

## **Cameron McNaught, Partner, Insurance team, Brodies LLP, examines the reforms proposed for Scotland's Courts in the long awaited report from leading judge, Lord Gill**

After more than two years of deliberation Lord Gill and his team have revealed the results of their review of Scotland's civil courts. If the proposals are accepted it will represent a radical shakeup of the current system which he describes as being "antiquated", "inadequate" and "seriously failing the nation". Lawyers from the early 20<sup>th</sup> Century, says Gill, would have little difficulty in slotting back into their roles at present. Strong words indeed - but few would argue with his conclusion that reform is long overdue.

The key highlights are these:

### **Protocols**

It is pleasing to see that the current voluntary pre action protocols, which include personal injury, have the Gill seal of approval with a recommendation that their use be made compulsory. The intention is to have a protocol for every category of claim with real sanctions for non compliance. It is to be hoped that this will reduce the number of litigated claims.

### **ADR**

Lord Gill avoids the anticipated move towards compulsory mediation whilst leaving the voluntary use of ADR as an option.

### **New Courts**

A new centralised Sheriff Court (Scotland's equivalent of the County Court), with specialist personal injury judges, will be created to deal with personal injury claims. The theme of specialisation continues with the proposal that more specialist judges also handle commercial, family and housing cases.

A third tier of court will be created staffed by a new breed of judge, the District Judge, already long established in England and Wales, who would handle small claims below £5,000.

The currently unfettered right to appeal final judgements will be heavily curtailed with a new requirement to seek permission before launching an appeal in most cases. A new Sheriff Appeal Court will be set up to handle appeals from Sheriffs and District Judges.

### **New Jurisdictional Limits**

There is a dramatic restriction in the level of case which can be brought in the Court of Session (Scotland's High Court). At present it can deal with any claim above £5,000; Gill proposes that it be limited to cases with a value of £150,000 or more. Cases below the £150,000 limit are to be handled in the Sheriff Court. Welcome news for insurers long concerned at the costs incurred by claimants litigating in the most expensive court and where, unlike the Sheriff Court, counsel are routinely involved.

### **Introduction of Case Management**

The report signals a move towards the active judicial case management which has been in place in England and Wales since the Woolf Reforms. Case Management Conferences, experts meetings and rules which compel the early exchange of evidence will become a feature of most types of case.

For personal injury cases a slightly different approach is proposed – termed process case management. The existing Court of Session procedure of standard directions, and trial dates fixed when a case begins, is retained by Gill and that procedure is shortly to be rolled out to the Sheriff Court. But there will be scope for judges to actively manage injury cases when something more than the standard process is needed.

Delays and lack of judges are currently a familiar feature of cases in the Sheriff Court and for these reforms to work the system will need more resources and more judges. The review's focus on increased use communications technology should help.

## Court Procedure

There are clear recommendations regarding details of court procedure with early exchange of witness statements, judicially controlled disclosure of documents, and simplified written pleadings all on the cards. A code of conduct for experts along with tighter controls on the use of expert evidence, and limitations on the extent of expert oral evidence gets the vote over compulsory joint appointment of a single expert. Nevertheless, Gill suggests that the joint instruction of experts should be considered by the courts as part of the case management process. There is no push for court control of the number of experts which seems a missed opportunity given the cost experts add to cases.

## Tenders

Tenders, the Scottish equivalent of Part 36 offers, are to be reformed and Claimants' Part 36 offers are to be introduced, with uplifts on Claimants' costs where a defendant fails to beat a tender. Tenders will be also made effective before litigation.

## Jury Trials

Gill recommends that jury trials for personal injury actions be retained. They have proved controversial over the years, but he considers that they still have a role to play in keeping awards of damages at "realistic levels". Indeed, he proposes extending the right to jury trial to the new specialist personal injury Sheriff Court. There is no recommendation to alter the existing rules whereby jurors are denied guidance as to the potential level of awards.

## Costs and Funding

Finally, we come to costs. The report largely sidesteps the issue, recommending that a new Civil Justice Council, with a remit to keep the courts and their procedures under continual review should look at costs in detail. In the interim, Gill urges the setting up of a Scottish Government Working Party to review costs and fee arrangements.

So what does all this add up to? Lord Gill's emphasis on the need for a more balanced court structure, and greater efficiency and specialisation within the courts, including an increased use of technology all represent welcome news for insurers. Certainly many of the proposals in the review will be familiar to those used to handling cases south of the border. Gill has drawn heavily on the reforms which followed the Woolf Review but with the benefit of seeing those reforms in action over the last 10 years

The Scottish Parliament debate the report on 8 October. If the political will is there, reform is implemented swiftly and adequately resourced we could see real modernisation of the litigation landscape in Scotland. Everyone wants a system that is both cost proportionate and efficient. But to ensure the success of any reform the issue of costs must be grasped and care taken to avoid the seemingly endless wrangling on costs which accompanied the Woolf Reforms in England and Wales.