Paths to Justice?

Essays prompted by the Gill Review

Edited by
David McArdle

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Paths to Justice?

Editor's foreword

David McArdle, Senior Lecturer in Law, University of Stirling

I am delighted to introduce this collection of short essays and opinion pieces on the future of civil justice in Scotland. It is my hope that readers will be sufficiently motivated by the sentiments expressed herein to take up the cudgels and make their own contributions to this important ongoing debate. This publication was instigated and commissioned by the Scottish Consumer Council (SCC)- an initiative that was prompted by the findings of the SCC's Civil Justice Advisory Group chaired by Lord Coulsfield. I, the contributors and SCOLAG would like to thank Lord Coulsfield and the SCC for their sterling work in this regard and for their contribution to the debate on civil justice reform in Scotland generally.

The use of the question-mark in the title 'Paths to Justice?' serves to indicate that these contributions are by no means the last word on the matter of civil justice reform, and neither are they intended to be. To the contrary, it is the hope of SCOLAG, the Scottish Consumer Council and the individual contributors that others will have their own views – perhaps diametrically opposed to those offered here – and will be motivated to share them, perhaps via the pages of *SCOLAG Legal Journal*, as the Gill Review gathers pace. There is plenty of fertile ground in what follows. Some will contend that the merits of alternative dispute resolution can be over-played; that in-court advisers are no panacea; and that dedicated family courts will cause as many problems as they solve. Others will feel that school mooting competitions, where the successful participants invariably emanate from the private sector and the 'better' state schools, actually do little to facilitate 'access to justice' in those communities most in need; or that law firms should be obliged to undertake legal aid work, secure in the knowledge that you don't meet many impoverished solicitors. Whatever one's views on the Scottish legal system, there is no better time to share them.

Readers will note the frequency with which the contributors have said (in effect) that 'more research is needed in this area'. While this is always true of law reform, the sentiment is particularly germane on this occasion; there is an ongoing debate to be influenced and time is very much of the essence. The practitioners and advice workers will say 'we don't have the time to take this on', while the academics will say 'we don't have the resources to take this on', and although both sentiments are true it should be noted that there are funding providers out there – such as the Clark Foundation and the Carnegie Trust – that exist to fund projects of such direct relevance to life in Scotland. One is far more likely to get funding from them than from the Executive, and there are opportunities right now to make important, long-lasting contributions to the field. To that end, anyone wishing to engage with these areas, submit funding bids and maybe work towards a postgraduate qualification in law should get in touch. If we at Stirling can't offer advice and supervision we'll introduce you to someone who can.

On a personal note, I'd like to thank the people at SCOLAG for giving me the opportunity to participate in this project, the Scottish Consumer Council for funding it, and of course the contributors for providing me with such high-quality submissions. It should be noted, of course, that all the authors have written in a personal capacity and their views are not necessarily shared by their employers or any other organisation.

Additional copies of this collection can be made available in print or as a PDF file by emailing - d.a.mcardle@stir.ac.uk

Those who would like to receive a copy of this publication in a larger font size can also contact me on 01786 467285 or by emailing d.a.mcardle@stir.ac.uk.

Introduction

Hugh Campbell, QC

I am honoured to be asked to write a short introduction to the excellent compendium of views that follows. Your editor may have considered that, while I have about 38 years of experience in acting for pursuers in personal injury claims, the fact that I am now seeking to wind down my practice may reduce the suspicion that my comments are motivated by self-interest. However, rather than simply using this introduction to outline the submissions that others have made to the collection, I would like to take this opportunity to comment upon an issue that is of particular concern to me – namely, the future funding of personal injury actions.

Lord Gill was appointed Chairman of the Committee in spite of, or perhaps because of, his well-publicised views that the Court of Session should not have to concern itself with personal injury cases of low to moderate value – or perhaps not concern itself with personal injury cases at all. I take an entirely different view. In my opinion, the matter at issue is the fundamental one of access to justice.

It will, I hope, go without saying that the pursuit of industrial injury and disease claims has been of benefit not only to the individual claimant, but to society in general. There is an inordinately greater regard now paid to matters of health and safety than there was a generation ago. That improvement can, in large measure, be seen to have been consequent on the knowledge, increasingly appreciated by the State and by employers large and small, that accidents are not cost-effective. In addition to the impact on the victim and his / her family, there is an adverse effect on the State through the Benefit system, on productivity, and on the insurance industry (and its customers, the employers themselves) when premiums go up. Any policy which seeks to detract from the present impetus is, in my view, to be deplored.

The system for funding personal injury actions has changed radically in the last decade. Civil Legal Aid is a thing of the past, and whereas Trades Unions used to pick up the bill for expenses in the event that a member's action was lost, most of them now no longer do so, acting merely as 'referral agencies' to the small number of firms whom they instruct. Those firms act either on a true speculative basis, or on a speculative basis backed by Legal Insurance cover – such cover being available only to a limited number of firms of proven competence.

The present system for personal injury actions in the Court of Session, since the introduction of the Coulsfield Rules, works well. It has had the support and enthusiasm of the profession and the clients alike. I know of no contradictor to that sweeping statement. It would be perhaps over-simplistic to adopt the adage that 'if it ain't bust, don't fix it'; but it goes a lot deeper than that, and there are numerous strands which, both separately and, more importantly, cumulatively, are involved in that success.

Since the introduction of the Coulsfield Rules, both the average costs of running an action in the Court of Session and the average time taken to run an action have shortened materially. In addition, only a small minority of cases require judicial input, and only a tiny minority proceed to Proof. All but a few of the cases are dealt with by administrative procedures – albeit that these procedures require considerable and carefully time-constrained input, at the various stages of the action, by the agents involved. The encouragement of openness, the requirement for valuations and, for the cases which now get that far, the pre-trial meeting, have each, and cumulatively, meant that cases now settle considerably earlier (and therefore at less cost) than before. Those factors, and the publication at an early stage of a timetable setting out the stages of the action and the date for the Proof (now less than a year from the raising of the action), mean also that clients are happy. 'Good!', you may say. 'Let us introduce Coulsfield-type rules in Sheriff Courts across the country. Then everyone will get the same benefit in their own back yard, at even less cost.' To do so would, in my opinion and those of all the solicitors with whom I have discussed the matter, be a disaster.

The different method of funding of cases now means that solicitors have to be extremely cost-efficient in order to be profitable. At present, five firms of solicitors act as pursuers' agents in well over 90% of the actions for personal injury in the Court of Session. That has two major advantages. Firstly, they are (rightly) seen as centres of excellence, offering levels of expertise that country practitioners could not hope to aspire to; secondly, they are able to act in the way that they do because they have the centralised focus of the Court of Session. About 2250 personal injury cases *per annum* are raised in the Court of Session. Although most originate from central Scotland, there is a substantial number from outlying areas. And in the Central Belt alone, one is looking at representation, in addition to Edinburgh and Glasgow, in Sheriff Courts in Haddington, Linlithgow, Falkirk, Stirling, Airdrie, Hamilton, Lanark, Paisley, Kilmarnock, Ayr and Dumbarton. Were the five firms to have to organise their procedures so as to deal with even a couple of hundred cases *per annum* in those Sheriffdoms, plus even fifty or so cases each *per annum* in the outlying areas, their carefully-pruned resources could not conceivably stretch.

Claimants, therefore, would lose the benefit of the expertise which those firms offer, and *per contra* would be required to instruct firms who do not possess the necessary expertise, even if such firms could be found who would be prepared to take instructions on a funding basis satisfactory to / possible for both client and Agent. Otherwise, they would simply be unable to pursue their claim.

Many of the speculative actions which are taken on by firms are supported by an Insurance Policy. Note that that policy is for the benefit only of the client, in order to protect him from the adverse consequences of a finding in expenses against him. It does not provide any cover for the unsuccessful solicitor or Counsel. But the important factor is that such policies are available for issue only to firms who have a proven record of expertise in handling personal injury claims. Non-specialist firms will not be able to obtain such a policy for their clients – and, without one, it would be a brave or foolhardy client who took the risk in a case in which liability is uncertain. The reason why country and smaller-town litigants can afford in relative safety to litigate is because the specialist firms are able to make indemnity policies available to them on an agency basis – i.e. under the supervision of the experts. One returns, therefore, to 'access to justice', and the prospect that it will be denied. Note also that even Legal Insurance policies do not cover the insured for appeals – so that, if a local Sheriff gets it wrong, (and, with the best will in the world, the quality of Sheriffs' expertise in personal injury is, at best, variable) the client has no redress. The existence of the appellate jurisdiction of the Court of Session may be all very well in theory, but if the prospective appellant cannot fund the appeal, it is useless in practice.

A counter-argument might be that the ability to prorogate jurisdiction for actions by agreement would mean that, in practice, there would be agreement to prorogate the Sheriff Courts in Glasgow or Edinburgh, and the business presently being channelled to the Court of Session would be centralised in those two Sheriff Courts. I see two competing difficulties with that.

Firstly, were such prorogation to become the norm, it would impose formidable difficulties of administration in those two already-overburdened Courts. They might each get another 750 or more cases *per annum*. At present, one frequently-voiced complaint is that Sheriff Court personal injury actions take an inordinately long time. Proof dates for such actions are, as a matter of practice, set down for one day only. If they go ahead (and there is always other preliminary business which will delay the start) they will be continued to another single day, weeks or months into the future, and so on and on and on. With several hundred more cases *per annum,* the system could not cope without a major infusion of funds for buildings and staff.

Secondly - and this is the competing difficulty - agents for Insurers obviously have a duty to promote their clients' interests. They would be correct to advise the Insurers that it was unlikely that the major claimants' firms would be prepared to take on a case which would run in a Sheriffdom in which they did not themselves have an office. In such circumstances, it would potentially be in the Insurer's best interests to refuse any prorogation, in the knowledge that it was likely that the claimant would either be unlikely to obtain representation at all, or that the representation would be likely to be of a standard materially poorer than he would otherwise obtain.

A great many claims raised in the Court of Session settle in the £5000 to £10000 bracket. It is to be hoped that the recent raising of the Summary Cause and Ordinary Action thresholds to £5000 is a pre-emptive strike which will define future targets. Any further increase in the privative jurisdiction of the Sheriff Court would prejudice a disproportionate number of pursuers. Many would be prejudiced by a diminution in level of service; some would lose the opportunity to vindicate their rights altogether. To impose such changes would in my view be deleterious to the system which presently enables the less fortunate in our society to obtain appropriate and expert access to justice, and to do so in circumstances in which, since the advent of the Coulsfield rules, there has been an enthusiastic acceptance not only by the profession, but also, and more important, from the clients, that the service being provided is a good one.

The author writes in a personal capacity.

Developing an enhanced role for public legal education and information

Robert Sutherland, Advocate and Convenor of the Scottish Legal Action Group

The need for public legal education

Most people understand the concept that ignorance of the law is no excuse[1]. It is accepted that as a matter of public policy nobody should be able to escape criminal or civil responsibility for their actions merely because they claim not to know what the actual law is. Rather than having to prove what a person did or did not know, or in order to avoid the consequences of wilful ignorance, knowledge of the law is presumed. Every member of society therefore has a need to be aware of their rights and responsibilities, and of the rights of other members in that society. When I decided to study law with a view to becoming a lawyer I did not at that time fully appreciate how much I did not know about the legal system and the basic concepts of laws that regulate civil society. By the time I had completed my university legal studies I had come to appreciate not only what I had previously been missing out on, but also how important that knowledge was in helping people to empower themselves. Since leaving university I have been appalled at how often the media produce stories where the legal background they refer to is wholly wrong, inaccurate or misleading. In addition my non-lawyer friends have from time to time asked for advice or information about a wide variety of law related topics that affect their daily lives or the lives of other friends or family. The fact that they do so is not just due to wanting advice from someone who might help; it is also a reflection of the more general problem of people having only a limited understanding of the laws and the legal system of the country they live in.

My experience reflects a wider and deeper problem. A study on judicial review procedure in Scotland[2] found that in social welfare law cases, which regularly involve complex legislation and clients from disadvantaged backgrounds, there was a heavy premium on the quality of advice given by lay advice agencies, particularly in identifying a legal remedy. The geographic spread of cases was patchy and could not be attributed to objective factors such as population size or local authority policies. The level of activity therefore was determined by the availability and quality of advice from advice agencies, which varied according to subject-matter and geography. A study of two English local authorities' internal review procedures for decision making in homelessness cases[3] concluded that officials believed that where an applicant was legally represented that person had a greater chance of success. The data from the study demonstrated that the practice of internal review changed with legal representation, and that greater caution was exercised in an internal review where a lawyer was involved. The *Paths to Justice* studies[4] revealed not only that it was common for people to experience legal problems, but that many of those problems were never resolved satisfactorily, that very few were ever resolved by legal proceedings, and that the public view of the legal system was largely negative. A research report of a study carried out by the Legal Services Research Centre first published in 2004[5] found that nothing was done to solve one in five civil law problems. In a third of these cases this was attributable to those involved not understanding their legal rights or not knowing how to get help.

The key objectives of any justice system ought to be accessibility, efficiency and fairness. Ensuring that the laws and the justice system are accessible is a cornerstone of democracy and is essential to the effective functioning of a legal system. It seems obvious that if it is to be accessible, individuals should be able to make informed decisions about rights as a citizen, and that in order to participate effectively it is necessary to have the information needed to make such decisions and become actively engaged. The studies referred to above show that the vast majority of people do not in fact have the knowledge necessary to deal with problems that affect their legal rights, and that for a variety of reasons they do not access either the advice or information required. One significant reason is a lack of understanding of what those rights are. Another is a lack of sources of information, or of where to go for information.

Understanding how the legal system works and the basic concepts which affect peoples' daily lives is important. People who have an informed understanding of the laws that govern them are less likely to be in conflict with those laws and the justice system that upholds them. Numerous studies show that information and education and increasing 'social capital' are important aspects of crime prevention.[6] As already noted, there is a need to be aware of individual rights and responsibilities. Knowledge about the law can help people identify the kind of legal advice or assistance they may require. People who come in contact with the system - whether as offender, victim, potential litigant or witness - may not be aware of their obligations or where to get information about their situation.

In countries with a codified legal system it can be made relatively easy to obtain basic information about the applicable law and parties rights than in common law jurisdictions. For example in France the Code Civil, Code Penal and Code of Criminal Procedure are published in thick red volumes each year and are 'available from all good bookshops'. Each Code provides a detailed description of the court system, including appeals and arbitration procedures, as well as the laws governing all aspects of French life, from definitions of crimes to sentencing policy for each crime, and from the running of elections to divorce law. In common law jurisdictions the law can be seen as less accessible, and certainly there is ample evidence to suggest that the need to address this issue is a pressing one. It is for these reasons that their there is a need to develop an enhanced role for public legal education and information in Scotland.

What public legal education does

Public legal education and information is not intended to replace the services of a lawyer where it is required, but often it is helpful to have information about the law in question, in addition to seeking advice. Its function is to help people understand their

rights and whether or not they need more specialised advice or assistance. In cases where this is not necessary, or because it is not available, it can act as a back up resource.

Ways of providing public legal education

One common way of providing legal education and information to those who need it is through public funding of community legal services. Australia and Canada are examples of countries where the provision of independent, community managed, not-for-profit legal centres are a key component of the provision of legal services and information through either specialist clinics or general advice and information services. These can use a mixture of paid lawyers and volunteers to provide a variety of services. In Scotland, the Legal Services Agency has published leaflets covering the whole range of advice areas in which they specialise as well as books on housing law matters and also on human rights and criminal injuries compensation. It also runs an extensive series of courses on a wide variety of subjects, many devised for non-legally qualified persons such as Citizens Advice Bureau volunteers. The Legal Action Group in England and SCOLAG in Scotland seek to improve public understanding of the law and legal services through publications, seminars and other means

Traditional formats for the provision of information can be supplemented or replaced by DVDs. A good example in Scotland is the dissemination of materials under the Vulnerable Witnesses (Scotland) Act, 2004 via DVDs as well as the printed word. Another possible resource is phone lines, staffed by people who do not provide advice on a particular legal problem but assist in relation to the legal system generally and direct people to places to go to get particular help. As well as live calls there is also scope for pre-recorded information being available on the telephone. Examples in Canada are the *Dial-a-law* and *Téléphone Juridique* services. Other jurisdictions make more use than we of speakers, seminars and workshops on specific legal topics that are aimed at the public through adult education courses or as part of a public legal education and information service, while an important way of introducing young people to the legal system has been the national mooting competitions that many schools take part in each year. For several years members of the Faculty of Advocates have organised mini-trials for pupils at some secondary schools as a direct response to the finding in the Paths to Justice Scotland research about the widespread lack of knowledge amongst the public about the civil and criminal justice systems.

Legal clinics staffed by law students are well established at Edinburgh and Strathclyde universities.[7] In British Columbia the People's Law School was founded by law students and as well as publishing and distributing free booklets on popular legal subjects, its activities have now expanded to include a touring theatre troupe (Justice Theatre) which provides courtroom dramatisations on a variety of legal topics to elementary and secondary school pupils. In Australia the Clinical Legal Education Program aims to promote public interest lawyering among university students and improve the quality of, and access to, legal assistance for socially and economically disadvantaged members of the community, and whilst some of these are directly government funded, others are not – such as mini-trials, TV programming and university law clinics. The Alberta Law Foundation, established under the Legal Profession Act of 2000, operates law libraries, provides programs and facilities to contribute to the legal education and knowledge of the people of Alberta, assists student and native people's legal aid programs, and contributes 25% of its income to the cost of legal aid provision. The Foundation is funded by the interest which is paid on client's funds held in lawyer's general trust accounts. Television and radio programmes with strong and accurate legal content have a role to play, while the internet obviously provides considerable scope for providing information and educational material.

Recent developments in England

Following publication of the *Paths to Justice* study the Legal Action Group, the Advice Services Alliance and the Citizenship Foundation argued that public legal education is a right.[8] In December 2005 the Department of Constitutional Affairs established a Public Legal Education Strategy Task Force, the report[9] of which identifies obstacles to effective public legal education ('PLE') and recommends that a step change is required in order for PLE to achieve its full potential. The report sets out the strategic tasks necessary for PLE development, and proposes that a new and independent PLE Centre is formed to focus solely on implementation of PLE strategy. In order to avoid delay this should take the form of a not-for-profit company in the first instance, but leading to a non-departmental public body acting under a statutory remit as soon as the necessary legislation can be enacted. First year funding would be £1.5m, with seven key tasks to be undertaken during its first year.

Whither Scotland?

The available research suggests that lack of knowledge about legal rights and the legal system is just as prevalent in Scotland as in England. The bottom line is that ignorance of the law and the legal system is an access to justice issue. In comparison to other jurisdictions there is a marked dearth of any central initiative to deal with this issue. When comparing the developments in England to the position in Scotland we can see that a serious attempt is being made to address this south of the border, but, whilst there are some ad hoc initiatives in Scotland, there is no sign of an equivalent political impetus to develop any coherent strategy for public legal education. Civil justice reform and access to justice in Scotland give the appearance of being firmly focussed on structures, processes and procedures. It would be nice to think that one day we might get to look at the wider picture and work on a strategy which tries to develop wider public understanding of the law for the betterment of individuals, society and the justice system.

1 The origins lie in the Latin phrases *ignorantia juris non excusat* ('ignorance of the law does not excuse') or *ignorantia legis neminem excusat* ('ignorance of the law excuses no one').

2 T. Mullen et al (1996) *Judicial Review in Scotland* (London, John Wiley and Sons).

3 D. Cowan and S. Halliday (2003) *The Appeal of Internal Review* (Oxford, Hart Publishing).

4 H. Genn (1999) *Paths to Justice: What People Do and Think About Going to Law* (Oxford, Hart Publishing); H. Genn and J. Paterson (2001) *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford, Hart Publishing).

5 Legal Services Research Centre (2006) *Causes of Action: Civil Law and Social Justice*, (2nd edition), Research Paper No. 14 (London, The Stationery Office).

6 One famous US study (the Scope/High project) started in the 1960s showed that children offered high quality pre-school education and activities which were designed not only to be of educational value but also to give the children control over what they chose to do were better employed, in more stable relationships, and much less likely to have been involved in delinquency and crime.

7 On which, see Donald Nicolson's contribution to this publication.

8 Advice Services Alliance et al (2005) *Public Legal Education: a Proposal for Development*, available via www.pleas.org.uk.

9 H. Genn et al (2007) *Developing Capable Citizens: The Role of Public Legal Education*, available via www.pleas.org.uk.

Promoting access to consumer savings and credit

Steve Cornelius, Professor of Law, University of Johannesburg

Introduction

Since the earliest societies, humans have realised that they could achieve more through cooperation. This applies to finance as much as any other aspect of human life. People in financial need have found ways and means of support by pooling some or all of their resources and utilising such resources for mutual benefit. In the Eighteenth Century BC, the Code of Hammurabi referred to a society of traders who contributed to a mutual fund which they could then collectively exploit during their merchant expeditions[1] and the ancient Chinese recognised associations where members would make regular predetermined contributions which would be preserved for mutual benefit and profit. Loans were granted from the pooled resources and profits were distributed equally amongst the members. During the Seventeenth and Eighteenth Centuries friendly societies aimed at mutual aid began to appear in the United Kingdom. Members would make weekly contributions that would be utilised to assist other members who were in dire need due to illness, death, unemployment or other reasons.[2] The Nineteenth Century saw the concept exported to various parts of the world where it was further developed and refined into a concept which has come to be known as 'credit unions'. Credit unions gained in popularity during the Second World War, when all kinds of shortages compelled people to cooperate for mutual benefit,[3] and their popularity remains.

In the United Kingdom, these developments culminated in the passing of the Credit Unions Act, 1979. This provides that a society can be registered as a credit union under the Industrial and Provident Societies Act 1965 if the Financial Services Authority is satisfied that the objects of the society are those of a credit union and that admission to membership of the society is restricted to persons who fulfil a specific qualification which is stated in the rules and is appropriate to a credit union.

