Scottish Civil Justice Council

REPORT ON IMPLEMENTATION

OF THE REPORT AND RECOMMENDATIONS OF

SHERIFF PRINCIPAL TAYLOR'S REVIEW OF EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND

by

The Scottish Civil Justice Council Costs and Funding Committee

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Contents

GLOSSARY

Act of Sederunt	Type of delegated legislation passed by the Court of Session to regulate civil procedure in the Court of Session, the Sheriff Court and administrative tribunals, and published as statutory instruments.
After the Event ('ATE') Insurance	Insurance by one party against the risk of having to pay an opponent's judicial expenses, where the insurance policy is taken out after the event giving rise to court proceedings.
Before the Event ('BTE') Insurance	Insurance that was in place before the occurrence of the event giving rise to the court proceedings. The insurance covers the legal fees of the insured, and may also cover an opponent's expenses (in the event of the insured being ordered to pay their opponent's expenses).
CCCA	Consultative Committee on Commercial Actions
CJC	Civil Justice Council (England and Wales)
Contingency fee	A lawyer's fee calculated as a percentage of the amount recovered by the client.
Contingent Legal Aid Fund ('CLAF')	A fund which grants funding to chosen applicants, where the receipt of funding is conditional on the applicant agreeing to pay a percentage of any amount awarded (e.g. as damages) back into the fund.
CAFC	Scottish Civil Justice Council - Costs and Funding Committee
Costs capping	A mechanism whereby judges impose limits on the amount of future costs that a successful party can recover from the losing party.
Costs shifting	The ordering that one person is to pay another's expenses. Costs shifting usually operates on a "loser pays" basis, so that the unsuccessful party is required to pay the successful party's

	recoverable expenses.
Damages based agreement	An agreement under which a lawyer's fee is calculated as a percentage of their client's damages if the case is won, but no fee is payable if it is lost. Commonly referred to as a contingency fee agreement.
In hoc statu	For the time being, at this stage.
Inner House	The appellate level of the Court of Session.
Interlocutor	A formal order made by a court containing its decision.
Judicial Review	A remedy whereby the Court of Session may review and if necessary set aside or rectify the decision of public officials or bodies where no other form of appeal is available.
LPAC	The Lord President's Advisory Committee on Solicitors' Fees.
Motion	An application made to the court for an order during the course of court proceedings.
Multi-party action	An action where a number of potential litigants have closely related or similar claims arising from the same event.
'No win no fee'	An agreement between a client and a lawyer that the lawyer will only be entitled to payment should the client be successful. In Scotland such agreements are usually in the form of speculative fee agreements.
One way costs shifting	A regime under which the opponent pays the pursuer's expenses if the action is successful, but the pursuer does not pay the opponent's expenses if the action is unsuccessful.
Party litigant	A litigant in civil proceedings who conducts his or her own case.
PI Committee	Scottish Civil Justice Council – Personal Injury Committee
Proof	A hearing of a case by a judge at which evidence is led orally or by affidavit.

Protective expenses order ('PEO')	A court order which limits a litigant's liability to pay the expenses of a successful opponent to a particular sum.
Qualified one way costs shifting ('QOCS')	A one way expenses shifting regime that may become qualified in certain circumstances, such as where the pursuer has acted unreasonably, or where the resources available to the parties are grossly unequal.
SCJC	Scottish Civil Justice Council
Speculative fee agreements ('SFA')	An agreement between lawyers and their clients in Scotland by which clients are only required to pay legal fees if the litigation is successful. Should they be unsuccessful, clients may still be liable for the expenses of their opponents.
Tender	An explicit, unqualified and unconditional offer by the defender to pay the pursuer in settlement of an action a specified amount, together with the judicial expenses to date.
Tables of Fees	Tables that regulate the amount of solicitors' fees for litigation which may be recovered as judicial expenses.
Third party funding	The funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often expressed as a percentage of the sum recovered; and (ii) the funder is not entitled to payment should the claim fail.

SUMMARY

We welcome Sheriff Principal Taylor's wide-ranging and comprehensive Report on his Review of Expenses and Funding of Civil Litigation in Scotland. We are glad of the opportunity to consider the Report and recommendations in the context of the major programme of courts reform which is about to be embarked upon and which we are pleased to contribute to.

We consider that priority should be given to implementation of the matters addressed in Chapters 2, 3 and 4 of the Report, these being: Judicial Expenses, Outlays and Predictability. Many of the recommendations in Chapters 2 to 4 may be taken forward through court rules made by the Court of Session and prepared by this Committee, under the auspices of the SCJC. Although we are broadly supportive of those proposals, we expect that further consideration will require to be given to certain recommendations (with particular regard to their practicability), such as arrangements for additional fees and cancellation and commitment fees, prior to any implementation. We have sought the views of the Consultative Committee on Commercial Actions (CCCA) and plan to seek views of other bodies and users of the courts (such as the Personal Injury Committee) when developing the detail of any rules.

Sheriff Principal Taylor's recommendations are predicated on the implementation of the recommendations of the Scottish Civil Courts Review. We are therefore of the view that rather than set a timetable, consideration should be given to the timing of any implementation of these recommendations alongside the procedural reforms being developed by the SCJC Committees. The views of those committees would need to be taken into account in the development of detailed proposals for costs reform in particular actions. Accordingly, the precise timescales for implementation of the recommendations in Chapters 2 to 4 will be guided by the SCJC's Rules Rewrite Programme for 2015/16, which will be developed by the Rules Rewrite Committee under the Rules Rewrite Project of the Scottish Government's *Making Justice Work* Programme.

Early consideration will also require to be given to the topics discussed in Chapters 7 (Speculative Fee Arrangements), 8 (Qualified One Way Costs Shifting) and 9 (Damages Based Agreements). We are supportive of the Scottish Government's intention to legislate in these areas and note that a consultation paper regarding these matters was published on 30 January 2015.

In relation to Protective Expenses Orders (Chapter 5), the Scottish Government is of the view that there should be a review of case law in relation to these orders. We agree that this would be a sensible way forward and that the SCJC should liaise with the Scottish Government on the approach.

We consider that the remainder of Sheriff Principal Taylor's Report are, in the main, matters for government and the relevant professional bodies to consider. These are:

Before the Event Insurance (Chapter 6), Referral Fees (Chapter 10), Alternative Sources of Funding (Chapter 11), Multi-Party Actions (Chapter 12) and Regulation (Chapter 13). While we offer some general comments on these subjects in our report, we suggest that the SCJC will wish to consider its position on, and role in any implementation of, these matters in light of any relevant proposals.

INTRODUCTION

1. This Report, prepared by the Costs and Funding Committee (CAFC) of the Scottish Civil Justice Council (SCJC), is intended to assist the SCJC in its consideration of the Report and recommendations of Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland.

