount of factual information and what level of argument was likely to be required and also what expert evidence may be led in support of that. Reference was made to a statement of HH Judge Simon Brown QC that costs schedules are most effective when the cost paying customer is present at a case management conference. The respondent suggested that the introduction of case management conferences into personal injury

litigation may add another layer of expenses into the litigation process, particularly since the majority of personal injury claims do not proceed to proof but settle. This opinion was shared by another respondent who pointed out that the case flow procedure for personal injury cases allows for little use of judicial resources but delivers early settlement of cases without the need for judicial intervention in relation to expenses.

139. One firm of solicitors with a cross-border practice, whilst keen to support any initiative to meet the expectations of clients for greater engagement and consultation on the management of the cost of litigation, emphasised that there are cultural differences between litigating in Scotland and England which must be borne in mind. Firstly, the concept of costs estimates has been within the CPR of England and Wales since 1999. Secondly, as a result of these factors, many English firms have invested heavily on budgetary software which facilitates a more economic process of litigation budgeting for firms and clients. It was said that while such software is available to Scottish solicitors, it is not thought to be as widely used. In addition, it pointed out that there is inarguably a larger volume of commercial litigation in England which makes it more cost effective for English firms to make such an investment. It concluded that "*for such a procedure to be introduced in Scotland there would have to be a sea change in the mindset of the judiciary and legal profession for it to be effective*."

140. One respondent suggested that instead of introducing a procedure of submitting schedules of expenditure into the Scottish courts a 'rolling' schedule of expenses should be introduced, which would allow each side to update the other on the expenses actually incurred at each stage of the process and increase certainty about the future potential liability for expenses. Four respondents suggested that a pilot scheme should be introduced into the Scottish courts, perhaps for commercial actions in the Court of Session, or in one sheriff court. Another respondent suggested that further investigation would need to be undertaken as to the benefits and advantages of the system before it is adopted in Scotland. Two respondents considered that the impact of the implementation of the procedural reforms recommended by the SCCR should be examined before a system of expenses management is introduced into the Scottish courts.

141. I recognise both the advantages and disadvantages of introducing a system of expenses management into the Scottish courts. On balance, I consider that a system for the management of expenses, based on budgeting, would increase the predictability of the cost of litigation. However, I recognise that the introduction of such a system, at least initially, is likely to increase the cost of litigation and impose an additional burden on both the legal profession and the judiciary. Few benefits come without some cost. I disagree with those who consider that expenses management is not a role for the judiciary. Managing the expenses of a process cannot be separated from managing the procedure in that process. This can be illustrated by way of an example. In the course of our Consultation process, solicitors who regularly make use of the commercial procedures in the Court of Session commented upon the high cost of preparing witness statements, which on occasion serve as the evidence in chief of the witness, and can amount to tens of thousands of pounds. Considerable care requires to be taken to ensure every aspect of the involvement of the witness is covered and that no unintentional nuances can be taken from the words deployed. While dispensing with oral evidence in chief saves court time, the saving is sometimes more

than consumed by the cost of preparing the witness statements. It seems to me that it would be very helpful for the member of the judiciary managing a case to know the likely cost to the litigating parties of an order which the court is contemplating making. The order under consideration might then be viewed in its proper context. I also do not accept that members of the judiciary are incapable of managing expenses, provided that proper training is given. I am confident that the Judicial Institute for Scotland will be able to design an appropriate training module. Indeed I am heartened by the response of the Sheriffs' Association which sees merit in the proposal to introduce such a system into the Scottish courts, albeit in certain limited circumstances.

142. I consider that the introduction of such a procedure will also enhance the predictability of the cost of a litigation. I agree with those who argue that resolving the question of expenses should not be left to the conclusion of an action. Modern commercial businesses want to know not only what they might be able to recover, for example, by way of damages, but also the inherent risks in seeking to effect such recovery. One of the most significant risks is the liability to meet the expenses of the litigation. Without such information no proper cost benefit analysis can be undertaken prior to the litigation commencing. A system of expenses management should assist in such an analysis and provide the means of keeping it up to date. Thus, expenses management should assist in retaining commercial litigation in Scotland in cases in which litigants can choose whether to litigate in England and Wales, or Scotland.

143. I agree with the comments made that not all types of litigation would benefit from expenses management. If it has been decided that cases should be subject to case flow management procedures, such as most personal injury actions, it would not be appropriate to introduce a system of expenses management. The underlying principle of case flow management is to keep the number of court appearances to a minimum. Thus, to increase the amount of judicial intervention by requiring judicial expenses management in such cases would undermine the underlying purpose of case flow management.

144. I do not consider that because costs estimates have been part of the landscape in England and Wales since 1999, this is sufficient reason for not introducing them to Scotland. Perhaps it is a case of better late than never. However, I do accept that expenses management may be more easily undertaken with more sophisticated software than is currently available to Scottish firms of solicitors. I do not accept that just because a procedure has been deemed to be of benefit in one jurisdiction, it will inevitably be beneficial in another. It is necessary to look at the system as a whole and that includes the cultural differences which may exist between the jurisdictions being compared. I therefore consider it is better, in this context at least, to learn to walk before running.

145. I consider that a system of expenses management should be introduced as a pilot scheme. Several respondents who advocated the benefits of expenses management in the consultation process were solicitors practising in commercial litigation with experience of litigating in England. Such experience should be a considerable advantage in the conduct of any litigation. Furthermore, many of the firms of solicitors making use of the commercial procedures have offices in England enabling the experience of English litigators, familiar with the concept, to be accessed. I therefore conclude that such a pilot could be undertaken

to greatest advantage for cases being conducted under commercial procedures in the Court of Session. **I therefore recommend that a system of expenses management should be introduced as a pilot scheme for commercial actions in the Court of Session.**

146. I also consider that the sheriff court should participate in the pilot as the potential benefits will be no less in that forum. After the implementation of the recommendations of the SCCR, commercial procedures will be available in every sheriffdom. Inevitably, there will be some teething problems and it might be asking rather a lot to impose a pilot scheme for expenses management when new concepts of case management are being introduced to a jurisdiction. **I therefore recommend that one of the sheriff courts where commercial procedures have been available for some time, such as Glasgow where commercial procedures have been available since 1999, should participate in the pilot.** This also has the advantage of keeping the number of members of the judiciary who will require to be trained to a manageable number. I envisage that the procedure will follow the precedent of the procedure in England and Wales for all multi-track cases commenced on or after April 2013, as described in paragraph 123. However, the exact details will be a matter for the new Scottish Civil Justice Council to formulate. Should the concept of expenses management be deemed to be of benefit, it can then be extended to other types of litigation in Scotland subject to active case management.

CHAPTER 5 PROTECTIVE EXPENSES ORDERS

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 liability for 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.

Development of protective expenses orders

England and Wales

2. The courts in England and Wales have, for some time, been developing case law on protective costs orders ('PCOs'), the equivalent of a PEO in Scotland. The leading case is *R (Corner House Research) v The Secretary of State for Trade and Industry*[1] 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.[2]

3. English case law has continued to develop with departures made from the *Corner House* guidelines in certain cases. The effect has been 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;[3] the requirement that the claimant should have no private interest in the outcome of

[1] [2005] EWCA Civ 192

[2] *ibid*, paragraph 74

[3] *Morgan and Baker v Hinton Organics (Wessex) Ltd and CAJE* [2009] EWCA Civ 107

the litigation has been doubted[4] and PCOs have been granted in a number of cases where the claimant's lawyers were not acting on a *pro bono* basis.[5]

Scotland

4. PEOs are a recent development in the Scottish courts. Lord Glennie first considered an application for a PEO in *McArthur v Lord Advocate*,[6] a case concerning a challenge in terms of Article 2 of the European Convention on Human Rights in respect of the alleged failure of the Lord Advocate to hold a public inquiry into the deaths of close relatives from Hepatitis C in the course of receiving blood transfusions during the late to mid-1980s. In that case he found it competent for the Scottish courts to make a PEO although he was not persuaded on the facts that it was appropriate to do so. In his judgment Lord Glennie endorsed the guidelines laid down by the Court of Appeal in the *Corner House* case.

Environmental cases

Scotland

5. The first PEO in Scotland was granted in 2010 in the case of *McGinty v Scottish Ministers.*[7] 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.[8]

6. A second PEO was granted in January 2011 in *Road Sense and William Walton v Scottish Ministers*,[9] a statutory appeal against a decision by the Scottish Ministers in relation to their 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 appellants to recover the taxed expenses of a solicitor and senior counsel acting without a junior.

7. 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

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[4] *ibid*. See also *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam); *R (England) v LB Tower Hamlets* [2006] EWCA Civ 1742; and *R. (on the application of Public Interest Lawyers Ltd) v Legal Services Commission* [2010] EWHC 3259 (Admin)

[5] For example, see *R (Corner House Research) v The Secretary of State for Trade and Industry* [2005] EWCA Civ 192; *Corner House 2 (R (Corner House & Campaign Against Arms Trade v Director of the Serious Fraud Office* [2008] EWHC 71 (Admin); *R (Buglife) v Natural England [2011] EWHC 746 (Admin); and CAAT v BAE Systems Plc* [2007] EWHC 330

[6] 2006 SLT 170

[7] 2010 CSOH 5

[8] "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 at paragraph 76

[9] [2011] Env. L.R. 22

Article 3(7) of the Public Participation Directive 2003/35/EC (the 'PPD') and implements the Aarhus Convention, [10] which stipulates that signatory states shall ensure access to justice for the public and establish procedures for doing so which shall "provide adequate and effective remedies… and be fair, equitable, timely and not prohibitively expensive."[11] The PPD implements, in part, this requirement and aims to improve public participation in the making of certain decisions affecting environmental matters.

8. The Scottish courts have always had a discretionary power, exercisable after the event, to modify the amount of expenses payable by an unsuccessful party. 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.[12] He also had sympathy with a supplementary argument, that uncertainty as to the expenses outcome is in itself a powerful disincentive to participation and is not consistent with the purposes of the legislation. The substantive hearing in this case failed[13] and the matter was appealed to the Inner House of the Court of Session where the appellant again obtained a PEO with his liability for the respondent's costs capped at nil.[14] The appellant failed in his appeal[15] and subsequently appealed to the Supreme Court where, again, he was ultimately unsuccessful.[16] In advance of these proceedings, the Supreme Court granted a PCO in the appellant's favour capped at £5,000.[17]

9. In a motion for expenses which came before the Inner House in the case of *Fife Council v Penny Uprichard*[18] the applicant sought to rely on the Aarhus Convention in order to limit her liability in expenses. The then Lord Justice Clerk, Lord Gill, said:

> *"Those who challenge decisions of this nature enter litigation with their eyes open. They have to expect that if they should fail, the normal consequence will be that they will be liable in expenses."*[19]

He did, however, comment that it would have been open to the applicant to have sought a PEO but such an application would have required a disclosure of the applicant's means.[20] Lord Hodge, whilst agreeing with the Opinion, added that:

> *"while, surprisingly, we do not yet have rules governing the grant of protective expenses orders in our Rules of Court, the possibility of applying for such orders is well known."*[21]

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[10] 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 and ratified by the UK Government in February 2005.
[11] Article 9, paragraph 4
[12] *Commission v Ireland* C-427/07 [2010] Env. L.R. 8
[13] *William Walton v Scottish Ministers* [2011] CSOH 131
[14] http://www.mauriceocarroll.co.uk/media/BBM.con2012.pdf, page 5
[15] *William Walton v Scottish Ministers* [2012] CSIH 19
[16] *William Walton v Scottish Ministers* [2012] UKSC 44
[17] http://www.journalonline.co.uk/News/1011207.aspx
[18] [2011] CSIH 77
[19] *ibid*, paragraph 14
[20] *ibid*, paragraph 18
[21] *ibid*, paragraph 22

He also noted that although failing to apply for a PEO does not prevent further consideration of the issue at a later stage in the proceedings, it is a relevant consideration at the end of proceedings that the threat of an adverse award of expenses did not prevent the applicant from pursuing the appeal. The case was appealed, unsuccessfully, to the Supreme Court.[22] The appellant obtained a PEO in respect of the Supreme Court appeal proceedings limiting her liability in expenses to £6,000 in the event that she was unsuccessful.[23] Lord Reed, giving the judgment of the court, confirmed that the possibility of applying for a PEO was well known at the time that the case was before the Inner House. He further commented:

> *"Although the procedure was not then regulated by a rule of court, clear guidance as to the procedure which should be followed had been given by Lord Glennie in the case of McArthur."*[24]

10. In December 2012, a PEO was successfully sought for the first time for a challenge to a renewables development. The PEO limited the liability for an award of expenses against the campaigner, Sustainable Shetland, to £5,000 and imposed a cross-cap whereby in the event of success, the campaigner's recovery of judicial expenses was limited to £30,000.[25]

England and Wales

11. The usual principles for the granting of PCOs, set out in *Corner House,* have been held by the Court of Appeal[26] to be in need of modification in environmental cases to ensure compliance with the access to justice provisions of the Aarhus Convention. It found that in environmental cases, the guidelines set out in paragraph (1) (i) and (ii) of *Corner House*, namely that the issues raised are of genuine public importance and the public interest requires that those issues be resolved, 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.

12. Jackson LJ considered PCOs and judicial review proceedings in his Review of Civil Litigation Costs and recommended in his Final Report that one way costs shifting should be introduced for judicial review claims.[27] 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 respect of the risk that qualified one way costs shifting would encourage unmeritorious claims, Jackson LJ considered that the permission requirement for

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[22] [2013] UKSC 21

[23] MacRoberts LLP, 'The Price of Success,' *MacRoberts Commercial Dispute Resolution e-Update* (18 April 2012)

[24] [2013] UKSC 21 at paragraph 56

[25] Pinsent Masons, '"Protective costs award to wind farm campaigners a first," says expert,' *Out-Law.com* (13 December 2012)

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

[27] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 30, Recommendation 5.1

judicial review proceedings in England and Wales is an effective filter to weed out unmeritorious cases. He therefore concluded that two way costs shifting is not generally necessary to deter frivolous claims. Furthermore, in Jackson LJ's view the PCO regime is not effective to protect claimants against excessive costs liability. He considered that 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. Sullivan LJ's Working Group on Access to Environmental Justice, set up in 2006 to consider issues of access to justice in environmental matters in England and Wales, also considered that adopting a system of qualified one way cost shifting for judicial review cases was the preferable approach and proposed the rule be set out as follows:

> *"An unsuccessful Claimant in a claim for judicial review shall not be ordered to pay the costs of any other party other than where the Claimant has acted unreasonably in bringing or conducting the proceedings."*[28]

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 Jackson LJ's recommendations.[29] 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.

European law

14. The Supreme Court made a reference to the European Court of Justice seeking a preliminary ruling on a number of issues in relation to the use of PCOs in Aarhus cases, namely those cases concerned with access to information, public participation in decision-making and access to justice in environmental cases. The Court ruled that when assessing costs against an unsuccessful claimant or considering a costs cap the national court:

> *"cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime. By contrast, the fact that a claimant has not been deterred, in practice, from asserting his claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him. Lastly, that assessment cannot be conducted according to different criteria*

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[28] Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales, An Update Report* (August 2010)

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

depending on whether it is carried out at the conclusion of first-instance proceedings, an appeal or a second appeal."[30]

UK compliance with the Aarhus Convention

15. 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 European 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.

16. The Ministry of Justice issued a Consultation Paper in October 2011 setting out outline proposals for a cost capping scheme for cases which fall within the Aarhus Convention.[31] These proposals are limited to judicial reviews and do not include statutory appeals. In its response to the consultation[32] the Government takes the view that a cap on the claimant's liability of £5,000 is a proportionate amount for an individual claimant to pay whereas a cap of £10,000 for organisations is reasonable. These caps will be fixed and there will be no provision for a defendant to alter or remove this cap. The proposed cross-cap for recoverability of claimants' expenses has been raised from the original proposal of £30,000 to £35,000 following the consultation process and will also be fixed. As the costs of both sides will be subject to caps that cannot be challenged, the UK Government considers that the proposals amount in effect to a system of fixed recoverable costs. The costs protection will apply from the time the claim is issued subject to it clearly being identified as within the scope of the public participation provisions of the Aarhus Convention. Rules based on these proposals, accompanied by a Practice Direction, came into force on 1 April 2013.[33]

17. 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

[30] *R (Edwards & Another) v Environment Agency* EU: Case C-260/11, 11 April 2013

[31] Ministry of Justice, *Cost Protection for Litigants in Environmental Judicial Review Claims*, Consultation Paper CP16/11 19 (October 2011)

[32] Ministry of Justice, *Cost Protection for Litigants in Environmental Judicial Review Claims*, response to Consultation CP (R) 16/11 (28 August 2012)

[33] The Civil Procedure (Amendment) Rules 2013 SI 2013/262 (L.1) Rule 45.41- 45.44, 60th update - P.D. Section VII of Part 45

should apply a prescribed limit in a particular set of proceedings, capable of being lowered but not increased, and that it would be reasonable to set that limit at a figure of £25,000.[34]

18. The Scottish Government issued a Consultation Paper[35] in January 2012 in which it sought views on proposals for new Rules of Court to regulate the award of PEOs in judicial review cases and statutory reviews in the Court of Session of decisions of public authorities falling within the scope of the PPD. The consultation findings were published in October 2012.[36] As a consequence of the consultation process, the Scottish Government proposed that Rules of Court be made which are to apply to judicial reviews and statutory appeals brought in the Court of Session of decisions by public authorities where the petitioner/applicant successfully demonstrates to the Court that the PPD applies to the proceedings. The applicant must be an individual or non-governmental organisation promoting environmental protection. The PEO must be applied for at the beginning of the proceedings and may be refused if the Court considers the application or petition is without merit and has no reasonable prospect of success. If a PEO is granted it will limit the petitioner's liability to pay the respondent's costs to £5,000 and a cross-cap will apply limiting the respondent's liability to pay the petitioner's costs to £30,000. The petitioners may also apply, on cause shown, for the £5,000 cap to be lowered and the £30,000 cross-cap to be increased. It is confirmed that it is possible to apply for a PEO on appeal and that the proposed rules are not intended to affect the ability of the Court of Session to grant a PEO in a case to which the PPD does not apply.[37] The Scottish Government presented the findings of its consultation and its proposals for PEO rules to the Court of Session Rules Council on 24 September 2012 when the Council agreed to consider draft rules at its next meeting in January 2013. Rules of Court have now been made bringing these proposals into effect from 25 March 2013.[38]

Should PEOs be available in all public interest cases?

19. In England and Wales, PCOs have been used in a wide variety of public interest cases outwith the scope of environmental matters.[39] In the Consultation Paper we asked whether the power to apply for a PEO in Scotland should be limited to environmental cases or whether PEOs should be available in all public interest cases. Matters have moved on significantly since that question was posed.

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[34] Minutes of the Meeting of the Court of Session Rules Council (14 February 2011)

[35] Scottish Government, *Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC: A Consultation* (January 2012)

[36] Scottish Government, *Legal Challenges to Decisions by Public Authorities Under the Public Participation Directive 2003/35/EC: Scottish Government Response to Consultation Findings* (October 2012)

[37] *ibid* at page 11

[38] Act of Sederunt (Rules of the Court of Session Amendment)(Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 SSI 2013/81

[39] In England and Wales, matters of "public importance" have included: a fast-track pilot scheme to deal with asylum claims (*R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1239); and whether a registered social landlord was a "public authority" under the Human Rights Act 1998 (*Weaver v London Quadrant Housing Trust* [2009] EWCA Civ 235). For further examples see Public Interest Law Alliance, *The Costs Barrier & Protective Costs Orders Report*, (Oct 2010), page 15.

20. The case of *McArthur,*[40] in which Lord Glennie held it was competent for a Scottish court to grant a PEO, was not an environmental case. It was also noted by one respondent that the *Corner House* case, which established the guidelines for PCOs in England and Wales, is not an environmental case.[41] Furthermore, The Scottish Civil Courts Review ('SCCR') recommended that an express power should be conferred upon the courts in this jurisdiction to make special orders in relation to expenses in cases raising significant issues of public interest. That recommendation was not limited to environmental matters.[42]

21. The application of a PEO in a non-environmental case arose again in the case of *Doogan v Greater Glasgow and Clyde Health Board* in February 2012.[43] In that case Lady Smith stated:

> *"I assume, for the purposes of this motion, that it would be competent for me to pronounce a protective expenses award."*[44]

However, she refused to grant the order on the basis that the case was not one *"where issues of public importance will be stifled at the outset if the award is not put in place."*[45] In that case the debate on the issues had already taken place at some length without the protection of a PEO and the petitioners advised that they would not give up the cause even if they were not successful in securing a PEO. In addition, the petitioners were supported by a limited company with a substantial income.

22. In a petition for judicial review brought by a residents flood prevention group Lord Tyre refused a PEO. He found there to be no issues which the public interest required to be resolved as the issue was a local issue concerning fears of flooding at a particular location. He noted that the petition was driven by the private interests of a small group of property owners and observed that the creation of the Group was simply a device to try to secure a PEO. Lord Tyre said in his judgment that:

> *"I regard the extent to which this petition is motivated by private interest as highly material to the question whether the court should, in exercise of its discretion, grant the order sought."*[46]

That decision was recently upheld on appeal to the Inner House.[47]

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[40] 2006 SLT 170

[41] The *Corner House* case concerned an export credit guarantee consultation process relating to anti-bribery and corruption in international trade.

[42] *Report of the Scottish Civil Courts Review* (2009), Recommendation 155

[43] 2012 SLT 1041. This case concerned the right of health care professionals not to "participate" in abortions provided by the Abortion Act 1967 and whether the rights provided by the European Convention on Human Rights Article 9 enabled two senior midwives to refuse to supervise staff who worked on a ward with abortion patients.

[44] *ibid*, paragraph 87

[45] *ibid*

[46] *The Newton Mearns Residents Flood Prevention Group for Cheviot Drive: Petitioners* [2013] CSOH 68, paragraph 14.

[47] *The Newton Mearns Residents Flood Prevention Group for Cheviot Drive v. East Renfrewshire Council and Stewart Milne Homes Limited* [2013] CSIH 70

23. In September 2012 Lord Hodge granted a PEO in favour of Alcohol Focus Scotland at the time of granting their application for a public interest intervention under Rule 58.8A of the Rules of the Court of Session in a judicial review of the Alcohol (Minimum Pricing) (Scotland) Act 2012 and related decisions.[48] This is the first reported decision where a PEO has been made in a case which is not concerned with environmental matters. The applicant proposed only to intervene by way of a written submission not exceeding 5,000 words. Lord Hodge noted in his decision that:

> *"Since 2006 this court has shown itself willing in appropriate cases to make protective expenses orders to a party in suitable cases which raise issues of general public interest…..In my view the court can adopt a similar approach in exercise of its power under Rule 58.8(7)…. I am satisfied that it is in the interests of justice to make an order providing that there should be no liability by any party in expenses in relation to the intervention rather than one which caps AFS's liability. In reaching this view I have also had regard to the considerations (i) that the issues raised in the judicial review application are of general public importance, (ii) that there is a public interest in the resolution of those issues, (iii) that AFS has no private interest in the outcome of that application (iv) that the resources available to the petitioners and the limited nature of the proposed intervention mean that that intervention will not impose a significant extra burden on the petitioners in the context of their judicial review challenge and (v) that AFS would be acting reasonably in not making its intervention in the absence of the order which it seeks."*[49]

It has therefore been established by case law that it is legitimate to grant a PEO in Scotland in public interest cases which are not concerned with environmental matters.

24. The vast majority of respondents considered that the power to apply for a PEO should not be limited to environmental cases. Several respondents expressly stated that PEOs should be made available in all public interest cases. One respondent considered they may be of use in cases regarding issues such as housing, education and immigration. A public interest group was of the opinion that PEOs could be a valuable tool in discrimination cases proceeding under the Equality Act 2010[50] as it is in the public interest that discriminatory behaviour is not allowed to continue.

25. One respondent refuted the suggestion that a heavy burden would be imposed on Government authorities if PEOs were available in all public interest cases as, in its view, the courts can be relied upon to make PEOs only where the issues raised are of general public importance and the public interest requires that they be resolved. It stated that the court may take into account the respective resources of the parties and noted that the English courts have taken into account the potential impact of depriving an NHS Trust of resources.[51] This respondent advised that some protection may be afforded to the public authority by imposing, as a condition of the PEO, restrictions on the expenses that a

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[48] *The Scotch Whisky Association and Others; Petitioners* [2012] CSOH 156

[49] *ibid* at paragraph 12

[50] c. 15

[51] *Goodson v. HM Coroner for Bedfordshire and Luton* [2005] EWCA Civ 1172, paragraph 30; *R (Compton) v. Wiltshire Primary Care Trust* [2008] EWHC 880 (Admin), paragraphs 40-41

petitioner can recover in the event of success as in *Road Sense v Scottish Ministers*.[52] Two respondents suggested that a requirement to seek the permission of the court to proceed with an action could be applied to all public law cases which would mean that unmeritorious or poorly argued cases would fall at the first hurdle. The SCCR recommended that a requirement to obtain leave to proceed with an application for judicial review should be introduced in Scotland.[53]

26. Respondents noted that following *AXA General Insurance Ltd & Others v Lord Advocate & Others*[54] and the change from a test of "title and interest" to one of "standing" when establishing whether an individual has a right to bring an application for judicial review before the court, there is scope for Non-Governmental Organisations (NGOs), charities, trade unions and campaign groups to raise proceedings in a range of different cases. One firm of solicitors predicted that there will be a "*surge in public interest judicial reviews in Scotland*" and that *"it would seem wholly unjust that these groups and their members, representing wide public interest issues, should be inhibited in their access to the court system through the lack of availability of expenses protection."*

27. Another respondent, however, warned that in its view the change to "standing" would give rise to an extension of PEOs which "*promotes the rights of an individual or group seeking to challenge the decision of a public authority over and above the rights of the public authority and the individual taxpayers who ultimately end up picking up the costs of such challenges."*

28. A small number of respondents considered that the availability of PEOs should not be expanded. The primary cause of concern expressed is the potential increase in the number of judicial review claims that may result if there is an expansion of PEOs which may, in turn, lead to an increased or disproportionate burden on public authorities and institutions which would normally be defenders in an action and cause delay in projects, which may have an impact on investment in Scotland. There is also concern that an expansion of PEOs will result in an increase in unmeritorious or vexatious claims. Another respondent pointed out the risk of politicisation of the judicial review process due to this extension. It was stated that actions with little prospect of success may be more likely to be brought against public bodies where there is a political advantage to the petitioner, or delay in implementation of the administrative decision under review, if a PEO is available.

Determining the level of a PEO

29. The second question that we asked in the Consultation Paper in respect of PEOs was whether limits should be set on the level at which a PEO is made or whether this should be a matter for judicial discretion. The first and second PEOs in Scotland were set at £30,000[55] and £40,000[56] respectively although, more recently, awards have been lower, particularly in environmental matters,[57] where the courts may have taken into account the proposals made

[52] [2011] Env. L.R. 22
[53] *Report of the Scottish Civil Courts Review* (2009), Recommendation 152
[54] 2012 S.C. (U.K.S.C.) 122
[55] *McGinty v Scottish Ministers* 2006 SLT 170
[56] *Road Sense and William Walton v Scottish Ministers* [2011] Env. L.R. 22
[57] Note the PEOs made in favour of Penny Uprichard and Sustainable Shetland (see paragraphs 9 and 10).

by the Scottish Government in respect of environmental cases which are encompassed by the PPD as a reference point.[58] For public interest cases outside the scope of the Aarhus Convention no limits have been proposed by the Scottish Government.

Judicial discretion

30. Just over half of respondents were in favour of the level of the PEO being left to judicial discretion. In one respondent's opinion, "*the element of judicial discretion, whilst possibly reducing certainty for a claimant would… ensure a fairer outcome*." Another respondent pointed out that:

> *"given the wide variety of circumstances in which a PEO application might be made, and the wide variety of circumstances of those making such an application….there may be a problem in pre-determining a specific limit at which a PEO should be made. Applications may be made by individuals, unincorporated associations, or other bodies. Applicants may have no additional funds beyond their own limited means, or they may have raised funds from within their communities or elsewhere. Experience of the court system also shows that once pre-determined limits are set these limits are not kept under regular review."*

One respondent commented that judicial discretion was appropriate as each case will be different. By not prescribing a set limit, this should allow the court some flexibility to determine the level for each individual case based upon its own circumstances.

31. Those respondents not in favour of judicial discretion suggested that the exercise of judicial discretion "*results in illogical and unreasoned decisions, producing uncertainty*." One respondent suggested that a general discretionary power with no statutory test of when it ought to be used is likely to lead to inconsistency in decision making. It suggested that what is needed is "*firm guidance on when such orders ought to be made*." In addition, it was suggested that only certain members of the judiciary with appropriate training should be able to make such an order. Another respondent suggested that judicial discretion should be subject to set guidelines in order to help provide certainty and consistency until a body of judicial precedent could be established.

Limits

32. Those respondents who consider that the matter should not be left to judicial discretion suggested vast differences in the limits at which a PEO should be set, ranging from £1,000 to £25,000[59]. Several made reference to the Scottish Government's proposed limits of £5,000 with a cross-cap of £30,000 for cases falling within the PPD as appropriate. They suggested that these should apply equally to all public interest cases as the underlying justification for PEOs is not unique to such cases. One special interest group, however, considered that the proposed limit of £5,000 is too high. In its opinion even £2,000-£3,000 would be "*difficult if not impossible for many community groups to find, let alone individuals*."

[58] See paragraph 18

[59] This is the limit proposed by the European Commission for Aarhus cases.

Recommendation

33. It may be that given recent and anticipated developments in Scots law, it is becoming easier and less expensive to challenge decisions of public authorities. In this connection, I refer to the decision in *AXA General Insurance Ltd & Others v Lord Advocate & Others*,[60] the Act of Sederunt establishing a new procedure for PEOs in environmental appeals and judicial reviews in the Court of Session; and the anticipated implementation of the recommendations of the SCCR as examples. **I therefore recommend that the power to apply for a protective expenses order in Scotland should be available in all public interest cases. However, the decision on whether to award a protective expenses order, and at what level, ought to be a matter for judicial discretion unless otherwise prescribed in Rules of Court for particular types of actions, such as those falling within the scope of the Public Participation Directive.** Guidance on the factors that ought to be taken into account when making a PEO will require to be developed. The SCCR recommended the adaptation of the model proposed by the Australian Law Reform Commission for this purpose.[61] Such guidelines, together with the provision of appropriate training, will ensure consistency of decision making. The implementation of the recommendation of the SCCR to introduce a leave or permission stage in an application for judicial review will prevent unmeritorious cases from proceeding and reduce the potential burden on defenders.

PEOs in multi-party actions[62]

34. In our Consultation Paper we asked whether the power to apply for a PEO in Scotland should extend to multi-party actions and, if so, whether there should be any restrictions on their availability. In England and Wales, the court may exercise its discretion to make a PCO in actions which proceed under the Group Litigation Order procedure there. The SCCR considered that its recommendations on awards of expenses in public interest cases should also apply to multi-party actions which satisfy the wider public interest criteria.[63]

35. The vast majority of respondents were in favour of the availability of PEOs being extended to multi-party actions. However, several thought that a PEO should only be available in a case where there is a public interest. Indeed , one respondent considered that there should be no specific rule for multi-party actions but considered it would be more likely that a multi-party action would attract a PEO given that it is likely to involve a far higher element of public interest than an individual case. Another respondent stated that since multi-party actions will essentially be cases involving damage to persons or property interests it did not expect a PEO to generally be available for a case of this type. One respondent, however, considered that, if there should be any difference in multi-party cases, there should be fewer restrictions to reflect the fact that each individual party may only be entitled to a very small award in their favour.

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[60] 2012 S.C. (U.K.S.C.) 122

[61] *Report of the Scottish Civil Courts Review* (2009), Recommendation 156

[62] See Chapter 12 for further discussion on multi-party actions.

[63] *Report of the Scottish Civil Courts Review* (2009), Recommendation 173

36. Only two respondents opposed the use of PEOs in multi-party actions. One considered that the availability of PEOs for this type of action would "*encourage the proliferation of large scale unmeritorious litigations against business organisations, the limited benefits of which would be outweighed by the unnecessary costs to those organisations, the economy and to the Scottish justice system*." The second respondent considered that once the work involved in a case or cases has gone beyond the limit set out in the PEO, then the pursuer's agents have little incentive to curtail their work in the further conduct of the case, especially if they are reasonably confident that they will recover their fees from the opponent. It considered that a difficulty similar to that which presently exists as a result of individual legal aid certificates having no upper limit of expenditure would be created. It should be noted, however, that the granting of a PEO does not alter the recipient's obligation to pay their own legal expenses and a cross-cap for recoverability may be imposed.

Recommendation

37. I see no good reason for not extending the power to apply for a PEO in Scotland to multi-party actions. There are other powers available to the court to deal with unmeritorious litigations at an early stage, such as summary decree and the procedure for summary disposal recommended by the SCCR.[64] The ability of the court to impose a cross-cap is also a useful tool. **I therefore recommend that protective expenses orders ought to be available in multi-party actions but only where a public interest can be demonstrated.** The development of guidance which I refer to in paragraph 33 should equally apply to applications for PEOs in multi-party actions.

[64] *Report of the Scottish Civil Courts Review* (2009), Recommendation 123

CHAPTER 6 BEFORE THE EVENT INSURANCE

1. The market in legal expenses insurance, including Before the Event ('BTE') insurance and After the Event ('ATE') insurance, has grown substantially in the UK in recent years. The market grew by 7.4% in 2009, the latest year for which figures are available, with a combined premium income of €654 million (£583 million). This still represents only a small fraction (less than 2%) of the total non-life insurance market, although on average the legal expenses insurance sector has grown faster than the insurance market as a whole.[1]

2. BTE insurance provides cover in the event that the insured has to bring or defend a legal action in the future. Cover typically includes both the insured person's own legal fees and, should the insured lose, the other party's judicial expenses. ATE insurance is purchased when the insured has already decided to bring or defend a legal action, and is dealt with in Chapter 8 of this Report.

3. In the UK, BTE insurance is rarely purchased by individuals as a stand-alone policy. It can be included as part of the standard cover or as an 'add-on' in motor, household or travel insurance policies. It was estimated that in 2008, 25 million households in the UK had acquired BTE insurance cover in this way.[2] It has been observed that market growth has been offset partly by the growing influence of price comparison websites, which allow price-sensitive customers to forego BTE insurance as an add-on to other insurance cover.[3]

4. The Scottish Legal Aid Board ('SLAB') recently reviewed legal expenses insurance products within the UK from leading home and motor insurers. It found that BTE insurance was offered as an optional extra in all of the home insurance products that it examined. Typically, cover was provided for the pursuit of personal injury claims, pursuit of breach of employment contracts, non-commercial disputes about faulty goods and services, and pursuit of actions arising from interference with the right to use, or damage to, the home. Some policies covered other areas, such as motoring offences or disputes over inheritance. None covered family actions or judicial review. Other common exclusions were clinical negligence and multi-party actions. BTE insurance offered as an optional extra in motor insurance policies covered only the recovery of uninsured losses (including personal injury) arising from a road traffic accident. Of the policies reviewed, nearly half covered only the pursuit (not the defence) of actions. Some policies also provided some cover for the defence of criminal proceedings.

5. All the policies reviewed by SLAB allowed the insurer to review the prospects of success before agreeing to provide funding: this was commonly expressed as success being "more likely than not." The cost of proceedings compared to the potential award was often considered when measuring prospects of success.

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[1] RIAD International Association of Legal Expenses Insurance, *The Legal Protection Insurance Market in Europe* (2010). The data provided relate to members of the Association of British Insurers, who account for approximately 80% of the UK market.

[2] Consumer Focus, *In case of emergency: Consumer analysis of legal expenses insurance* (2011), page 4, citing estimates by the Office for National Statistics

[3] RIAD, *op cit* (2012), page 4

6. Businesses, particularly small and medium enterprises, may purchase BTE insurance as a stand-alone policy or as part of a more general insurance policy. Jackson LJ found that this usually covered defending employment tribunal claims and health and safety prosecutions, pursuing claims arising from damage to property and sometimes HM Revenue and Customs investigations.[4]

7. BTE insurance is relatively inexpensive, typically costing consumers around £20-30 per year. However, cover is limited, often to £50,000 (and sometimes less), although some motor policies provide cover up to £100,000. Insurers generally have a panel of solicitors' firms to whom they routinely refer instructions to act under BTE insurance policies.

8. The Scottish Civil Courts Review ('SCCR') considered that BTE insurance could contribute to improving access to justice, particularly for those not eligible for legal aid, and recommended that the Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake. It did not advocate that BTE insurance should be made compulsory.[5]

9. Since then, qualified one way costs shifting ('QOCS') has been introduced for personal injury actions in England and Wales. In Chapter 8, I recommend that QOCS be introduced in Scotland.[6] One commentator has suggested that QOCS, combined with the prohibition on referral fees in England and Wales, will adversely affect the expansion of BTE insurance.[7] As noted in the Consultation Paper, the Review was informed that BTE insurers receive only a small proportion of the insurance premium, with income being topped up by referral fees. Insurers operate on a UK-wide basis, and it is possible that these measures may also affect the provision of BTE insurance in Scotland, despite the different position on referral fees taken by this Review.

10. This Chapter addresses four questions: Do BTE insurers adversely influence the conduct of litigations which they are funding? 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? Is it reasonably practicable for BTE insurance policy holders to be entitled to instruct any lawyer of their choice, at any stage? Should BTE insurance be encouraged and, if so, by what means might some of the criticisms levelled against it be addressed?

Background

11. Insurers are now subject to regulation by the Prudential Regulation Authority, part of the Bank of England. Its role includes securing an appropriate degree of protection for insurance policy holders.

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[4] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 13, paragraph 3.2

[5] *Report of the Scottish Civil Courts Review* (2009), Chapter 14, paragraph 140, and Recommendation 201

[6] See Recommendation 46

[7] M Harvey, 'Before the Event Legal Expenses Insurance – Why Do So Many Seek to Close This Access Gate to Justice?' [2010] *Personal Injury Law 93*

12. The Financial Ombudsman Service has jurisdiction to hear complaints from policy holders. It can require an insurer to remedy a complaint and/or pay compensation which can include directing an insurer to pay an insurance claim. Complaints about legal expenses insurance typically involve disputes about whether a proposed action has reasonable prospects of success; the choice of solicitors; or allegations of maladministration in relation to the policy or claim.[8]

13. The provision of BTE insurance is covered by the Insurance Companies (Legal Expenses Insurance) Regulations 1990[9] ('the 1990 Regulations'), which implement Council Directive 87/344/EEC of 22 June 1987 ('the Directive') on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance. These require insurers to make arrangements to avoid conflicts of interest. The insurer must either ensure that no member of staff who deals with legal expenses insurance claims also deals with general insurance business, or entrust claims management to a separate legal entity.[10] The policy holder is also given the right to choose a lawyer.

The influence of insurers

14. The Consultation Paper noted that it had been suggested to this Review that "BTE insurers may be intrusive and may make unreasonable demands on their panel solicitors during the course of the proceedings."[11]

Consultation responses

15. More than half of respondents considered that BTE insurers do not adversely influence the conduct of litigation. Several solicitor respondents stated that they had not experienced any adverse influence in practice. One solicitor respondent observed that insurers did not impose any pressure upon solicitors to conduct the litigation other than in accordance with the party's interests. Another solicitor considered that insurers were no more obtrusive than any other funder, such as the Scottish Legal Aid Board. In the experience of another respondent, insurers did not influence litigation other than by providing good support. Another respondent observed that while insurers could impose onerous reporting requirements on solicitors and the relationship could become strained, difficulties tended to relate to remuneration and policy coverage rather than any direct attempt by insurers to influence the conduct of the litigation.

16. Several respondents observed that while insurers did exert influence, their influence was not adverse. This included insurers' requirement that actions have reasonable prospects of success as a condition of maintaining funding, and their requirement that any offers in settlement be reported to them. Similarly, some insurer respondents observed that insurers exerted control by ensuring that panel solicitors were highly skilled and dealt with

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[8] Financial Ombudsman Service website:
http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html

[9] SI 1159/1990

[10] Regulation 5; a third option is to afford the insured the right to choose a lawyer from the moment a claim arises, but this option appears not to have been adopted by any UK insurer.

[11] *Consultation Paper*, Chapter 7, paragraph 7.17

the litigation appropriately. Another insurer pointed out that insurers made decisions about whether to continue or withdraw funding only on the basis of legal advice. Several insurers observed that it was in their interests to ensure the best possible outcome for their policy holders - there was a common interest between them.

17. One solicitor respondent took a more nuanced approach. It considered that since insurers tended to be sophisticated litigants making sensible decisions, it could not be said objectively that they adversely affected the conduct of litigation. However, there was potentially a conflict of interest, for example if the insured did not wish to accept an offer that the insurer thought should be accepted. There was a need for solicitors to ensure greater clarity for both insurer and insured as to how the litigation would be conducted.

18. However, some respondents considered that insurers did or could potentially adversely influence the conduct of litigation. These included the Law Society of Scotland, which considered that BTE insurers' requirements could have an adverse influence. It pointed out that insurers have differing reporting standards, making case management very difficult for non-panel firms. This leads to an inefficient use of time and a lower proportion of the cost recovered in the event of success. One solicitor respondent described how insurers' reporting requirements could become burdensome for non-panel firms.

19. Several solicitor respondents cited insurers' rates as a source of adverse influence. One observed that to meet these rates, solicitors would delegate work to a lower level than was appropriate. Other concerns related to funding included insurers' ability to withdraw funding if prospects of success were assessed at less than 50%, and the need to seek insurers' sanction for certain items of expenditure, such as the instruction of expert witnesses and counsel. One solicitor described insurers as unduly risk-averse and suspected that insurers did not wish to see claims made on BTE insurance policies.

Discussion

20. It is inevitable that there is a potential conflict of interest between the insurer and the insured. That is true for all forms of insurance backed litigation. Some insurers have experience of particular types of litigation and their input can be of considerable advantage. Thus not all influence by insurers on how a litigation might be conducted falls to be condemned. We did not receive significant evidence of insurers actually having an adverse impact on the course of a litigation which they were funding although several respondents acknowledged the potential for such. I am not persuaded that there exists a mischief which requires to be addressed in relation to interfering insurers.

The assessment of claims

21. Some insurance companies employ in-house solicitors to make an initial assessment of whether or not a policy holder's claim falls within the terms of the insurance policy. Others have this assessment made by a panel solicitor. Prior to publication of the Consultation Paper, it was suggested to this Review that insurers frequently try to avoid liability on the grounds of failure to intimate claims within what were described as very tight time limits.

22. As the SLAB research found, policies usually contain a clause that entitles the insurer to withhold or withdraw funding if proceedings have no reasonable prospects of success. Policies may also allow the insurer to refuse funding if the cost of proceedings is likely to be disproportionate compared to the amount of any recovery.

Consultation responses

23. Two thirds of respondents considered that it was appropriate for a lawyer directly employed by an insurance company to assess whether a claim fell within the terms of a policy. Several of these respondents considered that in-house assessment was appropriate because the assessment had to be made by a person with the requisite skill, legal knowledge and familiarity with the specific policy's terms. Another recurring view was that it was appropriate because the insurer would be providing funding and bearing the financial risk.

24. Other respondents considered that there was no distinction between this assessment and any other preliminary decision made by insurers about whether a claim fell within the policy. One solicitor respondent observed that SLAB carried out a similar assessment in deciding whether to make funding available. The Law Society of Scotland observed that such an assessment fell within an employed solicitor's duty to provide advice to his or her employer.

25. Several respondents connected to the insurance industry considered that in-house assessment was appropriate because safeguards existed such as the Financial Ombudsman Service and the regulatory regime of the Financial Services Authority (since replaced by the Prudential Regulation Authority).

26. Some respondents who agreed with in-house assessment in principle qualified their answers. Several of these respondents considered that there should be a mechanism by which the in-house solicitor's decision could be challenged, such as review by an independent solicitor. Other respondents considered that in-house assessment was appropriate only to a limited extent. One solicitor respondent thought that such assessment should cover only fundamental points such as whether the claim was time barred or involved a subject matter excluded by the policy. Similarly, another respondent considered that in-house assessment should be limited to determining whether cover existed, and should not extend to determining whether the claim had merit.

27. Respondents who opposed in-house assessment considered that it created, or potentially could create, a conflict between the interests of insurer and policy holder. This could be avoided if the assessment was made by an independent solicitor. One respondent feared that at the end of the financial year the in-house lawyer might be more concerned about his or her employer's budget than with any prospective claimant. It was observed that in-house assessment was specifically prohibited in Germany, although panel solicitors could still be used.

28. Research by Consumer Focus in England and Wales[12] found that consumers had mixed views on who should assess their case. Some felt that an in-house assessment may be conducted unfairly, and that insurance companies might choose to accept only claims assessed as being highly likely to succeed. Some consumers also felt that an independent panel of solicitors might be better at judging cases and have fewer 'hidden agendas' than an in-house solicitor. However, others felt that insurers could not be expected to take a risk on a case when they had only received a premium of perhaps £20 a year. Those consumers felt that the process was acceptable and that the in-house solicitors would be professionals applying the law.

29. In its response to the Consultation, Consumer Focus Scotland concluded that it would be preferable to have a degree of independence at the stage where the insurer assessed whether a claim fell within the terms of the policy. This may guard against potential conflicts of interest or perceptions of such conflicts. However, the potential benefits of this may need to be weighed against any disadvantages, such as additional costs to consumers. There was also a need for the process used to be far more transparent for consumers.

30. More generally, a respondent which represents personal injury lawyers observed that the insurer would inevitably make decisions as to coverage and indemnity, and it was difficult to see how that could be changed without rendering such schemes economically unattractive and unviable to BTE insurance providers as they currently existed. Another respondent observed that while in-house solicitors would doubtless take care to assess whether a claim fell within a policy, it would be surprising if cover was refused as a matter of routine since that would only invite challenges from policy holders.

Discussion

31. In my opinion it is appropriate for an insurer to assess in-house whether a claim falls within the terms of a BTE insurance policy, and to decide who should make that assessment, whether that be an in-house solicitor, a claims handler or another employee. It would not be reasonably practicable to require that this decision should always be made by an external solicitor. This would likely lead to increased cost and, therefore, increase premiums.

32. This can be differentiated from the position where an insurer, after investigating a claim which does fall within the terms of the BTE insurance policy, concludes that there are insufficient prospects of success to justify raising or defending proceedings. The need for some degree of independence in making this assessment was highlighted by Consumer Focus in its report on legal expenses insurance in England and Wales.[13] Some policies do give policy holders the option of obtaining a second opinion from a barrister (English terminology tends to be used). Where the barrister agrees with the policy holder, the insurer

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[12] Consumer Focus, *op cit* (2011)

[13] Consumer Focus, *op cit* (2011), page 5: *"At the very least we wish to see some degree of independence in the initial determination of whether a case is meritorious. We do not consider it appropriate that some insurance companies employ in-house solicitors to make this assessment, without giving consumers any recourse to an independent appeal process."*

will pay for the opinion.[14] The Directive on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance does not prevent the insurer from making an assessment on merit before proceedings are commenced, although it does provide that any dispute between the insurer and insured arising out of a legal expenses insurance contract may be referred to arbitration. This right must be mentioned in the policy.[15]

33. This area is already regulated by the Financial Ombudsman Service. In its on-line documentation on how it deals with complaints involving legal expenses insurance, it advises that:

> *"If the insurer considers that a claim should be pursued, the normal practice is for it to be passed to an external firm of solicitors on the insurer's panel. This firm should have knowledge of the relevant area of law – and their opinion as to the prospects of success is usually a sufficient basis for the insurer to agree (or refuse) to fund the legal claim/defence.*
>
> *In cases we see where the policy holder disputes this opinion, we will usually ask the policyholder for independent evidence from a suitably qualified, and comparable, lawyer – to support their view on the prospects of success of the legal action.*
>
> *Sometimes there may be conflicting legal opinions from two different solicitors on the prospects of success of the action. This may happen when the insurer's panel solicitor has advised that the case does not have prospects of success but the policy holder has a legal opinion from a solicitor to the contrary.*
>
> *If this happens in cases we deal with, we generally expect the insurer rather than the policy holder – unless the policy states otherwise – to obtain a legal opinion from a qualified barrister who has knowledge of the relevant area of law. In this situation, we normally place greater weight on the barrister's opinion than that of the solicitor's – as the barrister will be the expert in the particular area of law and in court advocacy and litigation generally."*[16]

34. As far as policy avoidance due to late intimation of claims is concerned, the Financial Services Ombudsman also addresses this issue in the same on-line document. It advises that:

> *"In the cases we see, we usually decide that an insurer should not reject a genuine claim – as long as it has not been prejudiced by the late notification. Late notification can be a significant issue with legal expenses policies, because failing to act as quickly as possible can adversely affect a legal case – for example, where issues involve: the preservation of evidence; difficulties in tracing witnesses; witnesses less able to recall information; time-bars coming*

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[14] BTE Legal Expenses Working Party (on behalf of Legal Expenses Insurers), *Promoting Access to Justice through Before the Event Legal Expenses Insurance:– A Response to Consumer Focus report, In Case of Emergency – Consumer analysis of legal expenses insurance* (2012), page 24

[15] Article 6 of the Directive, implemented by Regulation 8 of the 1990 Regulations. The Directive requires Member States to provide for arbitration "or other procedure offering comparable guarantees of objectivity."

[16] Financial Ombudsman Service, available at:
http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html

> *into effect; the legal requirement to avoid 'inordinate and inexcusable' delay*[17] *not being satisfied; interest and costs building up.*
>
> *"In cases we deal with where late notification is an issue, we look carefully at the evidence, to decide whether the insurer was entitled to reject the claim or limit its liability to certain costs. We take the view in these cases that the onus is on the insurer to show they have been prejudiced."* [18]

35. The position adopted by the Financial Services Ombudsman on these issues is sensible. Its jurisdiction extends to all insurers operating in the UK.[19] In the circumstances, I do not require to make any recommendation in this regard.

The choice of lawyer

36. BTE insurance policies often reserve to the insurer the right to appoint a panel solicitor up to the time when legal proceedings start. This was the case in all the policies reviewed by SLAB in the research referred to above. Some of the policies reviewed required the policy holder to pay an excess (up to £500) to use a solicitor of his or her own choice. Most of the policies specified that the nominated solicitor would be expected to agree to the insurer's standard terms.

37. Regulation 6 of the 1990 Regulations provides:

> (1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).[20]

The insured is also free to choose a lawyer whenever a conflict of interest arises.[21] These rights must be expressly recognised in the policy.[22]

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[17] The Court of Session has power to dismiss a claim where there has been inordinate and inexcusable delay in progressing the claim resulting in unfairness: Rules of the Court of Session, Rule 21A.1. Equivalent provision is made for the sheriff court by Ordinary Cause Rule 15.7. In England and Wales the court has power to strike out a statement of case as an abuse of process (Civil Procedure Rules, Rule 3.4(1)(b)), grounds for establishing which include inordinate and inexcusable delay: see for example *Aktas v Adepta* [2011] Q.B. 894.

[18] Financial Ombudsman Service, *op cit*

[19] The Ombudsman has compulsory jurisdiction over persons authorised to carry on "regulated activities:" Financial Services and Markets Act 2000 c. 8, s 226. "Regulated activities" include effecting or carrying out a contract of insurance as principal: Financial Services and Markets Act 2000 (Regulated Activities) Order 2001/544, article 10.

[20] This implements Article 4(1) of the Directive, which states: *"Any contract of legal expenses insurance shall expressly recognize that: (a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person."*

[21] Regulation 6(2)

[22] Regulation 6(3)

Consultation responses

38. In the Consultation Paper two issues were specifically addressed: at what stage may the freedom to choose a lawyer be exercised, and what rate of remuneration is the insurer obliged to pay if the insured chooses a lawyer who is not on the insurer's panel. Respondents to these issues also commented on the operation of the panel system more generally.

39. One respondent from the insurance industry explained that the current business model for BTE insurance ensured that premiums remained low without affecting the quality of service provided to the policy holder. Panel solicitors were chosen via a rigorous tendering process that took into account the quality of the solicitor's work as well as the cost to the insurer. Allowing policy holders to choose any lawyer they wished could expose the insurer to high costs while providing a poor quality service to the policy holder. A similar observation was made by a solicitor respondent, who noted that panel solicitors were subject to strict service level requirements. They also tended to be expert in dealing with the various issues referred to them by the insurers. By contrast, the service provided by policy holders' chosen firms might vary markedly. The benefit to policy holders in the service level standards and auditing requirements imposed by insurers on panel solicitors was noted by other respondents.

40. A related observation focused on the risk to policy holders. One respondent had experience of cases in which solicitors chosen by policy holders had provided inadequate advice due to their lack of specialist knowledge of the area of law concerned. Other respondents considered that insurers were better placed than policy holders to select a high-quality, affordable solicitor. It was also observed that insurers were prepared to consider a policy holder's choice of solicitor if the firm could demonstrate experience in the type of work in question.

41. Other respondents considered the freedom to choose a solicitor essential. One respondent, which represented personal injury lawyers, supported the provision and use of BTE insurance only provided that pursuers were neither denied access to a solicitor of their choice nor penalised for exercising that choice. It was argued that, in practice, policy wording often meant that choice was limited, giving the insurer control over proceedings by regulating expenditure on the work to be done. It considered that there was also a lack of transparency in how referrals were made. Another respondent pointed to the difficulties that non-panel solicitors encountered in complying with insurers' reporting requirements.

42. Other respondents, however, argued that the policy holder should be entitled to choose a solicitor provided that that solicitor was suitably qualified in the area of law involved.

43. While some respondents and commentators considered that one of the benefits of having a panel of solicitors is that quality can be assured by insurers, one interviewee had concerns over the quality of service provided under a BTE insurance policy. It was observed that as cases may be bought on a block basis, solicitors are paid low rates of remuneration. This may lead to paralegals and secretaries completing the paperwork, trainees being sent to court and proceedings taking place in a restricted number of courts, thereby ensuring that

the same practitioners can deal with several cases in one day. Another interviewee expressed concern that medical negligence cases, if covered by BTE insurance, may be referred to solicitors with expertise in personal injury, but not medical negligence, claims.

44. For the purposes of the present Review, Consumer Focus Scotland undertook research into consumers' views.[23] Focus groups were asked a number of questions on BTE insurance. Consumer Focus Scotland found that just under half of those surveyed would be unhappy about their insurer appointing a solicitor (although nearly a third were undecided). A commonly expressed reason was their concern as to whose interests the solicitor would be serving. General statements of preference for making one's own choice were expressed. It was also important for people to use a solicitor whom they trusted. Other concerns were about not having assurances about the quality of the solicitor appointed, fear that the insurer's chosen solicitor might be more expensive, or the solicitor's location. Of those who would be happy for their insurer to appoint a solicitor, many thought that the insurer was better placed to make the choice. Participants indicated a slight preference towards paying a higher premium to enable them to choose their own solicitor. The few participants who had experience of using such insurance were largely positive about their experience of having a solicitor appointed by the insurer.[24]

Discussion

45. An advantage of the panel system is that the insurer can direct the insured to a solicitor with the requisite skills to handle the problem. As solicitors become ever more specialised, this is potentially of considerable benefit to the insured. A panel also assists the insurer to operate a quality control system. It would be very difficult for an insurer to monitor quality effectively if required to deal with a great many firms. It is reasonable for insurers to require solicitors to report to them on a regular basis and in a particular form. This too would be difficult to administer if there was no panel system. Administrative efficiency in other areas may also be increased. One BTE insurer reportedly claimed that on average a panel solicitor will make savings on claims handling of approximately 50%, depending upon the type of case involved, because economies of scale and related efficiencies are much easier to accommodate with a reliable source of work and guaranteed volume.[25]

46. On the other hand, there is a danger that insurers will choose solicitors for their panel by reference only to the amount of money a firm is prepared to pay to be on the panel, or by reference to a solicitor's low charge out rates, and without any regard for quality.

47. In an article in the Journal of Personal Injury Law, Mark Harvey wrote that:

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[23] Consumer Focus Scotland, *Report of the Consumer Network survey and focus groups: expenses and funding of civil litigation in Scotland* (2012). The Consumer Network is a group of over 500 volunteers from all parts of Scotland who help to keep Consumer Focus Scotland informed about consumer concerns.

[24] Consumer Focus Scotland, *op cit* (2012), pages 16-24

[25] Harvey, *op cit*, page 98. The author is a partner and head of the claimant division at Hugh James Solicitors, London and Cardiff.

> *"The quality of service supplied by BTE panel solicitors was examined in a paper commissioned by the Nuffield Foundation and authored by Pamela Abram of the University of Westminster.*[26] *The paper noted the growth of legal expense insurance (LEI) from its introduction in the United Kingdom in 1974, such that by 1998 the then Lord Chancellor's Department estimated over 17 million people were paying premiums for LEI cover. However, it was noted that then, as indeed now, LEI was still not as widely established in the United Kingdom as it was in other jurisdictions. For example, it was noted in Germany in 1996 that the premium income was £1,927 million compared to only £96 million for the United Kingdom. As an aside however it should also be noted that the policies are portable in Germany so that the work is distributed amongst non-panel firms. The effect has been to increase the outlay to the insurers and hence to increase premiums…*
>
> *The overall conclusion of the study was that LEI was working well and there was satisfaction from the policy holders who used that cover. It was recognised that even then legal expense insurers were really acting as a referral service where they were accepting payment for their work and only expecting to indemnify their policy holder for adverse costs orders. Significantly, however, the standard of service that they received contrasted favourably with that of non-panel cases: 'However, LEI insurers offer more to policy holders than other referral schemes such as the imposition and monitoring of service standards and a point of contact for complaints if solicitor's claims handling causes satisfaction. LEI is also preferable to [Conditional Fee Agreements ('CFAs')] in that the policy-holder is referred to a specialist firm without the difficulties of selecting one, they had no concerns about funding after the event insurance premiums or of meeting upfront disbursements. LEI also provides coverage for a wider range of disputes than CFAs and even covers those with no monetary value. Given these benefits, the advantages of LEI are clear…'…*
>
> *The writer's own firm has represented clients referred from all sources of work. It is noteworthy that whilst there are very limited service standard requirements from claims referral companies and little more from the trades unions, the highest degree of service standards are prescribed by the legal expense insurers. This includes, for example, an independent audit of those cases rejected to ensure the rejection is reasonable."*[27]

48. In my opinion an appropriate balance is struck by the insurer being under an obligation, at the time of making a referral to a solicitor, to inform the insured in writing of the basis upon which the referral has been made. I make a recommendation to that effect in Chapter 10 of this Report, where I set out the information which should be provided to the insured.[28]

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[26] Pamela Abrams, *In Sure Hands? Funding Litigation by Legal Expenses Insurance: the Views of Insurers, Solicitors and Policyholders* (2002)

[27] Harvey, *op cit*, pages 5-7

[28] See Recommendation 72

When may the choice be exercised?

49. In *Eschig v UNIQA Sachversicherung AG*[29] the European Court of Justice held that the Directive "provides for the right to freely choose a representative only where an inquiry or proceedings are initiated."[30] This is ambiguous, particularly for those categories of litigation (including personal injury) for which a pre-action protocol is in place.

50. Insurers have generally interpreted Regulation 6 to mean that the freedom to choose a lawyer applies only from the point at which legal proceedings commence, and not at the stage of any pre-litigation inquiry. However, in July 2010, the director of the Insurance Sector of the Financial Services Authority issued a letter regarding the impact of *Eschig*, "*It is important to note that freedom of choice arises before the commencement of any inquiry or proceedings.*"[31] The letter was reissued in August 2010 with a footnote to clarify the statement in the following terms:

> *"This freedom has been interpreted as being triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated (see Sawar v Alam [2001] EWCA Civ 1401 at paragraph 26). Once it becomes clear that recourse is to be had to legal proceedings and litigation is pending then the insured may instruct a lawyer of their choice. This is because, generally, recourse to a lawyer logically precedes the commencement of legal proceedings which the lawyer initiates on behalf of his client."*[32]

51. The Financial Ombudsman Service has stated that in the absence of clear guidance from the courts, it would not require an insurer to offer the policy holder a choice of solicitor at the start of the claim. It currently advises that:

> *"Insurers sometimes have no objection to using a policy holder's own solicitor. But for legitimate commercial and quality-control reasons, insurers often prefer to use their solicitors from their own panel.*
>
> *We look at each case on its own individual merits. However, we are likely to decide that the policy holder should be able to appoint their own solicitors from the start only in exceptional circumstances…*
>
> *In the cases we see, the terms of a legal expenses policy do not generally guarantee any particular firm of solicitors, any specific location or any minimum size of firm. All they promise is a panel firm of solicitors prior to legal proceedings being issued. After legal proceedings have been issued – and to comply with statutory regulations the policy holder can choose their own solicitor."*[33]

52. In its report on legal expenses insurance in England and Wales, Consumer Focus noted that an insured who was required to use a particular solicitor at the stage of

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[29] C-199/08, 10th September 2009

[30] *ibid*, paragraph 50. The court in *Eschig* held that the Directive did not permit an insurer to reserve the right to select the legal representative of all the members of a class action.

[31] http://www.fsa.gov.uk/pubs/other/lei_190710.pdf

[32] *ibid*

[33] http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html

negotiations was likely to continue using the same solicitor should the claim then proceed to court. Consumer Focus considered that this effectively removed the insured's freedom of choice. It considered that consumers were unlikely to be aware of this restriction. Furthermore, panel solicitors came at little cost to the insurer, which arguably benefited the insurer rather than the insured. However, its research with vulnerable consumers indicated that most were happy with the present arrangement, for reasons including the difficulty or inconvenience of choosing their own solicitor.[34]

53. Jackson LJ saw force in amending Regulation 6 to provide that the freedom to choose a lawyer would arise when a letter of claim was sent on the insured's behalf to the opposing party. He considered, however, that before any amendment was made, the effect on insurance premiums would have to be considered. Insurers had maintained that the present panel arrangements were beneficial in keeping costs down.[35]

Consultation responses

54. Respondents were evenly split on whether it was reasonably practicable for policy holders to be entitled to instruct any lawyer of their choice at any stage. A solicitor respondent argued that allowing a choice of solicitor from the outset would enable policy holders to enjoy meaningfully the freedom which the 1990 Regulations were intended to confer.

55. Other respondents considered that it was not reasonably practicable for a policy holder to be entitled to choose a lawyer at any stage. It was said that this would impose an increased burden on insurers to monitor the costs and quality of service of a multitude of different solicitors. One respondent was of the view that there should be a choice of solicitor from the outset provided that the solicitor charged a rate which was accepted by the insurers and did not result in increased premiums.

Discussion

56. If freedom of choice is to be meaningful, it has to be capable of being exercised as soon as it is apparent that the dispute will only be resolved by means of litigation and not just when proceedings are about to be raised. After the preparation for the pursuit or defence of a claim has been undertaken, many litigants will feel obliged to continue to instruct the solicitor selected by the insurer even though that would not be their first choice. One should not underestimate inertia. On the other hand, it is not unreasonable for an insurer to instruct a solicitor of the insurer's choice to ascertain if the dispute is capable of resolution without litigation. Thus the interpretation of Regulation 6 offered by the Financial Services Authority in 2010, referred to in paragraph 50 above, has much to commend it. In my opinion, that strikes the correct balance between the interests of the insurer in keeping legal expenses to a minimum and the interests of the insured in being able to select a solicitor of their choice. This is particularly so if the policy makes provision for an excess to apply should the insured select his or her own solicitor. The excess should

[34] Consumer Focus, *op cit* (2011), pages 26-29

[35] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 8, paragraph 6.3

compensate the insurer for the additional administrative costs which will be incurred by the instruction of a solicitor not on the insured's panel. It must always be borne in mind that the premium paid in virtually all BTE insurance policies is very low. The insured is not entitled to a Rolls Royce having paid for a Mini. At the end of the day the real issue is the rate at which the solicitor selected by the insured will be paid.