In the days of Apartheid, the majority of South Africans had no access to mainstream banking services or any form of lawful consumer credit. The political change which swept over the country in the 1990s did little to redress this situation because economic upliftment would take time and few historically disadvantaged individuals were able to afford the exorbitant fees which banks charged to open and manage bank accounts. Furthermore, because of Apartheid, historically disadvantaged individuals had an inherent distrust of traditionally 'white-owned' banks and were reluctant to entrust their money to them. Similarly, the consumer credit legislation in force at the time excluded micro loans from its scope of application[4] and because the vast majority of historically disadvantaged individuals were still in the lower income groups, they also represented the overwhelming majority of credit seekers in the micro lending environment.[5] Finally, the Roman-Dutch common law principle of freedom of contract applied, so that there was no obligation on a credit grantor to conclude a contract with a credit seeker and a credit grantor was not even obliged to furnish reasons for refusing to conclude a credit agreement with any credit seeker. As in all aspects of life in South Africa, it would take time to eradicate institutionalised discrimination in the financial services sector.

One reaction to these problems was a proliferation of micro lenders amongst whom loansharking, usurious interest and other dubious practices were the order of the day. A far more preferable solution saw the rise of the *stokvel*.[6] This is an informal fund in which participants collectively pool their financial resources to provide small-scale rotating loans. Members each contribute a certain fixed monthly amount and would then take turns, rotating on a monthly basis, to each receive a particular month's pooled amount. So if twelve members each contributed £10 per month, each one of them would at one time during the course of the year, receive £120.

Over time, some *stokvels* have become more elaborate. Instead of taking periodical payouts from the *stokvel*, members seek profit by using their pooled resources for investment, to acquire property or to provide interest-bearing loans to other credit seekers. *Stokvels* have thus joined the ranks of the micro lenders and in some instances also participated in some of the more questionable practices prevalent in that industry.[7]

Regulatory controls in Scotland and South Africa

Section 1(3) of the (United Kingdom) Credit Unions Act, 1979 provides that the objects of a credit union are the promotion of thrift among the members of the society by the accumulation of their savings, the creation of sources of credit for the benefit of the members of the society at a fair and reasonable rate of interest, the use and control of the members' savings for their mutual benefit and the training and education of the members in the wise use of money and in the management of their financial affairs.

If one compares these objects to the definition of *stokvel* in South Africa, it becomes clear that the two concepts are similar in nature. In terms of s.1 of the (South African) National Credit Act, 2005:

> 'stokvel' means a formal or informal rotating financial scheme with entertainment, social or economic functions, which
>
> (a) consists of two or more persons in a voluntary association, each of whom has pledged mutual support to the others towards the attainment of specific objectives;
>
> (b) establishes a continuous pool of capital by raising funds by means of the subscriptions of the members;
>
> (c) grants credit to and on behalf of members;
>
> (d) provides for members to share in profits from, and to nominate management of, the scheme; and
>
> (e) relies on self-imposed regulation to protect the interest of its members.[8]

However, there are also some essential differences between credit unions and *stokvels*. The most significant difference lies in the extent of statutory regulation. Credit unions are subject to regulation under the Credit Unions Act, 1979, the Provident Societies Act, 1965 and the Financial Services and Markets Act, 2000. They are also subject to the control of the Financial Services Authority.

The concept of *stokvel* has been placed under statutory definition in South Africa since 1994,[9] but these definitions exist not for the purpose of regulation, but rather to define certain exclusions from statutory regulation, such as the provisions of the Banks Act, 1990. This trend was maintained in the National Credit Act, 2005 where s.8(2)(c) provides that an agreement, irrespective of its form, is not a credit agreement if it is a transaction between a *stokvel* and a member of that *stokvel* in accordance with the rules of that *stokvel*.

While loans by *stokvels* to credit seekers could perceivably qualify as credit agreements for the purposes of the 2005 Act,[10] the regulation of this aspect of the *stokvel* can be easily circumvented by ensuring that any credit seekers become members of the *stokvel* before loans are granted. As a result, *stokvels* are largely free from statutory regulation in South Africa. As can be seen in s.1 above, the definition of '*stokvel*' expressly states that *stokvels* rely on self-imposed regulation to protect the interest of its members.

This highlights another difference between credit unions and *stokvels*. *Stokvels* are voluntary associations and by definition there is no limitation or qualification in so far as it relates to membership. Any person who is willing to subscribe to the rules of and who is acceptable to the current members can become a member. On the other hand, s 1(2) of the Credit Unions Act, 1979 requires a common bond between members of the society. Admission to membership of a credit union must be restricted to persons who all fulfil specific qualifications appropriate to a credit union, as stated in the rules of the union. Qualifications that are appropriate to a credit union include restriction of membership to people who follow a particular occupation, who reside or work in a particular locality, people who are employed by a particular employer or people who are members of another association which is not a credit union.[11]

To regulate or not to regulate?

The Credit Unions Act, 1979 has been criticised as repressive legislation which has restricted the development of Credit Unions in comparison to other jurisdictions that have more supportive regimes.[12] This invariably begs the question whether statutory regulation is preferable to self-regulation. The lack of statutory regulation means that *stokvels* can maintain their informal character. More than a decade after the first democratic elections, South Africa is still plagued with the legacies of Apartheid including a lack of broad economic empowerment and substantial portions of the public who are semi-literate or illiterate. As a result, formal regulation of *stokvels* may discourage individuals from forming and participating in these associations, thereby limiting already limited access to financial services for many historically disadvantaged individuals.

The informal nature of *stokvels* also avoids the additional expenses that would inevitably flow from regulation. Statutory regulation means that credit unions have to comply with numerous directives. These include management, systems and controls, record keeping and reporting, auditing of accounts, maintenance of capital and minimum liquidity requirements.[13] The elaborate nature of regulation seems to justify the criticism against the current regulatory regime applicable to credit unions. Credit unions are no longer friendly societies, but have almost become small banks that cater for some exclusive clients. If such extensive regulations were to be applied in South Africa, it would place virtually insurmountable obstacles in the way of people who may wish to establish *stokvels*.

However, self regulation also has some important drawbacks. The most important disadvantage is the lack of protection which members enjoy. If any *stokvel* funds should be lost due to bad debts, theft or mismanagement, the members will bear that loss.[14] On the other hand, statutory regulation provides that credit unions fall under the Financial Services Compensation Scheme which means that members will be compensated if any credit union should fail.[15] If *stokvel* funds are mismanaged or if members fail to comply with their duties in terms of the *stokvel* rules, there is no public watchdog that can come to the aid of prejudiced members. Members' only recourse will be through the ordinary civil court system and this will most likely be beyond the means of people who are already under financial strain. This has resulted in some instances where members have taken the law into their own hands, with tragic consequences,[16] while a further disadvantage of not regulating *stokvels* is that these societies are targets for money laundering[17] as the formal financial sector is now subject to stringent anti-laundering measures.[18]

Because of statutory regulation, credit union members have the option of complaining to the Financial Ombudsman Service if they do not get satisfaction from the internal complaints procedure of their credit union.[19]

Self-regulation also has another disadvantage in that it makes government support virtually impossible. In a country where the economic empowerment of historically disadvantaged communities is crucial, the inability to provide and manage government support of *stokvels* in a sensible and accountable way, simply does not make sense. Because credit unions are regulated, the Scottish Credit Union Capacity Fund has been able to provided hundreds of thousands of Pounds in grants to credit unions in order to build capacity through employment of staff, upgrading of equipment and improvement of facilities.[20] *Stokvels* in South Africa would benefit nicely from this kind of support!

Conclusion

Credit unions and *stokvels* are similar concepts, developed in different parts of the world to deal with comparable problems. In both instances, members accumulate their contributions for mutual benefit. The main difference between credit unions and *stokvels* lies in the regulatory regime which applies in each instance. And since neither of these seem to be satisfactory, the solution may lie somewhere in between the strict formal regulation of credit unions and the complete self-regulation of *stokvels*. If regulation is too strict, it could stifle the establishment and development of more societies. However, having no regulation can also stifle development as it is impossible to provide adequate support. The challenge for regulators in both jurisdictions is to find some middle ground where societies will not get bogged down by regulation.

1 D. Van der Merwe (1996) Die Stokvel - 'n Ondernemingsregtelike Studie (Bloemfontein, UOFS Press).

2 G. Cole and R. Postgate (1938) *The Common People: 1746 - 1938* (London, Methuen).

3 'About Credit Unions': www.abcul.coop, last accessed 15th August 2007.

4 By notice under section 15A of the Usury Act 73 of 1968.

5 N. Grové (1994) 'Consumer Credit Law' in C. Heyns *et al Discrimination and the Law in South Africa* (Pretoria, Centre for Human Rights).

6 Pronounced 'stock fell'. According to the South African Concise Oxford Dictionary, the word *stokvel* is a (probably Afrikaans or Dutch) corruption of 'stock fair'. During the Nineteenth Century, farmers (and in particular farmers from indigenous communities) formed stock fairs where they would pool their financial resources so that they could effectively compete at cattle auctions to acquire good breeding stock that would be kept for mutual benefit.

7 According to 'The Financial Diaries': www.financialdiaries.com, last accessed 3rd September 2007. Some of these stokvel loans bore interest at a rate of 30% per annum.

8 This definition is essentially the same as the definitions contained earlier in Government Notice 16 of 5 January 1994 published in Gazette 15416 and Government Notice 2173 of 14 December 1994 published in Gazette 16167.

9 Government Notice 16 of 5 January 1994. See also Government Notice 2173 of 14 December 1994.

10 Act 34 of 2005.

11 Section 1(4).

12 'Scottish League of Credit Unions': http://www.scottishcu.org, last accessed 15th August 2007.

13 Financial Services Authority (2007) FSA Handbook http://fsahandbook.info/fsa/html/handbook/, last accessed 3rd September 2007.

14 'The Financial Diaries': www.financialdiaries.com, last accessed 3rd September 2007.

15 'About Credit Unions': www.abcul.coop, last accessed 15th August 2007.

16 'Murder at Stokvel Party' www.news24.co.za, last accessed 1st September 2007.

17 L. De Koker (2002) 'Money Laundering Trends in South Africa' 5(1) *Journal of Money Laundering Control* 27.

18 Such as the Prevention of Organised Crime Act 121 of 1998 and the Financial Intelligence Centre Act 38 of 2001.

19 'About Credit Unions': www.abcul.coop, last accessed 15th August 2007.

20 'Scottish League of Credit Unions': http://www.scottishcu.org, last accessed 15th August 2007.

Legal advice from your local CAB: today and tomorrow

Chloe Clemmons, Advisory Officer, Citizens Advice Scotland

Introduction

This article provides an overview of the work the CAB service is developing in the field of legal advice. Our work in this area involves individual CAB and regional groups of CABx, and work carried out in partnership with other agencies which thus lays a foundation for future development. The article highlights the potential for CABx to provide increased access to legal advice for members of the public by expanding and building on these foundations, and uses brief examples of ongoing cases to illustrate some of the unmet needs that CABx are presently seeking to address.

The CAB service is highly valued by the public. A survey undertaken by MORI in Scotland found that 98% of CAB clients felt they could trust the confidential service, 92% said they would be likely to use the service again, 84% of the general public surveyed believed that CABx help people get fair treatment.[1] The CAB service is developing new ways of delivering services, for example through the launch of Glasgow based Citizens Advice Direct (a CAB providing telephone advice in partnership with other CABx) which has helped to reduce the numbers of clients unable to contact a CAB. However, the lack of sustainable resources means that there is still significant unmet demand for advice.

Background to the CAB service

The Scottish Association of Citizens Advice Bureaux consists of 55 independent CABx which provide advice from 128 locations around Scotland. Citizens Advice Scotland (CAS) is the network body for the CAB service which sets and monitors quality standards as well as providing membership services to CABx. The CAB service aims to ensure that individuals do not suffer through a lack of knowledge of their rights and responsibilities, or of the services available to them, or through an inability to express their need effectively; it also aims to exercise a responsible influence on the development of social policies and services, both locally and nationally.

In 2005/06, Citizens Advice Bureau in Scotland dealt with a total of 442,550 new issues through a total of 480,276 advice sessions with clients. The main issues dealt with by CAB advisers are as follows:

	Number of enquiries	Percentage
Benefits	138,415	31.3
Consumer	98,058	22.2
Employment	48,563	11.0
Housing	43,085	9.7
Legal	31,241	7.1
Relationship	21,140	4.8
Tax	15,807	3.6
Utilities	9,371	2.1
Other	36,870	8.3

The CAB service is committed to the provision of advice which is independent, holistic, and empowering to clients. Our own evidence, as well as the Paths to Justice Scotland research,[2] demonstrates that problems occur in groups, for instance when a change in circumstances triggers a range of related problems for which early intervention is not only the most effective means of resolving the presenting problem but may also prevent future problems. For example a client seeking advice about rent arrears may have an underlying problem related to ill health or employment. Taking a holistic, client-centred approach to advice-giving ensures that all of a client's needs are met and therefore prevents them having to seek advice repeatedly. It also prevents deterioration of the issues for which advice is not immediately sought. In a recent consultation with CABx[3] it was reported that the legal advice services that CABx had most interest in developing were employment advice at all levels and an increased capacity for representation. It is the intention of the CAB service to provide legal information, advice (including casework) and representation as an integral part of this holistic advice service.

Over the past few years there has been a consensus in the legal profession and the advice sector that there are certain key weaknesses in the current arrangements for funding, planning and delivery of publicly funded legal advice, including the current structure of the legal aid system in Scotland. These weaknesses affect the ability of individuals to find appropriate advice at the appropriate time from the appropriate adviser, and impact on the sustainability of the supply of advice, as well as impacting on the achievement of best value from the various sources of public funds that are spent on delivery of advice.

For example, the legal aid means test excludes substantial numbers of people who in practice do not have the level of disposable income required to meet the costs of even a simple legal case. Even for those who would pass the means test there is no guarantee that there is a legal aid solicitor in their area irrespective of whether that solicitor has the specific expertise required to take their case.

> *A West of Scotland CAB reports of a male client who was pursing an action against his local authority in relation to the Adults with Incapacity (Scotland) Act. He was in full-time employment as a bus driver. One hearing had already taken place at the Sheriff Court and another hearing was due when the client approached the bureau. The client was alarmed at the cost of the action so far and the potential further costs. He wished to withdraw as he was concerned that he was unlikely to be successful. He could not afford to be represented by a solicitor in relation to the matter.*

> *A West of Scotland CAB reports of a male client requesting information about eligibility for Legal Aid because he was seeking custody of his children. He has spoken to a solicitor and been advised he will not qualify for legal aid. The Children's Panel refused to make a decision and said he had to go through the courts in order to obtain custody.*

The CAB service has been piloting new ways of delivering legal information and advice, both through increased provision of legal advice by lay advisers and by developing closer working relationships with solicitors. I will discuss a few of these projects in more detail to highlight the potential these developments create.

Access to solicitors as integrated part of CAB service

The CAB service is developing greater links with solicitors in order to increase the capacity of CAB advisers to deliver legal information and advice as well as to ensure that, when a solicitor is required, an effective referral is possible. This work includes new regional initiatives working alongside long-standing local arrangements.

Local arrangements

Local arrangements generally consist of a solicitor providing a clinic in the CAB or a solicitor indicating to a CAB that they can provide an initial free appointment for clients. In 2006/07 CAB made 1,723 appointments for clients at legal clinics or rota schemes. This is a 7.6% increase from 2005/06. However, a far higher number of clients are simply referrals to a solicitor because they have a need for detailed casework or representation that the CAB currently cannot meet. In 2006/07 CABx made 8,054 referrals to solicitors. The CAB service wants to improve the service provided to clients by establishing better processes for clients to access advice and representation from solicitors.

Regional initiatives with solicitors

The CAB service manages three Part V Projects whereby a solicitor employed by the Scottish Legal Aid Board is hosted by an advice agency and provides a combination of capacity building to that agency and casework to clients. Each of the Part V projects is regional and the solicitor is enlisted to address a specific issue. For example, in the Highland and Islands the solicitor is a generalist providing legal advice to a large rural area in which there is a shortage of legal aid solicitors. In North and South Lanarkshire there is a solicitor specialising in disability-related legal issues, while in Fife the solicitor specialises in Mental Health-related legal issues. These projects are developing closer working relationships with local solicitors as well as providing services to CAB and clients.

These projects have received very good feedback from the advisers that use them. Advisers have increased knowledge and, equally importantly, increased confidence in their ability to handle complex cases. To date CAB advisers have not referred high numbers of clients to receive direct casework or representation from solicitors, preferring instead to reach negotiated solutions.

The CAB service is now building on this model with the Ethnic Minorities Law Centre (EMLC) to provide legal advice and representation primarily on race discrimination and immigration. The EMLC and CAB service work in partnership in North & South Lanarkshire and in Edinburgh; we are also establishing work in the Highlands. The EMLC solicitors work with CABx to increase their capacity in these topics as well providing clinics for clients in CABx.

CAB are experiencing a particular increase in the number of immigration related enquiries. An organisation can only provide immigration advice if registered with the Office of the Immigration Services Commissioner[4] and for complex cases a solicitor, or supervision by a solicitor, is required. Between 2005/06 and 2006/07 the number of immigration enquiries referred by CAB to solicitors has more than doubled.[5] The complexities of this area of advice mean that in future, CAB advisers will need even more contact with solicitors. The establishment of more effective working arrangements with solicitors will help to increase the number of clients who are able to access holistic advice and representation service through an initial contact with a CAB.

Public funding for legal advice by non-legally qualified advisers

Lay advisers in the CAB service deliver a substantial amount of legal advice. The availability of legal aid and experienced solicitors in social welfare law is minimal, for example in 2005/06 legal aid funded 111 Employment Tribunals while CAB represented clients in 485 Employment Tribunals.[6] Legal Aid is only available for complex employment tribunal cases, leaving many individuals with a real need for representation with no recourse to public funding. In 2005/06 the overwhelming majority of this advice provided by the CAB service was provided by non-legally qualified advisers.

> *A West of Scotland CAB reports a male client with an ongoing case against his employer. The client had expected to be represented at an employment tribunal by his trade union; the trade union had pulled out and the client was unable to find alternative representation. The client has had an interview and also written to many solicitors in the area but no-one has taken on his case. They say they are either too busy or are not specialists. One has suggested contacting the Law Society. The CAB contacted the Law Society on behalf of the client but it was advised to 'look around for other solicitors' who specialised in this field. This client had received this 'advice' several times. The client was becoming very frustrated by the fact that this has been going on for 6 months.*

CAB are also piloting more specialised services. Five CAB around Scotland provide advisers based in Courts. These are pilot projects funded by the Scottish Government to support individuals who are involved in the court system. The project's aims include securing an increase in the number of clients who receive advice when using the court system; and to increase client confidence in court proceedings as well as making the court process more effective and efficient because parties understand them better. The majority of the in-court advisers are not solicitors. The projects were evaluated in 2005 and the evaluation report found that the In-court Advice Projects were 'uniquely placed within the court house, particularly able to address unmet legal need for people involved in court proceedings' and 'demand for the services is high, and current workloads are becoming more difficult to manage across the pilots. However, potentially unmet needs for the service remain.'[7]

Political change

CAS has been researching and commenting on the inadequacies of the legal aid system for over ten years. Since the publication of the Strategic Review in 2004[8] there has been significant debate and policy development in the field of legal advice. The advice sector has tried and tested ways of delivering legal advice in geographical areas and topics in which solicitors are less likely to practice. The Legal Profession and Legal Aid (Scotland) Act, 2007 represents a broad consensus based on practical experience. The grant-funding provisions in this Act have the potential to provide public funding for legal advice from quality assured non-legally qualified advisers. It is hoped that the planned reforms to the legal aid system will continue as these provisions would allow highly experienced advisers in CAB to increase their capacity to provide free and independent legal advice as part of a holistic service to clients across Scotland – and therefore increase access to justice.

1 MORI Scotland (2006) *Public Perceptions of Scotland's Citizens Advice Bureaux*, available at http://www.cas.org.uk/publicperceptionsofcab.aspx

2 H. Genn and A. Paterson (2001) *Paths to Justice Scotland* (Oxford, Hart Publishing).

3 J. Brooks (2007) *The Delivery of Discrimination Advice, Human Rights Advice and Legal Advice* (Edinburgh, Citizens Advice Scotland).

4 http://www.oisc.gov.uk.

5 Figures from CAS Legal Statistics Report 2006/07 (on file with author).

6 Figures from SLAB Annual Report 2005-06 and CAS Legal Statistical Report 2005/06 (on file with author).

7 S. Morris et al (2005) *Uniquely Placed: Evaluation of the In-court Advice Pilots (Phase One)* (Edinburgh, Scottish Executive Social Research).

8 Scottish Executive (2004) *Strategic Review on the Delivery of Legal Aid, Advice and Information Report to Ministers and the Scottish Legal Aid Board*, available at http://www.scotland.gov.uk/resource/doc/26800/0025004.pdf.

The cost of civil justice – a practitioner's view

Sean Lynch, Solicitor, McCluskey Browne, Kilmarnock

Introduction

At the first meeting of the policy group appointed to support the civil courts review, Lord Gill expressed the hope that 'everyone who has views on the civil court system…will contribute constructive thoughts and ideas.'[1] The Coulsfield Report[2] commented upon the lack of information and the need for research. To the extent that this paper attempts to address either it is not a scientific exercise. What follows is drawn from experiences gained and views formed over almost a quarter of a century of Sheriff Court practice. I do not offer any view about the operation of the Supreme Court in general, nor in particular whether routine reparation actions should be taken elsewhere. I agree with Coulsfield that the district courts are not suitable to deal with civil business. I find no attraction in the suggestion that new tribunals might deal with some civil disputes. I start from the premise that the Sheriff Court will continue to deal with most civil disputes, but for it to do so more effectively the framework needs radical revision. The biggest challenge is cost and how to manage it.

The cost of litigation

It is not possible to provide reliable information about the cost of Sheriff Court litigation. The vast majority of cases settle, but compromise on the question of expenses is very often central to the settlement terms. The amount actually charged by the solicitor to the client is nowadays governed by contract and, since 2005, must be spelled out in a letter of engagement. It may bear no relation to the amount recoverable according to the table of fees. There are contingency and speculative fee-charging agreements and legal expense insurance may be available although the uptake has not been high. City firms with higher overheads may charge more than provincial firms. They are also more likely to have solicitors specialising in civil litigation; commercial clients are more likely to be willing to pay for that expertise than are individuals. We learned last year (in response to a parliamentary question from the present Cabinet Secretary for Justice, then an opposition MSP) that the Scottish Executive paid £180 per hour for the services of a partner in an Edinburgh firm.[3] That is not a high rate as Glasgow/Edinburgh commercial firms go. Since civil legal aid generally pays less than a third of that rate, however, it is hardly surprising that few lawyers now actively seek such instructions.