2. As well as discussing the merits of Sheriff Principal Taylor's proposals, the Report aims to identify which body or bodies are responsible for implementation of each recommendation and whether the Court of Session has sufficient rule-making powers (with particular reference to the new powers contained in the Courts Reform (Scotland) Act 2014) with which to take forward the recommendations. Consideration has also been given as to the appropriate prioritisation of any implementation with particular regard to the SCJC's priorities for courts reform in mind.[1]

3. We set out our views and recommendations in **bold** throughout the text.

The Costs and Funding Committee

4. The Committee membership is:

The Honourable Lord Burns	Chairman
Sheriff Charles Stoddart	Judicial member
Sheriff Thomas Hughes	Judicial member

[1]Scottish Civil Justice Council Rules Rewrite Working Group, Interim Report on the "Making Justice Work 1", Rules Rewrite Project, Recommendation 12. Increase Privative Limit; Judicial Structures (introduction of new judicial offices of summary sheriff and Appeal Sheriff); Creation of Sheriff Appeal Court; Creation of Specialist Personal Injury Court, with civil jury trials; Simple Procedure; Judicial case management; Rules for enforcement/sanctions; Creation of compulsory pre-action protocol and Judicial Review. Scottish Civil Justice Council Rules Rewrite Working Group, now the Rules Rewrite Committee, Interim Report http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/rrwg-interim-report.pdf?sfvrsn=2, 2014, (Accessed 29 December 2014)

Mr James Mure QC	Advocate
Mr Eric Baijal	Solicitor, SCJC Member
Mr Iain Nicol	Solicitor
Mr Lindsay Montgomery	Scottish Legal Aid Board, SCJC Member
Ms Stella Smith	Scottish Government representative
Ms Julia Clarke	Which?
Mr Alan Rogerson	Aviva
Ms Gillian Prentice (DPCS)	Observer
Mrs Jane MacDonald (Head of SCS Policy & Legislation Branch)	Observer

Consideration by the Committee

5. The Committee considered its response to Sheriff Principal Taylor's Report and recommendations at its meetings of 24 February 2014, 13 June 2014, 4 December 2014, 19 January 2015 and 16 February 2015, before putting forward to the SCJC at the Council meeting on 16 March 2015.

6. The Committee's consideration has been informed by other work carried out under the auspices of the SCJC. This includes liaising with the Consultative Committee on Commercial Actions and other Committees within the SCJC. Members of the SCJC also attended the conference *Impact of "Jackson" Reforms,* held by the Civil Justice Council (CJC) in England and Wales, on 21 March 2014,[2] and the findings of the Rules Rewrite Working Group's (now the Rules Rewrite Committee) research into the experience of England and Wales in implementing the Woolf and Jackson reforms.[3]

7. In addition, the Personal Injury Committee gave some initial consideration to Sheriff Principal Taylor's Report on 9 December 2013, noting that qualified one way costs shifting should be considered as a priority and that fees and costs implications should be considered.

The role of the Scottish Civil Justice Council and the Costs and Funding Committee in implementation

8. With responsibility for preparation of draft civil procedural rules for the approval of the Court of Session, the SCJC will have a role in implementation of many of Sheriff Principal Taylor's recommendations.

[2] In attendance were: Lady Wise, Chair, Access to Justice Committee; Sheriff Thomas Hughes, Costs and Funding Committee; Duncan Murray, SCJC member, Rules Rewrite Working Group; Neil Robertson, Policy Officer of SCJC.
[3] Op. cit. Rules Rewrite Committee, Interim Report

9. During the passage of the Courts Reform (Sc) Bill, particular consideration was given to Sheriff Principal Taylor's recommendation that "the SCJC form a sub-committee to deal with the level of fees for litigation, which may be recovered as expenses. SCJC set up the current CAFC.

10. The SCJC considered that to be able to properly fulfil its statutory function to "keep the civil justice system under review",[4] the SCJC should have responsibility for the preparation of fees instruments. However, it was considered that there was a question as to whether the SCJC's statutory functions extend to the preparation of fees instruments. The SCJC took the view that the reform of legal expenses is a necessary complement to courts reform and as such that consideration should be given to Sheriff Principal Taylor's recommendations as a matter of priority, as part of a consistent and coherent package of reform. It therefore took the view that primary legislation would be desirable, if not necessary, to give full effect to Recommendation 14 and submitted written evidence to the Scottish Parliament's Justice Committee to that effect during Stage 1 proceedings. [5]

11. The Scottish Government subsequently brought forward an amendment to the Bill at Stage 2 to clarify the functions of the SCJC in this regard. The Courts Reform (Scotland) Act 2014 contains provision (at paragraph [31] of Schedule 5 to the Act) to amend the Scottish Civil Justice Council's statutory functions so as to ensure that the Council may prepare fees instruments (which the legislation terms "draft fees rules" for the Court's consideration.

12. The Costs and Funding Committee was established with a view to ensuring that it and LPAC could collaborate and so that the functions of LPAC may be subsumed into the Costs and Funding Committee within the SCJC structure once primary legislation was in place to extend the SCJC's functions.

13. While it would be possible for LPAC to take forward some of the recommendations falling within its remit prior to the entry into force of the provisions of the Courts Reform (Scotland) Act 2014 enabling the SCJC to prepare draft fees rules, this report has been prepared on the assumption that work will begin on drafting such rules once those provisions have been brought into force.

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[4] Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 s2(1), http://www.legislation.gov.uk/asp/2013/3/contents/enacted, 2013 (Accessed 29 December 2014)

[5] Justice Committee, Courts Reform (Scotland) Bill, Written submission from Scottish Civil Justice Council, http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/CR49._Scottish_Civil_Justice_Council.pdf, 2014 (Accessed 29 December 2014)

Scottish Government Consideration

14. The Scottish Government's response to the Taylor Report was published on 3 June 2014. It divides the recommendations into three distinct categories:

> *1) Chapters 2-4 (cost of litigation). The recommendations in these chapters are mainly for the SCJC to consider and implement. Some of the recommendations will be dependent on the successful passage of the Courts Reform Bill but others could be taken forward in a shorter timescale.*
>
> *2) Chapters 7-9 (speculative fee agreement and qualified one way costs shifting and damages based agreements), chapter 13 (claims management companies) and chapter 10 (referral fees). These will be taken forward by the Scottish Government through legislation and engagement with the relevant professional bodies.*
>
> *3) Other issues - chapter 5 (protective expenses orders), chapter 6 (before the event insurance), chapter 11 (alternative sources of funding) and chapter 12 (multiparty actions). The Scottish Government has set out how it intends to take these matters forward and consult on them.*

15. We have taken the Scottish Government's response into account in our consideration of Sheriff Principal Taylor's recommendations. We also support the Scottish Government's consultation process released on 30 January 2015, regarding these matters.

CHAPTERS 2 TO 4: COST OF LITIGATION – JUDICIAL EXPENSES, OUTLAYS AND PREDICTABILITY

16. Many (but not all) of the recommendations in Chapters 2 to 4 of Sheriff Principal Taylor's Report may be taken forward through court rules made by the Court of Session, which will fall to be prepared by this Committee, under the auspices of the SCJC.

17. We are broadly in support of the proposals contained in Chapters 2 to 4 and, in accordance with the principle that costs reform is a necessary complement to procedural reform,[6] we consider that work should begin on their implementation in early course. We therefore intend to begin detailed consideration of the implementation of these recommendations with a view to submitting proposals to the SCJC from Spring 2015.

18. **Sheriff Principal Taylor's recommendations are, however, predicated on the implementation of the recommendations of the Scottish Civil Courts Review, much of the detail of which is currently being developed by the SCJC under the Rules Rewrite**

[6] Op. cit. Rules Rewrite Committee, Interim Report, para. 83

Project. Careful consideration will therefore need to be given to the timing of any implementation of these recommendations. We are of the view that implementation of Chapters 2-4 must be considered in the context of the Rules Rewrite Project and alongside the development of rules which have been identified as priority areas by the SCJC.[7] We do not, however, consider that implementation of the recommendations in these Chapters should delay any implementation of the procedural reforms provided for in the Courts Reform (Scotland) Act 2014.

19. Several of Sheriff Principal Taylor's recommendations under these Chapters relate to procedural reforms being taken forward by other SCJC committees. The views of those committees will need to be taken into account in the development of detailed proposals for costs reform in particular actions.

20. In particular, the recommendations relating to actions which are subject to case flow management will require to be considered by the PI Committee, which is currently developing the procedure to be followed for the all-Scotland Personal Injury Court and the form of compulsory pre-actions protocols in personal injury actions. It will not be possible to come to a definitive view on the exact detail of a system for costs management in such actions until there is greater clarity as to the procedures being developed by that Committee.

21. The SCJC's Access to Justice Committee will wish to give some consideration to the question of the recoverability of incurred expenses in general, and recommendations relating to expenses in simple procedure cases in particular.