What must the insurer pay?

57. In *Brown-Quinn v Equity Syndicate Management Ltd*[36] an insurer had retained a panel of solicitors to act for its policy holders. Some policy holders wished to appoint solicitors who were not on the panel. The insurer refused to agree to this unless the solicitors agreed to charge no more than the hourly rates prescribed by the insurer's terms ("the non-panel rate"). The Court of Appeal held that the insurer's refusal would be a serious inhibition of policy holders' freedom to choose a solicitor, and thus contrary to the 1990 Regulations. The question of whether the insured were restricted to recovering the non-panel rate had to be decided according to the terms of the policy. Having regard to its terms, the insurer was obliged to pay at least the non-panel rate, but no more. The policy holders would therefore have to make up any shortfall if their chosen solicitors charged a higher rate.

58. In making its decision, the Court of Appeal followed the European Court of Justice's decision in *Stark v DAS Osterreichische Allgemeine Rechtsschutzversicherung AG*[37] in which it was held that the Directive did not require insurers in all circumstances to cover in full the insured's legal costs, provided that the insured's freedom of choice was not rendered "meaningless." That would be the case if the insurer's restriction on the payment of costs rendered *de facto* impossible a reasonable choice of representative by the insured.[38] Establishing this will require evidence that the remuneration offered by the insurer is so insufficient that it renders the freedom of choice meaningless.[39]

59. The research carried out by SLAB also identified that some BTE insurance policies gave more flexibility to policy holders to choose their own solicitor but at the expense of having to pay an increased excess. For example, the excess in one policy was £500 and in another £250, compared to the usual £50 excess.

Consultation responses

60. Some respondents considered that the policy holder should be entitled to choose a solicitor provided the solicitor was prepared to accept the insurer's terms. Others thought that the policy holder should be liable to make up any shortfall between the insurer's rates and the chosen solicitor's fees. Several insurers observed that by agreeing fee-charging structures with their panel solicitors, BTE insurers could monitor both costs and quality of service to their policy holders.

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[36] [2012] EWCA Civ 1633, allowing in part an appeal against a decision by Burton J.
[37] Case C-293/10 (2011)
[38] *ibid*, paragraph 33
[39] *Brown-Quinn,* per Longmore LJ at paragraph 29

61. One solicitor respondent considered that insurance premiums would inevitably rise if policy holders were able to choose any lawyer they wished without being subject to the cost constraints of a panel system. The ideal of free choice had therefore to be tempered by economic realities. Another respondent, a financial institution, foresaw insurers having to negotiate terms with solicitors on a case-by-case basis.

Discussion and recommendations

62. The outstanding problem as I see it is how, if the insured elects to instruct a solicitor of choice, that solicitor falls to be remunerated. Solicitors to whom BTE insurers refer cases tend to receive regular instructions from the insurers. In such circumstances it is hardly surprising that the solicitor's charge-out rates to the insurer tend to be lower than they would be if the level of instruction was minimal. In most walks of life there is a discount for bulk buying. Looked at from the perspective of the insurer, the premium which it will have charged for the policy will have, to some extent, been determined by the expenses which will be incurred should a claim arise. One such expense is the fees payable to the solicitor instructed. It might be thought unrealistic for the insurer to be obliged to meet open market rates. That could have the effect of driving premiums up to the point that BTE insurance cover becomes unaffordable. I believe that would be a retrograde step.

63. On the other hand, it would be unrealistic to expect a solicitor who does not normally receive instructions from the insurer and does not wish to develop such a practice to provide his or her services at the rates agreed between the insured and their panel solicitors.

64. **I recommend that where an insured exercises the right to instruct a solicitor of choice, and that solicitor and the insurer cannot agree rates, the difference between what the insurer pays its panel solicitors and what the solicitor of choice charges should be borne by the insured.** I note that this is consistent with the Court of Appeal's approach in *Brown-Quinn v Equity Syndicate Management Ltd.*[40]

65. **I further recommend that it is made clear in the Before the Event insurance policy that should the insured exercise the right to instruct a solicitor of choice rather than be represented by the insurer's choice of solicitor, he or she may be liable to pay any difference between the respective charges.**

Encouraging BTE insurance

66. As already noted in paragraph 8, the SCCR recommended that the Scottish Government should explore with insurance providers the scope for improving public awareness and increasing voluntary uptake of legal expenses insurance. Jackson LJ also recommended that positive efforts be made to encourage the take up of BTE insurance by small and medium-sized enterprises in respect of business disputes and by householders as an add-on to household insurance policies.[41]

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[40] [2012] EWCA Civ 1633

[41] Jackson LJ, *Review of Civil Litigation Costs: Final Report (2009)*, Chapter 8, Recommendation 7.1

67. The SCCR did not advocate that BTE insurance should become compulsory. I remain of that view. That is not to say that improvements cannot be made to the present system. Respondents were therefore asked to suggest ways in which the criticisms made of BTE insurance could be remedied. A number of respondents considered that measures could be taken to raise awareness of BTE insurance, increase transparency and otherwise improve BTE insurance products.

68. There are indications that consumers are often unaware that they have BTE insurance, or do not know what it covers. BTE insurance does not appear to be widely used. In 2007, funding from legal expenses insurance and third party funding combined accounted for only 4% of litigation funding in England and Wales, compared with 35% in Germany.[42] Indeed, reported growth in the legal expenses insurance market in recent years may have been driven instead by the uptake of ATE insurance, since prior to April 2013 an ATE insurance premium was a recoverable disbursement in England and Wales.

69. Consumer Focus Scotland found that around half of those surveyed had legal expenses insurance with many holding more than one policy, most commonly both home and motor insurance policies. The majority of those who had such insurance did not know what it covered. Common reasons for not having legal expenses insurance included that it had never been offered, the consumer either did not know about the product or understand what it covered, the consumer did not think that he or she would need it, or it was too expensive. Some respondents were sceptical about whether an insurer would pay out, or expressed concerns about the accessibility of information provided by insurers, in particular the use of small print and failure to use 'plain English'.[43] Only a small minority (5%) had experience of using legal expenses insurance. While the majority reported a positive experience in that they had obtained an outcome with which they were satisfied, others had not been able to make use of their policy.

70. The Scottish Government, in its 2011 report *A Sustainable Future for Legal Aid*, stated:

> *"We also propose to move closer to a system in which Legal Aid is seen as 'funder of last resort'. In many instances there are alternative sources of funding to legal aid that could have been used – including insurance and 'no win/no fee' arrangements. The Board already has discretion to refuse a civil legal aid application in situations where an applicant has 'other rights and facilities' that make it unnecessary for them to obtain legal aid - or where the applicant has a reasonable expectation of receiving financial or other help from a body of which they are a member. The proposal here is that the Board should review the verification of the information currently required under the existing provisions, in particular in relation to applicants' insurance policies."*[44]

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[42] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 55, paragraph 4.6

[43] Consumer Focus Scotland, *op cit* (2012), pages 9-13

[44] Scottish Government, *A Sustainable Future for Legal Aid* (2011), paragraph 30

Existing regulations entitle SLAB to refuse an application unless the applicant has been unsuccessful in enforcing or obtaining such rights, facilities or help, having taken all reasonable steps to do so.[45]

71. More broadly, SLAB has been considering how to ensure that legal aid is only used to fund civil actions where no alternative funding source exists, thereby ensuring that scarce resources are targeted on those applicants and actions that would not otherwise be able to proceed. This includes the use of legal expenses insurance to fund, or part-fund, some cases that are currently funded by legal aid.

72. The Competition Commission is currently investigating the transparency and complexity of add-on products and services sold with motor insurance policies. It expects to publish its provisional findings in September 2013.

Consultation responses

73. Virtually all respondents considered that BTE insurance should be encouraged. Several respondents, including several insurers, saw BTE insurance as a means of increasing access to justice. Some respondents observed that this was of particular benefit for those individuals who would not be eligible for legal aid. Several respondents recognised shortcomings in BTE insurance. Other respondents considered that BTE insurance had a place as one of a number of public and private funding mechanisms. The overwhelming majority considered that BTE insurance should remain optional rather than compulsory.

74. One solicitor respondent considered that BTE insurance did not provide an adequate solution to the present funding difficulties of litigants in Scotland. Often the level of insurance provided was inadequate and access to solicitors was restricted to panel lawyers.

75. A number of respondents considered that there was a need to increase awareness of BTE insurance. It was observed that many people did not know that they had BTE insurance or what it covered. The need for public legal education involving a variety of stakeholders was cited, as was the need for greater awareness amongst solicitors. It was also suggested that insurers could take greater steps to publicise the product. One proposal was that it should become mandatory for solicitors to ascertain at an early stage whether a client is covered by suitable BTE insurance.

76. Some respondents suggested that greater transparency in the information provided would benefit current and potential policy holders. One solicitor considered that insurers should be obliged to make greater efforts to clearly explain the coverage of legal expenses insurance enjoyed by policy holders. Another argued that the policy holder should be fully advised of the terms on which the panel solicitor had been instructed. A respondent which represents personal injury solicitors considered that policy holders needed to be fully aware of the conditions attached to the insurance when they acquired it. Other respondents suggested giving policy holders a greater choice of solicitor. Other respondents raised concerns about the extent of cover. Several considered that the financial limit ought to be

[45] Civil Legal Aid Regulations 2002 (SSI 2002/494), Regulation 16

increased, in particular to ensure that it was sufficient to cover both parties' expenses. One solicitor respondent observed that cover could be as low as £15,000 - sufficient to commence litigation but usually quite inadequate to bring it to a conclusion.

77. Others raised concerns that cases were being abandoned because cover was being exceeded. A respondent which represents personal injury lawyers observed that the low level of cover could restrict the work that could be done, for example, the instruction of expert reports. One suggestion was that insurers should offer more flexible policies, for example, allowing policy holders to purchase additional or top-up cover. It was observed that it could be difficult for consumers to make informed choices about the best cover for them since legal expenses insurance was often 'bundled' with other financial products. A high level of fragmentation was noted, with different policies covering different disputes and up to different values.

Discussion and recommendation

78. Although solicitors have a duty to advise clients who may be eligible of the existence of the legal aid scheme,[46] there is currently no obligation for a solicitor to explore whether a client has a BTE insurance policy that could be used to fund their litigation. Clients are assumed to be aware of any policy they may have purchased. However, the research by Consumer Focus Scotland suggests that consumers are often unaware of what their policy covers, or if in fact they have legal expenses cover at all.

79. **I therefore recommend that solicitors should be under an obligation to explore with their clients all potential funding options, including the possibility that the client may be covered by an existing Before the Event insurance policy, at the time when the solicitor is first instructed. In addition, solicitors should be obliged to write to clients with their reasoned recommendation as to which funding option best suits the client's position. The letter should specify all other forms of funding for which the client might qualify, such as legal aid, speculative fee agreements or damages based agreements and specify why, in the opinion of the solicitor, the method recommended is the best funding mechanism for the client.**

[46] Alan Paterson and Bruce Ritchie, *Law, Practice and Conduct for Solicitors* (2006), page 227

CHAPTER 7 SPECULATIVE FEE AGREEMENTS

1. A speculative fee agreement ('SFA') is a type of 'no win no fee' funding arrangement in terms of which an enhanced fee will normally be charged in the event of success. The success fee is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. This contrasts with damages based agreements whereby the success fee is calculated as a percentage of the client's damages or recovered funds. Under both SFAs and damages based agreements, no fees or, very occasionally, lower fees are charged by the client's solicitor if the case is lost.

2. Acting on a speculative basis has been seen as a way of providing access to justice for those who neither qualify for legal aid nor have the resources to fund a litigation privately. Indeed, as Paterson and Ritchie have observed, "*it has long been considered to be in the highest traditions of the Scottish profession to assist impecunious pursuers by undertaking certain forms of litigation (primarily personal injury cases) for the normal fee if the case is successful and without fees if the case is lost.*"[1]

Scotland

3. Following the introduction of section 61A of the Solicitors (Scotland) Act 1980[2] solicitors may agree to act on a speculative basis under three different types of speculative funding agreement: Type I – a solicitor may agree to accept party and party expenses with a success fee payable by their client of up to 100% of the fee element of the judicial account.[3] Type II – a solicitor may agree to accept agent and client expenses in the event of the case being successful, without any percentage increase for success. 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. Type III – a solicitor may enter into a written fee agreement with their client with a stated hourly rate and a success fee calculated as a percentage uplift of that rate. The agreement will provide that the judicial account is prepared on an agent and client basis.

4. Success fees are not recoverable from the unsuccessful opponent. Should they be successful, litigants who have entered into an SFA with their solicitors are therefore required to pay success fees out of their own funds. In practice, success fees are often taken out of funds recovered in the litigation. For this and other reasons, including the potential incentives that SFAs may offer lawyers, some commentators have argued that such agreements may not always be in the best interests of the client.[4]

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[1] Alan Paterson and Bruce Ritchie, *Law, Practice and Conduct for Solicitors* (2006), page 232

[2] Solicitors (Scotland) Act 1980 c. 46, s 61A was inserted by The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 c. 40, s 36

[3] 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.

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

5. Many solicitors have imposed a voluntary cap on the success fees that they charge, for example, by guaranteeing in their SFA that no more than 20% or 25% will be deducted from the monetary award.

6. While clients may be charged no fees by their own solicitor under an SFA if their case is unsuccessful, they may still be liable for their opponents' expenses. Depending on the agreement with their solicitor, unsuccessful litigants may also be liable for their own outlays. It may be possible for litigants to take out After the Event ('ATE') insurance to cover themselves against the risk of being found liable for their opponent's expenses. Like success fees, the ATE insurance premium is not recoverable from the unsuccessful party and must be absorbed either by the client or by his or her solicitor. Paterson and Ritchie have concluded that clients who are eligible for legal aid *"may well be better off to rely on it rather than a speculative fee, especially if there is to be a fee uplift, if for no other reason than the fact that legally aided litigants who lose their cases can often get their liability to pay the other side's expenses modified – sometimes to nothing at all."*[5]

7. Research published in 1998 on the funding of personal injury litigation in Scotland found that SFAs were relatively rare.[6] By 2009, however, a large proportion of actions for personal injury in Scotland were reportedly funded on the basis of SFAs of one type or another.[7] This was despite the failure of Compensure, (an ATE insurance scheme set up by the Law Society of Scotland in 1997 and withdrawn in 2003),[8] the reportedly high cost or unavailability of ATE insurance in Scotland and the fact that success fees and ATE insurance premiums are not recoverable from an unsuccessful opponent.

Speculative fee agreements in practice

8. When we issued our Consultation Paper in November 2011 there was little systematic evidence available on the use of SFAs in Scotland, the prevalence of different types of SFAs , and whether problems had emerged that now required to be addressed. Nor was there information on how success fees were charged, either with respect to the amount or the basis of the charge. It was not known, for example, whether and to what extent success fees may be modified by an assessment of the risk, by the complexity of the case, by the value of the claim or damages recovered, or by client characteristics.

9. While we were aware that speculative funding may promote access to justice, we understood that this may very well depend on the availability of reasonably and proportionately priced ATE insurance. Information on the availability of such insurance in Scotland was very limited. While details of 'Compensure' had been documented,[9] there was only anecdotal information to suggest that the present cost of ATE insurance in Scotland was higher than in England and Wales. In some cases, and particularly in clinical

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[5] A Paterson and B Ritchie, *op cit* (2006), pages 232-233

[6] John Blackie et al, *Funding Issues in Personal Injury Litigation* (1998)

[7] As reported by respondents to the Consultation Paper of the Scottish Civil Courts Review - See *Report of the Scottish Civil Courts Review* (2009), Volume 2, page 95

[8] See D Hartley, 'CFAs Insurance: Lessons of Scotland - an Insurer's Perspective,' *Journal of Personal Injury Law* 4 (2002), pages 399-404. See also, *The Lawyer* (25 February 1997)

[9] See D Hartley, *op cit* (2002)

negligence cases, we were told that an ATE insurance premium could equate to 40-60% of the amount of cover sought, and even then it was available to only a few practitioners. Since the premium was not recoverable, and since many pursuers would be neither willing nor able to assume the risk of paying their opponents' expenses, it was suspected that potential litigants were deterred from taking advantage of the availability of SFAs to vindicate their rights.

10. Although evidence as to the affordability of ATE insurance premiums in Scotland was anecdotal, a number of explanations were put forward for their high cost. Some attributed it to the small size of the Scottish litigation market. There was also a reticence to buy ATE insurance where there were good prospects of success, which was exacerbated by the non-recoverability of the premiums in Scotland. Hence, ATE insurance cover was more often obtained in cases with more limited prospects of success. Whether 'cherry picking' was avoidable in such situations is questionable since solicitors may have been unwilling to put unnecessary financial burdens on their clients. Indeed, the failure of the Law Society of Scotland's initiative to provide reasonably priced insurance through its Compensure scheme was attributed by some to similar concerns and practices.[10]

Scottish Civil Courts Review

11. The Scottish Civil Courts Review ('SCCR') considered the introduction of recoverable success fees and ATE insurance premiums in Scotland, with a view to broadening access to justice. It noted that several investigations, including Jackson LJ's Review of Costs and Funding of Civil Litigation in England and Wales, were then underway. It concluded that it would be premature to recommend any changes to the current regime in Scotland before Jackson LJ reported.[11] By the time we issued our Consultation Paper, Jackson LJ had completed his review, many of his recommendations had been accepted by the UK Government and a majority of them had been included in the Legal Aid, Sentencing and Punishment of Offenders Bill that was proceeding through the legislative process at that time.

England and Wales

12. In England and Wales the nearest equivalent to Scotland's SFA is the conditional fee agreement ('CFA'), which is enforceable provided the conditions set out in section 58 of the Courts and Legal Services Act 1990[12] are met. CFAs are a type of 'no win no fee' agreement whereby a success fee is calculated, in part or whole, as an uplift on the lawyer's hourly rate or base fee[13] should the case be successful. The success fee is designed to compensate solicitors for not receiving any fee in unsuccessful claims. While these provisions were initially restricted to personal injury, insolvency and cases brought under the European

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[10] *ibid*

[11] *Report of the Scottish Civil Courts Review* (2009), Volume 2, page 104

[12] c. 41; section 58 was brought into force by the Conditional Fee Agreements Order SI 1995/1674

[13] The base fee covers overheads as well as profit, excluding disbursements. The Conditional Fee Agreements Order 1995 provided that lawyers could claim for "advocacy or litigation services" in a successful case up to a maximum of 100% of base costs. The maximum success fee has remained at 100% ever since.

Convention on Human Rights,[14] they were later extended to cover all civil proceedings[15] with the exception of certain family proceedings.[16]

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 clinical negligence) and many other categories of civil actions that involved monetary claims. At the same time, it proposed extending CFAs to replace legal aid funding except in those cases that were in the public interest, such as housing claims and petitions for judicial review.[17] Following consultation, it concluded that CFAs may be more attractive to claimants if ATE insurance premiums and success fees were recoverable from the losing party. This was based partly on the view that deducting them from damages may be a denial of a claimant's rightful compensation and partly on the need to compensate potential litigants for the withdrawal of legal aid. The Access to Justice Act 1999[18] ('the 1999 Act') therefore provided for the recoverability of ATE insurance premiums and success fees from unsuccessful opponents.

14. Since then, CFAs have become a standard method of funding litigation in England and Wales whenever costs are recovered.[19] Hence, they are not normally available in claims before an employment tribunal, but are particularly appropriate in personal injury cases. As Michael Zander has observed, more claimants were attracted to CFAs when success fees and ATE insurance premiums became recoverable, since this made such agreements relatively risk free.[20]

15. The Law Society of England and Wales had previously recommended that a voluntary cap should be applied to success fees to ensure that total deductions from claimants would not be greater than 25% of the damages recovered. This was incorporated into the Law Society's model CFA. When success fees became recoverable, however, the model was abolished since claimants were no longer considered to be in need of this protection.

16. What followed the recoverability of success fees and ATE insurance premiums in England and Wales has been documented elsewhere in substantial detail.[21] The reforms encouraged the initial growth of claims management companies and were responsible for a large increase in the cost of litigation for defendants, both with respect to adverse costs orders and negotiated settlements. The result was a wave of 'satellite litigation' whereby

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[14] Conditional Fee Agreements Order 1995 SI 1995/1674

[15] Conditional Fee Agreements Order SI 1998/1860

[16] 1990 Act s 58(a)(1)

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

[18] c. 22

[19] Paul Fenn et al, *The Funding of Personal Injury Litigation: Comparisons over time and across jurisdictions*, DCA Research Series 2/06 (2006)

[20] Michael Zander, *Cases and Materials on English Law*, (2007), page 635

[21] See, for example: Michael Zander, 'Where are we heading with the funding of civil litigation?' Civil Justice Quarterly, Volume 22 (2003); *Report of the Scottish Civil Courts Review* (2009), Volume 2, pages 96-98 and pages 114 ff; and Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 3 'The costs rules and the Costs War'

cases were fought not on substantive issues, but on issues of costs.[22] Many of the battles between defendants' insurers and claimants focused on technicalities relating to the validity of CFA agreements.

17. Jackson LJ recommended in his final Report that success fees should cease to be recoverable. His recommendation was oriented towards returning to the position that preceded the enactment of the 1999 Act. In his view, recoverability had released claimants and their solicitors from the discipline imposed by paying success fees. He reasoned that if success fees were no longer recoverable, this would give claimants a financial interest in controlling the legal costs incurred on their behalf. To regulate the amount taken from damages, he recommended imposing a cap on success fees set at 25% of the damages (other than for future care and loss) in personal injury cases. This would restore the voluntary cap recommended by the Law Society of England and Wales prior to the implementation of the 1999 Act, albeit now as a compulsory measure. To compensate claimants for the deduction from damages he also recommended a 10% increase in general damages.[23]

18. Likewise, Jackson LJ recommended withdrawing the recoverability of ATE insurance premiums in judicial review and in personal injury, clinical negligence and defamation cases, as well as the self-insurance element by membership organisations equivalent to an ATE insurance premium. In its place, he recommended the introduction of a qualified one way costs shifting regime whereby defendants would pay successful claimants' costs but each side would bear its own costs if the claimant was unsuccessful.[24] Indeed, Jackson LJ observed that recoverability of ATE insurance premiums was itself a form of one way costs shifting, albeit one which had been represented to him by the insurance industry as a very expensive version.[25]

19. Jackson LJ's recommendations were implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the 2012 Act').[26] In personal injury claims at first instance, the success fee is now capped at 25% of damages awarded for pain, suffering, and loss of amenity and pecuniary loss, other than future pecuniary loss, and net of any sums recoverable by the Compensation Recovery Unit, inclusive of VAT.[27] For all other proceedings[28] the maximum success fee that a solicitor can charge remains 100% of the base cost.[29]

20. As far as ending the recoverability of success fees and ATE insurance premiums is concerned, the 2012 Act provides that a costs order may not require payment by one party of a success fee payable by another party under a CFA.[30] Nor, with certain exceptions, may it

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[22] See, for example, *Callery v Gray* [2002] UKHL 28 and *Halloran v Delaney* [2002] EWHC 9209

[23] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Executive Summary, paragraphs 2.1-2.8

[24] *ibid*

[25] Qualified one way costs shifting is discussed in more detail in Chapter 8.

[26] c. 10

[27] The Conditional Fee Agreements Order SI 2013/689, articles 4 and 5.

[28] except those under Environmental Protection Act 1990 c. 43, s 82

[29] *ibid*, article 3

[30] 2012 Act, s 44(4), substituting new section 58(6) into the Courts and Legal Services 1990 Act. Transitional arrangements have been made.

require payment in respect of the premium of a costs insurance policy.[31] Such a premium may however be recovered in certain clinical negligence proceedings but only to the extent that it relates to the costs of expert reports on liability or causation.[32] These provisions came into effect on 1st April 2013,[33] with the exception of proceedings for damages for mesothelioma (pending further consultation on these provisions' likely effect); publication and privacy proceedings (pending introduction of a new costs protection regime[34] – currently expected in October 2013); and certain categories of insolvency proceedings (expected to come into force in 2015).[35] Success fees and ATE insurance premiums therefore continue to be recoverable in these categories of litigation, for the time being. The Lord Chief Justice in *Simmons v Castle*[36] confirmed that general damages would increase by 10% from 1 April 2013.

Consultation responses

21. In our Consultation Paper we asked whether there were any aspects of SFAs that required regulation. More specifically, we asked what the maximum uplift for success fees should be and whether there should be a cap on success fees expressed as a percentage of damages or monetary award. We also asked whether success fees and ATE insurance premiums should be recoverable in Scotland and, if so, under what circumstances.

Regulation

22. A number of respondents were of the view that SFAs required no regulation. They argued that since success fees are not recoverable from unsuccessful opponents in Scotland, such agreements are primarily a matter for pursuers and their lawyers. As one firm of law accountants remarked, interference with the market may only be justified if it protects the consumer of legal services against inappropriate charging practices. It observed that consumer protection may be more appropriately achieved by requiring legal service providers to indicate to their clients that they may be entitled to legal services under a Before the Event ('BTE') insurance policy or legal aid, or that it may be possible to find the same services provided at a lower price elsewhere.

23. Many more respondents were of the view that regulation was necessary but that the present regulatory regime was fit for purpose. Firstly, strict duties, which were capable of protecting litigants entering into SFAs, were already imposed on solicitors by the Law Society of Scotland and on counsel by the Faculty of Advocates. The Faculty of Advocates, for example, observed that while there may be an inherent conflict in any fee agreement, this was countered by professional obligations. Secondly, a number of respondents, including

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[31] Defined as "a policy insuring against the risk of the party incurring a liability in those proceedings": section 46(5).

[32] 2012 Act section 46(1), substituting new section 58C into the Courts and Legal Services 1990 Act, and the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations SI 2013/739

[33] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order SI 2013/77

[34] As recommended by Leveson LJ following his recent *Inquiry into the Culture, Practices and Ethics of the Press*

[35] *ibid*, article 4

[36] [2012] EWCA Civ 1288

the Law Society of Scotland, observed that the ability to require the taxation of a solicitor's account in relation to the overall reasonableness of the fee was sufficient regulation. Indeed, the Law Society of Scotland reported that these provisions appeared to be working well. Several other respondents agreed that there was no evidence to the contrary. In their view no additional regulation was called for until such time as there was evidence to the contrary.

24. While respondents were largely positive about the contribution of SFAs to Scotland's civil justice system, some raised issues with regard to: deducting fees from awards of damages; conflicts of interests; and informed choice.

Deduction from damages

25. A number of respondents commented on the amount of damages that a successful personal injury pursuer may eventually receive after deduction of the success fee under an SFA. They observed that this was frequently a significant impediment to settlement. It was said that speculative fees were responsible for inhibiting access to justice for injured and disabled people, particularly when contingency fee agreements were also available via claims management companies associated with firms of solicitors.

26. Others observed that any system that encourages deductions from victims' damages strikes at the heart of the principle upon which awards of damages are based, namely, restoring victims to the position in which they would have been were it not for the event giving rise to their claim for damages. Some respondents argued that the success fees that pursuers are required to pay under SFAs are necessary to compensate solicitors not only for the risk taken by them but also for the low level of judicial expenses available in Scotland. They recommended that one way to deal with high success fees was to raise the level of judicial expenses. Some also suggested that capping success fees as a percentage of damages or funds recovered may be a way of protecting pursuers.

Conflicts of interest

27. Respondents alerted us to several ways in which SFAs may give rise to potential conflicts of interest between solicitors and their clients. The first was in relation to the 'no win no fee' aspect of SFAs. A solicitor might wish to settle a case for less than the claim is worth on the basis that this guarantees success and, therefore, a fee. The second was in relation to the success fee itself. For example, if a success fee was agreed on the basis of a solicitor's estimate of the prospects of success, it could be in the solicitor's interest to underestimate the prospects of success in order to increase the success fee. Similarly, solicitors might be reluctant to settle at an early stage in the proceedings on the basis that the fee which they could charge, and upon which the success element was calculated, had not been maximised. A member of the judiciary observed that under an SFA, the longer the action proceeds, the greater is the stake of the solicitor in the case.

28. Many respondents were of the view that conflicts of interest could be taken care of by the professional obligations presently incumbent on solicitors and advocates in Scotland. Some argued that conflicts of interest were inherent in any fee agreement and there was no requirement for new regulation of SFAs. Where commercial clients were involved, most considered that regulation was unnecessary. Market forces would ensure that there was no

abuse and, in any case, commercial clients were themselves increasingly interested in aligning fee agreements with success.

29. Nevertheless, several acknowledged that non-commercial clients may be in need of protection. Since success fees are not recovered from unsuccessful opponents, the client is ultimately liable for the payment of the whole fee.

Informed choice

30. Respondents were largely agreed that more should be done to ensure that clients understand the nature and impact of different SFAs. They observed that there was little clarity as to how such agreements are formulated or whether they are modified in accordance with certain aspects of the case.

31. Indeed, in one firm's view, there are as many types of SFAs in Scotland as there are law firms offering them, each one with different provisions applied in different ways. This rendered the term 'no win no fee' quite meaningless and provided potential litigants with little guidance as to the key elements of any funding agreement, such as:

- Will the arrangement extend to litigation or only to negotiated settlement?
- What indemnity is in place to protect the client against liability for the other side's expenses and who will pay the premium?
- How much will be payable if the case is successful and how much if it is unsuccessful?
- Who will fund the outlays as the case progresses and who will be liable for any unrecovered outlays?

Unless this basic information is readily available in a standardised form, it was likely that the potential litigant will find it difficult, if not impossible, to make an informed choice.

32. One firm advised that it would be helpful if the Law Society of Scotland could provide model agreements for each type of SFA. A member of the judiciary saw some force in insisting that certain aspects of speculative arrangements were spelled out for clients in bold print. Other respondents looked to the Law Society of Scotland for regulation of all SFAs.

Level of maximum success fee

33. At present, the maximum success fee in Type I SFAs is 100% of the fee element of a judicial account prepared on a party and party basis. There is no provision for a success fee in Type II agreements. There is no limit on the amount by which a solicitor can increase the hourly rate to reward success in Type III agreements. Most respondents appear to be have addressed the question of the appropriate level of a maximum success fee in relation to Type I SFAs. As will be discussed, this does not appear to be the SFA of choice amongst Scottish solicitors.

34. A minority of respondents did not favour any restriction on the level of the success fee, whether by statute or regulation. They argued that success fees should be governed by

competition rather than regulation as long as it was absolutely clear and transparent to the client from the outset *"so that the client can shop around for the best deal."* They maintained that it was unnecessary to regulate success fees by the introduction of a maximum when market forces were in operation. Indeed, they contended that if litigations of high risk and complexity were to be taken on by solicitors, a maximum may only impede access to justice. One law accountants' firm took the view that subject to safeguards being in place, no maximum was appropriate under a Type III agreement, although another firm of law accountants preferred to set a maximum at 100% of the account, prepared on an agent and client basis.

35. With regard to Type I SFAs, a majority of respondents, including the Law Society of Scotland, were of the view that the maximum success fee should remain at 100% where the judicial account is prepared on a party and party basis. While some respondents regretted the inevitable deduction that would be made from damages, they observed that a success fee of 100% where the account is based on a party and party basis was necessary until the gap between judicial expenses and actual legal costs was closed. Indeed, one firm suggested that 100% may be insufficient to provide access to justice under certain circumstances, for example, in fatal cases or where multiple pursuers were involved.

Capping success fees

36. The majority of respondents sought a cap on the amount that could be deducted from damages as a success fee, although it was not always clear whether this was in relation to personal injury actions alone or all cases. Some respondents made reference to the 25% voluntary cap placed on success fees by the Law Society of England and Wales, or to the then proposed compulsory cap, now imposed following implementation of the 2012 Act, as discussed in paragraph 19 above. Other respondents made reference to the 25% cap under Compensure, the ATE insurance scheme initiated by the Law Society of Scotland.

37. While the majority of all respondents favoured a cap on success fees expressed as a percentage of damages, there was little agreement as to whether damages awarded with respect to future care, future loss or both should be excluded. Most respondents who were in favour of a cap suggested 25% as the maximum percentage of damages which could be taken as a success fee, but made no reference to what should be included or excluded. One respondent specified that the cap should be calculated on *solatium*[37] alone and several more advised that the cap should be calculated on damages that excluded future loss and care. Only a few respondents specified that the cap should be calculated with reference to all heads of damages, although those that did were more likely to suggest a lower cap, such as 15% of all damages. Another respondent, representing a large personal injury practice which normally acts for pursuers, suggested that it should be set at an even lower percentage, namely 10%, and this should exclude any award of damages for future losses and care costs.

38. While several respondents were in favour of capping success fees, they warned that this was unlikely to increase access to justice, especially in relation to low and middle value

[37] Damages for pain and suffering.

claims, unless something was done to address the rate of recoverability of judicial expenses. In principle, they were in favour of a cap, since it would protect the value of an award for individual pursuers. In practice, however, they warned that SFAs were unlikely to be attractive to solicitors, especially with respect to low and middle value claims, as long as judicial expenses remained at 50-60% of the true cost of litigating.

39. A minority of respondents, including two firms representing commercial clients, a law accountancy firm and the Law Society of Scotland, saw no reason to cap success fees. In the context of commercial litigation, they argued that if a commercial organisation chose to agree a success fee with its lawyers for conducting a complex and high risk litigation, there was no justification for preventing them from doing so. Indeed, if a cap were to be introduced, it might deter solicitors from taking on the risk. In the commercial context, the market could properly determine what is acceptable and parties should be free to enter into whatever agreement they thought appropriate, without regulation.

40. While some respondents acknowledged a need to draw a distinction between commercial clients and individuals, the Law Society of Scotland was of the view that success fees should be left to the market in all cases. It observed that the 25% cap imposed by Compensure on success fees was never a practice rule of the Society but was part of the promotion of Compensure. It was confident that there were sufficient safeguards available to the general public, such as the ability to challenge excessive fees.[38]

Recoverability

Success fees

41. A minority of respondents thought that success fees should be recoverable, albeit with some qualifications. Several respondents noted that objections to recoverability in England and Wales had been mainly on the grounds that success fees were very high and unpredictable. They observed that the solution settled upon in England and Wales, namely, that the withdrawal of recoverability from all cases should be accompanied by a 10% increase in general damages, had come in for considerable criticism on the grounds that it would help only those with very high value damages and would penalise the rest.

42. Respondents who thought that success fees should become recoverable did so on the grounds that success fees should not be funded out of damages. However, most of them suggested that recovery should be capped or conform to a scale. So, for example, one firm suggested that no more than 50% of success fees should be recoverable while several others proposed that recoverability should be capped at a percentage of damages. This would give litigants a financial stake in the litigation and may also promote competition, since pursuers would thereby retain an interest in instructing solicitors that commanded reasonable fees.

43. One commercial firm of solicitors made a special case for introducing the recovery of success fees in insolvency litigation. It referred to the concern of insolvency practitioners that the withdrawal of recoverability of ATE insurance premiums and success fees in England and Wales could restrict access to justice there. It observed that insolvency

[38] Solicitors (Scotland) Act 1980 c. 46, s 39A

litigation must be seen quite apart from personal injury cases. It explained that insolvency practitioners are officers of the court and have a statutory duty to realise assets and thereafter distribute them to creditors. In many cases this involves pursuing directors who have been guilty of malfeasance/wrongful trading, or pursuing third parties in relation to unfair preferences/gratuitous alienations. It observed that it is increasingly the case that no funds are available when the insolvency practitioner is appointed. If no creditor is prepared to fund the litigation, then insolvency practitioners may very well seek an SFA with a solicitor and take out ATE insurance to protect their position should there be an award of expenses against them. The solicitor will not only be taking a risk with regard to the merits of the case but, unlike personal injury actions where defenders often have considerable financial resources, solicitors will also have to face the risk of there being insufficient assets to meet an award of expenses at the end of the action. The response also noted that a 10% increase in damages is irrelevant to insolvency litigation.

44. The large majority of respondents to this question did not think that success fees should be recoverable, although their grounds were often quite different. Insurers and many of the solicitors' firms that usually represent defenders, as well as one firm of law accountants, a bar association and the Faculty of Advocates, were of the view that success fees were a private contractual matter between successful pursuers and their solicitors, and were therefore not the responsibility of defenders. It would be inappropriate for defenders to meet different levels of fees that were not of their choosing. They also thought it unreasonable to require unsuccessful parties to pay a premium that reflected the degree of risk that pursuers' lawyers had elected to take on.

45. Some respondents considered that a provision to recover success fees would undermine the basic principle underlying the recovery of expenses in Scotland. The Faculty of Advocates observed that success fees are charged according to one of several types of agreement. The success fee may be an uplift of up to 100% of the fee element of a judicial account prepared on a party and party basis but may equally be a percentage uplift of an agreed hourly rate in an account prepared on an agent and client basis. If success fees were to be recovered, this would run contrary to the general rule that an award of expenses is calculated on a party and party basis unless otherwise specified by the court. Some members of the judiciary agreed. If the court is to retain the principle that only expenses which are reasonable for the proper conduct of the cause are recoverable, then this cannot be reconciled with additional expenses that are dependent on the particular fee agreement that the successful opponent has elected to enter into.

46. Many respondents based their opposition to the recovery of success fees on the grounds that litigants should take 'ownership' of the litigation. If recovery was to be introduced, claimants would be left with little incentive to minimise the cost of litigation. This would leave solicitors free to drive up costs. Respondents observed that the present Scottish system requires solicitors to engage with their clients and to take proper instructions from them.

47. Most respondents opposed to the recovery of success fees made reference to the experience in England and Wales. What had happened there provided a salutary lesson. The Law Society of Scotland, the Faculty of Advocates, as well as insurers and pursuers'

solicitors alike identified the responsibility of success fees for satellite litigation and consequent uncertainty, as well as for damaging the reputation of the legal profession. Others observed that it had fuelled a 'litigation culture' and frequently put obstacles in front of settlement. Still others reminded us that the recovery of success fees had been introduced in England and Wales when legal aid was removed from most personal injury actions. It was intended to cover the costs of losing cases that solicitors might otherwise have been compensated for out of publicly funded legal aid, and to cover risk. It was never intended to provide an additional source of income and profit for both lawyers and introducers, under zero risk conditions, which it had become.

48. Finally, while they could see both the merits and demerits of success fee recovery, some respondents considered it desirable for Scotland to align its position with that of England and Wales following implementation of the 2012 Act by not allowing the recovery of success fees.

ATE insurance premiums

49. A minority of respondents, representing trade unions, several personal injury pursuer solicitors, and a firm representing both insurers and personal injury pursuers, were in favour of allowing the recovery of ATE insurance premiums in Scotland. They observed that ATE insurers were limiting the availability of their product to a few firms of solicitors and claims management companies, and that the premiums offered by ATE insurance providers currently preclude insurance for complicated cases due to the high cost and non-recoverability of premiums. They advised that the introduction of ATE premium recovery would enable injured people to enjoy the benefit of a level playing field with defenders' insurers, some of which were amongst the largest corporations in Europe. It would also afford pursuers protection against liability for expenses as well as provide them with indemnity for outlays, particularly with regard to experts' fees, which could be very expensive.

50. A number of respondents were in favour of recovery in specific cases. One firm limited its response to insolvency litigation and argued that recovery would ensure that payment of non-recoverable insurance premiums would no longer deplete the sums that were rightfully due to creditors. Another firm was in favour of recovery for professional negligence and, in particular, clinical negligence cases. It argued that the choice of experts in these cases was crucial, and the most appropriate experts could be very costly. Pursuers required indemnity in respect of these outlays and the price of ATE insurance in clinical negligence cases, when it could be obtained, was now prohibitive. Indeed, while the Law Society of Scotland was not in favour of allowing the recovery of ATE insurance premiums in general, it raised the possibility of making an exception for clinical negligence cases.

51. Those in favour of recovery argued that if injured people or creditors had to pay an insurance premium to enforce their right to restitution, then the premium should be recovered from the unsuccessful party. If it was reasonable for parties to take out such insurance to vindicate their rights, then it was also reasonable to recover the cost of the premium. Likewise, if defenders acted unreasonably, they should pay the premium. Indeed, it was surmised that recovery of ATE insurance premiums may encourage defenders to comply with pre-action protocols with respect to personal injury claims and

avoid litigation altogether. Nevertheless, several respondents acknowledged the level of the premiums, as well as the costs wars and satellite litigation that had been generated by the recovery of ATE insurance premiums in England and Wales, and therefore suggested that the Lord President, or an advisory body, should set limits on the level of recovery in Scotland. They also observed that if such a system was introduced in Scotland, there would be a compelling case for trade unions to recover an appropriate fee to reflect the risk or level of insurance provided by them for cases which they underwrite.

52. A majority of respondents were not in favour of recoverability. They included defenders and the solicitors who represented them, but also some solicitors who normally act for pursuers. Many who had argued against the recovery of success fees argued against the recovery of ATE insurance premiums, and on similar grounds. If the principle was to be maintained that only such expenses as are reasonable for the conduct of the cause in a proper manner may be recovered, this could not be reconciled with the recovery of additional expenses where solicitors and clients have elected to enter an SFA. This, so they argued, was a private contractual matter between clients and their solicitors. It was neither fair nor reasonable for defenders to pay a premium to remove from pursuers, or mitigate for them, the risk of litigation. They observed that the present system, whereby the successful party usually recovers judicial expenses, has well developed safeguards to ensure that the expenses recovered correlate with work reasonably undertaken in the conduct of litigation. They reported that in England and Wales, especially since the decision in *Rogers v Merthyr Tydfil County Borough Council,*[39] it had become almost impossible for defendants to challenge the reasonableness of ATE insurance premiums which meant that there was little incentive for claimants to shop around or for ATE insurance providers to be competitive.

53. Several respondents, mainly representing the interests of defenders, considered that litigants should contribute to their litigation costs on the grounds that this would incentivise them to take control of them. They observed that litigants who have taken the precaution of purchasing BTE insurance cannot recover their insurance premiums. They did not see why ATE insurance should be any different. Other respondents were concerned that the recovery of ATE insurance premiums had increased the overall cost of litigation, even if the final burden was on defendants.

54. Finally, some respondents referred to Jackson LJ's conclusions that the recoverability of ATE insurance premiums was an inefficient form of costs shifting and that ATE insurance had done little to promote access to justice since ATE insurance providers were still unwilling to provide cover for cases with limited prospects of success. A few respondents thought it was desirable for Scotland to align its position with that of England and Wales following implementation of the 2012 Act by not allowing the recovery of ATE premiums, as they had argued with respect to success fees.

[39] [2006] EWCA 1134, in which the court said (*obiter*, paragraph 106) that once it was concluded that an ATE premium had been necessarily incurred, "*principle and pragmatism together compel the conclusion that it was a proportionate expense*."

Discussion

Access to justice and SFAs

55. A large proportion of all personal injury actions, as well as an increasing volume of commercial and insolvency litigation, is funded in Scotland under SFAs or some form of 'no win no fee' agreement. Most respondents to the Consultation Paper, including agents for pursuers, defenders and corporate litigants, agreed that SFAs had been responsible for promoting access to justice, albeit with some qualifications. Likewise, the Faculty of Advocates observed that a significant number of cases are now dealt with by counsel on a speculative basis and reported that several important litigations, which would not otherwise have been able to come to court, had been litigated on this basis.[40] Nor is the use of SFAs limited to cases in which the pursuer's prospects of success are very strong. We were told that trade unions require that cases assessed as having more than a 40% chance of success are undertaken on a speculative basis by the solicitors whom they instruct. Solicitors who normally act for pursuers reported that they take on cases on a speculative basis which they assess as having more than a 50% chance of success.

56. Several reasons may be given for this growing dependence on SFAs , all of which are likely to continue, if not strengthen. While legal aid is still available for personal injury actions in Scotland, unlike in England and Wales, it is nevertheless restricted. The Scottish Legal Aid Board, in its response to the Review, pointed out that as part of the Scottish Government's published proposals on a sustainable future for legal aid, it is anticipated that it will be the funder of last resort.[41] As such, legal aid funding should be focused on cases where other sources of funding are not reasonably available. Accordingly, it considers that a greater use of SFAs may assist this objective and is therefore welcomed. The rise of SFAs as a mode of funding has also been occasioned by a decline in trade union membership in Scotland, which had provided an alternative to legal aid funding in the past.[42] It can therefore be predicted with a fair degree of confidence that, in the future, access to justice will become increasingly reliant on SFAs or on some other form of 'no win no fee' funding mechanism, especially for private individuals. Ensuring that SFAs and other forms of 'no win no fee' agreements provide litigants with access to justice is therefore one of our highest priorities.

SFAs in practice

57. Responses to the Consultation Paper were augmented by public meetings and private discussions, which provided us with an overview of SFAs in Scotland. We met with personal injury solicitors, commercial litigators, defenders and those who spoke on behalf of pursuers. Many of them provided information about their business models on a confidential basis.

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[40] For example, *McTear v Imperial Tobacco* 2005 2 SC 1. This case concerned the liability of a tobacco company for lung cancer suffered by the pursuer's late husband, a smoker.

[41] Scottish Government, *A Sustainable Future for Legal Aid* (2011)

[42] Just 30% of the Scottish work force was unionised in 2011 compared to 35% in 2001 and more than one half of the work force in 1981: see Department for Business Innovation and Skills, *Trade Union Membership 2011*

58. We found that the most common form of SFA was Type III, followed by Type 1. We received no evidence of the use of Type II agreements. As respondents had suggested, within these two main types of SFAs are numerous variations. We also found that solicitors kept the terms of their SFAs under constant review, ever mindful of their competitors.

59. Of the three types of SFA, the model whereby the judicial account is prepared on a party and party basis and may be subject to a success fee of up to 100% of the fees element in that account (Type I) was found to be used relatively infrequently. Of the firms that used it, none reported charging a 100% success fee as a matter of course. The success fee was usually capped, most frequently at between 15% and 25% of damages. One firm reported that while it set a cap of 25% of damages and could charge a 100% success fee, the percentage taken out of damages was on average only 14.5% since judicial expenses were so low. One major firm specialising in personal injury work, which normally acts for pursuers, reported that while it did not consistently charge a success fee under its SFAs, it frequently found a large shortfall between the judicial expenses recovered and what would have been charged under the firm's budgeted hourly rate. It had therefore started to make provision for a small success fee in its agreements, which it capped at 10% of the damages, to compensate for the shortfall. Several firms reported making similar arrangements because of the shortfall, and expressed regret at having to adopt this solution.

60. We found the most common type of SFA to be Type III, whereby a standard hourly rate is specified with a success fee which is expressed as a percentage of the hourly rate. The majority of firms to whom we spoke reported that their success fee was based on a mark-up of their hourly charge out rate and had been adapted from the SFA under the now defunct Compensure scheme. Most firms that offered Type III SFAs set a cap on what was taken out of damages at between 20% and 25% of damages awarded, although some caps were set at between 10% and 20% of damages or any other monetary award. The specific cap adopted frequently depended on whether judicial expenses were used to off-set the fees for which the client was liable. Others sometimes reduced the cap in particular circumstances. In the majority of claims, we found that solicitors were in effect offering damages based agreements.[43] The cap meant that in low value claims the success fee rarely remunerated the solicitor for the work undertaken at the agreed hourly charge out rate. Some solicitors also reported that, on occasion, they departed from their contractual entitlement in order to facilitate settlement discussions. One firm reported that it only claimed the success fee to which it was contractually entitled if this was warranted by the case's complexity, which might not have been reflected in the judicial expenses recovered by the client.

61. Several firms reported that they had a policy of taking nothing out of damages for some clients, for example, children. During the consultation period, one respondent, a law accountant, observed that many successful pursuers who had entered into SFAs were not being required to pay anything by way of success fees out of their damages. This was confirmed by several solicitors with whom we spoke, especially in relation to low value cases. In the first place, some solicitors appeared to accept a reduction in their contractual entitlement to ensure that their clients received their damages in full. This was partly a

[43] See Chapter 9, paragraphs 55 and 58

principled response and partly a response to competition. For example, one firm reported that no deductions were made from damages in road traffic accident cases. Indeed, such was the competition between law firms in Scotland for this work that if deductions were made *"we would have to close down that part of the office."* A second approach was to seek an additional fee from the defender.[44] If an additional fee could be obtained equal to the shortfall between judicial expenses and charges under a Type III SFA, then nothing would be taken out of damages.

62. A number of firms reportedly charged no success fee on a party and party account in employers' liability cases (Type I agreements) and accepted judicial expenses in full payment of their fee, notwithstanding that they received no fee in unsuccessful cases. Two firms told us that they accepted judicial expenses as the totality of their fee in cases that were sent to them by claims management companies. They explained that this was possible due to the pre-litigation investigation and negotiation that had already been undertaken by the claims management company.

Regulating SFAs

63. Respondents to the Consultation Paper made it clear that there was little appetite for further regulation of SFAs. With respect to potential conflicts of interest, the argument that any remunerative system generates its own risks and incentives is a convincing one. I do not see that this is any more the case in SFAs than under any other funding regime. Conflicts of interest that are inherent in any fee agreement are dealt with by the existing regulatory systems put in place by the professional bodies. I am satisfied that these provisions are working well, and have found or heard no evidence to the contrary.

64. I hesitate to intrude into the working of the market, as I make clear with respect to damages based agreements in Chapter 9. While any limits imposed on success fees may be appropriate for some cases, they may be high for others and low for still others. A key justification for entitling solicitors to charge a success fee, whether in a speculative fee agreement or a damages based agreement, is that this offers access to justice in cases which solicitors may not otherwise have taken on. What is required, then, is a high degree of flexibility for solicitors – accompanied by measures in the system to ensure that clients are properly informed and understand the nature of the contracts into which they are entering.

65. As has already been noted in paragraphs 3 and 33 above, the maximum success fee in a Type I SFA is currently 100%. I consider that the maximum success fee in a Type I speculative fee agreement should remain at 100% of the fee element of a judicial account prepared on a party and party basis. A large minority of respondents argued that there should be no cap on the uplift, as long as the terms of the agreement are made absolutely clear to clients from the outset. Some argued that 100% may be insufficient to provide access to justice under certain circumstances, for example, in multi-party actions. I am not convinced by that argument, and not just because the majority of respondents, including the Law Society of Scotland, were of the view that the maximum success fee under a Type I SFA should remain at 100%. I do not propose to recommend a maximum success fee based on

[44] See Chapter 2, paragraph 45

the hourly rates charged by solicitors under Type III SFAs. The protection of the public will be obtained by an alternative route, namely, by a cap tapered to the value of the damages awarded.

66. Many of the firms to which we spoke, or which made submissions to the Review, advised us that they already impose such a cap, expressed as a percentage of the damages recovered. What cap they imposed partly depended on what the market could tolerate. It was also dependent on what provision the SFA made for judicial expenses: whether the solicitor was to take them in part payment of the account payable by the client, or in addition to the account payable. We found a clear interplay between the two. In most cases, firms were also alive to what their competitors charged and acted accordingly. In many cases this could involve waiving part of - or the entire - success fee to which the solicitor was entitled. Typically, the agreement provides that the client will retain between 75% and 85% of the damages awarded. I am mindful that flexibility is crucial given the range of cases, in terms of their complexity and prospects of success, which may require funding.

67. Nevertheless, by virtue of the vulnerability of pursuers in personal injury cases, I would not wish to allow market forces to be the sole determinant of what percentage can legitimately be taken from an award of damages in such cases. **I therefore recommend that the maximum success fee which can be charged in a speculative fee agreement in relation to personal injury cases should be capped with respect to what may be taken out of damages. I recommend that a cap of 20% (inclusive of VAT) is set on the first £100,000 of damages, 10% (inclusive of VAT) on damages between £100,001 and £500,000, and 2.5% (inclusive of VAT) on all damages over £500,000.** This means that no more than £20,000 may be taken out of the first £100,000 damages, no more than £60,000 where damages are £500,000 and no more than £72,500 where damages of £1 million are awarded. For the reasons discussed in Chapter 9 on damages based agreements, **I recommend a) that these caps should apply to all heads of damages and b) that solicitors should not be obliged to offset the judicial expenses against the success fee to which they are entitled.** That was never how the statutory provisions which introduced Type I SFAs to Scotland were intended to operate and nor have they so operated. I have limited the cap accordingly.

68. It is necessary to determine whether caps should be applied to cases other than those for personal injury. In England and Wales a cap of 25% applies in personal injury cases but there is currently no cap for any other type of case litigated under a CFA. In my view, there is a similarity between employment and personal injury cases in that there is usually an asymmetry between the financial standing of the parties. The claimant in an employment tribunal case, like the pursuer in a personal injury case, may very well be in a vulnerable position. **I therefore recommend that the maximum success fee which can be charged in a speculative fee agreement in relation to an application to an employment tribunal should be capped at 35% (inclusive of VAT) of the monetary award recovered.** This is consistent with the provisions which I recommend in relation to an application to an employment tribunal funded by a damages based agreement. If I were only to have regard to the supply side of legal services, I would set a higher cap than 35% as there are seldom awards of judicial expenses in such cases. However, I am mindful that more than a 35% deduction from damages may not serve the interests of justice with respect to individuals. I also have

in mind that access to employment tribunals is uncertain due to the recent introduction of issue and hearing fees by the UK Government.[45]

69. **For all other civil actions funded by speculative fee agreements, I recommend that the maximum success fee which can be charged should be capped at 50% of the monetary award recovered.**

70. I am persuaded by the large majority of respondents to the consultation who were not in favour of allowing the recovery of success fees. Some considered that this would undermine the basic principle that underlies the recovery of expenses in Scotland, namely, that expenses are awarded on a party and party basis. It was also unreasonable to require unsuccessful parties to pay a premium that reflected the degree of risk that pursuers' lawyers had elected to carry, which was a private contractual matter between successful pursuers and their solicitors over which defenders had no control. The variability of SFAs and their flexible response to the changing market environment encourages me to believe that these respondents are correct. This is not to say that the recoverability of success fees is without merit. It has been represented to me that it can act as an incentive for defenders to consider their position early and carefully in the course of a dispute, and that it may discourage spurious defences and delaying tactics. Nevertheless, I do not believe that the recovery of success fees can find a satisfactory place in Scotland's civil justice system, and I find no reason to recommend it.

71. Those who argued in favour of recoverability frequently did so because of their distaste for funding legal services out of damages. Some observed that this was happening too frequently, not because solicitors were looking for success fees but because the current shortfall between judicial expenses and their hourly rates was too great. They argued that this could be addressed by reducing the shortfall. These respondents may find satisfaction in the recent increases in judicial expenses, which should narrow the gap between an account prepared on a party and party basis and one prepared on an agent and client basis.

72. Lastly, many respondents urged that more should be done to ensure that clients understand the nature and implications of the SFAs to which they sign up. The preference of many practitioners for damages based agreements over SFAs resides in the impenetrability of the latter for their clients and the difficulties which solicitors found in explaining them. Given the different types of SFAs in Scotland and the variations within these types, the need for clarity and transparency in Scotland's 'no win no fee' agreements is particularly urgent. As already noted, one respondent commented that this variation renders the term 'no win no fee' practically meaningless. In order that a client is able to readily compare one solicitor's offer of an SFA with another solicitor's offer, it is essential that the two quotations do not have multiple variations. If they do, it will be very difficult for a client to properly compare one with the other. I am anxious that the need for price comparison websites in relation to the funding of litigation is avoided. Thus, as we will see in Chapter 9 when addressing damages based agreements, I recommend that it should be incumbent on solicitors to quote on a standard basis.[46] **I recommend that in a speculative**

[45] The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893

[46] See Chapter 9, paragraph 116

fee agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays, plus VAT, out of the success fee. The only outlay which should remain the responsibility of the client is any premium to obtain After the Event insurance cover, should the client deem that necessary. Given my recommendation in relation to qualified one way costs shifting,[47] there is likely to be a limited requirement, if any, for ATE insurance cover in personal injury litigation. In Chapter 6 at paragraph 79 I provide further detail of what obligations a solicitor should be under in relation to explaining the various aspects and means by which an action might be funded.

[47] See Recommendation 46

CHAPTER 8 QUALIFIED ONE WAY COSTS SHIFTING

1. A crucial component of access to justice is the liability, if any, that litigants may incur for their opponent's judicial expenses. In Scotland the usual rule is that 'expenses follow success,' that is, the unsuccessful party bears the successful party's expenses. In some jurisdictions this is known as 'costs shifting.' In Scotland, if the unsuccessful party is in receipt of civil legal aid, the court may – and frequently will – modify his or her liability for expenses to nil.[1] Before the Event ('BTE') insurance may include cover for judicial expenses,[2] and litigants supported by a trade union may similarly be protected. In public interest litigation the court may cap the pursuer's liability for expenses by making a Protective Expenses Order ('PEO').[3] Other would-be litigants have no such protection.

2. For reasons already outlined,[4] dependence on 'no win no fee' funding arrangements is likely to grow over the next decades. It is not readily appreciated by members of the public that such arrangements provide no automatic protection against liability for the other side's expenses. While speculative fee agreements ('SFAs') may have broadened access to justice in Scotland over the past decade, their impact has been restricted by the absence of such protection. The impact of BTE insurance may be similarly limited, since indemnity for expenses may be exhausted soon after proceedings have commenced.

3. Where litigants are not otherwise protected against an award of expenses made against them, we have been told that what is needed is reasonably and proportionately priced After the Event ('ATE') insurance. ATE insurance is purchased after the event that gave rise to the litigation, and covers the litigant against liability for an adverse award of expenses. However, we have been informed that, particularly in clinical negligence cases, an ATE insurance premium can amount to between 40-60% of the amount of cover sought, and that in practice cover is available to only a small number of solicitors. We have also been told that ATE insurance premiums are particularly high for what are frequently low value industrial disease cases, such as those relating to deafness and vibration white finger. The cost of ATE insurance in Scotland may deter potential litigants from vindicating their rights despite the availability of SFAs. The same may apply equally to damages based agreements if, as I recommend, these are to become enforceable in Scotland.[5]

4. Protection against an adverse award of expenses affords litigants access to justice not only in obvious ways. It provides pursuers with a weapon without which defenders may seek to negotiate damages downwards. By promoting equality of arms, protection against an adverse award of expenses offers litigants the means to negotiate effectively. This issue therefore constitutes a crucial aspect of this Review. It has also been recently addressed in

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[1] Legal Aid (Scotland) Act 1986 c. 47, s 18(2), which provides that "The liability of a legally assisted person under an award of expenses [in any proceedings] shall not exceed the amount (if any) which in the opinion of the court of tribunal making the award is a reasonable one for him to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute."

[2] See Chapter 6, paragraph 2

[3] See Chapter 5

[4] See Chapter 7, paragraph 56

[5] See Chapter 9

England and Wales, with significant implications for the availability of ATE insurance in Scotland.

England and Wales

5. Measures recently introduced in England and Wales to protect litigants from liability for costs were in response to developments that were quite different from the position in Scotland. Nevertheless, the evidence used and the reasoning employed are instructive.

6. In 1998, the Lord Chancellor's Department stated its intention to withdraw legal aid from all personal injury actions (excluding clinical negligence) and many other categories of civil litigation. It proposed extending the use of conditional fee agreements ('CFAs') to replace legal aid funding.[6] Following consultation, it concluded that CFAs may be more attractive to claimants if they could recover the cost of ATE insurance premiums and success fees from unsuccessful defendants. The Access to Justice Act 1999[7] therefore provided for the recovery of success fees and ATE insurance premiums.[8]

7. What followed has been documented elsewhere in substantial detail. The reforms encouraged the initial growth of claims management companies and were responsible for a large increase in the cost of litigation for defendants. The result was a wave of 'satellite litigation' whereby cases were fought not on substantive issues, but on costs.

8. Jackson LJ considered that the regime of recoverable ATE insurance premiums was "*indefensible.*"[9] In his opinion, it was in effect an extremely expensive form of shifting costs from the claimant to the defendant, based upon the premise that certain claimants needed to be protected against the risk of having to pay costs. The regime was flawed as it was not targeted at those claimants who merited protection, since anyone who could find a willing insurer could benefit from it.[10] Defendants' insurers estimated that they paid out far more in recoverable ATE insurance premiums in cases which they lost than they ever recovered as costs in cases which they won. It would be substantially cheaper for defendants to bear their own costs in every case, whether won or lost, than to pay out ATE insurance premiums in those cases which they lost.[11] On the other hand, there were sound policy reasons to continue personal injury claimants' protection against an adverse award of costs. For the vast majority of individuals it would be prohibitively expensive to pay the costs of a

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

[7] c. 22

[8] s 26(6) and 29

[9] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 19, paragraph 4.1

[10] *ibid*, Chapter 9, paragraph 4.4

[11] *ibid*, Chapter 9, paragraph 4.1. For example, the Medical Protection Society ('MPS') provided information with respect to 1,127 medical negligence claims that were settled, and for which damages were paid, in an 18-month period in 2008-9. It calculated that if claimants in all of these cases had taken out ATE insurance, they would have been able to recover nearly £7 million in respect of ATE insurance premiums from the Society. If just 40% of those cases had been insured, claimants still would have been able to recover approximately £2.8 million. By contrast, MPS had recovered just £368,000 in cases where insured health care professionals successfully defended the proceedings.

contested litigation.[12] By contrast, defendants were usually insured or self-insured.[13] Jackson LJ concluded that the only practicable solution was to introduce qualified one way costs shifting ('QOCS'). This would mean that the defendant would pay the claimant's costs if the claim succeeded, but each side would bear their own costs if the claim was unsuccessful. He therefore recommended that QOCS be introduced for personal injury cases.[14]

9. Jackson LJ identified several factors in support of this:

> *"i. Claimants are successful in the majority of personal injury claims. Defendants seldom recover costs, so they derive little benefit from two way costs shifting.*
>
> *ii. Personal injuries litigation is the paradigm instance of litigation in which parties are in an asymmetric relationship.*
>
> *iii. The principal objective of recoverable ATE insurance premiums is to protect claimants against adverse costs orders. One way costs shifting would be a less expensive method of achieving the same objective.*
>
> *iv. One way costs shifting is not a novel concept in personal injuries litigation. Between 1949 and 2000, the vast majority of personal injury claims proceeded under a one way costs shifting regime, namely the legal aid shield."*[15]

10. While Jackson LJ acknowledged that the success rate of claimants was lower in clinical negligence cases, he noted that the cost of ATE insurance premiums in such cases was significantly higher, giving greater force to (iii) above.