In addressing the issue of expense I have focussed on cases where there was a proof. The proof is the most risky part of any litigation. It is also the most expensive. By not settling, the client is effectively surrendering any control he might otherwise have over cost. Normally the loser pays for both sides - but not always. I tell my clients to avoid proofs if at all possible. But it is not always possible; sometimes there must be a proof. Winning a proof is no guarantee of anything, not even of recovering the expenses of a successful defence. The unsuccessful party may be impecunious or may be entitled to legal aid modification. Having a proof is the next worse thing only to losing a proof. The financial consequences are explained below.

I have looked at three cases which have gone to proof, all within the past eighteen months. One account was taxed, another was agreed at the door of taxation and the third remains a draft. All were prepared according to taxation principles which means they are a reliable guide. Even within this category of cases there are large cost variations according to such factors as whether block fees or detailed charges are used (the successful party normally electing the more lucrative), whether the shorthand notes of evidence are extended into typescript, and the amount of work done preliminary to the proof. There is also the possibility that an increase may be awarded to reflect the particular responsibility undertaken by the solicitor dealing with the case. I have tried to calculate a cost range *per day* at proof. The proof is the part of the process that the client tends to be most involved in and aware of and thus has an expectation or perception that the proof is what he is really paying for. The longer the proof runs, the more preliminary and preparatory work (precognitions, reports, motions, specifications, etc.) there is likely to be. Although two of the cases I looked at were set down at some stage for debate, those debates did not proceed. Had they done so the overall cost of these cases would have increased. I have not included any charge for skilled witnesses. I have included VAT since individuals have no facility to reclaim this.

The cost of getting these three ordinary actions to proof and conducting the proofs was in a range between £3000 and £3700 for each side for each day of the proof. Had experts been involved that might have added a couple of thousand more. If the case runs for three or more days the daily cost measured on this basis (i.e. the total cost of the case divided by the number of proof days) is likely to reduce. Sheriff Court proofs of such length are relatively rare. In a straightforward case involving a two-day proof the defender's account was agreed at £6750 on the eve of taxation, which works out at £3375 per day of the proof, again for one side only.

Consider the following recent ordinary actions: in *Lawson v. Broomfield Holiday Park*[4] Sheriff McFadyen awarded damages of £2400 exclusive of interest after a proof where he certified a doctor as a skilled witness; in *Lindsay v. Walker*[5] Sheriff Kelly awarded £2650 exclusive of interest after a proof where he certified two such witnesses. In the latter case liability was admitted. Worse still, in *Sherwood v. Hamilton-Gray*[6] Sheriff Evans awarded £1800 exclusive of interest after a proof which lasted two days in which the parties were described as 'neighbours for the last seven years [who] have never got on.'

By contrast my firm recently handled a summary cause action which involved a proof over most of a single day. The successful defender's account was assessed at £1662. This was much less than the cost of an ordinary action. What is disturbing is that the cost (for one side only) nonetheless exceeded the maximum value of a summary cause by £162, and the actual value of the case by more than half. It is also worth observing that in routine reparation actions which are settled after the options hearing but before proof, the expenses of the pursuer alone are likely to exceed the award of damages unless this exceeds £2500.

I am unashamedly of the view that lawyers are entitled to be paid properly for what we do. But it is obvious that lawyers' fees which make up the bulk of the expenses which I have looked at are out of proportion to the value of Sheriff Court cases. This either compromises or denies access to justice for many people and small, especially fledgling, businesses. For most, access to justice means access to lawyers. Few lay people are able effectively to conduct their own litigation. Relatively low value cases can involve difficult legal issues. Our current practices demand written pleadings and involve procedures which require lawyers to carry out work that is disproportionate and unnecessary in low value cases.

What is to be done?

The first step – to be taken urgently and as an *interim* measure - is that the Scottish Ministers should (as they said they would in 1999)[7] raise the summary cause limit to £5000 (the English limit is already £5000 but cases of higher value can be processed through the system by 'fast-tracking'). At the same time, the small claims limit should be raised to at least £1500 and preferably more but as I argue below the better course would be to abolish the small claim/ summary cause distinction altogether. The objection to the raising of the small claims limit has been that it will take a whole swathe of people out of the legal aid system. This can be addressed by straightforward changes to the legal aid system and requires the minimum of political will. Legal aid should certainly be available for reparation, but relatively few people now qualify for legal aid, even with a contribution and it is unacceptable that far larger numbers may be excluded from the court system by expense. There is practically no difference between the appearance on paper, or the procedural progress, of a summary cause action and those of a small claim. I would abolish the distinction as part of wider reform and would call all such cases 'small claims'.

I would then like to see the abolition or at least substantial simplification of formal written pleadings. This already works perfectly well for personal injury cases in the Court of Session, in England and in other jurisdictions – see for example *Burke v. Southern Education and Library Board*.[8] It is absurd that a whiplash case in the Sheriff Court is scrutinised more closely than a high value personal injury case in Edinburgh. In some Sheriff Courts, defenders can still engage in debate about the relevance of the pursuer's common law reparation case when it is perfectly clear that the alternative statutory case is more or less unanswerable. The public will have difficulty in understanding why a murder indictment can be framed in a single sentence yet a record in a personal injury case might run to several pages.

A less formal approach to pleadings would open the door to a single gateway for all civil claims in the Sheriff Court. Every case, regardless of value, would have to be brought by way of a summons with a fixed calling date. This would allow prompt identification of issues in dispute with a view to their resolution or preferably a resolution of the whole case. Most defended ordinary actions do not call in front of a sheriff until the options hearing by which time significant expense – well in excess of £1,000 per side in many cases - will have been incurred and not much *may* have been achieved. But if early hearings are to be effective a much greater degree of intervention will be required from the bench than we are used to.

Despite the good intentions evinced in the existing Rules of Court[9] proper case management rarely happens at the initial stages. Options hearings are put into busy ordinary courts; summary cause and small claims courts are laden with business including time to pay applications and heritable cases. There is no way for the Sheriff Clerk to know in advance of first callings what is likely to happen at them, so a court of first callings will inevitably be a clearing process. A new second stage is needed.

The current small claim and summary cause rules require the Sheriff at the first hearing to seek to negotiate settlement of the action. This may actually be news to many who work in the system. That such settlement rarely happens is in large part to do with the fact that there is insufficient time available, which is a great shame because cases disposed of without proof, at a first hearing or a continuation thereof, cost a fraction of those discussed above.

The experience of those of us who have participated in Sheriff Court commercial actions and child welfare hearings (in each of which adequate lead-in preparation time and hearing time are brought together) indicate that much can be achieved and indeed resolved by effective and directional early judicial intervention. As for the rest of the system, to paraphrase G.K. Chesterton, it is not so much that effective judicial case management has been tried and found wanting, as that it has been found difficult and left untried. We have to get away from the notion that if a case is not resolved at the first calling we just fix a proof. We need to create a dedicated slot in the system for interventionist case management and directed negotiation.

Conclusions and recommendations

Those cases in which it becomes apparent that there is a real issue to be tried would be continued three or four weeks to a new category of hearing. It should be given a label such as 'resolution hearing', be the subject of specific provision in the rules, and be mandatory before a proof can be fixed. At such a hearing cases of high value or unusual complexity (if not settled) would be sent to a procedure similar to that presently available in ordinary actions. Low-value cases might be appropriate for some kind of mediation but only if parties really want that. If each case were allocated fifteen or twenty minutes, the failure of the Sheriff to get substantial agreement between the parties in that period would indicate that mediation is unlikely to succeed. Commercial mediation is effective where both parties' agenda is settlement by compromise followed by closure. My experience as a CALM mediator in the 1990s suggested that this was very often not the agenda of individuals.

In most cases the Sheriff should seek resolution; if that is not possible, orders might be made such as for production of documents or other evidence. That in itself might prompt settlement. Attendance of parties would be encouraged. Where possible evidence would be agreed. Parties could be invited to see whether liability should be admitted. The hearing could be continued for implementation of any orders made and for settlement discussions, and a proof should only be allowed when every other avenue has been explored and dire warnings have been issued from the bench about expense.

So far as cases which remain as small claims are concerned I propose a scale of expenses which could be awarded – if an award of expenses was deemed appropriate at all - according to the value of the claim taken together with the amount of time taken in court to resolve it. Lawyers and their clients would have to decide whether they could live within such constraints. If not, lawyers might be less involved in the system but parties would be entitled to more assistance from the court. On the view that lawyers do have to be paid for what we do, we have to be realistic in saying that there are sums which just are not worth litigating.

Finally, the presumption against any award of expenses in small claims should be removed. There needs to be some kind of sanction to prevent abuse. The perpetrators are usually but not invariably party litigants.[10] They are happily relatively rare at the moment but in an expanded small claims system their prevalence would inevitably increase. The Sheriff Court (Scotland) Act, 1971 s.36B(3) is never invoked. The Sheriff should have an unfettered discretion whether to award expenses; a test of what is reasonable rather than simple success should inform the exercise of such a discretion.

1 Scottish Executive News Release, 24th May 2007.

2 Lord Coulsfield (2005) *The Civil Justice System in Scotland – a Case for Review?* (Glasgow, Scottish Consumer Council).

3 Scottish Parliamentary Question S2W-27832 answered by Colin Boyd QC, then Lord Advocate, 6th September 2006.

4 (2007) 13th July: http://www.scotcourts.gov.uk/opinions/a134_03.html, Dingwall Sheriff Court

5 (2007) 15th June: http://www.scotcourts.gov.uk/opinions/a1498.html, Linlithgow Sheriff Court.

6 (2007) 9th July http://www.scotcourts.gov.uk/opinions/a294_05.html, Cupar Sheriff Court.

7 SCC (2003) *Policy Paper on Increasing the Financial Limit in Small Claims Procedure* (Glasgow, Scottish Consumer Council). The summary cause and small claims limits have been unchanged since 1988.

8 [2004] NIQB 13. Neither counsel would commit as to whether the plaintiff was a visitor or a trespasser: in Northern Ireland the statutory duties owed are different. In the Sheriff Court this would almost certainly lead to a debate.

9 Specifically OCR 9.12 and Rules 8.3 and 9.2 of the Summary Cause Rules and Small Claims Rules respectively.

10 On which, see John P. McGroarty's contribution to this collection (p 14).

Access to environmental justice

Frances McCartney, Solicitor & Chair of the Environmental Law Centre Steering Group

Introduction

'Environmental justice' is still a relatively unknown term despite having been a policy commitment under Jack McConnell's period as First Minister. In fact, the policy commitment was the subject of a high profile personal launch by Mr McConnell. As with many policies, what 'environmental justice' means in practice very much depends on the speaker's perspective. The phrase was first used in the United States in the late 1960s, arising from studies showing that historically black neighbourhoods were more likely to have factories emitting pollutants and other contaminating land uses compared with areas with a higher white population. That early work, often called 'environmental racism', expanded to include examinations of disproportionate effects on socio-economic factors such as poverty. Some work has been done in respect of this in a Scottish context, but it is widely acknowledged that this type of land use research is at an early stage.

However, 'environmental justice' is now recognised to have a far wider context. It is increasingly used to signify the importance of procedural rights - the right to information regarding the environment, the right to participate in the decision-making process, and most controversially, the right to challenge that decision-making process. It is in that last stage where Scotland lags far behind, and upon which this article concentrates.

Environmental justice in a Scottish context

Little research has been carried out on the procedural aspects of environmental justice in Scotland. Planning Aid for Scotland has done some work in early community participation and consultation,[1] recognising the advantages of early involvement. However, there has been no comprehensive review of how the system of environmental regulation provides opportunities for participation. 'Environmental regulation' is defined widely in this context, including issues such as land use planning, regulation of cultural heritage and access disputes as well as the more traditional work of pollution control and regulation. The most comprehensive study to date examined SEPA's ability and opportunities to deliver environmental justice in its day-to-day work.[2] This was a welcome example of the range of steps that could be taken to deliver environmental justice through greater openness and attempts to engage at an earlier stage particularly in controversial applications.

However, assuming that the dispute is not resolved at an early stage, community councils, community groups and non-governmental organisations may wish to challenge the decision. What challenges must be overcome? The issue of access to environmental justice poses particular problems in Scotland. Some of these do not just relate to environmental matters, for example the question of standing can hinder those challenging decision-making in any field. However, there are some unique aspects to bringing court actions in the field of environmental law, while international obligations may force change on the system of challenging environmental decisions.

The starting point in acting for any community group is usually identifying the client. It is argued that environmental disputes are usually public interest disputes, with fewer examples of where the action is more truly motivated by private interests. Although private interests such as property values might be involved in opposing a road development or objecting to a proposed industrial installation, usually such individuals with a direct interest will also be joined by others who have no such direct personal interest. Often this leads to a pressure or campaign group being set up, although often one individual who might be prepared to represent the group as a whole is chosen to act as a client. This is usually because of the practicalities and difficulties involved in asking three or four individuals to give instructions. This gives rise to the issue of standing.

Standing and cost

At best, Scots law is unclear on standing although it is noticeable that in some environmental judicial review cases (for example, the action by WWF and the RSPB regarding the Cairngorm Funicular)[3] the issue of standing was not raised. However, a lack of clarity can be a barrier if only in respect of the uncertainty raised, and the fear of wasting campaign resources by being turned away on what groups will perceive as a 'technicality'.

The next hurdle is one of cost. Not every environmental action is by way of judicial review, but significant difficulties will arise if it is. Even with the lapse of a year from the petition being lodged to a substantive hearing, fundraising for both the agent's costs and potential liabilities is normally beyond the reach of most groups. Sympathetic Counsel and solicitors can be called upon to agree capped fees, giving some certainly of what the cost of the group's legal advice will be. However, the more significant difficulty is the uncertainty with liability for expenses, a factor intensified by the additional expense of litigating in the Court of Session. Cases with a 'public interest' are not usually funded by way of legal aid, even if the individual is otherwise financially eligible. SLAB's policy on cases with a wider public interest suggests that only cases where there is a financial interest for the individual will be funded. A 'wider public interest' appears to mean cases where the outcome will affect a group of individuals wider than just the individual applicant. However, it is understood that SLAB will make exceptions and in particular have deemed some of the cases involving prisoners' rights not to fall under this policy despite the wider implications of a favourable judgment to a wider group of prisoners.

Protective Costs Orders

The English courts recognised the difficulties of the 'loser bears all' approach in *R (Corner House Research) v. Secretary of State for Trade and Industry*.[4] Here, the Court of Appeal reviewed and amended the approach to be taken in granting protective cost orders, but there have been only two known applications for Protective Costs Orders in Scotland to date: in *McArthur*[5] Lord Glennie, whilst declining to make an order in those particular circumstances, considered that Protective Costs Orders were competent in Scotland. His reasons for refusal in that case centred on the financial information available, including support available from the Haemophilia Society which had provided a certain level of financial support.

The second application concerned an appeal by Friends of

the Earth Scotland and (at that stage) four individuals representing Joint Action Against the M74 regarding the M74 extension.[6] The Inner House were less inclined to consider that Protective Costs Orders were competent in Scotland, indicating that it would be more appropriate to consider the matter before the Rules Committee for more careful thought. The order was not made, and as a result the four named individuals representing the community angle dropped out of the action.

A Working Party was set up in England to review several aspects of public law litigation. It was chaired by Maurice Kay, LJ and set out to review and assess current law and practice in relation to costs in 'public interest' cases. The Working Party also considered whether any further developments in law or practice were necessary or desirable and what lessons could be learned from other jurisdictions. Finally, the Working Party agreed to formulate recommendations for changes in law and practice as agreed between its members. Membership of the Working Party ranged from those in private practice, to solicitors in government departments and non-governmental organisations.

The Working Party reported in July 2006. It made recommendations that would go further than current practice, in respect of private interests and pro bono advice. Firstly, it considered that a private interest should not automatically rule out a successful application for a Protective Cost Order. Rather, the Working Party noted that in a number of cases where there is a private interest, there is no possibility of a financial benefit to the applicant. This follows the approach in the case of *Wilkinson v. Kitzinger*[7] where the court considered an application for a declaration that a marriage contracted in Canada between same-sex partners should be recognised in English law as a marriage as opposed to a civil partnership. Sir Mark Potter considered that so long as he was otherwise convinced that a Protective Cost Order was appropriate, then the applicant's private interests should not be an automatic disqualification. The nature and extent of the interests were still relevant, but only as a factor in deciding on the success of the application. Secondly, the Working Party opined that whether or not the solicitors and barristers were working on a pro bono basis was irrelevant and the *Corner House* principles should be modified to that extent. Finally, the Working Party considered the principle of the applicant dropping out of the action should the Protective Cost Order not be made as unfair, and recommended this should be a factor for the court to consider rather than a condition. To date, no case has arisen where the English courts have been obliged to reconsider the *Corner House* principles.

The Aarhus Convention

Named after the Danish city where it was signed, the Convention on Access to Information, Public Participation on Decision-Making and Access to Justice in Environmental Matters may force a review of the system of challenging environmental decision-making. The Convention is in three parts, and it is the third part regarding access to justice that may prove most problematic in two respects.

Firstly, on the issue of standing, the Convention at Article 9 (2) provides that those with 'sufficient interest' should be able to challenge decision-making, although this right is subject to 'determination of the requirements of national law.' Article 2(5) provides that non-governmental organizations 'promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest' for the purposes of the provision on accessing environmental justice. The Scottish position on standing may therefore have to be reviewed.

Secondly, on the question of costs, Article 9 provides that the review of environmental decision-making 'must not be prohibitively expensive.' Although the then Scottish Executive advised shortly after the Aarhus Convention came into force that the Executive were satisfied that Scots law complied with the Convention, perhaps this is a premature view given the difficulties of non-governmental organisations litigating in Scotland.

Conclusion

Not all environmental challenges involve judicial review, and thus the risks associated with a foray into the Court of Session. Planning inquiries, for example, offer a more informal procedure, with Reporters taking a more pro-active role and the risk of expenses being far less. However, the extent to which unrepresented parties will be able to adequately present their case depends on a number of factors, not least the extent of capacity within the group itself. Furthermore, even in a more informal setting, developers are still at an advantage because they are usually represented by solicitors, advocates or planning consultants, all of whom are 'repeat-players', well versed in the procedure. Organisations such as Planning Aid for Scotland will not offer assistance on advocacy and there does seem to be a lack of accessible solicitors who are able and willing to act in environmental matters for community groups and non-governmental organisations.

It does appear that Scotland lags behind England in providing mechanisms that are affordable for individuals or groups seeking to challenge environmental decision-making. It is respectfully suggested that although the Protective Cost Order would have to be adapted to fit within Scotland's legal tradition, the concept recognises the imbalance of resources between litigants.

A small group has been set up to look at the issue of environmental justice and specifically to examine the need and potential opportunities of setting up a law centre offering advice in this area. Any readers interested in learning more about the group's work are invited to contact francesmccartney@mac.com.

1 www.planning-aid-scotland.org.uk/index.php?cid=18.

2 M. Poustie (2004) *Environmental Justice in SEPA's Environmental Protection Activities: a Report for the Scottish Environmental Protection Agency*, available at www.sepa.org.uk/pdf/publications/reports4sepa/environmental_justice.pdf.

3 Petition of WWF UK and the Royal Society for the Protection of Birds for Judicial Review of decisions relating to the Protection of European Sites at Cairngorm Mountain, by Aviemore and proposals for construction of a funicular railway thereon [1999] Env LR 632.

4 [2005] EWCA Civ 192; [2005] 1 WLR 2600. For further discussion of PCOs, see James Mulcahy's contribution to this collection.

5 *McArthur* v. *Lord Advocate and Scottish Ministers* 2006 SLT 170; Mulcahy op cit.

6 (2006) June, unreported.

7 [2006] EWHC 835 (Fam).

Access to justice, McKenzie friends and party litigants

John P McGroarty, Visiting Lecturer, University of Paisley and SCOLAG Director

Introduction

Party litigants are those individuals who represent themselves in the civil courts without a solicitor or advocate. This is often due to the party litigant's unwillingness or inability to afford the cost of litigation and legal representation. In *Kenneil v. Kenneil*[1] Lord Glennie considered that party litigants had a right to represent themselves and could, in certain circumstances be represented other than by an advocate or solicitor.

Traditionally, the McKenzie Friend may, before the bench, sit beside the litigant in person and may speak with him or her, provide moral support, assist with court documents and submission of such. What a McKenzie Friend cannot do is to act as a legal representative, nor exercise rights of audience before the court, unless invited to speak by a judge. Although a McKenzie Friend may be an actual friend, experience shows it is often someone acting on a *pro bono* basis and often part of an organisation or group that is assisting the party litigant in a particular field of law of interest to the friend or group.

Since the Scots Acts of 1537, party litigants have been entitled to plead their own cause in civil matters, though not to represent others. With the Scottish legal aid purse strings ever tightening, there are many city and rural legal firms that limit or indeed refuse to undertake civil legal aid work in Scotland – a classic case of justice being delayed or abandoned. In July 2007 The Scotsman reported the then Scottish National Party Spokesman on Justice, and now the Justice Minister, Kenny MacAskill MSP, as stating 'we are in danger of seeing the Executive covering up and the legal-aid board simply burgeoning as a bureaucracy, not as a service-provider. The whole legal-aid system is in meltdown.'[2] A number of Australian case studies and reports (1998-9) noted a link between an increase in party litigants and the cuts in legal aid provision,[3] and confirmed that parties who fail to obtain legal have no alternative but to represent themselves, thereby becoming party litigants.

If legal aid provision in Scotland is indeed in 'meltdown', then one needs to consider whether the present provision and support for party litigants (both through the utilisation of McKenzie friends and through other practical measures) is sufficient to meet the interests of justice in the 21st century. If the answer is 'no', then perhaps Gill represents an opportunity to make the process of party litigation a less time-consuming, more straightforward and better supported civil legal procedure.

The state of play

Although one is permitted to represent oneself in the civil courts in Scotland, the Scottish courts are far behind other jurisdictions in relation to access to justice, self representation and the assistance provided for party litigants in the form of (for example) facilitating access to the court, providing advice and assistance, and utilising state resources and materials. The access of party litigants to the courts is extremely varied and dependent upon the attitude of the judge or Sheriff concerned. Indeed, one can begin the party litigation process with a judge or Sheriff that will tolerate party litigants and as the legal process takes its majestic course, one may end up with a less tolerant judge or Sheriff. In Scotland there is very little in the way of resources, support and assistance for the party litigants and no recognition of the McKenzie Friend concept.