22. There are several other areas where we consider that the views of other bodies or groups will be of assistance in considering Sheriff Principal Taylor's recommendations further. For example, we consider the views of the judiciary and users of the commercial courts, and the Consultative Committee on Commercial Actions (CCCA) in particular, should be taken into account in relation to the recommendations on commercial actions. Where we have identified a need to consult specific groups on certain matters this is noted in the discussion of individual recommendations.

23. Our consideration of the individual recommendations in Chapters 2-4 is discussed below.

[7] Op.cit. Rules Rewrite Committee, Interim Report Increase Privative Limit; Judicial Structures (introduction of new judicial offices of summary sheriff and Appeal Sheriff); Creation of Sheriff Appeal Court; Creation of Specialist Personal Injury Court, with civil jury trials; Simple Procedure; Judicial case management; Rules for enforcement/sanctions; Creation of compulsory pre-action protocol and Judicial Review.

Chapter 2 – Cost of Litigation – Recovery of Judicial Expenses

No.	Recommendation
Commercial Actions	
1	The present criteria for awarding an additional fee should be revised for commercial actions. This would involve listing a number of criteria to include i) complexity ii) specialised knowledge or skill iii) whether there is any legal precedent for the issues iv) urgency v) likely volume of paperwork or electronic material vi) number of parties with a distinct interest vii) net value of the claim viii) commercial status of the parties and ix) expert witness requirements. Each of these criteria should be given a weighting and solicitors required to complete a pro-forma setting out their assessment of the case under each of the criteria when arriving at their view on the level of additional fee which should apply.
2	The concept of an additional fee should be retained for commercial actions with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%.
3	Any application for an additional fee in a commercial action should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect.
4	The block table of fees should be framed to more fully reflect the procedure in commercial actions and should be designed to incentivise efficiency.
5	There should be an option available to parties and the court in commercial cases whereby the hourly rates used in the calculation of judicial expenses are the hourly rates which the solicitors for the successful party have charged their client.

Responsibility

24. Recommendations 1-5 may be taken forward through court rules to be made by the Court of Session and prepared by the SCJC. **We suggest that the views of practitioners would be helpful in our further consideration of these recommendations. We have received the views of the CCCA regarding commercial actions and its response is noted throughout this report.**

Discussion

25. **Sheriff Principal Taylor considers that, in light of the arrangements for "bespoke" case management in individual commercial actions and the fact that the gap in recoverable costs is greater in commercial than in other types of action that they**

require to be considered separately.[8] We agree. We further agree that the criteria for awarding an additional fee should be revised in terms of Recommendation 1. We consider that definition, or clarification, of the term "commercial status of parties" may be necessary and that parties should also be required to complete the pro-forma when an application is made to review an uplift.

26. **The CCCA has concerns as to the process of weighting of criteria when determining an appropriate level of additional fee. Consideration will need to be given to how this exercise would be carried out.**

27. We are broadly supportive of recommendations 2 and 3. However, we would like to give further thought as to the practicability of the suggested arrangements in relation to determining the uplift prospectively. We have concerns about whether the decision as to the additional percentage can be made at the outset of proceedings in all types of actions. The complexity of a case or volume of paperwork involved may not always be knowable at the outset and we are conscious of the potential expense involved in the court being asked to revisit the additional fee on a regular basis. This concern is shared by the CCCA. Specifically, the CCCA is of the view that there is potential for a considerable amount of time to be taken up 'recalibrating' heads of claim for an additional fee during the course of an action. This would be likely to lead to additional expense. Consideration will therefore need to be given to how any review process is controlled.

28. In relation to setting the maximum percentage increase at 100% (Recommendation 2) we consider that reasonable but note that a 100% uplift may still fall short of the current calculations and may not reflect current market rates. We also consider that there may be rare circumstances in which the increase should be more than 100% and that there may be merit in allowing the court to depart from the rule (for example, on special cause shown).

29. **While we and the CCCA are broadly supportive of the proposals, we are of the view that further research is required in relation to recommendations 2 and 3.**

30. **We and the CCCA agree that the block table of fees[9] should be framed better to reflect the procedure within commercial actions (Recommendation 4).** To assist with predictability of expenses it may be necessary to include the process which will need to be carried out by prudent litigants. The first step towards implementing this recommendation has already been taken, with the fees instruments which came into

[8] Sheriff Principal Taylor, *Review of Expenses and Funding of Civil Litigation in Scotland Report*, para. 26 & 27 http://www.scotland.gov.uk/Resource/0043/00433831.pdf, 2013 (Accessed 29 December 2014)

[9] Ibid., para. 28

force on 1 March 2014 having established a coherent structure and addressed inconsistencies which were present in the Table of Fees.[10] Fees should now be capable of being considered in a more focused way.

31. **We agree with recommendation 5 but suggest that a clear structure will need to be put into place, setting out the circumstances where this option may be available. The CCCA has echoed the need for the election process open to parties and the Court to be clearly set out.**

No.	Recommendation
Other actions subject to judicial case management	
6	The concept of an additional fee should be retained for all other litigations subject to active judicial case management with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%.
7	Any application for an additional fee should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect.
8	The existing block tables of fees should be revised with a view to incentivising efficiency.
Actions subject to case flow management	
9	The issue of whether there should be an additional fee in actions subject to case flow management, such as personal injury actions, should be resolved at the conclusion of the proceedings, as is the case at present. The maximum percentage increase should be 100%.
10	The block tables of fees for personal injury actions should be revised with a view to incentivising efficiency.
Motions for an additional fee	
11	The Judicial Institute for Scotland should include in its training programme guidance as to how to approach motions for an additional fee.

[10] Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2014, Scottish Statutory Instrument No. 14 http://www.legislation.gov.uk/ssi/2014/14/made, 2014 (Accessed 29 December 2014)
Act of Sederunt (Rules of the Court of Session Amendment) (Fees of Solicitors) 2014, Scottish Statutory Instrument No. 15, http://www.legislation.gov.uk/ssi/2014/15/made, 2014 (Accessed 29 December 2014)

12	In actions subject to judicial case management the member of the judiciary in whose docket the case is placed should determine whether an additional fee is appropriate and what the percentage increase should be.
13	In actions subject to case flow management the member of the judiciary hearing the motion for an additional fee should determine whether an additional fee is appropriate and what the percentage increase should be.

Responsibility

32. Recommendations 6-10 and 12-13 may be taken forward through court rules to be made by the Court of Session and prepared by the SCJC. However, if docketing were to be taken forward on a purely administrative basis, Recommendation 12 would fall to the Scottish Court Service (SCS) to implement.

33. Recommendation 11 is for the Judicial Institute for Scotland to consider.

Discussion

34. **We support the retention of the concept of an additional fee for non-commercial cases subject to active judicial case management (Recommendation 6). We also support in principle the recommendation that any finding that such a case warrants an additional fee, or any review of the level of additional fee, should only have prospective effect (Recommendation 7). However, we recognise that determining additional fee applications at the outset of proceedings presents practical challenges, both for the parties and for the court. We also recognise the potential implication of the recommendation in relation to allowable expenses necessarily incurred before an application can be made. These factors may justify some flexibility in the adoption of the recommendation.**

35. Case flow management procedure is designed to involve little, if any, judicial intervention in the early stages of proceedings. There would therefore have to be a strong justification for any procedural change resulting in a requirement for additional hearings in the early stages. As such, we agree with the intention behind recommendation 9. In the interests of predictability, we nevertheless consider that there might be merit in considering whether additional fee applications ought to be made at an earlier stage in the proceedings.

36. In addition, we understand that the PI Committee is giving consideration to incorporating provision equivalent to Chapter 42A of the Rules of the Court of Session (Case management of certain personal injuries actions, which gives parties the option to

opt out of the case flow model and proceed under active judicial case management) in the Specialised PI court. We will be grateful for its views on these matters in relation to personal injury actions subject to active judicial case management as it develops these rules.