11. Jackson LJ considered that one way costs shifting would materially reduce the cost of personal injury litigation provided that the costs rules were drafted so as to (a) deter frivolous or fraudulent claims and (b) encourage acceptance of reasonable offers in settlement of claims. To achieve the former, he considered that the claimant had to remain at some risk of paying costs. He therefore proposed that costs ordered against the claimant in any claim for personal injuries or clinical negligence should not exceed what was reasonable for the claimant to pay, having regard to all the circumstances including the financial resources of all the parties to the proceedings, and their conduct in connection with the dispute to which the proceedings related.[16] This was modelled on an existing statutory

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[12] *ibid.* At Chapter 19, paragraph 1.2, Jackson LJ referred to *Social Trends 39*, which showed that 73% of all households had savings of less than £10,000, and that defence costs could be many times higher than this.
[13] *ibid.* By 'self-insured,' Jackson LJ meant that the defendant was a large organisation which has adopted the policy of paying out on personal injury claims as and when they arose, rather than paying substantial liability insurance premiums every year.
[14] *ibid*, Recommendation 19
[15] *ibid*, Chapter 19, paragraph 1.3
[16] *ibid*, Chapter 19, paragraph 4.7

provision qualifying the liability of legally aided parties for costs.[17] He anticipated that a costs order would be appropriate in any of three situations: where the claimant had behaved unreasonably (such as by bringing a frivolous or fraudulent claim); the defendant was neither insured nor a large organisation which was self-insured; or the claimant was conspicuously wealthy.[18]

12. To encourage acceptance of reasonable offers,[19] Jackson LJ proposed that if the claimant failed to beat an offer from the defendant, the existing consequences would continue to apply, that is, the court could order the claimant to pay the defendant's costs from the date of the offer. If the defendant failed to beat an offer from the claimant, the defendant would be liable for costs and in addition damages would automatically be increased by 10%.[20]

13. For similar reasons, Jackson also recommended the introduction of QOCS in applications for judicial review[21] and defamation and related proceedings.[22] This is addressed in more detail below.

14. For personal injury litigation, Jackson LJ's recommendations were implemented, in modified form, by the Legal Aid, Sentencing and Punishment of Offenders Act 2012[23] ("the 2012 Act"), associated orders and regulations, and changes to the Civil Procedure Rules ('CPR'). While it broadly accepted the recommendations, the Ministry of Justice decided that QOCS should not depend on the parties' financial resources.[24]

15. QOCS was introduced by an amendment to the CPR[25] which came into force on 1st April 2013. In summary, the new rules apply only to claims for damages for personal injury or death.[26] Costs orders against claimants are unenforceable except in specified circumstances. Subject to the exceptions noted below, a costs order against a claimant can be enforced without the court's permission only to the extent that the amount of the order does not exceed the amount of any order for damages and interest in the claimant's favour.[27] An

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[17] For legally aided parties, section 11(1) of the 1999 Act provided: "Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate." See now section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[18] Jackson LJ, *op cit* (2009), Chapter 19, paragraph 4.8

[19] In England and Wales the rules on parties' offers in settlement are contained in Part 36 of the Civil Procedure Rules, and such offers are therefore known as 'Part 36 offers.'

[20] Jackson LJ, *op cit* (2009), Chapter 19, paragraph 4.10

[21] *ibid*, Recommendation 63

[22] *ibid*, Recommendation 65

[23] c. 10

[24] Written Ministerial Statement by the Parliamentary Under-Secretary of State, Ministry of Justice (Jonathan Djanogly) dated 10th July 2012, *Implementation of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012: Civil Litigation Funding and Costs*

[25] Civil Procedure (Amendment) Rules SI 2013/262

[26] CPR Rule 44.13(1)

[27] CPR Rule 44.14

unsuccessful claimant who receives no damages will therefore pay no costs, unless one of the exceptions applies.

16. The exceptions are that a costs order can be enforced against the claimant to its full extent:

- without the court's permission, where proceedings have been struck out on the grounds that the claimant has disclosed no reasonable grounds for bringing the proceedings; the proceedings are an abuse of process; or the conduct of the claimant (or a person acting on behalf of the claimant with the claimant's knowledge) is likely to obstruct the just disposal of the proceedings;[28]

- with the court's permission, where the claim is found on the balance of probabilities to be fundamentally dishonest.[29]

17. If the claimant rejects an offer from the defendant but then fails to obtain a more advantageous judgment, the court will, unless it considers it unjust to do so, order that the defendant is entitled to costs from the expiry of the period for accepting the offer.[30] However, under QOCS, this costs order can be enforced only to the extent of the damages and interest awarded to the claimant.[31]

18. Also with effect from 1st April 2013, most ATE insurance premiums ceased to be recoverable in most categories of civil litigation.[32] ATE insurance premiums currently remain recoverable in mesothelioma claims, publication and privacy proceedings (as defined), and certain insolvency proceedings.[33] In addition, an ATE insurance premium remains recoverable in certain clinical negligence proceedings, but only to the extent that it relates to the cost of expert reports on liability or causation.[34]

19. The Ministry of Justice was not persuaded that the case had yet been made for extending QOCS beyond personal injury litigation. Its intention was to examine the experience of QOCS in personal injury claims before considering whether it should be extended further.[35] Subsequently, in his Report into the Culture, Practices and Ethics of the Press, Leveson LJ recommended the introduction of QOCS for defamation, privacy, breach of confidence and similar media related litigation, until such time as there was an approved

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[28] CPR Rule 44.15

[29] CPR Rule 44.16 (1)

[30] CPR 36.14(2). CPR 36.2 and 3 make provision for the time periods for accepting offers.

[31] CPR 44.14

[32] 2012 Act section 46(1), inserting new section 58C into The Courts and Legal Services Act 1990 c. 10, brought into force by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 SI 2013/77.

[33] The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 SI 2013/77 Article 4.

[34] The Courts and Legal Services Act 1990 c. 10, section 58C(2) and The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 SI 2013/739.

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

mechanism for dispute resolution at no cost to the claimant.[36] In April 2013 the Civil Justice Council recommended the introduction of a system of 'variable costs protection' – a form of QOCS for which both claimants and defendants could apply – in defamation and privacy proceedings, since in this area of law either claimant or defendant may require costs protection in order to conduct their case.[37] At the time of writing, this issue is still under consideration.

The consultation

20. We asked in our Consultation Paper whether ATE insurance premiums should be recoverable in Scotland and, if so, under what circumstances; if not, what alternatives could be suggested other than expecting successful pursuers to contribute towards the payment of their legal fees and insurance premiums out of damages. We also asked whether each party to a litigation in Scotland should bear their own expenses and, if so, in what types of litigation. We further asked whether such a rule should be qualified and, if so, in what circumstances. Finally, we asked whether the introduction of a one way costs shifting regime in England and Wales would create an incentive to litigate in that jurisdiction, if it were not introduced in Scotland.

Recovery of ATE insurance premiums and its alternatives

21. Responses to the question of recoverability of ATE insurance premiums have already been documented in full in Chapter 7 paragraphs 49 to 54.

22. Several respondents suggested alternative means of protecting litigants from exposure to an adverse award of expenses. Some of these respondents suggested QOCS. For several respondents the issues of QOCS and ATE insurance were linked. QOCS was identified as a means of reducing the need for ATE insurance and providing injured people with an effective means of redress. A solicitors' firm thought that QOCS might prove to be a "*lesser evil*" than recoverable ATE premiums. Other respondents considered the case for QOCS in specific categories of litigation. For example, one firm proposed QOCS for insolvency cases, arguing that this would remove the need for pursuers to purchase ATE insurance for such cases. A solicitors' firm frequently instructed by pursuers supported the introduction of QOCS on the ground that protection against liability for expenses was generally unavailable in Scotland. Given that ATE premiums were to become irrecoverable in England and Wales, this respondent considered that the already precarious market for ATE insurance in Scotland had an uncertain future.

A new expenses regime

23. Respondents generally agreed that the rule whereby expenses follow success should remain the cornerstone of any expenses regime. This was seen as a matter of fairness. Without this general rule, it was argued, weaker litigants (whether individuals or corporate bodies, and whether pursuers or defenders) would find it more difficult to vindicate their

[36] Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of the Press - Executive Summary* (2012), page 16, paragraph 68, footnote 23; and page 43, paragraph 74

[37] Civil Justice Council, *Defamation Costs Working Group 2013 - Final Report* (2013)

rights. Their ability to instruct legal representation and expert evidence would substantially be impaired if they could not recover expenses in so doing. Where 'no win no fee' agreements were used, monies recovered by the successful pursuer would be severely diminished if the pursuer could not recover expenses and had to meet all of his or her own legal fees and outlays. It was for this reason, so some respondents observed, that awards of damages are so much higher in jurisdictions which do not follow the general rule that expenses follow success.

24. A minority of respondents addressed the issue of QOCS. Of these respondents, half were in favour of QOCS and half were opposed. Those in favour saw no reasonable alternative means of protecting those who were unable to litigate without some form of protection against expenses liability. Some of these respondents warned of the need to restrict the grounds on which pursuers could lose the benefit of QOCS, in order to avoid satellite litigation. Of major importance to those respondents who were in favour of QOCS was how it would operate in cases in which a tender had been lodged.[38] They feared that the objective of protecting pursuers from the risk of paying expenses would be undermined if a pursuer who failed to beat a tender was liable for expenses. The risk of being so liable, together with the uncertainty that might be generated by the qualifications to QOCS, would require pursuers to purchase ATE insurance. In lower value cases, ATE insurance premiums may be disproportionate to the value of the action. If ATE insurance was required at the point at which a tender was offered, the premium would be prohibitively high, assuming that cover was available at all. The risk to the pursuer of being liable for expenses would, so it was argued, encourage defenders to make early low offers on quantum and to under-settle claims, and might deter pursuers from litigating in the first place.

25. Respondents who were opposed to QOCS argued that it would encourage unmeritorious litigation, although there was recognition that measures could be taken to discourage this. They considered that QOCS would create unfairness since it would enable pursuers to litigate without risk; this in turn was likely to prolong and therefore increase the cost of personal injury litigation. There was concern that parties freed from the sanction of expenses liability would conduct themselves irresponsibly or be less inclined to settle a case. Some argued that QOCS would also encourage solicitors who lacked expertise in the area of law in question to undertake litigation. Several responses were concerned as to how QOCS would operate in the event that a tender lodged was not beaten at proof. The risk of satellite litigation was again referred to. Respondents observed that pursuers may still require to obtain ATE insurance since they could not safely assume from the outset that they would never be found liable for defenders' expenses. Some respondents expressed concern that the introduction of QOCS would damage the already fragile market for ATE insurance. Finally,

[38] A tender is an explicit, unqualified and unconditional offer by the defender to pay to the pursuer in settlement of the action a specified amount, together with the expenses to date. If having refused to accept the tender the pursuer obtains decree for the sum tendered or less, the pursuer is awarded only expenses to the date when the tender ought to have been accepted, and the defender is entitled to expenses thereafter: See *Macphail's Sheriff Court Practice* (3rd edition), paragraph 14.35.

it was observed that QOCS had been introduced in England and Wales to address problems that had not arisen in Scotland.

'Forum shopping'

26. Just under half of those responding to this question considered that the failure to introduce QOCS in Scotland would incentivise personal injury pursuers to litigate in England and Wales. Not only would the risk of liability for expenses of pursuers be reduced, they would benefit from the general uplift in damages recommended by Jackson LJ and a generally more favourable costs regime should they succeed. Several respondents considered that they would be duty bound to make their clients aware of the potential benefits of litigating in England and Wales. It was argued that the risk of 'forum shopping,' that is, of litigants choosing the most advantageous court in which to litigate, could arise where the defender was a limited company or insurer registered in England and Wales.

27. The remainder of respondents disagreed. Their arguments relied partly on issues of convenience and familiarity with one's own jurisdiction. They observed that the former recoverability of success fees and ATE insurance premiums in England and Wales had not led to an increase in Scottish cases being litigated there. They also observed that the new QOCS regime in England and Wales was as yet untested and may therefore lead to satellite litigation, which would discourage potential litigants with a choice of forum. Finally, they argued that QOCS, as introduced in England and Wales, provided only a limited measure of protection against costs that was not as radically different from, or advantageous to, the Scottish system as it might at first glance appear.

28. Some respondents considered that this issue was inconsequential. They argued that the number of personal injury cases that could be raised in either jurisdiction was relatively small, and that the 'typical' personal injury pursuer was unlikely to 'forum shop.'

The ATE insurance market in Scotland

29. As part of our considerations, we undertook research into the market for ATE insurance in Scotland. Practitioners and stakeholders reiterated the contribution that ATE insurance made to the promotion of access to justice and equality of arms. However, while ATE insurance provision had grown rapidly in England and Wales over the past decade, they confirmed that it has developed slowly and sporadically in Scotland. We were told that initially underwriters had either wanted large premiums for cases on a 'one-off' basis, or had been unwilling to offer ATE insurance in Scotland. Several reasons were given for this. Firstly, underwriters had hesitated to enter into the Scottish market because of the failure of Compensure, an ATE insurance scheme set up by the Law Society of Scotland, whereby some member firms had been found to insure only those cases which had limited prospects of success. Underwriters had feared a repetition of this pattern. Secondly Scotland had not appeared fertile ground because ATE premiums had never been recoverable. For a considerable time, only one insurer had an interest in Scotland. Premiums had to be paid up front, were payable win or lose and were sold with a policy excess of £1,000. It readily acknowledged that its ATE product was not initially tailored to the Scottish market.

30. We were informed that ATE insurance only developed in Scotland when the insurance industry looked more carefully at the market and saw that potential customers could not afford to pay the premiums upfront. Since they were using 'no win no fee' agreements, pursuers expected to pay nothing should their action prove unsuccessful. Hence, while ATE insurance was crucial to protect many potential litigants against exposure to expenses, to make such insurance more attractive in Scotland entailed deferred premiums payable only in the event of success. This arrived in Scotland in the form of DAS's Scots Law Delegated Authority Scheme, which provided some firms with the authority to administer ATE cover for their clients on behalf of DAS.

31. We were also told that by the time of our consultation, the cost of ATE insurance in Scotland was lower than in England and Wales. This was due partly to the fact that awards of expenses and outlays are lower in Scotland and partly because insurers, recognising that ATE premiums are not recoverable, and being informed what their potential customers can afford, have adapted the cost accordingly. It was argued that ATE insurance was available to Scottish solicitors as long as insurers were given a sufficient volume of business and as long as purchasers of ATE insurance did not seek to insure only those cases with limited prospects of success.

32. One firm advised that it insured all of its risks, including road traffic cases where liability was admitted and where insurance was hardly necessary. This enabled it to negotiate a scheme rate at a very attractive price for all of its cases, (£200 plus VAT for a personal injury action and £400 plus VAT for a clinical negligence action), including cases with fairly serious risks. Another firm reported that its ATE insurance premiums cost between £300 and £400 for £50,000 cover, which could be topped up, if necessary, during proceedings. Another firm reported that premiums cost £206 with respect to road traffic accident cases; £312 for employers' liability cases; and £418 for public liability cases. Another firm reported that as of July 2012, excluding Insurance Premium Tax, the premium offered by one insurer was £195 for actions raised under motor related insurance; £295 for actions raised under employers' and occupiers' liability insurance; £395 for public liability claims; £525 for 'slip and trip' actions; and £995 for industrial claims. Some ATE premiums covered the insured client's solicitors' fees, although most did not.

33. The personal injury ATE product now sold by DAS is quite different from that originally marketed in Scotland. It includes cover for solicitors who are not acting under an SFA; premiums that are paid only if the client is successful; and premiums that are paid at the (successful) conclusion of the case. In short, ATE products and, by extension, access to justice in Scotland, have been heavily dependent on the market and insurers' readings of that market.

Discussion

34. All but the wealthiest members of the public require some form of protection against liability for an adverse award of expenses if they are to embark on civil litigation. If they are eligible and qualify for civil legal aid, they receive that protection by default. An unsuccessful legally aided litigant can ask the court to modify an award of expenses against them to nil. The court regularly grants such motions. Protection against liability for an

adverse award of expenses is also available to litigants covered by BTE insurance up to a specific, albeit limited, extent, as well as to litigants who are funded by virtue of their trade union membership. All other litigants, including those funded by 'no win no fee' agreements, have no such protection other than an ATE insurance policy if they have obtained one. This is so with respect to SFAs in Scotland and is no different for damages based agreements arranged by claims management companies. During the course of the consultation process, I have been made aware, and have become increasingly concerned, as to the basis on which ATE insurance has been made available in Scotland.

35. ATE insurance is available at a reasonable cost only in certain kinds of cases. This has profound implications for access to justice. In industrial disease claims, such as deafness and vibration white finger, one firm of solicitors reported that the cost of ATE insurance was wholly disproportionate to the value of the claim, which is frequently low because pursuers tend to be older individuals who may have retired, reducing the amount of future loss. Since litigants in these cases are in particular need of protection from liability for expenses by virtue of their age and income, and since the ATE insurance premium is not recoverable, these claims are frequently not litigated.

36. There are also problems in relation to clinical negligence claims. Many firms, including those who buy high volumes of ATE insurance policies for personal injury claims, have told us that they find it difficult to purchase cover for clinical negligence claims. Where protection is available, litigants find the price 'prohibitive'. One firm reported that it was quoted a premium of £63,000 for every £100,000 of cover in a case that required cover of £300,000. Its solution was to self-fund such cases, which it found to be *"very high risk ... and not for the fainthearted."* Other solicitors, including those specialising in clinical negligence claims, reported that since ATE insurance was rarely available to them, they were required to seek a settlement before proceeding to litigation. Some readily acknowledged that it was difficult to achieve a fair settlement if the defender knew that the pursuer could not access ATE insurance cover. Access to justice, in my view, requires not only access to litigation, but also access to specialist solicitors and access to a just settlement. The absence of reasonably priced protection against liability for expenses is responsible for limiting access to justice.

37. We also asked in our Consultation Paper whether pursuers faced particular difficulties in funding clinical negligence actions.[39] Respondents highlighted problems with ATE insurance. Clinical negligence actions posed a particular financial risk for prospective pursuers because, besides the risk of ultimately being found liable for the defender's expenses, only in the most exceptional circumstances was it possible for the pursuer to establish if there were grounds to pursue an action without first obtaining expensive expert reports. Pursuers frequently required to obtain reports on liability and causation, which were likely to be more expensive than in standard personal injury cases. It was reported that ATE insurance was not widely available for such cases in Scotland and that the cost of premiums was beyond the means of most individuals. Even amongst the handful of firms that undertook clinical negligence cases on a speculative fee basis and were funding outlays themselves, the high costs and risks associated with such cases was responsible for solicitors

[39] See Chapter 11, paragraph 116

selecting cases with extreme caution. One firm of solicitors with a defender client base observed that there was a marked discrepancy between the number of clinical negligence cases *per capita* south and north of the border and concluded that this was more likely to reflect problems with access to justice than a higher standard of medical care in Scotland.

38. We found that low cost ATE insurance was being sold, but to a restricted number of solicitors and at the discretion of the insurers. Firms other than those with a volume of personal injury cases can struggle to obtain cover for clients at reasonable premiums. This reveals something of a sellers' market for ATE insurance products in Scotland, and one which I view with apprehension under any conditions. There appear to be a number of pre-requisites for being allowed to write policies under the delegated authority of an insurer. A firm must: demonstrate a good track record in personal injury litigation; provide a strong flow of cases so that not just the cases with limited prospects of success are covered; and must not make too many, if any, claims on the policies purchased. It could be concluded that such an arrangement serves the public well in that the ATE insurer is performing an effective form of quality control. Indeed, a number of firms who have the pen of ATE insurers made this very point to us. However, in my opinion, this cedes far too much power to ATE insurers, which is capable of abuse. It also puts insurers in the position of determining which firms can have a pursuers' personal injury practice. Firms other than those with a volume of personal injury cases can struggle to obtain cover for their clients at reasonable premiums. I do not accept that personal injury litigation needs to be concentrated in the hands of a few firms for the protection of the public. There are other levers that can be used to direct pursuers to solicitors with the requisite skills. This does not depend on the provision of quality control by ATE insurance providers.

39. In a sellers' market, which ATE insurance undoubtedly is in Scotland, the situation in which firms find themselves in relation to insurers also has implications for access to justice, even amongst those firms that are successful in obtaining cover for their clients. As one solicitor observed, it may easily tempt solicitors to litigate only in cases of certainty so as to reduce the risk of ever claiming on the insurance policy. This would not be in the public interest. Indeed, we have been told by several solicitors that they try to protect their delegated authority by not claiming on their ATE insurance cover and by bearing the losses themselves. They continued to buy cover should there be an occasion on which they might really need it. Nor did they consider themselves atypical in this regard. The solution for some firms was to self-insure and assume the risk themselves, while relying on their particular expertise to avoid catastrophic decisions. In practice, then, it is not the insurers who are indemnifying pursuers against awards of expenses, but solicitors acting on behalf of pursuers.

40. We have also been told that solicitors may opt to proceed without the protection of ATE insurance cover and without explaining this to clients. While solicitors may bear the losses themselves should their client become liable for expenses, I am mindful that providing impartial advice in the course of the litigation under these circumstances could be at risk. Access to justice, as well as the development of the Law of Scotland, requires that cases proceeding through the courts are not limited to those with near certainty of success. Access to justice also requires that potential litigants have access to impartial legal advice.

Advice in the shadow of a sellers' market for ATE insurance, like advice where solicitors themselves take on the risk of liability for expenses, does not encourage impartiality.

41. The requirement of ATE insurers that solicitors do not 'cherry pick' by insuring only cases with limited prospects of success could, on occasion, put a strain on the solicitor-client relationship. Some firms found it difficult to tell clients that despite the excellent prospects of their case, they would still require insurance since the firm was required by its ATE insurance provider to insure all of its cases. Some firms considered that as long as ATE insurance premiums were not recoverable from the unsuccessful opponent, they were required to avoid paying ATE premiums altogether in order to preserve the damages of their clients. Indeed, DAS has confirmed that some personal injury firms in Scotland buy ATE insurance for their clients and pay the premiums themselves, rather than deducting the premium from the damages recovered by their clients.

42. There is a further concern with regard to access to justice and the insurance industry. At present, general insurers and ATE insurers tend to be separate companies. One doesn't find that ATE insurers also write employers' liability or road traffic cover. That may not remain the position. Such is the fluidity of the market that one could not exclude the possibility that a general insurer will acquire an ATE insurance business. This could mean that insurers are faced with a potential conflict of interest although the Insurance Companies (Legal Expenses Insurance) Regulations 1990,[40] which require insurers to make arrangements to avoid conflicts of interest, is likely to lessen the scope for such behaviour.[41] If one projects into the future and the advent of alternative business structures, it is not beyond the realms of possibility that ATE insurers will take a financial interest in Scottish solicitors' firms. Indeed, one ATE insurer informed me that such was its intention. Should that come to pass, it would be reasonable to assume that writing ATE policies will be restricted to the firm or firms in which the ATE insurer holds an interest. This could unduly restrict the choice of solicitors available to pursuers. Other forms of abuse are easy to contemplate.

43. I have come to the conclusion that a one way costs shifting regime should be introduced in Scotland. I have reached the same conclusion as England and Wales, but for different reasons. When available, ATE insurance does add a layer of expense to litigation in Scotland, but unlike England and Wales where, prior to the 2012 Act, the added layer of expense has been mainly imposed on defendants, the burden in Scotland has been on pursuers. We have gathered enough information as to the cost of ATE insurance in Scotland to rely on what practitioners and insurers have told us, namely, that ATE insurance can be "prohibitive" in certain cases. Individuals not only cannot afford it but, critically, they are put off from pursuing legitimate claims for fear of an award of expenses against them. They either cannot afford or cannot obtain ATE insurance. Either has the same practical impact on access to justice. There are barriers to accessing ATE insurance cover which appear to me to have no place in the operation of a justice system. A one way costs shifting regime, as Jackson LJ pointed out, is not new. It has operated in legal aid cases for years and has

[40] SI 1159/1990

[41] See Chapter 6, paragraph 13

afforded litigants protection from their liability for expenses – always providing that the litigant behaves reasonably. Indeed, it has often been stated that the 'shield' afforded by legal aid is the real benefit of having a legal aid certificate. I consider that such a shield should be available more widely.

44. While access to justice is my primary focus, there are other considerations that inform my recommendation to introduce a one way costs shifting regime in Scotland. The shape and form that the ATE insurance industry may take in the future is largely unknown. Indeed, the impact of the 2012 Act on the UK ATE insurance market only serves to increase the uncertainty and calls into question the viability of the ATE insurance market.

45. I readily acknowledge that a number of firms have delegated authority to provide clients with ATE insurance cover. They have observed that for certain cases, and on the condition that they do not 'cherry pick,' premiums are reasonably priced. Nevertheless, I detect a certain apprehension amongst them as to the future of the ATE insurance market in Scotland. In particular, they fear that individual premiums are too low to carry the risk and that this may be the undoing of the ATE insurance market in Scotland. The industry has told us likewise. The viability of the market largely depends on the capacity of the ATE insurance industry to monitor and prevent 'cherry picking,' which the industry admits to find "challenging." The signs of cherry picking are only evident after the fact, when the number of cases covered decreases, while the number of cases lost and the proportion of large losses increase. The viability of this market also depends, to an extent, on the willingness of solicitors not to lodge a claim against the ATE insurance policy in unsuccessful cases. We have been told that the industry may now be looking to set a fixed price premium which, with regard to clinical negligence and industrial disease cover, would need to be substantially higher than the present premiums – which are already too high.

46. Apprehension as to the future of the ATE insurance market is compounded, if not superseded, by concerns as to the landscape for ATE insurance cover in the United Kingdom following the introduction of the 2012 Act in England and Wales. As of 1 April 2013, the recoverability of ATE insurance was withdrawn from most litigation in England and Wales and a one way costs shifting regime came into effect for personal injury, including clinical negligence, claims. Reportedly, and not unexpectedly, there was a surge of applications for ATE insurance in England and Wales before the 1 April 2013 deadline. The future of the market for ATE insurance market, however, has been called into question.

47. At the request of the Civil Justice Council Working Group on Contingency Fees, a view as to the future of the ATE insurance market was submitted in April 2012 by Peter Smith of Firstassist Legal Expenses Insurance Limited.[42] Two markets for ATE insurance in the UK were identified, with 95% of the market comprising insurance for personal injury actions. Of approximately 500,000 personal injury claims litigated in the UK every year, he reported that approximately one fifth of them (100,000) were covered by ATE insurance. While the removal of recoverability of ATE insurance premiums in England and Wales on 1 April 2013 was likely to impact on the whole market for ATE insurance, the personal injury

[42] Peter Smith, 'The availability of ATE post-LASPO for DBA-funded cases' in Civil Justice Council, *Report of the Working Party on Damages Based Agreements (Contingency Fees)* (2012), Annex 7.

market would also be affected by the introduction of a qualified one way costs shifting rule which would remove the main part of ATE insurance cover from the insurance policy. Smith could not predict whether ATE insurance was likely to remain for disbursements-only cover or for cover against the loss of costs protection in the personal injury market by virtue of the qualified nature of the one way costs shifting rule. His briefing paper noted the intention at that time of some ATE insurers to withdraw from the market entirely.

48. Outside the personal injury market for ATE insurance, Smith reported that the ATE insurance market was more confident of its ability to respond to the new environment. In commercial cases it had only to deal with the withdrawal of recoverability of ATE insurance premiums and not with the introduction of a one way costs shifting regime. While he observed that a number of ATE insurance providers were known to have suffered underwriting losses and to have withdrawn from the market, he considered that there was likely to be a continuing demand for non-personal injury ATE insurance products.

49. Some solicitors in Scotland, who are now quite heavily reliant on ATE insurance, told us that they feared that the introduction of a qualified one way costs shifting regime in England and Wales would kill off the ATE insurance market altogether. My priority has been to consider how the availability of some form of protection from liability for expenses in Scotland is to be guaranteed in the future. Certainly, DAS has indicated that while it intends to remain in the ATE insurance market, the market is likely to be considerably "leaner."[43] Now that the future of the ATE insurance market in the UK appears insecure, it would be foolhardy to deliberate further over whether ATE insurance premiums should be made recoverable in Scotland. Recoverability of ATE insurance premiums is unlikely to address the problems under discussion. Nor do I see closing the gap between the level of expenses recovered on a party and party basis and the actual cost of the case on a reasonable agent and client basis to be the panacea that some have suggested. Indeed, closing that gap may result in exacerbating the problem: those who are in need of protection from liability for expenses will have even greater need for it. My recommendations for the introduction of a one way costs shifting regime must be seen in this context.

50. It is also relevant to note that defenders in personal injury cases rarely recover their judicial expenses from the unsuccessful pursuer. Jackson LJ observed in his Preliminary Report that in a sample of between 22,000 and 23,000 notified claims obtained from an insurer, costs orders against claimants were obtained in only 0.1% of the sample.[44] In his Final Report, Jackson LJ observed that in a sample of 1,600 litigated cases, there were 170 "defeated" cases and costs were recovered in only eight of them.[45] Thus, taking a pragmatic perspective, Jackson LJ found that there was little cost to the insurer by introducing QOCS in England and Wales. While I do not have equivalent statistics for this jurisdiction, all qualitative evidence and my own experience point to the position being broadly the same.

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[43] Neil Rose, 'DAS eyes 'ATE Lite' products as it commits to staying in market post-April,' *Litigation Futures* (14 November 2012)

[44] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report, Vol. 1,* (2009), Chapter 25, paragraph 2.6

[45] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 19, paragraph 2.8

51. **I therefore recommend the introduction of a qualified one way costs shifting regime in personal injury, including clinical negligence, litigation. A qualified one way costs shifting regime should apply whether there is a single pursuer or a multiplicity of pursuers**.

52. QOCS will not deal with the problem of providing cover for clinical negligence outlays. In England and Wales the 2012 Act has addressed this by making an exception whereby ATE insurance premiums will continue to be recoverable in clinical negligence cases insofar as they relate to expert reports on liability and causation. We cannot rely on this solution since ATE insurance premiums were never recoverable in the first place in Scotland and I do not consider it appropriate to introduce such, even in some limited form. In Chapter 11, I make recommendations for a Contingent Legal Aid Fund ('CLAF') to provide funding for clinical negligence outlays.[46]

53. **I recommend that a qualified one way costs shifting regime should apply to appeals from decisions in personal injury cases.** Following implementation of the recommendations of the Scottish Civil Courts Review ('SCCR'), the privative jurisdiction of the sheriff court will be £150,000[47] so that the majority of personal injury cases will proceed there. While leave to appeal to the Sheriff Appeal Court will not be required, and there will therefore be no mechanism by which unmeritorious appeals may be filtered out, there is no history in this jurisdiction of spurious appeals in personal injury cases. I see no reason why any of the recommendations of the SCCR or this Review should alter that position.

54. For actions which combine personal injury and non-personal injury claims, provision is made in the court rules in England and Wales for QOCS protection to be lost in part, and subject to the court's permission, in two instances. First, if an otherwise successful claim includes an unsuccessful non-personal injury element (for example, housing disrepair or costs of credit hire in arranging an alternative vehicle). If there is an order for costs against the claimant of that unsuccessful element, the claimant is liable for all the defendant's costs of that unsuccessful element to the extent that it is just and fair. Second, where the claim, or an element of it, is made for the financial benefit of someone other than the claimant (for example, a credit hire claim in respect of the financing company), an order for the defendant's costs of the claim, or that element, may be made, and enforced, against that person/organisation.[48] I consider that a similar position should prevail in Scotland for actions which combine personal injury and non-personal injury claims. **I recommend that in the event that a pursuer's successful action for personal injuries includes an unsuccessful non-personal injury element and there is an order for expenses against the pursuer for that unsuccessful element, such award will be enforceable against the pursuer. I further recommend that if the claim, or an element of it, is made for the financial benefit of someone other than the pursuer, the benefit of qualified one way costs shifting will extend only to the element of the claim which may benefit the pursuer.**

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[46] See Recommendation 79

[47] *Report of the Scottish Civil Courts Review* (2009), Recommendation 20

[48] CPR 44.16(2) and (3)

55. I do not recommend the introduction of QOCS in applications for judicial review. I have already examined in some detail the need to restrict certain litigants' liability for expenses in judicial review applications[49] and have recommended that the power to apply for a Protective Expenses Order ('PEO') should be available in all public interest cases.[50] The decision to make a PEO and at what level ought to be a matter for judicial discretion. The effect of such an order will be to limit a litigant's liability for expenses to a particular sum, which may be nil in some cases. To an extent, the judiciary are already embracing the concept of QOCS, albeit under the guise of PEOs. Implementing the SCCR recommendation to introduce a leave or permission stage in applications for judicial review[51] should prevent unmeritorious cases from proceeding and reduce the potential burden on defenders.

56. Following Jackson LJ's recommendation that defamation and related claims should be subject to QOCS, Leveson LJ recommended that there should be a forum for dispute resolution in which complainants can take action without the fear of being found liable for an adverse award of costs.[52] There are far fewer defamation actions in Scotland than in England and Wales. In the consultation process, no respondent identified a problem with potential pursuers being deterred from raising actions in such cases because of adverse awards of expenses. I am also mindful that defamation actions do not always involve a weak pursuer against a powerful defender. Thus there is not the consistent asymmetry between the parties that I consider to be a necessary pre-requisite for the introduction of QOCS. Consideration is also being given to how Leveson LJ's recommendation will apply in Scotland, following the report of the Expert Group on the Leveson Report in Scotland chaired by Lord McCluskey.[53] In these circumstances, I do not propose to make any recommendations with respect to defamation actions.

57. No respondent has suggested that QOCS should be generally available in commercial litigation, although one respondent did so with respect to insolvency litigation. I am not persuaded that QOCS should apply in such actions. There is no inevitable asymmetric relationship between one commercial entity and another. In my opinion, such is a necessary pre-requisite before I would recommend interfering with the normal rule that expenses follow success. I fail to see any reason why a liquidator who raises an action on behalf of an insolvent company should be treated any differently from what would have been the position if the company had raised the proceedings prior to insolvency. It could be said that the liquidator will inevitably be in a weaker financial position than the defender since most liquidators, almost by definition, do not have much money available to fund a litigation. However, I see no reason why one party to a commercial dispute should find that it has no, as opposed to poor, prospects of recovering its judicial expenses should it succeed in a litigation, just because the other party has gone into liquidation. I therefore do not recommend the introduction of QOCS for cases being pursued by a liquidator, or in any other commercial action.

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[49] See Chapter 5

[50] See Recommendation 37.

[51] *Report of the Scottish Civil Courts Review* (2009), Recommendation 152

[52] Leveson LJ, *An Inquiry into the Culture, Practices and Ethics of the Press - Executive Summary* (2012), page 16, paragraphs 65-68, and footnote 23

[53] Scottish Government, *Report of the Expert Group on the Leveson Report in Scotland* (March 2013)

58. I have given careful consideration to the objections to QOCS raised during the consultation period. Indeed, I note that similar concerns were raised by those in favour of QOCS. I should also underscore that my recommendations for QOCS are not to the exclusion of other methods of protecting litigants from their liability for expenses. The Legal Aid Fund still has an important role to play in this respect, as does BTE insurance. However, access to the Legal Aid Fund is restricted on grounds of financial eligibility, as well as *probabilis causa litigandi,* while BTE insurance is unlikely to cover all members of the Scottish public in the foreseeable future, however much encouragement is given to obtain such cover. At the same time, QOCS may have major and beneficial implications for the cost and limits of cover provided by BTE insurance with respect to those cases in which QOCS applies. It should improve the cover given for the same price, since the cost of protection from expenses will be taken out of the equation.

59. I agree with those who consider that the fear of 'forum shopping' does not constitute a justifiable ground for adopting QOCS in Scotland. In any case, our consultation revealed marked differences of opinion as to whether the introduction of QOCS in England and Wales, without the introduction of a similar regime in Scotland, would incentivise Scottish litigants to litigate south of the border.

60. There are those who have said that QOCS is a response to a problem in England and Wales that has not arisen in Scotland. That is in some sense true. QOCS was a response to a particular problem in England and Wales that we do not find in Scotland, namely, the high cost of recoverable ATE insurance premiums for defendants. However, I have different concerns, namely, access to litigation for those in need of protection from their liability for the expenses of the defender, and these concerns have led me to the same conclusion.

61. I take on board the argument that QOCS will damage the already fragile market for ATE insurance products in Scotland. However, that market is already set to deteriorate by virtue of the withdrawal of recoverability from ATE insurance premiums in England and Wales, as well as the introduction of QOCS there. Indeed, in so far as I take my cue from what is happening south of the border, it is only with respect to the likely impact of the recent reforms in England and Wales on the ATE insurance market in Scotland.

62. Nor do I believe that the introduction of QOCS in Scotland will result in the courts being flooded with unmeritorious actions. Firstly, any client will have to persuade a solicitor that he or she should accept instructions on a ‘no win no fee’ basis. We have been told that some firms have an internal system to prevent weak cases being funded on this basis. That is understandable since weak cases are likely to require much attention with limited prospects of recovering any payment for the work undertaken. Not many firms will survive if they have a number of cases for which they do not get paid.

63. Secondly, I do not accept that the courts will be flooded with party litigants who have refused to accept the advice of their solicitor. One of the existing levers available to solicitors who provide an ATE insurance product for their clients is the threat to withdraw such cover should their client adopt an unreasonable approach to the litigation. It should be noted that such a lever could also be deployed when not in the interest of the client but in the interest of the solicitor. Similar levers will also be available under QOCS. Clients can be

informed that the court is likely to view their conduct as unreasonable and that they therefore risk being found liable for the defender's expenses. In my opinion, it is unlikely that many litigants will reject the advice of their lawyer against such a background. Furthermore, should a solicitor consider it necessary to withdraw from acting, the agreement with the client will almost certainly make provision for the client to make payment of the outlays and probably also a fee based upon the hours worked. I also consider that the Scottish Court Service's desire to make the civil courts pay for themselves will similarly prevent the courts from being flooded by clients who reject the advice being tendered by their solicitors.

64. It must also be borne in mind that this recommendation is made on the basis that the recommendations of the SCCR have been implemented and that there is a procedure whereby a defender may seek to strike out summarily any case which has no real prospect of success. These provisions, as well as solicitors' own interests, should be sufficient to deter unmeritorious cases.

Implementing a one way costs shifting regime: Qualifying the rule

Financial qualifications

65. Respondents raised concerns as to the potential uncertainty that would follow from any qualification to a one way costs shifting rule. They were particularly opposed to Jackson LJ's proposal that the court should have regard to the parties' financial resources. This was not accepted by the Ministry of Justice, and the relevant civil procedure rules do not direct the court to have regard to the parties' resources. I am persuaded by respondents who opposed such a qualification on the ground that it would hinder access to justice. Furthermore, the uncertainty that would be introduced by such a qualification would considerably undermine the objective of altering the normal rule that expenses follow success. Consequently, I do not recommend that eligibility for QOCS should be subject to a financial test.

Failure to beat a tender

66. I am of the view that should a pursuer fail to beat a tender, the protection afforded him or her by QOCS should be limited. It would, in my opinion, be perverse to permit a pursuer to continue to litigate free of cost against a defender who has offered to pay damages for the loss caused along with the judicial expenses of the proceedings. However, not every pursuer who rejects a tender can be said to have acted unreasonably. Some tenders can be carefully pitched, so that the decision whether to accept or reject the tender is finely balanced. Accordingly, I do not consider that the full impact of costs shifting should be visited upon a pursuer who rejects a tender and then fails to beat it.

67. A major concern of respondents was the uncertainty that QOCS would create for pursuers in relation to tenders. They argued that should protection against liability for expenses be lost by the pursuer's failure to beat a tender, then the benefits of QOCS will be

largely illusory. Following *Carver v BAA plc*,[54] they were partly concerned that if a pursuer was to beat a defender's offer in low value claims by only a narrow margin, such that the cost of obtaining the increase was disproportionate to the benefit obtained, the court might decide that the tender had not been beaten. In *Carver*, the Court of Appeal held that because the claimant had only narrowly beaten a defendant's Part 36 offer, she had failed to obtain a judgment which was "more advantageous" within the meaning of the applicable court rule.[55] As a result, the claimant was found liable for the defendant's costs from the date the offer expired. The SCCR recommended that the rules on tenders should be subject to the overall discretion of the court, to be exercised as laid down in *Carver*: success should be judged by looking at the conduct of the parties and the whole circumstances of the case.[56]

68. Such was the controversy surrounding the decision in *Carver*, caused by the uncertainty it introduced by giving increased discretion to the court, that it was felt necessary to legislate to remove the impact of the decision. The amended rule now provides that *"'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly."*[57]

69. Since *Carver* is no longer good law south of the border, there will be greater discretion in the Scottish courts in the future than there currently is in England and Wales should the SCCR recommendation be implemented. I note that the Civil Justice Council has welcomed the departure from *Carver* on the grounds that under a strict arithmetic test there is no need to examine the conduct of either party in making or rejecting the offer.[58] This ensures greater predictability. Had the SCCR, which reported in September 2009, been aware of the controversy which followed the decision in *Carver* and set out by Jackson LJ in his Final Report later in the same year,[59] I question whether it would have recommended that Scotland should adopt the approach taken in *Carver*.

70. My aim is to achieve a better balance of risk between pursuers and defenders in those cases for which I recommend QOCS. There needs to be a potential sanction on pursuers in the event that they fail to beat a tender, otherwise, as was observed by one personal injury firm that represents pursuers, *"defenders would in effect be at the mercy of unreasonable and recalcitrant pursuers. It therefore seems inevitable that tenders would have to take priority over one way costs shifting."* At present, should a pursuer fail to beat a tender, the pursuer is liable for the defender's judicial expenses from the date of the tender. It is therefore possible that a pursuer can win the case, but if a tender has not been beaten the

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[54] [2008] EWCA Civ 412

[55] Formerly CPR Rule 36.20, which provided as follows: "(1) This Rule applies where at trial a claimant – (a) fails to better a Part 36 payment; or (b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer. (2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court."

[56] *Report of the Scottish Civil Courts Review* (2009), Recommendation 110

[57] CPR Rule 36.14(1A)

[58] Civil Justice Council, *Response To Ministry of Justice Commissioning Note entitled "Implementation Of Part 2 Of The Legal Aid, Sentencing And Punishment Of Offenders Act 2012: Civil Litigation Funding And Costs – Issues For Further Consideration By The Civil Justice Council"* (2012), paragraph 81

[59] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 41

damages awarded may be insufficient to meet the liability to pay the defender's post tender judicial expenses. Such a situation is very rare. An alternative approach, which attempts to improve the balance, may be by amending the pursuer's potential liability to post tender expenses. Where the case is subject to QOCS, I could recommend that the pursuer's liability for the defender's post tender judicial expenses should be limited by the amount of damages awarded. This would allay the fears of pursuers' solicitors who have stated that ATE insurance cover will still be required to protect against the risk of failing to beat a tender. However, I can sympathise with the pursuer who believes, or has been advised, that a tender is too low but who is forced to accept the tender for fear that expenses will exhaust the whole award of damages. I can also sympathise with the pursuer who fails by a narrow margin to beat a tender and thereby loses all damages recovered in settlement of the award of judicial expenses.

71. As the Civil Justice Council has noted,[60] an important consequence of this policy is that the claimant's damages could, in theory, be eroded in their entirety by the costs liability to the defendant for its post-offer costs. It went on to re-iterate its position, which it had articulated the previous year: "*This is clearly not a happy outcome in a matter in which a claimant has been successful.*"[61] The Civil Justice Council saw no clear or immediate solution to this outcome. It did not wish to reintroduce the discretion given to the court by the decision in *Carver.* However, those representing claimants suggested that the claimant's costs liability should be capped at a percentage of the damages awarded to ensure that successful claimants would recover something.

72. I am just persuaded by the argument that it is too drastic for a pursuer to find that his or her whole award of damages may be exhausted by an award of expenses following the pursuer's failure to beat a tender. **I recommend that in the event that the recommendation of the Scottish Civil Courts Review to adopt the rule in *Carver* is implemented in Scotland, the court should have a discretion to determine whether the pursuer acted reasonably in not accepting a defender's tender and thus the extent to which the pursuer should be liable to meet the defender's entitlement to judicial expenses from the date of the tender. In the event that the recommendation of the Scottish Civil Courts Review is not implemented, I recommend that the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded.**

The pursuer's conduct

73. I now turn to consider whether a fraudulent or dishonest pursuer should lose the benefit of QOCS. Jackson LJ anticipated that one of the situations in which a costs order against the claimant would be appropriate would be where the claimant had behaved unreasonably, such as by bringing a frivolous or fraudulent claim.[62] After much debate, the circumstances in which the benefit of QOCS may be lost in England and Wales are, without

[60] Civil Justice Council, *Costs Protection in Defamation and Privacy Cases: Report of the Working Group on Defamation Cost* (March 2013)
[61] *ibid*
[62] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 19, paragraph 4.8

the court's permission, where proceedings have been struck out on the grounds that i) the claimant has disclosed no reasonable grounds for bringing the proceedings ii) the proceedings are an abuse of the court's process or iii) the conduct of the claimant or a person acting on the claimant's behalf, and with the claimant's knowledge, is likely to obstruct the just disposal of the proceedings. With the permission of the court, QOCS also does not apply where the claim is found on the balance of probabilities to be 'fundamentally dishonest.' Unlike fraud, 'fundamentally dishonest' is not a legal term of art and how it will be interpreted by the courts of England and Wales remains to be seen. Distinguishing between dishonesty and 'fundamental dishonesty' may not be an easy task.

74. In Scotland, case law has provided a definition of, and test for, fraud. In Scots law, the general definition of fraud is where the defender has, by his dishonest word or deed, deliberately persuaded the pursuer to act to his detriment. The test for fraudulent representation in Scots law is found in the English case of *Derry v Peek*,[63] where Lord Herschell held that: *"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."*[64] This was followed by the House of Lords in *Robinson v National Bank of Scotland*.[65] Further, in *Derry v Peek*, Lord Herschell held that making a statement through want of care falls far short of, and is very different from, fraud.[66] This approach was approved in *Boyd and Forrest v Glasgow and South Western Railway Co*,[67] where it was held that there was no fraud where a defender had had an honest belief in his or her representations.

75. I have come to the view that in the context of personal injury litigation, where pursuers can suffer trauma, the court finding a pursuer to be incredible should not, by itself, be a reason for the pursuer to lose the benefit of QOCS. Trauma can have considerable impact upon the ability of a pursuer to accurately recall the events surrounding and central to an accident occurring. The line between a witness being incredible and unreliable can be fine. It is placing too much faith in the ability of the judiciary to distinguish one from the other in every case and to put some financial consequences on the correct distinction being made. There are some cases in which there is little doubt that the pursuer is not telling the whole truth. But there are many cases in which it is less than clear whether the pursuer's evidence, albeit unacceptable to the court, is unreliable as opposed to incredible. On the other hand, for what should be obvious reasons, a pursuer who is held by the court to have acted fraudulently should not have the benefit of QOCS. My recommendation is consequently restricted to fraud. **I therefore recommend that where the court finds that fraud on the part of the pursuer is established on the balance of probabilities, the pursuer should lose the benefit of one way costs shifting.**

76. **I also recommend that where a pursuer's conduct is found by the court to have been an abuse of process, the pursuer should lose the benefit of one way costs shifting.** A litigant who abuses the court's process has deliberately set out to deceive the court. Such

[63] (1889) 14 App Cas 337
[64] *ibid*, page 374
[65] 1916 SC (HL) 154
[66] *op cit* (1889), page 375
[67] 1912 SC (HL) 93

instances are mercifully rare.[68] It is difficult to see why somebody who has compromised the integrity of the court's procedures should have the benefit of QOCS.

77. I must now consider whether a pursuer who acts unreasonably in either raising or conducting the action should lose the benefit of QOCS. The SCCR recommended that either party should be able to seek summary disposal where the opposing party has no real prospect of success and there is no other compelling reason why the case should proceed. The court should also have power summarily to dispose of an action or defence *ex proprio motu*.[69] If a case is so weak that it is summarily dismissed, it is difficult to see why the pursuer should benefit from QOCS as the case should never have been brought to court. **I therefore recommend that where a pursuer's case is disposed of summarily, the pursuer should lose the benefit of one way costs shifting. Conversely, the pursuer should be entitled to found on the defender's failure to move for summary disposal should the defender subsequently argue that the benefit of one way costs shifting should fly off.** It would be going too far to recommend that it is only in cases where a pursuer's case is summarily dismissed that the pursuer can be said to have acted unreasonably in bringing the litigation.

78. Unreasonableness can also manifest itself in the conduct of the litigation. Unreasonableness is not easy to define. That said, in cases funded by legal aid, it has for many years been possible for a defender to oppose the pursuer's application for modification of expenses on the ground that the pursuer's conduct has been unreasonable. The court has not had a problem in dealing with such situations, albeit a modification to nil is the usual outcome. Pursuers should not be so concerned that they will lose the benefit of QOCS that they require to take out ATE insurance to cover a risk that the court will find their conduct of the litigation to have been unreasonable. On the other hand, an unreasonable litigant should not receive the benefit of being able to pursue a litigation without the risk of having to pay the defender's judicial expenses. In my opinion the balance can be struck by removing the benefit of QOCS from a pursuer who conducts the litigation in an unreasonable manner but requiring the court to apply a high test when considering the reasonableness of the pursuer's conduct. I expect that it will be unusual for the benefit to be lost on the ground of unreasonable conduct. **I recommend that where a pursuer conducts the litigation in an unreasonable manner, the pursuer should lose the benefit of one way costs shifting. For the avoidance of doubt, the test of unreasonableness should be that set out in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation.***[70] If it were a lower test, the benefits of QOCS might well be lost as pursuers may not have the confidence to litigate without the benefit of an ATE insurance policy.

79. In summary, the benefit of QOCS should be lost by a pursuer who is deemed by the court to have acted fraudulently, who has been held to have abused the court's process or who has acted unreasonably in either raising or conducting the litigation. Unreasonableness

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[68] See *Levison v Jewish Chronicle Ltd* 1924 SLT 755; *Shetland Sea Farms Ltd v Assuranceforeningen Skuld* 2004 SLT 30

[69] 'On the court's own initiative.' See *Report of the Scottish Civil Courts Review* (2009), Recommendation 123

[70] [1948] 1KB 223. In this case Lord Greene held that "*if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere*."

in raising the action will be satisfied if the case is summarily dismissed. The test of unreasonableness in the conduct of the litigation should be the Wednesbury test. A finding by a court that the pursuer is incredible should not, in itself, warrant the removal of the benefit of QOCS.

CHAPTER 9 DAMAGES BASED AGREEMENTS

1. A damages based agreement is a type of 'no win no fee' agreement under which a lawyer's fee is calculated as a percentage of monies recovered in a successful litigation. This mode of funding is sometimes referred to as contingency funding, and the fee charged is referred to as a contingency fee. More recently,[1] the term "damages based agreement" has been employed.

2. Under a damages based agreement the calculation of the fee payable to the lawyer, referred to as a 'success fee', varies between lawyers and jurisdictions but is typically based on a percentage of the award or negotiated settlement. A sliding scale is frequently employed according to the stage at which the case is concluded or according to the value of the final award or settlement. Like speculative and conditional fee agreements ('SFAs' and 'CFAs'), which are referred to in Chapter 7 of this Report, lawyers' fees are not payable if the case is lost.

Scotland

3. The position in Scotland with regard to damages based agreements differs between solicitors and advocates. Advocates are expressly forbidden by the Faculty of Advocates from entering into damages based agreements.[2] The Law Society of Scotland's Practice Rules do not contain a specific prohibition against damages based agreements. However, such agreements are unenforceable if entered into by solicitors, on the basis that they fall into the category of contracts which are *pactum de quota litis*.[3]

4. Claims management companies, however, may enforce damages based agreements.[4] Indeed, the Inner House has observed that it may be of considerable importance to claimants, if they are to be able to vindicate their claims effectually, to obtain assistance of this kind, granting in return for the risk and expenditure undertaken a percentage share of what is eventually recovered.[5] Firms of solicitors can thus circumvent the unenforceability of damages based agreements by setting up their own claims management companies.

5. Whereas solicitors are regulated by the Law Society of Scotland, claims management companies are currently not regulated. This can be contrasted with the position in England and Wales where they are regulated by the Claims Management 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.[6] Were it not for the fact that

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[1] The term first appears to have been first introduced by the Ministry of Justice in 2009 (Coroners and Justice Act 2009 s 154).

[2] Faculty of Advocates, *For the Accounting For and Recovery of Counsel's Fees 2008 Scheme* (2008): "Counsel are not permitted to accept instructions on a contingency basis, that is, where fees will be based on any quantum measurement of the outcome."

[3] *Quantum Claims Compensation Specialists Ltd v Powell* 1998 S.C. 316 at page 323. A *pactum de quota litis* (literally a contract for a share of the litigation) is unenforceable in law.

[4] *ibid* at page 319

[5] *ibid*

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

many claims management companies in Scotland are wholly owned by solicitors as a device to ensure the enforceability of damages based agreements, it could be said that solicitors and claims management companies do not operate on a level playing field.

6. Other significant developments in the legal services market are about to take place which make consideration of these issues pressing. The first is the advent of alternative business structures. Currently, law firms in Scotland can only be owned by solicitors either as sole practitioners or in partnership with other solicitors. The Legal Services (Scotland) Act 2010[7] allows solicitors to provide legal services via a range of different business models, such as allowing non-solicitor partners to work in partnership with other professionals (multi-disciplinary practices) provided that solicitors and/or other regulated professionals (such as accountants or surveyors) have majority ownership. The implementing regulations came into force on 2 July 2012.[8]

7. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('the 2012 Act'),[9] which applies only to England and Wales, permits damages based agreements in England and Wales as from 1 April 2013. This could lead to significant changes in the claims management market in England and Wales, which may have manifold consequences for Scotland. These developments demand that further consideration be given to the status of damages based agreements and the regulation of claims management companies in Scotland.

England and Wales

8. The 2012 Act is designed to make substantial changes to the landscape of civil litigation funding in England and Wales. Prior to the 2012 Act, solicitors were forbidden by their Code of Conduct from entering into damages based agreements in relation to contentious business.[10] Nor were barristers permitted to act on the basis of such agreements.[11] Damages based agreements were permitted in non-contentious business and for tribunal proceedings, other than the Lands Tribunal and the Employment Appeal Tribunal which were treated as "contentious business." Employment tribunals were treated as "non-contentious."[12] Jackson LJ found that contingency fee agreements were most commonly used in employment tribunals, where they made a modest contribution to access to justice and were popular with some clients.[13]

9. In recent years there has been a marked interest in contingency funding in England and Wales, attributable to concerns arising from the operation of CFAs. These included

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[7] asp 16

[8] Legal Services (Scotland) Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2012 SI 2012/152

[9] c. 10

[10] Solicitors Act 1974 c. 47, s 59 and Rule 2.04 of the Solicitors' Code of Conduct 2007. Definitions of 'contentious' and 'non-contentious' are to be found in Section 87 of the 1974 Act.

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

[12] Prior to the 2012 Act, the tribunals in which solicitors in England and Wales most frequently acted on a contingency fee basis were employment tribunals. As Jackson LJ observed, *"The classification of the business of those tribunals as non-contentious is an oddity, to say the least."* (Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 20, paragraph 2.2).

[13] *ibid*, paragraphs 2.2-2.3

their lack of transparency and the satellite litigation that had grown up around the recoverability of success fees and After the Event ('ATE') insurance premiums. Under the 2012 Act, neither is now recoverable, save in very limited circumstances.[14]

10. Jackson LJ gave considerable attention to contingency fee agreements (his term for damages based agreements) in his Review and addressed the following questions: (a) whether contingency fees should be permitted in England and Wales; (b) whether any costs recovery should be assessed on the conventional grounds or by reference to the contingency fee; and (c) how contingency fee agreements should be regulated.

11. Jackson LJ found that the arguments in favour of contingency fee agreements included their simplicity. Fees would be proportionate to damages. Lawyers would have an incentive to maximise their clients' recovery. Allowing an additional funding mechanism could only increase access to justice. The principle of 'no win no fee' had already been accepted. Arguments against such agreements included the potential for conflicts of interest. It was wrong in principle for lawyers to have an interest in the level of damages, or for clients to lose part of their damages. Jackson LJ concluded that the arguments in favour outweighed the arguments against. He considered it desirable that as many funding methods as possible should be available to litigants. He saw particular force in the argument for freedom of contract. Clients who wished to enter into contingency fee agreements, having received independent advice, should be free to do so. While this was self-evident with respect to commercial litigants, independent advice and effective regulation would be required to provide safeguards for private individuals.

12. Jackson LJ therefore recommended that solicitors and counsel should be permitted to enter into contingency fee agreements ('CFAs') with their clients, subject to proper regulation. Regulations should (i) introduce a requirement that clear and transparent advice and information be provided to consumers on costs, other expenses and other methods of funding available; (ii) provide a maximum percentage of the damages that can be recovered in fees from the award; and (iii) control the use of unfair terms and conditions.

13. Jackson LJ recommended that:

- the contingency fee in personal injury litigation should not exceed 25% of the claimant's damages, excluding damages referable to future costs or losses. (This was the same cap as applied in CFAs).[15] This should be read in light of Jackson LJ's earlier recommendation that general damages should be increased by 10%[16], discussed below.[17] For other litigation, he proposed that regulations specify a maximum percentage.[18]

[14] See Chapter 7
[15] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 12, paragraph 4.11
[16] *ibid*, Chapter 10, paragraph 5.3
[17] See paragraph 43
[18] *ibid*, Chapter 12, paragraph 4.6

- The agreement should not be valid unless the client had received advice on its terms from an independent solicitor.[19]
- CFAs would require to state at the outset how any adverse costs orders would be met[20] (that is, whether by the client or the solicitor) and how counsel's fees were to be dealt with.[21]

14. Jackson LJ recommended that costs recoverable from the opposing party should be assessed without reference to the contingency fee.[22] In so far as the contingency fee exceeds what would be chargeable under a "normal" fee agreement, the excess would therefore be borne by the successful client. Unsuccessful defendants would therefore pay no more in costs than they would have paid had the claimant used a different funding mechanism, such as a CFA. This was to address one of Jackson LJ's overriding concerns, namely, restoring the balance between defendants and claimants, which he had seen as having become too heavily weighted in favour of claimants by virtue of recoverable success fees and ATE insurance premiums.

15. The Ministry of Justice accepted most of Jackson LJ's recommendations (other than the requirement to obtain independent legal advice) and welcomed them as a useful additional form of funding for claimants. It accepted that damages based agreements should be capped at 25% of damages (excluding damages for future care and loss) and legal costs and disbursements should be recovered by successful parties on the conventional basis in personal injury cases.[23]

16. Accordingly, the 2012 Act permits lawyers to enter into damages based agreements in those types of civil litigation in which it is currently possible to use a CFA.[24] This excludes family proceedings.[25] Thus, it will be possible to use damages based agreements, for example, in personal injury or commercial actions.

17. The Damages-Based Agreements Regulations ('the 2013 Regulations')[26] provide that:

- in personal injuries cases, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 25% of the total of (a) general damages for pain, suffering and loss of amenity and (b)

[19] *ibid*, paragraph 4.10
[20] *ibid*, paragraph 4.7
[21] *ibid*, paragraph 4.8
[22] *ibid*, paragraph 4.1
[23] Ministry of Justice, *Reforming Civil Litigation Funding and Costs in England and Wales Implementation of Jackson LJ's Recommendations: The Government Response* (2011)
[24] Section 45 of the 2012 Act, inserting section 58AA of the Courts and Legal Services Act 1990 c. 41. The 2012 Act uses the expression 'damages based agreement.'
[25] The proceedings which cannot be the subject of a conditional fee agreement are family proceedings and criminal proceedings: 1990 Act section 58A
[26] SI 2013/609

damages for pecuniary loss other than future pecuniary loss.[27] In an employment matter the cap is 35%,[28] while in all other cases the cap is 50%. [29]

- a damages based agreement[30] must not require the client to make payment other than (a) the sum which the client has agreed to pay, net of any costs and disbursements recovered from the defendant, and (b) any unrecoverable expenses incurred by the lawyer.[31] That is to say, costs recovered from the other party are offset against the sum due by the client to the solicitor. Offsetting is discussed in more detail below.

18. The amended Civil Procedure Rules further provide that the successful party cannot recover by way of costs more than the amount payable for legal services under the damages based agreement.[32] It follows that if the fee due under the damages based agreement is less than the recoverable costs would have been had there been no such agreement, the defendant is liable only for that lesser amount. This is known as 'the indemnity principle.' In this respect, the rules as enacted differ significantly from Jackson LJ's recommendation that costs should be recoverable from the opposing party on the conventional basis and not by reference to the contingency fee.[33]

Consultation responses

19. In our Consultation Paper we asked nine questions with respect to damages based agreements.

Damages based agreements and the legal profession

20. We firstly asked whether the law should be changed to allow solicitors and counsel to enter into damages based agreements. Several respondents pointed out that while counsel are expressly forbidden from entering into a damages based agreement in Scotland, solicitors may do so - albeit at the risk of not being able to enforce payment. While some referred to the frequency with which solicitors in Scotland enter into damages based agreements in non-contentious business, others observed that a separate and full investigation of their potential impact was imperative before they were even considered.

21. Opposition to the proposal for damages based agreements rested on several grounds. Some respondents opposed them on principle. They argued that innocent parties should be

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[27] Regulation 4(2); the percentage caps in the Regulations are inclusive of VAT.
[28] Regulation 7
[29] Regulation 4(3)
[30] Other than in employment matters, for which separate provision is made: Regulation 7.
[31] Regulation 4(1)
[32] Civil Procedure Rules, Rule 44.18: "(1) The fact that a party has entered into a damages based agreement will not affect the making of any order for costs which otherwise would be made in favour of that party. (2) Where costs are to be assessed in favour of a party who has entered into a damages based agreement (a) the party's recoverable costs will be assessed in accordance with rule 44.3; and (b) the party may not recover by way of costs more than the total amount payable by that party under the damages based agreement for legal services provided under that agreement."
[33] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 12, Recommendation 5.1(i)

returned to the position in which they found themselves prior to being harmed. Indeed, some were of the view that it may be inherently immoral for professionals to reward themselves out of damages intended to compensate an injured party for a wrong done. Where damages based agreements are entered into with claims management companies, they observed that pursuers may be deprived of a substantial part of their loss and certainly more than under SFAs, with the most vulnerable exposed to the highest losses.

22. Other respondents identified the conflicts of interest to which damages based agreements may give rise: both between lawyers and the court, and between lawyers and their clients. They argued that damages based agreements provide lawyers with an interest in, and entitlement to, the client's award. This may generate an inherent conflict with their first duty, which was to the court. They also feared that by incentivising lawyers to act in their own best interests, this could impact on the soundness of their professional advice to their clients. As a result, professionalism, professional ethics and the reputation of the legal profession were likely to be undermined. In addition to the encouragement of unrealistic valuations and unreasonable negotiating behaviour, rewards may be provided that are out of kilter with the professional services rendered and this may concentrate attention on the value of the claim rather than the whole circumstances of the case.

23. Lastly, several respondents queried whether damages based agreements were needed in the first place. They acknowledged that measures were required to improve access to justice. They observed, however, that unlike in the United States, expenses are awarded to successful parties in Scotland. If the expenses regime was to be amended so as to provide a more adequate reflection of the true cost of litigation, including the pre-litigation stage, there would be no need for damages based agreements.

24. Those in favour of damages based agreements largely argued on empirical and pragmatic grounds. They observed that damages based agreements were not new in the Scottish civil litigation landscape but had been used for more than twenty years. They reported that the model employed by Quantum Claims Limited had now been replicated by a number of firms of solicitors via linked claims management companies. Hence, a significant proportion of all Scottish personal injury litigation was underpinned by this model. There was no evidence to suggest that this had encouraged frivolous claims. Nor was there evidence of complaints by clients either as to fee levels or conflicts of interest. Similarly, pre-litigation protocol fees, which had been set up by and agreed upon by the Law Society of Scotland and the Forum of Scottish Claims Managers, were calculated by reference to the settlement value without any concerns ever having being raised.

