

# COST AND FEE ALLOCATION IN CIVIL PROCEDURE

## NATIONAL REPORT FOR SCOTLAND<sup>1</sup>

### *Introduction*

There have been few revolutions in Scots civil procedure over the years. Instead, the courts and (especially) the legislature have tended to tinker around the edges of the machinery of justice. This has resulted in a system which, at best, displays the robust common sense born of long experience and which, at its worst, appears cumbersome and old fashioned.

A revolution, or something close to one, may be on the horizon. The Report of the Scottish Civil Courts Review (generally referred to as The Gill Report after its lead author, Lord Gill, a senior Scottish judge) was published in September 2009. The Gill Report makes many far-reaching proposals and if implemented will change the face of the Scottish civil justice system. Where the Gill Report proposes changes which are germane to the subject matter of this report, these are noted and discussed below. However as it is not known when, or if, or to what extent, the recommendations in the Gill Report will be implemented, this Report generally proceeds on the basis of current procedure and practice.

Some of the terminology used and structures described may be a little alien to those unfamiliar with Scots procedure and a few introductory words of explanation are offered here. Firstly, a few words should be said about the hierarchy of courts in Scotland. In civil proceedings, the Court of Session is the senior court before which the most high-value and significant business is generally conducted. However, as we shall see, it is possible to raise relatively low-value actions in the Court of Session, and this has led to the court becoming overwhelmed with business. It has also unnecessarily raised the cost of litigation, as Court of Session proceedings are in general significantly more expensive than those in other courts. Within that court, a variety of different forms of procedure are utilised for different actions. For our purposes the most significant are the court's Ordinary Procedure and its Commercial Procedure. Lower in the court hierarchy is the Sheriff Court, which is essentially a local court used for low and low-to-mid value claims. Again, there exists a multiplicity of different forms of procedure within the Sheriff Court; Small Claim procedure (for low value claims), Summary Cause Procedure (for slightly higher value claims, but the difference is so slight that it hardly justifies the existence of two low-value claims procedures), Ordinary Cause procedure (for claims which exceed the ceiling value of Summary Cause procedure) and Commercial Procedure. The people litigating within these courts are known as pursuers (claimants/plaintiffs) and defenders (defendants). What is generally known as "costs" in other jurisdictions is described as "**expenses**" in Scotland (but for the ease of comparison, other than in direct quotations, the term "costs" will be used throughout this Report). Finally, by way of introduction, a few words about the Scottish legal profession. Like the profession in England and Wales, Scotland has a split bar, where the more senior branch of the profession (Advocates) enjoy rights of audience in all Scottish courts, while the more junior branch of the profession (Solicitors) have rights of audience in the Sheriff Court, and also most specialist tribunals, but do not generally<sup>2</sup> have rights of audience in the Court of Session or the new Supreme Court, which has taken over the judicial function of the House of Lords and, although it is based in London, is Scotland's supreme court of civil appeal.

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<sup>2</sup> Especially experienced solicitors may apply to become solicitor-advocates and to obtain a right of audience in the most senior courts but in general it continues to be the case that when litigation is conducted in the Court of Session or the Supreme Court the function of the Advocate is to present the client's case while the function of the Solicitor is to do the majority of the pre-hearing preparation.

## I. The Basic Rules: Who Pays?

I.1 The basic rule of cost and fee allocation in Scots civil litigation is often said to be that the loser pays the winner's expenses (henceforth "costs"). This, however, is something of an over-simplification. It is more accurate to say that the judge has a discretion as to which party should bear the costs of a particular litigation, but that in exercising that discretion the judge will be guided primarily by the principle that the party whose conduct made the litigation (or the particular procedural step in an overall litigation) necessary bears the expense of the litigation (or step). Because Scots law holds to the notion that "the rights of the parties are to be taken all along such as the ultimate decree declares them to be"<sup>3</sup>, the application of this principle generally results in the loser paying. However, where success is divided, the judge's discretion results in a wide range of potential outcomes: for instance, partial awards may travel in each direction, or the judge may simply find in the circumstances the parties have fought each other to a draw, and no costs are due to or by either party. Similarly, as the rule lays emphasis upon the way in which the litigation has been conducted, the judge will also bear in mind whether the litigation was conducted properly and efficiently. So a litigant who ultimately wins, but who, along the way to that victory, led evidence from a witness whose testimony is found by the court to be wholly irrelevant, is likely to find that the court will make an award of costs in favour of the loser in relation to the costs associated with that witness's testimony.