37. **We agree that there should be a review of the block table of fees for personal injury actions (Recommendation 10). We consider that Recommendations 9 and 10 should be considered alongside the development of rules for the all-Scotland Personal Injury Court and rules for pre-action protocols, which we note are currently subject to consideration by the SCJC Personal Injury Committee. We therefore consider that the views of the SCJC PI Committee should be sought when developing proposals in this regard.**

38. **We agree with Sheriff Principal Taylor that a consistent approach in relation to additional fees is essential.** The particular matter of judicial training in this regard (Recommendation 11) is for the Judicial Institute for Scotland to consider and take forward.

39. We have given significant thought to the proposals in relation to additional fees contained in recommendations 6, 7, 9 and 13. In sheriff court proceedings, and in cases where a motion is decided at the outset, we agree that a judicial determination in respect of any additional fee is appropriate. We have given thought as to the desirability of amending the current practice in the Court of Session, where most cases settle without a proof (and as such, the case will not have previously been heard by a judge). **We conclude that mandatory pre-action protocols would be required to support implementation of the proposals at recommendations 6, 7, 9 and 13. We note that the PI Committee is giving consideration to pre-action protocols and will seek its views on recommendations 9 and 13 in particular.**

No.	**Recommendation**
Review of Level of Fees for Litigation	
14	The Scottish Civil Justice Council should form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses. Membership should include the users of the system (such as the existing members of the Lord President's Advisory Committee on Solicitors' Fees), the funders of the system (such as a representative of the insurance industry and also a representative of the Scottish Legal Aid Board), a sheriff court auditor, a sheriff, a law accountant, a lay person who may well be an economist and someone to represent the interests of the consumer.

Responsibility

40. Implementation of recommendation 14 is for the SCJC, once the relevant provisions of the Courts Reform (Scotland) Act 2014 are brought into force.

Discussion

41. **We agree with the terms of recommendation 14.** The SCJC indicated to the Scottish Parliament's Justice Committee during the parliamentary passage of the Courts Reform (Sc) Bill that it supported this recommendation and that it would be helpful to take the opportunity to clarify the SCJC's statutory functions in respect of the preparation of fees instruments. The matter was addressed at Stage 2 proceedings and the Act as passed by Parliament confirms the SCJC's functions in this regard.[11] As it is the intention is that the functions currently carried out by the Lord President's Advisory Committee should be subsumed by the Costs and Funding Committee, its remit and membership will require to be reviewed in advance of these functions being commenced.

No.	**Recommendation**
Interest on Judicial Expenses	
15	The courts should have the power to award interest on judicial expenses from 28 days after an account of expenses has been lodged.
16	An account of expenses in sheriff court actions must be lodged no later than four months from the date of the final interlocutor. If the party fails to comply with this time limit, leave of the court will be required to lodge the account late, subject to such conditions (if any) as the court thinks fit to impose.

Responsibility

42. It is envisaged that these recommendations would be taken forward through court rules. However, recent authority (*Phee v Gordon* [2014] CSIH 50)[12] suggests that the common law power of courts to award interest does not extend to awarding interest on expenses from a date before the date on which decree is granted for the ascertained total. It will therefore be necessary to consider if the Court of Session's rule-making power is subject to the same constraint.

[11] Courts Reform (Scotland) Act 2014 http://www.legislation.gov.uk/asp/2014/18/contents/enacted, 2014 (Accessed 29 December 2014)

[12] Opinion of the Inner House in the cause A Phee –v- J Gordon & C CSIH50 http://www.scotcourts.gov.uk/search-judgments/judgment?id=bb1789a6-8980-69d2-b500-ff0000d74aa7, 2014 (Accessed 29 December 2014)

Discussion

43. **We agree that the prompt payment of expenses should be encouraged and incentivised and consider that implementation of recommendations 15 and 16 will help to ensure expenses are dealt with expeditiously.** Recommendation 16 accords with Court of Session Rule of Court 42.1(2)(a)[13] and we consider that equivalent provision in the sheriff court rules would be appropriate.

Chapter 3: Cost of Litigation – Judicial Expenses

No.	Recommendation
Counsel's Fees – The sheriff court	
17	The current test for granting sanction for the employment of counsel in the sheriff court should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied.
18	When deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them.
19	For cases proceeding under active judicial case management in the sheriff court a motion for sanction for the employment of counsel should be made at the start of the proceedings or, at a later stage, on cause shown.
20	Counsel's fees should be a competent outlay in a judicial account of expenses only from the date of an interlocutor sanctioning the employment of counsel.
21	Where counsel is required to be instructed urgently, either before the raising of proceedings or during the proceedings, parties may apply for retrospective sanction provided that the application for sanction is sought as soon as is reasonably practicable following the instruction of counsel, which will normally be at the next case management hearing. Any refusal of a motion will be in hoc statu and a new motion can be enrolled in the event of there being a change in circumstances

[13] **Court of Session Rule of Court 42.1(2)(a) states**, *"Any party found entitled to expenses shall lodge an account of expenses in process not later than four months after the final interlocutor in which a finding in respect of expenses is made".*

22	The amount of fees for counsel which can be recovered as an outlay in a judicial account should be stipulated by the sheriff at the hearing to sanction the employment of counsel.

Responsibility

44. Sheriff Principal Taylor's suggested test for granting sanction for counsel in the sheriff court and Sheriff Appeal Court (Recommendations 17 and 18) was provided for the Courts Reform (Sc) Bill by way of an amendment at Stage 2 of its parliamentary proceedings. It is for the Scottish Government to commence those provisions to give the test the force of law.

45. Recommendations 19-21 may be taken forward through court rules to be made by the Court of Session and prepared by the SCJC.

46. In relation to recommendation 22, the fees of counsel are not regulated by the Court of Session. The Courts Reform (Scotland) Act 2014 contains provision enabling the Scottish Ministers, by order, to extend the Court of Session's powers to regulate fees to persons beyond those specified within the Act.[14]

Discussion

47. Under section 108 of the Courts Reform (Scotland) Act 2014, rules may provide further detail on how the test will operate. **We consider that the courts should have some flexibility in applying the test and that the test provided for in the Bill does not require further provision in court rules. We consider that the test should be brought into force no later than the provisions for the new exclusive competence of the sheriff court.**

48. **We are generally in support of recommendations 19-21**, which we believe will assist in providing predictability and transparency. We recognise that there may be circumstances in which the involvement of counsel is required urgently and consider that it would be appropriate to allow the court discretion as regards granting sanction retrospectively. We are conscious, however, that there may be a risk that the exception becomes the norm and care should be taken to guard against this. As noted at paras. 35-36 in this report, we understand that the PI Committee is giving consideration to rules (equivalent to Chapter 42A of the Rules of the Court of Session) for active judicial case management for personal injury actions in the sheriff court. We consider that its views

[14] Op.cit. Courts Reform (Scotland) Act 2014, Part 4 Section 103.2(f),

should be sought on the detail of arrangements for the granting of sanction of counsel in the sheriff court.

49. **We are not persuaded that recommendation 22 should be implemented within existing fee arrangements.** It will be difficult for the court to specify the amount of fees which may be recovered within the existing arrangements. This is currently a matter for the Auditor of the Court. We suggest that the matter of the regulation of counsel fees (including those appearing in the sheriff court) will require to be considered if this recommendation is to be implemented.

50. Sections 105 and 106 of the Courts Reform (Scotland) Act 2014, allow the Scottish Ministers, by order, to extend the categories of person in relation to whom the Court of Session has the power to regulate fees that can be charged in civil proceedings. We consider the Scottish Government should exercise that power to give the Court the power to regulate the fees of advocates and solicitor advocates. This would allow the SCJC to prepare tables of fees for advocates and solicitor advocates, on the same basis as the existing tables for solicitors.