25. A number of respondents remarked that the difficulties which damages based agreements presented to solicitors, on account of such agreements being unenforceable as a *pactum de quota litis*, have little practical impact now that a number of solicitors have set up their own claims management companies. Any risk posed by solicitors entering into damages based agreements, so they argued, would be better managed if agreements were clear and transparent rather than obscured by the involvement of claims management companies. In any case, they observed no significant difference between damages based agreements and SFAs that are capped by reference to the value of the award in low to moderate value claims. This is developed further in Chapter 7, which deals with SFAs.

26. Respondents, and particularly solicitors entering into damages based agreements via their own claims management companies, reported that their clients liked damages based agreements for their transparency and proportionality. They were more easily understood than SFAs and afforded clients greater predictability as to their liability in fees. Lawyers in favour of damages based agreements observed that they were no more likely to generate conflicts of interest than SFAs. They observed that conflicts of interest were rarely raised in opposition to pre-litigation protocol fees and that any concerns with regard to conflicts of interest inherent in damages based agreements were not sufficiently well-founded to justify their current unenforceable status. In any case, professional standards of practice and regulation could be invoked to address concerns, were they to arise.

27. Several respondents were of the view that any rise in the number of funding options available to would-be litigants was likely to increase access to justice. Except for one respondent who identified multi-party actions as a particular beneficiary of damages based agreements, there was no elaboration as to how and for whom damages based agreements might improve access to justice.

28. Lastly, some argued for a change in the status of damages based agreements in Scotland on the grounds that this would enable all lawyers to enter into damages based agreements, and not just those who were running sophisticated operations by setting up claims management companies. Indeed, if damages based agreements were enforceable, solicitors would not be required to set up claims management companies in the first place. It would also afford solicitors a level playing field with the independent claims management companies that were presently operating in the Scottish market. A few argued that there may be serious consequences for the Scottish litigation market if damages based agreements were permitted in England and Wales, but not enforceable in Scotland. In particular, litigants with complex or high value cases might find it easier to find representation south of the border.

29. Only a few respondents argued for the enforcement of damages based agreements in Scotland on the grounds that if introduced in England and Wales but not in Scotland, this would create an incentive to litigate in England. The few who raised the possibility were not resolute in their view. The majority of respondents thought it unlikely that it would create an incentive to litigate in England and based their view on past experience. They noted that despite the more favourable conditions with regard to the recoverability of success fees and ATE insurance premiums in England, there had been no exodus of cases out of Scotland. Other than certain types of commercial litigation, they reported that there was little evidence of forum shopping. Some respondents reasoned that where choice of jurisdiction was available, parties took into consideration more than the level of recovery and the availability of alternative funding mechanisms. In personal injury litigation, for example, distinctive features and advantages of the Scottish system, which include civil jury trials, the Chapter 43 procedure in the Court of Session and local convenience, pulled in the other direction. As one respondent observed, most damages claims will continue to be litigated in the jurisdiction most closely associated with the events in question.

30. Several respondents also argued that in the event of a choice of forum, damages based agreements would present no incentive since they offered pursuers no particular

advantage. They reasoned that if a lawyer in England and Wales was willing to take on a particular case, it was likely to have every chance of succeeding. If so, pursuers could enter into an SFAwith a Scottish solicitor and may not have to forgo a proportion of their damages in the event of a successful claim. The Law Society of Scotland likewise argued that since damages based agreements were unlikely to offer claimants any advantage, they would only prompt a litigation exodus if people are misled by advertising campaigns.

The contribution of damages and other monetary awards to legal fees

31. In the event that damages based agreements are to become enforceable, we asked whether it is reasonable to expect successful pursuers to contribute some of their award towards payment of their legal fees. A few respondents strongly opposed the proposal and argued that people injured through the fault of others should, as a matter of principle, be fully compensated. They argued that if the test of reasonableness in the matter of recoverable expenses was based on the proper conduct of the case, it should not be necessary for awards to subsidise legal fees.

32. The majority of respondents to this question, however, considered that it was reasonable to expect successful pursuers to contribute to any shortfall out of damages or other monetary awards. They argued that since damages based agreements, like SFAs, shift the risk from the litigant to the solicitor, it was fair to expect litigants to contribute a proportion of their award towards the payment of legal fees. Justification for sharing the risk may be strongest in high value cases with more limited prospects of success, where the risk was greatest. Indeed, such cases may not be taken on under any other funding regime.

33. The argument was also made, albeit by only one respondent, that pursuers should have a financial stake in their claim and this could be achieved by requiring them to contribute to their legal fees out of damages received. Another argued that if expenses could not meet the fees that had been privately agreed between the pursuer and his or her legal advisers, any shortfall should be funded out of damages received and not by defenders who had played no part in the agreement.

Capping damages based agreements

34. We also consulted on whether there should be a cap on the percentage of the award that lawyers would be entitled to charge, in the event that damages based agreements are enforceable. A number of respondents were opposed to a cap. Some were of the view that a cap was redundant since competition would keep the percentage low. Others argued for freedom of contract, with the percentage of damages charged a matter to be decided between clients and their lawyers. Another respondent observed that it may be difficult to allocate a starting point for a cap. If damages based agreements were to become enforceable, it may be advisable to allow the market to decide the percentage(s). Should the market not operate as expected, a cap could then be fixed.

35. Some respondents focused on the issue that damages based agreements were being introduced to deal with. While they acknowledged that clients may require protection, they observed that the rationale for introducing damages based agreements was to improve access to justice by incentivising solicitors to take on complex and risky cases which they

might not otherwise have done under an SFA. They reasoned that a cap could unfairly prejudice more complex cases where the prospect of success may be limited, which could very well merit a higher fee than the cap imposed.

36. Nevertheless, a majority of respondents to this question were in favour of capping the percentage of damages that lawyers should be entitled to charge. While several were of the view that competition would probably keep it low anyway, a cap would provide clients with some protection by ensuring that they would still recover a substantial percentage of the damages to which they were entitled.

37. Although 10% was suggested in one response, a majority of those respondents in favour of a cap suggested that it should be set at 25%. This would be consistent with Jackson LJ's recommendations, as well as consistent with their preference for a cap on SFAs. While in favour of a cap in principle, another respondent reasoned that it should be higher in damages based agreements since cases for which they are offered are likely to have lower prospects of success than cases where SFAs are offered. Some also suggested that the cap should be applied by claims management companies. The Law Society of Scotland proposed that the percentage cap should be on a reducing basis as the award increases, following the Completion Fee in the voluntary Pre Action Protocol agreed between the Law Society of Scotland and the Forum of Scottish Claims Managers.

Ring-fencing heads of damages

38. The Consultation Paper went on to ask whether the percentage of award agreed upon by client and solicitor under a damages based agreement should apply to and be deducted from all heads of loss. A small majority of respondents were opposed to the proposal, mostly on the grounds that damages designated for the funding of future care and medical expenses should be ring-fenced. They identified serious concerns that may arise if damages designated for recovery and rehabilitation were used to fund legal fees. For a start, it would expose the most vulnerable, with serious or catastrophic injuries, to an unacceptable level of fee recovery from damages. Some argued, however, that not all future loss need be protected. For example, a number of respondents proposed that only damages for future care should be protected.

39. Almost half of all respondents, however, were in favour of deducting the percentage of damages specified under a damages based agreement from all heads of loss. They argued that this was only pragmatic since it took into account how negotiations are conducted and settlements are constructed. With certain exceptions, most cases where damages are sought are concluded by settlement - and most of these cases are settled on the basis of a once and for all payment. They found it unrealistic to subdivide an agreed settlement into specific heads of damages and frequently artificial to distinguish between past and future losses. The Faculty of Advocates argued that it would not be fair or reasonable to have one rule applicable in cases decided by the court in which heads of loss were specified and another applicable in cases resolved by agreement where a global settlement may have been adopted with no specified heads of loss agreed.

40. A few respondents argued on grounds of remuneration. They referred to the disparity between the actual expenses incurred in a litigation and what was recovered by

way of judicial expenses. They were of the view that solicitors would not be adequately rewarded in complex cases if damages were restricted to past losses. They observed that few high value cases are litigated in respect of past losses and most are fought on future losses. Indeed, so they argued, it was in maximising the claim for future loss that solicitors' skills are brought into play. Should Jackson LJ's proposals be followed and damages for future care ring-fenced, solicitors representing claimants in complex cases with large claims for future loss were likely to receive the same level of success fee as someone handling straightforward cases of much lower value.

41. Finally, a number of respondents observed that ring-fencing future loss may encourage poor practice by penalising the efficient solicitor who takes one year to achieve a higher settlement and rewarding the inefficient solicitor who takes four years to achieve a lower settlement. In a similar vein, another respondent suggested that ring-fencing future loss could incentivise delay in reaching settlement so as to maximise past loss.

Increasing the level of damages

42. We asked in the Consultation Paper whether, in the event that damages based agreements were introduced, there should be an increase in the level of damages awarded and, if so, by what percentage. Only one respondent was in favour of an increase and this was only in so far as it might help fund the larger shortfall between what a successful litigant has to pay his or her solicitor and what is recovered from the unsuccessful litigant by way of judicial expenses in Scotland as compared to England and Wales. Even so, it was not this respondent's preferred option, which would have been to increase the level of recoverable judicial expenses in Scotland.

43. Most respondents pointed to the inappropriateness of applying a 10% increase in the level of damages in Scotland, as recommended by Jackson LJ.[34] They observed that Jackson LJ's proposal was informed by a desire to compensate claimants in England and Wales for losing the recoverability of success fees and ATE insurance premiums which had never been recoverable in Scotland. They also observed that if damages based agreements are to be made available to civil litigation more generally, a percentage increase in damages would not sit well outwith personal injury litigation. Nor would it sit well in a jurisdiction in which, unlike England and Wales, damages may be awarded by juries as well as judges.

44. Indeed, there was strong support for ensuring that the value of damages should remain separate from the issue of expenses in Scotland. Respondents argued that levels of compensation should be set by the court based on merit and not be influenced by legal expenses. Damages must remain a measure of the loss suffered by the pursuer at the hands of the defender. Increasing awards to accommodate funding offends the compensatory nature of damages and subverts the function of damages, which is to place parties in the position from which they started out before the alleged wrongdoing. Nor was an increase of 10% on damages for pain and suffering likely to provide substantial benefits. For pursuers, it would make a minimal impact on mitigating the impact of paying for legal fees out of damages, particularly in low to moderate value cases. For defenders, it would not only

[34] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 10, Recommendation 6.1(ii)

erode the link between awards and actual loss, but would represent an opaque and arbitrary means of shifting the burden to the defender.

Damages based agreements and the protection of clients

45. In the event that the current rules against entering damages based agreements were reversed, we asked whether protection was required for clients entering into damages based agreements. Just two respondents were of the view that no new measures were needed. One firm of solicitors advised that there were no empirical grounds for requiring protection in Scotland while another observed that lawyers are always under a duty to give their clients best advice. The remaining 24 respondents addressed this question by identifying the means by which clients could best be protected.

46. Respondents firstly considered the content and form of damages based agreements. They advised that agreements should be clear and transparent; they should be drafted by or agreed with the appointed regulatory body and they should be in a standard form. There should be a 'cooling off' period. Agreements should set out all of the essential features which will enable clients to make an informed choice. Respondents suggested that agreements should include: what services the agreement relates to, such as pre-litigation as well as litigation costs; the maximum amount of success fees that can be recovered at different stages of proceedings; the impact of the agreement on the damages received; how experts, counsel and court fees are to be funded; how any awards of expenses against the client are to be met; what clients may and may not be charged for; and what alternative methods of funding may be available. They also suggested that agreements should inform clients as to what will happen if the client refuses to accept advice, withdraws instructions or disagrees with the fee, as well as how conflicts of interest are to be managed should they arise.

47. Respondents disagreed as to whether independent advice should be required, as Jackson LJ had recommended.[35] Some were of the view that the rigorous application of rules of conduct would minimise the need for independent advice, while others considered that claimants should explore all other funding options with an independent adviser. At least two respondents advised that if this recommendation were to be pursued, consumers should not be presented with further costs or barriers to accessing justice.

48. Finally, the means by which damages based agreements should be regulated was addressed. A number of respondents proposed that they should be regulated and governed by consumer protection legislation, with provisions for an appropriate cooling off period, a right to terminate, protection against unfair contract terms and the right to independent advice. The Law Society of Scotland suggested that the regulations in England and Wales could be adapted for Scotland.

[35] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 12, Recommendation 5.1(ii)

Solicitors and affiliated claims management companies

49. In the event that the current rules against entering into damages based agreements are retained for counsel and solicitors, we also asked whether steps should be taken to prevent their circumvention by the formation of claims management companies in which solicitors are directors or shareholders. The majority of respondents were of the view that no steps should, or need, be taken. Some referred to the case of *Quantum Claims Compensation Specialists Ltd. v Powell*,[36] in which the court, while expressing unease at the possibility of confusion between the fact that the claims management company were instructing the solicitors' practice, nonetheless held that the unenforceability of damages based agreements applied only to solicitors.[37] Others observed that the present situation allowed Scottish solicitors to compete on a level playing field with claims management companies and were not willing to block this initiative. Indeed, some ventured to say that any action taken to block it could be seen as anti-competitive. Still others observed that it was impractical to attempt to block these initiatives. It would also be foolhardy in view of the likely impact of alternative business structures on the Scottish legal services landscape.

50. Most respondents in favour of taking steps to address circumvention argued on the grounds of consistency. They said that any prohibition or enforceability rule is pointless unless its circumvention is prevented. It was absurd for a damages based agreement entered into by a solicitor to be deemed unenforceable while simultaneously allowing solicitors to derive exactly the same benefit from the arrangement by virtue of being directors and shareholders of claims management companies to which their clients have been directed. They observed that such circumvention brings any profession into disrepute. Hence, if there was indeed circumvention, it would need to be addressed.

Discussion

Enforcing damages based agreements

51. The overwhelming consensus of respondents to the consultation was that there should be a level playing field between solicitors and claims management companies in Scotland. This can be achieved in a number of ways. I could recommend that legislation be introduced to make damages based agreements illegal, or at least unenforceable at the instance of all parties. Another solution would be to recommend that the law of Scotland is changed to enable damages based agreements to be enforced by all regulated parties who enter into them.

Contributions from damages

52. Firstly, I have considered the general issue of taking lawyers' fees and outlays from damages or other monetary awards. We found that this was not unique to cases funded by damages based agreements. A client may require to contribute out of his or her damages to fees payable under SFAs, or under the 'claw-back' arrangements in cases funded by civil

[36] *op cit*
[37] *op cit*, paragraph 323

legal aid.[38] A contribution from damages may also be required in cases dealt with by claims management companies. However, this in itself does not provide sufficient justification for allowing damages based agreements to be enforceable.

53. Pursuers, for their part, may think that it is better to recover a proportion of the damages to which they consider they are entitled rather than have no damages at all. We have been told that, for a price, claims management companies have taken on cases that would never have been accepted under an SFA. Such arrangements enable potential litigants to access a source of funding which they may not otherwise have been able to do. Indeed, as Lord Prosser, delivering the opinion of the Inner House in *Quantum Claims Compensation Specialists Ltd. v Powell*[39] observed, it may be of considerable importance to a claimant to obtain assistance of this kind if he is to be able to vindicate his claim effectually.[40] In virtually all types of litigation in Scotland, full fee recovery is not achieved by the successful party, with the result that they require to meet any shortfall between the judicial expenses recovered and the fees due to their solicitor. It is not by accident, nor due to the greed of lawyers, that this situation arises. It is a matter of longstanding policy. Judicial expenses and solicitor client expenses are calculated on a different basis, with the former always being lower than the latter. As Jackson LJ subsequently pointed out, the myth of full cost recovery is a recent one. He suggests that it only came to be expected in England and Wales after April 2000, when success fees and ATE insurance premiums became recoverable.[41] This issue is discussed more fully in Chapter 2, which deals with the recovery of judicial expenses. We carried out research into other jurisdictions and found a shortfall between legal fees and judicial expenses in all of the jurisdictions examined.[42] I am not persuaded that the requirement for pursuers to make a contribution towards the cost of litigation out of their own funds is a valid reason to maintain the *status quo* in Scotland, namely, that solicitors cannot enforce damages based agreements while claims management companies may.

Damages based agreements and 'user-friendliness'

54. Claims management companies in Scotland presently fund all of their cases under damages based agreements, albeit at varying rates for different values, levels of complexity and prospects of success. Claims management companies, as well as solicitors who offer this arrangement through affiliated claims management companies, report that clients find the concept easy to understand. Several solicitors told us how complex it was to explain to clients what they are charged under SFAs and how the charge is calculated, whatever model of SFA is used. In short, several of those solicitors who have not set up their own claims management company to enable them to offer damages based agreements to clients, but who instead offer SFAs to clients with personal injury claims, have urged me to recommend

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[38] Scottish Legal Aid Board, *Civil Legal Assistance Handbook* (June 2013), Part VII, Chapter 2

[39] *op cit*

[40] *op cit*, paragraph 319

[41] Jackson LJ, 'Legal Aid and the Costs Review Reforms,' First Lecture in the Implementation Programme (2011); and Jackson LJ, 'Why Ten Per Cent?' Tenth Lecture in the Implementation Programme (2012).

[42] See Chapter 2, Annex 1

that the law be changed to allow damages based agreements entered into by solicitors to be enforceable in Scotland.

55. Solicitors told us that while they may be neutral on the question of damages based agreements, or may even find them distasteful, they found damages based agreements "tempting" and "attractive" by virtue of their simplicity which made it easier for them and for their clients. They reported that despite the fact that it was frequently to their cost, many employed a self-imposed cap in SFAs which rendered them 'virtual' damages based agreements.[43] One may well imagine that while damages based agreements may be attractive because of their supposed simplicity and transparency, their superficial attraction may not always work to the client's advantage. Clients may be lured by their simplicity at the cost of larger deductions from their damages than might have been likely under an SFA, particularly in higher value cases. 'User-friendliness' could well have its own costs for clients. Any model for a proposed damages based agreement must therefore employ mechanisms to balance 'user friendliness' with fairness for the recipient of an award.

Conflicts of interest

56. Those who argue in favour of a total ban on damages based agreements across claims management companies and lawyers frequently cite an inherent conflict of interest between service providers and clients when fees are calculated as a percentage of the damages recovered. Their argument bears inspection, if only because speculative and damages based fee agreements are more similar than they may at first appear. In both agreements, the solicitor is paid only if the client recovers a monetary award. As one solicitor explained with reference to SFAs, *"We are conflicted all of the time....we have to win to get paid. So there is an incentive for us to settle, which may be in conflict with our clients."* Similarly, it has been reported to us that claims management companies entering into damages based agreements may prefer to settle at the door of the court, rather than risk proceeding and receive nothing. The preferences of clients under these circumstances may differ.

57. For all their similarities, and contrary to the received wisdom, some have argued that damages based agreements create a mutuality of interests between solicitors and clients which is absent in SFAs. One claims management company related how its clients are told that their claims are maximised because it is in the interests of the claims management company to do so, while there may be little interest in maximising recovery for the client under SFAs. If damages based agreements may afford legal service providers a greater stake in the outcome, it may be argued that SFAs afford them a greater stake in the process. With success fees based on a percentage of the judicial expenses or on a percentage of the hourly rates under SFAs, legal services providers who have entered into an SFA could be incentivised to prolong proceedings at the cost of an earlier settlement.

58. Many solicitors offering SFAs enter into agreements that are some version of the Law Society of Scotland's Compensure model, by which the solicitor charges an agreed hourly rate with a voluntary cap limiting the amount payable by the client to a percentage of the

[43] See Chapter 7, paragraph 60

damages recovered. That cap is usually between 15% and 25%. Thus the client is guaranteed between 75% and 85% of the damages awarded. For anything other than cases with high awards of damages, the fee payable is limited by the percentage cap on damages. While not nominally so, cases conducted under SFAs in many low to medium value claims are therefore, in reality, damages based agreements.

59. Similarly, while providers entering damages based agreements have a stake in the outcome, they must always keep an eye on the process. Consistent with their professional duties, they will require to monitor the work in progress to ensure that should the action be unsuccessful, the loss to the firm in terms of non-chargeable time is controlled.

60. In sum, a more nuanced view should be taken on the question of conflicts of interest. The differences between damages based agreements and SFAs may be more apparent than real, and this is particularly the case in low value work, which constitutes the bulk of personal injury litigation. Legal service providers who offer SFAs do have some interest in the damages recovered, while those offering damages based agreements are not exclusively interested in the damages recovered. Both may look at the cost-benefit of engaging in more work for a specified increase in the return, and may make an assessment of the risks involved. Their decisions may not always be in perfect concordance with the interests of their clients.

61. I acknowledge there is a potential conflict between the interests of the client and the lawyer in damages based agreements. But as we have seen, such conflicts exist in other forms of funding, such as settlement agreements under the voluntary pre-action protocols and SFAs which have been permitted for nearly 20 years. The profession has been able to cope with such conflicts. We have not had problems with such conflicts drawn to our attention. I do not consider such conflicts as may arise in relation to damages based agreements are sufficient reason to make them unenforceable at the instance of a lawyer.

The Scottish civil litigation landscape and claims management companies

62. Claims management companies with links to firms that normally represent pursuers in personal injury cases now underpin a significant proportion of Scottish personal injury litigation. To put the foregoing in context, in 2011-12 the Scottish Legal Aid Board granted legal aid in 65 medical negligence and other reparation actions in the Court of Session and in 222 actions in the Sheriff Court.[44] On the other hand, one claims management company operating in Scotland informed us that it handles around 5,000 claims at any one time.

63. The main objection that we have received with regard to claims management companies is not founded on any evidence of mischief *per se* but the potential for mischief namely that the absence of regulation may expose vulnerable clients to unacceptable risks. We are unaware of any complaints made against claims management companies by the public. Few were elicited by the Scottish Government's 2008 consultation on the regulation

[44] Scottish Legal Aid Board, *SLAB Annual Report 2011-12* (2012), Appendix 3

of legal services in Scotland.[45] Likewise, several respondents to our Consultation Paper, including defenders and their legal representatives, observed that claims management companies have made no distorting impact on civil litigation in Scotland over the past 20 years. The high volume claims management company referred to in paragraph 62 above likewise reported that it had received just three complaints that could not be resolved internally since it began operating. One is therefore not required to imagine the impact of damages based agreements in Scotland: it is already in view. It would be difficult to find good reason for banning claims management companies from providing damages based agreements in Scotland on the available evidence.

Circumvention and enforceability

64. We have also considered the practice by which solicitors have set up their own claims management companies to circumvent the prohibition on enforcing damages based agreements. There is little doubt that, given sufficient resources and know-how, the prohibition can be circumvented. This, in itself, may justify a change in the law. Solicitors who have set up claims management vehicles have readily spoken of them as 'fictions' which they would prefer to disappear. They would welcome replacing them with transparent arrangements, which are then subject to the same regulations as those services provided by solicitors in the normal way.

Family actions

65. As far as damages based agreements for family proceedings are concerned, these are not available in England and Wales. I consider that they should also not be available in family actions in Scotland. Where a party seeks financial provision on divorce (or the dissolution of a civil partnership) the basis of the award is the fair sharing of matrimonial property. In such cases it is much more difficult to define success, since the court may require to make a range of different orders dealing with various aspects of matrimonial breakdown aside from purely financial matters. Success may therefore be divided. I have also been informed that the issue for family clients is one of cash flow: they can pay fees, but only when they receive their settlement. For this reason many legal firms are therefore prepared to defer fees. In these circumstances clients would have no incentive to pay their solicitor a higher percentage of their settlement under a damages based agreement.

The impact of damages based agreements in England and Wales

66. Lastly, we considered the likely impact of banning damages based agreements in Scotland now that they are available in England and Wales. If they were to be banned across the whole legal services sector in Scotland, (claims management companies and lawyers), we wanted to test opinion with regard to the potential consequences of this for litigation in Scotland; in particular, whether this would incentivise claimants to litigate in England and Wales.

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[45] Scottish Government, *Wider Choice and Better Protection: A consultation paper on the regulation of legal services in Scotland* (2009)

67. Few doubted that a total ban on damages based agreements in Scotland could be circumnavigated, though the balance of opinion was that their prohibition in Scotland would not unduly incentivise parties in Scotland to litigate down south. As a general rule, we were told that even where a claimant could potentially found jurisdiction in the courts of another country, the action still tended to be raised in the courts of the country where the wrong was said to have occurred. So, for example, following the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007,[46] the insurance industry predicted that there would be an influx of such cases from England and Wales to Scotland. It did not happen. One informant, a pursuer's reparation solicitor, observed that conditions over the past decade have already been more favourable for claimants in England and Wales than in Scotland. Until recently, success fees and ATE insurance premiums were recoverable from the other side, and recovery of costs was greater. Yet in cases where the defender is a cross border entity, this has not resulted in an exodus of personal injury cases from Scotland to England and Wales.

68. Following the decision in *MacShannon v Rockware Glass Ltd*,[47] the courts in England and Wales are less willing to accept jurisdiction in personal injury cases where the natural forum is Scotland. It was said in that case that the case should be litigated in Scotland unless the plaintiff would be "*deprived of a legitimate personal or juridical advantage which would have been available to him in the High Court in England*."[48] It has been difficult for claimants to overcome that hurdle. However, should it be possible for a claimant to fund a personal injury litigation in England and Wales by means of a damages based agreement and such a means of funding was not available in Scotland, a reasonable case could be made that the test has been met. This is borne out by the House of Lords decision in *Cape v Lubbe plc*[49] in which the claimants' inability to obtain legal representation and expert evidence in their home jurisdiction (South Africa) due to the non-availability of appropriate funding, whether by legal aid, contingency funding or otherwise, was used to overcome the defendants' plea of *forum non conveniens*.[50]

69. Nevertheless, an exodus of cases to solicitors and courts in England and Wales could remain a possibility under certain circumstances. If Scottish solicitors are so minded, they may refer their Scottish clients to an English solicitor who would then enter into a damages based agreement with the client and instruct Scottish solicitors on an agency basis. If the agreement is made under the law of contract of England and Wales, Scottish courts would have to enforce it. Alternatively, Scottish solicitors could set up their own claims management companies in England, from which they could enter into an enforceable damages based agreement with their clients. If Scottish solicitors already have a thriving business through their affiliated claims management companies, they may not wish to let it die a death when it could be so easily transplanted into Berwick-upon-Tweed and thrive.

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[46] asp 18, repealed by the Damages (Scotland) Act 2011 asp 7

[47] [1978] All ER 625

[48] [1978] A.C.795

[49] [2000] 1 W.L.R 1545

[50] An argument that the case should instead be dealt with by a court in another country as the most appropriate court to hear the case.

70. On the basis of this discussion, I am persuaded that damages based agreements have a legitimate place in the funding of personal injury litigation in Scotland. Such an agreement will not always be the best form of funding for a pursuer and it will be necessary for the solicitor to fully advise the client on all alternative forms such as legal aid, SFAs and legal expenses insurance. The present position whereby the lack of enforceability can be circumvented by solicitors establishing their own claims management companies has the considerable potential to bring the law into disrepute. Although not determinative, I am also influenced by the availability of damages based agreements for claimants in England and Wales and the potential for further circumvention of the law of Scotland by artificial means to the detriment of Scottish lawyers. **I recommend that the law of Scotland should be changed to allow damages based agreements, entered into by solicitors in cases where a monetary award is sought, to be enforceable, other than in family actions.** It will be a matter for the Faculty of Advocates to decide if its 2008 Scheme should be so altered to allow its members to legitimately enter into such arrangements.[51] I hope that there is such a change.

Provisions in damages based agreements

71. Consideration is given next to the damages based agreement itself. There are three main issues which require to be determined: what provisions should be put in place for the recovery of judicial expenses under damages based agreements; whether there should be a cap on the percentage that can be taken as a success fee; and whether the success fee should be limited to some heads of damages or whether all heads of damages should be included. These issues are inter-related in that the decision taken on one will influence the decision taken on another. We also considered whether there should be an increase in awards of *solatium*.[52]

Entitlement to judicial expenses

72. The first issue is what effect, if any, should the damages based agreement have on the recovery of judicial expenses. While we have considered various possible permutations, these boil down to two main options. One is that the solicitor retains the judicial expenses but sets them off against the success fee, which is reduced accordingly. The other is that the solicitor retains the judicial expenses and, in addition, is entitled to take from the client's damages the whole success fee stipulated in the damages based agreement.

73. In the first option, the perceived advantages of offsetting include that the solicitor's total remuneration is capped by, and limited to, the sum stipulated in the damages based agreement. This helps attain proportionality between the damages obtained and the solicitor's remuneration. The actual deduction from the client's damages is reduced to the extent of the judicial expenses recovered.

74. In England and Wales, as discussed above, an offsetting model has been adopted. A particular feature of the rules in England and Wales is that costs are calculated by reference

[51] Faculty of Advocates, *For the Accounting For and Recovery of Counsel's Fees 2008 Scheme* (2008)
[52] Damages for pain and suffering

to, and cannot exceed, the agreed success fee. Defenders will, of course, perceive this to be an advantage. However, a consequence is that in lower value cases, solicitors' remuneration is likely to be considerably less under a damages based agreement than under a CFA under which costs are calculated in the normal way and, in addition, clients can be charged a success fee. It has therefore been suggested that claimants' solicitors are unlikely to offer damages based agreements other than in high value cases. Speaking at the LexisNexis Cost and Litigation Funding Forum in October 2012, Peter Haworth, Master at the Senior Court Costs Office observed that *"it makes damages based agreements meaningless in low-value claims."*[53]

75. In the second option, there is no offsetting. The success fee can be considered an additional payment compensating the solicitor for the risk of having been paid nothing had the case failed. A perceived advantage of this model is its simplicity. It can easily be compared with other funding arrangements, particularly CFAs, which facilitate informed choice by clients. Since it will always provide solicitors with greater remuneration than an offsetting model, it may facilitate access to justice for those cases in which solicitors would otherwise have been unwilling to act. However, this potential for greater remuneration could also be perceived as a disadvantage.

76. Practitioners expressed different opinions to this Review on the question of offsetting. Having considered these views and the empirical evidence available to me, I have concluded that the second option is to be preferred. Solicitors should be entitled to retain judicial expenses and in addition recover the agreed success fee from their clients, subject to the restrictions that I will recommend later in this Chapter.

77. Depending on the amount of damages and the percentage deduction, it can be anticipated that in many cases judicial expenses (calculated in the normal way) will be greater than a fee expressed as a proportion of damages obtained - particularly in lower value cases. If solicitors required to offset judicial expenses against the success fee, they would receive far less remuneration than they would under an SFA, in which the solicitor can retain judicial expenses and in addition charge a success fee. It is difficult to see why solicitors should choose to offer damages based agreements when they would receive considerably less than they presently do under SFAs if the action succeeds, and nothing at all should the action fail. This would be particularly so if a model like that used in England and Wales was adopted, and the recovery of judicial expenses thereby substantially reduced from the present position.

78. This result could only be obviated if the percentage cap on the amount of the success fee was set much higher than I will recommend later in this Chapter.[54] It can be anticipated that a success fee of around 50% would be required. I do not consider that such a high percentage deduction from damages would be acceptable to the public in Scotland, even with offsetting. Confidence in the civil justice system is a crucial factor in maintaining and broadening access to justice. It is also in the public interest that funding mechanisms

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[53] Neil Rose, 'SCCO is "gearing up for Costs War 2,"' *Litigation Futures* (1 November 2012): http://www.litigationfutures.com/news/scco-gearing-costs-war-2-says-judge

[54] See paragraph 88

provide remuneration sufficient for competent lawyers to continue to be able and willing to act.

79. I note that the model already in use by claims management companies in Scotland does not involve offsetting. It seems to have proven acceptable to the public. Recommending offsetting could undermine what has proved to be a successful, transparent and straightforward business model. Claims management companies told the Review that once unrecoverable outlays and VAT had been met, the success fee in lower value cases was almost exhausted. For damages based agreements to be sufficiently attractive, pursuers' representatives must be entitled to retain judicial expenses in addition to a success fee.

80. The model I propose has the additional merit, for solicitors and clients alike, of simplicity. Many solicitors told the Review that they supported damages based agreements if only because they reduced the difficulty of explaining alternative and more complicated means of funding to their clients. The client knows on entering into a damages based agreement that he or she will pay the solicitor a specified percentage of any damages recovered and retain the rest. This provides certainty and transparency. It enables a prospective client to make an informed choice as between different service-providers.

81. **I therefore recommend that where a damages based agreement has been entered into, solicitors should be entitled to retain the judicial expenses in addition to the agreed success fee.**

Should there be a cap on the percentage which can be taken as a success fee?

82. A proper balance must be struck between sufficient remuneration for solicitors and justice for clients awarded damages. This requires close examination of the percentage deduction from damages, particularly if judicial expenses may be retained by the solicitor.

83. Those who argue for capping success fees do so on the ground that it would protect clients. While this is not disputed, there is nevertheless an argument against setting a cap. We understand that, at present in Scotland, claims management companies may charge anywhere between 5% and 30% of the damages recovered, with some, but not all, operating a sliding scale according to the amount of the damages. This, however, is not the only criterion for setting the cap. We were told by one large claims management company that each case is reviewed prior to proceeding so that the percentage fee is set in terms of the complexity of the case, its prospects of success and the expected amount of damages. The pursuer in a straightforward road traffic case may be charged 10% of damages. By contrast, in clinical negligence cases, where the ability to assess the prospects of success is more difficult and the cost of preparatory work for establishing negligence and causation is high, the percentage of damages taken may be 30% or more by virtue of the financial risk which the claims management company bears. As noted, we have also been told that different scales may be applied to cases before an employment tribunal, where expenses are unlikely to be recovered, and to claims that are settled without litigation.

84. A cap of 25% may therefore give rise to a reasonable fee in some cases, be on the high side in some straightforward cases and on the low side in others. If a solicitor and counsel agree to take on a particularly difficult case with limited prospects of success it may be that a

reasonable level of remuneration will amount to more than 25% of damages. As one respondent to the consultation wrote, a capped fee may unfairly prejudice those lawyers prepared to enter into damages based agreements in more complex claims with limited prospects of success. A key justification for entitling solicitors to enter into damages based agreements is that they may offer access to justice in cases which solicitors might otherwise have never taken on.

85. Presently, it is the market that governs the percentage cap on damages which different claims management companies charge. It has been represented to us that the market is working. Success fee rates have been changing in the face of competition, pursuers have been shopping around for better rates and claims management companies have been offering what the market will bear. From the evidence available to us, it would appear that such representations are correct. However, several concerns remain. Even if the market would appear to be working at present, we cannot pretend to know the future. So, for example, it has been suggested to us that with the introduction of alternative business structures, a few 'big players' may dominate the market in personal injury work. If healthy competition is restricted in this way, the need to protect clients may become greater.

86. What is required, then, is a high degree of flexibility, with measures to ensure that clients are properly informed and understand the nature of the contract into which they are entering. Jackson LJ recommended that no contingency fee agreement should be valid unless it is countersigned by an independent solicitor, who certifies that he or she has advised the client about the terms of that agreement.[55] While I can see the force in the requirement, I consider that it introduces an additional layer of procedure and expense which, on the evidence available to me, is not warranted. It is also open to abuse. One suggestion is that the court should set the percentage that is to be deducted from damages by way of an application after the case has been heard, but that begs the question as to what should prevail in the cases which settle before court proceedings are raised or which settle after proceedings are raised but before a proof. I also doubt if there would be much appetite for increasing the role of the court to such a significant extent. The advantages of damages based agreements reside in their simplicity and predictability. Such a procedure could add unnecessary complexity and generate uncertainty.

87. However, I consider it would be going too far to allow market forces to be the sole determinant of what percentage can legitimately be taken from an award of damages in personal injury cases. The cap requires to be set at a level which is fair to solicitors and counsel on the one hand and the pursuer on the other. Any cap has to reflect the risk which the lawyers are taking that the case might not succeed after proof and they end up receiving nothing for their work. This may not be a great risk since only a very small number of actions raised in Scotland actually go to proof.[56] However, what court-based statistics do not

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[55] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 12, paragraph 4.10

[56] Elaine Samuel, *Managing Procedure: Evaluation of New Rules for actions of damages for, or arising from, personal injuries in the Court of Session (Chapter 43)* (2007). In the Court of Session in 2006, for example, only 2.5% of personal injury actions proceeding under Chapter 43 went to a jury trial or hearing on proof, although 9% of personal injury actions that were remitted out of Chapter 43 and proceeded on the Ordinary Roll went to a jury trial or hearing on proof.

disclose is the number of cases in which the solicitor has to advise the client that, after consideration of the defences lodged, there is little prospect of success, and the client eventually instructs that the case be withdrawn on the basis that each party bears their own expenses. Consideration must also be given to the work undertaken by the solicitor in vetting those claims in which the solicitor ends up advising, before proceedings are raised, that the prospects of success are sufficiently poor that the solicitor is not prepared to commence proceedings regardless of the means of funding the litigation.

88. At the same time, consideration must be given to the fact that I am not recommending a model whereby judicial expenses are used to off-set the success fee. If the solicitor is to retain judicial expenses, the pursuer must also be left with sufficient damages to warrant the trouble and anxiety which most litigants experience. I consider that balance is struck by a sliding scale. **I therefore recommend that there should be a maximum percentage which can be deducted from damages, and that this should be deducted on a sliding scale, as follows. On the first £100,000 of damages in a personal injury action, the maximum should be set at 20% (inclusive of VAT), on damages between £100,001 and £500,000 the maximum should be set at 10% (inclusive of VAT), and on any damages over £500,000, the maximum should be set at 2.5% (inclusive of VAT).** I must stress that these percentages are maxima and from the evidence before me it is likely, with members of the public becoming increasingly aware of different funding mechanisms, that competition will determine the actual rates used. It should also be noted that since the cap is inclusive of VAT, no more than 20% is deducted from the client's first £100,000 of damages but the solicitor receives a success fee of considerably less. So, for example, if a client is awarded £100,000, the success fee is set at 20% and VAT remains at 20%, then the client receives £80,000 in damages, the solicitor receives £16,667 and VAT is paid at £3,333. Out of the £16,667 received by the solicitor, counsel's success fee (plus VAT) and any outlays not recovered in the judicial account of expenses must be met.

89. The Civil Justice Council's Working Party on damages based agreements recommended that a cap of 35% should remain in employment tribunals, that there should be no cap in commercial actions but that a cap of 50% should be considered in what it referred to as consumer/micro-commercial cases as these are defined in the FSA Handbook.[57] The 2013 Regulations make provision for a cap of 35% in cases before employment tribunals (inclusive of VAT). However, all damages based agreements funding other than personal injury and employment tribunal cases have been capped at 50% of the sums ultimately recovered by the client.[58] I am comfortable with a cap of 35% in employment tribunal cases and have set out my thinking in Chapter 7, paragraph 68, which deals with SFAs. **I therefore recommend that in employment tribunal cases the maximum deduction from the monetary award should be 35% (inclusive of VAT).**

90. As for other civil actions, I was at first minded to follow what has been proposed for England and Wales by the Civil Justice Council's Working Party, namely, that there should

[57] See: http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Pre-action%20protocols/wp-report-list-of-recommendations1.pdf

[58] 2013 Regulations, *op cit*, Regulation 4(3)

be no cap on the percentage which can be taken from damages in commercial actions. Commercial entities may not require such protection. Nevertheless, I acknowledge that if there should be no cap on damages in commercial actions, cases may be bought from clients and pursued for the sole benefit of solicitors. I find such distasteful and it would also change the dynamic between the lawyer and the court. It has been and should remain the position that the lawyer appearing in a case is an officer of the court and owes duties to the court. If the lawyer became the only party who could benefit from a potential decision of the court, this relationship will be brought under considerable pressure. There is a need to obviate this risk**. I therefore recommend a cap of 50% (inclusive of VAT) on the percentage which can be deducted as a success fee in commercial actions.** There is one qualification which I wish to make and which differentiates my recommendations from the 2013 Regulations that apply in England and Wales. In my discussions with solicitors who undertake commercial litigation, it was brought to my attention that some clients now wish their legal advisers in a commercial litigation to share the risk of the action or defence failing. The lawyers are paid less should the client lose and are paid an enhanced fee in the event of success. This appears to me to be a sensible approach and I would not wish to make any recommendations to preclude this happening. **I therefore recommend that damages based agreements may be entered into in commercial cases on a 'no win lower fee' basis**.

91. I think it undesirable that there should be an opportunity for lawyers to accept a fee, albeit a lower fee, should the action fail in a personal injury litigation. Such a facility would cut across my objective that solicitors should be obliged to quote their terms on a uniform basis in order that the prospective pursuer can make an informed choice. I wish to avoid the situation which exists, for example, in relation to tariffs for gas and electricity, which at times seem so numerous that a comparison between tariffs from different suppliers requires recourse to a price comparison website. **I therefore recommend that all damages based agreements in personal injury actions should be on the basis of 'no win no fee' as opposed to 'no win lower fee.'**

Should all heads of damages be liable to a deduction when calculating the success fee?

92. Jackson LJ recommended that the percentage fee recoverable from damages under a damages based agreement should be applied to damages on past loss alone.[59] The Civil Justice Council Working Party recommended that this be extended to all heads of damages in personal injury cases.[60] The 2013 Regulations provide that the success fee in personal injury cases should be calculated by reference to general damages for pain, suffering and loss of amenity and damages for pecuniary loss, but have followed Jackson LJ in excluding future pecuniary loss.[61]

[59] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 12, paragraph 4.11
[60] Civil Justice Council, *Report of the Working Party on Damages Based Agreements (Contingency Fees)*, Recommendation 9(ii), page 7
[61] 2013 Regulations, *op cit*, Regulation 4(2)

93. At first sight it may seem to be only right that the damages awarded for the future medical care of a pursuer should not be subject to any deduction under a damages based agreement as was recommended by Jackson LJ. However, it is instructive to note that in the series of implementation lectures given by Jackson LJ and others, Jackson LJ may be having second thoughts about this issue. In these lectures he notes that *"ring-fencing damages in respect of future loss was out of deference to the vociferous submissions of The Personal Injuries Bar Association (PIBA), The Association of Personal Injury Lawyers (APIL) and others in 2009."*[62] Thus it was not as the result of the application of any principle that the recommendation was made. Jackson LJ also noted that PIBA and the Bar Council had subsequently sent to him "forceful submissions" that a deduction from all heads of damages should be permitted. They had changed their view. One can only speculate what Jackson LJ might have recommended had PIBA and others held the view which they now advance to the effect that a deduction from all heads of damages should be permitted. It is reasonable to infer that the recommendation might well have been different.

94. Whether Scotland should take the route recommended by Jackson LJ and provided for in the 2013 Regulations is open to question. At issue is the protection of those to whom damages are awarded for their care and rehabilitation. This was the main concern of respondents who expressed their opposition to applying the percentage deduction to all heads of damage. Nevertheless, many acknowledged that not all future loss need be protected. At present, claims management companies in Scotland are not restricted to calculating fees with reference to certain heads of damages. Indeed, it has been reported to us that the percentage fee may be taken from all heads of damages, although it is not always taken, for example, in damages relating to the future care needs of children.

95. Also at issue are implications for the profession and professional conduct. Restricting the fee to a percentage of past loss, as the 2013 Regulations do, could incentivise delay. This may starkly pit the interests of solicitors against their clients. It would also penalise the efficient and effective solicitor who has taken one year to achieve a higher settlement while rewarding the inefficient and ineffective solicitor who has taken three years to achieve a lower settlement. In short, restricting calculation of the fee to past loss may not incentivise efficient professional practice and thus may not be in the public interest.

96. It was represented to the Review that very few high value cases are litigated in respect of past loss alone, and most are fought on future loss. Indeed, it was said that it is in the litigation of future loss that professional skills and expertise are brought into play. In short, restricting calculation of the fee to past loss may not incentivise professional practice that is in the client's best interest.

97. Furthermore, restricting the success fee to past losses alone does not take into account that the great majority of cases settle, how they are settled and where they are settled. Many cases are settled on the basis of a global figure. It may not only be unrealistic to require that an agreed global settlement be divided into specific heads, particularly when settlement is reached in hurried discussions at the door of the court, but the requirement to

[62] Jackson LJ, 'Why Ten Per Cent?' Tenth Lecture in the Implementation Programme (2012)

distinguish between past and future loss may itself generate conflicts of interest between lawyers and their clients. Mitigating the impact of loss from damages by the introduction of tapering, rather than limiting it to past loss, is, however, not only likely to reduce the potential for conflict between client and solicitor, but is also likely to maximise the value of the claim for the benefit of both client and solicitor.

98. Likewise, it was represented to us that problems could arise when multiple pursuers are present, as is sometimes the position in personal injury and clinical negligence cases. One solicitor observed that breaking down global figures between family members could generate conflict, if conflict was not already present. This is likely to be exacerbated were it required to break down the global settlement between past loss and future loss.

99. Nevertheless, if the success fee is applied against all heads of damages, there may remain technical complexities and ethical/welfare issues that require further consideration. In relation to future care and medical expenses, the need to protect the damages of the most vulnerable is a justifiable concern. Should there be a deduction from the award of damages for future care and medical expenses in order to meet legal expenses, it is axiomatic that not all of what the court thought was necessary to properly provide for the future care of the pursuer will be put to that purpose. That presupposes that the care plan upon which an award of damages was based is then implemented by the pursuer following receipt of the damages. There is usually more than one way in which to care for an injured party. On the other hand, without damages based agreements, some cases may never be raised due to a lack of funding with the result that those with personal injury or clinical negligence claims are denied access to the courts.

100. The potential prejudice to the pursuer is most acute in the catastrophic cases where the award in respect of future care is high. Many consider that a pursuer with a large claim for future loss is best advised to negotiate an award which provides a periodical payment from the defender, assuming the defender is financially sound. Such a course avoids arguments as to the life expectancy of the pursuer, which can be problematic given continuous improvements in medical knowledge and the ability to extend life. It has been represented to us that it would place a solicitor in an invidious position to have to advise in such circumstances. The fee under a damages based agreement could be considerable if the pursuer was compensated by payment of a lump sum. If, instead, the agreement provided for periodical payments to represent damages for future care, the solicitor would be considerably less well remunerated. Unlike England and Wales and Northern Ireland, where the courts now have the power to impose an order providing for periodical payments to the injured person without the consent of the parties,[63] section 2 of the Damages Act 1996[64] only permits such an award in Scotland with the consent of the parties. The Scottish Government has recently consulted on whether the law should be changed to allow the court, without the consent of the parties, to make an order under which the damages wholly or partly take the form of periodical payments.[65] The analysis of the written responses to

[63] Courts Act 2003 c. 39 , s 100-101 which amended section 2 of the Damages Act 1996 c. 48

[64] c.48

[65] The Scottish Government, *Civil Law of Damages: Issues in Personal Injury – A Consultation Paper* (19 December 2012): http://www.scotland.gov.uk/Resource/0041/00411137.pdf

that consultation reveals that the vast majority (93%) of those providing a view saw merit in reviewing the existing approach to periodical payments.[66]

101. Some have suggested that a different and modest percentage, with a multiplier, should be applied to damages for future care. Sufficient protection may be given by reducing the percentage fee to 2.5% for cases where the award exceeds £500,000 as recommended in paragraph 88. Another solution may be to ask the court or any Regulator to oversee any deduction from damages for future care and rehabilitation, with each application to the court judged on its merits. However, using the court as a vehicle to regulate every such claim might be putting too much of a burden on the court and would also add expense for the parties

102. Two of the significant complaints against our civil judicial system is, firstly, the delay in getting a case into court and secondly, after the action has been raised, getting to a proof diet where the evidence is explored. To a large extent, the latter has been addressed by the introduction of case flow management in actions for personal injuries. However, I would not wish to make any recommendation which would incentivise delay in raising a court action to enable a larger head of past loss to be built up thereby increasing the fee to which the solicitor is entitled. I am also concerned that excluding future loss from the scope of a damages based agreement will give rise to some very significant practical difficulties. Some cases settle after a defender has lodged a judicial tender. In Scotland, tenders are always for a lump sum with no split into different heads of loss. If one was to exclude certain heads of loss from the ambit of a damages based agreement, this practice would require to change. The defender, when lodging a tender, would require to divide the sum tendered into different amounts to reflect how the tender was made up. To require such is to pre-suppose that the sum tendered is arrived at by means of a logical process. The sum tendered is, on many occasions, arrived at by considerably less analytical means. On occasions it is arrived at by assessing in the round what it is thought the pursuer will settle for. It would also be rather odd for the defender to be in a position to influence the fee to which the pursuer's solicitor is entitled. That gives the opportunity to defenders to manipulate the makeup of the tender in order to maximise the pursuer's solicitor's fee entitlement. It is not difficult to see how past loss could be deflated and future loss inflated by defenders in an attempt to create tensions between the pursuer and his or her solicitor.

103. I would also be reluctant to create the opportunity for arguments at a hearing on expenses that a successful pursuer should not be entitled to the whole judicial expenses of an action because a considerable amount of time was taken up at a proof in exploring the evidence in relation to one head of loss and the pursuer did not recover more than the sum tendered in respect of this head. I am also concerned that when settlement discussions take place, sometimes at the door of the court, consideration of how the principal sum being negotiated is made up is much less important than what the principal sum should be. To require parties to stipulate how an agreed lump sum settlement figure should be divided into different heads of loss could be impractical and pose a barrier to settlement. That

[66] The Scottish Government, *Civil Law of Damages: Issues in Personal Injury – Analysis of Written Consultation Responses* (6 August 2013), page 60, paragraph 6.5

would not be in the public interest. On balance, I prefer the position adopted by the Civil Justice Council Working Party. **Accordingly, I recommend that future loss should not be excluded from the ambit of a damages based agreement.** This has the considerable advantage of simplicity. Protection for the pursuer should be achieved by other means which I will now discuss.

104. The most significant concern which I have is in relation to those cases in which the awards of damages to which a pursuer is entitled are very large and intended to pay for future care and medical costs. At present when such a pursuer enters into a damages based agreement with a claims management company, the deduction from the damages awarded can be as high as 20% to 25% of the total damages awarded or agreed. In my opinion, that is too high and could have a considerable adverse impact on the ability of the pursuer to be properly cared for in the future. I accept that there will be an element of future loss in many cases where the damages are less than £500,000. However, in cases where the award is greater than £500,000, the excess over £500,000 will in most cases be in respect of future loss. Thus the deduction from the bulk of the future care element in catastrophic cases will be limited to 2.5%. In my opinion this is a reasonable price to pay when set against the benefit of increased access to the courts. I suspect that few judges would claim that the award of damages which they make in such cases is accurate to a margin of 2.5%. On occasions a broad brush requires to be taken to the assessment of damages. Furthermore, the care plan which is before the court and upon which awards of damages are based, is, of necessity, only an approximate estimate of the type and cost of care which a pursuer may require in the future. As medical advancement is made so the means by which an injured pursuer will be cared for will also change. On occasions the social circumstances of the pursuer and his or her family will change thus necessitating a departure from the care plan which was before the court. Thus the care plan can only ever be an approximate for what the actual costs will be.

105. From the information before me, the ability of an award of damages to provide future care for an injured pursuer will not be jeopardised by the deduction of 2.5%. On the other hand, by virtue of the proposals which I make in this Chapter, some claimants may be able to pursue an action in court which they may not be able to do under the present funding regimes. I am also fortified in making the recommendation in paragraph 103 by considering the terms presently on offer by some claims management companies. The maxima here recommended is less generous to lawyers/claims management companies than the terms presently offered by several of their number. Such claims management companies are undoubtedly successful yet neither we, nor the Scottish Government when it consulted on the activities of claims management companies in 2008,[67] were able to uncover dissatisfaction expressed by members of the public who had used their services.

106. I have also given consideration to whether the cap should be absolute or whether there should be a facility for lawyers to be rewarded at percentages greater than the cap

[67] Scottish Government, *Wider Choice and Better Protection: Consultation on the Legal Profession in Scotland* (2008) http://www.scotland.gov.uk/Publications/2008/12/29155017/0 and Scottish Government (2009) *Analysis of Responses to the Consultation on the Regulation of Legal Services in Scotland, Chapter 10* http://www.scotland.gov.uk/Publications/2009/10/29090306/0

should the court approve such. The justification for permitting this is that should a higher percentage deduction be permitted, some cases may be funded by a damages based agreement which would not otherwise be taken on by solicitors had the cap as recommended in paragraph 88 above applied. I have come to the view that the cap should be absolute. There are several reasons for this decision.

107. Many cases settle before the court action is underway. In such circumstances there is no immediate route to a judge and a separate action would require to be raised should it be necessary to obtain the court's approval for a higher reward. This would add expense and delay. It also begs the question as to who would represent the interests of the pursuer in such an application which, given our judicial system, would be an adversarial process with the court expecting to hear competing arguments. Such arguments could not be made by the solicitor or counsel who represented the pursuer in the principal action as they will have a conflict of interest. Thus it would involve the pursuer instructing new solicitors and counsel to represent his or her interests at the hearing. Again this would add to the expense and delay and also rob damages based agreements of one of their attractions, namely their simplicity. I am also not persuaded that a pursuer with a reasonable case will find it impossible to find a solicitor to accept instructions under a damages based agreement, or some other form of funding, if the recommendations in this report are implemented.

108. There is one further issue which has been drawn to my attention and which requires to be addressed. As indicated in paragraph 100**,** at present a Scottish court can only make an order for periodical payments of damages, as opposed to a lump sum payment, with the consent of the parties. It seems to me that a damages based agreement is not well suited to an award which may be spread over many years into the future. For what I think are obvious reasons, a deduction from future annual payments under a periodical payment order to satisfy a damages based agreement should not be permitted. **Should an order for periodical payments be made by the courts, I recommend that the success fee should be calculated by reference to the award of damages excluding the periodical element.**

109. I am informed that periodical payments will be in contemplation only if the level of damages is expected to exceed £2 million. From data obtained by the Review, the number of personal injury cases in Scotland in which there is an award in excess of £1 million is low. In a sample of 3,482 road traffic accident and accident at work cases that settled in 2012, there were only five cases where the pursuer's damages exceeded £1 million. While it is acknowledged that other cases, such as claims for clinical negligence, are not contained in this dataset, it suggests that periodical payments will be comparatively rare, even if the court should be granted more extensive powers to make them in the future. Nevertheless, lawyers are placed in a difficult position in such cases. The issue of whether future loss should be compensated by means of a lump sum or by periodical payments presents a potential conflict of significant proportion for the lawyers – a conflict which they have readily acknowledged in their discussions with me. Many pursuers may want an order for a lump sum rather than for periodical payments although their best interests would be served by periodical payments. The attraction of an immediate payment of a large sum of money can be difficult to resist for many pursuers. Pursuers can also come under pressure from family members to opt for payment of a capital sum. Close relatives sometimes see the opportunity for a significant inheritance should the pursuer's life be shorter than

anticipated. Under an order for periodical payments, the pursuer's entitlement dies with him or her.

110. When one adds the foregoing to the solicitor being significantly better remunerated should the pursuer receive a lump sum, it has been stated to me by practitioners that the conflict for the solicitor is considerable. I can understand the concern expressed. The solution is for there to be some form of independent scrutiny of the settlement without unduly delaying the judicial process. One model is for there to be a requirement that the court must approve a lump sum settlement in which the future loss element exceeds £1 million before the solicitor is entitled to take his success fee based upon the lump sum award. Such a model will work for cases in which court action has been initiated. I am informed that this will be the large majority of such cases. However, it is possible that there might be a settlement before court action but after a damages based agreement has been entered into. One firm of solicitors that presently enters into damages based agreements with its clients via an associated claims management company has informed me that it seeks to protect its position when there is a choice between a lump sum payment and periodical payments by obtaining a report from an independent actuary prior to advising clients to opt for a lump sum rather than periodical payments. In the preparation of the report, the actuary meets with the client in the absence of the solicitor. The client is thus provided with advice which cannot be thought to be tainted in any respect.

111. **I therefore recommend that where a pursuer is funded by a damages based agreement and the agreed damages contains an element for future loss in excess of £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid by way of a lump sum as opposed to periodical payments before the pursuer's solicitor will be entitled to make a deduction from the future loss element of an award of damages in order to satisfy the success fee. I also recommend that in the preparation of the report, the actuary must meet the pursuer outwith the presence of the solicitor. The liability for the actuary's fee should fall upon the solicitor should the solicitor advise that a lump sum award be made, regardless of the actuarial recommendation.**

112. That still leaves the issue of what should happen in the event that the client is advised by his or her solicitor to accept periodical payments but ignores such advice and settles for a lump sum payment. In such circumstances, the question arises as to whether the solicitor should be entitled to a success fee based upon the future loss element of the lump sum. With some hesitation, I have come to the view that it would be safer if the solicitor in such circumstances was entitled to calculate his or her success fee entitlement only by reference to the award of damages, excluding the periodical element. **I therefore recommend that where a client is advised by his or her solicitor to accept periodical payments but elects to accept a lump sum payment of damages instead, the solicitor is entitled to calculate his or her success fee only by reference to the award of damages, excluding the periodical element which the client would have received had the advice been accepted.** I would not wish to allow any suggestion that a solicitor gave one view in writing to the effect that periodical payments were in the best interests of the client but

managed to create an impression when communicating verbally, that a lump sum payment would be just as appropriate if not better.

Increasing the level of damages

113. Jackson LJ recommended that there should be a 10% increase in damages to compensate claimants in England and Wales for his recommendation that success fees and ATE insurance premiums under conditional fees agreements should cease to be recoverable. Likewise, he did not propose that ATE insurance premiums or the success fee should be recoverable under damages based agreements. The Lord Chief Justice in *Simmons v Castle*[68] confirmed that general damages would increase by 10% from 1 April 2013.

114. Our consultation received only one endorsement of Jackson LJ's recommendation. Even then, it was not the preferred option. Given that success fees under SFAs and ATE premiums have never been recoverable from an unsuccessful defender in Scotland, I see no reason why I should recommend any general increase in the level of awards of damages for personal injury in Scotland.

Regulation

115. A client who is about to enter into a funding arrangement with a solicitor should be able to obtain quotes from a number of solicitors and be in a position to meaningfully compare one with another. It is in my opinion necessary for such comparison that the quotations are in a standard form. **I therefore recommend that in a damages based agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays out of the success fee, plus VAT.** The only outlay which should remain the responsibility of the client is any premium to obtain ATE insurance cover, should the client deem that necessary. Given my recommendation in relation to qualified one way costs shifting,[69] there is likely to be a limited requirement, if any, for ATE insurance cover in personal injury litigation. **In order that there might be some protection for the public, I further recommend that only solicitors, members of the Faculty of Advocates and claims management companies which are regulated should be entitled to enter into damages based agreements.**

116. **I also recommend that prior to entering into a damages based agreement with a client, a lawyer or claims management company should be obliged to write to the client setting out in clear language what percentage will be deducted by way of a fee from the damages awarded, when and how the client may terminate the agreement, and the client's obligations in the event of such termination by the client. How conflicts of interest are to be managed should they arise must also be specified. It should also be made clear who will have the responsibility to meet an award of judicial expenses against the client.** This information should be contained in the letter which I have recommended should be sent to all clients.[70]

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[68] [2012] EWCA Civ 1288

[69] See Recommendation 46

[70] See Recommendation 41

117. It will be for the relevant regulator to ensure that there is compliance by solicitors and claims management companies with the foregoing. It is not for me to specify how such might be achieved, but I consider it to be an essential element in this recommendation that there is a rigorous regulatory regime with severe sanctions imposed for any failure to comply. It has been represented to me that the system for ensuring compliance with the present requirement on solicitors to send a letter of engagement to clients is regularly breached with little sanction available to the regulator. No doubt there will be differing views on the appropriateness of the sanction for failing to send a letter of engagement. For the avoidance of doubt, I consider that any failure by a solicitor or a claims management company in regard to the letter to be sent in relation to the funding of litigation is of critical importance. Such a failure may be considered a ground of professional misconduct which may lead to the solicitor being suspended from practice as a solicitor or being struck off. **I also recommend that there should be a 14 day cooling off period after a client enters into a damages based agreement which would be mandatory, save in circumstances where a client's interests would be prejudiced**, for example by a claim being time barred should it not be raised before the expiry of the fourteen day period. It is perhaps unnecessary to record that if all of the foregoing requirements are not met by the solicitor or claims management company the damages based agreement will be voidable at the instance of the client.

CHAPTER 10 REFERRAL FEES

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.

Scotland

2. The position in Scotland with regard to referrals differs for counsel and solicitors. In 2008 the Faculty of Advocates issued an explicit rule prohibiting advocates from entering into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work.[1] The Faculty's Code of Conduct already incorporated the rules of the Council of Bars and Law Societies of Europe[2] ('CCBE'), which include an equivalent prohibition applicable to cross-border activities. This reflects the CCBE principle that *"a lawyer should not pay or receive payment purely for the referral of a client, which would risk impairing the client's free choice of lawyer or the client's interest in being referred to the best available service."*[3]

3. The restriction on the payment of referral fees by solicitors arises from the prohibition, under Practice Rules issued by the Law Society of Scotland, on solicitors sharing with any unqualified person any profits or fees derived from any business transacted by them.[4]

4. Nevertheless, solicitors may pay a fee to be included on a panel to which referrals will be made, provided that the fee is not expressed as a proportion of the fees generated for referred business. As the Law Society of Scotland has indicated to us, a flat fee is not in breach of the rules since there is no sharing of fees. Rather, the payment is analogous to a marketing cost for solicitors. Whether or not such payments are designated 'referral fees', they are commonplace amongst solicitors in Scotland, even if payment is not made on a case by case basis. The fee for joining a panel may sometimes be paid in instalments, which are closely correlated with the flow of instructions and, under some arrangements, solicitors pay a fee only if they are successful in pursuing or defending the claim.

5. We were also informed by the Law Society of Scotland that a solicitor may pay a fee for the referral of a single case, and express it as such, always providing the fee is identified

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[1] Rule 9.12 states: "*Counsel may not enter into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work, or for recommending or introducing counsel to the client or an instructing agent*." Faculty of Advocates, *Guide to the Professional Conduct of Advocates* (5th ed. 2008).

[2] Article 5.4.1. *A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending the lawyer to a client.* Article 5.4.2. *A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to him- or herself.* Council of Bars and Law Societies of Europe, *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*. The CCBE code is incorporated into the Faculty of Advocates' Code of Conduct at Appendix B.

[3] Commentary on Article 5.4. of the CCBE in The Faculty of Advocates, *Guide to the Professional Conduct of Advocates* (5th edition, 2008)

[4] The Law Society of Scotland, *The Law Society of Scotland Practice Rules 2011* (2011), Rule D9.2.

as an outlay in the account rendered by the solicitor to the client. An account is usually rendered at the end of a piece of business.

6. A number of solicitors' firms which receive a regular flow of remunerative work from clients offer free advice, representation and other services in return. For example, some firms of solicitors provide free representation at employment tribunals for members of a trade union and, in return, the trade union directs their members who have sustained a personal injury to that firm to pursue the personal injury claim. Some firms of solicitors will second a trainee to a client at a low cost to the client in order to generate or retain a good relationship with the client and thus secure or protect a flow of instructions. Other firms will provide to clients, free of charge, a telephone advisory service in terms of which the client's employees may have access to a solicitor for, say, up to half an hour every day to give advice on relatively minor issues in return for a flow of more complicated work for which a charge can then be made. We refer to the passing of consideration other than money as 'payment in kind.'