The McKenzie Friend concept arose in the English case of *McKenzie v. McKenzie*[4] and has been extended to various other jurisdictions including the USA, Canada, Australia, New Zealand and, most recently, Singapore.[5] At its most basic, *McKenzie* provides that party litigants are entitled to have assistance, whether professional or lay, unless there are exceptional circumstances to the contrary.[6] There are numerous questions of law as to the status of McKenzie Friends, including matters of confidentiality, the question of fees and whether the friend is actually acting as a legal representative. The particular issues of confidentiality and the use of McKenzie Friends in family law matters were recently addressed in *Re O*[7], where the English Court of Appeal authorised the use of McKenzie Friends in the family courts and for the litigant in person to disclose confidential court papers to the McKenzie Friend, albeit under strictly controlled court procedures.

Encouraging access to justice by supporting party litigants and McKenzie Friends is a noble task, but there is a concern that providing such support will also benefit vexatious litigants. In Scotland, vexatious actions fall under the purview of the Vexatious Actions (Scotland) Act, 1898 as amended by the Administration of Justice (Scotland) Act, 1933. This allows the Lord Advocate to apply to the Inner House for an order requiring any person who has habitually and persistently instituted vexatious legal proceedings without reasonable grounds to obtain leave from the Outer House before instituting any further proceedings. An important recent case dealing with s. 1 of the 1898 Act is *HM Advocate v. Frost*,[8] where the compatibility of s.1 with the European Convention on Human Rights was at issue. In *Frost* Lords Osbourne, Carloway and Kirkwood confirmed that 'the kind of restraint available in terms of s.1 was compatible with Article 6 of the European Convention on Human Rights'[9] on the ground that (per Lord Osbourne) there is a need 'to protect members of the public from what could be described as unqualified representation.'[10]

Lord Osbourne's warning of the need for protection from 'unqualified representation' had been presaged by an article in the Scotsman in 2003,[11] which noted 'a worrying development from party litigants seeking justice in the civil courts is the 'semi-professional litigator.'' The article reported that the same Martin Frost, who possessed neither legal qualifications nor rights of audience, had purchased other people's claims and had his many days in both Scottish and English courts as a party litigant. This mode of 'semi-professional litigator' led to considerable criticism of Mr Frost, with Lady Smith commenting in the Scotsman article 'I have serious concerns regarding Mr Frost's position in this

litigation….In short, he runs a business in which he seeks to act for persons who have a grievance but no lawyer' while in similar vein, Lord Osbourne (giving the judgment of the court) was scathing of Mr Frost's 'own particular brand of advocacy (which) has involved the making of reckless and unfounded allegations, the wholly unnecessary prolongation of legal proceedings by the exploration of the legally irrelevant, the subjection of his opponents to the trouble and expense of countering his allegations, with little hope of any remedy becoming available to them.'[12] But Frost's position was fundamentally different to that of a party who is either denied access to justice through the shortcomings of the legal aid scheme, or who has legitimate reasons (perhaps on the basis of cost, or their previous negative experiences) for not wanting to instruct a lawyer. Any jurisdiction that wishes to make proper provision for the needs of party litigants must surely draw a distinction between those who wish to represent themselves, or who cannot afford legal representation and fail to obtain legal aid, to those who purchase others' claims. An application process to register/become a party litigant or a sifting process would go some way to addressing such concerns. Presently in the UK, business models exist to assist party litigants in England, Wales and Northern Ireland. These are individuals without rights of audience who assist party litigants in various legal matters. Two web based examples are www.litigant-in-person.com and, with regard to disputes over family law matters, www.familylegalresearch.co.uk. These business models exist due to a combination of factors, but primarily because of a lowering of legal aid availability and/or the cost of litigation. In the best of all possible legal aid-funded worlds, those disadvantaged members of society would be able to consult with and instruct legally qualified personnel on more frequent occasions. Alas, this is not the real world of civil legal aid in Scotland. There is a growing number of people who have no recourse to law, other than to become party litigants or to invoke the services of a Mr Frost. More likely, they will choose not to pursue their litigation and are thus denied 'justice'.

Could do better

The Court of Session publishes a brief guide for party litigants, but when compared to many other jurisdictions' guides for party litigants it fares badly. It is a bland document, with neither a legal glossary nor an introduction to what one can expect in a court, and there is no guide as to who does what, where or when. There is no advice as to timescales or what may happen once documents are lodged, let alone what to expect in court when one is representing oneself. In other countries there are freephone numbers providing access to call centre staff who can assist, but in Scotland there are no call centres and no court specific web sites devoted to party litigants; there are no specifically-trained clerks; and there are no pdfs, court forms or user-friendly guides that can be downloaded.

In California there are dedicated web sites[13] on court information, with one pdf advising[14] party litigants on such mundane but important matters as what to wear, when to arrive at court, where to park and what materials to bring. It offers assistance on the use of witnesses and other helpful hints, as well as detailing nine dedicated telephone numbers offering various services to party litigants and six other web sites advising 'useful information' for party litigants. Similarly, the New Zealand Family Court web site operates a user friendly and dedicated service to the party litigant, providing basic facts on the family court service and a guide for litigants in person as well as guidelines for judges and staff in dealing with unrepresented litigants and copies of court documents. There is also advice on confidentiality and protocol matters for the Lay Assistant / McKenzie Friend and with undertakings for the proposed lay assistant to have his or her role clearly defined:

> 3(a) Sit beside the party; (b) Take notes; (c) Quietly make suggestions and give advice; (d) Assist the party with questions and submissions for the party to put to the Court or witnesses.
>
> 4. I accept that I will not be allowed to address the Court or take any active part in the proceedings myself. [15]

Conclusion

Much of what is done to facilitate access in other jurisdictions could be achieved in Scotland without there being any need to change the existing law, but a formal recognition of the McKenzie Friend concept would certainly seem to be a strong starting point. One need only look at the use of McKenzie Friends in other jurisdictions to appreciate that this would not demean the judicial process in Scotland but, to the contrary, would represent an acceptance that disadvantaged members of society deserve not only access to justice, but justice itself. Trained and/or dedicated court staff, specific web sites, guides to who does what, where and when in the court process are the norm in many common law jurisdictions – so why not Scotland? An appraisal of those other jurisdictions' best practises, together with a consideration of how best to support party litigants and administer McKenzie Friends is long overdue in Scotland. The Gill Review is an ideal platform for such an undertaking.

1 *Kenneil v. Kenneil* 2006 SLT 449.

2 The Scotsman 11th January 2007, http://thescotsman.scotsman.com/scotland.cfm?id=52402007. Last accessed 14th July 2007.

3 C. Caruana (1998) *Hitting the Ceiling* (Springvale, Springvale Legal Service) .

4 *McKenzie v. McKenzie* [1970] 3 All ER 1034 .

5 In September 2006 the Subordinate Courts of Singapore initiated a pilot project called the Lay Assistant Scheme, with participation from law undergraduates in the National University of Singapore.

6 The English Court of Appeal case of *Re: H (McKenzie Friend: Pre-Trial Determination)* [2002] 1 FLR 39 further develops the jurisprudence on litigants in person and the McKenzie Friend concept.

7 *Re O (Children) (Hearing in Private: Assistance)* [2005] EWCA Civ 759; [2006] Fam 1.

8 2007 SLT 345.

9 2007 SLT 345 at 354.

10 2007 SLT 345 at 347.

11 *The Scotsman* 18th November 2003, http://thescotsman.scotsman.com/index.cfm?id=1272482003. Last accessed 14th July 2007.

12 2007 SLT 345 at 353.

13 www.courtinfo.ca.gov.

14 www.courtinfo.ca.gov/programs/equalaccess/documents/basic_information.pdf. Last accessed 17th July 2007.

15 www.justice.govt.nz/family/home.asp. Last accessed 17th July 2007.

Protective Costs Orders in Scotland: the significance of *McArthur*

James Mulcahy, Legal Researcher, Department of Justice, Dublin

Introduction

> [There is a] growing feeling … in countries …which have adopted the 'costs follow the event' regime, that access to justice is sometimes unjustly impeded if there is a slavish adherence to the normal private law costs regime.[1]

In many jurisdictions, there has been an acknowledgment that expenses form a significant barrier to access to justice. The 'expenses follow success' rule (or the 'English rule') requires the losing party in litigation to pay the expenses of the other party in addition to their own costs. This is in contrast with the 'American rule' which requires parties to pay their own expenses regardless of the outcome. The English rule has its roots in the conventional 'bilateral private dispute model'[2] of litigation and the suitability of this model to public law litigation is questionable. The chilling effect that expenses can have on public law litigation has been acknowledged[3] and a judicial response has been the recognition that courts can decide on costs at the commencement of litigation. The essential benefit of the protective costs order (PCO) is that it 'eliminates the uncertainty regarding potential future liability for costs which may otherwise deter a potential challenger'.[4] The English Court of Appeal first recognised the jurisdiction to make a PCO in the decision of *R v. Lord Chancellor, ex parte Child Poverty Action Group*.[5] In *McArthur v. Lord Advocate and Scottish Ministers*[6] the power to make PCOs under Scots law was considered.

Protective Costs Orders in Scotland

Expenses in Judicial Review

It has long been held that English decisions on the practice of the courts in dealing with expenses are not normally accorded much weight in Scots law.[7] The Dunpark Working Party on Procedure for Judicial Review of Administrative Action, in its report dated June 1984, proposed the rule of practice that expenses follow success should be modified (at draft rule 19). The Working Party suggested that an unsuccessful applicant should not be found liable in the expenses of the respondent solely on the ground that he had failed to obtain any remedy from the court. In addition, an unsuccessful applicant who made out a *prima facie* case might be found entitled to expenses against the respondent if such an award seemed to be just and reasonable in the circumstances. The commentary which accompanied the draft rules noted that the modification was intended to give the judge a wider discretion and to soften the rigours of the 'expenses follow success' rule. However, these provisions were not incorporated into the rules governing judicial review which can be found at Chapter 58 of the Rules of Court.

McArthur

In *McArthur* Lord Glennie was invited by the petitioners to make a PCO. Counsel for the applicant accepted that such an order had never before been granted by the courts in Scotland. *McArthur* dealt with the petitions of three women for judicial review of certain decisions of the Lord Advocate and the Scottish Ministers regarding investigations into the deaths of close relatives. More specifically, they sought to review the failure by the Lord Advocate to make a decision under s.1(1)(b) of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1976 and also the failure by the Scottish Ministers to hold an inquiry compatible with the requirements of Article 2 of the ECHR. In each case it was claimed that the death was caused or materially contributed to by infection with Hepatitis C in the course of receiving blood transfusions in National Health Service hospitals in the 1980s. Counsel for the petitioners sought a PCO and claimed that it was appropriate in cases 'where an issue of great public importance was raised, where the petitioners did not seek any benefit for themselves, and where the risk of having an order for expenses made against them in the event they failed would deter them from proceeding with the petitions'.[8] The petitioners asserted that their case fulfilled these criteria and made extensive references to the developments in, *inter alia*, England, Ireland,[9] and Australia.[10]

The submissions of counsel for the respondent attempted to differentiate the development of the general discretion of the courts vis-à-vis expenses in Scotland from developments in England. Counsel submitted that there was no basis for such an order in Scots law and that it was a complete innovation unlike in England where it had developed over a number of years. He asserted that as the Rules Council did not act upon the recommendations in the Dunpark Report, the court should be slow to innovate to achieve the same result. Lord Glennie rejected the respondents' arguments and held that 'it is competent to make an order in the terms sought'.[11] The width of the discretion held by the courts in relation to expenses has been emphasised in previous cases, notably *Howitt v Alexander*[12] and *Ramm v Lothian and Borders Fire Board*.[13] While Lord Glennie stated that English rules regarding expenses do not wield much influence in Scotland, he held that departure from the ordinary approach to expenses may be permissible where the public interest dictates:

> It is, to my mind, a principle which applies as much in Scotland as it does in England and in the other jurisdictions to which the Court of Appeal [in *R (Corner House Research) v. Secretary of State for Trade and Industry*[14]] made reference.[15]

The test set out in *Corner House*, a judgment which refined the principles in the seminal *Child Poverty Action Group* decision, is as follows:

> A PCO may be made at any stage of the proceedings, on such condition as the court thinks fit, provided that the court is satisfied that:
> (i) the issues are of general public importance;
> (ii) the public interest requires that those issues should be resolved;
> (iii) the claimant has no private interest in the outcome of the case;
> (iv) having regard to the financial resources of the parties and the amount of the costs likely to be involved, it is fair and just to make the order;
> (v) if the order is not made, the claimant will probably discontinue proceedings and will be acting reasonably in doing so.[16]

Lord Glennie then proceeded to apply the *Corner House* criteria to the present case and held that the first and second criteria were met in the cases of two out of the three petitioners and that all of the petitioners satisfied the third requirement. However, they failed to satisfy the fourth and fifth criteria. The court observed that the assets of the petitioners were of such value as to prevent them from benefiting from a PCO.

Analysis

The decision in *McArthur*, while being positive to the extent that it recognises the jurisdiction to make PCOs, it is also

disappointing because it incorporates into Scots law certain anomalies present in certain aspects of the *Corner House* jurisprudence.

A centre-piece of the jurisprudence on the PCO in all jurisdictions has been the prohibition on private interests i.e. an applicant cannot benefit from a PCO where they have a personal or private interest in the outcome of the case. This rule supposes that the public interest character of a challenge is wholly tarnished by the presence of a private interest on the part of the applicant. The problem with this approach is that it buys into a false dichotomy which accepts that public and private interests operate distinctly and to the exclusion of the other.[17] This suggests that the exercise by the courts of its jurisdiction to make PCOs will only be possible when an altruistic stranger decides to bring a case. Chakrabarti *et al* suggest that this prohibition is 'nonsensical' and 'deeply flawed'[18] and call for its abandonment. In *McArthur* Lord Glennie took a different approach to the English courts in *Goodson v. Bedfordshire and Luton Coroner*[19] vis-à-vis the private interests prohibition. In *Goodson*, the claimant sought to challenge the failure to hold an inquiry into the death of her husband during surgery. Counsel for the applicant asserted that it is sufficient that the public interest in having the issue decided transcends or wholly outweighs the interest of the particular litigant. The Court, in response, held that as the 'requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms',[20] the applicant must have no private interest in the outcome whatsoever. The application was dismissed on the grounds of her private interest in the outcome of the case. However, as has been mentioned, Lord Glennie held in *McArthur* that the petitioners did not have a private interest in a very similar factual situation: 'although the petitioners are relatives of the deceased, they have no financial interest in pursuing the actions'.[21] While the Scottish approach is preferable to *Goodson*, the desirability of retaining any form of the private interests prohibition should be given serious consideration.

The position in England post-*Goodson* appears to be that PCOs will be restricted to NGOs and public interest groups rather than individuals.[22] The Court in *Goodson* stated that:

> a personal litigant who has sufficient standing to apply for judicial review will normally have a private interest in the outcome of the case, although in rare cases a public-spirited individual may be permitted to make such an application in relation to a matter in which he has no direct personal interest separate from the population as a whole.[23]

McIntyre warns that that such a restriction further concentrates the ability to initiate judicial review proceedings in the hands of a few interest groups. Stein and Beagent express concern, in relation to the environmental litigation, that such interest groups may not have the capacity to take the number of challenges warranted at a particular time.[24] *McArthur* appears not to envisage a regime under which PCOs are reserved for pressure groups. The petitioners were put forward, rather than a pressure group, because it was they who had standing for the purposes of judicial review in Scotland. This approach recognises the incongruity of the relationship between rules of standing and the prohibition on private interests.

Conclusion

While the private interests prohibition is open to criticism, the broad interpretation in *McArthur* by Lord Glennie demonstrates an awareness that a strict *Goodson*-type interpretation is not suited to jurisdictions with smaller NGO sectors. A similar approach has been favoured in Northern Ireland in the recent case of *an Application by Lorraine McHugh for Judicial Review*.[25] An interesting aspect of the *McHugh* decision is the acceptance that the *Corner House/CPAG* principles were guiding principles, and as such 'the fact that the applicant has a personal interest in the proceedings…[does not mean] that this must invariably amount to a complete bar' to granting a PCO.[26]

The courts, when exercising their discretion, should continue to follow the general rule that expenses follow success. They should depart from this general rule when the case is taken in the public interest, i.e. where it involves a genuine challenge to legislation, policy or practice of a public authority which is of a wide (or potentially wide) application.[27] This definition necessarily excludes redundant and frivolous challenges. The presence of a private/personal interest should not impact upon the public interest character of a challenge. Also, the failure of a litigant to receive a PCO should not prejudice their application for expenses after the trial.

Clayton has observed that 'the chilling effect of the costs orders made in public interest litigation is well recognised'.[28] We have, through the development of the judicial review procedure, entrusted the courts with the authority to adjudicate the legality and propriety of legislation and the actions of bodies exercising public power. It would therefore appear that this chilling effect should be taken very seriously, especially where a challenge relates to some issue of public interest or of consequence to the public or a group in society. The protective costs order can enable greater access to justice and it is therefore of the utmost importance that its potential be realised. As Justice John Toohey, formerly of the High Court of Australia, has stated[29] 'there is little point in opening the doors to courts if litigants cannot afford to come in."

1 *R (Corner House Research) .v Secretary of State for Trade and Industry* [2005] 1 WLR 2600 *per* Phillips L.J.

2 S. Chakrabarti, J. Stephens and C. Gallagher (2003) 'Whose Cost the Public Interest?' *Public Law* 697.

3 R. Clayton (2006) 'Public Interest Litigation, Costs and the Role of Legal Aid' *Public Law* 429.

4 A. Ryall (2006) 'Access to Justice and the EIA Directive; the Implications of the Aarhus Convention', in J. Holder (ed.), *Environmental Assessment: Law, Policy and Custom* (London, UCL Press).

5 [1999] 1 WLR 347.

6 2006 SLT 170.

7 1948 SC 154

8 2006 SLT 170 at 172.

9 *Village Residents v. An Bord Pleanála* [2000] 4 IR 321. The Law Reform Commission of Ireland has taken a cautious approach to PCOs and has recommended that the courts continue to exercise their jurisdiction to make them only in exceptional cases: Law Reform Commission, *Report on Judicial Review Procedure* (LRC71-2004), at 64.

10 Australian Law Reform Commission (1995) *Costs Shifting - Who Pays for Litigation* (Sydney, ALRC) 75.

11 2006 SLT 170 at 173.

12 1948 SC 154.

13 1994 SC 226.

14 [2005] EWCA Civ 192; [2005] I WLR 2600.

15 2006 SLT 170 at 173.

16 [2005] EWCA Civ 192 at para. 74.

17 P. Thomas (2001) 'Costs in Public Interest Cases' Oct *Legal Action* 21.

18 Chakrabarti *et al* at 712.

19 [2005] EWCA Civ 1172; [2006] CP Rep. 6.

20 [2005] EWCA Civ 1172 at para. 27.

21 2006 SLT 170 at 175.

22 O. McIntyre (2006) 'The Role of Pre-emptive/Protective Costs Orders in Environmental Judicial Review' www.ucc.ie/en/lawsite/eventsandnews/previousevents/environapr2006/DocumentFile,16192,en.doc

23 [2005] EWCA Civ 1172 at para. 28.

24 R. Stein and J. Beagent (2005) 'Case Law Analysis: *R (Corner House Research) v Secretary of State for Trade and Industry*' *Journal of Environmental Law* 413 at 435.

25 [2007] NICA 26.

26 [2007] NICA 26, at para. 17.

27 This is one limb of the dual working definition of a public interest challenge proposed by Chakrabarti *et al*. The other limb involves cases in which there is a real (as opposed to manufactured or academic) human rights complaint.

28 Clayton, at 429.

29 See J. Toohey (1989) 'Environmental Law - Its Place in the System' in Proceedings of the First National Environmental Law Association/Law Asia Conference on Environmental Law (14-18 June , Sydney).

Access to justice: the role of the University Law Clinic

Donald Nicolson, Professor of Law and Director of the Strathclyde University Law Clinic

Introduction

As the contributions to this Special Edition demonstrate, there are serious problems with access to the Scottish civil justice system. One of the most pressing is the growing number of people who cannot afford legal assistance but do not qualify for legal aid. Starting in the United States as long ago as the 1930s and spreading more recently to other English-speaking jurisdictions such as Australia, South Africa, England and Canada, as well as some South American countries, many universities have established student law clinics which provide legal services to those in need. While the main aim of most of these clinics is to provide students with a deeper and more realistic understanding of law, legal skills, justice and ethics, they have also played an important role in ensuring access to justice.

In 2003, I set up Scotland's first student law clinic. Unlike law clinics which stress educational goals, the University of Strathclyde Law Clinic was set up with the primary aim of ensuring access to justice for those who live in or near Glasgow. As a secondary aim, the Clinic seeks to inspire law students to use their skills to help those in need rather than simply practising law as means to other ends, or at least to take seriously the profession's pro bono obligations. Despite their accumulated debt from university there are still students who are willing to go into legal aid or law centre work - although there are insufficient career opportunities for them. By contrast, there is certainly a need to encourage pro bono work amongst Scottish lawyers. Using the University of Strathclyde Law Clinic as an example, this article outlines what can be achieved by law schools in redressing problems of access to justice, both directly through providing assistance to those in need, and indirectly by encouraging new generations of lawyers committed to ensuring social justice.

Service to the community

In terms of its governing ethos, the Law Clinic is not committed simply to providing a safety net for those who cannot find assistance elsewhere, but also to providing a 'holistic' service to clients. Rather than just bearers of legal problems requiring the use of intellectual and technical skills ('the eviction', 'the breach of contract', etc), clients are seen as flesh and blood individuals with unique sets of problems of an emotional as well as a legal and material nature. Accordingly, where clients present problems of a non-legal nature, the Clinic will seek to ensure that these are addressed by appropriate agencies. Moreover, in order to ensure that clients do not give up when passed on to other agencies or legal advisors, and that they understand any advice they receive, Clinic advisors set up the interviews with the referring agency or legal advisor and may even accompany clients. To facilitate such referrals the Clinic has set up arrangements with a number of other agencies, such as a citizens advice bureau, a law centre, Shelter, Planning Aid and the Faculty of Advocates' Free Legal Representation Unit, although hitherto most referrals have been from rather than to these organisations.