No.	**Recommendation**
Counsel's Fees – Court of Session	
23	In actions in the Court of Session, an instructing solicitor should be obliged to inform the opposing party that junior and/or senior counsel has been instructed.

Responsibility

51. As recommendation 23 is framed as imposing an obligation on the instructing solicitor, it could be affected through professional regulation. However, we consider that it would be more appropriate for it to be effected through court rules.

Discussion

52. We are supportive of this recommendation. We consider that it would promote predictability by allowing parties to estimate with greater precision the extent of their potential liability in expenses.

No.	Recommendation
Recoverable charges for counsel	
24	Counsel and solicitor advocates should be entitled to recover a cancellation fee where a case settles within two working days of the first scheduled day of a hearing. The fee should be determined by the number of days for which the hearing was set down. Equivalent provisions should apply if a case settles after a hearing commences. That is to say, the fee should be for one day if there are up to seven days of the hearing remaining; two days if there are up to eleven days remaining; and so forth.
25	Save for fees to cover the three elements of preparation, appearance and cancellation, counsel and solicitor advocates should not be able to recover any other payment. The concept of a commitment fee should play no part in a judicial account.

Responsibility

53. Implementation of recommendations 24 and 25 through court rules would require these matters to be subject to regulation by the Court of Session (as may be provided for through subordinate legislation under the Courts Reform (Scotland) Act 2014. The Scottish Government is consulting on this matter, which is included in its consultation paper released on 30 January 2015. ***Discussion***

54. **We are supportive of recommendation 24.** However, we would note for the sake of clarity that the recommendation relates only to the question of the extent to which counsel's fees incurred by a successful party can be recovered under an award of expenses. Sheriff Principal Taylor expressly acknowledges that it will be a matter for private arrangement between the litigant and counsel if a commitment fee should be paid.

55. We have given some thought as to the desirability of a commitment fee (recommendation 25). Despite the recommendation that they should play no part in a judicial account, we consider that commitment fees might be appropriate in exceptional circumstances. However, we also consider that it will be necessary to specify clearly the principles which might justify the recoverability of a commitment fee.

56. **While we are of the view that recommendation 25 is in general a sound proposal, we are not minded to support an absolute ban on commitment fees. We wish to consider further the principles which might justify departing from the general rule of non-recoverability of commitment fees in exceptional cases.**

57. **We will consider any proposals by the Scottish Government, following the consultation process, to enable the Court of Session to regulate these matters with interest.**

No.	Recommendation
Fees of expert witnesses	
26	When assessing the reasonableness of instructing an expert and what that expert should be paid, the court should have regard to the proportionality of instructing the expert and his or her charges.
27	Certification of an expert witness should be obtained prior to his or her instruction in cases proceeding under active judicial case management in the Court of Session and in the sheriff court or, where that is not possible, such as when an expert has to be instructed before the raising of the action, as soon as reasonably practicable after proceedings are initiated. In most circumstances, this will be at the first case management hearing. Any refusal of a motion will be in hoc statu. The test to be applied will be whether that instruction at that time was reasonable.
28	For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, expert witnesses' fees should be recoverable from the date of certification. For parties who seek retrospective sanction of expert witnesses instructed prior to the commencement of litigation, any fees reasonably incurred would become a competent outlay at this stage. Should a party fail to obtain certification as soon as reasonably practicable after proceedings are initiated, they should not be able to recover in a judicial account any fee charged by the expert witness during the period between when it would have been reasonably practicable to obtain certification and when it was achieved.
29	For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, the amount of expert witnesses' fees that can be recovered as an outlay in a judicial account should be stipulated by the presiding judicial officer at the hearing for the certification of an expert witness.

Responsibility

58. Recommendations 26-29 may be taken forward through court rules to be made by the Court of Session and prepared by the SCJC.

Discussion

59. We support these recommendations in principle. In particular, we are of the view that certification of expert witnesses in advance of instruction is desirable, and are supportive of the idea that identification of experts should be carried out as early as is possible. .

60. However, we recognise that recommendation 29 presents a number of difficulties, and that it would involve imposing a significant burden on the presiding judge. The CCCA has informed us that there is not currently a perceived difficulty with the cost of expert witnesses in the Commercial Court, and that it is opposed to the concept of the judiciary setting the level of recoverable fees for expert witnesses.

61. The introduction of a table of fees for expert witnesses might serve to address some of the practical difficulties arising from this recommendation. However, it is recognised that it would be a challenge to develop a table that was capable of accommodating the range of circumstances in which an expert might be required.

62. **We nevertheless intend to give further consideration to how a table of expert witness fees might operate, in particular as to how it might accommodate regular revisions to the level of fees (particularly if it is intended to apply to a wide range of professional witnesses).**

Chapter 4: Predictability

No.	**Recommendation**
Fixed expenses	
30	The court should have discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. This should be reflected in the rules for the new simple procedure.
31	With the exception of personal injury actions, recoverable expenses in actions under the simple procedure should be fixed.
32	When a case is remitted from the simple procedure to the ordinary cause roll, the scale upon which expenses should be assessed should be a matter for the discretion of the court that allows the remit and should be determined at the time the remit is made.
33	A model along the lines of the Patents County Court should be introduced for cases proceeding under Chapter 47 of the Rules of the Court of Session (commercial actions).

Responsibility

63. Recommendations 30, 32 and 33 may be taken forward through court rules to be made by the Court of Session and prepared by the SCJC.

64. Expenses in small claims are, in the main, prescribed by the Scottish Ministers.[15] Section 81 of the Courts Reform (Scotland) Act 2014 confers similar powers on the Scottish Ministers in relation to the new simple procedure. Recommendation 31 is therefore for the Scottish Ministers to implement.

Discussion

65. Section 81 of the Courts Reform (Scotland) Act 2014, gives the Scottish Ministers the power to prescribe categories of simplified procedure cases in which any award of expenses will generally be subject to a cap. However, any such cap will not apply when the defender has stated a defence but has not proceeded with it, e.g. where a case has been settled after a defence has been stated. The effect of recommendation 30 is that the court should nevertheless have discretion to restrict the expenses payable by the defender in these circumstances. **We support this recommendation.**

66. In any simplified procedure case where expenses are not capped by virtue of section 81 of the Courts Reform (Scotland) Act 2014, the expenses payable by the unsuccessful party will be assessed in accordance with the rules and tables established under the Court of Session's power to prescribe fees. It is therefore anticipated that recommendation 30 would be implemented by way of provision in the rules giving the court the required discretion to restrict expenses in these circumstances.

67. With regard to recommendation 31, it will be for the Scottish Government to determine what categories of simplified procedure cases will be subject to a cap on expense. Such a cap would, in its practical effect, broadly equate to fixed expenses. It will also be for the Government to determine if a cap on expenses is introduced at the same time as the introduction of the simplified procedure. While it is not strictly necessary that expenses should be capped from the outset, we recognise that it is desirable that they should be. This is a matter that the Access to Justice Committee may wish to consider.

68. **In relation to the exception of personal injury actions from any fixed expenses regime in lower value claims, we agree in principle that such actions should not be subject to such a regime within existing arrangements. We note that the SCJC PI Committee is developing proposals for procedures in PI actions and for pre-action protocols and think that there is merit in giving consideration to the question of expenses in lower value PI actions in due course.**

69. **We agree broadly with recommendation 32.** We agree that expenses should be awarded on the scale relevant to the roll a case is remitted to, and that this should be a matter for the court allowing the remit. In the interests of ensuring predictability, we agree in principle that the decision on expenses should be made at the time the remit is

[15] Op. cit. Courts Reform (Scotland) Act 2014, Part 3 Section 81

made but note that in circumstances where a case is remitted to ordinary procedure owing to difficult questions of fact or law arising, that this may give rise to a number of unknowns. We wish to give this element of the recommendation further consideration.