England and Wales

7. Barristers are in a position similar to that of advocates in Scotland. Guidance on the prohibition of referral fees was last issued by the Bar Council in 2011,[5] when barristers were reminded that the payment by a barrister of a referral fee for the purpose of procuring professional instructions is forbidden under the Code of Conduct and, whether or not it is disclosed to the lay client, is potentially both a civil wrong and a criminal offence.[6] The decision to continue the ban was strongly supported by the Bar Council on the grounds that its cab rank rule, which is intended to promote access to justice, was thereby secured.[7]

8. The position of solicitors has been quite different. In 2004, after pressure had been exerted by the Office of Fair Trading ('OFT'), the Law Society lifted its prohibition of referral fees, subject to certain conditions and safeguards. Although a large majority of its members was found to be in favour of reinstating the ban soon after it was lifted, the Law Society decided that it would not reintroduce a prohibition for the time being, but would instead issue guidance to the profession - which it did in 2007.[8]

9. The 2007 guidance permitted solicitors in England and Wales to pay referral fees on a case by case basis, subject to full disclosure to the client and other safeguards aimed at protecting the solicitor's independence and ability to act in the client's best interests. These safeguards include a provision that no arrangement can be made with a referrer whose

[5] Bar Council of England and Wales, *Guidance on the Prohibition of Referral Fees* (2011)

[6] Paragraph 307(e) of the Code of Conduct of the Bar of England and Wales (8th edition)

[7] Bar Council of England and Wales, *Response of the Bar Council of England and Wales to the Bar Standards Board's Consultation Paper on the New BSB Handbook* (2013)

[8] A ballot of Law Society members in 2004 found that 73% 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.

business model includes 'cold calling.'[9] This guidance was subsequently revised and replaced in 2011 by outcomes-focused regulation.[10]

10. Jackson LJ considered the issue of referral fees in his 2009 Review of Civil Litigation Costs. He recommended that the payment of referral fees for personal injury claims should be banned.[11] This recommendation was implemented by sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[12] ('the 2012 Act') which came into force in April 2013.[13]

11. Submissions to the Jackson Review primarily focused on referral fees in relation to personal injury cases. 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 said to be facilitated by referral fees. 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, the average person does not have confidence to approach a solicitor but feels more comfortable talking to representatives of claims management companies. It also argued that claims management companies require high standards of service from the solicitors to whom they refer cases, which is for the benefit of claimants.[14]

12. Opposition to referral fees was based on the grounds that they were unnecessary. They neither promoted competition nor access to justice. Nor did they promote quality services since solicitors were required to pay referral fees out of the costs they recovered, which could mean that cases were ill-prepared. Many personal injury lawyers opposed referral fees and were critical of the service provided by solicitors who paid referral fees. A representative of the Insurance Fraud Bureau reported that thousands of pounds were being paid by solicitors to claims management companies for claims, many of which turned out to be manufactured.[15]

13. Jackson LJ considered that referral fees did not enhance competition. He saw no benefits to be gained from allowing them and saw no inconsistency between a ban on referral fees and European competition law. He found himself in disagreement with the OFT, which had maintained that referral fees were likely to enhance competition between solicitors by providing an incentive to maintain high standards of service so as to invite repeat custom.[16] In Jackson LJ's view, cases were mainly referred to the highest bidder, which neither matched cases to solicitors with appropriate skill and experience nor required solicitors to compete with each other for clients on the level of fees and quality. Rather,

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[9] Solicitors Code of Conduct (2007), Rule 9

[10] Solicitors Code of Conduct (2011), Chapter 9

[11] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Recommendation 20

[12] c. 10

[13] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 6) Order SI 2013/453

[14] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), pages 195-202

[15] *ibid*

[16] *ibid*. The OFT's position is set out at page 203.

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.[17]

14. In more general terms, Jackson LJ 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 access to justice. The availability and identity of solicitors conducting personal injury work could be publicised through the Law Society, the Association of Personal Injury Lawyers website and by other similar means. As a matter of principle, he firmly opposed treating personal injury claims as commodities to be traded for profit, particularly when claims management companies also received a proportion of the claimant's damages.

15. As far as a solution to the problem was concerned, Jackson LJ found considerable disagreement. Some doubted whether the "clock could be put back." Others predicted an inevitable circumvention of any ban on referral fees. Despite this, Jackson LJ 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, at around £200. If either of these recommendations was accepted, Jackson LJ proposed that serious consideration should also be given to prohibiting or capping referral fees in other areas of litigation.[18]

16. The Ministry of Justice was initially hesitant over introducing a ban on referral fees. Two reports, Lord Young's *Common Sense, Common Safety*[19] and the Legal Services Board's *Referral Fees, Referral Arrangements and Fee Sharing*[20] had come to opposite conclusions with respect to referral fees. To begin with, the Ministry of Justice appears to have taken its lead from the Legal Services Board's paper, which indicated that although there were issues around transparency that were of importance for consumer confidence, there was insufficient evidence of consumer detriment to justify a ban. The Legal Services Board advised that transparency could be addressed by regulation.

17. Nevertheless, a prohibition on the payment or receipt of referral fees was included in the 2012 Act. The UK Government's stated policy objectives were: *"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."*[21] The Under Secretary of State for Justice explained the Government's desire to address referral fees with regard to personal

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[17] *ibid*, pages 197-204

[18] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 29, Recommendation 5

[19] Lord Young, *Common Sense, Common Safety* (2010), in which he argued that the higher fees remitted by those who secure the referral work did not achieve higher quality work but only meant that the balance left to cover the cost of providing legal services was diminished, to the detriment of the client.

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

[21] Ministry of Justice, *Referral Fees in Personal Injury Claims: Impact Assessment* (October 2011)

injury claims on the ground that they are *"one of the symptoms of the compensation culture in this country."*[22]

18. The 2012 Act prohibits a 'regulated person' from making or receiving payment for the referral of 'prescribed legal business.'[23] The Solicitors Regulation Authority ('SRA') issued a document in March 2013 providing an overview of the approach it will adopt in determining whether or not a regulated person has paid or received a referral fee contrary to the 2012 Act.[24] It explains that **'Regulated person'** includes a claims management company, solicitor, barrister, and authorised providers of financial services (such as insurers) if specified in regulations made by the Treasury. As far as the other definitions are concerned:

> **'Prescribed legal business'**[25] is business that involves the provision of legal services for claims for damages for personal injury or death, and for any other claims for damages arising out of circumstances involving personal injury or death. This would include, for example, claims for uninsured losses arising from the road traffic accident in which the claimant had been injured.[26] It also includes such other claims as the Lord Chancellor may specify by regulations.
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> A **'referral'** is the provision of information by a person (other than the client) that a regulated person would need in order to offer legal services to the client.[27] The SRA considers that this includes provision of the client's name and contact details to or by a regulated person.[28]
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> **'Payment'** includes any form of consideration other than the provision of reasonable hospitality.[29] The SRA considers that this would include, for example, a solicitor agreeing to provide free wills for trade union members in return for the union referring members with personal injury claims to the solicitor.[30] To be prohibited, the payment must have been made for the referral. The SRA acknowledges that difficult questions may arise where a referral is made in the course of providing other services, such as marketing. If it considers that a payment may be a referral fee it will require firms to demonstrate that the payment was made for another reason.[31]

19. The prohibition on the payment or receipt of referral fees applies both to referrals between regulated persons (such as from a claims management company to a solicitor) and referrals where only one party is a regulated person (such as from a trade union to a solicitor).[32] A regulated person will also breach the prohibition if, in providing legal

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[22] HC Deb 1 November 2011, column 826 (Mr. Djangoly)
[23] 2012 Act s 56(1)
[24] Solicitors Regulation Authority, *The prohibition of referral fees in the Legal Aid Sentencing and Punishment of Offenders Act 2012,* sections 56-60 (2012)
[25] s 56(4)
[26] Solicitors Regulations Authority (SRA), *op cit* (2012), paragraph 10
[27] s 56(5)
[28] SRA, *op cit* (2012), *op cit*, paragraph 14
[29] s 56(8)
[30] SRA, *op cit* (2012), paragraph 18
[31] *ibid*, paragraphs 21-24
[32] *ibid*, paragraph 6

services, he or she arranges for another person to provide services to the client and is paid for making the arrangement.[33] This would include, for example, a solicitor receiving payment from a medical agency in return for referring a client for a medical report.[34]

20. Responsibility for monitoring and enforcing compliance lies with the relevant regulator.[35] Contravention of the prohibition is a regulatory breach. It is not a criminal offence, nor does it give rise to a claim for breach of statutory duty.[36] A contract to pay or receive a referral fee is unenforceable.[37]

Consultation responses

21. This Review went out to consultation at a time when the UK Government had announced its intention to ban referral fees in England and Wales. We consulted on whether lawyers should be permitted to pay either a sum of money or provide 'payment in kind' to a third party in return for the referral of business or to have their name placed on a panel for the purpose of securing a flow of instructions in litigation. We also asked whether there should be a limit upon the value of the referral fee or services provided, if referral fees are to be permitted.

22. Altogether 44 respondents answered these questions. In summary, respondents connected to the insurance and banking industries were unanimous in their opposition to referral fees, while trade unions were unanimous in their support. The insurance industry, a major beneficiary of the referral fee process, was mostly critical of the quantity, quality and value of claims that were pursued on the back of referrals, while the Law Society of Scotland restated its support for payments in kind as well as payment for panel membership. Most solicitors, however, had some reservations about referral fees, including those who currently paid them.

Referrals fees in Scotland: further information from respondents

23. Payment in return for referrals, whether by panel membership fee, marketing fee or by providing free legal advice and representation, was reported by respondents to be commonplace in Scotland, and was made to insurance companies, legal expenses insurance companies, claims management companies and trade unions in return for referrals. Institutions such as banks were also reportedly charging solicitors a fee to be on their panels for security work and executry work. Nevertheless, several respondents observed that Scotland had never been fertile ground for claims farmers, given the lower recoverability of judicial expenses and the non-recoverability of After the Event insurance premiums and success fees in Scotland. As a result, the mischiefs caused in England and Wales, such as breaches of data protection, cold calling and fraudulent claims, were not in evidence in Scotland to the same extent.

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[33] s 56(2)
[34] SRA, *op cit* (2012), paragraph 7
[35] s 57(1)
[36] s 57(5)
[37] s 57(6)

24. The Law Society of Scotland's rules on referral fees[38] prohibit an arrangement to pay commission for the introduction of business on a case by case basis. Solicitors are entitled to pay for the cost of services provided to the firm, such as the cost of marketing or promoting the firm, as part of their overheads. Provided that the fee is transparent and explained to the client at the outset, solicitors are also entitled to state in their terms of business that the client will pay a fee at the end of the case, such as commission paid to an introducer, which is later shown in the fee note as an outlay. In other words, as the Law Society of Scotland's rules were explained to me, the client ultimately has to pay the referral fee which brought the client into contact with the solicitor in the first place. In this way, the Law Society of Scotland resolves a dilemma that it faces: it wishes to prohibit the sharing of profits and fees with unqualified persons at the same time as it does not wish to impinge upon freedom of contract between solicitors and their clients.

Views

25. Many respondents, including those in favour of referral fees, see the present position in Scotland as unsatisfactory. The rules, such as they are, are confusing and easy to circumvent. One firm, for example, told us that payment of an 'administration fee' may be made to the referring agency in return for the referral of a single case. It frankly acknowledged that the administrative work carried out by the agency is nominal and is no more than a device to get round the prohibition.

26. The key issue raised by referral fees, according to several respondents, is the transparency of referral arrangements. In particular, clients need to be aware of the basis on which referrals are made and given information that could promote client choice. As an adjunct, one respondent suggested that there should be an obligation on any legal firm contracting on this basis to provide the client with an initial statement pointing out the basis of any arrangement with the third party and indicating to the client that the service to be provided is available elsewhere, including firms that do not have such an arrangement.

27. Other respondents pointed to the lack of regulation of claims management companies in Scotland. They reported unsavoury and unacceptable advertising which should be stamped out, and observed that the Law Society of Scotland had shown little appetite for enforcing advertising rules. There was no Scottish equivalent to the system employed by the Ministry of Justice which provided specific rules with regard to contacting potential clients and regulating against cold calling.

28. Others wished to encourage more research on the impact of referral arrangements in Scotland. Research in England and Wales, for example, had explored the impact of referral arrangements on consumers and acknowledged that it had widened access to justice.[39] At the same time, it found that it was common for the third party to refer work to the highest bidder and found evidence of persistent non-compliance with practice rules requiring the size of the fee to be disclosed to consumers.

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[38] The Law Society of Scotland, *op cit (2011),* Rules D9.2.1 and 9.2.2

[39] The Legal Services Consumer Panel, *Referral Arrangements: Final Report* (May 2010)

29. It was observed that payments similar to referral fees are not the sole preserve of the private sector in Scotland, and are not only driven by the profit motive. For example, the Money Advice Service, set up by the UK Government in 2010 to *"enhance the ability of members of the public to manage their own financial affairs,"*[40] pays referral fees to 'not for profit' advice organisations, such as Citizens Advice, to encourage them to participate in an effective referral system. Once a successful referral has been made to the Money Advice Service, payment is made to the 'not for profit' organisation for its introduction.

30. Those opposed to referral fees argued that they do not improve access to justice and do not provide injured parties with any clear benefits. The quality of services is not thereby improved and clients are not suitably matched to legal services providers. They argued that referral fees were responsible for directly fuelling cost inflation by creating a "feeding frenzy" at the point of accident and providing solicitors with a vested interest to recoup the referral fee at all cost, regardless of clients' interests. The lifting of the prohibition against referral fees in England and Wales was said to have led to significant abuse of the process and commoditisation of personal injury work. This was responsible for the entry into the market of organisations and individuals who have no historic connection or empathy with injured persons. Control of the claims market had thereby passed from firms of solicitors to persons extraneous to the legal process and without the ethical constraints of the legal profession.

31. Those in favour of permitting referral fees in Scotland pointed to the role that they played in an imperfect market, firstly by signposting clients to law firms that provide high quality legal services and secondly because paying referral fees to claims management companies was a more efficient and effective means for solicitors to acquire business than by marketing and advertising, due to economies of scale. They took issue with Jackson LJ and maintained that claims companies do 'add value' by virtue of being marketing organisations that are better able to promote legal services. With greater budgets than individual firms, they reach members of society who would not have otherwise been reached by solicitors' firms acting independently. In response to the charge that anyone can now find a solicitor on the internet, several respondents pointed to the substantial cost of securing a worthwhile internet ranking, which claims management companies are able to pay on behalf of the firms to which they refer cases. Individual firms which had tried television advertising reported that it is not cost effective. Besides advertising, referrers also provide initial services of value to solicitors, such as capturing the details of the client's claim and obtaining relevant information in relation to a claim. While many agreed that lawyers should not be allowed to pay simply for the referral of a case, they maintained that they should continue to be allowed to pay for services provided by the referring agency.

32. Arguments were also made by those in favour of permitting referral fees in Scotland in terms of the quality of justice which referral fees promote. Addressing the charge that cases are referred to the highest bidder, they pointed out that the majority of the Law Society of Scotland's accredited specialists in personal injury law (for pursuers) are employed by

[40] The service is paid for out of a statutory levy on the financial services industry and is available across the UK, on-line, over the phone and face-to-face. See: https://www.moneyadviceservice.org.uk/en/static/about-us

firms who make such payments. Insurers who refer their customers to law firms in return for referral fees were said to demand high standards of service, which were both client focused and grounded in specialist knowledge.

33. Respondents also addressed the issue that referral fees were directly involved in cost inflation. One respondent, speaking on behalf of an organisation of personal injury practitioners, reported that panel membership and other referral fees are taken out of a firm's marketing budget that would be allocated elsewhere if such payments were banned. Another respondent observed that they are paid for out of recovered judicial expenses. Far from driving up insurance premiums, he surmised that referral fees helped to reduce premiums since they provide a significant income stream to insurance companies.

34. Only a few respondents wished to see lawyers prohibited from providing 'payments in kind' to a third party in return for referrals, although there were some amongst them who were willing to make exceptions to the prohibition, such as arrangements with charities. These respondents, who were mainly connected to the insurance industry, called for the prohibition of 'payments in kind' on the ground that such arrangements would be used to circumvent the prohibition of payment of referral fees. They maintained that while lawyers regularly offer 'added value' services such as training or legal updates to clients and intermediaries as part of their efforts to generate business, these activities should be differentiated from arrangements whereby third parties are obliged to make business referrals in return.

35. Those in favour of permitting 'payments in kind' argued on a number of levels: 'payments in kind' were materially different from monetary payments; they facilitated access to justice; they were a reality of commercial life; regulation of a ban on such arrangements may well be impossible; and, in any case, such a ban may be contrary to the private rights of citizens to enter into such arrangements.

36. Respondents observed that such arrangements more usually develop out of relationships of trust, which are qualitatively different from the auctioning of claims to the highest bidder. One voluntary organisation referred to the spirit of partnership working which informed its relationship with its solicitors. This had been built up over many years and was based on the organisation's confidence in its solicitors' ability, awareness and professionalism with regard to the organisation's core concerns and values. Arrangements based on relationships of this kind are not restricted to pursuer firms and 'not for profit' organisations. As one firm of solicitors that was involved in pursuer and defender work observed, insurance companies will also receive benefits from panel law firms by way of free advice, training and appropriate legal services. A response made on behalf of solicitors who mainly acted for defenders observed that arrangements by which solicitors undertake work for certain clients at a lower or even zero rate of remuneration was in accordance with the realities of commercial life. Any interference by the state in the contractual arrangements between lawyers and their clients would constitute a breach of the private rights of citizens and companies to regulate their commercial affairs.

37. In the view of trade union respondents, the additional benefits which lawyers provide their members, such as employment advice and training, should never be viewed as

a referral fee but as broadening access to justice. They observed that commercial firms frequently second their staff to work with their corporate clients on a 'below cost' basis, with no suggestion that these arrangements may fall within the rubric of 'referral fees'. Indeed, some respondents viewed the prohibition of 'payments in kind' in England and Wales as no less than a direct and focused attack on the trade union movement.

38. Lastly, there is the issue of regulation. Even the few respondents who were in favour of extending a proposed ban on payment of fees to include 'payments in kind' acknowledged the difficulties of achieving compliance, both in respect to 'no cost' and 'low cost' services. One respondent, representing an insurance company which was in favour of such a ban in principle, reviewed the complexities inherent in enforcing prohibitions against 'payments in kind.' They included difficulties in determining the range of ancillary services provided; establishing a link between the work referred and the services provided; and valuing these services. He concluded that it was unworkable. Another respondent, also a representative of the insurance industry, acknowledged that it would be so difficult to regulate 'payments in kind' that solicitors would be obliged to conform to the spirit of the law, as well as the letter, if a ban of referral fees were to be at all effective.

39. Many of the same issues were raised with regard to the question of whether lawyers should be permitted to make payments for panel membership. Those against such payments argued that panel membership provided an opportunity for circumventing the Law Society of Scotland's ban on referral fees. They expressed their distaste for the commoditisation of legal work which was being sold on to the highest bidders rather than the best service providers. They also feared that panel membership was a threat to the independence of a profession whose overriding duty is to act in the best interests of the client. Those in favour of retaining payment for panel membership argued that they saw nothing wrong with paying a marketing or advertising fee to an institutional organisation that can advertise more efficiently than solicitors. They reported that panel membership was the preferred mode of operation of before the event insurers because the arrangement provides them with the opportunity of monitoring the quality of services that their policy-holders receive. They observed that panel arrangements are in place with firms that are both client focused and have specialist knowledge. They argued that the expectation that business-to-business referrers would receive something in return is a commercial reality and is unlikely to disappear. This is as likely to be found in firms taking on defender work as pursuer work. In any case, so some argued, a prohibition would constitute an impingement upon parties' freedom of contract.

40. Whether they were for or against payments for panel membership, many respondents identified a series of difficulties inherent in enforcing a prohibition against such payments. Some wished to distinguish between payments paid to gain admission to a panel from those ancillary services that may be provided free of charge, or at reduced cost, once admission to the panel was achieved. Nevertheless, they acknowledged that such distinctions may be difficult to identify in practice and could provide a route to circumvention. If payments were allowed for advertising and marketing, a prohibition on a payment for referrals would require valuing these services and then identifying what portion of the payment for panel membership was in return for case referrals alone. This may be more than any regulatory authority could monitor.

41. Few responded in any detail to the question of whether there should be a limit to the value of referral fees in the event that payments are permitted. While some doubted whether a cap would be allowed under competition law, others warned that a cap would not address the problem in isolation from other measures, such as an increase in regulation and clearer penalties. Some advised that referral fees should be market driven and that any attempt to impose a limit would be redundant since *"the market will end up determining the value."* Others, including a number of respondents who were in favour of referral fees, advised that it should not be left to the market since *"it encourages a less scrupulous approach."* They supported the setting of limits on the grounds that it would discourage the practice of providing a fee from *"becoming duly influential"* on the provision of services and was likely to enhance fair competition. Various limits were suggested and are reviewed in the discussion below. Most respondents considered that a limit on 'payments in kind' would be impossible to enforce: the value of services provided would be too difficult to measure and it would therefore be too difficult to set a cap on them.

Discussion

42. The prohibition of referral fees in England and Wales has been applied to personal injury and death cases, plus any ancillary claims that should arise from such cases. The prohibition extends to solicitors who provide services at a reduced rate or for no payment in return for referrals. Thus, 'payment in kind' arrangements are not permitted. This means, for example, that in England and Wales solicitors are now prohibited from providing trade union members with free advice in return for personal injury claims referrals from the union.[41]

43. The easiest route would be to replicate the position in England and Wales. There would be a certain symmetry if the position on both sides of the border was the same. I have some unease in taking this line. I am concerned that no matter what the legislation might say, it will not be possible to ban referral fees. Policing a ban, as research conducted in 2010 on behalf of the Legal Services Board concluded, would be "challenging" to say the least.[42] Companies have discovered how lucrative the referral fee market can be. Ways will be found to get round the intent of the legislation. There is anecdotal evidence that this is already happening in England and Wales.[43]

44. Difficulties inherent in defining a referral fee were recognised by the UK Government during the passage of the 2012 Act. The Legal Services Board has similarly referred to *"an inherent difficulty in defining referral fees… it is possible to blur definitions through*

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[41] The Solicitors Regulation Authority (SRA) website, on whether trades unions and charities are caught by the ban, advises: *"There are no exemptions in The Legal Aid, Sentencing and Punishment of Offenders Act 2012 for particular categories of introducer. Therefore the same considerations will apply to these arrangements and you will need to be satisfied that you are not paying a prohibited referral fee."* It should be noted that 'client' is defined for the purpose of the 2012 Act in section 56(4) as *"the person who makes or would make the claim."*

[42] Charles River Associates on behalf of The Legal Services Board, *Cost Benefit Analysis of Policy Options related to Referral Fees in Legal Services* (2010). See 'Policy options,' pages 109-114

[43] John Hyde, 'Desperate PI firms breaking referral fee ban – AXA chief', *The Law Gazette* (15 May 2013)

using sub-contracting arrangements, payment in kind and marketing costs as a cover for the referral fee."[44]

45. If referral fees are difficult to define, they may be even more difficult to identify in practice, and almost impossible to regulate. These sentiments have also been articulated by the SRA[45] which identified three main aspects of an arrangement that will determine whether the ban has been contravened: i) whether there is a referral ii) whether there is a payment; and iii) whether the payment is for the referral. In its view, the difficulty will be in establishing whether the payment is for the referral, particularly where the introducer is providing services to the solicitor such as marketing, vetting of claims or other claims management activities. It admitted that any arrangement that involved advertising was likely to be problematic and that claims management companies may legitimately argue that they are carrying out marketing for groups of firms and are therefore not covered by the ban. Referring to the UK Government's expressed aim of reducing activities *"that actively encourage people to make unnecessary or spurious claims when they might not otherwise have done so,"* the SRA went on to acknowledge that *"it is possible that the ban will not lead to this outcome"* because of the difficulties of assessing whether a payment is responsible for a referral.[46]

46. Similarly, the Head of Practice Compliance at LexisNexis has observed that the 2012 Act is far from watertight: a key potential loophole is *"woven into its very fabric,"* with the shape and size of the loophole depending on how each of the front-line regulators make rules that treat some payments as a referral fee and other payments *"as consideration for the provision of services, or another reason."*[47] Those operating in the personal injury market prior to the lifting of the ban in 2004, so the writer goes on to observe, will remember that it was common for claims management companies and even for some insurance companies to charge substantial fees for other services, such as marketing costs, taking initial witness statements and other administrative activities. The legislation returns the market for claims in England and Wales to the pre-2004 position, with clear déjà vu as to how the ban may be circumvented. As one respondent to our Consultation Paper remarked, *"referral arrangements will simply be redrawn to fit into one or more of the excepted categories."*

47. In a number of respects, we have no need of déjà vu in Scotland. The legislation that is being implemented in England and Wales has provisions that are not altogether dissimilar to Scotland. The concerns expressed by the SRA and LexisNexis chime with what is happening on the ground in Scotland at present. Some solicitors were quite open in saying that to get round the Law Society of Scotland's prohibition on fee sharing, and thus the payment of referral fees, they pay a fee to cover the referrer's administration costs which bears little resemblance to the actual value of the work undertaken. I understand that the Law Society of Scotland has not taken any action against such firms. Furthermore, while it

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[44] Legal Services Board, *Referral fees, referral arrangements and fee sharing: Discussion document on the regulatory treatment of referral fees, referral arrangements and fee sharing* (2010), page 16

[45] SRA, *Proposed ban on referral fees in personal injury cases: Discussion Paper* (June 2012)

[46] *ibid*

[47] Allison Woodisse, http://legalvoice.org.uk/practice-management/sra-consultation-on-proposed-personal-injury-referral-fee-ban/ (July 2012)

is a breach of the Law Society of Scotland's practice rules for a solicitor to pay a referral fee to a non-solicitor in return for a single case, it is not a breach of the regulations for a solicitor to pay a fee to a referrer, such as an insurance company, in order to be placed on a panel of solicitors to whom the referral agency will refer cases. The explanation given to us by the Law Society of Scotland for the different approach is that there is no sharing of profits with non-solicitors in the latter situation and the payment is analogous to a marketing cost for the solicitors. Commentators on the 2012 Act consider that the legislation is likely to be circumvented on the basis that it will be difficult to ascertain whether a reasonable amount has been paid for services or whether some of the payment has been made for the referral of cases alone. In my view, then, to adopt the UK Government's approach to 'banning' referral fees would, in practice, introduce very little change to current practices in Scotland's referral fees market or even the philosophy that underpins it.

48. The introduction of alternative business structures in England and Wales, and shortly in Scotland, provides a straightforward opportunity for profit sharing, and therefore fee sharing, between solicitors and non-qualified persons. Since 2011, fee sharing between lawyers and non-lawyers (insurers, legal expenses insurers and claims management companies) has been permitted in England and Wales under the SRA's new Code of Conduct. In 2008, John Peysner, Professor of Law at the University of Lincoln, predicted the impact of a prohibition of referral fees once alternative business structures had been permitted in England and Wales: *"In the areas of personal injury practice, existing conglomerates of insurance companies; roadside repair services; insurance brokers; repair shops and car hire companies will add lawyers to their roster. Referral fees between lawyers and brokers or insurers will be replaced by transfer pricing within vertically integrated organisations. If these arrangements are outside regulation but the remaining firms surviving outside the corporate umbrella remain subject to the full rigor of discipline, it is difficult to see how this can be sustained."*[48] In June 2012, the SRA addressed the concern that businesses may become alternative business structures in order to circumvent the ban. So long as the formal requirements for authorisation are met, the SRA could see no grounds on which to prevent such arrangements, even where they are made explicitly to circumvent the ban.[49] It could be said that Peysner's comment was prescient.

49. Certainly, the prohibition of referral fees in England and Wales has led to a marked interest in alternative business structures. Personal injury law firms that have depended on the referral fee model are faced with adopting one of three possible survival strategies depending upon the size of the firm and the ethos of the firm's management: smaller firms may now depend on collective advertising; larger firms may *"ramp up their advertising spend to increase the proportion of directly captured clients"* and a third option may be to take the alternative business structures route.[50] Following the Clementi Report into legal services in England and Wales,[51] it was anticipated by the UK Government that alternative business structures would provide one-stop shopping for related services, such as car insurance and

[48] John Peysner , 'Referring to Justice,' *European Business Law Review* (2008), pages 1105-1127
[49] SRA, *Proposed ban on referral fees in personal injury cases: Discussion Paper* (12 June 2012)
[50] John Spencer, 'Desperate Ban,' *Law Society Gazette* (24 May 2012)
[51] Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales* (2004)

legal services for accidents claims.[52] Accordingly, some entities have been developing a profit sharing, as opposed to a referral fee, model for a number of years[53] and management consultants have been advising clients as to the advantages of providing legal services directly to their customers through alternative business structures, rather than referring them elsewhere. The SRA has seen an increase in applications for the authorisation of alternative business structures since the intention to prohibit referral fees was announced.

50. Some respondents to the Consultation Paper found it no coincidence that insurers were buying up legal firms in response to the then proposals in England and Wales to prohibit referral fees. As one respondent observed: *"However much some might wish it, the notion that a ban on referral fees will result in claims management companies folding their tents and disappearing from the scene is unrealistic and naïve."*

51. A number of respondents also predicted that if referral fees were to be banned outright in Scotland, there would be an exodus of claims from Scotland to alternative business structures situated in England, which is and will remain the principal source of case referrals. A ban on referral fees in Scotland would provide the impetus for the insurance and claims management industries to bring the work 'in house', that is, into their new alternative business structures. If a ban on referral fees was to be imposed, so one respondent surmised, this would have a number of unintended consequences, none of which were in the public interest: litigation is likely to be avoided at all costs as Scottish solicitors would have to be instructed; no account would be taken of differences in substantive law and procedure; and claims would be handled by paralegals on a commoditised basis. As the same respondent observed, *"The current position is that, in general, cases referred by English claims management companies and insurers are handled to a high standard by Scottish solicitors. We find it difficult to understand how any move (viz. a ban on referral fees) which results in Scottish clients being represented by claims companies and insurers can possibly be in the public interest."*

52. The stated justification for the prohibition on referral fees is that solicitors and non-solicitors should not be allowed to share profits. However, there seems to be no appetite to enforce the present regulatory regime. Payments are being made by solicitors which are referral fees in all but name. The reason for this lack of appetite may be recognition that the present position is impossible to police effectively. If that is the perception, then I can sympathise with it. It seems to me, for example, that determining what is a reasonable payment for an administrative service provided by a referrer of business, and therefore legitimate, is fraught with difficulty. The position becomes even more difficult when one considers that, in the near future, solicitors in Scotland will be able to enter into profit sharing arrangements with non-solicitors. Apart from any other considerations, the whole basis underpinning the present ban on the payment of referral fees will then be redundant: solicitors will be sharing fees with non-solicitors. At the time of writing, we do not know what the regulations in relation to alternative business structures will look like. Whatever

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[52] DCA, *The Future of Legal Services: Putting Consumers First* (2005), page 40

[53] For example, NewLaw Solicitors 'Regulatory Summary', http://www.new-law.co.uk/docs/Regulatory_Update_29-02-2012.pdf

they may be, it is reasonable to conclude that it will become more difficult than it is at present to police a ban on the payment of referral fees. Put shortly, I consider that any ban which I might recommend will be almost impossible to police properly.

53. I can fully understand the repugnance which many feel in having individuals with personal injury claims treated as commodities. However, I consider it better that referral fees should be permitted and properly regulated than retain the present position whereby fictions are created to circumvent the ban, with the result that the referral fee industry is thriving. I also have some difficulty in fully appreciating the distinction made by the Law Society of Scotland between a solicitor making payment of a sum of money to become a member of a panel which has work referred to its members and a solicitor making payment of a sum of money to have a discrete piece of work referred to him or her. If I was minded to recommend a ban on referral fees, I would feel it necessary, for the sake of consistency, to include the former within the ambit of the ban.

54. Some respondents urged me to ban what we have described as 'payments in kind', arrangements such as those entered into by solicitors and trade unions. If I was to recommend a ban on referral fees, it might be thought inconsistent to do so without recommending that 'payment in kind' referral arrangements should also be banned. The UK Government clearly thought that. In my opinion the type of arrangement entered into by trade unions and solicitors is beneficial in that it enhances access to legal services that enable ordinary people to seek to vindicate their legal rights. I can see no mischief therein which requires to be addressed. Such a conclusion encourages me to believe that referral fees fall to be accepted as part of commercial reality.

55. One of the driving forces behind the ban on referral fees in England and Wales was the belief that there is a "compensation culture" which results in insurance companies and the courts being swamped with unmeritorious claims, particularly arising from motor accidents. There is a perception in England and Wales that referral fees are behind this culture. Not everyone accepts that such a culture exists south of the border but it is not necessary for me to explore this issue as I am concerned with the position in Scotland. Whatever may be the position south of the border, it would be difficult to sustain an argument that there is a compensation culture in this jurisdiction. In our Consultation Paper we narrated the reduction in the number of actions raised in Scotland between 2008/9 and 2010/11. As we recorded in the Consultation Paper,[54] whereas the number of claims in England and Wales increased by 23% between 2008 and 2011, the number of claims in Scotland in the same period increased by only 7%. The Civil Law Statistics in Scotland 2011-12 disclosed that 131,633 civil cases were initiated in Scotland's courts in 2008-9 whereas the number had fallen to 85,256, a reduction of 35%, in 2011-12.[55] The number of personal injury claims per capita is much lower in Scotland than in England and Wales. Thus the main driver for the ban on referral fees in England and Wales is not present in Scotland.

56. For there to be a fall in the number of civil cases raised should be a cause for concern. One could argue that a rise in the number of civil cases should be welcomed as such would

[54] Review of Expenses and Funding of Civil Litigation in Scotland, *Consultation Paper* (2011), paragraphs 2.8-2.9
[55] Scottish Government, *Civil Law Statistics in Scotland 2011-12* (2012)

demonstrate that members of the public with claims which in the past were not pursued were now being raised. Had there been an increase in the number of actions initiated I would not necessarily have viewed that as undesirable. What would be undesirable is an increase in the number of unmeritorious actions raised. Not surprisingly, given the foregoing statistics, there was no evidence placed before me that there was a problem in Scotland that claims were being manufactured. That falls to be contrasted with the evidence before Jackson LJ. As one academic has recently argued, *"While reducing litigation may be a desirable goal, reducing litigation at the point of entry to the court system is inherently regressive because it prejudices those who lack the information and resources needed to enforce (or defend) their rights….A legal system can hardly claim a level playing field if many with good, or reasonably arguable, claims (or defences) are not able to get onto the field."*[56]

57. Jackson LJ's recommendation to prohibit referral fees was partly driven by his concern that legal work was being sold to the highest bidder with no reference to quality. Many respondents to the Consultation Paper opposed referral fees on this ground. I am not convinced that this accurately reflects the situation in Scotland. There are currently 64 specialists accredited by the Law Society of Scotland in personal injury law and 14 more medical negligence specialists, in firms that, for the most part, either represent pursuers or defenders. In our conversations with solicitors, and from their written representations to us, I can readily infer that many of Scotland's accredited specialists are in firms that make payments for a place on one or more panels. Some of these accredited specialists are also partners or assistants in firms that are known to enter into 'payment in kind' arrangements for referrals. I doubt that such firms have been selected on financial consideration alone. While it may be that a number of firms are competing against each other for the referral of personal injury work, be it for the pursuer or the defender, on the evidence available, it is improbable that this work is being offered to the lowest bidder to the exclusion of other qualities. I am fortified in this view by the research carried out in England and Wales on behalf of the Legal Services Board in 2010.[57] It found no evidence that referral fees were responsible for a reduction in the quality of services. It also found very high levels of customer satisfaction, with few complaints related to referral fees. Nor was there evidence to suggest that solicitors were under-settling cases to save them costs. It also found that service level agreements were in place between large introducers and large firms of solicitors in terms of which lawyers must meet certain requirements, typically related to communication and speed of response. Although these agreements were principally thought to help protect the reputation of introducers, we may infer, from what we have been told during our consultation, that they also help protect the consumer.

58. For the reasons which are set out elsewhere in this Report,[58] insurers prefer to operate with a limited number of panel solicitors. Several panel solicitors have told us that they are subject to the stringent audit of the insurers who are instructing them. This is in

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[56] Andrew Higgins, 'Referral fees – the business of access to justice,' *Legal Studies 32:1*, (2012), pages 109-131 at page 117

[57] Charles River Associates on behalf of The Legal Services Board, *Cost Benefit Analysis of Policy Options related to Referral Fees in Legal Services* (2010)

[58] See Chapter 6

relation to the referral of all types of work and not just personal injury actions. I have no difficulty in accepting such evidence. When I was in private practice some years ago insurance companies had then just started carrying out file audits and I have been aware from before this Review started that the tendency to carry out audits had increased, as had the stringency of the audit.

59. I have pondered the revulsion felt by Jackson LJ towards the commodification of the claims market. I can well understand why a market for personal injury actions, or say divorce, may provoke revulsion while conveyancing may not. The revulsion partly resides in the fact that one party profits from the misery of others. That may be fairly claimed in relation to many areas of life in which other professions are engaged. The same moral revulsion, as others have pointed out to me, has not been applied to third party funding, which could similarly be responsible for the commodification of misfortune. Perhaps this is because such claims funded in this manner are more likely to be corporate rather than individual.

60. Nor am I prepared to take Jackson LJ's wholly negative stance against claims management companies. Members of the public must be informed of their legal rights and the means by which such information is made available should be affordable. Perhaps it was once thought that solicitors performed this role. However, I have been told by several firms of solicitors that they have tried to alert members of the public of their legal rights by means of advertising campaigns. They have all reported that such initiatives have not worked. Why this may be so has been explored more fully elsewhere.[59] Whatever the reason, it is more cost effective for solicitors to pay referral fees, which they view as a marketing cost. Marketing can take many guises. One such guise is for the supplier to make itself attractive to the party with the demand by means of corporate entertainment. Buying a supply of work by payment of a referral fee can be viewed as no more than an extension of corporate entertainment. Nobody would suggest that firms of solicitors should be banned from providing corporate entertainment. At the end of the day, the opposition to referral fees is just a feeling that it is "unprofessional." As Peysner has pointed out, there is a need to strike the correct balance between professionalism, access to justice and business requirements.[60]

61. Claims management companies have a legitimate role to play in this process: they promote access to justice by acting as *"arbitrageurs who assist consumers navigating their way through a legal services market where the product is opaque and most people use the service only once."*[61] They also provide solicitors with a crucial lever for acquiring work in a market environment by giving suppliers of services the opportunity to catch the attention of those persons with demand for such services.[62] Claims management companies therefore require an income stream. It is only when the means adopted by claims management companies verge on harassment, such as cold calling, that problems emerge.

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[59] Peysner, *op cit* (2008), argues out that sporadic or low investment advertising is particularly ineffective where 'distress' purchases are involved, litigation being a classic example of a 'distress' purchase.
[60] *ibid*, page 1126
[61] Quoted in Higgins, *op cit* (2012), page 116
[62] Peysner, *op cit* (2008), pages 1108-1111

62. Rather than banning referral fees, my preference is to address the mischiefs as they appear in Scotland and as they were presented to me both by those who responded to the Consultation Paper and by those with whom we met during the consultation period. To follow England and Wales by banning referral fees may not only fail to reflect these mischiefs, it may also address mischiefs that we have not encountered.

63. In conclusion, I am of the view that referral fees should not be banned. There is no evidence before me that they result in unmeritorious claims being raised. There is no clear evidence that they have even caused there to be an increase in claims intimated in this jurisdiction. There is evidence that the present ban on referral fees is regularly circumvented and there is no appetite to enforce the ban, perhaps due to the difficulty in so doing. With the imminent advent of alternative business structures in Scotland, any ban will become even more difficult to police effectively and may be redundant, depending on the rules when we have sight of them. Were I to be persuaded that there was a case for a ban, it would require extending it to 'payment in kind' arrangements for referrals. I consider this would have an adverse effect on access to legal services for a significant proportion of the public. In the interests of consistency, I would also feel it necessary to recommend a ban on solicitors making payment to be placed on a panel in order to receive referrals. I am unable to conclude that this would serve any useful purpose providing appropriate safeguards are put in place. I am unable to conclude, on the available evidence, that the quality of service provided by solicitors who acquire business by paying referral fees is thereby reduced. Similarly, there is no evidence available that referral fees have had an impact on the price of legal services or that solicitors have resorted to settling claims below their true value by virtue of a referral fee having been paid. I share the widely held view that the commodification of personal injury claims is repugnant and that the means by which some organisations attract new business is unacceptable. However, I am persuaded that, on balance, the interests of the public are best served by accepting that referral fees are a fact of life and making sure that their operation is properly regulated. It will be a matter for the Law Society of Scotland and the Faculty of Advocates to determine what their respective rules should provide.

Regulating referral fees

64. It is important that the conduct of those who are involved in paying and receiving referral fees is properly regulated. The regulation of claims management companies is dealt with in Chapter 13 of this Report. **I recommend that only regulated bodies should be entitled to charge a referral fee.** It should be a criminal offence for an unregulated body to charge a referral fee and also for a party to pay a referral fee to an unregulated body.

Regulating for transparency

65. There are a number of aspects of referral fees which, on any view, require to be regulated. I am informed that referred parties may know nothing of the arrangements into which the solicitors receiving the referrals have entered. My understanding is that a solicitor in Scotland can make payment of a referral fee, and express it as such, as long as the fee is identified as an outlay in the account rendered to the client and this is made clear to the client at the outset in the terms of business. If the payment by the solicitor is

characterised as an 'administration fee,' however, there is no obligation to disclose such to the client. It has also been pointed out to me that clients are not routinely informed of any payment made for panel membership. Similarly, clients accessing services for which a consideration or a 'business barter' arrangement exists are not informed as to these arrangements. In my view, clients are entitled to a clear disclosure of the arrangement between providers of legal services and their intermediaries. If disclosure was required and effectively monitored, as a considerable number of respondents and informants have urged me to recommend, then referred parties would be able to make an informed decision as to whether they wished to stay with the firm to which they had been referred, or go elsewhere.

66. In research carried out on behalf of the Legal Services Board in 2010, it was discovered that so highly did consumers value transparency that it was sufficient to allay concerns otherwise expressed as to the role of referral fees.[63] Those consulted in the course of the research project stated that transparency should be the central feature of the regulatory regime: it addressed consumers' concerns around charges – they can see what they are paying for; suitability – they would know whether it is a fee-driven referral rather than a quality driven recommendation; and freedom of choice – even if they did not change service providers, their decision to remain with the allocated solicitor was now a more informed one.

67. It seems obvious that a client who is referred to a solicitor by a third party agency is entitled to know what consideration has passed between the solicitor and the referring agency, and this should be required at the outset. This is the case in other similar relationships. For example, before the implementation of the Retail Distribution Review in 2013, an Independent Financial Adviser ('IFA') was obliged to disclose to his or her client the amount of any commission which was paid to the IFA by the supplier of the product which the IFA had recommended. In relation to referral fees, by analogy, the party being referred should be informed in writing at the outset by the solicitor what consideration has passed from the solicitor to the referring agency. It makes no difference whether the consideration is financial, a 'payment in kind' or a mixture of the two.

68. **I therefore recommend that solicitors should be under an obligation to provide clients who have been referred to them by a third party agency with a written statement which should a) list all potential factors which a responsible referring agency might consider relevant when making a referral and b) indicate whether such factors played a part in the selection of the particular solicitor for the referral. Relevant factors would include, but not necessarily be limited to i) the particular skill possessed by the solicitor, ii) whether there has been any quality control audit of the solicitor or the firm of solicitors, iii) whether the result of such an audit is available for inspection by the client, and iv) the basis upon which the solicitor is to be remunerated if legal costs are to be met by the referring agency, for example, a Before the Event insurer. The statement should also indicate that the services provided may be available elsewhere, for example, from a firm that does not have an arrangement with the referring party.** The client will then be in a position to exercise a choice as to whether to instruct the solicitor who has paid the referral

[63] Legal Services Board Consumer Panel, *Referral Arrangements* (2010)

fee or whether to look elsewhere. **I also recommend that the statement should set out the means by which the referring agency obtains its business.** In order for solicitors to be in a position to provide the required information **I further recommend that the referring agency should be under an obligation to provide to the solicitors to whom the client is being referred such information as is necessary to enable the solicitors to fulfil their obligations.**

Regulating advertising and marketing

69. Respondents to our Consultation Paper frequently referred to their aversion to the means by which some claims management companies obtained business. This also featured in the various meetings which we had with interested parties. Reference was made to cold calling, particularly after a motor accident. It was not just the cold calling but also the persistence of the claims management company which was deemed to be at best a nuisance and at worst offensive. Which? has informed me that it intends to conduct research on this issue in Scotland in the near future. While there is no documented evidence of this mischief in Scotland, I am well aware of problems associated with the conduct of claims management companies particularly in relation to claims associated with the alleged mis-selling of Payment Protection Insurance.

70. A number of respondents to our Consultation Paper, while otherwise favourably disposed to referral fees, urged that action be taken on these practices. **I therefore recommend that claims management companies, and those acting on their behalf, should not be permitted to cold call prospective clients.** This would require to be rigorously enforced by the regulator. In order to emphasise the importance of this provision, **I also recommend that an obligation be placed upon solicitors who obtain clients from a claims management company to satisfy themselves that the claims management company does not obtain clients by cold calling.** I can only express a strong desire that the Law Society of Scotland should make it a ground of professional misconduct for a solicitor to knowingly accept referrals from a claims management company which obtains clients, either directly or indirectly, by means of cold calling. I do not consider it necessary in this Report to define what might fall within the definition of cold calling. I will leave that to the Scottish Civil Justice Council.

Regulating the level of fee

71. We have considered whether the level of referral fees should be capped. Several respondents were in favour of this on the grounds that it would discourage referral fees from becoming unduly influential on the provision of service. Some respondents said that a cap may also foster fair competition between firms. Other respondents, predominantly insurance companies, were in favour of setting a monetary limit but only if their preferred option, a complete ban on referral fees, was not recommended.

72. A variety of limits and formulae were suggested for capping referral fees. An organisation which represents insurers supported Jackson LJ's suggestion that limits should be set at £200 per case. One insurance company, supported by several other respondents,

suggested £100 and referred to research conducted by the Association of British Insurers that found that the level of marketing costs in almost every other sector is less that £100.[64] Where solicitors identified a limit, they suggested between £400 and £600 per referral on the grounds that Jackson LJ's proposal did not reflect the work undertaken by the client introducer. However, others considered that policing a limit on referral fees would be as challenging as policing a ban.

73. Their concern finds support in the research commissioned by the Legal Services Board.[65] Interviewees, comprising legal service providers, intermediaries and other stakeholders were of the view that should a cap be set, additional arrangements would more than likely be used to "make up the difference." The research also reported some concern that a cap would distort competition by favouring business models where there was a 'pure referral' over those that offered additional services. The research concluded that while policing a cap would be problematic, the difficulties faced by the regulator in determining how the cap would be set, whether it would vary by sector for different kinds of claims and how, if at all, it would be reviewed over time, would impose additional regulatory costs that were of no benefit, particularly since it had found no detriment in the first place.[66]

74. Given the difficulties that were articulated with regard to policing a ban on referral fees, or a cap on them, a number of respondents opted for letting the market determine the level of referral fees. The functioning of the market for referral fees in England and Wales requires that I consider this option with extreme caution. Referral fees for personal injury claims in England and Wales rose by more than 100% between 2005 and 2009, from £400 to £850-£1,000 per referral. A number of reasons have been given to explain the market's failure to put sufficient pressure on fees in the personal injury market.[67] In particular, costs shifting – in the absence of proper regulation – was identified as the root of the market's failure. Where costs shifting is absent, as in the conveyancing market, evidence suggests that conveyancing fees are lower among firms paying referral fees.[68]

75. The argument, as developed by Higgins, is that where marketing costs are borne by defendants or their insurers, claimant solicitors may spend on acquiring clients with impunity, *"knowing that the costs can be passed onto defendants as part of their hourly fee."*[69] This, in turn, puts *"competitive pressure on other claimant lawyers to increase their own expending on acquiring clients, sure in the knowledge that they will not be paying for it either."* Referral fees in uncapped cost shifting systems are likely to be excessive, that is, they are likely to be more than a normal market would tolerate, because *"the persons agreeing to the fee have no incentive to reduce the price, and the persons paying the fee have no capacity to control it."* Higgins concludes that if there is a rule that legal costs should be borne by the losing party, then

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[64] The research found that referral fees in other areas of law were, as follows: Basic single wills - £20; property trust wills - £70; uncontested divorce - £75; conveyancing services - £75-£125 (Source 1); discretionary trust wills - £100; conveyancing services - £150 (Source 2); divorce ancillary relief - £150; employment law - £300; PI cases - £600-£900. See ABI Research Paper No 15, *Marketing Costs for Personal Injury Claims* (2009), page 35

[65] Charles River Associates on behalf of The Legal Services Board, *op cit* (2010)

[66] Charles River Associates on behalf of The Legal Services Board, *op cit* (2010), pages 111-112

[67] Andrew Higgins, *op cit* (2012)

[68] Charles River Associates on behalf of The Legal Services Board, *op cit* (2010), page 2

[69] Andrew Higgins, *op cit* (2012), page 121

there must be interventions in the working of the market to regulate the amount a lawyer can spend on acquiring clients. This position was represented to me by several respondents to the Consultation.[70]

76. While it may hold good for England and Wales, the conclusion reached by Higgins may not apply at all in Scotland, or it may apply with considerably diminished force. I question if it would be possible in Scotland to inflate the fee which the successful pursuer can recover from the unsuccessful defender to reflect the payment by the pursuer's solicitor of a higher referral fee. That is because the system for the assessment of what can be successfully recovered in the name of judicial expenses is different in the two jurisdictions. The hourly charge is controlled in Scotland by the tables of fees. The Scottish system of assessing judicial expenses, with either block fees or prescribed hourly rates, does not permit payment for a referral to be passed on to the losing party in the same way as appeared to have been the case in England and Wales prior to the prohibition of referral fees. There is thus a brake on levels of referral fees in Scotland because, unlike in England and Wales, those paying the fee do have an interest in controlling them.

76. I am also persuaded by the argument that policing a limit on referral fees would be as challenging as policing a ban, particularly in relation to 'payment in kind' arrangements. For these reasons, I consider that the amount payable by way of referral fees should not be regulated.

[70] For a similar finding, see ABI Research Paper No 15, *op cit* (2009)

CHAPTER 11 ALTERNATIVE SOURCES OF FUNDING

1. In this Chapter we consider alternative mechanisms for funding litigation that have not been considered in earlier Chapters. These include third party funding, legal aid for family actions, self-funding schemes and *pro bono* funding.

THIRD PARTY FUNDING

2. Third party funding refers to the provision of financial support for a litigation by individuals or companies with no pre-existing interest in the litigation. In this sense, the Legal Aid Fund, legal expenses insurance,[1] trade unions and professional associations all provide third party funding. Here we consider one particular type, where commercial investors provide financial support to litigants usually in return for an agreed share of any sum recovered. This is sometimes known simply as litigation funding.

3. Unlike legal expenses insurance, third party funding does not charge a premium. Nor does it charge interest, like a bank loan. Rather, it seeks to provide for the funder an appropriate return on investing in selected litigations. The return may be based on a multiplier of the investment or on a percentage of any monies received by the recipient of the funding.[2] Occasionally a fixed sum will be agreed. In addition, the agreement will often allow funders to retain any expenses recovered from the other party. The fee itself cannot be recovered as part of an award of expenses and is therefore payable by the funded party out of monies received.

4. Like speculative fee and damages based agreements, a third party funder is entitled to payment only if the action succeeds. Should the action fail, the funded party is not obliged to repay the funder. This reduces the financial risk to those individuals and companies wishing to embark on litigation. Whereas in speculative and contingency funding those who reap the rewards of success and bear the risks of failure are primarily the lawyers involved, in third party funding the reward and risk is assumed by the funder. The funder's involvement in the litigation is mainly financial, although this ultimately depends on the funding model.[3] The funder may agree to fund the litigation in whole or in part, for example, providing funding for outlays only, or taking over funding part way through a case. The funder will usually offer an indemnity, or pay for (or require the funded party to pay for) an After the Event ('ATE') insurance policy, against the risk of having to pay the other side's expenses.[4]

5. While third party funding may be available for a broad spectrum of commercial disputes, funders are typically willing to invest only where there are good prospects of success (often expressed in percentage terms), the defender is creditworthy (to ensure that

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[1] Before the Event insurance is discussed in Chapter 6 of this Report. After the Event insurance is discussed in Chapter 7.

[2] Civil Justice Council, *The Future of Litigation - Alternative Funding Structures* (2007), page 53

[3] Christopher Hodges, John Peysner and Angus Nurse, *Litigation Funding: Status and Issues* (2012), page 2

[4] One funder now established in England and Wales offers both ATE insurance and third party funding.

any award of damages can be enforced), and the ratio of the cost of financing to the action's value is sufficiently low to ensure an adequate return for the funder. Funders, who may themselves come from a legal services background, typically conduct a detailed assessment of the legal merits of a case prior to agreeing to fund it. It has been observed that some funders publicly advise that they reject over 85% of applications.[5]

6. There is no prohibition or restriction in Scots law on a litigation being funded wholly, or in part, by a third party. The prohibition on maintenance and champerty, discussed below, is not part of Scots law.

England and Wales

7. In England and Wales, the historical prohibition of maintenance and champerty hindered the development of third party funding.[6] In recent years the prohibition has been eroded by a series of decisions.[7] By 2009, Jackson LJ identified "a sea change" in the courts' approach to third party funding:

> *"It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice."*[8]

Further benefits observed by Jackson LJ include the filtering out of unmeritorious cases by third party funding, since funders will not take on the risk of such cases.[9]

8. Jackson LJ addressed third party funding by identifying the largest providers in the UK at the time and asking them to provide him with details of how they operate. They informed him that, given the commercial nature of their involvement, they required to generate a profit while at the same time covering their costs with respect to both 'won' cases (in so far as costs are not fully recoverable from the other side) and 'lost' cases. This meant that they selected cases with considerable care, which some quantified as having prospects of success of 70% or greater. They typically identified high value cases which, depending on the funder, meant a minimum value ranging from £150,000 to £25,000,000. Since funders were potentially liable for the other side's costs, they generally required funded parties to obtain ATE insurance cover. Some brokers specialised in packages comprising third party funding and ATE insurance cover.

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[5] See http://www.thejudge.co.uk/index.php/third-party-funding

[6] 'Maintenance' has been defined as the support of litigation by a stranger without just cause. 'Champerty' is an aggravated form of maintenance and entails the support of litigation by a stranger with a financial interest in the outcome, such as a share of the proceeds. Section 14 of the Criminal Law Act 1967 c. 58 abolished criminal and tortious liability for maintenance and champerty but provided that such abolition "*shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal*": *Blackstone's Civil Practice* (2013), paragraph 14.7.

[7] Summarised by Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 TCC at paragraphs 102-103

[8] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 15 paragraph 1.1

[9] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 11 paragraph 1.2

9. Jackson LJ found that third party funding was commonly used to fund insolvency cases. While it was reportedly still rare in commercial cases, it was becoming more common. Its use was also growing in professional negligence[10] and group actions. In personal injury cases its use was at that time prohibited by the solicitors' Code of Conduct.[11] It was not used in some other types of litigation for reasons including the perceived low rate of return (such as small business disputes), the technical and legal complexity (such as intellectual property or construction disputes), or the unpredictability of outcome (such as defamation actions).

10. Having affirmed that, in principle, third party funding was beneficial and should be supported,[12] Jackson LJ went on to consider whether third party funders should be regulated or should subscribe to a voluntary code. He also addressed measures to ensure the capital adequacy of third party funders, and liability for awards of costs. It has been suggested that other changes introduced following Jackson LJ's report, such as the non-recoverability of ATE insurance premiums, will lead to an expansion of alternative funding arrangements such as third party funding.[13]

Consultation responses

11. In the Consultation Paper we sought identification of the risks and potential abuses involved in third party funding and how might they be addressed. We asked if regulation was desirable and what form it should take; and whether a party to a litigation who has entered into a funding arrangement should be obliged to disclose details of that arrangement to any other party and, if so, in what circumstances.

12. There were 42 respondents to this section of the Consultation Paper. Many chose to respond to the questions more generally by providing general comments on the third party funding landscape in Scotland. Several respondents drew attention to the various forms that such funding may take and differentiated funding provided by membership organisations in the interests of their members from commercial funders, such as venture capitalists, where profit is the primary motive. The Law Society of Scotland also identified funding by debt factors and a party's creditors, both of which are in the party's interest but which, in its opinion, give rise to no concerns in the public interest.

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[10] For example, *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] UKHL 39. That claim was unsuccessful and the funder reportedly had to meet costs of £2.5 million. See Rachel Rothwell, 'Major third-party funding case fails in House of Lords', *Law Society Gazette* (6 August 2009)

[11] Rule 9.01(4) of the Solicitors' Code of Conduct 2007 prohibited a solicitor, in any personal injury claim, from acting in association with inter alia any person whose business was to support claims and who in the course of such business received contingency fees. This was replaced by 'outcomes-focussed regulation' in the Solicitors Regulation Authority Code of Conduct 2011. This is discussed in more detail elsewhere in this Report: in Chapter 9 (Damages Based Agreements) and Chapter 10 (Referral Fees)

[12] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 11, paragraph 1.2

[13] John Hyde, 'Jackson reforms will encourage third-party funding,' *Law Society Gazette* (15 December 2011)

Risks and abuses

Principled objections

13. A considerable number of respondents considered that third party funding was contrary to fundamental principles of law and justice. They argued that risks and abuses were inherent in its very nature. They were of the view that the legal system should never be a forum for commercial speculation, citing the banking industry as an example of what could happen if it became so.

14. Secondly, they argued that since it takes a substantial percentage of the funded party's award, third party funding could be said to *"strike at the heart of the principle of compensation which underpins the legal system, viz. restitution."* They argued that it was a basic principle of justice for litigants to be entitled to recover as much as possible of any damages or other financial award that a court may make. The involvement of a third party, other than the 'not for profit' sector, was said to be an impediment to that principle.

15. Thirdly, some respondents referred to inherent conflicts of interest that were likely to arise wherever third party funders are both underwriting liability for judicial expenses and are reliant on a successful outcome for their income. This was unlike other funders, such as trade unions and professional associations, which were concerned with judicial expenses but not reliant on damages for their income. However, several respondents acknowledged that there was potential for a conflict of interests whenever third parties had a direct interest in the action, be they solicitors or commercial organisations.

Control

16. A number of respondents identified control over litigation, including withdrawal of support for it, as the primary risk associated with third party funding. However, one solicitor respondent noted that this was not restricted to 'for profit' third party funding and observed that no organisation was more insistent on being kept informed, and more likely to refuse an extension of funding, than the Scottish Legal Aid Board.

17. These respondents also identified conflicts of interest. Where a third party funder exercised control over the litigation, little regard may be paid to the pursuer's interests. This could work in several ways. Funders could pressurise pursuers to agree a lower but more immediate settlement figure. Alternatively, pursuers may be pressurised to wait for a higher offer. Pursuers who wished to accept a non-financial remedy could also come into conflict with the interests of funders.

18. Some considered that control exercised by third party funders could be detrimental to the lawyer/client relationship by exerting influence on funded parties to act contrary to their lawyer's advice. However, others observed that the potential for abuse existed with all funding arrangements. For example, when litigation was funded by an insurance policy, a solicitor's financial interests could conflict with those of the policy holder whenever the indemnity limit was approached.

19. Other potential risks included the withdrawal of – or refusal to continue – funding, possibly at short notice and/or in the absence of proper grounds. However, only one

respondent (a firm of solicitors) reported having had any direct experience of this during the course of a third party funded case.

Capital adequacy and recovery of expenses

20. A small number of respondents identified the risk of third party funders becoming insolvent, especially during a protracted litigation. This could impact on both parties, since the funder might be unable to fund the litigation and/or meet an award of expenses in favour of the other party.

21. More generally, a number of respondents referred to difficulties that successful parties might encounter in recovering expenses from a third party funded opponent. They observed that where funded parties did not have the financial means to meet an award of expenses, no mechanism was available by which the expenses could be recovered. It was observed that similar difficulties could arise where other funding mechanisms were used, specifically legal aid.

Regulation

22. Some respondents did not support regulation of third party funding, albeit for different reasons. Those who saw no place in the Scottish legal system for third party funding argued that regulation would appear to endorse it. In any case, they considered that regulation could not address adequately the inherent conflicts of interest. Others argued that since third party funding was rare in Scotland, there was no need for more regulation here.

23. However, most respondents did favour regulation, although what they meant by this varied as did the strength of their views. Several respondents stressed the need for careful definition of third party funding if regulation was to be effective.

24. Several respondents considered that it might be sufficient to have a standard form agreement, drawn up by an independent body such as the Law Society of Scotland, to regulate relations between the funded party and the funder (and possibly the solicitor) on matters such as when funding could be withdrawn. Some sought restrictions to prevent withdrawal of funding part way through a litigation. More generally, others thought that any agreement should specify the funder's and the solicitor's responsibilities. Others considered that such an agreement would not address certain risks, such as insolvency. One respondent, a financial institution, considered that third party funding should be subject to the same regulatory requirements as other financial products.[14]

25. Other respondents favoured a voluntary code of conduct, as has been developed in England and Wales. This did not preclude the reconsideration of statutory regulation should third party funding become more prevalent in the future. In the meantime, the Law Society of Scotland was of the view that if not already subject to the Financial Ombudsman

[14] Regulation of financial services was formerly carried out by the Financial Services Authority. This was abolished on 1st April 2013 and replaced by two new regulators: the Financial Conduct Authority and the Prudential Regulation Authority.

Service, third party funders should come within the remit of the Scottish Legal Complaints Commission and should be required to contribute to its running costs.

26. Only one respondent considered that individuals contemplating a third party funding agreement should first be obliged to take legal advice from an independent solicitor. Such advice would include consideration of alternative sources of funding. Another respondent considered that solicitors and counsel should be prohibited from being directors or shareholders of third party funders or, at the very least, from acting for clients funded by an entity in which they were so involved.

27. Several respondents suggested that potential conflicts of interest could be addressed by capping the amount which third party funders could deduct from a monetary award.

28. A number of respondents addressed the issue of capital adequacy and suggested that the funded party should require to find caution on commencing litigation. Others considered that the court should be entitled to award expenses against the funder. This would require disclosure of the funding mechanism and the funder's identity.

Disclosing the funding mechanism

29. A slight majority of respondents considered that the funded party should have an obligation to disclose the means of funding the litigation. Those respondents in favour of disclosure were often associated with defenders. They stressed the need for openness and transparency, and the potential for third party funding to impact on a party's willingness to proceed with litigation. Some specified, however, that the funded party should not be obliged to disclose details of the arrangement, such as the percentage of damages to be taken by the funder. One respondent, who considered that successful opponents should be entitled to enforce awards of expenses against the funders themselves, argued that identifying a funder by name was a necessary step towards this. More generally, several respondents considered that the obligation of disclosure should be extended to all litigation in which a funding arrangement was used, since this would allow the opponent to assess the financial risk of proceeding.