Where clients are taken on, the Clinic assists them by advising them as to their legal rights and representing them in disputes. Usually this involves negotiating on their behalf but in an increasing number of cases students have argued cases in the small claims court and Employment Tribunal, and are even currently helping a solicitor with the judicial review of a planning decision in the Court of Session.

In order to ensure a quality service to clients, students must first convince the Clinic that they want to join in order to help others rather than simply to further their careers. They are then provided with an induction course in essential legal skills which are supplemented by regular workshops on advanced skills and specific areas of practice. Students are also encouraged and funded to attend training sessions provided by other professional education providers.

Once trained students are placed in one of six 'firms' each of which takes responsibility for cases coming in during particular weeks. Students always work in pairs with newer members mentored by more experienced members, and both supported by the firm's Case Manager, who is on hand to provide advice. While students are given considerable autonomy in handling their cases, no advice can be given, action taken, letters sent or pleadings lodged without being checked by a case supervisor. In addition to myself, who originally supervised all cases, in order to cope with increased case loads, the Clinic now employs two part-time solicitors, and also receives supervisory assistance from a volunteer. With this level of assistance, the Clinic has handled a steadily increasing stream of cases which are simultaneously becoming increasingly more complex and more likely to require representation in court or a tribunal. Thus, despite confining advertising to leaflets in the Small Claims Court (where the Clinic operates with the support of the Sheriffs who frequently refer cases) the Clinic has handled almost 400 cases, the vast majority of these involved either consumer issues (for example, 28% in 2005/6) or employment cases (23%), while Housing/Landlord and Tenant cases continue to be popular with the Clinic (14%). The remaining cases have come from a wide range of areas including delict, criminal, family law and even intellectual property. Through both litigation and negotiation, the Clinic has, since its inception, obtained for its clients thousands of pounds in compensation. While the sums involved obviously do not compare with those dealt with by law firms, they may make a big difference to sort of clients who approach the Clinic. For instance, unjustified claims of £1000 against clients may cause them untold stress and even damage to their health (as occurred with one dispute over a council tax bill that lasted for eleven years). However, the Clinic's successes should not be seen solely in financial terms: clients have had faulty goods replaced, received apologies for wrongdoing, allowed to repay debts in manageable instalments and obtained permission to use copyrighted materials. Even informing clients that their claims have little chance of success or no possible legal remedy may be valuable in encouraging them to move on in their lives.

Modus Operandi

What is notable about this level of service is that, until recently, it has been provided on a relatively modest budget - obtained for the last three years from the University's Graduate

Association and supplemented by the Law School's covering of hidden costs such as my time (now around two, but previously four, hours per day), accommodation, heating, phone calls etc. Last year, in order to enable the Clinic to dramatically expand its services, expenditure was considerably increased by the employment of the part-time supervisor as well as a part-time administrator. Nevertheless, compared to most clinics in England and elsewhere, a number of factors ensure that the provision of legal services to the community is highly cost-effective.

One important factor is that qualified lawyers are not employed to represent clients, let alone interview them. This reduces staff costs and insurance premiums, and saves on the costs of practising certificates, as well as allowing the Clinic to legally protect itself against claims by a disclaimer informing clients that advice is not given by professional lawyers. Second, advice on cases is provided by law school staff and a few supportive local lawyers, who, like me, regard their involvement as a form of pro bono work. Third, although I oversee all aspects of clinic management, and the Clinic's Administrator and Case Supervisor undertake some of the administrative, case allocation and monitoring roles, students remain responsible for most of the day to day administration (such as recruiting and interviewing new members, organising training, maintaining membership details, running email accounts and an intranet, and liaising with other organisations), as well as deciding on Clinic development and ethical dilemmas that arise in cases.

The final reason for the Clinic's cost effectiveness is that it is designed to provide a service to the community rather than to educate students.[1] Obviously, in order to ensure that clients receive the best possible service, students need to learn essential legal skills, whereas in taking on cases they will inevitably learn about how law really operates in practice as opposed to how it appears in the books, and in particular how it frequently crosses subject boundaries and involves dealing with facts, procedure and ethical problems as well as law. Moreover, recently a course was developed with the help of Clark Foundation funding to enable students to further develop their skills and to reflect on the ethical and justice issues raised in cases. However, unlike most other law clinics worldwide, staff time is not spent on maximising student's learning experience or assessing their performance for academic purposes. Instead, learning is student-centered, students are supported by networks of their more experienced colleagues and supervision is focused on checking the final product of their activities – the letter, pleadings, negotiation strategy, court arguments, etc. While other clinics might opt for more constant and interventionist supervision, and direct action on behalf of clients by supervisors, with the same level of resources, clinics like that at Strathclyde which rely on volunteers and prioritise access to justice over education assist a greater number of clients. In any event, in over twelve years of involvement in such clinics I have not experienced any irreparable mistakes.

The future

Indeed, the success of the Clinic has enabled it to attract more funding, both from within the University and from large law firms. This money has been devoted to providing the necessary infrastructure to allow the Clinic to reach more clients through advertising, referral arrangements and, most importantly, through establishing outreach clinics in those parts of Glasgow and its environs (and eventually rural West Scotland) where there are currently no legal services for those who cannot afford a lawyer or qualify for legal aid. Recent discussions with other advice agencies suggest that the demand for legal advice and assistance vastly exceeds the resources of current providers. However, in order to fund the supervision required in order to meet this demand, the Law Clinic will require even further additional funding.

It will also require more advisors. Currently, the Clinic has just over 130 student advisors. More could probably be recruited, but there are limits to the number of those who are suited to the demands of clinic participation. In addition, while the students have shown a remarkable willingness to learn 'on the job', and incredible confidence and ability in representing clients, there are limits to what they can achieve at their stage of legal experience. In other jurisdictions, community law centres are staffed both by students and experienced pro bono lawyers. Accordingly the Law Clinic is seeking to attract local lawyers to work alongside the students. Recently, it has been offered assistance by two large commercial firms, but only a few solicitors are involved and even fewer have expertise relevant to Clinic cases. Unlike in England and Wales, and at the Scottish Bar, there is no formal organisation of pro bono activities amongst Scottish solicitors, or provision of pro bono work by the large law firms.

As noted earlier, it is hoped that by giving students the opportunity to appreciate the sort of problems many people face and gain satisfaction from making a difference to the lives of others, the Law Clinic might help create a new generation of lawyers who see pro bono representation as part of their professional obligations. This possibility is supported by anecdotal evidence from those involved with law clinics[2] although some claim that clinics can only reinforce existing attitudes[3] and may even evoke students' cynicism about legal justice.[4] Significantly, however, these latter views relate to clinics where students are only involved for a term or at best a year, and where their overriding educational goals may encourage students to see clients as means to educational ends rather than people in genuine need. The impact on student attitudes is likely to be far more positive if they participate for altruistic reasons and over a long period of time.

Nevertheless, even if this is overly optimistic, it is clear that the problem of unmet legal need would be substantially reduced if all law schools were to establish law clinics, particularly on the extra-curricular model. Moreover, their potential to play this role would be appreciably enhanced if they were to receive substantial government funding, as occurs in Australia and elsewhere.

1 For this and other advantages, see D. Nicolson (2006) 'Legal Education or Community Service? The Extra-Curricular Student Law Clinic' *Web Journal of Current Legal Issues*, http://webjcli.ncl.ac.uk/2006/issue3/nicolson3.html.

2 See for example S. Maresh (1997) 'The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law' in J. Cooper and L. Trubek (eds) *Educating for Justice: Social Values and Legal Education* (Aldershot, Ashgate); I. Styles and A. Zariska (2001) 'Law Clinics and the Promotion of Public Interest Lawyering' 19 *Law in Context* 65; K. Tranter (2002) 'Pro-Bono Ethos: Teaching Legal Ethics' 29 *Brief* 12.

3 R. Simon (1996) 'An Evaluation of the Effectiveness of Some Curriculum Innovations in Law Schools' 2 *International Journal of Applied Behavioural Science* 219; H. Sacks (1968) 'Student Fieldwork as a Technique in Educating Students in Professional Responsibility' 20 *Journal of Legal Education* 291; A. Evans (1998) 'Conclusion' in H. Brayne, N. Duncan & R. Grimes (eds), *Clinical Legal Education: Active Learning in Your Law School* (London, Blackstone Press Ltd).

4 J. MacFarlane (1992) 'Look Before You Leap: Knowledge and Learning in Legal Skills Education' 19 *Journal of Law and Society* 293.

How the civil justice system can meet the needs of vulnerable people

Hilary Patrick, Honorary Fellow, School of Law, Edinburgh University

Introduction

> We want everyone…to be confident that our civil justice services will help them sort out problems when they arise … [and that they are] based on … values, such as treating people fairly and with respect, and being accessible.[1]

The late 20th and early 21st centuries have witnessed a considerable amount of reforming social legislation in Scotland, and both the Westminster and Holyrood Parliaments have shown particular concern for people with mental vulnerabilities. Reforms to mental health and incapacity legislation have made Scottish law a world leader and there has been significant reform in community care and adult protection law. Rights sometimes need to be enforced or clarified through legal action in the courts, and in such situations people need accessible and high quality legal information, advice and representation. This contribution considers how the civil justice process can be adapted to meet the needs of people living with mental health challenges, learning disabilities and dementia.[2] Ensuring that people with mental vulnerabilities can enjoy an accessible and appropriate right of access to the courts would be in the spirit of the substantive law reforms, which are based on principles of non-discrimination, respect for the individual and empowerment. Whenever a person with mental vulnerabilities comes before the courts (not just in mental health or incapacity cases) she should be satisfied that the court has taken her special needs into account. Although there has been very little formal research in Scotland about the issues facing people with mental vulnerabilities involved in the civil justice process, recent research into the family court service[3] is relevant and instructive. There was unhappiness about the cost of proceedings, the adversarial nature of the legal system and the length of the court process. Court dress, style and language were also seen as unhelpful in this setting. Similarly, research into the implementation of the Adults with Incapacity Act, 2000 identified some unhappiness with the formality of the court setting - carers who attended court found the process perplexing and inhibiting, and adults with incapacities who attended court reported that the experience was confusing and stressful. The association of the Sheriff Court with criminal justice matters was particularly unhelpful.[4] It has been estimated that 1-2% of the population have communication support needs, including needs from mental vulnerability.[5] The researchers recommended that legal professionals working in the [criminal] courts should receive specialised training in recognising and meeting people's communication support needs to enable them to communicate appropriately and avoid underestimating or overestimating people's capabilities.[6]

Human rights and discrimination

National and international law underlines the need to improve the accessibility of the courts system. The right to a fair hearing in Article 6 of the European Convention on Human Rights means that each party should have a reasonable opportunity to present her case under conditions that do not place her at a substantial disadvantage vis-à-vis her opponent.[7] It is for the national authorities to ensure a fair hearing, and the Scottish Executive Justice Department and court service should take steps to enable people with mental vulnerabilities to participate in the court process. There are now additional legal duties on public authorities to meet the needs of people with disabilities, including mental disabilities. All public authorities should pay due attention to the need to eliminate unlawful discrimination, to promote equality of opportunity and encourage the participation of disabled people in public life.[8] Public bodies are obliged to publish disability equality schemes to show how they will achieve this. Although mental disabilities should receive as much priority as physical disability, it is unfortunate that the current disability equality scheme of the Scottish Court Service still concentrates on physical disability.

Vulnerable witnesses

The Scottish courts are in the process of implementing the significant reforms contained in the Vulnerable Witnesses (Scotland) Act, 2004. The Act has been in force for adult vulnerable witnesses involved in criminal proceedings since April 2006 and (as of 1st November 2007) covers civil cases in the Sheriff Court and Court of Session. The court can authorise the use of special measures where it decides that a witness is vulnerable and the quality of their evidence could be affected. Mental health issues, learning disability and some forms of personality disorder could constitute vulnerability, as could fear and distress in connection with giving evidence. The special measures include the use of screens, television links, the taking of evidence by a commissioner and allowing a person to be present in court to provide support while a witness is giving evidence. Although the expressed aim of these changes is to improve the evidence a witness gives to the court,[9] it is to be hoped that they will begin a process of making the justice system more generally accessible to vulnerable people. Certainly there are accessible leaflets about the scheme and helpful literature on the Scottish Executive website.

The need for further reform

It could be argued that making the court system accessible to people with mental vulnerability will also improve its accessibility to other members of the public. For example, reducing the stress of attending court or ensuring that the court process and language used in court is comprehensible is likely to benefit all who attend. In addition, judges and lawyers should have some understanding of the possible impact of the disability on witnesses' individual needs (for example, flexibility on timetabling might help a person with mental health challenges whose condition might fluctuate; or a person with a learning disability may need reassurance that it is acceptable to tell the truth, even if the answer is not what he thinks the questioner wants to hear.) The Adults with Incapacity Act's guidance on maximising capacity could be suitably adapted, but many of the possible changes require a

change in culture rather than expensive technology. They could include:

Information giving

- Ensuring that written and oral information is easily intelligible,[10] with a reduction in the unnecessary use of jargon.[11] Easy-read versions should also be available for people with learning disabilities.
- Giving witnesses clear explanations at the start of the process about the various people in the court and their roles.
- Making it clear that witnesses can ask questions if something is not clear.

Communication

- Providing training for legal professionals (including judges and Sheriffs) in communication skills, such as asking simple questions which require a yes/no answer, and, where appropriate, reducing the use of abstract terms.[12]
- Involving speech or language therapists, interpreters and/or the use of visual or other aids, if necessary.
- Pre-trial meetings to ascertain the level of an individual's ability to understand and engage in the legal process.[13]

Support

- Allowing supporters to attend court with the person.
- Reducing stressful delays.
- Giving witnesses a chance to take breaks whilst giving evidence.
- Reducing unnecessary and intimidating formality, such as the use of wigs.
- Consideration of courtroom design, with facilities for people to give evidence sitting down.
- Use of less formal settings, such as judges' chambers, where appropriate.

Curators *ad litem* and the Adults with Incapacity Act

When a mental disorder means a person does not have the legal capacity to instruct a solicitor or participate in legal proceedings, the court has a variety of powers available. These include the appointment of a curator *ad litem* and procedures under the Adults with Incapacity Act. The courts have a common law power to appoint a curator *ad litem* whenever an adult or child is unable to participate in litigation and has no guardian to represent her interests. The curator's function is to protect and safeguard the person's interests in the litigation.

Rules of court make special provision for the appointment of a curator *ad litem* in an action of divorce or separation where the court considers that the defender is suffering from a mental disorder.[14] The ground is not linked to the capacity of the defender, who may, if she has capacity, instruct her own solicitor. The curator may defend the action on the person's behalf and may appear in court to protect the person's interests.[15] Additional rules provide for the involvement of the Mental Welfare Commission in cases of divorce based on one year's separation and consent. If the Mental Welfare Commission establishes that a defender is unable to consent, it must notify the court. The Rules contain no power to appoint a curator to *initiate* an action for divorce or separation.

Under the Adults with Incapacity Act, if an adult lacks the capacity to instruct or defend legal proceedings the court can make a one-off intervention order authorising the intervener to act on the adult's behalf, or it can grant a guardianship order including this power. A guardianship order can also grant the power to defend or pursue an action of divorce or separation.[16] In addition, in any proceedings under the Act the court may appoint a person to safeguard the interests of the adult, which includes representing their views to the court.[17] If it is inappropriate for the safeguarder to represent an adult's views, the court may appoint yet another person for that function.

Concerns

The various legal powers available do not sit together very happily and could be streamlined. The common law does not appear to set out any clear procedures for the appointment of a curator *ad litem*, and although there may be a court hearing, this does not appear essential under the common law[18] (although compliance with Article 6 ECHR is likely to require a hearing.)[19] The Adults with Incapacity Act ensures a court hearing, suitable medical reports and the involvement of the principles set out in that Act, including respect for the wishes and feelings of the adult, past and present (a curator is obliged to act in the 'best interests' of the adult, a concept now considered paternalistic and old-fashioned). Adrian Ward has argued that the use of the Incapacity Act is preferable to the appointment of a curator,[20] although there would be cost implications.

Research into the implementation of the Adults with Incapacity Act shows variable practice in the appointment of curators *ad litem* and safeguarders[21] and it may be that the practice could be standardised. Furthermore, there remains uncertainty about the payment of safeguarders/curators in applications under it. The Act did not make provision for their payment and there is no provision in the Rules of Court. The courts invariably appoint solicitors to this role, but the solicitor is acting as an officer of court, not a solicitor. As she is not providing legal services to clients, the Scottish Legal Aid Board has taken the view that it is not appropriate for the legal aid fund to pay these costs. The common law normally requires the party seeking the appointment to pay. In Adults with Incapacity Act guardianship cases this will be the local authority, but if a private individual applies, he may have to finance the curator.

It is suggested that it is no longer appropriate to appoint a curator *ad litem* in divorce on the grounds of 'mental disorder' alone. A person with, for example, depression, anxiety or learning disability may well retain the capacity to take her own decisions and arrange her own representation in the divorce action. If mental disorder means a person is unable to take action in relation to divorce, she will need someone to represent her interests in court, but the benefits of special court protection in other cases appear less clear. Indeed, it could be said that such an intervention runs contrary to Adults with Incapacity Act principles of minimum necessary intervention and respect for the wishes of the adult.

With increasing debate about the duties and payment of curators *ad litem* in mental health tribunals,[22] it may be that the time has come to review and standardise practice throughout the civil justice system.

Particular concerns in mental health cases

Privacy

The reporting of court judgments has given rise to some concerns because the court service has an inconsistent policy on protecting the anonymity of people involved in mental health and incapacity cases. Since May 2005, the reports of adult incapacity cases have been anonymised,[23] but mental health appeals, which raise equally sensitive issues, are not.

These judgments are public documents, published on the Scottish Court Service's website. It is to be questioned whether there is any public interest in having patients' details published on the internet in this way, easily accessible by a simple web search. This breach of the individual's right to privacy could be challengeable under Article 8 of the ECHR.

Forum

Complaints about the courts often focus on their perceived formality and lack of adaptability to people's special needs. There is no doubt that, with the growing body of expertise in adult incapacity cases and mental health tribunals, Scotland is developing models of good practice in providing a judicial forum for resolving disputes in relation to people with mental disorders. This good practice might be enhanced by a move to specialist Sheriffs for incapacity cases, as recommended by the Scottish Law Commission.[24] They would receive special training about the needs of people with mental incapacity and would be able to develop expertise. The reported cases show that certain Sheriffs are specialising in this area, but this recommendation has not to date been taken up by the Scottish Executive, although there is growing interest in the idea of judicial specialisation.[25] Another suggestion would be to move all mental health matters to the Mental Health Tribunal for Scotland once it has become established. Many of those responding to the Scottish Law Commission consultation preferred a tribunal model for incapacity matters, perceiving it as more user-friendly and informal and less confrontational. The involvement of professionals with skills and experience would lead to better-informed discussions. This solution was proposed many years ago as a more suitable forum for resolving disputes for people with dementia.[26]

The Millan Committee recommended that in due course the Adults with Incapacity Act and Mental Health Act should be consolidated.[27] If this recommendation was adopted, moving incapacity matters to the tribunal might follow.

While many people with mental vulnerabilities will need legal representation to ensure they have a fair hearing in the courts,[28] there is no doubt that the presence of lawyers increases the legalism and inaccessibility of the proceedings. The court should look at ways in which lay people could be encouraged to take their own applications to the court. For example, it should not be necessary to involve lawyers in an application for guardianship under the Adults with Incapacity Act. In Germany and elsewhere, lay applications are the norm.[29]

Conclusions

The Gill Review gives an opportunity to ensure that the Scottish courts meet the needs of all citizens, including those with mental vulnerabilities. While this paper attempts to highlight some of the issues, if effective solutions are to be found, then a coherent programme of research into the problems faced by vulnerable people who come into contact with the civil courts needs to be implemented.

In addition, the Scottish Courts Service should expand its disability equality scheme to consider the needs of people with mental disabilities and the training needs of lawyers, including judges and sheriffs, should be reviewed. Voluntary agencies, with the help of service users, could provide training in communication skills.

Finally, there should be a review of the way the curator *ad litem* system for adults is operating in all Scottish courts and tribunals, with a view to its replacement by a simplified procedure under the Adults with Incapacity Act.

1 Scottish Executive (2007) *Modern Laws for a Modern Scotland: A Report on Civil Justice in the 21st Century* (Edinburgh, Scottish Executive), para 3.24.

2 H. Patrick (2007) 'Excluded from Justice? People with Mental Vulnerabilities and the Legal System in Scotland' 362 *SCOLAG Legal Journal* December (forthcoming).

3 L. Nicholson (2004) *Improving Family Law in Scotland: Analysis of Written Consultation Responses* (Edinburgh, Scottish Executive).

4 J. Killeen et al (2004) *The Adults with Incapacity (Scotland) Act 2000: Learning from Experience* (Edinburgh, Scottish Executive Social Research), paras 5.90-95.

5 J. Law (2007) *Communication Support Needs: a Review of the Literature* (Edinburgh, Scottish Executive), para 2.19.

6 Law, para 7.18.

7 *Dombo Beheer BV v. The Netherlands* [1993] ECHR 49 at para 33.

8 Disability Discrimination Act 2005, s. 49A.

9 Vulnerable Witnesses (Scotland) Act 2004, s. 11.

10 Enable (2006) *Being a Witness – the Use of Special Measures* (Edinburgh, Scottish Executive).

11 For example, the website of the Crown Office and Procurator Fiscal service now includes a 'jargon buster'. On the other hand, the helpful book from the Scottish Executive explaining the vulnerable witnesses scheme does not explain what it means to 'cite' a witness.

12 P. Snow and M. Powell (2004) 'Interviewing Juvenile Offenders: The Importance of Oral Language Competence' 16(2) *Journal of the Institute of Criminology* 220. In a criminal prosecution brought to the attention of the author, the judge asked a man with learning disabilities if he 'felt any remorse'. As he did not know what this was, he said 'no'.