70. **Having received and considered the views of the CCCA, we have concluded that there is little merit in pursuing recommendation 33. The CCCA considers that the privative limit of the Patents County Court is a distinguishing feature of a court that covers a specific area of expertise. In contrast, the Commercial Court covers a breadth of cases that do not fall within any defined area. For that reason, the CCCA is of the view that a scheme for capping recoverable costs would not be appropriate in the Commercial Court.**

No.	Recommendation
Summary assessment of expenses	
34	A procedure for the summary assessment of expenses should be introduced as a pilot for commercial actions in the Court of Session and sheriff court.

Responsibility

71. Recommendation 34 may be taken forward through court rules to be made by the Court of Session. Once the relevant provisions of the Courts Reform (Scotland) Act 2014 enter into force, responsibility for preparing draft rules in this regard will sit with the Scottish Civil Justice Council.

Discussion

72. We are of the view that any pilot should be implemented in the Court of Session and sheriff court simultaneously so as to avoid forum shopping, and that any pilot should be carefully monitored. **The CCCA envisages that there may be difficulties with such a scheme, but would be willing to conduct a pilot within the Commercial Court provided that some further guidance (for example under reference to market rates or block table of fees) could be given.**

No.	Recommendation
Expenses management	

35	A system of expenses management should be introduced as a pilot scheme for commercial actions in the Court of Session.
36	One of the sheriff courts where commercial procedures have been available for some time, such as Glasgow where commercial procedures have been available since 1999, should participate in the expenses management pilot.

Responsibility

73. Once the relevant provisions of the Courts Reform (Scotland) Act 2014 enter into force recommendation 35 will fall to be taken forward by the SCJC.

74. Recommendation 36 is a matter for the Scottish Court Service and the Sheriffs Principal.

Discussion

75. **We and the CCCA are supportive of recommendation 35,** although we are of the view that any pilot would require to be carefully handled, so as to avoid excessive cost and procedure, while increasing predictability.

CHAPTER 5: PROTECTIVE EXPENSES ORDERS

No.	**Recommendation**
Protective Expenses Orders	
37	The power to apply for a protective expenses order in Scotland should be available in all public interest cases. However, the decision on whether to award a protective expenses order, and at what level, ought to be a matter for judicial discretion unless otherwise prescribed in Rules of Court for particular types of actions, such as those falling within the scope of the Public Participation Directive.
38	Protective expenses orders ought to be available in multi-party actions but only where a public interest can be demonstrated.

Responsibility

76. Rules of court may make provision in relation to the availability or operation of arrangements for protective expenses orders. In the absence of legislation or rules on particular matters, Recommendation 37 is a matter of judicial discretion.

77. To the extent that recommendation 38 can be effected by court rules, this is a matter which would fall to the SCJC to consider. This will be dependent on any legislative proposals by the Scottish Government in relation to the introduction of multi-party actions.[16]

Discussion

78. **We agree with recommendation 37.** The power to apply for protective expenses orders is currently available and is subject to judicial discretion. The SCJC is giving consideration to the operation of Chapter 58A of the Rules of the Court of Session, which were introduced in March 2013 and made provision in relation to protective expenses orders in judicial reviews and statutory appeals in environmental cases.[17] **The Scottish Government indicated in its response to Sheriff Principal Taylor's recommendations that it intends to review the case law and liaise with the SCJC with a view to identifying whether there is any need for guidance or legislative provision by way of rules. We agree that this would be a sensible way forward.**

79. In relation to recommendation 38, we agree in principle that PEOs should be available in multi-party actions where a public interest can be demonstrated.[18] In its response to Taylor, the Scottish Government stated its intention to consult on the implementation of certain of Sheriff Principal Taylor's recommendations.[19] We note that the Scottish Government's consultation paper is seeking views on possible models for multi-party action procedures. We will give further consideration to this particular matter once the outcome of the consultation is known.

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[16] Scottish Government Response of Sheriff Principal Taylor, Review of Expenses and Funding of Civil Litigation in Scotland Report, Chapter 12 – Multi-Party Actions, http://www.scotland.gov.uk/Resource/0045/00451822.pdf, 2014 (Accessed 29 December 2014)

[17] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:026:0001:0021:EN:PDF, 2012 (Accessed 29 December 2014)

[18] Report of the SCCR Volume 2, p45 "*public interest actions which are brought by public officials who seek redress for the public at large, or for a section of it*"

[19] Op. cit. Scottish Government Response of Sheriff Principal Taylor, Review of Expenses and Funding of Civil Litigation in Scotland Report, Chapter 12 – Multi-Party Actions.

CHAPTER 6: BEFORE THE EVENT INSURANCE

No.	Recommendation
Before the Event Insurance	
39	Where an insured exercises the right to instruct a solicitor of choice, and that solicitor and the insurer cannot agree rates, the difference between what the insurer pays its panel solicitors and what the solicitor of choice charges should be borne by the insured.
40	It should be made clear in the Before the Event insurance policy that should the insured exercise the right to instruct a solicitor of choice rather than be represented by the insurer's choice of solicitor; he or she may be liable to pay any difference between the respective charges.
41	Solicitors should be under an obligation to explore with their clients all potential funding options, including the possibility that the client may be covered by an existing Before the Event insurance policy, at the time when the solicitor is first instructed. In addition, solicitors should be obliged to write to clients with their reasoned recommendation as to which funding option best suits the client's position. The letter should specify all other forms of funding for which the client might qualify, such as legal aid, speculative fee agreements or damages based agreements and specify why, in the opinion of the solicitor, the method recommended is the best funding mechanism for the client.

Responsibility

80. The law of insurance is a reserved matter and recommendations 39 and 40, which will require primary legislation, will therefore fall to be considered by the UK Government in conjunction with the Scottish Government.

81. Recommendation 41 is a matter for the Law Society of Scotland as the professional regulator for solicitors.

Discussion

82. We note that the Scottish Government is considering its response in relation to Sheriff Principal Taylor's recommendations as regards Before the Event insurance and that it intends to engage with the profession and the insurance industry on the matter. We wish to consider these matters in further detail once such engagement has taken place.

In the meantime, we would note that we are broadly supportive of recommendations 39 and 40.

83. We are generally supportive of the thrust of the proposal at recommendation 41 but would note that careful thought would need to be given to the detail in any implementation and terminology used. For example, we wonder whether solicitors who do not offer legal aid should be obliged to advise clients of their right to apply for legal aid as best practice.

CHAPTERS 7 – 10: SPECULATIVE FEE AGREEMENTS, QUALIFIED ONE WAY COSTS SHIFTING, DAMAGES BASED AGREEMENTS AND REFERRAL FEES

84. We note the Scottish Government's intention to address Chapters 7 to 10 of Sheriff Principal Taylor's Report through primary legislation and consultation with the relevant professional bodies.[20]

85. We are broadly in support of the proposals contained in Chapters 7 to 9. **While we discuss our consideration of the individual recommendations below, we will consider the position on these matters further after the Scottish Government's consultation.**

Chapter 7 – Speculative Fee Agreements

No.	Recommendation
Speculative Fee Agreements	
42	The maximum success fee which can be charged in a speculative fee agreement in relation to personal injury cases should be capped with respect to what may be taken out of damages as follows. A cap of 20% (inclusive of VAT) should be set on the first £100,000 of damages, 10% (inclusive of VAT) on damages between £100,001 and £500,000, and 2.5% (inclusive of VAT) on all damages over £500,000. These caps should apply to all heads of damages. Solicitors should not be obliged to offset the judicial expenses against the success fee to which they are entitled.

[20] Op. cit. Scottish Government Response of Sheriff Principal Taylor, Review of Expenses and Funding of Civil Litigation in Scotland Report, p6

43	The maximum success fee which can be charged in a speculative fee agreement in relation to an application to an employment tribunal should be capped at 35% (inclusive of VAT) of the monetary award recovered.
44	For all other civil actions funded by speculative fee agreements, the maximum success fee which can be charged should be capped at 50% of the monetary award recovered.
45	In a speculative fee agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays, plus VAT, out of the success fee. The only outlay which should remain the responsibility of the client is any premium to obtain After the Event insurance cover, should the client deem that necessary.