30. Those respondents opposed to disclosure – often solicitors or their representative associations – considered that funding was a private matter and that no change to the current law was required. As one respondent explained, an opponent is not entitled to this information because the fee paid to the funder is not recoverable from the opponent.

Discussion

31. There are no legal impediments to third party funding in Scotland, such as the prohibition on maintenance and champerty which has hindered its development in England and Wales. Thus far, however, there is little evidence of third party funding having found fertile ground in Scotland. Indeed, it has been represented to me that the issue of third party funding is thereby redundant and undeserving of treatment by this Review. I am not inclined to take this view.

32. The current paucity of third party funding in Scotland is indicative of market conditions, and may relate to supply factors, demand factors or both. With regard to the

supply side, I have been told that the value of claims raised in Scotland was unlikely to entice third party funders into the Scottish legal market. While this may be so at present, third party funders are reportedly looking for new markets and I am aware of several who are presently making tentative steps into the Scottish marketplace by making initial contact with a number of commercial firms. With a view to providing a precedent for third party funding in Scotland, I am aware of one funder that is seeking to fund several high value claims (over £750,000) with a 65% chance of success and is ready to consider cases that involve breach of contract, professional negligence, intellectual property, insolvency, and international arbitration and mediation.[15]

33. Cases which are likely to be funded are those where the potential for a financial return is significantly greater than the cost of recovery. One solicitor with whom the Review met observed that there would be *"little left on a £1 million claim,"* even if judicial expenses were recovered. If £200,000 were to be invested by a third party funder in addition to the cost of an ATE insurance policy, the funder will require a success fee of between £400,000 and £600,000, in addition to the return of the initial investment and repayment of the ATE insurance premium. In commercial cases, so I was told, the ATE premium itself could be as high as 30% of the value of the claim. Some have argued that by virtue of the infrequency of high value cases, third party funding was likely to remain in limited supply in Scotland.

34. Nevertheless, it may be unsafe to predict a limited supply of third party funding in Scotland in the long term. In discussions during the Consultation period, the potential impact of alternative business structures on the supply of third party funding in Scotland was frequently pointed out to me. One solicitor observed that law firms, with their traditional partnership arrangements, have until now been seen by third party funders as an unsuitable basis for investment. Alternative business structures, on the other hand, may present themselves as an opportunity for third party funder investment. The introduction of alternative business structures in Scotland could therefore draw more third party funders into the Scottish legal market, and there are indications that this is already beginning to happen.

35. I have been told that some solicitor firms in Scotland are now being invited by their clients to enter into novel fee or profit sharing arrangements which probably have their origins in alternative business structures. We know that a number of legal firms are being taken over by insurers in England and Wales. There are indications of a similar trend in Scotland. So, for example, Parabis, which was the first private equity-backed alternative business structures to be licensed by the Solicitors Regulation Authority in England and Wales in August 2012, has recently been launched in Scotland as Parabis Scotland, offering pursuer and defender insurance law services.[16]

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[15] The value of case should also be at least 5 times the likely costs of running the case. The funder will provide initial funding in return for a 2 to 3 times multiplier of the fees or a percentage of the damages/value, whichever is higher. It expects ATE insurance to be put in place and will fund that cost, though it will be paid for out of damages if the ATE is not recoverable.

[16] Sam Chadderton, 'Parabis Marches North With Launch in Scotland,' *The Lawyer* (6 November 2012)

36. At the same time, third party funders with an interest in funding lower value claims have recently entered the market in England and Wales. So, for example, a new fund was launched in May 2012 by Novitas, which had previously dealt with high value divorce cases with an average loan of £50,000 but which is now offering loans from £3,000 to fund divorce cases.[17] There is no reason to believe that third party funder entry into low value cases will be restricted to England and Wales. Supply may not depend exclusively upon the availability of high value cases. I am therefore unwilling to follow the advice of at least one response to the Consultation which recommended that since third party funding was not active in Scotland, I could well avoid dealing with it.

37. On the demand side, some respondents observed that demand for third party funding, as demonstrated in England and Wales, was also unlikely to develop in Scotland. They argued that Jackson LJ's encouragement of third party funding was a response to significant changes that he recommended should be introduced into the costs regime in England and Wales, such as the non-recoverability of success fees and ATE premiums. A 'mischief based analysis' suggested that demand for third party funding will remain limited in Scotland.

38. This was by no means a unanimous view. For example, an association of solicitors representing pursuers in personal injury claims considered that third party funding may well address funding gaps in Scotland. They observed that it could provide an option where no other funding is available, for example, in multi-party litigation and clinical negligence actions. Other solicitors with whom I met were of the view that third party funding may be particularly attractive in certain areas such as insolvency, and especially with regard to complex high value cases where solicitors may wish to share the risk with a third party funder rather than enter into an SFA, as they frequently do in lower value work. This could equally apply to a broader field of cases and circumstances. It has been suggested that the demand for third party funding, which can meet the cost of counsel's fees, outlays, insurance premiums and other fees as the case progresses in return for either a multiple of the amount invested or a percentage of the damages, is likely to increase in England and Wales following the introduction of damages based agreements in April 2013.[18] There is no reason why the same may not apply to cases in Scotland funded by 'no win no fee' arrangements, whether they are damages based agreements or speculative fee agreements ('SFAs').

39. Demand for third party funding may also arise because of the tactical advantages that it offers. It has been represented to me, just as it was to Jackson LJ, that third party funding provides a clear message to the opposing side that a party with no interest in the litigation other than its profitability has confidence in the case. The decision of third party funders to invest in the litigation is made only after a detailed assessment of the legal and factual matrix of the case, its prospects of success and the qualities of the legal team.[19] Since the case is assessed by an independent party for its prospects for success, this may serve the

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[17] Rachel Rothwell, 'Is it wrong to profit from divorce litigation?' *Law Society Gazette* (28 May 2012)
[18] Rachel Rothwell, 'Litigation Funder Targets Case "Portfolios,"' *Law Society Gazette* (25 October 2012)
[19] Hodges et al, *op cit* (2012), pages 2 and 102

public interest by promoting settlement. Where pursuers are pitted against a stronger party, it may also promote access to justice. As one representative of third party funders argued in the Law Society Gazette, *"Large firms often find it preferable to bury claimants under excessive costs, rather than settle genuine claims....Funding removes this weapon from their armoury and puts previously weak claimants on a level playing field."*[20]

40. This view is not restricted to funders. Empirical research in England and Wales found that many of the cases suitable for third party funding were of a David vs. Goliath nature and would never have proceeded without it.[21] Indeed, the funding for commercial litigation which third party funding offered small and medium sized enterprises in England and Wales was found to represent *"a significant extension in access to justice in an area that has been consistently overlooked by commentators, lawyers and policy makers, who have concentrated concern and analysis almost exclusively on low value claims by consumers and individuals."*[22]

41. The research also demonstrated that demand for third party funding in England and Wales far outstripped supply, so that funders were able to select meritorious cases that offered the best returns. These were frequently high value cases. Hence, the availability of high value cases may not be a necessary condition of supply. Rather, it may be that the present restriction of funding to very high value cases is a consequence of high demand, which allows funders to take their pick of cases. As the market for third party funding matures, and supply increases, investors may choose to support cases with higher risk and lower value.[23]

Regulation

42. The question that must now be addressed is whether regulation of third party funding is necessary in Scotland and, if so, what form it should take.

43. There is currently a voluntary code of conduct for members of the Association of Litigation Funders of England and Wales, which is reproduced at Annex 1. The Association was founded in 2011 with the stated aim of ensuring that the code's legal and ethical standards are met by all its members. Its website (as of July 2013) lists ten funder members (including one overseas member), almost all of whom are limited companies or limited liability partnerships; three broker members; one law firm member and; two academic members. The code of conduct sets out the standards by which members must abide. It requires funders to maintain at all times financial resources adequate to enable them to meet their obligations to fund all of the disputes they have agreed to fund. It provides that funders must behave reasonably and may only withdraw from funding in specific circumstances. Where there is a dispute about termination or settlement, a binding opinion must be obtained from senior counsel. Funders are not to seek to influence the funded party's lawyer to cede control of the litigation to the funder, or cause the lawyer to act in

[20] John Hyde, 'US Plea to Curb Third-Party Funding,' *Law Society Gazette* (31 October 2012)
[21] Hodges et al, *op cit* (2012), page 105
[22] *ibid*, page 104
[23] *ibid*, page 103

breach of professional duties. In practice, because of their financial interest, funders will ask to be kept informed as the case progresses.

44. Jackson LJ considered that since third party funding was in its infancy in England and Wales, and since parties presently using it were commercial enterprises with access to full legal advice, a voluntary code would suffice until third party funding expanded, when it may be necessary to revisit the issue of full statutory regulation. The same position could be taken here, particularly given the low prevalence of third party funding in Scotland at present. In Jackson LJ's view, however, much also depended on the nature of the investors entering the market place and the nature of the claims and claimants that they are funding. If third party funders were to support group actions brought by consumers, for example, he observed that the issue of statutory regulation may have to be reconsidered.

45. Recent evidence suggests that the market is not only expanding in England and Wales but that funders are planning to extend into new markets, such as multi-party actions and divorce. This extension into cases involving ordinary citizens may mean that the case for transparency and regulation is stronger now than in 2009 when Jackson LJ was writing. A number of respondents to the Consultation identified clinical negligence and multi-party litigation as potential markets for third party funding in Scotland. Protection would be required since individuals are not 'repeat players' and do not have access to the financial and legal advice resources normally available to commercial parties.

46. Statutory regulation was considered during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012[24] but was not implemented. The Minister stated that the Lord Chancellor would be reviewing the operation of the voluntary code, leaving open the possibility that the Government may need to return to the issue in the future.[25]

47. Formal regulation has also been supported by academic legal commentators. It has been argued that a voluntary scheme does not address the requirements of a developing market and *"any potential harm caused by the emergence of new funders who may develop new litigation funding products and alternative business models that fall outside the scope of the code."*[26] The writers considered that third party funding in England and Wales had already expanded to the point where regulation by the Ministry of Justice, the Legal Services Ombudsman or a financial regulator should be considered. They doubted whether a voluntary code would provide sanctions adequate to deal with rogue funders and bad practice.[27]

48. Self-regulation of the industry, as is presently in place in England and Wales, may be sufficient to delineate core elements of the funder-client-lawyer relationship. At present, litigants funded by third party funding will have the protection of independent advice from their own lawyers before entering a funding agreement and also during the resulting litigation. However the legal landscape is rapidly changing, not least due to the advent of

[24] c. 10
[25] HL Deb 14 March 2012, vol 736, cols 368-369, per the Minister of State for Justice (Lord McNally)
[26] Hodges et al, *op cit* (2012), page 148
[27] *ibid*, page 149

law firms being able to access external capital. Should a third party funder in the future acquire an interest in a legal firm and offer a 'one stop shop,' a completely new set of risks will be presented and will require to be addressed. At this stage in the evolution of third party funding and in the current legal landscape, I consider that I should adopt the solution adopted in England and Wales, where it appears to be working satisfactorily. Third party funding is very much in its infancy in Scotland. It may not reach adolescence.

49. **I therefore recommend that there should, in the first instance, be a voluntary Code of Practice to which third party funders should conform.** It is beyond the remit of this Review to draft codes of practice or similar. That is a task for the new Scottish Civil Justice Council to oversee. However, this is a dynamic arena. I do not have a crystal ball to enable me to predict how, for example, alternative business structures will impact upon present practices and values. It may be that, in the future, a voluntary code will be insufficient to protect individuals who make use of third party funding and that statutory regulation will be required.

Capital adequacy

50. Capital adequacy has implications for both the funded party and the successful opponent of a funded party. Several respondents observed that there was a risk of funders becoming insolvent, particularly during a protracted litigation. This raises the question of what can be done to ensure that funders have sufficient capital to fulfil their obligations to the litigants that they have funded.

51. In England and Wales the voluntary code of conduct requires a funder to maintain at all times adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund.[28] While the code does not currently specify a minimum amount, it has been reported that the ALF intends to introduce more rigorous rules which will require funder members to have capital of at least £2 million. This figure will be reviewed annually. Members will also require to be audited annually.[29]

52. I consider that similar provision to that made by the ALF code should be included in the voluntary Code of Practice for third party funders operating in Scotland.

Recovery of expenses

53. Several respondents referred to the difficulties of recovering expenses awarded against funded parties where the third party funder had insufficient capital to meet the award. This may be addressed under existing procedures by which the court can require parties to find caution. So, for example, in *Gaelic Seafoods (Ireland) Ltd v Ewos Ltd*,[30] the defenders were entitled to an order for caution despite the fact that the pursuers, a company in liquidation, had the benefit of legal expenses insurance.

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[28] Rule 7(d)

[29] Rachel Rothwell, 'Third-party funders face tougher rules,' *Law Society Gazette* (8 February 2013)

[30] 2009 SCLR 417

54. In Scotland the courts can impose liability for judicial expenses on a person who, though not a party to the action, has control of the litigation and an interest in its subject matter.[31] Such a person is known as a *dominus litus*. It is, however, rare for such a finding in expenses to be made.[32] In England and Wales the courts also have the power to award costs against a body which is not a party to the proceedings.[33] Such an order will be 'exceptional,'[34] for example, where non-parties pursue or defend claims for their own benefit and at their own expense. The Privy Council has held that where the non-party not only funds the proceedings but substantially controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, the non-party will pay the successful party's costs.[35]

55. As far as third party funders are concerned, the Court of Appeal in England and Wales has attempted to strike a balance between the need to preserve the expectation that costs follow success while avoiding the discouragement of professional funding of claims brought by litigants who would otherwise be unable to afford litigation. In *Arkin v Borchard Lines Ltd and others*[36] the Court of Appeal held that third party funders should potentially be liable for costs, but only up to the value of their investment. Giving the judgment of the Court, Lord Phillips MR said:

> *"If a professional funder, who is contemplating funding a discrete part of an impecunious claimant's expenses, such as the cost of expert evidence, is to be potentially liable for the entirety of the defendant's costs should the claim fail, no professional funder will be likely to be prepared to provide the necessary funding. The exposure will be too great to render funding on a contingency basis of recovery a viable commercial transaction. Access to justice will be denied. We consider, however, that there is a solution that is practicable, just and that caters for some of the policy considerations that we have considered above. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit."*[37]

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[31] *Cairns v McGregor* 1931 SC 84 applied by the Inner House in *Eastford Ltd* v *Gillespie and Airdrie North Ltd* 2010 CSIH 12.

[32] See for example, *O'Connor v Bullimore Underwriting Agency Ltd* 2005 SCLR 1111.

[33] The House of Lords held in *Aiden Shipping Co. Ltd. v Interbulk Ltd* [1986] AC 965 that section 51 of the Senior Courts Act 1981 confers a sufficiently wide discretion on the court on the question of costs to allow it to award costs against non-parties.

[34] Nicholls LJ in *Re Land and Property Trust Co. plc* [1991] 1 WLR 601.

[35] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39, at paragraph 25 per Lord Brown

[36] [2005] EWCA Civ 655

[37] *ibid*, paragraphs 39-41

56. By contrast, Jackson LJ considered it wrong in principle that a third party funder, which stands to recover a share of any monies recovered in the event of success, should be able to escape part of the liability for costs in the event of defeat. This was unjust not only to the opposing party (who may be left with unrecovered costs) but also to the client (who may be exposed to costs liabilities which the client cannot meet). He recommended that the extent of a third party funder's liability for costs should be for the court's discretion, and should not be limited by the extent of its investment in the case.[38]

57. I am persuaded by the reasoning in *Arkin*. A funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of a litigation should not be protected against an award of expenses. However, the funder should not be liable for the whole award as that would have the potential to make third party funding so unattractive that it would not be offered. Third party funding is a means of securing access to justice for litigants who would otherwise not be able to afford an attempt to have the court vindicate their rights. It seems to me to be proportionate that the funder should be liable only to the extent of its investment in the case. Thus, at any hearing on expenses after the case has been decided in favour of the other party, the court will require information from the funder as to the extent of the funding provided. I am also of the opinion that any award of expenses against the funded litigant should be on a joint and several basis, albeit with the funder's liability capped at the extent of its investment in the case. It is insufficient that the award is against the funded litigant only, since the successful party would have no recourse to the funder should the funded litigant take no steps to require the funder to satisfy its liability**. I therefore recommend that a professional funder who finances part of a pursuer's expenses of litigation should be potentially liable for the judicial expenses of the opposing party to the extent of the funding provided. Any award of expenses against the funded litigant should be on a joint and several basis, with the funder's liability capped at the extent of the funding provided by it.**

58. A number of respondents identified the funder taking control of the litigation as the primary risk of third party funding. It has been suggested that this may be a particular risk in jurisdictions which, like Scotland, do not have a prohibition on maintenance and champerty.[39] This could not only interfere with the solicitor-client relationship but conflict with the interests of funded parties. So, for example, funders could exercise control over the amount and timing of settlement. They could also withdraw funding at short notice. I have been told that this may happen where funders have not been tied into funding the litigation to proof under the terms of the funding agreement.

59. As Hodges and colleagues observe, the central issue in all types of third party funding, whether provided by lawyers under damages based agreements, by the state under legal aid or by private investors under third party funding agreements, is the potential for conflicts of interest. Any solution, however, must have regard to competing interests. As they explain*: "the essential conflict that needs to be balanced in any situation in which an independent party provides funding to another who is a party to litigation is between the interests of*

[38] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 11, paragraphs 4.5-4.7
[39] Hodges et al, *op cit* (2012), page 106

enabling justice to be accessed as a result of the availability of funding, of recognising the commercial interests of the investing funder, of protecting the interests of the litigant from unfair pressure, and of protecting the integrity of the legal process."[40] In their view, contemporary public policy in England and Wales should accept third party funding subject to the following principles:

1. The client retaining control over their litigation;

2. The integrity of the lawyer-client relationship remaining intact;

3. The integrity of the court process and cases being pursued on legal merits remaining core factors in any litigation; and

4. The client understanding the terms of any agreement that they enter into with a third party such that they are making an informed decision on whether to accept third party funding.[41]

60. These are basic principles that I fully accept, and which I commend to the Scottish Civil Justice Council when it comes to consider the new voluntary Code of Practice.

Disclosing the funding mechanism

61. In Scotland, with the exception of parties in receipt of civil legal aid,[42] there is no obligation to disclose to the court, or to an opponent, how the litigation is to be funded. While third party funding may afford parties a degree of privacy, it has been observed that some parties may prefer to make this information public for tactical reasons.[43] The question is whether disclosure of the means of funding a litigation should be a requirement.

62. I am of the view that disclosure of the means of funding should be required in every litigation. With respect to third party funding, I note that defenders are in favour of a requirement to disclose, and for good reason. Disclosure has implications for how defenders proceed, for their willingness to settle, and for their willingness to settle early. Funders, who mainly fund claimants, likewise referred to the advantages of disclosure. In particular, they could look forward to earlier settlement, which had implications for the return on their investment.[44] It would appear, then, that disclosure expedites dispute resolution to the benefit of both parties and promotes efficiency in the legal system. If this is correct, I fail to see why disclosure of a litigation funding arrangement should not be desirable for all funded parties, whether they are pursuers or defenders. If, as I recommend, third party funders are liable for a proportion of the other side's expenses should the funded client be unsuccessful, then disclosure is also necessary.

63. **I therefore recommend that in all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or**

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[40] Hodges et al, *op cit* (2012), page 139
[41] Hodges et al, *op cit* (2012), pages 139-140
[42] Act of Sederunt (Civil Legal Aid Rules) 1987 SI 1987/492
[43] Gary Barker, 'Litigation Funding – Latest Developments,' *MBL Seminars* (April 2012)
[44] Hodges et al, *op cit* (2012), page 105

notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner as a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case.

LEGAL AID FOR FAMILY ACTIONS

64. It is not within the remit of this Review to examine the current legal aid scheme in Scotland. However, bearing in mind that a significant proportion of all family actions are funded by civil legal aid in Scotland, some consideration is necessary.[45] In 2011-12, there were 20,015 applications to the Scottish Legal Aid Board ('SLAB'), of which 55% (10,990) were with regard to family matters. Of these, just under 25% (4,780) of all applications were with regard to 'contact/parentage'. In 2011-12, SLAB's expenditure on civil legal aid (in all courts) was £45,589,000. Of this, 50% (£22,886,000) was taken up by family actions, with 25% of the total expenditure on civil legal aid (£11,619,000) by actions for 'contact/parentage.'[46] In this context, our Consultation Paper asked whether a disproportionate amount of the civil legal aid budget was being allocated to family actions and whether this might be reduced.

65. Respondents to the Consultation Paper noted that civil litigation funding presents particular problems for those seeking to resolve family disputes through the courts. They observed that the scope for funding family actions is more limited than for most civil actions. SFAs are not normally available for family actions and such actions are outwith the ambit of most legal expenses insurance policies. Potential litigants in family actions have the option of either funding the litigation privately or making an application to the Legal Aid Fund. The unavailability of SFAs could explain the apparent disproportionality of the representation of family actions in SLAB's statistics. It also explained, so one respondent observed, why family actions represent the majority of cases in Scotland in which at least one of the parties appears without legal representation.

66. One respondent observed that the disbursement of funds by SLAB to family actions would only be disproportionate if family cases comprised less than 50% of all actions coming before Scotland's civil courts.[47] Most respondents, however, dismissed the allegation of disproportionality by referring to the importance of these cases, both for the individuals concerned and society in general. They put significant emphasis on the need for family

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[45] The Scottish Legal Aid Board identifies by subject matter all applications to the fund and grants by it. Family actions include: divorce; family/matrimonial; contact/parentage; and residence

[46] The Scottish Legal Aid Board, *Annual Report 2011-12* (2012), Appendix 3: Civil legal assistance

[47] 85,256 civil cases were initiated in Scotland's civil courts in 2011-12, of which just 16% (13,679 cases) were family actions ('aliment, 'divorce/dissolution', 'exclusion,' 'interdict,' 'nullity of marriage,' 'parental responsibilities' and 'others'). We do not know what proportion of all defended cases in Scotland's civil courts were family actions. Scottish Government, *Civil Law Statistics in Scotland 2011-12* (2012)

actions to be determined quickly, fairly and without causing undue financial hardship to the parties involved. They observed that the breakdown of the family unit can have a devastating impact on adults and children alike and that access to the legal system in family actions was sought during periods of intense stress. It was therefore all the more important that matters were not aggravated by difficulties and delay in accessing the courts. In particular, respondents referred to the effect that delay could have on the children involved, especially with regard to disputes over contact and residence.

67. Indeed, there was almost uniform consensus amongst respondents to our Consultation Paper that if the civil legal aid budget was being disproportionately allocated to family actions, this was entirely justified. In the first place, access to justice is a fundamental right enthroned in Article 6 of the European Convention on Human Rights. Secondly, they argued that public funds should be targeted on those in need, as those found eligible and granted civil legal aid evidently were. Thirdly, it was in the general public interest, as well as the interest of those more immediately involved, that disputes raised by family actions should be resolved.

68. SLAB stated in its response to the Consultation Paper that it does not allocate funds to specific heads of work. Rather, civil legal aid awards are based on the nature of the application received. Accordingly, SLAB does not look to award certain proportions of its budget to certain types of actions. It makes awards to applicants based on whether or not they meet the eligibility criteria.

69. Section 14(1) of the Legal Aid (Scotland) Act 1986 provides that:

> *Subject to section 15 of this Act and to subsection (2) below, civil legal aid shall be available to a person if, on an application made to the Board (a) the Board is satisfied that he has probabilis causa litigandi;*[48] *and (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.*[49]

This section provides SLAB with a significant amount of discretion in determining whether it is reasonable in the circumstances to award civil legal aid. It may not be reasonable to do so in instances where the application is premature, the claim is frivolous or vexatious, and a reasonable offer has been made in settlement.[50]

70. In May 2010, SLAB issued new guidance which clarifies how it approaches the 'reasonableness test'.[51] SLAB developed the new guidance to ensure that public funding was being directed to appropriate cases. The changes require solicitors to provide SLAB with more in-depth information regarding the prospects of success, the prospects of recovery, all attempts made to settle the dispute without recourse to litigation, and the practical benefit to the client of pursuing litigation.

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[48] 'Substantial grounds for commencing legal action'

[49] Legal Aid (Scotland) Act 1986 c. 47, s 14(1)

[50] Scottish Legal Aid Board *Civil Legal Assistance Handbook 2013*, 3.3ff

[51] Scottish Legal Aid Board, *Civil Legal Aid: Information for Applicants*, page 9

71. The introduction of this new guidance has had an impact on the approval rate for applications for civil legal aid. Between 2009 and 2011, there was a reduction of 5.1% in the number of civil legal aid applications which were approved.[52] In its response to the Consultation Paper, SLAB observed that this reduction was mostly due to the failure of applicants to provide sufficient information in respect of the prospects of the action, attempts at negotiation, and the potential benefit in pursuing litigation.

The High Cost of Resolving Domestic Disputes

72. Despite the new guidance on the 'reasonableness test', we were informed by SLAB that in family actions, and particularly where parties are in receipt of legal aid, there is a risk of court actions being conducted with a lack of "private client reality." Accordingly, when parties are in receipt of legal aid, they often do things that they would not necessarily do if funding the litigation themselves. In essence, it has been observed that the presence of legal aid itself can contribute to an increase in the cost of litigation.

73. Further, SLAB observed that actions where multiple parties are in receipt of legal aid can be also be a trigger for an increase in the expenditure of civil legal aid. We were informed by SLAB that, for the period from January 2008 to January 2010, in actions where there were multiple legally aided parties, the average expenditure was almost £1,000 more per legally aided party than in actions where there was only one legally aided party. Specifically, we were told that in actions where there was one legally aided party, the average expense per legally aided party was £1,233.75, whereas, in actions with multiple legally aided parties, this figure rose to £2,102.99. One respondent was of the view that this difference of approximately £1,000 was not extremely high. Another respondent suggested that while this figure was interesting and worthy of further examination, it was necessary to realise that actions where there is more than one legally aided party are, by definition, highly contentious and that they would always expect such matters to exhibit higher net average expenses.

74. Further, family actions often involve the use of experts, counsel and children's reporters. The use of these services is open to all parties in an action and is likely to be expensive. SLAB suggested that those in receipt of legal aid may over-utilise these services and therefore increase the expense of the action. The recent case of *NJDB v JEG and Another*[53] is an example of expenses in a family action spiralling out of control. In the action, commenced in Alloa Sheriff Court in October 2003, a father sought orders for parental rights and responsibilities, and residence or contact orders. The action was transferred to Stirling Sheriff Court in January 2008. An eight day proof was fixed for September 2008 and ultimately ran to 52 days of evidence and took more than a year to complete.[54] The sheriff's decision was appealed, unsuccessfully, to the Inner House of the Court of Session in 2010.[55] In the opinion of the court it was noted that the cost of the proceedings, excluding judicial

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[52] See: Scottish Legal Aid Board, *Annual Reports 2009-2010* and *2010-2011*

[53] *NJDB v JEG and Another* [2012] UKSC 21

[54] *ibid*

[55] *NJDB v JEG and Another* [2010] CSIH 83

costs, was estimated at around £1 million, of which by far the larger proportion had been borne by SLAB.

75. The decision of the Inner House was subsequently appealed to the Supreme Court of the United Kingdom.[56] In delivering the court's judgment, Lord Reed said that

> *"The cost of the proceedings before the sheriff, in particular, was wholly disproportionate to the complexity of the issues which had to be resolved. It is a cost which could only arise in proceedings of this kind where the parties were publicly funded: it is inconceivable that any reasonable person would expend resources on this scale on a dispute over contact if the money were coming out of his or her own pocket."*[57]

While this case represents an extreme example, SLAB has been introducing reforms to deal with such cases and to ensure a more proportionate and fair use of public resources.

Special Urgency Provisions

76. One such reform is the revision to the 'special urgency' provisions contained in Regulation 18 of the Civil Legal Aid (Scotland) Regulations 2002.[58] Civil legal aid is only available when SLAB is satisfied that the eligibility criteria have been met. However, it is recognised that there may be times when solicitors must act before a civil legal aid application has been processed. This usually occurs when solicitors are required to take urgent action in order to protect their client's interests. Regulation 18 allows a solicitor to carry out certain items of urgent work without prior approval from SLAB.

77. We were informed by SLAB that in a substantial number of situations solicitors use the special urgency provisions when it is unnecessary to do so. For example, SLAB stated that it spent £1 million in 2010 on work carried out under the special urgency provisions in instances where one of the eligibility criteria was not eventually met. To resolve such situations, Regulation 18 was amended in April 2011[59] to remove actions seeking interim orders relating to parental rights and responsibilities,[60] applications for interim residence, applications for interim contact, and the ability to initiate or defend a Minute of Variation, from items of work which may be carried out without prior approval. These changes are intended to lessen the number of actions which are raised in the Scottish courts before legal aid applications are processed.

Stage Reporting

78. Another way in which SLAB seeks to control civil legal aid expenditure is through stage reporting. This requires solicitors to provide SLAB with periodic reports on the progress of actions and the prospects of success. SLAB observed in its response to the Review that despite stage reporting being a facet of civil legal aid since 2003, the rate of

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[56] *NJDB v JEG and Another* [2012] UKSC 21

[57] *ibid,* paragraph 23

[58] SSI 2002/494

[59] The Advice and Assistance and Civil Legal Aid (Special Urgency and Property Recovered or Preserved) (Scotland) Regulations SSI 2011/134

[60] Children (Scotland) Act 1995 c. 36, s 11

compliance with requests for periodic reports had hovered around 50%. With such low compliance it argued that actions which should have had civil legal aid withdrawn continued to accrue large expenses. The new stage reporting enforcement procedures are intended to counteract this and ensure that public funding is focused on actions that maintain a chance of success.

79. Prior to February 2012, SLAB did not require routine time-based reports in most cases. However, where a grant of legal aid had been in place for eighteen months in a family action, and twenty four months in any other action, SLAB would normally request a report on the progress of the action. Further, unprompted reports had to be sent to SLAB upon any material change of circumstances and in cases where the action was sisted.[61]

80. As of February 2012, a report is required six months after the grant of civil legal aid is made in a family action where issues regarding children are involved, and after twelve months in any other type of action.[62] Unprompted reports must be sent to SLAB upon major developments in the action, or when anything changes which may alter the assumptions that SLAB made when granting legal aid.[63] If any required reports are not submitted, civil legal aid will be suspended and eventually terminated.[64]

Cost Limitations

81. A final method of controlling the cost of civil legal aid is the use of 'cost limitations'. From 21 March 2013, all grants of civil legal aid will include a fixed level of expenditure that will vary depending on the particular action.[65] For example, a higher level of expenditure may be set for a reparation action in the Court of Session than for a contact action in the sheriff court. In instances where solicitors require to exceed the limit set, they will have to submit detailed reasons to SLAB justifying why an increase in the cost limitation is necessary.[66] SLAB is of the view that one benefit of this is that solicitors will not be able to incur large or disproportionate costs without SLAB being able to determine if legal aid should continue to be available.[67]

82. The Law Society of Scotland considered that, in light of the current economic climate and the need to achieve savings for the legal aid budget, the whole system of legal aid eligibility may need to be reviewed. It was observed that the changes to eligibility which were introduced in 2009 brought around 70% of the population of Scotland into the reach of civil legal aid.[68] It was also observed that in the current difficult financial climate, and consistent with the move towards a system in which SLAB is seen as a 'funder of last resort', it is important for resources for civil legal assistance to be refocused on those in society that

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[61] Scottish Legal Aid Board, *Civil Legal Assistance Handbook* (August 2011), Part IV, Chapter 7.9
[62] Scottish Legal Aid Board: *Civil Legal Assistance Handbook* (March 2013), Part IV, Chapter 7.4
[63] Civil Legal Aid (Scotland) Regulations SSI 2002/494, Regulation 23
[64] Scottish Legal Aid Board, *Civil Legal Assistance Handbook* (March 2013) Part IV, Chapters 7.4 and 7.9
[65] *ibid,* Chapter 3.32
[66] *ibid,* Chapters 3.35 and 3.37
[67] *ibid,* Chapter 3.38
[68] The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations SSI 2009/143

can least afford it. Another respondent suggested that there should be a separate family legal aid budget with more stringent rules since the conduct of the parties in family actions can result in prolonged litigation.

Reports

83. One aspect of family actions that invariably triggers an increase in expenses is child welfare reports. SLAB observed in its response to the Review that in instances when a party is legally aided, it is expected that the legally aided party will bear the cost of the report.

84. We were informed by SLAB that it spent £4.1 million on child welfare reports in 2010/2011, with the cost of individual reports ranging from £1,000 to £10,000. The Scottish Government is chairing a working group to examine the role of court reporters in cases involving contact and residence with children. I am informed that the Scottish Government is to publish a table of fees detailing the fees to be paid to reporters, curators and safeguarders which will result in greater predictability in the cost of litigation where such reports are ordered.

85. As I have already indicated, it is not the purpose of this Review to examine the current legal aid scheme in Scotland. However, I do recognise that the availability of legal aid as a source of funding litigation is an important element in securing access to justice. There can be little doubt that the expenses of family actions can spiral out of control. Part of the solution to this problem lies with increased judicial case management powers arising out of the recommendations made by the Scottish Civil Courts Review ('SCCR'). It is also welcome that sheriffs now have the express power to exclude certain documents and witnesses from proof.[69] There is no doubt that properly prepared child welfare reports can save much court time in that very often parties resolve their differences according to what the report recommends. On the other hand, some reports are far too long, and thus expensive, and miss relevant material. The recommendations of the SCCR[70] with regard to the recruitment and training of reporters, once implemented, will also have a beneficial impact on the quality and costs of reports. Sheriffs, too, can assist by being more prescriptive about what they expect the reporter to do. The increased specialisation of the judiciary as recommended by the SCCR[71] will assist in this respect. Further, the table of fees to be paid to reporters, curators and safeguarders, due to be published by the Scottish Government, should increase predictability and limit the amount that is expended on child welfare reports. These measures taken together should help better manage the expenses incurred by parties in family actions and particularly those funded by legal aid. Given these measures I make no specific recommendation in this regard.

[69] Act of Sederunt (Sheriff Court Rules)(Miscellaneous Amendments (No. 2) 2013/139

[70] *Report of the Scottish Civil Courts Review* (2009), Recommendation 74

[71] *Report of the Scottish Civil Courts Review* (2009), Recommendation 4

SELF-FUNDING SCHEMES

86. An alternative mechanism for funding litigation is the establishment of self-funding schemes in terms of which 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 and used to fund future litigations. It follows that for the scheme to endure, a flow of successful litigations is required.

87. Two such self-funding schemes are a Contingent Legal Aid Fund ('CLAF') and a Supplementary Legal Aid Scheme ('SLAS') which cover a wide variety of funding options.[72] 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 or added onto an existing publicly funded legal aid scheme and administered by the relevant legal aid authority. The normal beneficiary of such a scheme is the claimant although it could also be used by a defender with a counterclaim.

88. No such schemes have, to date, been implemented in Scotland. In England and Wales, provision was made for a CLAF or SLAS system in the Access to Justice Act 1999[73] but this has not been brought into force.[74] Similar provisions were made in the Access to Justice (Northern Ireland) Order 2003.[75] Between 2005 and 2007, the Northern Ireland Legal Services Commission developed the concept of a SLAS for Northern Ireland to be administered by the Commission. The Northern Ireland Alternative Legal Aid Scheme ('NIALAS') would involve the creation of a ring fenced fund out of which lawyers' fees and costs would be paid in cases that were lost. In order to replenish the fund and keep it in a self-financing state, a proportion of damages in winning cases would be paid into it. It was recognised that the scheme would require a significant injection of capital, or seed funding, to make it viable at the outset. The financial modelling that was carried out demonstrated how, if it was to remain self-funding, it would be dependent on the maintenance of a high percentage success rate; a small under performance would have a significant impact on costs and risk triggering a need for subsidy from the Legal Aid Fund. The possibility of lawyers 'cherry picking' their stronger cases to run outside the scheme would by definition threaten the viability of NIALAS. In its final report, the Access to Justice Review in Northern Ireland concluded that the financial risks and administrative complications associated with a SLAS or a CLAF were too great to justify a recommendation for their introduction as a means of replacing legal aid in cases involving claims for damages.[76]

89. The best known self-funding scheme is the SLAS scheme operated by the Hong Kong Legal Aid Department, which was established in 1984. It provides legal representation to litigants whose financial resources are above the upper eligibility limit for legal aid,

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[72] See Jackson LJ, *Review of Civil Litigation Costs Preliminary Report* (2009), page 177

[73] Section 28, which inserted section 58B into the Courts and Legal Services Act 1990

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

[75] SI 2003/435

[76] *Report of the Access to Justice Review in Northern Ireland* (August 2011), paragraphs 5.105 and 5.106

currently HK$260,000, but which do not exceed HK$1,300,000. 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. With effect from 30 November 2012, the scheme was expanded to cover professional negligence claims against other professions, namely, public accountants, architects, engineers, surveyors, planners, estate agents and insurers together with monetary claims against sellers in the sale of first-hand residential properties where the claim is likely to exceed $60,000. The scheme was also extended to cover representation for employees in appeals against awards made by the Labour Tribunal, irrespective of the amount in dispute. The scheme is self-financing funded by the application fee, contribution and percentage deduction out of damages or compensation recovered.

90. For claims arising from personal injuries or death, employees' compensation claims and representation of employees in appeals against awards made by the Labour Tribunal (Type I Proceedings), the claimant is required to pay an application fee of HK$1,000 and an interim contribution of $65,000 upon acceptance into the scheme. For all other cases (Type II Proceedings) the claimant is required to pay an application fee of HK$5,000 and an interim contribution of 10% of their assessed financial resources or HK$65,000, whichever is higher, upon acceptance into the scheme. If the case is successful, the claimant has to pay to the Director of Legal Aid out of the damages/compensation recovered all the expenses that are not recovered from the opposite party. In addition, for Type I Proceedings, the claimant must pay ten percent of the damages recovered into the SLAS in respect of cases that proceed to trial and six percent in respect of cases settled before trial. For Type II Proceedings the claimant must pay twenty percent of the damages recovered into the SLAS in respect of cases that proceed to trial and fifteen percent in respect of cases settled before trial.[77]

91. Jackson LJ reported that the Hong Kong Law Society regards the SLAS "*as a valuable mechanism for promoting access to justice*." However, he also reported a perception amongst certain commercial solicitors that when litigating against a SLAS supported claimant, the bureaucracy of the Legal Aid Department made settlement negotiations difficult. In their opinion, a CLAF operated independently of the Legal Aid Department but upon the same principles as the current SLAS would be more advantageous.[78] It should be noted that SFAs and damages based agreements are not permitted in Hong Kong.

92. Contingency based subsidised funding is also available in Quebec and Ontario, but is limited to supporting multi-party actions.[79] 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 and have, therefore, not attracted a large number of applicants.[80]

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[77] Government of Hong Kong Legal Aid Department. See: http://www.lad.gov.hk/eng/las/faq.html
[78] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 18, paragraph 2.5
[79] *ibid*, paragraphs 2.6 – 2.10
[80] *ibid*, paragraphs 2.11 – 2.14

93. 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 funding of litigation and alternative funding structures.[81] 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. 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. It 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.[82]

94. The Civil Justice Council took a different view with regard to a SLAS fund, however, and recommended that such a fund should be established and operated by the Legal Services Commission.[83] It considered that a SLAS was preferable to a CLAF as, 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. It 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.[84]

95. The UK Government chose not to implement that recommendation as there was insufficient evidence of need for a SLAS in light of the wide availability of CFAs. The matter therefore formed part of Jackson LJ's Review of Civil Litigation Costs in England and Wales. Jackson LJ identified four main policy issues which would need to be addressed in setting up such a scheme, with particular reference to the impact on costs and costs shifting:

(i) Should any self-funding scheme be set up as a CLAF or as a SLAS and, for a CLAF in particular, where should initial seed funding come from?

(ii) From what source should the levy on successful cases come, and how should it be calculated?

(iii) Who should be liable for the other side's costs (assuming costs shifting applies)?

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[81] Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs; the future funding of litigation – alternative funding structures* (2007)

[82] *ibid*, pages 22-24

[83] *ibid*, pages 25-52

[84] *ibid*, page 11 and pages 25-52

(iv) What should the remuneration regime be for lawyers operating under the scheme?[85]

96. The Bar Council in England and Wales established a 'CLAF Group' in November 2008 with a remit to inquire into the possibilities of creating a CLAF. The Group submitted two discussion papers to Jackson LJ's Review. It concluded that a private CLAF was a viable concept but should not be seen as a replacement for legal aid or CFAs, but instead as an additional means to help provide effective access to justice. It proposed the creation of a number of not-for-profit CLAFs, which it called 'Charitable Contingent Funds' ('CCFs'), which would operate in different areas of litigation. The Group also identified certain areas, such as defamation, which could benefit from a 'boutique CLAF.' It accepted that no large scale CLAF could be established which would take over as the principal means of funding personal injury and other similar type claims. It also identified issues that would need to be addressed when setting up smaller CLAFs, namely: the level of contribution from successful claimants; how to deal with adverse awards of expenses; initial funding; and the returns required by investors in the CLAF. It recognised that until the costs landscape was known following any changes arising out of Jackson LJ's recommendations, however, it remained uncertain to what extent a CLAF would best operate or compete.[86] Such recommendations included, 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.

97. Jackson LJ confirmed in his Final Report that he supported the creation of one or more CLAFs or CCFs, if a viable financial model could be created. He recorded that, with the assistance of his accountant judicial assistant, he had attempted to devise a workable financial model for a large scale CLAF but had been unsuccessful.[87] He acknowledged, however, that a number of CLAFs and one SLAS have been successfully established in overseas jurisdictions. However, whilst acknowledging that any additional means of funding litigation which promotes access to justice for some claimants with meritorious cases should be encouraged, he also acknowledged the risk that solicitors would continue to use CFAs, or his proposed damages based agreements, for stronger cases. That could mean that a CLAF may not be viable as it would still be vulnerable to mainly funding cases with limited prospects of success. Assessing the risk to any CLAF proposal was in his opinion *"not simply a matter of statistics and economic modelling, but also involves an estimation of likely behaviour based on incentives."*[88] Jackson LJ therefore signalled caution in relation to the potential of a CLAF to make a significant contribution to access to justice.

98. Jackson LJ also examined the arguments made by the Civil Justice Council in its recommendation that a SLAS be established.[89] 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

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[85] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 18, paragraph 1.6
[86] The Bar Council, *The Merits of a Contingent Legal Aid Fund: Discussion Paper* and *Second Discussion Paper* (2009)
[87] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 13, paragraph 3.4
[88] *ibid*, paragraph 3.5
[89] *ibid*, paragraphs 3.6 -3.10

normal legal aid eligibility limits and the funding of these cases was strictly ring fenced to ensure no assets of the SLAS were redirected into the general Legal Aid Fund. This conformed to Jackson LJ's position, namely that no SLAS should be established unless its assets were ring fenced. Whether there would be a need for a SLAS would depend, in his view, on whether gaps existed in access to justice following the implementation of his recommendations.

99. Jackson LJ therefore found scope for the operation of one or more CLAFs or a SLAS, but only as an alternative means of funding for a minority of cases.[90] He therefore 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.[91]

100. In its 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.[92] 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 Jackson LJ's recommendations to abolish the recoverability of success fees from opponents, together with a 10 per cent increase in general damages awards. It noted that if Jackson LJ'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 per cent 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 a privately funded CFA.

101. 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. Whilst recognising that the proposal for a SLAS represented a new and unfamiliar way of funding some civil cases in England and Wales, the UK Government took the view that no compelling argument against a CLAF had been presented. In its view "*at a time when the public purse is constrained, the partially self-funding SLAS will supplement the legal aid fund, thereby supporting members of the public to pursue civil cases*."[93] It therefore decided to introduce a SLAS under which 25% of all damages successfully claimed, other than damages for future care and loss, would be repaid to the

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[90] *ibid*, pages 140-141

[91] *ibid*, Recommendation 16

[92] Ministry of Justice, *Consultation Paper on Proposals for Reform of Legal Aid* (November 2010), Chapter 9, pages 134-137

[93] The UK Government, *Reform of Legal Aid in England and Wales: the Government Response* (June 2011)

Legal Aid Fund in cases funded by legal aid. That proposal was said to be consistent with the wider reforms recommended by Jackson LJ and should ensure that legal aid would be no more attractive than CFAs or other forms of funding. Provision was made in section 23(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for regulations to provide 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.

102. The proposal to deduct a flat 25% from all cases gave rise to serious opposition. The charity Action against Medical Accidents ('AvMA') launched a petition in an attempt to prevent the proposal coming into force. It represented the SLAS as amounting to "*a 'raid' on funds earmarked for years of potential care for victims of clinical negligence*" and threatened to seek a judicial review of the scheme.[94] Indeed Jackson LJ himself commented on the 25% fixed deduction as contrary to his proposed maximum deduction in the case of personal injury CFAs. He pointed out that under the proposal, the full deduction would be made even if the case settled almost immediately. He compared the proposal to the system in Hong Kong which, at that point in time, allowed a deduction of 6% of all damages, including damages for future care and loss, if the case settled before delivery of the brief for trial, and 10% if the case went beyond that stage.[95]

103. The Government announced in September 2012 that, having carefully considered the views expressed in a stakeholder engagement exercise, it no longer intended to go ahead with implementation of the proposed scheme but it did not rule out such a scheme as an option for the future. The chair of the Bar Council 'CLAF Group', Guy Mansfield QC, has emphasised that a CLAF should still be seen as one of a number of funding mechanisms, but that it is too early to know if it will work. He referred to a Bar Council commissioned report by consultants Europe Economics,[96] which concluded that a CLAF could work and could secure seed funding as long as it had a good business case, but that its viability could not be assessed until the Jackson reforms settled down. He suggested that this would not be until at least autumn 2014. He did, however, suggest that:

> *"There could be specialist CLAFs, for example, in clinical negligence, or they could be regional. A CLAF might fund investigation costs and disbursements but not the legal costs of the solicitor, who would act on a CFA. Clients often don't have enough money to fund the initial investigation, and with this idea the solicitor would also be taking a risk so wouldn't be sending us the hopeless cases."* [97]

In Mansfield's view, it was important to *"keep the concept alive because there will be cases which will not attract funding…..Everybody's going to have to be imaginative about this."*[98]

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[94] John Hyde, 'Petition Fights Clinical Negligence Clawback,' *The Law Gazette* (24 August 2012)

[95] Jackson LJ, 'Contingency Legal Aid Fund and Supplementary Legal Aid Fund,' Second Lecture in the Implementation Programme (8 October 2011)

[96] Europe Economics, *Contingent Legal Aid Funds: an outline feasibility study for the General Council of the Bar* (November 2011)

[97] Quoted by Elizabeth Davidson, 'CLAF: A tax on brain-damaged children,' *LEGALVOICE* (4 October 2012)

[98] *ibid*

Consultation responses

104. We asked in our Consultation Paper whether a CLAF or SLAS should be introduced in Scotland and, if so, which is preferable. Three of the twenty one respondents to this question considered that either a CLAF or a SLAS should be introduced in Scotland. One respondent commented that both systems provide an opportunity to increase access to justice by widening the funding options available for those wishing to pursue a claim. Another respondent, who supported the introduction of a CLAF, suggested that by providing a system of funding based on merits and not means, a CLAF could, in theory, help create a level playing field for meritorious claims pursued by individuals against well-resourced defenders.

105. Seven respondents considered that a SLAS was the preferred option. The Scottish Legal Aid Board ('SLAB') considered a SLAS preferable to a CLAF since there is already a well-established publicly funded legal aid system in Scotland and SLAB has considerable experience in dealing with issues relating to legal aid. In its opinion, the creation of an entirely new and separate body to operate a CLAF appeared unnecessary and undesirable when a SLAS could be established and operated within the existing legal aid framework. It suggested that a SLAS should assist difficult cases where alternative sources of funding are not available but where public interest in the litigation would justify the expenditure of public funds.

106. The same number of respondents, seven, considered that neither a CLAF nor SLAS should be introduced in Scotland. Several referred to the differences between this jurisdiction and that of England and Wales. It was pointed out that legal aid is available to a large proportion of the Scottish population and, in particular, the current arrangements for funding personal injury claims, including on a speculative basis, work well. It was suggested that no evidence was available to suggest that the existing combination of funding mechanisms in Scotland gives rise to access to justice problems.

107. A firm of solicitors which represents pursuers in personal injury claims advised that consideration must be given as to whether there is currently perceived to be a gap in funding and whether or not any changes proposed by the Review are likely to create gaps that previously did not exist. If the answer to both questions is no, then that firm was of the view that there is no need to introduce alternative means of funding, such as a SLAS or CLAF. It submitted that there is no funding gap from the perspective of personal injury litigants at present as those who wish to pursue actions which have merit will be able to access litigation funding. It argued that, from one perspective, a CLAF is no different to a damages based agreement in that the pursuer is able to access litigation funding in return for agreeing to make a contribution to the fund or to pay a fee to the funder out of his or her damages, usually in the form of a percentage of the damages received. In its opinion, the answer was not to create a new type of funding, but instead introduce a system of capping the levels or percentages of deductions which can be taken from a pursuer's damages under a damages based agreement. If this was done in conjunction with increasing the percentage of recoverable judicial expenses, it considered that this would improve access to justice in two important senses: firstly, pursuers would retain more of their damages; and secondly, there would be no gap in the funding available.

108. One respondent suggested that, given the current economic environment, a CLAF would not be viable as significant work would be required to ascertain what would be required for a seed fund. Another respondent pointed to a risk that the system would grind to a halt because of under-investment and warned that, given the high level of initial investment that it anticipated, "*this could turn out to be an expensive waste of time*." One respondent suggested that such a system seemed unnecessarily complex for Scotland. In his opinion, it was also wrong in principle for a successful litigant to be required to sponsor other unsuccessful litigants.

Requirements for establishing a CLAF or SLAS

109. Several respondents referred to the difficulties in establishing a CLAF or SLAS. Firstly, it would cost a significant amount of money. In 1998 the Association of Personal Injury Lawyers ('APIL') calculated that it would cost £34 million to set up a CLAF for personal injury claims only for England and Wales.[99] The Association indicated in its response to the Review that more than ten years later, this figure is likely to have increased. Whilst the market in Scotland is smaller, it anticipated that the seed funding would still need to be substantial to set up such a scheme and questioned where this funding would come from. Secondly, APIL pointed out that any mutual fund will have to rely on there being a sufficient number of cases with good prospects of success entering the scheme if it is to be successful and generate enough money to fund unsuccessful cases. The risk is that if the fund is financed by contributions from successful pursuers, then those with cases with good prospects of success are less likely to be willing to join the scheme if it means parting with more of their damages than they would have done had they entered into an SFA with their solicitor. They anticipated that those who are unable to find other forms of funding, however, will be very keen to join the scheme. Another respondent suggested that if such a scheme was to be successful, it may be necessary to provide some kind of compulsory take up which may be difficult to enforce.

Eligibility

110. If a CLAF or SLAS were to be introduced it is necessary to consider the criteria for determining the eligibility of an applicant to access the fund and whether this should include a limit on an applicant's minimum and maximum disposable income. Four respondents tied the minimum and maximum levels for eligibility to the existing legal aid limits. Several other respondents suggested that the minimum threshold should be a tier above the legal aid threshold. As far as the maximum threshold is concerned several suggestions were made including that it should be: aligned with the income level at which a UK taxpayer would start to pay middle rate tax; aligned with the income level at which a UK taxpayer would start to pay higher rate tax; a multiplier of the minimum wage; or a matter for the managers of the scheme to determine. It was emphasised by one respondent that financial modelling would be required to make projections and determine the profitability of any scheme based on set financial parameters.

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[99] Association of Personal Injury Lawyers, 'Response' to the Lord Chancellor's Department Consultation Paper *Access to Justice with Conditional Fees* (30 April 1998)

111. Other respondents considered that there should be no minimum or maximum levels of disposable income set as an eligibility criterion. As one respondent submitted:

> *"Restriction of any such system based on capital or income limits is counter-productive. It is very much in the interests of all participants in such a scheme that there is no upper ceiling. This then produces a universal system and makes it less likely that individuals would opt out."*

Liability for expenses

112. Jackson LJ identified one of the main policy issues which would need to be addressed in setting up a CLAF or SLAS as who should be liable for the other side's expenses. 95% of respondents consider that a CLAF or SLAS should be liable for payment of the expenses of successful opponents. Two respondents pointed out that the danger of an award of expenses should remain as cases might otherwise be pursued in circumstances where they ought not to be and unnecessary cost and court time may be incurred. Three respondents, however, suggested qualifications to the amount of expenses that ought to be payable. They recognised that a widely used right of full recovery would change the calculations to be made in funding a CLAF or SLAS. One respondent considered that a CLAF or SLAS should not be liable for expenses as the result would be that the scheme would not be financially viable.

Types of litigation

113. If a CLAF or SLAS were to be introduced, it is necessary to consider what types of litigation should be covered by such schemes. Two respondents considered that there should be no restriction. One respondent pointed out that because of the need to take a levy from successful litigants the types of cases to be funded by the scheme would be ones where there is some monetary benefit to be obtained from the litigation. This accorded with a number of respondents who considered that personal injury actions could be eligible. For the same reason, another respondent considered that a CLAF or SLAS would not be useful to fund public law cases as many do not seek damages as a primary remedy.

114. One respondent cautioned that if it is considered that there is a need to introduce such schemes it would be desirable to carry out further comparative research to establish the types of claim covered by schemes operating in other jurisdictions. It suggested that financial modelling would also be required to establish the viability of schemes intended to deal with particular categories of case and that a pilot scheme could be established restricted, for example, to road traffic personal injury cases up to a maximum value of £50,000.

115. Three respondents considered that multi-party actions could be covered by a CLAF or a SLAS. The Scottish Consumer Council has previously recommended that an

independent Class Action Fund, similar to a CLAF, would be an appropriate means of funding multi-party actions.[100]

Clinical negligence claims

116. As we pointed out in our Consultation Paper, it had been represented to us that clinical negligence claimants face particular difficulties in the funding of claims. That was also the conclusion reached by the No Fault Compensation Review Group, chaired by Professor Sheila McLean, which reported in February 2011.[101] We therefore asked, as part of our consultation exercise, whether that is indeed the case and, if so, what measures might be taken to address these difficulties. 86% of respondents said that pursuers do face particular difficulties in the funding of clinical negligence claims. It was represented to us, primarily by firms of solicitors who act for pursuers in such cases, that legal aid remuneration is inadequate to cover the work involved in complex clinical negligence cases and pursuers can rarely afford to pursue claims on a privately paying basis. One respondent advised that the direct costs of running a clinical negligence litigation, together with the potential liability for the defender's expenses, are such that none but the most wealthy can afford to litigate without legal aid or insurance cover. It was observed that ATE insurance is virtually non-existent, and Before the Event ('BTE') insurance is rarely sufficient in the rare cases that it is available. It was suggested that only a handful of firms have a business model that enables clinical negligence cases to be undertaken on a speculative fee basis. Another respondent was of the view that this gives rise to inequality of arms.

117. SLAB pointed out in its response that the number of applications for civil legal aid in respect of clinical negligence cases increased in the year 2011/2012 by over 46% from the previous year. The current upper disposable income limit for civil legal aid is £26,239, with the result that just over 70% of the Scottish population is eligible for civil legal aid should they wish to access it.

118. SLAB does acknowledge, however, that it may be more problematic to obtain funding to investigate whether there is a potential claim. The ability to fund outlays was indeed the main difficulty referred to by respondents. It is usually necessary to obtain medical records and expert medical reports before it is possible to assess prospects of success. Indeed several expert reports may be required to address such matters as liability, causation and injury. This gives rise to substantial outlays. A firm of solicitors practising in this area explained that clinical negligence reports can run to thousands of pounds per report. It was said that it is common for a number of expert reports to be sought where there are issues with a system of care and/or where there were a number of medical professionals involved in a course of treatment. Another firm of solicitors advised that there is often a spend in the region of £2,000 on reports before pursuers know whether or not they have a stateable case.

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[100] Scottish Consumer Council, *Class Actions in the Scottish Courts* (1982) and *A class of their own: why Scotland needs a class action procedure* (2003)

[101] No Fault Compensation Review Group, *Report and Recommendations* (2011)

119. The Review has been informed that obtaining funding to investigate whether there is a potential claim can, and practically does, prove very difficult. The cost of funding such investigations may be covered by the legal advice and assistance scheme. However, the financial eligibility criteria for advice and assistance is far more restrictive than for civil legal aid and fewer individuals qualify. Although BTE and ATE insurance exist, it was said by another respondent that both of those policies will generally not pay out for the cost of the initial investigations. Furthermore, the ATE insurance policy can only be obtained when the party has a supportive medical report suggesting that negligence exists. We are told that the vast majority of people wishing to pursue a clinical negligence claim will require to fund these initial investigations on their own. The result is that significant numbers of people who may have reasonable clinical negligence cases are unable to progress even the basic investigations which they require to assist them. It is therefore said that a funding gap exists in relation to clinical negligence claims.

120. As for the measures that might be taken to address these difficulties, some respondents suggested extending the scope of funding under the legal advice and assistance and legal aid schemes. Given that it is the Scottish Government's stipulated ambition to move to a system in which legal aid is seen as the "funder of last resort,"[102] that is unlikely to happen. Other respondents advocated greater use of BTE and ATE legal expenses insurance. Two respondents suggested that ATE insurance premiums should be recoverable in clinical negligence cases whereas one suggested that they should be recoverable only insofar as they cover the cost of expert reports. Another respondent cautioned against allowing ATE insurance premium recovery in clinical negligence cases as it would remove most of the premium income from the "underwriting pot." This would amount to adverse selection (against those with complex or difficult cases) and make it a most unattractive market for the ATE insurers, who would be asked to insure only the difficult cases. As I have said in Chapter 8, I do not consider it appropriate to introduce the recoverability of ATE insurance premiums in Scotland, even in a limited form.

121. Five respondents suggested that clinical negligence cases may be suitable for a CLAF or SLAS. In particular, one suggested that the funding of the initial expert reports to enable investigations to be progressed could be facilitated in this manner. If the case is ultimately successful, the pursuer will be required to pay a percentage, or a fixed amount, into the fund – which money will be used to fund the investigation of other clinical negligence claims. However, if this idea is to be taken forward, one respondent cautioned that it should be the subject of a detailed report in its own right.

Europe Economics

122. As part of our consideration of this matter I met on two occasions with Robert Young of Europe Economics, author of the feasibility study of contingent legal aid funds commissioned by the Bar Council.[103] I explored with him, in particular, the possibility of establishing a CLAF to fund outlays in clinical negligence cases. As far as the parameters of

[102] The Scottish Government, *A Sustainable Future for Legal Aid* (October 2011)
[103] Europe Economics, *op cit* (November 2011)

the outlays that may be covered by the scheme are concerned, I was advised that, in principle, there was no need to restrict the types or extent of outlays that may be covered. This would be entirely for the CLAF managers or trustees to determine. In his opinion, the potential sources of seed funding were quite wide-ranging. For example, it is possible that an investment company, or an insurance company with relevant experience or access to it, might see a revenue opportunity in establishing a commercial CLAF. It is equally possible that an existing not-for-profit body which specialises in advising people on clinical negligence claims could establish its own CLAF: the case expertise would be there, and it is then a question of whether the charitable rules under which the body operates would allow the establishment of a CLAF, whether within the existing body or as an adjunct to it. A further possibility is the creation of one or more CLAFs by solicitors, or groups of solicitors, or by the Faculty of Advocates. Another potential source of seed funding is lottery funding. Mr Young advised that he was aware of a not-for-profit venture in the medical field which was minded to set up a CLAF. It considered that the seed funding required was the equivalent of one year's worth of business, which the venture estimated to be £1m.

123. In Mr Young's opinion, a CLAF should not be liable for payment of the expenses of successful opponents. In order to establish what percentage of damages recovered would require to be deducted to make the CLAF economically viable, financial modelling work on a representative selection of clinical negligence cases in Scotland would be required, taking into account different operating assumptions for a CLAF. That modelling would require to take into account such issues as: how much initial capital might be required; what percentage(s) of damages awarded might the CLAF require; what the CLAF's cash flow might look like; how many cases the CLAF could take on at any point in time; what sizes of case it could take on in terms of damages awarded and outlays incurred; and whether multiple CLAFs might be preferable to a single CLAF in order to spread risk.

Recommendation

124. I consider that a CLAF is a useful additional means of providing funding for litigants. It should not, however, be viewed as an alternative to legal aid and should not be interpreted as such. I agree with the conclusion reached by the Group convened by the Bar Council in England and Wales that no large scale CLAF could be established which would take over as the principal means of funding personal injury and other similar type claims. I do, however, consider that a 'boutique CLAF' is worthy of further consideration.

125. Our consultation exercise has confirmed that there is clearly a gap in the ability to obtain funding for investigations into clinical negligence claims to cover outlays such as the cost of recovering medical reports and the instruction of expert reports. Before I could recommend the establishment of a CLAF for this sole purpose, it will be necessary to undertake some financial modelling. The benefits for those who have suffered from clinical negligence could be substantial. The precise terms upon which the CLAF might be accessed will depend on the outcome of the financial modelling. My preference would be that there should be no minimum or maximum limit on the financial eligibility of an applicant, although payment of an application fee would be required. Nor should there be a limit on eligibility based on the value of the claim. In the event of success, the litigant should be required to reimburse the CLAF the amount of the outlays paid out of the CLAF together

with a percentage of the damages recovered. As the aim of the fund is to be self-financing, the amount of the application fee and the percentage that ought to be deducted from the damages recovered should be determined once the financial modelling has been carried out.

126. Furthermore, the CLAF should not be liable for any adverse awards of expenses otherwise it would not be financially viable. In order to avoid bureaucracy and to enable the CLAF managers or trustees to act independently of government, I consider that the CLAF should not be linked to the Scottish Legal Aid Fund. As far as seed funding is concerned, the amount required and its potential sources should also be addressed in the financial modelling exercise. Those to whom we spoke were reasonably confident that sources of seed funding would be available. The fund should be administered by a specialist body of experts drawn from the legal and medical fields. The Law Society of Scotland may have a role to play in the establishment of such a model as they grant accredited specialist status to solicitors in the field of clinical negligence.

127. **I therefore recommend that the Scottish Government should commission financial modelling work on the viability of establishing a Contingent Legal Aid Fund to fund outlays in cases of alleged clinical negligence. The outcome of the modelling will dictate the parameters of the Contingent Legal Aid Fund.**

PRO BONO FUNDING

128. The legal profession has a long tradition of providing free advice as a means of enabling access to justice and meeting otherwise unmet legal need. A number of respondents to our Consultation Paper stressed that the provision of such advice is an adjunct to, and not a substitute for, a proper system of publicly funded legal services.

129. 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 third 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 aims to co-ordinate, develop and encourage the provision of *pro bono* legal services in Scotland.