13 Law, para 7.14.

14 Rules of the Court of Session 49.17; Ordinary Cause Rules (OCR), rule 33.16.

15 See Rules of the Court of Session 49.17(7).

16 Adults with Incapacity (Scotland) Act 2000 ss. 53, 64.

17 Adults with Incapacity (Scotland) Act 2000 s. 3.

18 A.Ward (2003) *Adult Incapacity* (Edinburgh, W Green/Sweet & Maxwell), para 10.43.

19 In *Winterwerp v. The Netherlands* [1979] ECHR 4 depriving a person of the ability to manage his property and finances without a hearing was held to be a breach of Article 6(1).

20 *Adult Incapacity*, para 10.43.

21 Killeen et al, para 3.46.

22 D. Hanlon and K. McGill (2006) '*Safeguards Before the Mental Health Tribunal for Scotland*' 51(4) Journal of the Law Society of Scotland 28.

23 Killeen et al, para 3.47.

24 Scottish Law Commission (1995) 'Report on Incapable Adults' Com 151 (Edinburgh, SLC), para 2.28.

25 Scottish Consumer Council (2005) 'The Civil Justice System in Scotland – a Case for Review?' (Edinburgh, Scottish Consumer Council), para 4.32.

26 C. Davison et al (1993) 'Mental Health Hearings for Elderly People with Dementia: a Study of Demand and Feasibility' (Edinburgh, Scottish Office Home and Health Department).

27 Scottish Executive (2001) 'New Directions: Report on the Review of the Mental Health (Scotland) Act 1984' (Edinburgh, Scottish Executive), recommendation 2.1.

28 *Airey v. Ireland* [1979] ECHR 3, para 26.

29 Information provided by Hr Ulrich Hellman of Lebenshilfe eV.

Access to justice: migrant workers

Jennifer Veitch, Freelance Journalist

After a long period in decline, the UK's population is growing. According to figures from the Office for National Statistics, in 2004 an estimated 223,000 more people migrated to the UK than emigrated abroad. That figure is likely to rise substantially, as it does not reflect the full impact of EU enlargement in 2004. Some 427,000 Eastern Europeans registered for work in the UK between May 2004 and June 2006. The full effect of enlargement to include Bulgaria and Romania, who joined the EU in January 2007, has yet to be felt.

Statistics aside, it is apparent in our everyday lives that thousands of workers have come to the UK from Eastern Europe. Many of them have been attracted to Scotland, where the official welcome was noticeably warmer than south of the Border, after former First Minister Jack McConnell decided that Scotland's ageing population needed some 'Fresh Talent' to kick-start economic growth. Employers who had been struggling to recruit staff for key but low-paid jobs have doubtless welcomed the opportunity to take their pick from an influx of enthusiastic and often well-qualified newcomers, many of them from Poland. On websites like that of the Sikorski Polish Club in Glasgow, there is a regularly updated list of job vacancies, with employers looking for everything from cleaners to qualified butchers to sugar boiler operators and even PhD students in computer science. A number of recruitment agencies have begun to specialise in placing East European migrants. Of course, many enterprising migrant workers are working for themselves and have already set up their own thriving businesses – the most visible sign of their success are the shops springing up around our cities, often selling imported Polish produce to the homesick or the curious.

Unfortunately it seems that the welcome received by migrants from countries like Poland has not been universally warm, and signs are emerging that not all Scottish employers have treated migrants with the respect that they might automatically afford indigenous Scots. One of the most high profile cases emerged in May this year, when Polish sisters Joanna and Lydia Wisniewska and their friend Sylvia Pionkowska were awarded £16,0000 in compensation by an employment tribunal after facing exploitation and race discrimination at a Highland hotel. The women were reported to have been working up to 75 hours a week in return for wages of £180, and to have been called 'Polish slaves' and 'Polish bitches' by their employer. The tribunal chairman, Walter Muir, said the employer's reference to the women as slaves 'very much accorded with the factual position.'

In April, concerns about the standards of accommodation offered by employers were raised after a Czech man died in a caravan fire at an unlicensed site on a farm in Arbroath. Shelter Scotland said they had heard of many more workers who were being forced to live in 'horrific conditions', and have started to produce advice leaflets in Polish. Concerns have persisted, and over the summer, the Inverness Polish Association claimed that migrants were being charged £35 a week to rent 'sleeping bag-sized' patches of floor. It was also alleged that a hostel was charging £65 a week to share a room with three others and a bathroom with more than 20 people.

The experience of migrant workers was a major theme at the recent Citizens Advice Scotland conference. CAS has already signalled that 'increasing numbers' of migrant workers were complaining about issues including low pay, excessive working hours and accommodation. CAS said language barriers and a 'lack of knowledge of basic rights' were exacerbating the problem, and that their bureaux across Scotland were hearing reports of exploitation, such as people being paid below minimum wage or having illegal deductions made from their wage packets. While most problems appear to be related to employment and housing, CAS has noted that migrants are also experiencing problems with opening bank accounts, obtaining NI numbers and work permits, and dealing with the benefits system. Language barriers have also hampered the efforts of advice workers both to understand and communicate with clients, and CAS has been working to secure extra funding to have leaflets translated.

Widening access to advice for migrant workers is only one part of the solution to protecting their rights, however. Innes Clark, who heads the employment team at Morton Fraser in Edinburgh, says that increasing awareness of the law among employers is a vital step towards protecting migrant workers. Clark suggests that employers need to keep up to date with current rules, to ensure they check whether a work permit is required and have checked and copied documentation – and to bear in mind the implications of the Race Relations Act.

'With the accession of a great number of European nations into the EU over the last few years, and the promotion of the Fresh Talent Initiative, the number of non-UK national workers within Scotland has increased markedly,' Clark says. 'This presents issues for both employers and workers when they attempt to navigate the fast-changing legislation and regulations concerning this subject. A number of groups do not require a Work Permit to work in the UK, but the rules differ depending upon the type of work to be undertaken and the nationality of the worker. If a permit is required it must be considered in advance to prevent problems when the worker enters the country. As it is a criminal offence to employ a person who is not entitled to work in the UK, it is vital that employers take the necessary steps to ensure they are not falling foul of the law (including seeking copies of the necessary documentary evidence) before employing someone. Equally, workers wishing to work in the UK must ensure they have the required permissions before commencing their journey lest they be refused entry to the UK. All those involved must also be aware of the provisions of relevant discrimination legislation which offer protection to workers of non-UK nationality or origin.'

Clark adds that employers must also be aware of their duties to protect employees' safety in the workplace. 'The Health and Safety at Work Act, 1974 as amended along with the large number of Regulations (the so-called 'Six Pack Regulations') impose a large number of duties upon employers to train, equip, warn, instruct and support employees to minimise or avoid the risk of accidents and injuries occurring in the workplace. The most common way this is done is by the provision of verbal/written instructions or training. The duty upon employers exists irrespective of the ability of the employees to speak English and, for example, a workplace with a large number of Polish workers would be well advised to provide such training documents/verbal instruction/manual handling wall posters and warnings etc in Polish as well as English.'

Unfortunately while all migrant workers should be protected by health and safety legislation, anecdotal evidence suggests that language barriers and lack of training are already contributing to injury in the work place. Edinburgh-based personal injury solicitors Lawford Kidd recently decided to have their literature translated into Polish to help migrant workers make claims after accidents at work. The firm's senior partner, David Sandison, said a lot of claims are now coming through from people having accidents. 'It is probably quite common because people are not properly trained,' he said. 'The more claims we have the better, because it means they will start taking care.'

Eviction – first port of call, or last resort?

Rachel Smith, In-Court Adviser, Aberdeen Sheriff Court

Introduction

> If any large number of tenants were to insist on defending their rights under present court procedures, the Sheriff Court system in much of Scotland would seize up. The system relies for its smooth administration on people not exercising their rights.[1]

In Scotland, only a small minority of defenders in heritable property actions are represented, or even attend the hearing for recovery of possession.[2] Nevertheless, the majority of proceedings for recovery of possession raised against local authority tenants do not result in eviction.[3] So what does 'access to justice' mean where the majority of actions appear to be resolved by payment arrangements, and where most of the remainder by decree in absence? And where a dormant action that had been enrolled in the 1990s can be reactivated in 2007 to threaten eviction with only 2 day's notice of the hearing?

The Woolf Report singled out housing cases for particular consideration in 1996 'because of the fundamental importance of this area of the law to those involved. The two main categories of housing cases I have looked at are possession…and disrepair. These cases often raise very difficult problems, involving the rights and obligations of individuals and sometimes the constitutional functions of public bodies.'[4]

Across Scotland, during the twelve months from July 2005 over 16500 local authority tenants were taken to court for repossession (only 98 of which were on antisocial behaviour grounds);[5] 5654 eviction orders were granted and 1935 tenancies were terminated by eviction or 'abandonment' following decree.[6] The most up-to-date official civil judicial statistics are from 2002,[7] and it seems clear that further research into the more recent picture is warranted by the observation that 98% of the 11,541 decrees for recovery of possession that were granted in that year pertained to actions that were classed as 'undefended'. In 1999, Jonathan Mitchell QC wrote that 'the Scottish courts in the twentieth century have had before them well over a million eviction actions. Even now there are something like twenty thousand such actions a year - although the exact figure is not known because, it seems, it is not thought to be important enough for the court service to keep a record.'[8]

It is not enough to talk about access to justice without methods of quantitative measurement. Justice is required to be seen to be done, and this requirement is not met simply by holding hearings in public. Effective and consistent monitoring of claims and outcomes is essential for any meaningful assessment. This is particularly important for eviction actions, where many similar cases proceed through the courts on a relentless conveyor-belt of mind-numbing awfulness, in direct opposition to the professed public agenda of homelessness prevention.

What is civil justice?

'Access to justice' is not synonymous with 'access to legal aid' or even 'access to a fair hearing', although both concepts are important and tend to dominate the agenda. According to a recent Scottish Executive report,[9] access to justice is delivered by means of:

- information, advice and support to help people avoid problems in the first place, and to get the right advice and help if they do have a problem;
- accessible ways of helping people sort out problems when they arise, short of going to a court or a tribunal; and
- streamlined procedures for determining, protecting and enforcing rights for those cases that need to go to a court or tribunal.

So what does this mean for tenants facing proceedings for recovery of heritable property? One consideration might be the design of the summons; a second, the availability of representation; a third, the fragmentary landscape of advice provision.

Representation for tenants in the Sheriff Court

Very few tenants are represented by a solicitor, in part because of difficulties in accessing legal aid, the inadequate cover even where legal aid is granted, and the inherent Catch 22 for those defenders in financial difficulties whose income is too high for legal aid. Realistically, it is only in areas covered by a law centre that significant numbers of tenants will be able to access legal representation.[10]

In some Sheriff Courts, such as Aberdeen and Edinburgh, there are no law centres serving the area. Significant numbers of tenants may be represented by lay representatives, but unless the Sheriff directs otherwise, lay representatives are not allowed to represent the tenant after a defence has been noted and a proof date set.

Mitchell remarks that 'the thinking, if there is any which is unlikely, must be that on the one hand eviction is so simple and unimportant that lawyers should not be there (except for landlords'); but that on the other hand its defence so difficult and important that nobody else can be trusted to carry it out. The contradiction is obvious, except to the Court Service and the Legal Aid Board. The only representatives who are likely to appear in most cases, accordingly, are boxed into a choice between not defending the case and simply appearing at continuation after continuation to negotiate instalments, or, if they think there is a good legal defence, stating it and leaving the tenant to sink or swim.'[11]

What are the underlying problems faced by tenants?

According to the definition above, legal representation in the Sheriff Court on its own would be insufficient to secure 'access to justice' for tenants. Tenants need to be able to access the right information, advice, support and help to resolve any difficulties, preferably at an early stage.

Out of a sample of 362 tenants facing possible repossession for rent arrears in Aberdeen during 2005, at least 15% reported financial problems related to multiple consumer debts, over 15% reported financial problems stemming from unstable or irregular employment, and a further 15% reported financial and other issues relating to bereavement or relationship breakdown.[12] Of the remainder, a further 35% reported difficulties indicative of ongoing support needs that were mostly unmet, for example learning disabilities; literacy issues; language issues; addiction issues; criminal justice issues; care leavers; parents of children in local authority care; and carers. Eighty-three per cent of households included only one adult,

and 81% of households had income profiles where housing benefit was an issue.

Overall, 70% of tenants facing repossession reported a significant physical or mental health problem or both. Thirty per cent reported mental health issues, and a further 13% reported substance dependency issues. Eviction and the threat of eviction can only compound these difficulties, placing additional demands onto health, homeless and other services.

What financial help is available for low income tenants?

Guidance on Homelessness states that 'the help available to tenants through housing benefit and other social security benefits should enable all tenants to meet their financial obligations to the local authority.'[13] Unfortunately, it is not always straightforward for a tenant to ensure that they receive their full entitlement to this help. Furthermore, factors such as benefit sanctions, overpayment recovery and non-dependent deductions can result in increasing rent arrears.

Tax credits have brought new problems for many households. For example, (i) tax credits are based on annual income whereas income or employment status may fluctuate from week to week; (ii) tax credits have moved particularly vulnerable single parents off income support (those in receipt of incapacity or certain other non-means-tested benefits), causing them to lose the protection of full housing benefit; and (iii) through the endemic problem of overpayments that are subject to recovery without any independent right of appeal or right of offset. Tax credits have created massive debt and sudden drops in income for households with no financial reserves.[14]

Delays in processing or payment of housing benefit create technical arrears that affect the landlord's balance sheet,[15] however perhaps more serious are the levels of unclaimed benefits.[16] Even where a claim for housing benefit has been submitted, the requirements of the verification framework can leave tenants unable to supply the requested evidence, resulting in cancelled claims and housing debt.[17] Housing benefit can sometimes be backdated, but only for a maximum of 52 weeks when 'good cause for late claim' can be established. Effective help may result in a reduction in the level of arrears (for example, by backdated housing benefit) and/or an improvement in the sustainability of a repayment arrangement (by negotiation with other creditors, housing benefit administration or the Department for Work and Pensions to reduce the rate of debt recovery; benefit appeals; overpayments offset against underlying entitlement; or discretionary housing payment applications).

Thus effective rent arrears resolution strategies can prevent the majority of evictions, thereby avoiding the social and financial cost of unnecessary homelessness. However, this leaves the question of whether access to justice should be improved by 'poverty proofing' the benefit system to identify and remove some of the pitfalls that can lead to rent arrears and eviction.

How to provide effective help?

The local authority is the major service provider, via homelessness services, social work, debt advisers, and welfare rights. This may be all well and good until there is a conflict of interest – money advisers from the Trading Standards Department of Aberdeen City Council routinely represented local authority tenants in the Sheriff Court until one of the permanent Sheriffs objected on the ground that it was 'unseemly' for a money adviser from the local authority to represent a local authority tenant in court.

Fundamentally the social landlord has conflicting agendas – both to recover rent arrears and to prevent homelessness. The local authority is charged with the administration of housing benefit, and has duties towards children and vulnerable adults. Eviction should be a last resort, but the threat of eviction often appears to be the first and only tool of the arrears recovery process. Mitchell remarks that 'these actions are odd in a number of ways, but perhaps their oddest feature is that the landlord does not normally want the remedy that is apparently sought [repossession].'[18]

One current trend appears to be the centralisation of advice provision in call-centres such as Shelter's advice-line based in Sheffield, or Consumer Direct. The efficacy of telephone advice on its own has to be questioned, however, particularly when court proceedings are involved.

Homepoint has helpfully divided housing and other advice provision into three categories – Type I (active information/ signposting); Type II (Casework); and Type III (Advocacy/ representation/mediation at tribunal/court). The challenge for the local authority is to ensure that tenants have access to independent Type II&III assistance.[19]

There can be further difficulties for the tenant who requires input from multiple agencies. For example, debt advice may be essential to ensure that any repayment arrangement is sustainable, and to prevent diligence by other creditors from sabotaging the tenant's ability to pay; however, the tenant may have to go elsewhere for help with benefits, and again for representation. Some local authorities provide services at one location via CABx or other agencies. Access to justice may be improved by a law centre model where legal representation, money advice and welfare rights advocacy are available at one location.

The In-Court Advice Service is independent and ideally placed to assist party litigants. Following the success of the first In-Court Advice Service, which was launched in Edinburgh in 1997, the Scottish Executive funded five additional pilots from 2004 in Aberdeen, Airdrie, Dundee, Hamilton and Kilmarnock. The remit is to assist unrepresented litigants in small claims, summary cause, debt and housing cases. In Aberdeen, around half of new contacts are from tenants facing proceedings for recovery of possession.

One of the stated aims of the In-Court pilot[20] is to reduce the number of decrees granted in absence of the defender. This is particularly relevant for heritable actions, where decree may be granted in the absence of a defender after the case had previously been continued or sisted to monitor a payment arrangement.

The In-Court Advice model places an adviser full-time in the Sheriff Court building to assist tenants before and at the hearing. The objective is to provide immediate advice and representation where applicable and to make appropriate referrals for ongoing assistance. The In-Court Adviser works in partnership with money advisers and welfare rights officers who would not themselves be able to represent the tenant. Often tenants who have difficulties managing appointments will contact the In-Court Adviser when there is an imminent court hearing, giving an opportunity for casework to pursue backdated housing benefit and other issues. Where a proof date has been set, the In-Court Adviser attempts to assist the tenant to access the holy grail of legal representation.[21]

The In-Court Advice service was originally envisaged as a one-stop shop to diagnose, provide emergency assistance and refer on, but the balance of referrals has been in the opposite direction. In fact, the In-Court Adviser can be the first point of contact both for solicitors who refer tenants because 'we can't get legal aid for that kind of thing', and for advice agencies that say 'we don't go to court'.

When a tenant presents with rent arrears, it is an opportunity not only for income maximisation, but also to identify

underlying issues such as community care needs. The In-Court Adviser has a unique position in the advice landscape, enabling help to be targetted at party litigants.[22] Furthermore, the evidence gained from this work can assist with social policy planning, such as strategies for the prevention of homelessness.

1 J. Mitchell (1999) 'Security of Tenure and Eviction Policy', available at http://www.jonathanmitchell.info.

2 P. Brown and M. Selkirk (2004) 'Eviction Trends in Scotland: The Need for Full Spectrum Advice and Representation Services' 316 SCOLAG 27.

3 Communities Scotland (2005) 'Evictions in Practice', available at http://www.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/rics_011393.hcsp.

4 Ld Woolf (1996) 'Access to Justice: Final Report', available at http://www.dca.gov.uk/civil/final/index.htm.

5 It may be assumed that most of the remainder were on rent arrears grounds, however other possible grounds are not distinguished.

6 HSG/2006/3,4,5&7 available at http://www.scotland.gov.uk/Topics/Statistics/14844/1762.

7 Of the 11541 summary cause actions for recovery of possession of heritable property where decree was granted in favour of the pursuer, only 237 were classed as defended: http://www.scotland.gov.uk/Publications/2004/02/18897/33082.

8 Mitchell (1999).

9 Scottish Executive (2007) 'Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland', available at http://www.scotland.gov.uk/Publications/2007/02/09110006/0.

10 Brown and Selkirk, op cit.

11 Mitchell (1999).

12 R. Smith (2006) 'Aberdeen In-Court Advice Service Annual Report 2006', available from the author. Note that only one underlying problem was recorded per client, so there may be under-recording.

13 Scottish Government (2005) 'Code of Guidance on Homelessness', available at http://www.scotland.gov.uk/Publications/2005/05/31133334/33366, para 2.62.

14 A. Gillies (2007) 'Tax Credit Overpayments: The Latest' 199 CPAG Welfare Rights Bulletin 11.

15 J. Ford and J. Seavers (1998) 'Housing Associations and Rent Arrears: Attitudes, Beliefs and Behaviour', available at http://www.jrf.org.uk/knowledge/findings/housing/hrd18.asp.

16 Statistics published 13th September 2007, available at http://www.dwp.gov.uk.

17 H. Pawson et al (2005) 'The Use of Possession Actions and Evictions by Social Landlords', available at http://www.communities.gov.uk/documents/housing/pdf/138880.

18 J. Mitchell (1995) 'Eviction and Rent Arrears – A Guide to the Law in Scotland', available at http://www.jonathanmitchell.info.

19 Communities Scotland (n.d.) 'Homepoint Standards', available at http://www.homepoint.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/hpcs_006225.hcsp.

20 S. Morris, et al (2005) 'Uniquely Placed: Evaluation of the In-court Advice Pilots (Phase One)', available at http://www.scotland.gov.uk/Publications/2006/01/24132154/0.

21 Perhaps from Shelter's Housing Law Service, based in Edinburgh.

22 On which, see John McGroarty's contribution to this collection.

Mediation

Problems and possibilities of civil mediation

Hong-Lin Yu, Reader in Law, University of Stirling

Introduction

Securing access to justice within a reasonable time and at a reasonable cost is a challenge for the civil legal systems of most jurisdictions. Following the radical reform of the Scottish criminal justice system and the criminal courts, the Scottish Executive has asked Lord Gill to look into the ways to improve the efficiency of the civil court system in Scotland.

In the announcement, the principles of proportionality and value of money have been singled out as the pillars of the reforms. The principle of proportionality is directly linked to the challenge for the civil justice system to make sure that 'whether the level of legal and, where appropriate, judicial resource applied to an issue is proportionate to the importance and value of the issue to the parties and to society in general.'[1] As the Scottish Executive correctly pointed out,

> it is all too easy for a party who has the desire and resources to do so, to pursue (or defend) a case for an indefinite period, on the basis of little or no valid legal argument, even where the sums involved are insignificant, causing expense to his or her opponent and using up valuable public resources in the form of court time.[2]

With regard to the principle of value-for-money, the Scottish Executive intends to 'assess and compare the extent to which different types of services within the civil justice system provide value and efficiency, in terms of their monetary cost both to the public purse and to the people and business using them, and in terms of how well they meet public expectations.'[3]

To achieve these two principles, one of the suggestions in Para 3.20. of the Scottish Executive's *Modern Laws for a Modern Scotland* is that the potential benefits of case management should be examined in depth in the Civil Court Review in order to help ameliorate the worst excesses of the civil litigation system. The possibility of multi-party actions or of similar cases being grouped together; of greater powers to control the amount and nature of evidence presented being vested in the courts; and of powers to refer disputes to mediation or another form of alternative dispute resolution being granted have all been mentioned. As far as alternative dispute resolution is concerned, it is evident that the Review Team's focus is on mediation in the hope that most courts' caseloads will be significantly reduced by encouraging parties to take up mediation opportunities so that the principles of proportionality and value for money can be fulfilled.