Responsibility

86. We consider that court rules would be an appropriate mechanism for implementing recommendations 42, 44 and 45. However, we consider that additional rule-making powers would need to be conferred upon the Court of Session in order to do so.[21] The SCJC's role in any implementation of these recommendations will need to be considered once more is known about the detail of the proposed Bill following the Scottish Government's consultation process.

87. Recommendation 43 is a reserved matter and as such would fall to the UK Government to take forward.[22]

Discussion

88. We have read the effect of recommendation 45 as being that, in the event of damages being paid, the successful client's liability to a solicitor acting under a speculative fee agreement would be restricted to the agreed success fee, along with reimbursement of any after-the-event insurance premium. The solicitor would be expected to meet all other outlays that were unrecovered under the award of expenses. **On this reading, we are supportive in principle of recommendation 45, along with recommendations 42 to 44. However we think further consideration should be given to allowing solicitors to agree with clients that, where damages have been paid, the solicitor would be able to**

[21] Existing rules dealing with speculative fee agreements are: Act of Sederunt (Fees of Advocates in Speculative Actions) 1992 (SI 1992/1897), http://www.legislation.gov.uk/uksi/1992/1897/introduction/made, 1992 (Accessed 29 December 2014) and Act of Sederunt (Rules of the Court of Session Amendment no. 8) 2000 (Fees of Solicitors) 2000 (SI 2000/450), http://www.legislation.gov.uk/ssi/2000/450/introduction/made, 2000 (Accessed 29 December 2014)

[22] This area is governed by UK Statutory Instrument Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, http://www.legislation.gov.uk/uksi/2013/1237/schedule/1/made, 2013 (Accessed 29 December 2014)

look to the client for reimbursement of any outlays still outstanding after the success fee and the judicial expenses had been exhausted.

Chapter 8 – Qualified One Way Costs Shifting

No.	Recommendation
Qualified One Way Costs Shifting	
46	A qualified one way costs shifting regime should be introduced in Scotland for personal injury, including clinical negligence, litigation. The regime should apply whether there is a single pursuer or a multiplicity of pursuers.
47	A qualified one way costs shifting regime should apply to appeals from decisions in personal injury cases.
48	In the event that a pursuer's successful action for personal injuries includes an unsuccessful non-personal injury element and there is an order for expenses against the pursuer for that unsuccessful element, such award will be enforceable against the pursuer.
49	If the claim, or an element of it, is made for the financial benefit of someone other than the pursuer, the benefit of qualified one way costs shifting will extend only to the element of the claim which may benefit the pursuer.
50	In the event that the recommendation of the Scottish Civil Courts Review to adopt the rule in Carver v BAA plc is implemented in Scotland, the court should have a discretion to determine whether the pursuer acted reasonably in not accepting a defender's tender and thus the extent to which the pursuer should be liable to meet the defender's entitlement to judicial expenses from the date of the tender. In the event that the recommendation of the Scottish Civil Courts Review is not implemented, the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded.
51	Where the court finds that fraud on the part of the pursuer is established on the balance of probabilities, the pursuer should lose the benefit of one way costs shifting.
52	Where a pursuer's conduct is found by the court to have been an abuse of

	process, the pursuer should lose the benefit of one way costs shifting.
53	Where a pursuer's case is disposed of summarily, the pursuer should lose the benefit of one way costs shifting. Conversely, the pursuer should be entitled to found on the defender's failure to move for summary disposal should the defender subsequently argue that the benefit of one way costs shifting should fly off.
54	Where a pursuer conducts the litigation in an unreasonable manner, the pursuer should lose the benefit of one way costs shifting. For the avoidance of doubt, the test of unreasonableness should be that set out in the case of Associated Provincial Picture Houses Ltd. v Wednesbury Corporation.

Responsibility

89. The introduction of a system of Qualified One Way Costs Shifting (QOCS), as envisaged by Sheriff Principal Taylor could be taken forward by court rules prepared by the SCJC. The Scottish Government has included this topic within its consultation paper. The SCJC's role in implementing these recommendations will require to be considered once more is known about the detail of the proposed Bill following the Scottish Government's consultation process.

90. The SCJC will wish to give detailed consideration to the Scottish Government's consultation findings when available. Our comments below are therefore restricted to the introduction of a QOCS system in general terms.

Discussion

91. **We agree that a system of QOCS should be introduced for personal injury litigation and we are broadly in support of the model proposed at recommendations 46-54.**

92. We would suggest that any QOCS regime will need to be carefully designed and monitored (so as to mitigate the likelihood of unmeritorious claims, for example). The introduction of mandatory pre-action protocols (which are currently being considered by the SCJC PI Committee) with the effect of narrowing areas of dispute prior to commencing litigation, might assist with this.

We consider that the SCJC PI Committee's views should be sought when considering detailed proposals in this regard.[23] We would be particularly interested in the PI Committee's views as to whether exceptions are required, for example, in relation to private individuals (i.e. those who are uninsured). We have assumed that recommendation 49 is not intended to have the effect of removing the benefit of qualified one way cost shifting from 'services' claims under sections 8 and 9 of the Administration of Justice Act 1982, and our support for this recommendation is on the basis of that assumption.

Chapter 9 – Damages Based Agreements

No.	Recommendation
Damages Based Agreements	
55	Damages based agreements entered into by solicitors in cases where a monetary award is sought should be enforceable in Scotland, other than in family actions.
56	Where a damages based agreement has been entered into, solicitors should be entitled to retain the judicial expenses in addition to the agreed success fee.
57	In personal injury cases funded by a damages based agreement, the maximum percentage which can be deducted from damages should be on a sliding scale, as follows. On the first £100,000 of damages, the maximum should be set at 20% (inclusive of VAT), on damages between £100,001 and £500,000 the maximum should be set at 10% (inclusive of VAT), and on any damages over £500,000, the maximum should be set at 2.5% (inclusive of VAT).
58	In employment tribunal cases funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 35% (inclusive of VAT).
59	In commercial actions funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 50% (inclusive of VAT).

[23] The SCJC PI Committee considered this matter at its meeting of December 2013 and indicated that there would be a need to consider solicitors' fees and general cost implications as part of the introduction of QOCS.

60	Damages based agreements may be entered into in commercial cases on a 'no win lower fee' basis.
61	All damages based agreements in personal injury actions should be on the basis of 'no win no fee 'as opposed to' a win lower fee.'
62	The damages from which a success fee may be recoverable under a damages based agreement may include damages for future loss.
63	Should an order for periodical payments be made by the courts, the success fee in a damages based agreement should be calculated by reference to the award of damages excluding the periodical element.
64	Where a pursuer is funded by a damages based agreement and the agreed damages contains an element for future loss in excess of £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid by way of a lump sum as opposed to periodical payments before the pursuer's solicitor will be entitled to make a deduction from the future loss element of an award of damages in order to satisfy the success fee.
65	In the preparation of the report from an independent actuary, the actuary must meet the pursuer out with the presence of the solicitor. The liability for the actuary's fee should fall upon the solicitor should the solicitor advise that a lump sum award be made, regardless of the actuarial recommendation.
66	Where a client is advised by his or her solicitor to accept periodical payments but elects to accept a lump sum payment of damages instead, the solicitor is entitled to calculate his or her success fee only by reference to the award of damages, excluding the periodical element which the client would have received had the advice been accepted.
67	In a damages based agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays out of the success fee, plus VAT.
68	Only solicitors, members of the Faculty of Advocates and claims management companies which are regulated should be entitled to enter into damages based

	agreements.
69	Prior to entering into a damages based agreement with a client, a lawyer or claims management company should be obliged to write to the client setting out in clear language what percentage will be deducted by way of a fee from the damages awarded, when and how the client may terminate the agreement, and the client's obligations in the event of such termination by the client. How conflicts of interest are to be managed should they arise must also be specified. It should also be made clear who will have the responsibility to meet an award of judicial expenses against the client.
70	There should be a 14 day cooling off period after a client enters into a damages based agreement which would be mandatory, save in circumstances where a client's interests would be prejudiced.