130. The Law Society of Scotland itself manages a trust fund, The Scottish Legal Services Trust, which was set up to meet the necessary costs, expenses and outlays in cases where a solicitor is providing services on a *pro bono* basis:

a) to members of the public who are in need or unable to meet them or are suffering financial hardship; or

b) to charitable institutions of limited means which support local communities or community organisations or activities; or

c) where the Trust is satisfied there is a public interest.[104]

131. The Faculty of Advocates established a unit in 2006, known as the 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[105] and are considered by the Faculty's Management Committee, whose decision is final. Advice and representation are 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. The Free Legal Services Unit has now merged with the Faculty's Free Representation Unit, which provided free legal advice via trainee advocates. This merger was "*driven by the desire to simplify and streamline the case-sifting process while making it more efficient and effective in matching the expertise of individual advocates to cases*."[106]

Promoting *Pro Bono* Funding of Litigation

132. The contribution that *pro bono* representation has made to access to justice was recognised by the Inner House of the Court of Session in its judgment in *Clarence Bvuanzai v Glasgow City Council*[107] where it said that "*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.*"[108] Given that *pro bono* representation already has a role in the Scottish legal system, we asked in the Consultation Paper what further steps, if any, should be taken to promote *pro bono* funding of litigation and by whom?

133. Almost half of respondents stated that undertaking *pro bono* work ought to remain a voluntary act. One respondent was of the view that any element of compulsion would be contrary to the ethos of *pro bono*. Another respondent expressed the view that while there was a place for *pro bono* work, it should be promoted as a part of an improving justice system: actions which have 'probable cause' should not have to rely on *pro bono* representation in order to achieve an equitable outcome. A further respondent stated that "*where legal services are provided pro bono, that is almost always because there is no realistic alternative, with the result that access to justice would otherwise be denied. It is not, we suggest, attractive to suggest that there ought to be more occasions when that is the position.*" Additionally, this respondent was of the view that "*encouraging greater participation is a matter for the professional bodies and for the university law faculties. It is not, and ought not to be, a regulatory matter; nor a matter for outside bodies to require.*"

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[104] http://www.lawscot.org.uk/forthepublic/legal-fees/scottish-legal-services-trust

[105] 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.

[106] Faculty of Advocates News, *Newsletter of the Faculty of Advocates* (May 2012)

[107] [2009] CSIH 93

[108] *ibid,* paragraph 8

134. Whether the provision of *pro bono* services should be on a mandatory or voluntary basis is often discussed, particularly in the United States, where the American Bar Association Model Rules of Professional Conduct state:

> *"Every lawyer has a professional responsibility to provide services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono public services per year."*[109]

The rule further states that a substantial majority of the 50 hours should be provided without fee or expectation of fee to those of limited means or organisations which are designed primarily to address the needs of persons with limited means.[110] Additional services may be charged at a substantially reduced rate to individuals of limited means, or certain categories of organisations, or by participating in activities for improving the law, legal system or profession.[111]

135. The model rule is an aspiration rather than an obligation, and the responsibility to provide *pro bono* services is not intended to be enforced through a disciplinary process.[112] The commentary to the model rule states that at times when it is not feasible for a lawyer to engage in *pro bono* services, he or she may discharge the responsibility by providing financial support to organisations that provide free legal services to persons of limited means.[113] It also provides that law firms should enable and encourage all lawyers to provide free legal services.[114] A number of American states have amended their *pro bono* service rules to correspond with this model rule.[115]

136. The Australian Law Reform Commission has recommended that legal professional associations should urge members to undertake *pro bono* work each year in terms similar to the American Bar Association model rule.[116] One commentator considered that this would be of benefit as:

> *"It will convey a strong message about what the profession should strive for and how the profession should judge itself. A voluntary minimum pro bono target will make a clear statement that Australian lawyers see the provision of pro bono legal services as an essential element in our concept of professionalism."*[117]

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[109] The American Bar Association, Model Rules of Professional Conduct, Rule 6.1
[110] *ibid,* Rule 6.1(a)
[111] *ibid,* Rule 6.1(b)
[112] *ibid,* Comment on Rule 6.1, paragraph 12
[113] *ibid*, paragraph 9
[114] *ibid,* paragraph 12
[115] http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccesstojusticechairs/ls_sclaid_atj_pro_bono.authcheckdam.pdf
[116] Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (2000 No. 89), Recommendation 37
[117] David Hillard, 'Establishing a Voluntary Minimum Pro Bono Target for Australian Lawyers,' The Second National Pro Bono Conference: Transforming Access to Justice (2003)

The Commission did not support a compulsory target as there was a concern that mandatory *pro bono* work would relieve governments of their legal aid responsibilities.[118] The Commission did, however, recommend that law students should be encouraged and be provided with an opportunity to undertake *pro bono* work as part of their academic or practical legal training requirements.[119]

137. New York was the first state in the United States to impose a requirement on applicants to the State Bar to have performed a minimum number of hours of *pro bono* work prior to joining.[120] This has been criticised as being unduly onerous on new lawyers at a time when law school fees are rising, and because these young lawyers are, by definition, inexperienced.[121] However, those who formulated the rule highlight that applicants have a period of three years while at law school to complete the obligation and must be supervised.[122]

138. It is often asked why lawyers, as opposed to other professionals, should provide their services for free. One commentator has stated that access to justice is a fundamental need and, as the legal profession has a monopoly on the provision of essential services, lawyers have a responsibility to assist with this need.[123] As such, she is of the view that lawyers have *'special privileges that entail special obligations.'*[124] Another commentator observed that providing *pro bono* services can be beneficial to lawyers individually and to the profession, by providing experience to young lawyers, helping to develop professional contacts and enhancing the public perception of the profession.[125]

139. Other commentators are of the view that requiring lawyers to supply their services for free allows the state to avoid the responsibility of providing legal services. One commentator has noted that "*The public responsibility of Society (to provide access to justice) should not be (in whole or in part) made the private responsibility of one sector of society.*"[126] Another commentator, who voluntarily provides *pro bono* legal services, noted that not all lawyers share a passion for *pro bono*, and in fact may be against it for commercial reasons.[127] She questions what type of service a dispassionate lawyer would provide.[128] This is echoed by another commentator who was of the view that lawyers "*who want to participate in public*

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[118] Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* (2000 No. 89), pages 309 - 311

[119] *ibid*, Recommendation 38

[120] State of New York, Rules of the Courts of Appeal, 520.16

[121] Ben Trachtenberg, 'Rethinking Pro Bono,' *The New York Times* (13 May 2012)

[122] Mosi Secret, 'Judge Details a Rule Requiring Pro Bono Work by Aspiring Lawyers,' *The New York Times* (19 September 2012)

[123] Deborah L Rhode, 'Cultures of Commitment: *Pro Bono* for lawyers and law students' in Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (2000), page 266

[124] *ibid*

[125] *ibid*, pages 266 -267

[126] M Cole, 'Are Compulsory Targets in the Public Interest?' The Second National Pro Bono Conference: Transforming Access to Justice (2003)

[127] L Moses, 'Should pro bono be compulsory?' *Law Gazette* (Online Edition) (26 September 2012)

[128] *ibid*

interest work are likely to do so more effectively than those who are fulfilling an irksome obligation."[129]

140. On a practical level, it is often considered how a requirement to provide *pro bono* legal services could be enforced and what would be an appropriate sanction for non-compliance.[130] It has been stated that, if penalties are not severe, lawyers may choose to ignore the requirement.[131] Further, it has been noted that employed solicitors may be unable to control the number of unbillable hours they can dedicate to *pro bono* work.[132] If the requirement was applicable to firms rather than individuals, this could also create difficulty in determining an appropriate sanction,[133] and may pose an unfair burden on smaller firms. Additionally, requiring mandatory *pro bono* legal services may not benefit the people or groups that it is intended to benefit. One commentator in the United States observes that most lawyers have "*targeted their pro bono efforts to friends, relatives or matters designed to attract or accommodate paying clients.*"[134] However, a narrow definition limiting *pro bono* legal services to low income clients may disqualify some environmental, women's rights or civil rights organisations.[135]

141. While some respondents to the Consultation Paper were against the promotion of *pro bono* funding of litigation in any sense, others were happy for this to be undertaken by the professional bodies and university law faculties, as long as it was not imposed as a regulatory matter. For example, one respondent suggested that the Law Society of Scotland could provide incentives to solicitors to undertake *pro bono* work by providing free advertising in the Journal of the Law Society of Scotland. Another respondent proposed that the Law Society of Scotland provide an education programme in order to promote *pro bono* work. Other respondents considered that closer community links between the professional bodies and university law schools and faculties would be beneficial.

142. A minority of respondents suggested more stringent measures. These included: proposing that the Scottish Government offer incentives to law firms to promote *pro bono* funding; tax breaks being given to firms providing *pro bono* services; and the introduction of a Corporate Social Responsibility Index whereby firms are scored by reference to the level of *pro bono* work that they undertake.

143. I am of the view that an obligation to undertake *pro bono* work should not be imposed on solicitors or counsel. *Pro bono* work should continue to be undertaken on a voluntary basis. I agree with one respondent that the Scottish legal market is wide and varied and, consequently, it is not possible or appropriate to place the same requirements on the range of firms, or individuals, operating in Scotland in respect of *pro bono* work. Instead, I would encourage the professional bodies, university law faculties and other organisations,

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[129] Deborah L Rhode, *op cit* (2000), page 270
[130] L Moses, *op cit* (2012)
[131] *ibid*
[132] M Cole, *op cit* (2003)
[133] *ibid*
[134] Deborah L Rhode, 'Social Responsibility and the Legal Profession: Making Pro Bono Mandatory?' *The Responsive Community* (Volume 9, Issue 4, Fall 1999), page 45
[135] Deborah L Rhode, *op cit* (2000), page 268

such as LawWorks, to continue to promote *pro bono* work. I am not inclined to recommend any of the ideas which are expressed in the preceding paragraph. They imply that *pro bono* work should be rewarded which runs counter to the spirit of undertaking *pro bono* cases.

Awards of expenses in *pro bono* cases

Should an award be made?

144. We asked in our Consultation Paper if the Scottish courts should have the power to oblige an unsuccessful party in a civil litigation to pay judicial expenses where the successful party has been represented *pro bono* and, if so, to whom should such a payment be made. It has been represented to the Review that this power already exists and that an agreement between legal representatives and their client as to the method of funding a case is irrelevant for the purpose of awarding expenses. However, we are not aware of any instances where an award of expenses has been made in favour of a party who has been represented *pro bono*. Perhaps the reason for this is that the purpose of such an award is to compensate the successful party for having to pay for legal representation. If the recipient of an award of expenses has not had to pay for legal representation then they will be compensated for a liability that they have not incurred.

145. The vast majority of respondents were in favour of an express power to make it clear beyond all doubt that the Scottish courts do have the power to make an award of expenses in favour of a successful party who has been represented *pro bono*. It was thought that this would provide equality of treatment to litigants represented *pro bono*, as currently awards can be made against them. One respondent noted the fact that solicitors and counsel do not seek judicial expenses when representing clients *pro bono* may encourage their opponents to "*adopt an especially obdurate approach to the case.*" It was observed that the unsuccessful party should not benefit from the fact their opponent was represented *pro bono*. One respondent considered that the potential for an award of expenses should be a deterrent for all litigants whose claims are unmeritorious. It was contended by one commentator that since an opponent of a party represented *pro bono* is aware that an award of expenses is unlikely to be made against them, there is not a level playing field when negotiating a settlement. This commentator was of the view that if the usual risk of an adverse award of expenses were to apply, this would encourage settlement.[136]

England and Wales

146. The civil courts in England and Wales have the power to make an order requiring an unsuccessful party whose opponent is represented *pro bono* to make a payment to a charity prescribed by the Lord Chancellor.[137] Such an order is known as a *pro bono* costs order and may be made where legal services were provided, all or in part, free of charge.[138] A *pro bono*

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[136] E Boffey, 'On Level Ground?' *The Journal of the Law Society of Scotland* (May 2010), page 9

[137] Legal Services Act 2007 c. 29, s 194(3). Further, it should be noted that section 61 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 1 October 2012, enables the Supreme Court of the United Kingdom to make a *pro bono* costs order. Previously, section 194 of the Legal Services Act 2007 only applied to the Court of Appeal, the High Court, and the County courts.

[138] Legal Services Act 2007 c. 29, s 194(1)(b)

costs order may also be made in instances where one of the party's legal representatives, for example, counsel, were not acting free of charge.[139] However, the order will only be made in respect of the *pro bono* representation.[140] The court may order payment by the unsuccessful party of a sum equivalent to all or part of the costs that would have been awarded to the successful party had the representation not been free.[141] Alternatively, if the action is subject to fixed costs,[142] the court may award the prescribed charity a sum no greater than the costs specified in Part 45 of the Civil Procedure Rules that the party represented *pro bono* would have been entitled to.[143] If the action is not subject to fixed costs, the court may determine the amount to be paid to the prescribed charity by either making a summary assessment,[144] or making an order for a detailed assessment,[145] of a sum that the unsuccessful party would have had to pay to the successful party had it not been represented *pro bono*.[146]

147. Lord Goldsmith has described the potential of *pro bono* costs awards to encourage settlement:

> *"…at last, where a pro bono assisted party must assert its rights or defend its position in court, the other party is now equally liable for potential costs. In negotiations, the pro bono lawyer can use this "carrot" to encourage settlement or to obtain a better settlement for their client than they might have obtained previously. If the opposing party knows it will face a costs order, it has a real incentive to settle - and to settle on good terms."*[147]

We have been informed that *pro bono* costs orders have, in practice, greatly assisted in encouraging settlement.

148. I therefore consider that the civil courts in Scotland should be granted an express power to enable them to make an award of expenses in favour of a successful party who has been represented on a *pro bono* basis. This will put parties with *pro bono* representation on an equal footing with their opponents who are funded on a different basis. This, in turn, will encourage settlement and reduce any incentive for opponents to protract proceedings unnecessarily.

To whom should such a payment be made?

149. A number of respondents expressed support for awards of expenses granted in favour of a successful party represented *pro bono* being made to a charity or organisation with the object of assisting with *pro bono* work or, more generally, access to justice. Suggestions from those in favour of a charity receiving the award included the imposition of conditions that the charity should be prescribed by law or nominated by a Sheriff Principal,

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[139] Legal Services Act 2007 c. 29, s 194(2)
[140] Legal Services Act 2007 c. 29, s 194(3)
[141] Civil Procedure Rules Rule 46.7(1)(a)
[142] Civil Procedure Rules Part 45
[143] Civil Procedure Rules Rule 46.7(1)(a)
[144] Civil Procedure Rules Rule 46.7(1)(b)(i)
[145] Civil Procedure Rules Rule 46.7(1)(b)(ii)
[146] Civil Procedure Rules Rule 46.7(1)(b)
[147] Lord Goldsmith, 'Keynote Speech,' City Law School *Pro Bono* Fair (26 March 2009)

the Lord President or, if this were to cause conflict, a politician. However, one respondent considered that the recipient of the award should depend on the mechanism by which *pro bono* services were provided and the circumstances of the case. It was suggested that the court should have discretion as to whom the award is made and that judicial guidelines may be helpful in this area.

150. Other suggestions were: the award of expenses should be made to a public body which promotes *pro bono* work; paid into a fund which could pay for the cost of outlays in public interest cases; used to provide travel and subsistence expenses to lawyers acting *pro bono*; or made to whichever organisation funded the litigation. A small number of respondents proposed that the award of expenses could provide a small, but useful, top up fund for a SLAS or a CLAF [148] that is set up or, alternatively, they could be donated to SLAB and used to fund future cases.

151. Some respondents commented that an award of expenses in favour of a successful party represented *pro bono* should not be made to either the successful party or their legal representatives. A minority of respondents considered that the award should be made to the solicitor representing the successful party. One respondent stated that this should only be in cases where there are matters that go far beyond the individual they have represented, for example, where the litigation raises constitutional issues, and that this power should be used sparingly.

England and Wales

152. In England and Wales, a *pro bono* costs order is sought by the party, assisted by his or her *pro bono* lawyers. All awards must specify that payment is to be made to the charity prescribed by the Lord Chancellor under the Legal Services Act 2007.[149] The prescribed charity must provide, organise or facilitate *pro bono* legal assistance or advice.[150] That charity is currently the Access to Justice Foundation ('AJF'), an independent national body set up specifically for the purpose of receiving these awards. It distributes funds to regional Legal Support Trusts, national *pro bono* organisations, such as LawWorks, and strategic projects. The Legal Support Trusts in turn distribute funds to local advice agencies and law centres.

153. It is important not to overestimate the funds that may be generated by *pro bono* costs awards. The AJF reported that the funds received from *pro bono* costs orders amounted to £56,000 in 2011, and £39,862 in 2010.[151] It is anticipated that these sums would be far less in Scotland given the comparative size of the jurisdictions. A priority for the AJF is to make lawyers who provide services *pro bono*, and members of the judiciary, aware that the power to make a *pro bono* costs order exists. The Review has been advised that there have been instances where *pro bono* costs orders have not been sought, or indeed refused, due to the parties or the court being unaware of the power to make such orders. The full potential benefit of these orders has, therefore, yet to be seen.

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[148] See paragraph 87

[149] Legal Services Act 2007 c. 29, s 194(3) and s 194(8)

[150] *ibid*, s 194(9)(b)

[151] The Access to Justice Foundation, *Report and Financial Statements* (31st December 2011), page 8

154. In deciding which body should benefit from *pro bono* costs orders in England and Wales, it was considered by the Ministry of Justice that a single prescribed charity would have no interest in the litigation itself and could take a strategic view of need, distributing the money where it was needed most.[152] The Ministry of Justice was of the view that money raised through the efforts of *pro bono* lawyers ought to go back into the system to ensure that more people could benefit from the provision of free legal services. It noted that "*where opposition to the prescribed charity approach was expressed it was mainly in relation to the possible bureaucracy that might be involved and the lack of financial recognition for those either on whose behalf the work was undertaken or for the wishes of those providing representation*."[153] Concerns were raised that making the prescribed charity the sole destination for *pro bono* costs awards would be a disincentive to those undertaking *pro bono* legal work, and that they might prefer to nominate the charity which would receive the proceeds of any successful case.[154] This point was addressed by Lord Goldsmith during the passage of the Legal Services Bill when he commented that:

> *"Pro bono work is presently undertaken by practitioners simply because the person receiving the help needs it; that is the incentive, and I do not anticipate that that will change one jot. To date, lawyers have not needed any incentive for being able to direct funds to a particular charity in order to undertake pro bono work."*[155]

In response to this concern, the AJF distribution principles provide that the AJF will take into account preferences expressed by the legal representative. This does not bind the AJF, however, as a strategic approach must be maintained.[156]

Comparison with distribution of residue funds from 'opt out' collective competition actions

155. The consultation of the Department of Business Innovation and Skills ('BIS'), *Private Actions on Competition Law*,[157] contained a proposal to introduce opt-out collective actions in relation to anti-competitive behaviour.[158] As these actions are intended to be 'opt-out', it is expected that some damages will remain unclaimed due to individuals not coming forward to claim their loss, or because some may not be able to prove their loss. BIS considered how to distribute these sums in the same way as this Review is considering the distribution of *pro bono* awards of expenses. The UK Government's preferred solution is for the recipient of the unclaimed sums to be a single specified body, which it has suggested could be the AJF.[159] The consultation, and the UK Government's response to the consultation, noted that the advantages of having any unclaimed sums paid to a single specified body are that:

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[152] Ministry of Justice, *Cost Recovery in Pro Bono Assisted Cases – Summary of Responses* (2007), page 9
[153] *ibid*
[154] *ibid,* page 6
[155] House of Lords, *Hansard* (6 March 2007), Column 205
[156] The Access to Justice Foundation: Access to Justice Distribution Principles, principle 7
[157] Department of Business Innovation and Skills, *Private Actions on Competition Law*: *A Consultation on Options for Reform,* (April 2012)
[158] See definition in Chapter 12, paragraphs 34-37
[159] Department of Business Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform – Government Response* (January 2013), pages 42 - 43

- It avoids the problem of trying to find a suitable recipient for each case, and the associated lobbying of judges and potential satellite ligation;
- It would be administratively simple; and
- These sums could be used to fund "a relevant socially desirable objective such as access to justice, of benefit to the whole of society." [160]

156. Additional advantages of unclaimed sums being paid to a single specified body have been represented to this Review. The specified body would receive the funds in the public interest and would not be involved in the litigation. Further, having one specified recipient of unclaimed sums would provide legal certainty for all concerned, prior to and during litigation. I consider that these arguments are of relevance when considering how awards of expenses in favour of successful parties represented *pro bono* ought to be distributed in Scotland.

157. **I therefore recommend that the civil courts in Scotland be granted an express power to enable them to make an award of expenses in favour of a successful party who has been represented on a *pro bono* basis. Payment of that award should be made to a charity prescribed by the Lord President. 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.** The Access to Justice Foundation would appear to be an ideal candidate given that its administration is already in place. I consider that it would be inappropriate for such an award of expenses to be made to the party's legal representatives as that would, in effect, amount to an SFA. Nor should the award be made to the successful party as it would be inappropriate to compensate that party for a liability in expenses which they have not incurred.

Disclosing a *pro bono* agreement

158. Two respondents raised the issue of whether or not a party should be required to disclose that they are represented on a *pro bono* basis. One respondent was of the view that a solicitor ought to certify that he or she is carrying out the case *pro bono* at the commencement of the action, with failure to do so amounting to misconduct. The other respondent considered that there should not be a requirement on a party to disclose their funding arrangements. It should be noted that in England and Wales there is no general obligation to disclose to another party that representation is provided on a *pro bono basis*, nor that a *pro bono* costs order will be sought.

159. I have recommended earlier in this Report that in the interests of transparency, the arrangements as to how a litigation is to be funded must be disclosed to the court and intimated to all parties at the stage when proceedings are raised or notification given that a cause is to be defended.[161] This applies equally to cases where legal representation is provided on a *pro bono* basis.

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[160] Department of Business Innovation and Skills, *op cit* (2012), page 61; and *ibid,* pages 41-42

[161] See Recommendation 78

Calculating judicial expenses in *pro bono* cases

160. Two respondents considered how judicial expenses should be assessed in cases where the successful party is represented *pro bono.* One suggested that this could be done either by a pre-determined sum based on an average cost for that particular type of litigation, or that the unsuccessful party should pay the same expenses as they themselves have incurred, as taxed by the auditor of court. The first of these options could lead to the paying party being penalised too severely, or leave them at a greater advantage than if their opponent had been funded by other means, depending on the circumstances of the particular case. Either of these outcomes would be undesirable. Regarding the second option, it should be noted that the fees which pursuers and defenders incur are seldom mirror images of each other and, therefore, this would not be an appropriate basis for making an assessment. The other respondent that addressed this issue endorsed the approach taken in England and Wales in which lawyers acting *pro bono* must provide information to help the court assess what the legal costs would have been if their client had been paying.[162]

161. It is my view that the fact that representation has been provided *pro bono* ought to be irrelevant as far as the assessment of expenses recoverable by the successful party is concerned. Expenses should therefore be assessed in the usual manner**. I therefore recommend that when a judicial account of expenses is prepared by or on behalf of a party whose representation was *pro bono*, it should be prepared on the normal party and party basis.**

[162] CPR Practice Direction 46 – Costs Special Cases, section 4.1

ANNEX 1

The Association of Litigation Funders of England & Wales: Code of conduct

1. This code (the Code) sets out standards of practice and behaviour to be observed by Funders who are Members of The Association of Litigation Funders of England & Wales.

2. A Funder has access to funds immediately within its control or acts as the exclusive investment advisor to an investment fund which has access to funds immediately within its control, such funds being invested pursuant to a Litigation Funding Agreement (LFA) to enable a Litigant to meet the costs of resolving disputes by litigation or arbitration (including pre-action costs) in return for the Funder:

(a) receiving a share of the proceeds if the claim is successful (as defined in the LFA); and

(b) not seeking any payment from the Litigant in excess of the amount of the proceeds of the dispute that is being funded, unless the Litigant is in material breach of the provisions of the LFA.

3. A Funder shall be deemed to have adopted the Code in respect of funding the resolution of disputes within England and Wales.

4. The promotional literature of a Funder must be clear and not misleading.

5. A Funder will observe the confidentiality of all information and documentation relating to the dispute to the extent that the law permits, and subject to the terms of any Confidentiality or Non-Disclosure Agreement agreed between the Funder and the Litigant.

6. A Litigation Funding Agreement is a contractually binding agreement entered into between a Funder and a Litigant relating to the resolution of disputes within England and Wales.

7. A Funder will:

(a) take reasonable steps to ensure that the Litigant shall have received independent advice on the terms of the LFA, which obligation shall be satisfied if the Litigant confirms in writing to the Funder that the Litigant has taken advice from the solicitor instructed in the dispute;

(b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;

(c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder;

(d) maintain at all times adequate financial resources to meet its obligations to fund all of the disputes that it has agreed to fund, and in particular will maintain the capacity:

(i) to pay all debts when they become due and payable; and

(ii) to cover aggregate funding liabilities under all of its LFAs for a minimum period of 36 months.

8. The LFA shall state whether (and if so to what extent) the Funder is liable to the Litigant to:

(a) meet any liability for adverse costs;

(b) pay any premium (including insurance premium tax) to obtain costs insurance;

(c) provide security for costs;

(d) meet any other financial liability.

9. The LFA shall state whether (and if so how) the Funder may:

(a) provide input to the Litigant's decisions in relation to settlements;

(b) terminate the LFA in the event that the Funder:

(i) reasonably ceases to be satisfied about the merits of the dispute;

(ii) reasonably believes that the dispute is no longer commercially viable; or

(iii) reasonably believes that there has been a material breach of the LFA by the Litigant.

10. The LFA shall not establish a discretionary right for a Funder to terminate a LFA in the absence of the circumstances described in clause 9(b).

11. If the LFA does give the Funder any of the rights described in clause 9 the LFA shall provide that:

(a) if the Funder terminates the LFA, the Funder shall remain liable for all funding obligations accrued to the date of termination unless the termination is due to a material breach under clause 9(b)(iii);

(b) if there is a dispute between the Funder and the Litigant about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council.

This code is to be read in conjunction with the Articles and Rules of the Association of Litigation Funders of England & Wales, which are available for inspection at:

http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc

CHAPTER 12 MULTI-PARTY ACTIONS

1. The Scottish Civil Courts Review ('SCCR') recommended the introduction of a new procedure for dealing with multiple claims giving rise to common or similar issues of fact or law.[1] This might include, for example, litigation arising out of a mass disaster, or liability for defective products. The Scottish Government, in its response to the Report and recommendations of the SCCR,[2] agreed in principle that there should be a special multi-party procedure, taking into account the recommendations of the present Review in relation to the options for funding such actions. This necessarily entails further consideration of what features the new procedure might have.

2. The need for multi-party procedure typically arises in two distinct situations. The first is where a large number of similar or related claims are raised, presenting problems for the court in dealing with them efficiently. The second is where many individuals have suffered loss but each person's loss is insufficient to make individual litigation economically viable.[3] More fundamental is the need to identify which goal or goals the new procedure will seek to achieve. Goals might include compensating the victims of civil wrongs (the traditional civil law rationale), deterring harmful behaviour (such as price-fixing or environmental damage), or remedying regulatory failures through private law enforcement.[4] This will have a bearing on which types of case the new procedure should encompass, and how issues of expenses and funding should be approached.

3. Multi-party procedure can take various forms. One is the representative action in which issues common to a number of individuals are determined in a single case raised and conducted by one person acting on behalf of all. A variant is the class action, now a well-established feature of litigation in the United States, in which typically class members are not identified but merely described by reference to some shared characteristic. Another approach is exemplified by the Group Litigation Order ('GLO') in England and Wales, in which a number of separate cases raising common issues are administered together by the court. Each individual claimant remains a party to the litigation and each case requires to be resolved in its own right. Both a representative procedure and a group procedure might be appropriate in Scotland for different types of case. Different considerations for expenses and funding will inevitably apply depending on which form of procedure is adopted. The SCCR recommended a representative procedure, while also envisaging that individual actions could be managed together as a group where appropriate.[5]

4. Multi-party procedure typically uses either an 'opt in' or an 'opt out' model. In an 'opt in' scheme, individuals wishing to participate must take positive steps to join the proceedings, usually by a specified cut-off date. Those who do opt in will be bound by the

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[1] *Report of the Scottish Civil Courts Review (*2009*),* Recommendation 157

[2] Scottish Government, *Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review* (2010)

[3] The Law Reform Commission of Hong Kong, *Report – Class Actions* (2012), page 3

[4] Susan Gibbons, 'Group litigation, class actions and Lord Woolf's three objectives - a critical analysis' (2008) CJQ 27(2) 209

[5] *Report of the Scottish Civil Courts Review* (2009), Recommendations 158 – 171

judgment or, as the case may be, the settlement reached. In an 'opt out' scheme, proceedings can be brought on behalf of a defined group without the need to identify individual members. All those falling within the group as defined will automatically be bound by the judgment or settlement unless they have expressed a wish to be excluded from the proceedings. The SCCR recommended that it should be for the court to decide whether in the particular circumstances of a case an 'opt in' or 'opt out' model would be appropriate.[6] Again, expenses and funding considerations will differ depending on what model applies.

5. Multi-party actions can involve additional expenditure, in particular, costs associated with co-ordinating and administering the litigation. This raises the issue of proportionality, particularly where claims are of such low value that they would never have been pursued as individual actions. High or unpredictable expenses can act as a barrier to justice for potential pursuers, but may also compel defenders to settle cases irrespective of merit. Jackson LJ likened group actions to a project the costs of which can escalate out of control unless carefully managed.[7] Active judicial case management of all multi-party actions, as recommended by the SCCR,[8] will be essential. It must include, in particular, rigorous control of the cost of the litigation.

6. The SCCR recommended that in multi-party actions the general rule that expenses follow success should, in principle, apply.[9] It is necessary to consider how this should apply in practice. For example, it may be thought unfair that the pursuer in a selected test case should bear the whole risk of expenses if the test case fails. The group litigation procedure in England and Wales distinguishes between 'individual costs' and 'common costs', with the latter shared equally between group members unless the court otherwise directs. On one view, however, equal sharing might not be fair sharing, particularly if it does not reflect the amount of damages sought or obtained by individual group members. This could create conflicts of interest between members and, in turn, solicitors acting for individual members of the group. Group membership may change over time, necessitating provision for members who arrive late or leave early. In a representative action, where only the representative is a party, consideration must be given to whether liability for expenses should be shifted onto those represented and if so, by what means.

7. A closely related question is how multi-party actions should be funded. The SCCR recommended the introduction of a special funding mechanism for its proposed new representative action, to be administered by the Scottish Legal Aid Board ('SLAB').[10] However, it is likely that many actions under the new procedure will have to be funded privately. I recommend in Chapter 9 the introduction of contingency funding by damages based agreements.[11] This presents another potential means of funding multi-party actions.

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[6] *Report of the Scottish Civil Courts Review* (2009), Recommendation 163

[7] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 38 paragraph 2.11

[8] *Report of the Scottish Civil Courts Review* (2009), Recommendation 168

[9] *ibid,* Recommendation 173

[10] *ibid,* Recommendation 175

[11] See Recommendation 55

8. Funding arrangements need to be clear from the outset so that individuals can make informed decisions about whether to participate in proceedings. There may be a need for a 'fighting fund' to cover initial expenditure, for example, advertising for potential group members. From the defender's perspective there is a legitimate interest in knowing that should the action fail it will be possible to recover expenses.

9. While the Review has considered the position in other jurisdictions, procedural differences make any comparison of limited utility. Questions of expenses and funding cannot be separated from questions of procedure. The new procedures necessary to permit multi-party actions in Scotland will have to be created before final decisions can be made about how such actions should be funded.

The current position in Scotland

10. Scotland does not have a multi-party action procedure. Cases raising similar issues may be sisted[12] pending the outcome of a test case.[13] Ad hoc arrangements are occasionally devised. For example, Practice Notes or Practice Directions were issued for compensation claims following the grounding of the oil tanker Braer,[14] for personal injury actions against the manufacturers of the drugs Vioxx and Celebrex,[15] in respect of pleural plaques claims following exposure to asbestos,[16] and for actions arising from alleged ground contamination at a housing development in Motherwell.[17] These arrangements provide for case management by a designated judge with the aim of securing the efficient disposal of actions. They do not refer expressly to matters of expenses or funding. There are also recent examples of proceedings raised by pressure groups or similar unincorporated associations, as an indirect means of representing the interests of multiple interested persons.[18]

The Scottish Civil Courts Review

11. The SCCR, adopting an earlier recommendation of the Scottish Law Commission ('SLC'),[19] recommended the introduction of a multi-party procedure, initially for the Court

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[12] Suspended temporarily.

[13] An example is the pleural plaques litigation: several hundred cases were sisted for a number of years pending the House of Lords decision in *Rothwell v Chemical and Insulating Co Ltd* 2008 1 AC 281.

[14] Practice Note No. 1 of 1999. All actions thereafter proceeded as claims on a statutory fund. Some 239 such actions were raised, with 367 claims lodged thereafter on the fund: *Assuranceforeningen Skuld –v- The International Oil Pollution Compensation Fund and others*, unreported, 14th February 2001.

[15] Practice Direction No. 2 of 2010. Recent decisions indicate that in the region of 200 such actions have been raised in Scotland: *Cooper v Merck Sharp & Dohme Limited* [2012] CSOH 48, *Hamilton and Others v Merck & Co Inc, Merck, Sharp & Dohme Ltd* [2012] CSOH 144

[16] Practice Direction No. 2 of 2012

[17] Practice Direction No. 1 of 2013. It has been reported that there are 42 such actions: see BBC website 9th October 2012, *Legal action over Watling Street 'toxic homes'*, available at http://www.bbc.co.uk/news/uk-scotland-glasgow-west-19882841

[18] See for example *Appeal by Road Sense against a Decision of Scottish Ministers* [2011] CSOH 10; *Petition of the Newton Mearns Residents Flood Prevention Group for Cheviot Drive for judicial review of decisions of East Renfrewshire Council* [2013] CSOH 68

[19] Scottish Law Commission, *Multi-Party Actions: Report by Working Party set up by Scottish Law Commission* (1994), and Scottish Law Commission, *Multi-Party Actions: Report on a reference under section 3(1)(e) of the Law Commissions Act 1965* (1996)

of Session only.[20] The procedure proposed is a representative procedure. It would be for the court to decide whether in the particular circumstances of a case an 'opt in' or 'opt out' model was appropriate.[21] The court would have a wide range of case management powers and a general power to regulate procedure as it thought fit.[22] There would be a preliminary merits test requiring pursuers to demonstrate a prima facie cause of action.[23]

12. Before certifying an action as suitable for the new procedure the court would have to be satisfied that:

- the applicant was one of a group of persons whose claims gave rise to common or similar issues of fact or law;
- adopting the procedure was preferable to any other available procedure for the fair, economic and expeditious determination of similar or common issues; and
- the applicant was an appropriate person to be appointed as a representative party, having regard in particular to his financial resources, and would fairly and adequately represent the interests of the group in relation to the common issues.[24]

13. The SLC considered it implicit in the requirement to 'adequately' represent group interests that the representative has the financial resources likely to be necessary to support the litigation, as well as the determination to see it to a conclusion.[25]

14. The SCCR anticipated that applications might in the future be made by representative bodies with the legal standing to bring proceedings on behalf of consumers or other groups and recommended that the multi-party procedure be designed to permit those bodies to make use of it.[26]

15. The SCCR also recommended that where a number of individual actions have a common factual or legal basis but initiate proceedings on an individual basis, it should be open to the defender to apply to the court, or for the court on its own initiative, to transfer the cases to the new procedure.[27] There should be a case management mechanism that would enable multiple sheriff court actions bearing on the same subject matter to be transferred to the Court of Session and managed there on a multi-party basis, either on the motion of one or more of the parties, by the sheriff on his own initiative, or by order of the

[20] *Report of the Scottish Civil Courts Review* (2009), Recommendation 164
[21] *ibid*, Recommendation 163
[22] *ibid*, Recommendation 168
[23] *ibid*, Recommendation 159
[24] *ibid*, Recommendation 158
[25] Scottish Law Commission (1996), paragraphs 4.36-4.37
[26] *Report of the Scottish Civil Courts Review* (2009), Recommendation 161
[27] *ibid*, Recommendation 169

Lord President.[28] This procedure would be more akin to the group litigation procedure in England and Wales.

16. On expenses, the SCCR recommended that the general rule that expenses follow success should in principle apply,[29] subject to the court's discretion to make a different award. If the action raised a significant issue of public interest, the court should have power to make special orders on expenses. This could include an order that the party bringing proceedings would have no liability for expenses, or would be liable only up to a specified figure.[30] It observed that an additional fee could be sought to recognise the additional responsibility involved in managing a multi-party action and recommended that this be made a specific ground for awarding an additional fee.[31]

17. On methods of funding, the SCCR noted the potential for multi-party litigation to be undertaken on a speculative basis.[32] It considered it premature to make recommendations on the use of damages based agreements in light of the then ongoing reviews in England and Wales.[33] It did, however, recommend that there be a special funding regime for multi-party actions, preferably administered by SLAB.[34] It drew on the work of the SLC, which had concluded that in the absence of any indication that public funding would be available to establish a Contingent Legal Aid Fund ('CLAF')[35] or class action fund, legal aid was the most suitable means of providing financial assistance.[36]

18. The SCCR recommended that the multi-party action fund should have the following features:

- anyone seeking public funding to bring a multi-party action would have to do so by way of an application to the fund. Class members who were not representatives could, if eligible, seek legal advice and assistance to help them decide whether to opt in or opt out.[37]
- to obtain funding the representative would have to meet special criteria. Applying the test of reasonableness, SLAB should 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 issues of wider public interest were raised that would justify the expenditure of public funds.[38]

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[28] i*bid*, Recommendation 170
[29] *ibid*, Recommendation 173
[30] *ibid*, Recommendation 173. Protective Expenses Orders ('PEOs') are discussed in Chapter 5 of this Report.
[31] *Report of the Scottish Civil Courts Review* (2009). The procedure for seeking an additional fee is discussed in Chapter 2 of this Report.
[32] *ibid*, paragraph 97
[33] *ibid*, paragraph 96
[34] *ibid*, Recommendation 175
[35] See Chapter 11 of this Report
[36] Scottish Law Commission (1996), paragraphs 5.12-5.31, 5.48, 5.50
[37] *Report of the Scottish Civil Courts Review* (2009), Recommendation 179
[38] *ibid*, Recommendation 177

- in deciding applications SLAB should be assisted by an advisory committee comprising both legal and non-legal members.[39]

- it should be possible for a grant of funding to be conditional, such as on a staged basis (for example, all work done up to the application for certification), with regular reviews thereafter of whether the criteria of reasonableness continued to be met.[40]

- the funding arrangements may require to differ in other respects from civil legal aid generally, for example, as to means testing, a levy on damages obtained, financial contributions by applicants or a combination of these.[41]

- it should be open to the multi-party action fund to limit funding to litigation of the common issues.[42]

- where multiple individual applications for civil legal aid raised the same or similar issues of fact or law, SLAB should have the power to refuse to grant legal aid on an individual basis and invite application to the multi-party action fund instead.[43]

- funding could be made available on a different basis to representative bodies. For example, the body might be required to contribute to or share the costs of bringing the action, or agree to bear a share of the expenses if the action was unsuccessful. The application for funding would have to meet a public interest merits test. The fund would have a broad discretion to determine whether it was reasonable to make public funds available, having regard to the body's resources and the potential for the issues to be resolved by other means.[44]

- in appropriate cases expenses could be awarded against the fund.[45] This would not be appropriate in all cases where a multi-party action was unsuccessful. The court may consider that the case had been brought in the public interest and that, having regard to the importance of the issues raised and the defender's resources, it was appropriate that each party should bear its own expenses, or some other modification of the general rule.

19. In its response to the Report and recommendations of the SCCR, the Scottish Government agreed in principle that a multi-party action procedure should be introduced. It considered that there should be a consistent set of arrangements for such actions on which individual types of cases could draw. This would require primary legislation. It indicated

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[39] *ibid*
[40] *ibid*, Recommendation 178
[41] *ibid*, Chapter 13, paragraph 115
[42] *ibid*, Recommendation 180
[43] *ibid*, Recommendation 181
[44] *ibid*, Recommendation 182
[45] *ibid*, Recommendation 176

that it would consider making the new procedure available in the sheriff court as well as in the Court of Session, reflecting the sheriff court's generally enhanced role arising from the SCCR.[46]

The current position in England and Wales

20. Several procedural mechanisms are available to manage multi-party litigation in England and Wales. Firstly, one case may be brought as a test case. A recent example of this is the dispute concerning the lawfulness of bank charges for unarranged overdrafts. In 2007 the Office of Fair Trading ('OFT') entered into an agreement with eight lenders and the Financial Services Authority to bring a test case, in order to ensure the orderly and efficient resolution of this issue, with the agreement that each party was to bear its own costs.[47]

21. Other procedural mechanisms include consolidation and single trial of multiple claims, the representative action and the GLO. Consolidation and the GLO are both mechanisms for handling multiple individual claims, whereas a representative action is a single claim brought by a representative on behalf of him or herself and a defined class of others. The general rule on costs usually applies to all of these procedures, that is, the unsuccessful party will be ordered to pay the costs of the successful party but the court has discretion to make a different order.[48]

22. As far as consolidation of multiple claims is concerned, the court has discretion to consolidate separate proceedings in the exercise of its case management powers.[49] This is an 'opt in' procedure. Consolidation is only likely where there is a strong overlap of issues of fact or law, or a risk of irreconcilable judgments. An order will be refused if it would lead to procedural unfairness and case management difficulties. Once consolidated the proceedings are treated as though they are one single action to which multiple parties are joined. One claim will be nominated as the lead claim. The usual rule is that the claimants must thereafter have the same solicitors and counsel.[50] The Civil Justice Council has observed that consolidation "*serves to ensure that parties to litigation, primarily defendants, are not vexed with the cost and delay of having to defend a number of separate claims which could have been brought in a single action*."[51] Consolidation has been used to manage mass asbestos claims[52] and claims by shareholders.[53] However, it has been criticised as unwieldy and inadequate when very large numbers of claims are involved.[54] Woolf LJ observed that consolidation requires that claims

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[46] Scottish Government, *Scottish Government Response to the Report and Recommendations of the Scottish Civil Courts Review* (2010)

[47] For more information, see the OFT's website at: http://www.oft.gov.uk/shared_oft/freedom_of_information/FoIA-responses/IAT-FOIA-76649.pdf

[48] CPR Rule 44.2

[49] CPR Rule 3.1(2)(g)

[50] Kay LJ et al, *Blackstone's Civil Practice* (11th edition, 2010), paragraph 14.60

[51] Civil Justice Council, *Improving Access to Justice through Collective Actions: final report* (2008), Part 2, paragraph 6

[52] *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL), in which over 3,000 claims were consolidated.

[53] *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch) in which there were around 48,000 claims by shareholders of Railtrack plc, all members of the "Railtrack Private Shareholders' Action Group".

[54] Civil Justice Council, *op cit* (2008), Part 6, paragraph 10

have already been commenced, and that it is better that multi-party litigation is dealt with on a collective basis before then.[55]

23. The court can also order that two or more claims be tried together.[56] This can achieve similar case management objectives if consolidation is inappropriate.[57] The fundamental purpose, as for consolidation, is to save litigation time and cost.[58]

24. In a representative action there is a single claim to which the representative (but not those represented) is a party. Where more than one person has "the same interest" in a claim, the claim may be begun or, on the court's order, continued, by or against one or more of those persons as representatives of any other persons having that interest.[59] "Same interest" has been interpreted narrowly; it requires that there must be a common interest, a common grievance and a remedy beneficial to all.[60] The representative must have the same interest as those represented.[61] If satisfied that there is the same interest, the court has discretion to allow the representative to act in a representative capacity[62] or to direct that a person may not act as a representative.[63] The representative can bring and conduct proceedings without the authority of those represented - the applicable rule of court itself provides the authority.[64] The action can also be settled without their approval.[65] Any judgment or order given in the proceedings is binding on all those represented, but its enforcement by or against a person who was not a party to the claim requires the court's permission. This has been described as a limited form of 'opt out' post-judgment.[66]

25. As far as liability for costs is concerned, in a representative action the persons represented, not being parties to the claim, have no liability.[67] As between the representative and those represented, it has been observed that a represented person will not be liable for any costs unless he or she specifically authorised the proceedings brought on his or her behalf; nor can the representative retain any damages recovered on a person's behalf unless that person agrees.[68] It has been suggested that this creates an economic deterrent to the representative bringing such proceedings. Even if successful, and costs are awarded against

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[55] Woolf LJ, *Access to Justice: Final Report* (1996), Chapter 17, paragraph 7
[56] CPR Rule 3.1(2)(h)
[57] Kay LJ et al, *Blackstone's Civil Practice* (2010), paragraph 14.60
[58] Civil Justice Council, *op cit* (2008), Part 2, paragraph 8
[59] CPR Rule 19.6(1)
[60] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] EWHC 470 (Ch)
[61] *Millharbour Management Ltd and others v Weston Homes Ltd and others* [2011] 3 All ER 1027, paragraph 22
[62] *Millharbour Management Ltd, ibid*
[63] CPR Rule 19.6(2)
[64] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003], *op cit*, paragraph 32. See also *Blackstone's Civil Practice* (2010), paragraph 14.62
[65] Neil Andrews, 'Multi-Party Actions and Complex Litigation in England' (2011). Electronic copy available at: http://ssrn.com/abstract=1825082
[66] Civil Justice Council, *op cit* (2008), Part 6, paragraph 8
[67] *Howells v The Dominion Insurance Company Limited* [2005] EWHC 552 (QB), paragraphs 37-39, *Blackstone's Civil Practice* (2010), paragraph 14.62. In *Howells* Cox J left open the possibility that application for costs to be paid by a member could be made on the basis of an application for costs to be paid by a non-party, where the court has a discretion in exceptional cases.
[68] *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003], *op cit*, paragraph 39

the defendant, the representative may be unable to recover any shortfall from those represented. If unsuccessful, the representative will be personally liable for the defendant's costs.[69]

26. The representative procedure was not designed expressly for handling multi-party litigation, and various criticisms have been made of it. These include lack of an effective case management mechanism,[70] the restrictive "same interest" test[71] and difficulties that can arise when the remedy sought is damages. Jackson LJ noted that it was not usually a satisfactory vehicle for pursuing claims on behalf of a group, essentially because of the rule's technical requirements.[72]

27. The GLO was introduced in 2000[73] and was the first procedure specifically designed for multi-party litigation. It is an 'opt in' procedure and provides a case management regime designed to manage effectively a large number of individual claims. The procedure is set out in detail in a Practice Direction.[74] According to the Ministry of Justice website, 76 such orders have been made to date dealing with such diverse matters as employers' liability, child abuse, healthcare, environmental protection and various consumer claims.

28. The court can make a GLO when a number of claims give rise to common or related issues of fact or law ('the GLO issues').[75] An order can be made at any time before or after any relevant claims have been issued, either on application by a claimant or defendant or by the court on its own initiative.[76] Once a GLO has been made, a Group Register of claims is established. A claim must be issued before it can be added to the Group Register.[77] All existing claims raising any of the GLO issues are transferred to a specified "management court." The court can order that as from a specified date all claims that raise a GLO issue shall be commenced in that court. It can specify a date after which no claim can be added to the Group Register without the court's permission. The Practice Direction states that an early cut-off date may be appropriate for 'instant disasters' like transport accidents, whereas for consumer claims, particularly pharmaceutical claims, it may be necessary to delay the ordering of a cut-off date.[78] The management court has wide powers of case management, including the identification of test cases.[79] A "managing judge" assumes overall responsibility for managing the claims, and generally hears the GLO issues.[80] A judgment on a GLO issue binds all claims on the Group Register, unless the court orders otherwise.[81]

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[69] Neil Andrews, *op cit* (2011)
[70] *Blackstone's Civil Practice* (2010), paragraph 14.65
[71] Civil Justice Council, *op cit* (2008), Part 2, paragraph 18
[72] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 33, paragraph 1,3
[73] CPR Rule 19.10 *et seq*, Practice Direction 19B
[74] CPR Practice Direction 19B
[75] CPR Rule 19.10
[76] CPR Practice Direction 19B, paragraphs 3.1, 4
[77] *ibid*, paragraph 6.1A
[78] *ibid*, paragraph 13
[79] *ibid*, paragraph 12.3
[80] *ibid*, paragraph 8
[81] CPR Rule 19.12(1)(a)

29. Before seeking a GLO, the applicants' solicitor should consider whether any other order would be more appropriate.[82] In *Hobson v Ashton Morton Slack,*[83] one of the court's reasons for refusing to make a GLO was that insufficient consideration had been given to more cost-effective means of resolving the dispute, such as test cases or consolidation.

30. On costs, a distinction is drawn between "individual costs" and "common costs". "Individual costs" are costs incurred in relation to an individual claim on the Group Register. "Common costs" are:

- costs incurred in relation to the GLO issues;
- individual costs incurred in a claim while it is proceeding as a test claim; and
- costs incurred by the lead solicitor in administering the group litigation.[84]

31. Unless the court orders otherwise, an order for common costs against group litigants imposes on each group litigant several liability[85] for an equal proportion of those common costs.[86] The general rule is that where a group litigant is the paying party, that litigant will, in addition to any costs he or she is liable to pay to the receiving party, be liable for

- the individual costs of his or her claim; and
- an equal proportion, together with all the other group litigants, of the common costs.[87]

When making an order for costs the court will specify the proportions of common costs and individual costs respectively.[88] Where common costs were incurred before a claim was entered on the Group Register, the court may find that group litigant liable retrospectively for a proportion of those costs.[89] Where a claim is removed from the Group Register, the court can make an order for costs in that claim including a proportion of common costs incurred to the date of removal.[90] As between group members, the court may give directions about how the costs of resolving common issues, or the costs of claims proceeding as test claims, are to be borne or shared.[91]

32. It has been observed that these rules do not entirely resolve difficult issues that may arise in practice. Problems can arise where the group loses; where the group wins but there is a shortfall in expenses recovered from the defendant; where group members vary in their success or failure, such as under different test claims; and where individual claims fail

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[82] CPR Practice Direction 19B, paragraph 2.3
[83] [2006] EWHC 1134 (QB)
[84] CPR Rule 46.6(2)
[85] Each group member is liable only for that proportion, and cannot be required to make up any shortfall if other group members do not pay.
[86] CPR Rule 46.6(3)
[87] CPR Rule 46.6(4)
[88] CPR Rule 46.6(5)
[89] CPR Rule 46.6(6)
[90] CPR Rule 46.6(7)
[91] CPR Practice Direction 19B, paragraph 12.4

although the group itself was at least partly successful on the GLO issues. A problem can also arise over the liability of the paying party for the receiving party's administrative and co-ordination costs.[92]

33. Claims subject to a GLO ultimately must be resolved individually once common issues of liability and causation have been resolved. The Civil Justice Council considered that the GLO was not an ideal mechanism for bringing a collective action, in particular because individual claimants require to issue proceedings in order to form part of the group. This required significant front-loading of litigation costs and, in its opinion, could not provide effective access to justice for those with low value claims where the costs risk far outweighed the potential value of a successful judgment.[93]

Competition law

34. The Competition Appeal Tribunal, which sits mainly in London, has jurisdiction throughout the UK. Its functions include hearing actions for damages and other monetary claims under the Competition Act 1998.[94] A form of representative action is available. This enables claims for damages to be brought or continued by a "specified body" on behalf of two or more named consumers.[95] The consumers' consent is required,[96] so this is an 'opt in' procedure. The only 'specified body' currently empowered to bring such an action is the Consumers' Association Which?[97] To date it has brought only one action, against the retailer JJB Sports in 2007, in respect of price-fixing arrangements for the sale of replica football shirts. The case settled on terms which granted purchasers a refund of between £5 and £20 per shirt, amounting, in total, to around £21,000, with the defendant agreeing to pay the Association's reasonable costs.[98] Costs reportedly were likely to reach several hundreds of thousands of pounds, which Jackson LJ criticised as disproportionate.[99]

35. In January 2013 the Department for Business Innovation and Skills ('BIS') announced proposals for a new form of 'collective' action before the Tribunal.[100] This will enable claims to be brought on behalf of both consumers and businesses. Unlike the current regime, there will be no requirement for a prior finding by a competition authority that there has been an infringement of competition law. The Tribunal will decide in each case whether proceedings should be 'opt in' or 'opt out.' To protect against frivolous or unmeritorious cases there will be safeguards including a strict certification process.

36. Certain of the BIS proposals bear on costs and funding. Only representatives with a genuine interest in the case will be able to bring proceedings. This will exclude, for example,

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[92] *The White Book 2012,* Section A Part 19 III 19.10.0; Susan Gibbons, *op cit* (2008), page 234
[93] Civil Justice Council, *op cit* (2008*),* Part 6, paragraph 17
[94] Competition law is reserved to the UK Government under Head C3 of Schedule 5 to the Scotland Act 1998 c. 46
[95] Competition Act 1998 c. 41, s 47B(1)
[96] *ibid*, s 47B(3)
[97] Specified Body (Consumer Claims) Order SI 2005/2365
[98] *The Consumers' Association v JJB Sports Plc,* judgment on the assessment of costs [2009] CAT 2
[99] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 3, paragraph 12.9
[100] Department for Business Innovation and Skills, *Private actions in competition law: a consultation on options for reform – government response* (2013)

vehicles established for that sole purpose. The usual rule will be that the unsuccessful party bears the costs. Damages based agreements will not be available to litigants. The UK Government was concerned that these might encourage speculative litigation and place an undue burden on business. This is contrary to the position of the OFT who opposed such a prohibition, arguing that it would restrict unnecessarily the funding arrangements open to potential claimants.[101]

37. The European Commission has been considering collective redress in competition law for some time. Existing mechanisms differ throughout the European Union. This was the subject of a consultation by the Commission in 2011.[102] It is understood that follow up work by the Commission in this area is still on-going.[103]

Consultation responses

38. In our Consultation Paper we asked whether damages based agreements, in the event that they are not otherwise recommended, should be available for the funding of multi-party actions; if not, how else may lawyers be remunerated for the additional responsibility involved in such actions; and whether the funding arrangements for multi-party actions should cover payment of legal representation and disbursements. Thirty respondents answered these questions, either separately or by making more general observations.

39. On the use of damages based agreements to fund multi-party actions, most respondents tied their answer to whether they were in favour of damages based agreements generally. There was little discussion of the specific issues that might arise in relation to multi-party actions.

40. Many respondents, particularly insurers, considered that there was nothing particular to the funding of multi-party actions that would justify them being treated differently from other types of litigation. Several of these respondents were opposed to damages based agreements generally while others took a more neutral stance. One solicitor respondent argued that it would be illogical to permit damages based agreements for multi-party actions if they were not permitted for other types of litigation. This respondent's general objection to damages based agreements (that is, that pursuers would receive less of the damages intended to recompense them for injury or loss) was in no way diluted or resolved simply because there was a greater number of participants. Another solicitor respondent cautioned that allowing damages based agreements for only certain categories of litigation would create undue complexity.

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[101] Office of Fair Trading, *Private actions in competition law: a consultation on options for reform - The OFT's response to the Government's Consultation* (2012), paragraph 3.3

[102] European Commission, *Towards a Coherent European Approach to Collective Redress* (2011)

[103] In February 2013, the EU's Director-General for competition intimated that a legislative proposal on action for damages for breach of competition law is likely in 2013. Its aims will include enabling effective actions before national courts. On collective redress, the Director-General said that the Commission continues to work on a follow-up to the 2011 consultation. See *Competition Law Insight*, interview with Alexander Italianer, available at http://ec.europa.eu/competition/speeches/text/sp2013_02_en.pdf

41. The Faculty of Advocates, which generally supported the introduction of damages based agreements subject to appropriate regulation, considered that the same ethical principles applied to multi-party actions as to litigation generally. It observed that multi-party procedure may carry greater incentives and therefore a greater risk of cutting across individual positions, but in principle these could be protected by regulation.

42. Two solicitor respondents, who were generally opposed to damages based agreements, considered that they should nevertheless be available to fund multi-party actions. One noted that it was difficult to find a funding mechanism for multi-party actions and damages based agreements could bridge the funding gap, provided that the court agreed the level of the contingency fee. The other observed that multi-party actions can be very expensive and speculative; a 'fighting fund' was required to cover initial costs. The cost of running the action could vastly exceed the expenses recoverable. In these circumstances, damages based agreements should be available to increase access to justice.

43. Another respondent, with considerable experience of defending multiple court actions, opposed the use of damages based agreements in multi-party actions. It warned that the cost of running a multi-party action without public funding was likely to be enormous, such that it was possible that only a handful of very well-funded law firms would feel able to take the risk of funding an action by a damages based agreement. Using damages based agreements to fund multi-party actions might, in its opinion, therefore restrict, not increase, access to justice.

44. On alternative means of remuneration, eleven respondents referred to the option of seeking an additional fee or uplift on fees. As noted in paragraph 16, the SCCR[104] recommended that the additional responsibility involved in managing a multi-party action be made a specific ground for awarding an additional fee.[105] One respondent commented that a fixed additional fee might encourage multi-party actions. Another considered that an additional fee for multi-party actions should be mandatory rather than discretionary.

45. One of these respondents considered that the additional responsibility involved in multi-party actions was, in most cases, likely to be remunerated by the additional work undertaken by the lawyer in co-ordinating such actions. The current arrangements for an additional fee would allow a fair fee in any cases where that remuneration was insufficient. If special funding arrangements were to be adopted which ensured that the work done was constrained within reasonable limits, it considered that there may be a case for an additional fee to reflect the responsibility involved.

46. One financial institution was sceptical about whether multi-party actions involved significant additional responsibility meriting additional remuneration. It was opposed to multi-party actions, considering that they would encourage the proliferation of large scale unmeritorious litigation against businesses. Their limited benefits would be outweighed by unnecessary costs to business, the economy and the justice system. It stressed the need for recoverability of expenses to equate as closely as possible to actual expenditure. It

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[104] *Report of the Scottish Civil Courts Review* (2009), Recommendation 174

[105] *Report of the Scottish Civil Courts Review* (2009), Chapter 13, paragraph 97

considered that pursuers should not be shielded from the expenses consequences of unsuccessful litigation by reliance on a class action fund or similar arrangement.

47. Other respondents thought that multi-party actions could be funded by existing mechanisms. Several referred to the introduction of compulsory pre-action protocols. One respondent suggested the possibility of a speculative fee agreement ('SFA') backed by After the Event ('ATE') or Before the Event ('BTE') insurance cover, with each party contributing to a 'fighting fund' to cover outlays and irrecoverable expenses. It pointed out that while multi-party procedure was likely to be most useful where there were many group members, each with a small stake in the outcome, in such circumstances members may be unwilling to contribute anything. It stressed that ATE and BTE insurance were important aspects of access to justice for those involved in multi-party actions.

48. Five respondents referred to the possibility of new funding arrangements, including a Contingent Legal Aid Fund ('CLAF') or a Supplementary Legal Aid Scheme ('SLAS').[106] A consumers' group thought that such an arrangement could prove viable. As referred to in paragraph 7, the SCCR recommended the creation of a special funding regime for multi-party actions, preferably administered by SLAB. In its response to the Consultation Paper SLAB advised that it considered that the proposals for change, as set out by the SCCR, would be a significant improvement to existing arrangements. It pointed out that at present, where there are multiple claimants, modest claims may have to be pursued at a substantial cost because legal aid arrangements do not allow the cost of a test case to be shared amongst all potential litigants. The test case litigant bears all the risk. If that litigant is legally aided, the risk lies with the Legal Aid Fund. It considered that special funding arrangements administered by SLAB were potentially one option for dealing with multi-party actions.

49. As far as whether the funding arrangements for multi-party actions should cover the payment of legal representation and disbursements is concerned, thirteen respondents, including the Law Society of Scotland, considered that should be the case, with one observing that there would otherwise be little point in the arrangement. SLAB pointed out that this would avoid any difficulties of litigation being part funded. Seven respondents were of the view that no change to existing arrangements was required. The Faculty of Advocates addressed this question in terms of the defender's ability to recover expenses in the event that such actions were funded by SLAB. It considered that irrespective of funding arrangements, in principle multi-party actions should be treated no differently from other litigation. The general rule that expenses follow success should apply, and expenses should be recoverable subject to tests of reasonableness and necessity.

Discussion

Expenses in multi-party actions

50. The significance of expenses has long been recognised. In its 1982 report on class actions, costs were identified as "*the single most important issue*" by the Ontario Law Reform Commission:

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[106] See Chapter 11

> "*the matter of costs will not merely affect the efficacy of class actions, but in fact will determine whether this procedure will be utilised at all*."[107]

Woolf LJ warned that if costs are not dealt with from the outset, the result is either subsidiary litigation or protracted problems at taxation.[108]

51. Multi-party procedure has the potential to reduce costs for all parties involved. Woolf LJ explained that in litigations involving hundreds or thousands of parties, any procedural step which each party has to take can, cumulatively, make costs disproportionate both to the parties' means and the issues at stake. All litigants, including those of ample means, are entitled to be protected from incurring such unnecessary costs. Woolf LJ considered this to be of benefit to all parties.[109]

52. Several decisions in England and Wales have stressed the need to control the costs of group litigation.[110] In *Solutia UK Ltd v Griffiths* a group of claimants sought damages for personal injury caused by pollution from the defendant's factory. The claims were settled for between £340 and £1,500 per claimant, totalling £90,000. Costs sought from the defendant were £210,000.[111] Describing this as "ludicrous", the Court of Appeal criticised such disproportionate spending and said that in future courts needed to exercise greater case management to limit costs in group litigation.[112] In *Hobson v Ashton Morton Slack* the court's reasons for refusing to make a GLO included the "gross imbalance" between parties' estimated costs (totalling around £1.8 million) and the principal sums sought by claimants (averaging £357 per claimant, totalling not more than £25,000). The court held that on any costs benefit approach a GLO was not a just means of resolving the dispute.

53. In England and Wales the court has the power to make a costs capping order,[113] which limits the amount of future costs, including disbursements, that a party can subsequently recover. A costs capping order can be made if (a) it is in the interests of justice (b) there is a substantial risk that costs will be disproportionately incurred without it and (c) that risk cannot adequately be controlled by case management and detailed costs assessment. In making a costs capping order, the court is to consider all the circumstances, including whether there is a substantial imbalance between the parties' financial positions; whether the costs of determining the amount of the cap are likely to be proportionate to overall costs; the stage proceedings have reached; and costs incurred to date and future costs. Both the claimants' and the defendant's costs can be capped.[114] Such an order does

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[107] Ontario Law Reform Commission, *Report on Class Actions* (1982), Volume 3, page 647

[108] Woolf LJ, *Access to Justice: Final Report* (1996), Chapter 17, paragraph 57

[109] *Boake Allen Ltd v Revenue and Customs Commissioners* [2007] 1 W.L.R. 1386, per Lord Woolf at paragraph 30-31

[110] *Solutia UK Ltd v Griffiths and others* [2001] 2 Costs L.R. 247; *AB and others v Leeds Teaching Hospitals NHS Trust* [2003] 3 Costs LR 405; *Various Ledward Claimants v Kent and Medway H.A. and East Kent Hospitals* [2003] EWHC 2551; *Hobson v Ashton Morton Slack, op cit*; *AA and others v TUI UK Ltd* [2005] EWHC 90017 (Costs); *Barr v Biffa Waste Services Ltd (No. 2)* [2010] 3 Costs LR 317; see also *Blackstone's Civil Practice,* Civil Justice Council *Draft court rules for collective proceedings* (2010), page 10.