It is the writer's intention to point out that mediation alone may not reduce the congestion in the civil court system or provide an outcome within a reasonable time (and at a reasonable cost) to the parties involved and to the public purse as the Executive has hoped. Furthermore, the discussion will examine whether other possible alternative resolution mechanisms, such as arbitration and mediation/arbitration, are more appropriate in this context. Finally, concerns over referring parties to a consensual resolution will also be raised.

The myth of mediation

Mediation is usually described as 'assisted negotiation'. The appointed mediator is neutral and has no bias against any party or their positions and acts as the facilitator who assists the disputants in reaching an agreement. It is said that the mediation process is voluntary to the extent that the parties decide who the mediator is, when the mediation takes place, and how the dispute is settled. By applying the technique of negotiation, the mediation is claimed to be informal and inexpensive compared to the courts and other alternative disputes methods. Over and above, with the help of the mediator, a mutually agreed solution to the disputes will be found for the parties. Recognising the potential benefit that mediation may bring to the reforms,[4] Lord Gill has put mediation high on the agenda for the Civil Court Review.

However, unlike other forms of dispute resolution, such as arbitration and litigation, the mediator does not impose a settlement. Instead, the mediator guides or helps the disputants to reach their own solution. In other words, the parties have the right to either follow the guidance given by the mediators or abandon the whole process and return to the courts or other alternative dispute mechanisms to resolve their disputes. Consequently, the benefit of mediation and the intention to encourage disputants to use mediation to resolve their disputes can be hampered by the non-binding nature which is the main characteristic of mediation. To insist on the use of mediation to fulfill the principles of proportionality and value for money, there is the need for a detailed study on the success rates of court annexed mediation projects in order to determine, among other things, what percentage of mediation cases eventually return to the court system.

There is evidence to suggest that unwilling parties with disposable resources may decide to abandon the mediation process or the suggestion made by the mediator and bring the disputes back to the court and have two bites of the cherry. This lack of binding force in the mediator's suggestion may produce undesirable effects to the well-meaning intention of the Executive. Furthermore, the principles of proportionality and value for money that the Review seeks to achieve will not be fulfilled because this 'revolving-door' effect means the courts will not be able to prevent the disputants from returning, causing expense to opponents and using up valuable public resources in the form of court time.

Reaching a binding decision outside the courts – mediation/arbitration

To obtain a binding decision outside of the civil court, parties are left with only one choice – arbitration. In the recent past, we have witnessed an explosion in the use of alternative dispute resolution to settle civil matters as parties have sought to avoid the costly and lengthy judicial review process. Frustrated or simply hampered by the extraordinary time and expense involved in the judicial determination of disputes, potential litigants have found in alternative dispute resolution a system where disputes can be finally and fairly resolved in a comparatively simple and speedy process. Arbitration is just one of the mechanisms through which this may be achieved.

The wide acceptance of arbitration has been helped by the establishing of a huge number of organisations which specialise in both national and international arbitration,[5] as well as by legislation being passed at national level to encourage its use of arbitration. It differs from mediation in that awards are binding, final and subject to appeal only on the narrow grounds provided by the relevant national legislation or international conventions. Although arbitration provides the disputants with a binding decision, it is in general more expensive than other forms of alternative dispute resolution. The potentially high expenses incurred in arbitration may be a factor in deterring the disputants from using it to resolve their disputes. Bearing this in mind, pure arbitration may not offer the parties with small claims the value for money they would expect.

To reduce the caseloads of the courts and offer the parties the flexibility, speed and binding decision they expect, it may be a good idea for the Review Team to look into mediation/arbitration (Med/Arb) as the possible alternative dispute resolution. Med/Arb offers the disputants an opportunity to resolve their dispute by means of mediation first. Failing to reach any agreement regarding the settlement will result in the mediator transferring his role to that of arbitrator in order to resolve the dispute and make a final binding decision. Although used in the context of ADR, this method has been widely used in the USA and Hong Kong; despite the reservations expressed by commentators in the West, mediation/arbitration is commonplace in the Far East and appears to operate effectively.[6]

From the outset, Med/Arb will achieve the principles of proportionality and value for money because, under case management, suitable cases will be directed to this alternative disputes resolution and provide a binding decision. Consequently, public resources can be better distributed. To adapt this mechanism in the reform, however, the Review Team will need to address the following concerns:

- The parties will have to understand that their disputes are to be resolved by a third party, whose binding decision is subject to review on very limited, narrow grounds.
- The reservations of the legal profession will have to be challenged. In particular, to quote Redfern and Hunter, the legal profession will inevitably ask 'how can the arbitrator satisfy or appear to satisfy the requirements of 'impartiality' and 'a fair hearing' if he has previously held private discussions with the parties separately and indicated his views to them?'[7]
- Bearing the principle of proportionality in mind, it is essential to work out what types of dispute shall be directed, who makes such decisions and the basis for such choice. It is also important to address the issues of choice of mediators/ arbitrators; to define their nature and status in terms of remuneration; and to determine whether this design is private in nature or created as an informal adjudicatory system outside the normal court system.

If it is classified as private in nature, would the parties be happy to pay for the services while they have the rights to return to courts? If it is regarded as an informal adjudicatory system, should the costs be met by the public purse? Would this provide answers to the principle of value for money?

It is the writer's opinion that further studies will have to be conducted to provide the answers whether Med/Arb is a good design which can be agreed among parties, the legal profession and the judicial system and stop the 'revolving-door effect' in order to ensure proportionality and value for money.

1 Scottish Executive (2007) Modern Laws for a Modern Scotland (Edinburgh, Scottish Executive) para 3.5.

2 Modern Laws para. 3.7.

3 Modern Laws para 3.9.

4 As recognised by the English courts in, for example, Dunnett v. Railtrack [2002] 1 WLR 2434 and Hurst v. Leeming [2002] CP Rep 59.

5 For example, the International Chamber of Commerce and the London Court of International Arbitration.

6 J. Tackaberry and A. Marriott (2003) Bernstein's Handbook of Arbitration and Dispute Resolution Practice (London, Sweet and Maxwell) 4-029.

7 A. Redfern, A. and M. Hunter (2004) Law and Practice of International Commercial Arbitration (London, Sweet and Maxwell) I-82.

Mediation in the Sheriff Courts & modern ADR processes

Brendan O'Sullivan, Trainee, Orpen Franks Solicitors, Dublin

Nicola White, Law Reform Commission of Ireland

Introduction

Justice, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.[1] The modern principle of justice must encompass more than formal legal processes. The very essence of justice concerns the inherent flexibility of the concept; in one case it may require a decision from the Sheriffs Court while in another a simple apology has the ability to fulfil this criterion. Justice can take an infinite number of different shapes and forms depending upon how the parties involved perceive it: the Alder Hey mediation attests to the myriad ways in which 'justice' may be defined.[2]

It has been stated[3] that the Gill Review is aimed at ensuring the civil justice system continues to provide an effective service for those who need it and will result in a more user-friendly system which will allow consumers to resolve their disputes more quickly, cheaply and easily than at present. Alternative Dispute Resolution ('ADR') must be accorded high priority in such an undertaking as it is one of the few means which militates against a calcified justice system. To echo the sentiments of Menkel-Meadow,

> We are living in a time of social and legal evolution and it appears as if a single civil adversary court style process will not be adequate to satisfy all of the desiderata of a good justice system. With specialisation in some areas…and varying claimant preferences in others…it certainly appears that a modern civil justice system ought to permit some menu of choices for particular kinds of processes.[4]

The Wider ADR Spectrum

An Ethiopian proverb argues that 'when spider webs unite, they can hold back a lion'. Similarly:

> A good dispute resolution system consists of a series of successive safety nets – negotiation followed by mediation, advisory arbitration, arbitration, third party intervention, and so on – that can ensnare a dangerous conflict before it can do irreparable harm. An attempt is made to catch disputes early. If one procedure fails, another is waiting.[5]

While Australian and English case law on ADR can be characterised as rich and contentious, Scottish jurisprudence is, by contrast, extremely sparse. In part, this may be due to the general observation that the former jurisdictions are more complex, diverse and litigious, hence their courts hear a wider variety of cases. A more likely explanation, however, is that contemporary ADR processes are a relatively new feature of the Scottish system. Just as Professor Frank Sander urged American lawyers and judges in 1976[6] to re-imagine the civil courts as a collection of dispute resolution procedures tailored to fit the variety of disputes that parties bring to the justice system,[7] so too must the Scottish Executive and Judiciary strive to provide a 'multi-door courthouse' to its citizens, where a full menu of dispute resolution choices are readily available.

While it is acknowledged that arbitration and mediation are undoubtedly alternatives to litigation, the Gill Review provides an opportunity to accentuate other forms of ADR which have successfully been developed in other jurisdictions as tools for increasing the menu of choices for citizens seeking the resolution of disputes and the attainment of justice. Examples of ADR processes which merit consideration in any discussion of increasing access to justice include ADR clauses, consensus building, partnering, facilitation, conciliation, early neutral evaluation, summary jury trial, dispute review boards, case appraisal, collaborative lawyering, expert determination, judicial mini-trial, adjudication, med-arb, arb-med. This is not an exhaustive list, but rather serves to illustrate the wider ADR spectrum which is expanding in other jurisdictions such as the United States and Canada.

Any examination of ADR processes must include a framework of ADR terminology as there appears to be a vast difference of understanding and interpretation in respect of the terminology of the mechanisms that make up the spectrum of dispute resolution procedures. As noted by the National Alternative Dispute Resolution Advisory Council (NADRAC) of Australia 'most service users have little awareness of ADR generally, let alone the fine distinctions among particular ADR processes such as facilitation, mediation, conciliation.'[8] Furthermore, if the Gill Review is to recommend the introduction of multiple forms of ADR it must also ensure that standards of training and accreditation of ADR professionals are also addressed.

In considering the ADR Spectrum the Gill Review should endeavour to incorporate trend indications, policy ideas and evaluations of pilot and continuing projects in other jurisdictions which have resulted in increasing access to justice for potential litigants.

The Sheriffs Court and Commercial Mediation

Per Lord Eassie, 'there is increasing recognition of the role of alternative dispute resolution procedures in the settlement of commercial affairs.'[9] The recognition of the merits of mediation among a growing number of practitioners, coupled with judicial endorsement of the process, has prompted substantial developments in the area of mediation in commercial disputes. While it is readily acknowledged that encouragement of ADR has been forthcoming from Scotland's Court of Session, with the introduction of a practice note directing the early resolution of conflicts,[10] it is asserted that any ADR process, including mediation, would best be served by a complete and meaningful incorporation into the Ordinary Cause Rules which govern the Sheriffs Courts. Currently, there are no compulsory mediation schemes within court procedures in Scotland and the issue of the institutionalisation of mediation into the Sheriff Court, although controversial, merits consideration by the Gill Review.

There are rules that permit, but do not mandate, the Sheriff to refer a matter to mediation. Under Ordinary Cause Rule 40.12 (1), at the Case Management Conference in a commercial action the Sheriff shall seek to secure the expeditious resolution

of the action by making 'any order which [he] thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution)'. As noted by Mays and Clark, 'the scope for mediation appears to be under exploited'[11] particularly in the Sheriffs Court in which the majority of litigation is conducted. Under the Draft Rule proposed by the Sheriff Court Rules Council[12] the court cannot compel the parties to engage in mediation, but rather only encourage the parties to consider the prospect of mediation for resolving their dispute. Under the Draft Rule an unjustified failure to give mediation due consideration may have costs implications. As is apparent, this mirrors the Civil Procedure Rules in England and Wales, namely CPR rule 1.4(2) and rule 26.4. Thus, while there would remain no compulsion to mediate, it is contended that one would be brave to disregard judicial invitations to engage in a mediation conference.

By diverging from the path of mandatory mediation as is in force in many other jurisdictions, it is clear that the judiciary in Scotland in this instance will be the catalyst for increased use of mediation in commercial matters. Yet the duty on solicitors in advising clients plays an integral role in the uptake of mediation and as such this duty, if any, must not be overlooked in the consideration of increased access to justice. Thus far the legal profession's anodyne utilisation of mediation has not allowed an understanding of the process of mediation to permeate all legal levels, from everyday practice to the commencement of legal training. Professional advisors should regard themselves as under a duty to ensure that their clients are aware of the potentially catastrophic consequences of litigation and of the possibilities of ADR procedures.[13]

It is arguable that at the consultation phase, the Gill Review would best be served by taking the following into consideration:

- The creation of an express onus on the legal profession to inform potential litigants of the option of mediation but likewise the inclusion of an indication of the potential consequences of failing to fulfil the duty of informing their clients;
- By either initiating a system of filing executed declarations of having been informed of the option to mediate before allowing the case to proceed; or by requiring attendance at a pre-litigation mediation conference.[14]

As agents for their clients' interests, the legal profession must be responsive to changes in economic structures, social expectations and disputing cultures. Thus the legal profession plays an important role, not merely in the legitimisation of new ideas and practices but also in their promotion, thereby allowing an enhanced uptake. As a result the assimilation, acceptance, rejection or integration by lawyers of the burgeoning array of alternatives to formal litigation is critical to the impact of civil justice reform and innovation, on both a practical and political level.[15]

Conclusion

The effect of ADR processes in providing a 'menu of choices' for the resolution of disputes cannot be overstated or overlooked by the Gill Review. ADR makes a crucial contribution to any civil justice system by increasing access to justice for potential litigants through greater flexibility and accessibility to justice. Moreover, ADR provides the opportunity for party empowerment which can frequently be meagre where litigation is concerned. This article highlights the many ADR avenues which should be readily available in the Scottish legal system. The growing ADR spectrum provides disputants with an array of creative and valuable means for resolving disputes. The Gill Review provides an opportunity to examine and promote such processes which have been successfully integrated into the legal systems of other jurisdictions. At its simplest, an increased menu of choices equates to increased access to justice.

Furthermore, it is important that in examining mediation, the Gill Review explores the option of integrating it into all court systems. Mediation should not be seen as a separate entity from the courts, but rather it should become an integral part of the Scottish judicial system. Taking this stance requires increased involvement from the judiciary, courts service and legal profession alike, with distinct duties, roles and responsibilities being allocated to all involved. The Gill Review undoubtedly represents the platform for enhanced access to justice through the medium of substantial procedural, operational and cultural change within the Scottish system, a system which has to-date arguably stymied innovation. The legislature and courts systems in Scotland currently stand at a crossroads and must ultimately decide which legal avenue to embark upon as far as ADR is concerned and to what extent it should be incorporated into the Scottish legal landscape. However, it should be remembered that 'the obligation of our profession has long been thought to be, to serve as healers of human conflicts. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.'[16]

The views expressed in this article are solely those of the authors.

1 Hansard, 11th November 1947.

2 The group litigation concerning organ retention by Alder Hey Hospital (comprising about 1,100 claims) was settled by way of a three day mediation through the Centre for Effective Dispute Resolution (CEDR). The settlement included financial compensation but it was accepted that the ability to discuss non-financial remedies ensured a successful conclusion. The families involved produced a 'wish list' and this resulted in the provision of a memorial plaque at the hospital, letters of apology, a press conference and contribution to a charity of the claimants' choice: www.cedr.co.uk.

3 LSS (2007) 'Lord Gill to Review Civil Court Procedures' *The Law Society of Scotland Journal Online* 12th February, available at www.journalonline.co.uk/news/1003902.aspx.

4 C. Menkel-Meadow (2004) *Institutions of Civil Justice: a paper prepared for the Scottish Consumer Council Seminar on Civil Justice*, available at www.scotconsumer.org.uk/civil.

5 W. Ury et. al (1988) *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (San Francisco, Jossey-Bass).

6 At the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (also known as the Pound Conference).

7 D. Hensler (2003/04) 'Our Courts, Ourselves: How the Alternative Dispute Resolution Movement us Re-Shaping Our Legal System' 108 *Penn State Law Review* 165.

8 NADRAC (2002) *ADR Termininology: A Discussion Paper*, available via www.nadrac.gov.au. The National ADR Advisory Council (NADRAC) is an independent body which provides advice on ADR to the Commonwealth Attorney-General. Its reports and publications cover standards for ADR, diversity, ADR in courts and tribunals, family law PDR, ADR and small business and on-line ADR.

9 *E & J Glasgow Ltd v. UGC Estates Ltd* [2005] CSOH 63.

10 Rules of the Court of Session, available at: www.scotcourts.gov.uk/

11 R. Mays and B. Clark (1996) *Alternative Dispute Resolution in Scotland* (Edinburgh, Scottish Office Central Research Unit).

12 'Sheriff Court Rules Council: Consultation on The Sheriffs Court and Alternative Dispute Resolution', Mediation Committee of the Sheriff Court Rules Council, 2006. Available at www.scotcourts.gov.uk/sheriff/rules_council/docs/ADR%20Consultation.pdf

13 *Liaquat Ali v. Robert Lane* [2006] EWCA Civ 94.

14 As is in force in various jurisdictions in the United States.

15 M. Galanter (1984) 'Worlds of Deals: Using Negotiation to Teach About Legal Process' 34 *Journal of Legal Education* 268.

16 W. Burger (1982) 'Isn't There a Better Way?' 68 *American Bar Association Journal* 274 .

A personal plea for family courts

Liz Welsh, Principal, Elizabeth Welsh Family Law Practice, Ayr and Vice-Chair of the FLA

Introduction

For several years it has been the policy of the Family Law Association ('FLA') to support the introduction of family courts. The review of civil justice now being undertaken by Lord Gill presents the challenge of defining what we mean by that. This article represents my own views and not the views of the FLA as we are now embarking on the process of drawing up our policy in detail. I hope this article will identify a number of issues and look at possible solutions. I have referred throughout to Sheriffs as the great majority of family cases are dealt with in the Sheriff Court rather than the Court of Session.

Where are we now?

A good place to start is to look at what is right and wrong with the present system. A consideration of what is right will necessarily be brief: insofar as the present system works at all, it does so thanks mainly to the skills of the experienced lawyers working in this field. Practitioners can make a very great difference to a case. The court system may still be adversarial but a cooperative and informed approach can speed up the process to the benefit of both clients and courts. The savings this brings can be measured not simply in monetary terms, for in family cases, by definition, there is more at stake than cash. If the settlement is achieved by negotiation, whether the method is mediation, collaboration or plain old-fashioned cooperation, both parties are going to be happier than they would be if the settlement is imposed upon them.

Where there are children involved the stakes are higher again. An appreciation that there are no winners and losers in child cases is essential; there is no room here for the ambush by procedure or pleadings. Since *Girvan v. Girvan*[1] we have had clear dicta that the interests of children are more important than the Rules of the Court. Here the cooperative approach is what gets results. That is appreciated and encouraged by Sheriffs who constantly instruct parties to listen to their solicitors and at the same time tell us to 'go and bang heads together'. Underpinning this approach - and essential to its effectiveness - is the certainty that the law brings. Experience and interpersonal skills help, but it is essential when advising clients to be able to say with some certainty what the Sheriff would do and accordingly what clients must accept as their obligations in law.

I recognise however that sometimes it needs a higher authority to resolve the issue, and it is here that the child welfare hearing comes into its own. These hearings have been controversial since they were first introduced in November 1996. Some, admittedly very few, Sheriffs have taken to them like the proverbial ducks to water. Wigs and gowns came off and benches were abandoned. Some Sheriffs were happy to get into the nitty gritty of the dispute, trying to get inside the hearts and minds and find out who was genuine and who was not, who was acting out old bitterness and who was putting their own hurt into the minds of their children. I do not intend to criticise Sheriffs who were not willing or able to do so, because that is not what they were trained to do. One has to ask whether a hearing that required direct involvement with the parties could be wholly successful when it had simply been dropped into an adversarial system based on written pleadings. While I contend that child welfare hearings are one of the successes of the present system, they could be vastly improved given the right training and resources.

This brings me to what I consider to be wrong with the present system. Family cases are still dealt with in adversarial court proceedings, the practice and procedure for which does not reflect modern thinking on how to resolve family disputes. While the statute law enjoins courts to regard the welfare of the child as its paramount consideration, the procedures used are old fashioned and often ineffective. One major failing concerns how we approach children in order to ascertain their views: interviewing children is a skill in itself, so should we not have specially trained people to whom Sheriffs could entrust this function? At the moment the court rules provide for this to be done by intimation on the child of a form which runs to three A4 pages. While sheriffs do currently use other mechanisms for finding out a child's views, these forms are still in regular use.

Other resources that should be readily available to the Sheriff are support services such as counselling, anger management courses, mediators, family conferences and parenting classes. Many of these services are available in some areas but are often over–stretched or hard to access. At the moment Sheriffs rely a great deal on reports prepared by members of the bar. Is it right for Sheriffs to 'devolve' responsibility in this way? If not what is the alternative? The Scottish Legal Aid Board has been making noises for some years about capping the cost of such reports. However without them I suggest there would be far more contentious child welfare hearings and certainly far more proofs. These reports represent terrific value for money, drawing as they do on the forensic training of the lawyer and the experience of many years in family cases.

The rationale for family courts

Family cases are concerned with far more than orders relating to parental responsibilities and parental rights. There are financial provision claims, domestic abuse protective orders, adoptions and soon we will be seeing dissolution of civil partnerships and claims by former cohabitants under the Civil Partnership Act, 2004 and the Family Law (Scotland) Act, 2006. Should all of these issues be dealt with in a court separate from criminal and other civil business and if so, in what form? There are two main arguments for a separate court. The first is that issues involving children require a different approach, some of the reasons for which are identified above. The second is that the legislation and case law is sufficiently profuse and complex to justify specialist Sheriffs. If we are to invest in training for Sheriffs to deal with child cases in particular is there not a benefit to be had from using these Sheriffs to the full by placing all types of family cases before them? Training that is focussed on the skills and the law needed for the full range of these cases can then be delivered.

Of course, the issue is not just about Sheriffs. If we have specially-designated family Sheriffs the full range of support services can be built around them. The pilot domestic abuse court and the family court experiment in Glasgow provide a template and valuable lessons, and we have the benefit of a detailed evaluation of the domestic abuse court[2] which has been overwhelmingly positive in stressing the effectiveness of a well-resourced court and a multi-agency approach. I suggest that this is exactly what is required in family cases, particularly those involving children, and there surely is also a case for civil domestic abuse orders having the benefit of the same approach?