Responsibility

93. With the exception of recommendation 58, which is a matter reserved to the UK Government, the recommendations in Chapter 9 are for the Scottish Government to take forward. This will involve primary legislation if damages based agreements entered into with solicitors are to be made enforceable. Whether the SCJC will have a role in implementing the recommendations will depend on the extent to which the legislation, as ultimately enacted, calls for the exercise of the Court's rule-making powers.

Discussion

94. We are broadly supportive of the proposal to allow solicitors to enter into enforceable damages based agreements, subject to appropriate safeguards. However, as with speculative fee agreements, we think that consideration should be given to providing for an exception to recommendation 67 where damages have been paid, and where the extent of unrecovered outlays exhausts both the agreed deduction from damages, and the fee element of the judicial expenses.

Chapter 10 – Referral Fees

No.	Recommendation
Referral Fees	
71	Only regulated bodies should be entitled to charge a referral fee.
72	Solicitors should be under an obligation to provide clients who have been referred to them by a third party agency with a written statement which should a) list all potential factors which a responsible referring agency might consider relevant when making a referral and b) indicate whether such factors played a part in the selection of the particular solicitor for the referral. Relevant factors would include, but not necessarily be limited to i) the particular skill possessed by the solicitor, ii) whether there has been a quality control audit of the solicitor or the firm of solicitors, iii) whether the result of such an audit is available for inspection by the client, and iv) the basis upon which the solicitor is to be remunerated if legal costs are to be met by the referring agency, for example, by a Before the Event insurer. The statement should also indicate that the services provided may be available elsewhere, for example, from a firm that does not have an arrangement with the referring party. The statement should also set out the means by which the referring agency obtains its business.
73	The referring agency should be under an obligation to provide to the solicitors to whom the client is being referred such information as is necessary to enable the solicitors to fulfill their obligations.
74	Claims management companies, and those acting on their behalf, should not be permitted to cold call prospective clients.
75	Solicitors who obtain clients from a claims management company should be obliged to satisfy themselves that the claims management company does not obtain clients by cold calling.

Responsibility

95. While we are generally supportive of the thrust of recommendations 71 to 75, we are of the view that these are matters for the Scottish Government, the Faculty of Advocates and the Law Society of Scotland to consider and take forward.

Discussion

96. **We note the Scottish Government's intention to engage with the Faculty and Law Society on these matters and look forward to learning of the outcomes of those discussions.**

CHAPTERS 11 – 13: ALTERNATIVE SOURCES OF FUNDING, MULTI-PARTY ACTIONS AND REGULATION

The recommendations in Chapters 11-13 are matters for the Scottish and/or UK Government, as the case may be, to take forward. The SCJC's role in any implementation of these recommendations would require to be considered in light of those proposals. While we have, accordingly, restricted our consideration of the matters addressed in Chapters 11-13, we do offer some general comments on some of the recommendations below, which we hope will be of assistance in further consideration of these matters.

Chapter 11 – Alternative Sources of Funding

No.	Recommendation
Third Party Funding	
76	There should be a voluntary Code of Practice to which third party funders should conform.
77	A professional funder who finances part of a pursuer's expenses of litigation should be potentially liable for the judicial expenses of the opposing party to the extent of the funding provided. Any award of expenses against the funded litigant should be on a joint and several basis, with the funder's liability capped at the extent of the funding provided by it.

78	In all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner as a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case.
Self-Funding Schemes	
79	The Scottish Government should commission financial modelling work on the viability of establishing a Contingent Legal Aid Fund to fund outlays in cases of alleged clinical negligence. The outcome of the modelling will dictate the parameters of the Contingent Legal Aid Fund.
Pro Bono Funding of Litigation	
80	The civil courts in Scotland should be granted an express power to enable them to make an award of expenses in favour of a successful party who has been represented on a pro bono basis. Payment of that award should be made to a charity prescribed by the Lord President. The charity must be a registered charity which provides financial support to persons who provide, organise or facilitate the provision of legal advice or assistance free of charge.
81	When a judicial account of expenses is prepared by or on behalf of a party whose representation was pro bono, it should be prepared on the normal party and party basis.

Responsibility

97. The proposals contained in Chapter 11 are matters to be considered and taken forward by the Scottish, or as the case may be, UK, Government.[24] While we consider it appropriate for these matters to be addressed by court rules,[25] this would require additional rule-making powers to be conferred upon the Court of Session.

Discussion

98. **We are broadly in support of recommendation 78.** We consider that further thought may be needed as to the nature of any disclosure of sources of funding and how rules might be drawn so as to prevent unwarranted disclosure.

99. **We are supportive of recommendation 79 in general terms. However, we consider that it should apply to professional negligence claims as well as clinical negligence claims.**

100. **We are supportive in principle of recommendations 80 and 81. However, any implementation of these recommendations will require careful consideration of the detail. For example, how should outlays which have not been incurred (i.e. pro bono services) be quantified?**

101. We note that the Scottish Government is giving consideration to the recommendations contained in Chapter 11 insofar as they may be interconnected with other proposals to be taken forward by primary legislation. The SCJC's role in implementing these recommendations will require to be considered in light of those proposals and the extent to which rules may be required for any implementation. **These matters will require further consideration after the Scottish Government's findings of the consultation are made available.** We would expect that the SCJC's Access to Justice Committee would be of assistance in considering any proposals.

[24] Dependant on funder within recommendation 76 will either be for the Scottish or UK Government to consider.

[25] The prescription of a charity by the Lord President in terms of Recommendation 80 will require power to be conferred upon the Lord President and not dealt with by Rules of Court.

Chapter 12 – Multi-Party Actions

No.	Recommendation
Multi-Party Actions	
82	Expenses management should be mandatory in all actions that proceed under multiparty procedure unless the case management judge determines otherwise, having regard to all the circumstances.
83	Damages based agreements should be available for use in multi-party actions, subject to the same restrictions as are set out in Chapter 9 for damages based agreements.
84	The test for making an award of expenses against the multi-party action fund should be that set out in section 19 of the Legal Aid (Scotland) Act 1986.

Responsibility

102. Sheriff Principal Taylor's recommendations in relation to multi-party actions are made on the basis of a multi-party procedure as recommended by the Scottish Civil Courts Review, the introduction of which would require primary legislation. The Scottish Government has indicated that it is giving consideration to such a procedure, including as to the appropriate funding model, and that it will consult on implementation of the recommendations in Chapter 12 insofar as they relate to those recommendations it proposes to legislate for. The SCJC's role in any implementation of these recommendations will require to be considered in light of those proposals.

Discussion

103. **We consider it would be premature to offer a view on any implementation of Chapter 12 until there is some certainty as to the detail of any proposed multi-party procedure.**

Chapter 13 — Regulation

No.	Recommendation
Regulation	
85	There ought to be a regulator of claims management companies.

Responsibility

104. The regulation of claims management companies is a matter for the Scottish and/or UK Government, as the case may be.

Discussion

105. **We note that the Scottish Government intends to turn to this matter once the primary legislation to implement Chapters 7 to 9 of Sheriff Principal Taylor's Report has been delivered. We welcome this commitment.**

106. It should be noted that implementation of Recommendations 68 and 71 are dependent on the regulation of the bodies referred to, as proposed in Chapter 13. The Scottish Government has indicated in its response to the Taylor report that it will consider this matter "as part of a wider review of legal services regulation". SOURCES

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