[111] *Solutia UK Ltd, ibid*, paragraph 25 per Sir Christopher Staughton

[112] *ibid*, per Sir Christopher Staughton at paragraph 29, Mance LJ at paragraph 32

[113] CPR Rule 3.19

[114] As for example in the Corby Group Litigation [2008] EWHC 619, in which recoverable costs were capped at £900,000 for the claimants and £1.25 million for the defendant.

not prevent, although it may discourage, a party from incurring expenditure over and above that which will be recoverable.

54. Costs capping can be utilised in multi-party litigation. For example, in *AA and others v TUI UK Ltd*,[115] the court capped the costs of a group of consumer litigants in proceedings against a tour operator. The senior costs judge had concluded that the litigation was being used to generate excessive and unreasonable costs. The GLO procedure enabled the claimants to pursue modest claims, but that came with the concomitant requirement that costs be strictly controlled. The court also limited the number of lead claims and expert witnesses. This illustrates how costs management is an integral and necessary part of case management.

55. Given the sums involved, defenders will be anxious to ascertain whether they will be able to recover their costs should the multi-party action fail. In England and Wales there have been conflicting decisions on whether a defendant is entitled to disclosure of the group's ATE insurance policy. The general rule is that a party is not required to reveal how it is funding the litigation, nor whether it has the benefit of insurance, but different considerations may apply to ATE insurance policies. Disclosure was ordered where the group had referred to the policy in support of its application for a GLO, in circumstances where the litigation would not have proceeded had there been no policy.[116] It was refused where the group had negotiated a bespoke policy, disclosure of which would have revealed to the defendant advice given by the group's legal advisers.[117]

56. The Civil Justice Council addressed the issue of costs in its 2008 Report *Improving Access to Justice through Collective Actions*.[118] It considered that the court should utilise in appropriate cases the full range of costs measures, such as security for costs,[119] protective costs orders or costs capping orders,[120] and costs budgeting.[121] Case management should include costs management.[122] As a general rule it considered that the unsuccessful party should be liable for costs as this would deter spurious claims.[123]

57. Jackson LJ recommended that the starting point for group personal injury actions, as for personal injury actions generally, should be qualified one way costs shifting ('QOCS'). For all other actions the starting point should be that the unsuccessful party is liable for

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[115] [2005] EWHC 90017 (Costs)

[116] *Barr v* Biffa *Waste Services Ltd* [2010] 3 Costs L.R. 291

[117] *Arroyo v BP Exploration Company (Colombia) Limited* [2010] EWHC 1643 (QB)

[118] Civil Justice Council, *op cit* (2008). The Civil Justice Council recommended the introduction of a new generic representative procedure called a 'collective action'. The Government has opted to proceed instead by way of sector-specific measures, as shown by the BIS proposals referred to above.

[119] *ibid*, page 151. An order for security for costs usually requires the claimant to pay money into court, or find some other form of security, as security for the payment of any costs order that might ultimately be made in favour of the defendant. The claimant must provide the required security as a condition of being allowed to proceed with the action. The equivalent Scottish procedure is known as caution.

[120] *ibid*, page 173

[121] *ibid*, page 179

[122] *ibid*, page 161

[123] *ibid*, page 173. The Civil Justice Council observed that different rules might apply in the Employment Tribunal, where parties generally bear their own costs.

costs. The applicable costs regime would be determined at certification, having regard to the nature of the case, the funding arrangements and parties' resources.[124]

The funding of multi-party actions

58. The difficulties of securing funding for a multi-party action have been recognised. Different jurisdictions approach this in various ways. Damages based agreements are a key feature of class actions in the United States, albeit in a very different litigation environment. In particular, parties generally bear their own costs. In Canada, where virtually all provinces have introduced class action procedures, damages based agreements are permitted subject to the court approving the terms of the fee agreement as being fair and reasonable, and are widely used.[125] In Quebec and Ontario, public agencies provide an additional means of funding. In Quebec, the *Fonds D'aide aux Recours Collectifs* provides assistance with legal fees and disbursements, whereas Ontario's Class Proceedings Fund provides assistance with disbursements only.[126] In both provinces the successful plaintiff requires to reimburse the fund out of damages received. Australia prohibits damages based agreements between lawyers and clients.[127] Since non-lawyers are not so constrained, the result has been the development of third party funding of class actions on a contingency basis by private funders. Such arrangements are lawful.[128] The funder receives an agreed proportion of any award of damages, typically one-third to two-thirds, and has a broad discretion to conduct the litigation as it sees fit.[129] Hong Kong prohibits both damages based agreements and conditional fee agreements for all forms of litigation, but has a Consumer Legal Action Fund - a trust fund which assists consumers to bring or defend representative actions. The introduction of a class action fund to make discretionary grants to all eligible impecunious class action plaintiffs was recently recommended.[130]

59. The approach of several recent reviews to multi-party actions has been to leave parties free to choose their own funding arrangements, subject to these arrangements being properly regulated. A combination of private and public sector funding options has been envisaged. This was the approach anticipated by the SCCR.

60. Jackson LJ considered that claimants with a viable multi-party action should in principle have available to them as many means of funding as possible.[131] These included:

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[124] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 33, paragraphs 3.3-3.4, 5.1

[125] See for example the legislation for British Columbia: Class Proceedings Act [RSBC 1996] Chapter 50, section 38

[126] For a discussion of funding arrangements in Quebec and Ontario, see Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report*, (2009) Chapter 18 paragraph 2.6-2.10 and the *Report of the Scottish Civil Courts Review* (2009), Chapter 13.

[127] Legal Profession Act 2006 (ACT) s 285; Legal Profession Act 2004 (NSW) s 325(1)(b); Legal Profession Act 2006 (NT) s 320(1); Legal Profession Act 2007 (Qld) s 325; Rules of Professional Conduct and Practice 2003 (SA) r 42; Legal Profession Act 2007 (Tas) s 309(1); Legal Profession Act 2004 (Vic) s 3.4.29(1)(b); Legal Profession Act 2008 (WA) s 285(1)

[128] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [2006] HCA 41

[129] S Clark and C Harris, 'The push to reform class action procedure in Australia: Evolution or revolution?' *Melbourne University Law Review* 32 (2008) 775

[130] The Law Reform Commission of Hong Kong, *Report: Class Actions* (2012), Recommendation 8

[131] Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2009), Chapter 33, paragraph 4.1

- Conditional fee agreements. Jackson LJ suggested that economies of scale may mean that success fees in collective actions represent a lower proportion of any damages awarded than in single claimant litigation.

- Third party funding. This would be a proper means of funding if the claimants were advised that the proposed funding agreement is appropriate and if the funders subscribed to the voluntary code recommended by Jackson LJ.

- Damages based agreements. Jackson LJ considered that these may be appropriate where the lawyers had sufficient confidence in success and the claimants received independent advice that the terms of the proposed agreement were reasonable.[132]

Jackson LJ recommended that after decisions had been made about the wider costs and funding regime, serious consideration be given to creating a SLAS for multi-party actions. This could provide funding for the claimants' own costs as well as covering disbursements and liability for the defendant's costs, although this could necessitate a greater deduction from successful claimants' damages.[133]

61. Consistent with this approach, a recent report to the European Parliament on collective redress recommended that "*any possible funding solution*" should be allowed. It considered that the main obstacle to the proper functioning of a collective redress system stemmed from the inability to fund such an action. To effectively protect consumers' right to compensation, this obstacle had to be lowered.[134]

62. The Civil Justice Council had recommended the establishment of a SLAS for both individual and group litigation, and that damages based agreements and third party funding should be available for group litigation.[135] In its later report it considered that at the certification stage the representative in a multi-party litigation should be required to demonstrate that any funding arrangement was fair as between the parties. The court should ensure that the claim was sufficiently insured, backed by properly capitalised funders, or that the claimants themselves had sufficient means to pay the defendant's costs.[136] The Civil Justice Council has since produced draft rules of court reflecting its recommendations on costs and funding for collective actions.[137]

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[132] *ibid*, paragraphs 4.2-4.5
[133] *ibid*, paragraph 4.6
[134] Policy Department, Directorate-General for Internal Policies, *Collective redress in anti-trust* (2012), paragraph 4.9
[135] Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs. The Future Funding of Litigation - Alternative Funding Structures* (2007)
[136] Civil Justice Council, *op cit* (2008), Part 6, paragraph 32. Factors identified as potentially relevant were: a. The client demonstrated an interest in suing on its own behalf; b. The funder does not have the capacity to monopolise the litigation; c. No conflict in interest between the funder and the client; d. The funder has fully informed the client about the effects of the funding arrangement; e. The funder has sufficient resources to meet its commitments to the claimants; f. The funder must be willing and able to meet any adverse costs order that may be rendered against the claimants or the funder should the action fail. The funder will not corrupt the legal process; and g. The funder has not negotiated an inordinately high fee.
[137] Civil Justice Council, *Draft court rules for collective actions* (2010)

63. The importance of addressing matters of expenses and funding at the certification stage has also been stressed by the Law Reform Commission of Hong Kong. It considered that when seeking certification the representative should be required to prove that funding and costs protection arrangements were already in place.[138]

Recommendations

64. In Chapter 8, I recommend the introduction of a qualified one way costs shifting regime in personal injury actions, including clinical negligence actions.[139] My intention is that this will include multi-party personal injury and clinical negligence actions. For all other multi-party actions, as recommended by the SCCR, the general rule will be that expenses follow success, subject to the court's discretion to make a different order.

65. Experience from England and Wales shows that even if the individual's stake in proceedings is small, multi-party actions can become major litigations involving significant expenditure. While multi-party procedure, if properly managed, can enable individual claims to be litigated with greater economy, the procedure can generate its own costs. It is imperative that the court keeps this under control. This is in the interests of all involved, in particular members of a represented class who may have no practical opportunity to supervise or restrict the expenditure being incurred.

66. In these circumstances I consider that the court must have a wide discretion to make such orders on expenses as it considers appropriate in the circumstances. Since multi-party procedure can take different forms, within which many variables are possible, it would be both undesirable and impractical to be too prescriptive. A useful model is Chapter 47 of the Rules of the Court of Session (commercial actions), which gives the commercial judge discretion to make such procedural orders as thought fit.[140] The SCCR recommended that the court in a multi-party action should have at its disposal a wide range of case management powers similar to those conferred on the commercial judge, and a general power to regulate procedure as thought fit with regard both to certified questions and any other matters at issue.[141]

67. The court must exercise control over the cost of multi-party proceedings from the outset. In practice this will be the hearing of the proposed representative's application for certification, or of a motion to have several court actions managed together as a group.

68. The test for certification, recommended by the SCCR and set out at paragraph 12 above, is sufficiently broad to enable the court to have regard to the representative's ability to meet an award of expenses and the means by which the action is being funded. As the SLC observed, implicit in the requirement to 'adequately' represent group interests is that

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[138] The Law Reform Commission of Hong Kong, *op cit* (2012), Recommendation 5(1)

[139] See Recommendation 46

[140] Rules of the Court of Session, Rule 47.5 "Subject to the provisions of this Chapter, the procedure in a commercial action shall be such as the commercial judge shall order or direct"; Rule 47.11(1) (preliminary hearings) "the commercial judge-(e) may make such other order as he thinks fit for the speedy determination of the action"; Rule 47.12(2) "the commercial judge…may make such other order as he thinks fit."

[141] *Report of the Scottish Civil Courts Review* (2009), Recommendation 168

the representative has adequate financial resources to support the litigation. This includes having the resources to meet an award of expenses if the action fails. The test also enables the court to have due regard to questions of proportionality. As discussed above, the courts in England and Wales have on several occasions criticised the costs incurred in multi-party litigation as disproportionate to the sums at stake.[142] A clear example is the representative action by Which? against JJB Sports, referred to in paragraph 34, in which the significant costs incurred were wholly disproportionate to the end result achieved for individual consumers.

69. While this test is expressed in terms of an application for certification by a proposed representative, I consider that the court should apply a similar test when deciding whether separate court actions should be managed together as a group.

70. It would be undesirable to be overly prescriptive about the type of body that can apply for certification. The court will require to be satisfied in every case that the proposed representative is 'an appropriate person'. However, it seems to me that it would rarely be appropriate for the representative to be a lawyer or law firm acting for those seeking compensation. This risks fuelling entrepreneurial litigation particularly if, as I recommend, damages based agreements are to be permitted.

71. I recommend in Chapter 4 that a system of expenses management should be introduced as a pilot scheme for cases being conducted under commercial procedures in the Court of Session and for one of the sheriff courts where commercial procedures have been available for some time.[143] I consider that expenses management will be a necessary tool for controlling the cost of litigation in multi-party actions. **I therefore recommend that expenses management should be mandatory in all actions that proceed under multi-party procedure unless the case management judge determines otherwise, having regard to all the circumstances.**

72. As recommended in Chapter 5, it will be open to the court to make a Protective Expenses Order ('PEO') in a multi-party action if a public interest can be demonstrated.[144] Unless otherwise prescribed by Rules of Court it will be for the case management judge to decide at what level to set the PEO. The judge will, of course, be able to have regard to the budgets submitted by parties. If appropriate, a 'cross cap' on recoverability can be imposed.

73. In appropriate cases the court should consider making it a condition of certification that the representative find caution. Lord Hodge recently explained that

> *"The court has a discretion whether to order the provision of caution and exercises that discretion in the interests of justice. The purpose of the order is to protect a defender who is successful in his defence from an inability to enforce a resulting award of expenses. In relation to pursuers who are individuals and are not formally insolvent it is well established that mere impecuniosity is not sufficient of itself to warrant an order for caution. There must be further*

[142] See for example the cases noted at paragraph 52
[143] See Recommendations 35 and 36
[144] See Recommendation 38

> *circumstances which cumulatively justify the order, such as the weakness of his pleaded case, his failure to obtemper a decree for payment in another cause or other evidence that he cannot meet his obligations, whether current or becoming prestable during the expected currency of the action."*[145]

In considering whether caution is appropriate the court can have regard, amongst other factors, to the funding arrangements in place. An order for caution should also be considered where application is made for group management of existing actions.

74. I consider that these powers, combined with the procedure for summary disposal recommended by the SCCR,[146] will provide a safeguard against unmeritorious litigation without stifling genuine actions.

75. While issues bearing on expenses should be addressed at the outset, they should be revisited as the litigation progresses if circumstances change. Rigorous case management of multi-party actions will be crucial in managing the overall cost of proceedings. This might include, for example, the court limiting the number of expert witnesses.

76. The SCCR recommended that the additional responsibility involved in managing a multi-party action be made a specific ground for awarding an additional fee. In line with my recommendation in Chapter 2, the motion for an additional fee will be made at the outset of proceedings.[147] By this means parties will know from the outset whether an additional fee will be available and, if so, what the percentage will be. Given the variables in multi-party procedure, I do not consider that the additional fee should be either fixed or mandatory. The court should have regard to the circumstances of the individual case in deciding whether an additional fee should be awarded.

77. In the exercise of its general discretion on expenses, the court may determine how expenses are to be borne as between members of the group should a group action prove unsuccessful.

78. It is not within my remit to undertake a major review of publicly funded legal services. Detailed recommendations for a multi-party action fund have already been made by the SCCR. Except as discussed below, these are not revisited here. This Report has considered what additional funding mechanisms should be available in multi-party actions and what, if any, safeguards the court should insist upon.

79. Experience suggests that parties and their legal advisers can be adept at devising suitable mechanisms to fund and manage multi-party litigation. Jackson LJ cites the example of the Equitable Life group litigation, where the policy holders formed a special purpose limited company to run the litigation.[148] A relatively new development in England

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[145] *Total Containment Engineering Limited v Total Waste Management Alliance Limited* [2012] CSOH 163 paragraph 8, references omitted. Lord Hodge went on to explain that different considerations apply where the pursuer is a company: *ibid*, paragraph 9.

[146] *Report of the Scottish Civil Courts Review* (2009), Recommendation 123

[147] See Recommendation 6

[148] Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009), Chapter 38, paragraph 7.7

and Wales is the use of third party funding to fund multi-party litigation. At present a multi-million pound shareholders' rights issue claim is reportedly being financed by a number of third party funders, backed by ATE insurance cover spread over a number of insurers.[149] This is likely to be an option only in high value commercial litigation which the funder assesses as having good prospects of success, since the funder will require to invest considerable resources in performing due diligence and thereafter monitoring the litigation. The approach outlined above, whereby a range of public and private sector funding mechanisms is available, is the correct one.

80. My starting point on funding is therefore that no formal restriction should be placed on the funding options available to parties. The *quid pro quo*, as discussed above, is that the court will require to be satisfied before certifying a multi-party action that adequate funding is in place, and will exercise rigorous case management thereafter. It has also to be accepted that not every funding mechanism will be suitable for every type of multi-party action.

81. On damages based agreements, I agree with respondents that multi-party actions should not be treated differently from other actions. In Chapter 9, I recommend that the law should be changed to allow solicitors to enter into enforceable damages based agreements.[150] It follows that **I recommend that damages based agreements be available for use in multi-party actions, subject to the same restrictions as are set out in Chapter 9**.

82. I do not consider that a funding arrangement should be subject to the court's approval. This would entail further expenditure for the parties; nor is it clear what test the court would apply. Such a requirement is not imposed in other types of litigation. It may prove impractical since an individual's funding arrangements may have been in place since before the action became a multi-party action. Clients' interests will be protected by the recommendations made elsewhere in this Report, such as those capping the applicable percentages of fees recoverable from damages in damages based agreements and SFAs, and the recommendations on regulation.

83. The representative may wish to establish a 'fighting fund' to meet outlays, and will wish to ensure that others in the group or class contribute towards any liability for expenses. Generally this will be a private contractual matter between the representative and those represented. For example, one possibility would be an agreement that the representative has a first charge on any damages recovered to cover unrecovered expenses. Again, this is unlikely to be of assistance in an 'opt out' action. The reality is that a proposed representative who risks being left out of pocket will simply be unwilling to act, so those interested in bringing such an action will require to devise a solution. Again, given the variables in multi-party procedure I do not consider it possible or desirable to be prescriptive here.

84. The final issue is what the funding arrangements for multi-party actions should cover. As a matter of principle, I think that anyone who benefits from such funding should require to make reimbursement to the fund, commensurate with the benefit that he or she

[149] 'Third-party funder backs RBS misrepresentation claims,' *The Lawyer* (4th April 2013)
[150] See Recommendation 55

has gained by having had access to the fund. Beyond that, it would be premature for me to make further detailed recommendations, since financial modelling will require to be undertaken and that can only sensibly be done once rules for the new multi-party procedure are available. I can therefore make no recommendation at this stage.

85. The SCCR considered that there should be scope, in appropriate cases, for the defender to obtain an award of expenses against the multi-party action fund.[151] Under existing arrangements, a successful party whose opponent is funded by legal aid can ask the court to make an award out of the Legal Aid Fund of the whole or part of the expenses that he or she has incurred. Before making such an order, the court must first consider awarding expenses against the legally aided party personally. The court will award expenses out of the Legal Aid Fund only if, for proceedings at first instance, the proceedings were instituted by the legally aided party and the court is satisfied that the party seeking the award will suffer exceptional financial hardship unless the order is made. For all proceedings, the court must be satisfied that it is just and equitable in all the circumstances that the award should be paid out of public funds.[152] This test is familiar to the courts and practitioners and there is an existing a body of case law on its interpretation. **I therefore recommend that the test for making an award of expenses against the multi-party action fund should be that set out in section 19 of the Legal Aid (Scotland) Act 1986.**

[151] *Report of the Scottish Civil Courts Review* (2009), Recommendation 176
[152] Legal Aid (Scotland) Act 1986 c. 47, s 19

CHAPTER 13 REGULATION

Regulation of claims management companies

1. As both the Scottish Government's consultation on legal services[1] and our consultation and meetings with solicitors and claims management companies indicate, there have been no reports of major irregularities with respect to claims management companies in Scotland. Where solicitors do enter into fee agreements based on a percentage of the damages recovered, such as under the voluntary pre-action protocol for personal injury actions, it has been represented to us that there is no evidence of complaints or malfeasance. We are unaware of any dissatisfaction. When the Scottish Government consulted on the regulation of legal services in Scotland, the great majority (85%) of respondents to its consultation paper favoured regulation, mainly on the grounds that it would create a level playing field between solicitors and claims management companies in Scotland. It would also address the issue of cross-border inconsistency between England and Wales, where claims management companies are regulated, and Scotland, where they are not. Where malpractice was observed, respondents mainly identified it in relation to advertising and 'cold calling.'[2] These findings are entirely consistent with the responses to our Consultation Paper and our discussions with solicitors and claims management companies.

2. In our Consultation Paper we asked whether claims management companies should continue to be entitled to enter into damages based agreements. Opposition was mainly on the grounds that claims management companies are not currently regulated in Scotland. They may therefore expose vulnerable clients to unacceptable risks and offer them no protection. For example, claims management companies are not members of a Guarantee Fund; they are not subject to rules in regard to the handling of clients' monies and they are not subject to inspections by a regulatory authority. Their claims handlers are not subject to rules of professional conduct and they cannot be disciplined for professional misconduct. Nor are they subject to a complaints regime such as that of the Scottish Legal Complaints Commission. Unlike solicitors, they are not obliged to act in the best interests of their clients; they are not subject to sanctions against charging excessive fees; and they are not required to inform clients that they may benefit from other funding options. Indeed, some respondents thought this may call into question the independence of their advice.

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[1] Scottish Government, *Wider Choice and Better Protection: A Consultation Paper on the Regulation of Legal Services in Scotland* (December 2008), Chapter 9

[2] Scottish Government, *Analysis of the Responses to the Consultation on the Regulation of Legal Services in Scotland* (October 2009). Respondents reported being aware of poor practices by claims management companies in Scotland, the most common of which were misleading advertising (including misleading claims about what companies can provide) and misleading inferences that the company is a solicitors' practice. There were allegations of other poor practices (some anecdotal), such as firms putting their own interests before those of their clients, a firm signing up claimants on the basis that the consumer agrees to surrender a percentage of any damages, cold calling, street surveys and selling names and addresses of accident victims to Scottish solicitors. These were not considered to be common occurrences. The Review was informed by the Claims Management Regulator in England and Wales that 75% of approximately 1000 complaints received every month are in relation to companies managing claims in the financial services sector.

3. Other respondents objected to claims management companies on grounds of consistency. They considered that if rules prohibiting or discouraging lawyers from entering into damages based agreements were to be meaningfully enforced, then such rules should apply equally to claims management companies. Regulations should be universally applicable so as to create a level playing field for claims management companies and lawyers.

4. Finally, a number of respondents, representing diverse interests, opposed the promotion of claims management companies on the grounds that they were symptomatic of the failure of other forms of funding. They considered that claims management companies were made necessary by limited access to legal aid, inadequate legal expenses insurance cover and the unsatisfactory level of recovery of expenses from an unsuccessful party. They advised that it would be best to address the failings in the funding system rather than look outside of it.

5. Respondents in favour of maintaining the current position in respect of claims management companies cited the Scottish experience and observed that they had not distorted civil litigation over the past twenty years. Some questioned whether an outright ban on claims management companies would even be lawful and found it particularly inappropriate to consider at a time when the legal profession was being opened to competition through alternative business structures.

6. Other respondents argued in favour of the current position on the assumption that rules prohibiting or discouraging lawyers from entering into damages based agreements would be lifted. They surmised that market forces may then render claims management companies redundant and that it would be preferable to let the market take care of this.

7. A number of respondents advised that claims management companies should continue to enter into damages based agreements just as long as clients were fully informed on the issue of expenses. Other respondents conceded that if claims management companies were to be allowed to continue, then at least some regulation was required. They argued that lack of consumer protection made it an area ripe for the exploitation of vulnerable and ill-informed clients.

8. We asked in our Consultation Paper whether claims management companies operating in Scotland should be regulated. It was observed by several respondents that some claims management companies operating in Scotland are already regulated - those which are UK based are subject to the Claims Management Regulator in England and Wales. However, a number of respondents reported their dissatisfaction with the present regulation of claims managements companies in England and Wales. They observed that the Association of Professional Claims Management's Code of Practice, which includes prohibitions against cold calling, is honoured more in the breach. Claims management companies, so respondents reported, were not subject to the same kind of credible deterrence as firms regulated by the Financial Services Authority (now the Financial Conduct Authority). One respondent claimed to have received thousands of complaints from consumers and defenders who had been exposed to abuse in England and Wales.

9. A few respondents argued against regulation in Scotland. They were aware of no evidence to suggest that extensive and invasive regulation was needed in Scotland. Indeed, they referred to the fact that the Scottish Government had consulted on this issue and had found no evidence of mischief. There were very few claims management companies operating in Scotland anyway, and solicitors employed by or benefiting from them were already subject to regulation by the Law Society of Scotland. They suspected that the funding of an expensive regulatory regime may cause more harm than good, and could make litigation more expensive.

10. The majority of respondents were in favour of regulation, however, and identified a number of potential mischiefs. They observed that there was potential for excessive profits; for conflicts of interest; and for exposing the ill-informed and most vulnerable to unacceptable risks. They reported that profits were frequently derived from services that were redundant, with fees taken from clients who could have gone directly to those against whom they had a complaint. They alleged that claims management companies were responsible for the 'compensation culture' and partly responsible for referral fees. This had led to aggressive marketing tactics, including spam emails, cold calling, the selling on of personal details, the publication of misleading adverts and demands for upfront fees. They also reported that prospective defenders were being "bombarded" with lists of complaints relating to individuals who may never have been their customers – or to products that they may never have sold. Where such complaints were escalated to the Financial Ombudsman Service ('FOS') by consumers, defenders reported that they were being unfairly charged a FOS case fee.

Regulatory objectives and tasks

11. Respondents who sought regulation identified a number of regulatory objectives. Firstly, regulation was required in Scotland to provide customer protection: to monitor standards of competence and promote good practice; to protect clients from agreements contrary to their interests; and to ensure that clients are fully advised.

12. Secondly, regulation was required to ensure consistency in the provision of legal services in Scotland between lawyers and claims management companies. Respondents found it anomalous that solicitors should be regulated while claims management companies are not. Should barriers against counsel and solicitors entering damages based agreements be removed, this anomaly would be particularly striking. They also sought consistency of provision with England and Wales, where claims management companies are presently subject to regulation. They advised that regulations should now be applied to claims management companies that would enforce stringent client account rules, guarantee respect for customer privacy and oversee compliance with data protection requirements. This would provide some consistency between them and the professions, as well as affording clients and opposing parties, including successful opposing parties, a measure of security.

13. Thirdly, regulation was required to protect the interests of the general public, to reduce unsolicited marketing and to limit the unsubstantiated claims made by claims management companies in their advertising, marketing and promotion material.

14. To achieve these objectives, respondents identified a series of regulatory tasks, including the following:

- conduct regular and rigorous audits;
- require additional disclosures, such as associated companies, and referral fees;
- monitor agreements and ensure customers are fully informed, including costs, consequences and the risks, costs and benefits of alternative options;
- ensure that customers are aware of the availability of independent legal advice;
- set appropriate levels for expenses as a proportion of damages;
- require and enforce an obligation to carry professional indemnity insurance;
- enforce a ban on cold calling;
- subject claims management companies to the same principles of conduct as the financial services industry.

The regulatory framework

15. Respondents suggested a number of different ideas as to how a regulatory framework should be set up. Some were of the view that claims management companies should be regulated on a similar basis to England and Wales. Others were insistent that a single body should be established so as to prevent the dilution of its effectiveness among several bodies.

16. A few respondents proposed that the Financial Services Authority (now the Financial Conduct Authority), or a similar UK body, could take over the regulation of claims management companies in Scotland. Others suggested that regulation should remain in Scotland. Some were of the view that the regulatory framework introduced by the Legal Services (Scotland) Act 2010[3] should be considered for the opportunities that it may provide. Another respondent proposed that the Civil Justice Council for Scotland regulate and license claims management companies in Scotland. Other respondents looked to the Law Society of Scotland for regulation, so long as it was given the appropriate resources. Others suggested that claims management companies should either be subject to the Scottish Legal Complaints Commission or some kind of consumer complaints/ombudsman scheme to assess customer disputes against them. While respondents differed with respect to the regulatory regime proposed, they were unanimous in their view that the claims management industry should contribute to, if not fully pay for, whatever measures are taken to regulate the industry.

17. As previously advised, unlike in England and Wales, there is no regulator for claims management companies in Scotland other than those companies which are UK based. Although there is presently a symbiotic relationship between some claims management

[3] asp 16

companies and solicitors in Scotland, it is right and proper that there should be a level playing field with solicitors who are highly regulated. Responsible claims management companies have told us that they would welcome regulation as it provides them, as well as members of the public, with some protection from the arrival on the scene of rogue elements. The legal landscape is already rapidly changing with 'Tesco law' a reality south of the border and alternative business structures about to become a reality in Scotland. Respondents to the consultation sought the regulation of claims management companies for the following reasons: respect for client privacy requires to be guaranteed; compliance with data protection requirements needs to be overseen; stringent client account rules need to be enforced; and the allegedly unsubstantiated claims made by some claims management companies in their advertising, marketing and promotion material require control. They agreed that, at the very least, there should be a Code of Conduct for claims management companies in Scotland, which should include a ban on cold calling. It was also suggested solicitors should not be allowed to accept referrals from claims management companies which obtain business by means of cold calling.

18. The arguments rehearsed in the foregoing paragraphs do not disclose any sound rationale for leaving matters as they stand. **I therefore recommend that there ought to be a regulator of claims management companies.** The best argument against regulation is that members of the public would appear not to be complaining. That is not sufficient. The arguments in favour of the regulation of claims management companies find favour with me. At the very least there requires to be a level playing field with solicitors, with whom some claims management companies are in competition, and who are regulated. At the very minimum there requires to be rules with regard to the handling of clients' monies; there requires to be a system to enable clients of claims management companies to make complaint; there requires to be a system whereby competitors can raise complaint should a claims management company make extravagant and unjustifiable claims regarding their abilities and services; and there requires to be a Code of Conduct governing matters such as cold calling. The foregoing is not intended to be at all exhaustive.

19. I do not consider it to be my function to recommend how regulation might be achieved. It may be that one of the existing professional regulators would be prepared to fulfil this task for claims management companies. It is really a matter for the claims management companies to address. They have the obligation to arrange for their own system of regulation which would require to be approved by the Scottish Ministers. Unless there was an approved regulatory regime in place, claims management companies should not be permitted to enter into damages based agreements nor receive payment of referral fees.[4] Even if it was my function to make a recommendation as to the means by which claims management companies should be regulated, it would be a very difficult, if not impossible, task. That is because it is almost impossible to predict how many claims management companies will continue to operate in Scotland should my recommendation that solicitors be able to enforce a damages based agreement be accepted and implemented. Several solicitors told us that they had established claims management companies only to enable them to offer damages based agreements to their clients. If that can be achieved

[4] See Recommendations 68 and 71

without the device of a claims management company, many claims management companies may cease to exist. Any regulator would require to self-funded. I can see no argument for any public money being used for this purpose, even if public budgets permitted such. The Law Society of Scotland is self-funded as are, at least to my knowledge, the other regulators of the professions such as the Institute for Chartered Accountants of Scotland ('ICAS'). Without being able to predict the number of claims management companies which will require regulation, it is impossible to recommend a sustainable framework for their regulation.

An alternative regulatory model

20. Readers who have made it to this stage of the Report may well have been struck by the importance which I attach to proper and efficient regulation. I am not now referring just to claims management companies but to all the providers of services to the public in the litigation process. My remit did not extend to addressing the means by which the legal and other professions are regulated. Therefore there was no question in the Consultation Paper directed to the mechanics of regulation of solicitors, accountants, insurance companies etc. Accordingly, it is not open to me to make any recommendations in this area. Nonetheless, I consider I would be failing in my duty if I did not draw attention to what I consider are systemic failures in the present regulatory regime. The recommendation which I make in paragraph 18 above that there should be a claims management company regulator is made on the basis that the present regulatory regime continues. As I will seek to demonstrate, I believe that a debate is necessary as to whether there is a better alternative model.

21. In the past it was possible to buy a steak from the butcher, salmon from the fishmonger and a shirt from the draper. Now, it is possible to acquire all such items and more in a supermarket. It is still the position that if one wishes legal advice one consults a solicitor, if it is tax advice one consults an accountant and life insurance policies can be obtained through an independent financial adviser. But for how much longer will these divisions survive and what will be the consequences if the professions are subsumed into a supermarket as have so many of the butchers, fishmongers and drapers? One consequence will be the need to rethink the regulatory regime.

22. At present each profession is independently regulated with the Law Society of Scotland performing the role for solicitors in Scotland and the Solicitors Regulation Authority ('SRA') for solicitors in England and Wales. Advocates are regulated by the Faculty of Advocates. Had it been the case that there was a need for butchers, fishmongers and drapers to be individually regulated, one might think that the regulatory system would require to be redesigned after the supermarket became established.

23. In this Report, I have recommended, for example, that any barriers to lawyers entering into damages based agreements should be removed and that referral fees should not be banned. Further deregulation, such as I recommend in these and other areas, demands a more rigorous regulatory regime than presently exists.

24. Although we still do not know what will happen in Scotland after external capital can be legitimately introduced to a firm of solicitors, we can obtain some idea from what has started to happen in England and Wales: third party funders are acquiring insurance

companies; insurance companies are acquiring firms of solicitors; and claims management companies are acquiring firms of solicitors. It might not be too long before we have the 'one stop shop' or 'litigation supermarket.' What will be permitted under the alternative business structures model is a multi-disciplinary practice with individuals of different professions being entitled to enter into partnership, an option which is presently not permitted. Thus we know that it is likely that solicitors, accountants and independent financial advisers, for example, will be permitted to enter into a partnership. To some extent the solicitor branch of the legal profession in Scotland will be protected or, depending upon your perspective, hindered by the rule that only 49% of a legal firm can be owned by non-solicitors. But even that may be illusory should English regulated firms of solicitors become the dominant partner in a merger with a Scottish counterpart. Such mergers bring the possibility of Scottish firms effectively disappearing and the merged business being regulated by the SRA. The 49% rule does not apply in England and Wales.

25. So whither regulation in this new world? Perhaps the time has come to look at regulation of new as the old demarcations between the professions gradually dissolve. Perhaps it is better for the regulator to be ahead of the game and anticipate what might be, or probably is, just round the corner.

26. I was struck by reading Jackson LJ's comments in relation to the regulation of damages based agreements. Notwithstanding that one is dealing with the same product, solicitors will be regulated by the SRA, barristers by the Bar Council, claims management companies by the Claims Management Regulator and insurance companies by the Financial Conduct Authority. Four regulators will be seeking to police the same core activity. Solicitors, barristers, claims management and insurance companies will probably each have different internal Codes of Practice or Guidance yet the regulators will be expected to apply the statutory regulations in a uniform manner such as to command the respect of those being regulated and the confidence of the public. I do not envy them their task. Would it not be preferable for there to be one regulator protecting the public in the application and use of damages based agreements? Confidence can very quickly be eroded if it is seen that the rules and/or regulations are applied in an erratic or even inconsistent manner.

27. One can analyse the position with regard to referral fees in a similar manner. In this arena the players include solicitors, insurance companies, claims management companies, and the myriad garages, breakdown specialists, bodywork repair shops, car hire firms etc. which may all try to muscle in on the action. Again one can legitimately ask if the protection of the public would be better served if there was one body responsible for ensuring compliance with the requisite regulations. The answer seems to me to be obvious.

28. The same issue arises in other professional disciplines. At present there are no fewer than seven recognised professional bodies that licence insolvency practitioners.[5] Each of these bodies had, until recently, its own complaints procedure and still has its own

[5] The Association of Chartered Certified Accountants ('ACCA'), Chartered Accountants of Ireland ('CAI'), Institute of Chartered Accountants of England and Wales ('ICAEW'), Insolvency Practitioners Association ('IPA'), Institute of Chartered Accountants of Scotland ('ICAS'), the Law Society of Scotland and the Insolvency Service.

disciplinary process. I understand that some bodies are considered to be more demanding regulators than others. That is hardly surprising given the chances of achieving uniformity over seven different organisations, each with its own history and culture. An insolvency practitioner can choose which of the seven professional bodies should licence him or her. Perhaps, not surprisingly, these arrangements have come in for public scrutiny. In 2011 the Insolvency Service issued a consultation document[6] which contained proposals to reform the regulation of insolvency practitioners in the United Kingdom. As a result, some voluntary reforms have been undertaken. There is now a single gateway through which all complaints against insolvency practitioners must be submitted regardless of the licensing body which issued the licensing permit of the insolvency practitioner against whom the complaint is made. The seven licensing bodies are presently working towards an agreement that each of their disciplinary processes will adopt common sanctions guidance in order to improve transparency and consistency when an insolvency practitioner has fallen short of the standards expected of him or her. Progress is also being made towards a common pool of appeal tribunal chairmen, again to improve consistency and transparency. However, the man in the street might be tempted to conclude that the best way to achieve consistency would be for there to be one licensing body and regulator. The subject at least deserves a debate.

29. Thus the attraction of having one regulator may be seen even before the demarcation between the players becomes blurred when, for example, an insurance company may have an equity stake in a firm of solicitors which is already partly owned by a third party funder. It would be possible for all three to operate under the one roof and for one individual to perform more than one function within the organisation. At present we have individuals who are both solicitors and claims management consultants. It is therefore not too fanciful to anticipate that one individual may provide legal advice in relation to a litigation and also be responsible for funding that litigation as a third party funder.

30. I believe the time has arrived when we require a debate on whether we should have a single regulator policing all the players in a single activity rather than having several regulators doing so. The relevant activity for present purposes might be described as "The Litigation Process." It would cover all aspects from the time a potential litigant is approached by, or makes an approach to, someone providing a service in relation to a claim. Thus the potential crossover between referral fees, damages based agreements, After the Event insurance, third party funding etc. would be covered.

31. There are other advantages which may be obtained from such an approach. While I have recommended that damages based agreements should be permitted and enforceable. I am very alive to the potential for abuse of the system to the detriment of the public: *"What can be used for the benefit of all can also be abused to the benefit of some."*[7] A few might bring great ingenuity to bear upon the process with a view to distorting it in their favour. Having one regulator to police the whole litigation process or system is likely to give rise to a

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[6] The Insolvency Service, *Consultation on Reforms to the Regulation of Insolvency Practitioners* (February 2011)

[7] Lord Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding,' Harbour Litigation Funding First Annual Lecture (8 May 2013)

superior understanding and overview of, for example, damages based agreements than the existing arrangements provide. The regulator should become more skilled at spotting potential abuses. There should be less chance that some activities of questionable motivation and outcome will fall between the respective stools of two separate regulators. In short, all the arguments which can be deployed in favour of specialisation, for example, of the legal profession – a Rubicon which was crossed many years ago, and of the judiciary – a Rubicon being slowly negotiated at present, can be deployed to support a specialist regulator.

32. That the regulator(s) will require to be vigilant is emphasised by the new landscape which outside capital will bring. There is a real risk to the public interest in the advent of alternative business structures alone without adding to the risk by a further relaxation of strictures which presently constrain the legal profession, at least in theory. As Lord Dyson, the new Master of the Rolls, pointed out in his Keynote Address to The Law Society's Civil Justice Section Conference on 18 October 2012, there is a risk that "*the external investor will set the parameters of practice in their favour rather than in the consumers' best interests or the public interest*." Lord Dyson quoted the immediate past President of the American Bar Association, William T Robinson III as saying:-

> *"There is a strong sense that in the ABS approach there is an inherent conflict of interest. Investors invest to make money and, as we say, 'he or she who has the gold makes the golden rule'."*

33. With such added pressures from external sources the role of the regulator will become even more important and the need to be vigilant and well informed of the latest practices even more critical. I am inclined to the view that a single regulator charged with policing the litigation process stands a better chance of achieving public confidence than the present patchwork arrangements. At the very least we require the issue to be debated.

34. It is also necessary for me to spell out what I mean when I refer to a regulator being vigilant. I am in no doubt that the recommendations in this Report will, if implemented, provide the public with greater access to the means whereby they can exercise their legal rights. However, there is also scope for the public's rights to be abused. For there to be proper protection of the public, the regulator will require to do more than deal with complaints or alleged abuses which are brought to its attention. The regulator will require to make spot checks on those being regulated to ensure that there is compliance. I expect the regulator to be proactive rather than reactive. Regular audits will be necessary.

35. There are also advantages to the players in the system in having a confident, well informed regulator. If the regulator has a very clear understanding of the underlying purpose of the regulations, misconceived applications of the regulations by the regulator should be avoided to the benefit of all.

36. A single regulator should also provide a level playing field for all the players. The potential problems created by different regulators coming up with different solutions to the same issue and different interpretations of the same regulation should be avoided. It is in everyone's interests that the public has confidence in the litigation process and, where appropriate, makes use of it to test their legal rights. It is better for all that there is a

confident competent regulator. That is most likely to be achieved by having a single regulator for the litigation process.

37. The prospect that a firm of solicitors may have more than one regulator is not new. Some firms of solicitors provide financial advice to clients and in that respect are regulated by the Financial Conduct Authority, formerly the Financial Services Authority. When multi-disciplinary practices become a reality, there will inevitably be several regulators looking at the activities of one business entity.

38. Thus, the latter part of this Chapter is a plea for there to be debate on the means by which the professions are regulated as deregulation increases.

APPENDIX 1 MEETINGS HELD BY THE REVIEW OF EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND

The Judiciary

During the course of the Review, the Chairman and members of the Review Team held several meetings with members of the judiciary to discuss the issues raised in the Consultation Paper, and the responses to it.

Two meetings were held with the Lord President's Consultative Committee on Commercial Actions.

The Chairman and the Secretary to the Review observed three meetings of the Lord President's Advisory Committee on Solicitors' Fees.

Scottish Government

On 21 March 2012 the Chairman attended a meeting with officials from the Scottish Government.

Other Public Bodies

Meetings were held with representatives from:

14 February 2012	The Scottish Legal Aid Board
15 February 2012	The Employment Appeal Tribunal
9 May 2013	Central Legal Office (NHS Scotland)

Public Meetings

A series of four public meetings were held across Scotland in order to ascertain the views of the public on the issues raised in the Consultation Paper:

1 February 2012	Perth Public Meeting
15 February 2012	Glasgow Public Meeting
5 March 2012	Edinburgh Public Meeting
7 March 2012	Aberdeen Public Meeting

Legal Profession

Meetings were held with:

14 June 2011	Paull & Williamsons
16 June 2011	Irwin Mitchell
7 July 2011	Dundas & Wilson

7 July 2011	Maclay Murray & Spens
16 December 2011	The Law Society of Scotland
16 January 2012	Simpson and Marwick
23 January 2012	Thorntons
26 January 2012	The Scottish Government Legal Directorate
30 January 2012	Andrew Smith QC
13 February 2012	Bonnar and Company
22 February 2012	Brodies LLP
22 February 2012	Shepherd and Wedderburn
23 February 2012	Digby Brown
24 February 2012	McGrigors LLP
5 March 2012	Office of the Advocate General
6 March 2012	Dallas McMillan
6 March 2012	Peacock Johnston
7 March 2012	Quantum Claims
8 March 2012	Raeburn Christie Clark & Wallace
20 March 2012	MacRoberts LLP
23 May 2012	HBM Sayers
29 November 2012	The Vice-Dean of the Faculty of Advocates
14 January 2013	Commercial Procedure Practitioners
22 April 2013	Clinical Negligence Practitioners

Other Individuals and Groups

14 June 2011	John Skipper, Assistant General Counsel BP plc
16 June 2011	Murgitroyd & Company
8 September 2011	Association of British Insurers
10 January 2012	Consumer Focus
17 January 2012	Professor Alan Paterson, Strathclyde University
30 January 2012	Marks and Clerk LLP
31 January 2012	Aviva Insurance
9 February 2012	Friends of the Earth
13 February 2012	Professor John Sawkins, Heriot-Watt University
23 February 2012	Kenneth Cumming, Auditor of the Court of Session
20 March 2012	Citizens Advice Scotland
21 March 2012	Association of Personal Injury Lawyers
21 March 2012	Alex Quinn
21 March 2012	Stewart Mullan
22 March 2012	Motor Accident Solicitors Society
27 March 2012	Scottish Women's Aid
2 April 2012	Clydeside Action on Asbestos
18 June 2012	Professor Dame Hazel Genn QC, University College London
19 June 2012	Europe Economics
20 July 2012	The Access to Justice Foundation
27 September 2012	The Association of Independent Law Accountants

Other Jurisdictions

The Chairman and Secretary to the Review visited Birmingham in December 2011 where they attended at St. Phillips Chambers and met with H H Judge Simon Brown QC, H H Judge David Grant and Ed Pepperall, barrister. This meeting provided the Review Team with a greater understanding of the costs management regime which was then in place in the Mercantile and Technology and Construction Courts in Birmingham.

In April 2012 the Chairman and Secretary to the Review visited London where they met with representatives from the law firms McGrigors LLP, Bird & Bird, legal expenses insurer DAS and Robert Young of Europe Economics. They also met with the Secretary to, and a member of, the Civil Justice Council and officials from the Ministry of Justice. Those meetings provided the Review Team with an increased understanding of the costs reforms proposed by Lord Justice Jackson for England and Wales.

A further visit to London took place in February 2013 to meet with Lord Justice Jackson who provided valuable insight from his experience of conducting the review of costs in England and Wales.

Reference Group Meetings

16 May 2011
6 September 2011
26 October 2011
24 September 2012
29 October 2012
10 December 2012
28 January 2013
11 March 2013

RECOMMENDATIONS

CHAPTER 2 COST OF LITIGATION – JUDICIAL EXPENSES

Recovery of Judicial Expenses

Commercial actions

1. The present criteria for awarding an additional fee should be revised for commercial actions. This would involve listing a number of criteria to include i) complexity ii) specialised knowledge or skill iii) whether there is any legal precedent for the issues iv) urgency v) likely volume of paperwork or electronic material vi) number of parties with a distinct interest vii) net value of the claim viii) commercial status of the parties and ix) expert witness requirements. Each of these criteria should be given a weighting and solicitors required to complete a pro-forma setting out their assessment of the case under each of the criteria when arriving at their view on the level of additional fee which should apply. (Paragraph 66)

2. The concept of an additional fee should be retained for commercial actions with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. (Paragraph 78)

3. Any application for an additional fee in a commercial action should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. (Paragraph 78)

4. The block table of fees should be framed to more fully reflect the procedure in commercial actions and should be designed to incentivise efficiency. (Paragraph 78)

5. There should be an option available to parties and the court in commercial cases whereby the hourly rates used in the calculation of judicial expenses are the hourly rates which the solicitors for the successful party have charged their client. (Paragraph 78)

Actions subject to judicial case management

6. The concept of an additional fee should be retained for all other litigations subject to active judicial case management with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. (Paragraph 79)

7. Any application for an additional fee should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. (Paragraph 79)

8. The existing block tables of fees should be revised with a view to incentivising efficiency. (Paragraph 79)

Actions subject to case flow management

9. The issue of whether there should be an additional fee in actions subject to case flow management, such as personal injury actions, should be resolved at the conclusion of the proceedings, as is the case at present. The maximum percentage increase should be 100%. (Paragraph 80)

10. The block tables of fees for personal injury actions should be revised with a view to incentivising efficiency. (Paragraph 80)

Motions for an additional fee

11. The Judicial Institute for Scotland should include in its training programme guidance as to how to approach motions for an additional fee. (Paragraph 81)

12. In actions subject to judicial case management the member of the judiciary in whose docket the case is placed should determine whether an additional fee is appropriate and what the percentage increase should be. (Paragraph 81)

13. In actions subject to case flow management the member of the judiciary hearing the motion for an additional fee should determine whether an additional fee is appropriate and what the percentage increase should be. (Paragraph 81)

Review of level of fees for litigation

14. The Scottish Civil Justice Council should form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses. Membership should include the users of the system (such as the existing members of the Lord President's Advisory Committee on Solicitors' Fees), the funders of the system (such as a representative of the insurance industry and also a representative of the Scottish Legal Aid Board), a sheriff court auditor, a sheriff, a law accountant, a lay person who may well be an economist and someone to represent the interests of the consumer. (Paragraph 102)

Interest on Judicial Expenses

15. The courts should have the power to award interest on judicial expenses from 28 days after an account of expenses has been lodged. (Paragraph 130)

16. An account of expenses in sheriff court actions must be lodged no later than four months from the date of the final interlocutor. If the party fails to comply with this time limit, leave of the court will be required to lodge the account late, subject to such conditions (if any) as the court thinks fit to impose. (Paragraph 130)

CHAPTER 3 COST OF LITIGATION – JUDICIAL EXPENSES

Counsel's Fees

The sheriff court

17. The current test for granting sanction for the employment of counsel in the sheriff court should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied. (Paragraph 8)

18. When deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them. (Paragraph 9)

Actions subject to judicial case management in the sheriff court

19. For cases proceeding under active judicial case management in the sheriff court a motion for sanction for the employment of counsel should be made at the start of the proceedings or, at a later stage, on cause shown. (Paragraph 15)

20. Counsel's fees should be a competent outlay in a judicial account of expenses only from the date of an interlocutor sanctioning the employment of counsel. (Paragraph 15)

21. Where counsel is required to be instructed urgently, either before the raising of proceedings or during the proceedings, parties may apply for retrospective sanction provided that the application for sanction is sought as soon as is reasonably practicable following the instruction of counsel, which will normally be at the next case management hearing. Any refusal of a motion will be *in hoc statu* and a new motion can be enrolled in the event of there being a change in circumstances. (Paragraph 15)

22. The amount of fees for counsel which can be recovered as an outlay in a judicial account should be stipulated by the sheriff at the hearing to sanction the employment of counsel. (Paragraph 25)

Court of Session

23. In actions in the Court of Session, an instructing solicitor should be obliged to inform the opposing party that junior and/or senior counsel has been instructed. (Paragraph 38)

Recoverable charges for counsel

24. Counsel and solicitor advocates should be entitled to recover a cancellation fee where a case settles within two working days of the first scheduled day of a hearing. The fee should be determined by the number of days for which the hearing was set down. It should be calculated as follows:

Scheduled length of hearing	Fee
Up to 7 days	1 day
Up to 11 days	2 days
Up to 15 days	2½ days
16 days or more	3 days

Equivalent provisions should apply if a case settles after a hearing commences. That is to say, the fee should be for one day if there are up to seven days of the hearing remaining; two days if there are up to eleven days remaining; and so forth. (Paragraph 57)

25. Save for fees to cover the three elements of preparation, appearance and cancellation, counsel and solicitor advocates should not be able to recover any other payment. The concept of a commitment fee should play no part in a judicial account. (Paragraph 58)

Fees of expert witnesses

26. When assessing the reasonableness of instructing an expert and what that expert should be paid, the court should have regard to the proportionality of instructing the expert and his or her charges. (Paragraph 64)

27. Certification of an expert witness should be obtained prior to his or her instruction in cases proceeding under active judicial case management in the Court of Session and in the sheriff court or, where that is not possible, such as when an expert has to be instructed before the raising of the action, as soon as reasonably practicable after proceedings are initiated. In most circumstances, this will be at the first case management hearing. Any refusal of a motion will be *in hoc statu*. The test to be applied will be whether that instruction at that time was reasonable. (Paragraph 73)

28. For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, expert witnesses' fees should be recoverable from the date of certification. For parties who seek retrospective sanction of expert witnesses instructed prior to the commencement of litigation, any fees reasonably incurred would become a competent outlay at this stage. Should a party fail to obtain certification as soon as reasonably practicable after proceedings are initiated, they should not be able to recover in a judicial account any fee charged by the expert witness during the period between when it would have been reasonably practicable to obtain certification and when it was achieved. (Paragraph 77)

29. For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, the amount of expert witnesses' fees that can be recovered as an outlay in a judicial account should be stipulated by the presiding judicial officer at the hearing for the certification of an expert witness. (Paragraph 87)

CHAPTER 4 PREDICTABILITY

Fixed expenses

30. The court should have a discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. This should be reflected in the rules for the new simple procedure. (Paragraph 21)

31. With the exception of personal injury actions, recoverable expenses in actions under the simple procedure should be fixed. (Paragraph 69)

32. When a case is remitted from the simple procedure to the ordinary cause roll, the scale upon which expenses should be assessed should be a matter for the discretion of the court that allows the remit and should be determined at the time the remit is made. (Paragraph 70)

33. A model along the lines of the Patents County Court should be introduced for cases proceeding under Chapter 47 of the Rules of the Court of Session (commercial actions). (Paragraph 72)

Summary assessment of expenses

34. A procedure for the summary assessment of expenses should be introduced as a pilot for commercial actions in the Court of Session and sheriff court. (Paragraph 107)

Expenses management

35. A system of expenses management should be introduced as a pilot scheme for commercial actions in the Court of Session. (Paragraph 145)

36. One of the sheriff courts where commercial procedures have been available for some time, such as Glasgow where commercial procedures have been available since 1999, should participate in the expenses management pilot. (Paragraph 146)

CHAPTER 5 PROTECTIVE EXPENSES ORDERS

37. The power to apply for a protective expenses order in Scotland should be available in all public interest cases. However, the decision on whether to award a protective expenses order, and at what level, ought to be a matter for judicial discretion unless otherwise prescribed in Rules of Court for particular types of actions, such as those falling within the scope of the Public Participation Directive. (Paragraph 33).

38. Protective expenses orders ought to be available in multi-party actions but only where a public interest can be demonstrated. (Paragraph 37)

CHAPTER 6 BEFORE THE EVENT INSURANCE

39. Where an insured exercises the right to instruct a solicitor of choice, and that solicitor and the insurer cannot agree rates, the difference between what the insurer pays its panel solicitors and what the solicitor of choice charges should be borne by the insured. (Paragraph 64)

40. It should be made clear in the Before the Event insurance policy that should the insured exercise the right to instruct a solicitor of choice rather than be represented by the insurer's choice of solicitor, he or she may be liable to pay any difference between the respective charges. (Paragraph 65)

41. Solicitors should be under an obligation to explore with their clients all potential funding options, including the possibility that the client may be covered by an existing Before the Event insurance policy, at the time when the solicitor is first instructed. In addition, solicitors should be obliged to write to clients with their reasoned recommendation as to which funding option best suits the client's position. The letter should specify all other forms of funding for which the client might qualify, such as legal aid, speculative fee agreements or damages based agreements and specify why, in the opinion of the solicitor, the method recommended is the best funding mechanism for the client. (Paragraph 79)

CHAPTER 7 SPECULATIVE FEE AGREEMENTS

42. The maximum success fee which can be charged in a speculative fee agreement in relation to personal injury cases should be capped with respect to what may be taken out of damages as follows. A cap of 20% (inclusive of VAT) should be set on the first £100,000 of damages, 10% (inclusive of VAT) on damages between £100,001 and £500,000, and 2.5% (inclusive of VAT) on all damages over £500,000. These caps should apply to all heads of damages. Solicitors should not be obliged to offset the judicial expenses against the success fee to which they are entitled. (Paragraph 67)

43. The maximum success fee which can be charged in a speculative fee agreement in relation to an application to an employment tribunal should be capped at 35% (inclusive of VAT) of the monetary award recovered. (Paragraph 68)

44. For all other civil actions funded by speculative fee agreements, the maximum success fee which can be charged should be capped at 50% of the monetary award recovered. (Paragraph 69)

45. In a speculative fee agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays, plus VAT, out of the success fee. The only outlay which should remain the responsibility of the client is any premium to obtain After the Event insurance cover, should the client deem that necessary. (Paragraph 72)

CHAPTER 8 QUALIFIED ONE WAY COSTS SHIFTING

46. A qualified one way costs shifting regime should be introduced in Scotland for personal injury, including clinical negligence, litigation. The regime should apply whether there is a single pursuer or a multiplicity of pursuers. (Paragraph 51)

47. A qualified one way costs shifting regime should apply to appeals from decisions in personal injury cases. (Paragraph 53)

48. In the event that a pursuer's successful action for personal injuries includes an unsuccessful non-personal injury element and there is an order for expenses against the pursuer for that unsuccessful element, such award will be enforceable against the pursuer. (Paragraph 54)

49. If the claim, or an element of it, is made for the financial benefit of someone other than the pursuer, the benefit of qualified one way costs shifting will extend only to the element of the claim which may benefit the pursuer. (Paragraph 54)

50. In the event that the recommendation of the Scottish Civil Courts Review to adopt the rule in *Carver v BAA plc* is implemented in Scotland, the court should have a discretion to determine whether the pursuer acted reasonably in not accepting a defender's tender and thus the extent to which the pursuer should be liable to meet the defender's entitlement to judicial expenses from the date of the tender. In the event that the recommendation of the Scottish Civil Courts Review is not implemented, the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded. (Paragraph 72)

51. Where the court finds that fraud on the part of the pursuer is established on the balance of probabilities, the pursuer should lose the benefit of one way costs shifting. (Paragraph 75)

52. Where a pursuer's conduct is found by the court to have been an abuse of process, the pursuer should lose the benefit of one way costs shifting. (Paragraph 76)

53. Where a pursuer's case is disposed of summarily, the pursuer should lose the benefit of one way costs shifting. Conversely, the pursuer should be entitled to found on the defender's failure to move for summary disposal should the defender subsequently argue that the benefit of one way costs shifting should fly off. (Paragraph 77)

54. Where a pursuer conducts the litigation in an unreasonable manner, the pursuer should lose the benefit of one way costs shifting. For the avoidance of doubt, the test of unreasonableness should be that set out in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*. (Paragraph 78)

CHAPTER 9 DAMAGES BASED AGREEMENTS

55. Damages based agreements entered into by solicitors in cases where a monetary award is sought should be enforceable in Scotland, other than in family actions. (Paragraph 70)

56. Where a damages based agreement has been entered into, solicitors should be entitled to retain the judicial expenses in addition to the agreed success fee. (Paragraph 81)

57. In personal injury cases funded by a damages based agreement, the maximum percentage which can be deducted from damages should be on a sliding scale, as follows. On the first £100,000 of damages, the maximum should be set at 20% (inclusive of VAT), on damages between £100,001 and £500,000 the maximum should be set at 10% (inclusive of VAT), and on any damages over £500,000, the maximum should be set at 2.5% (inclusive of VAT). (Paragraph 88)

58. In employment tribunal cases funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 35% (inclusive of VAT). (Paragraph 89)

59. In commercial actions funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 50% (inclusive of VAT). (Paragraph 90)

60. Damages based agreements may be entered into in commercial cases on a 'no win lower fee' basis. (Paragraph 90)

61. All damages based agreements in personal injury actions should be on the basis of 'no win no fee' as opposed to 'no win lower fee.' (Paragraph 91)

62. The damages from which a success fee may be recoverable under a damages based agreement may include damages for future loss. (Paragraph 103)

63. Should an order for periodical payments be made by the courts, the success fee in a damages based agreement should be calculated by reference to the award of damages excluding the periodical element. (Paragraph 108)

64. Where a pursuer is funded by a damages based agreement and the agreed damages contains an element for future loss in excess of £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid by way of a lump sum as opposed to periodical payments before the pursuer's solicitor will be entitled to make a deduction from the future loss element of an award of damages in order to satisfy the success fee. (Paragraph 111)

65. In the preparation of the report from an independent actuary, the actuary must meet the pursuer outwith the presence of the solicitor. The liability for the actuary's fee should fall upon the solicitor should the solicitor advise that a lump sum award be made, regardless of the actuarial recommendation. (Paragraph 111)

66. Where a client is advised by his or her solicitor to accept periodical payments but elects to accept a lump sum payment of damages instead, the solicitor is entitled to calculate his or her success fee only by reference to the award of damages, excluding the periodical element which the client would have received had the advice been accepted. (Paragraph 112)

67. In a damages based agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays out of the success fee, plus VAT. (Paragraph 115)

68. Only solicitors, members of the Faculty of Advocates and claims management companies which are regulated should be entitled to enter into damages based agreements. (Paragraph 115)

69. Prior to entering into a damages based agreement with a client, a lawyer or claims management company should be obliged to write to the client setting out in clear language what percentage will be deducted by way of a fee from the damages awarded, when and how the client may terminate the agreement, and the client's obligations in the event of such termination by the client. How conflicts of interest are to be managed should they arise must also be specified. It should also be made clear who will have the responsibility to meet an award of judicial expenses against the client. (Paragraph 116)

70. There should be a 14 day cooling off period after a client enters into a damages based agreement which would be mandatory, save in circumstances where a client's interests would be prejudiced. (Paragraph 117)

CHAPTER 10 REFERRAL FEES

71. Only regulated bodies should be entitled to charge a referral fee. (Paragraph 64)

72. Solicitors should be under an obligation to provide clients who have been referred to them by a third party agency with a written statement which should a) list all potential factors which a responsible referring agency might consider relevant when making a referral and b) indicate whether such factors played a part in the selection of the particular solicitor for the referral. Relevant factors would include, but not necessarily be limited to i) the particular skill possessed by the solicitor, ii) whether there has been a quality control audit of the solicitor or the firm of solicitors, iii) whether the result of such an audit is available for inspection by the client, and iv) the basis upon which the solicitor is to be remunerated if legal costs are to be met by the referring agency, for example, by a Before the Event insurer. The statement should also indicate that the services provided may be available elsewhere, for example, from a firm that does not have an arrangement with the referring party. The statement should also set out the means by which the referring agency obtains its business. (Paragraph 68)

73. The referring agency should be under an obligation to provide to the solicitors to whom the client is being referred such information as is necessary to enable the solicitors to fulfil their obligations. (Paragraph 68)

74. Claims management companies, and those acting on their behalf, should not be permitted to cold call prospective clients. (Paragraph 70)

75. Solicitors who obtain clients from a claims management company should be obliged to satisfy themselves that the claims management company does not obtain clients by cold calling. (Paragraph 70)

CHAPTER 11 ALTERNATIVE SOURCES OF FUNDING

Third Party Funding

76. There should be a voluntary Code of Practice to which third party funders should conform. (Paragraph 49)

77. A professional funder who finances part of a pursuer's expenses of litigation should be potentially liable for the judicial expenses of the opposing party to the extent of the funding provided. Any award of expenses against the funded litigant should be on a joint and several basis, with the funder's liability capped at the extent of the funding provided by it. (Paragraph 57)

78. In all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner as a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case. (Paragraph 63)

Self-Funding Schemes

79. The Scottish Government should commission financial modelling work on the viability of establishing a Contingent Legal Aid Fund to fund outlays in cases of alleged clinical negligence. The outcome of the modelling will dictate the parameters of the Contingent Legal Aid Fund. (Paragraph 127)

Pro Bono Funding of Litigation

80. The civil courts in Scotland should be granted an express power to enable them to make an award of expenses in favour of a successful party who has been represented on a *pro bono* basis. Payment of that award should be made to a charity prescribed by the Lord President. 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. (Paragraph 157)

81. When a judicial account of expenses is prepared by or on behalf of a party whose representation was *pro bono,* it should be prepared on the normal party and party basis. (Paragraph 161)

CHAPTER 12 MULTI-PARTY ACTIONS

82. Expenses management should be mandatory in all actions that proceed under multi-party procedure unless the case management judge determines otherwise, having regard to all the circumstances. (Paragraph 71)

83. Damages based agreements should be available for use in multi-party actions, subject to the same restrictions as are set out in Chapter 9 for damages based agreements. (Paragraph 81)

84. The test for making an award of expenses against the multi-party action fund should be that set out in section 19 of the Legal Aid (Scotland) Act 1986. (Paragraph 85)

CHAPTER 13 REGULATION

85. There ought to be a regulator of claims management companies. (Paragraph 18)