Unfortunately there has been no similar research-based evaluation of the Glasgow family court project, although the anecdotal evidence is again very positive. The court designated four Sheriffs to deal with all family cases; a courtroom was set aside so that all cases were heard in the same place and the

family Sheriffs were able to keep the case from first hearing up to, but not including, proof and it would be extremely useful for a detailed assessment of the benefits and weaknesses of this practice. The practice of keeping at least the child issues, such as motions for interim contact and residence, before the same Sheriff has been successfully adopted in many other courts and this would be a starting point for a family court system.

The question then arises, do we need courts for family cases or should some or all of these cases be diverted to alternative agencies? It has been suggested[3] that child cases could be dealt with in children's hearing type tribunals, but I would suggest that such an approach would simply not work because the sheer volume of cases would defeat a system staffed by volunteers. I also doubt that parties involved in intra-family disputes would accept the views of lay people being imposed on them. As it is, we often hear the refrain 'no one is going to tell me what's best for my child', a view which can be given short shrift by a Sheriff who necessarily has the authority that volunteers lack and can thus impose solutions. Although I strongly advocate a child-centred and sensitive approach, there is no question in my mind that some form of authority is necessary in family disputes as in any other civil case. The approach may have to be different but the outcome has to be certain and respected. A court as the final arbiter is the answer.

Such a separation would be impracticable because many actions have several aspects to them, with status, protective orders and financial matters arising alongside child issues. Furthermore, there would be benefits to all family cases being heard in a specialist court. The Sheriffs would be trained to deal with them and they would build experience of complex financial provision law in addition to becoming well-versed in the support structures that are available locally. The experience of both the domestic abuse and family court projects suggest that cases would become easier to manage within a dedicated framework.

Conclusion

If I have made a case for a separate family court, what form should it take? Ideally there should be separate court buildings because it is not appropriate for children to be brought to a court where criminal business is taking place. However there is a need for the majesty and authority of the law in family cases (perhaps a greater need if the proceedings themselves are to be less formal as I have suggested) and a court setting provides that. I accept that it is probably not feasible to create entirely separate buildings given the resources which would be required in order to provide that throughout Scotland, but on those occasions where new premises are being considered a separate building should be provided. Even if separate courtrooms, waiting areas and entrances would not be easy to achieve in most courts, there are some where they could and the provision of separate days for family business would be achievable in most venues.

Would these new family courts require new rules and procedures? The existing court rules for family cases are a development of the standard rules, but this would be an opportunity to start from first principles by considering such issues as whether we need written pleadings in all family cases; whether there is any benefit in putting down in writing all the complaints one parent has about the other; and whether we should accept that pleadings in child cases are ignored for the best part. We might also consider whether there is a need for one party to raise an action *against* the other. In most child cases the rules are often abandoned: options hearings are discharged, there are multiple child welfare hearings and there is a reluctance to fix proofs. However, a final decision by a Sheriff is still an option we need, so what mechanism should there be for getting to it if we accept that traditional proofs are not always appropriate? Should we abandon wigs and gowns completely? Is there a need for lawyers and if so should the family court be the preserve only of accredited specialists?

There is room here for some very creative thinking. There are good and bad models throughout the world for us to learn from. We must grasp this opportunity while being aware that, although the costs of creating a new family court system will be high, there would also be the high social cost associated with family breakdown if we get it wrong. The financial cost of a properly-resourced court is certainly worth paying in order to provide an effective forum for resolving these issues and keeping families together.

1. 1988 SCLR 493.
2. www.scotland.gov.uk/publications/2007/03/28153424/2.
3. R. Mackenzie (2007) 'Point of Contact' 7 *Journal of the Law Society of Scotland* 20.

Alternative business structures – better for big business or the consumer?

Jennifer Veitch, Freelance Journalist

When the consumer charity Which? made its super-complaint to the Office of Fair Trading about the Scottish legal services market earlier this year, those tasked with regulating the profession in Scotland were – with the benefit of hindsight – perhaps a little too quick to defend the status quo. Both the Law Society and the Faculty of Advocates recommended the OFT take no action on the call to open up the Scottish legal services market. They argued that the working group set up by the previous Executive, which had reported just over a year previously, had found insufficient evidence for change. And while Which? argued that lifting restrictions such as those relating to the ownership of firms and access to advocates would benefit consumers by increasing choice and driving down prices, both the Society and Faculty warned it actually could harm access to justice. If so-called 'Tesco law' became a reality in Scotland, they said, smaller firms in rural areas could struggle to remain viable as big businesses could 'cherry-pick' the most lucrative work. However, in the post-Clementi climate and with the proposals in the Legal Services Bill set to radically alter the marketplace in England and Wales, it seems it is now too late to turn back the tide of change.

Having considered the super-complaint in detail, the OFT was clearly not convinced that the status quo could continue to be an option. It called for an end to restrictions that 'could be harming consumers', and urged the Scottish Government to consider: how legal services should be regulated; how the restrictions outlined in the super-complaint could be lifted; and a timing commitment for both these aims. Following the OFT's

response, the Law Society has conceded that no change is not an option, and at its recent conference, *The Public Interest: Delivering Scottish Legal Services*, it became clear that the Justice Secretary, Kenny MacAskill, was similarly inclined. As he said during a question and answer session, 'we as a Government are more than happy to circle the wagon to defend the profession, but we cannot defend what is perceived as indefensible.' Those who are not keen to see Tesco take over the market in Scotland may have been somewhat dismayed to hear the Justice Secretary is keen to press his foot on the accelerator for reforms, suggesting that Scotland could out-manoeuvre England, which is not expected to implement significant change until its Legal Services Board is established in 2011.

So it seems that reforms to the regulation of the Scottish legal services marketplace are now all but inevitable; it is merely the nature and the extent of them that still remains unclear. However, MacAskill has also acknowledged that the profession and the Government now have a difficult circle to square. Whatever new regulatory framework is envisaged, it will need to be designed in the interests of the individual consumer, Scottish business, and the general public. The key question may be not whether opening up the market might drive down prices and increase efficiency, but whether this is worth the potential price paid by smaller firms that are crucial in maintaining access to justice across the country.

A recurring theme of *The Public Interest* debate was whether a distinction can be drawn between consumers who are paying for a legal service – and by extension can afford to take their money elsewhere – and those who cannot afford to pay and must therefore rely on legal aid or other subsidised sources of advice. Issues such as criminal legal aid and cases of domestic abuse were repeatedly mentioned as legal services that are often subsidised by the privately-funded work that solicitors do. As Professor Stewart Hamilton, a Law Society lay observer, put it during the question and answer session at the conference, 'my real concern is that the Law Society is sleep-walking into a minefield of conflict of interest, of cherry-picking and that what we are looking to serve is not the law, but Mammon.'

Jonathan Goldsmith, the CEO of the European Bar Association, the CCBE [Conseil des barreaux europeens], said it was crucial to separate what might be the individual consumer's interest – such as lower prices – and the wider public interest, such as quality of service and access to justice. The CCBE is not in favour of alternative business structures because, Goldsmith said, it was still not clear how they could be reconciled with the profession's need to protect its core values including independence and confidentiality. This, he added, amounted to an 'over-riding economic argument' against the ABS.

Yet the view of the Scottish Consumer Council was almost diametrically opposed. Its director, Martyn Evans, told the conference that alternative business structures could provide more choice, reduced prices, better access for some consumers, convenience and improved confidence. The SCC supports alternative business structures such as legal disciplinary partnerships (LDPs) allowing solicitors, advocates and foreign lawyers to work in the same firm, and multidisciplinary partnerships (MDPs).

Several practical questions of continuing to offer consumers the same degree of protection as the current regulatory framework were also debated. Some of the issues that will need to be resolved are the potential impact on the guarantee fund, which gives unlimited liability in the event of clients being defrauded by dishonest solicitors and is paid for out of fees from practising certificates. Questions have also been raised as to how potential conflicts of interest would be addressed if, for example, banks started to offer legal services. Julia Clark of Which? has made it clear that they would expect any new regulatory proposals to offer consumers the same degree of protection or greater – a view that did not appear to be supported by the majority of solicitors present at *The Public Interest* conference.

The OFT remain committed to removing the restrictions, and have warned that Scottish firms could be left behind if they fail to take account of the changes happening on their doorstep. In an interview ahead of the conference, Kyla Brand, the OFT's representative in Scotland, says that does not mean Scotland will have to copy the English model, but that the Scottish profession does need to recognise the new landscape that is emerging. She acknowledged that there would be winners and losers.

'Competition does mean that some people lose out,' she said. 'If new people come in because they are offering a service that consumers need and want, they will buy these services when they get what they need.' Brand added that some smaller firms have told the OFT they see potential in the removal of market restrictions. 'We heard from representatives of small firms that they could see some real advantages from being able to finance your business in other forms. At the moment if you are a sole practitioner and you want to leave you can't sell on your business. There are already huge risks in the unsustainability of services.'

It is now up to the Law Society to lead the profession's response to the challenge thrown down by the OFT and the consumer lobby. At the time of writing, a 'green paper' style draft of options for the way ahead is expected to be published this autumn, ahead of the Government's own response to the OFT recommendations. The Society is scheduled to produce a final options paper early next year, which will go out to public consultation. While it might seem optimistic to expect that legislative reform could be in place before it is in England, it is possible that the Government will sanction the introduction of pilot projects to test new models of working.

Michael Clancy, the Law Society's director of law reform, has urged solicitors and others interested in access to justice to actively engage in the debate about alternative business structures, which he has said will be crucial for the future of the legal system in Scotland. Asked if there should be a review of access to justice in the light of prospective regulatory changes, Clancy said it was an issue that needed to be kept under constant check, rather than the subject of a single review:

> It is a continually moving feast. The fact of the matter is our law is not static and is being reviewed by a number of bodies in a number of ways. In terms of access to justice, it ought to be kept under review and it must be kept under review. I am sure that the way in which the Justice [Secretary] is presented with these issues, he will see very clearly the need to balance the various interests, and that we create a system that ensures that citizens get access to justice and that Scottish business is protected.

The OFT is also keen to encourage the legal profession to come up with workable solutions, rather than have reforms imposed upon them. 'We do see this as an opportunity,' said Kyla Brand. 'We feel the time is good because some of the sector is opening up. Our concern is to make sure the market works well for consumers – any suggestions need to pass that test.'

Securing access to justice for survivors of domestic abuse

Jennifer Veitch, Freelance Journalist

For almost a decade, the message from Scotland's devolved government on domestic abuse has been clear – quite simply, there can be 'no excuse' for it. And there are some signs that the high profile media campaigns may be beginning to pay off. The attitudes of the police and the courts are generally held to have improved, as official figures suggest that women may now be more willing to report their abusive partners to the authorities. The most recent statistics, for 2005-2006, reveal a five per cent increase in incidents of domestic abuse recorded by the police compared to the previous year, continuing the upward trend since records began in 1999.[1] But, in spite of efforts to change social attitudes and reduce stigma for victims, when it comes down to offering practical support for those caught in a violent or abusive relationship, Scotland's legal system is often perceived to be lacking.

The Family Law Association Scotland recently highlighted a stark disparity between the treatment of the – usually female – victims and the perpetrators of domestic abuse. According to the FLA, due to means testing, between a third and a half of women have been unable to get full legal aid for a protection order, while their former partners will receive full funding if charged with a criminal offence such as assault. Progress in raising awareness and reducing the stigma surrounding domestic abuse may also be undermined by wider problems with access to justice, particularly in rural areas such as Highland towns including Dingwall, Fort William and Wick.

Rates of legal aid and widespread dissatisfaction with the block fee system used to calculate fees for most civil cases have seen the number of solicitors willing to take on domestic abuse cases start to dwindle. A recent survey by the Law Society of Scotland also highlighted that the number of lawyers willing to offer civil legal aid is likely to decline further, as a survey of solicitors showed 92% of respondents expect to withdraw from providing the service within four years. Both the Law Society and the FLA have been stepping up pressure on the former Scottish Executive and now the new SNP-led Scottish Government to resolve the situation. The new justice secretary, Kenny MacAskill, has indicated his willingness to put legal aid on 'a more stable footing', but at the time of writing, details of any revised arrangements had yet to be made public.

The FLA's current chair, Helen Hughes, a partner with McAuley, McCarthy & Co in Paisley, has raised concerns with MacAskill. She certainly wants to see rates of legal aid increased, and is particularly keen to see the block fee system reviewed. But after representing abused women for the past 20 years, Hughes questions whether people who are suffering abuse should have to apply for advice and assistance or legal aid in the first place. She says there is a strong argument for funding such cases from the public purse, to reinforce the message that such behaviour will not be tolerated in a modern Scotland. 'If we are saying the victims of domestic abuse should be protected, then they should be protected with legal aid without means testing of income they receive,' she says. Hughes acknowledges that this would mean a wealthy woman would be entitled to legal aid when she could afford to pay her own fees. 'But why should she pay for it?,' she asks. 'If we as a society are saying it's wrong, then why not fund it?'

While Hughes believes this would send out a powerful message, she is pragmatic and suggests that the first step the new Government should take is to review the eligibility for legal aid and what the means test should be. She adds that different tests for advice and assistance and for legal aid can mean that women qualify for funding for initial help but are expected to make a contribution if the case goes further. So while most women will qualify for advice and assistance, she adds, the difficulties arise with the means test for legal aid, which takes account of child benefit and tax credits as part of income.

Hughes argues that the block fee system needs to be reviewed, as the FLA believes it is the single biggest reason why the number of solicitors willing to take on civil legal aid cases is dwindling. At the very least, she says, block fees, currently set at £19 a unit, should not apply in such cases. 'It's not rocket science – the block fee came in 2003 and suddenly there was this exodus,' she says. 'There is a pressing need to do something. My argument is that lawyers don't need legal aid. Instead of working a 60 hour week, they can work a 35 hour a week, and private work will be charged at £120 an hour, sometimes more.' She adds: 'we have found that lots of solicitors are refusing to take on legal aid because they are not paid enough to cover their costs. In a domestic violence case, we are spending a lot of time with clients and witnesses. There is a lot of pressure to get it all done. The FLA's position is that a block fee should not apply in family cases.'

Hughes is pleased that the Scottish Legal Aid Board is reviewing block fees, but she adds that there should have been earlier and more frequent reviews of the system following its introduction in 2003. 'The frustration we have is that we were told when it came in that there would be regular reviews. One of the things they are looking at is that they have a category of exceptional cases. What we are doing is trying to impress upon them to have a long list of exceptional cases. We have given them a whole list. If we manage to get some of these other types of cases in, particularly protective order cases, then we will find that access to justice will be improved.'

SLAB is progressing its plans to introduce Civil Legal Assistance Offices, which will plug gaps in legal aid provision. But Hughes is sceptical that this will result in a better service to clients. 'I don't agree with them – I feel they are … an unnecessary expense. There are already lawyers prepared to do this type of work. Someone coming in to see me today would find they would be in court tomorrow or the next day – that's because I know what I'm doing and have been doing it for 20 years.' Colin Lancaster, SLAB's director of policy and development, says the board has been working to identify particular types of case where the block fee system may 'remunerate' less well, and is working with the FLA to agree criteria for exceptional cases.

1. Scottish Executive (2007) Domestic Abuse Recorded by the Police in Scotland, 2005-06, available at: www.scottishexecutive.gov.uk/Publications/2007/01/19160856/3

Access to health and access to justice – the erosion of public entitlements

Rena Gertz, Research Fellow in Law and Public Health Policy, Edinburgh University

Allyson Pollock, Professor of International Health Policy, Edinburgh University

David Brown, Solicitor, Drummond Miller, Glasgow

In 2003, the UK government and the British Medical Association finally agreed a new UK-wide GP contract. Its key feature was to end the GP monopoly of delivery of public health care and in particular it introduced new contracting forms, which, for the first time, included a commercial contract and the facility to open GP services to large health care corporations.[1] In England, unlike Scotland, the process of commercialisation and privatisation is now very advanced with a growing number of international companies running services and employing GPs. This process has been highly controversial with the public, not least because of failings on the part of government to consult with local people. As a result there have been a number of judicial reviews challenging the process of consultation.[2] In Lanarkshire, the public successfully campaigned against the Harthill practice being awarded under commercial contract to facilities management company SERCO.[3] Indeed, no commercial contracts have been awarded to date in Scotland. However another aspect of the GP contract was the break up of services as part of the process of commodification and commercialisation. In particular, GPs no longer had an open-ended, 24-hour duty of care and these services could either be transferred to health boards to manage, contracted out to NHS 24 or handed back to GPs. Although many practices had been opting out of out-of-hours services, GPs had retained control by running highly efficient cooperatives which continued to provide 24 hour cover for all patients.

The new contract made provision for any practice to opt out of their previous commitment to provide out-of-hours cover regardless of whether there was adequate GP cover, subject to health board agreement. This has had a particular impact on remote and rural areas where the GP is the only point of access to medical services. In 2004, the GP practice in the remote, rural area of Kinloch Rannoch and Tayside Health Board applied to Tayside Health Board for permission to stop providing out-of-hours service. The Health Board refused for safety and quality reasons and delayed its decision. To cut a long story short, the practice appealed against the decision and an independent panel was convened comprising a LMC representative, a lay member and the chairman. The chairman, the chief executive of NHS Orkney, overruled the Health Board's decision. The flawed basis of the decision is the subject of another report[4] but the effect was to allow the practice to permanently opt out of the out-of-hours service. The result is that residents now have to travel many miles across difficult terrain with journey travel times in excess of an hour in the winter. For many medical emergencies the time to access health care is vital and a recent research report has highlighted how travel time and distance is related to mortality risks for some conditions.[5]

The local community in Kinloch Rannoch was unhappy not least because they had not been consulted and in their view the proposed substitute services were not safe. One local resident was particularly concerned and applied for legal aid to appeal against the decision. The Scottish Legal Aid Board (SLAB) decided that it was 'unreasonable to grant legal aid in the circumstances.' It argued that the applicant had a joint interest with others regarding the matter in question, citing Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002.

Regulation 15 provides as follows:

> Where it appears to the Board that a person making an application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that-
>
> (a) the person making the application would not be seriously prejudiced in his or her own right if legal aid were not granted; or
>
> (b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted.

The SLAB Guidance[6] on providing civil legal assistance in Regulation 15 cases states that decisions on whether to grant legal aid are made according to the information submitted in the applications and assessment of these submissions. The assessment is then made on the basis of whether the applicant has probable cause and whether it is reasonable to grant legal aid. For the determination of probable cause, two criteria must be fulfilled: the applicant must demonstrate that a sound legal basis exists for the proposed action; and he/she must provide information to establish jurisdiction and right, title and interest to raise proceedings. In cases such as the Kinloch Rannoch case, determining reasonableness is a futile effort, as the second part of the probable cause condition refers us to section 13 of the Handbook, where, under 13.77, 'wider public interest' is discussed. There we are taken back to Regulation 15 and told that 'we must refuse the application if the tests in regulation 15 are met.'

In England and Wales, the Civil Legal Aid (General) Regulations 1989 – the equivalent of Regulation 15 in Scotland – were abolished in 2000 and the basis for granting legal aid is now the Legal Service Commission's Funding Code.[7] In Part C, 'Guidance', C18 stipulates that contributions from other persons or sources are considered. One of those sources may be other individuals who would benefit from a positive outcome of the case for a contribution: the Legal Services Commission's approach is to expect these individuals to fund half the likely costs of the case at first instance, although the proportion can be varied according to such circumstances as the size of the group and the financial situation of the

individuals.

Further, Part C explains public interest in detail. There, it says that 'public interest' means the potential of the proceedings to produce real benefits for individuals other than the client, other than benefits to the public at large.[8] Four categories of real benefits have been identified: protection of life or other basic human rights; direct financial benefits; potential financial benefits; cases concerning intangible benefits such as health, safety or quality of life. However, to have an impact on funding, wider public interest must be significant. The Legal Services Commission has a special panel for public interest cases. This panel examines cases and provides both the Legal Services Commission and client with an opinion on the public interest of the cases. Significant cases are graded 'exceptional', 'high' or generally 'significant'. According to Criterion 5.7.5 of the General Funding Code, the case then needs to be subject to a cost benefit test, i.e. the benefits to the applicant and the others concerned must justify the likely costs.

Looking beyond the UK's borders to other European countries such as Germany where legal actions are divided into areas of law, a case against a health insurance provider would lead to a legal action under the Social Welfare Act and would be cost free in the first two instances. Representation through a solicitor is not required. If an individual engages a solicitor, legal aid can be applied for. Aspects to be considered are financial eligibility and difficulty of the matter. Whether the case is in the public interest and others are affected is of no concern. Similarly in Canada, until recently, special funds were laid aside for public interest cases.

The erosion of health care rights and entitlements to access health care under the new GP contract are a serious cause for concern. The SNP have signalled that they will be prepared to review and renegotiate the GP contract for Scotland and similar moves are afoot in Wales - neither administration is following the market route. Access to health and access to justice go hand in hand and an urgent review of mechanisms for strengthening public and parliamentary accountability in the public interest are long overdue. It is notable that between 13 May 2005 and 16 August 2007, 4972 applications for legal aid falling under Regulation 15 were received by SLAB. Of those, 2983 were granted and 1421 were refused with a number of decisions still outstanding. A third of all applications have been refused.

Currently, the residents of Scotland have fewer legal rights than those of England, including decisions which involve the commercialisation and privatisation of clinical health services. This is a serious cause for concern because, in this instance, the denial of access to justice equates to the denial of access to out-of-hours emergency medical care.

1 A. Pollock, D. Price, E. Viebrock, E. Miller and G. Watt (2007) 'The Market in Primary Care' 335 British Medical Journal 475.

2 Available at www.keepournhspublic.com.

3 www.theherald.co.uk/news/news/display.var.1152251.0.0.php.

4 Available via www.health.ed.ac.uk/CIPHP/publications.

5 L. Nicholl, J. West, S. Goodacre and J. Turner (2007) 'The Relationship Between Distance to Hospital and Patient Mortality in Emergencies: an Observational Study' 24 Emergency Medical Journal 665.

6 Scottish Legal Aid Board (2007) Scottish Legal Assistance Handbook, ch 12, available at www.slab.org.uk/profession/handbook/index.htm.

7 Available at www.legalservices.gov.uk/civil/guidance/funding_code.asp.

8 Op cit, at page 119.

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