I.2. The usual position in Scots law is that the loser will have to pay the winner's legal fees "as taxed" (i.e., as assessed by an expert and approved by the judge<sup>4</sup>) on a party and party basis. Here, the winner receives an amount that the Auditor of Court considers was reasonably necessary for the proper conduct of the case. This basis of calculation has been found to significantly under-estimate the amount of work which is typically done by a lawyer both before litigation commences and in preparation proof (which is to say, the trial of the facts).<sup>5</sup> An award calculated on this basis will almost invariably be at least somewhat lower than the fees actually charged by the winner's lawyers, and the restrictive nature of the items which are allowable on a party-to-party basis can, most notably in complex commercial cases, lead to a very wide divergence between the cost of the service as billed by the lawyer to the client and the amount which the rules and practice of the court permit. Recent research suggests that recovery rates of 50 to 60% of actual lawyers' fees are normal for commercial actions in the Court of Session, and that in complex cases the recoverable element can fall below 50%.<sup>6</sup> It is generally considered that the recovery rate in non-commercial actions is higher and lies at around 60%.<sup>7</sup>

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<sup>3</sup> *Shepherd v Elliot* (1896) 23 Rettie's Reports 695 per the Lord President (Robertson) at 696

<sup>4</sup> For a further discussion on the process of taxation, see para IV.3, below.

<sup>5</sup> Law Society of Scotland Professional Remuneration Committee, *Shortfall in Judicial Costs: Response of the Committee to the Scottish Civil Courts Review*, ("Law Society Remuneration Committee, *Evidence to Gill*") available at

[http://www.scotcourts.gov.uk/civilcourtsreview/Responses\\_to\\_the\\_Consultation\\_Paper/L/Law\\_Society\\_of\\_Scotland\\_Remuneration\\_Committee.pdf](http://www.scotcourts.gov.uk/civilcourtsreview/Responses_to_the_Consultation_Paper/L/Law_Society_of_Scotland_Remuneration_Committee.pdf) (visited 12 January 2010).

<sup>6</sup> Lord Gill et al, Report of the Scottish Civil Courts Review, Edinburgh, 2009, ("The Gill Report") Volume II at p. 76.

<sup>7</sup> Law Society of Scotland Remuneration Committee, *Evidence to Gill*, p.1.

It is competent for awards to be made on an indemnity (otherwise known as agent and client) basis. Here the norms used in calculating an award on a party and party basis are rejected in favour of the overarching principle that the successful party should be reimbursed in full. Such awards are rarely made in the Scottish courts, and when they are, the court is almost always expressing its considerable displeasure at some aspect of the way in which the case has been conducted. For instance, if a litigant completely changes the basis on which its claim or defence is formulated, and the other party can demonstrate that it has been inconvenienced by investigating and answering a case which is no longer being proceeded with, then the court may very well order that all of the costs incurred up to the time of the rewriting must be met by the amending party on an indemnity basis.

I.3 There are no especial rules for appeals. This position is generally justified on the basis that, as noted at paragraph I.1, above, the rights of the parties are to be taken all along such as the ultimate decree declares them to be.

I.4 The costs associated with preparing for proof, and in particular the costs of expert and other witnesses, are borne in first instance by the litigant who wishes that witness to give evidence on his behalf, and, (so long as the judge and the Auditor of Court are satisfied that this particular witness's evidence was reasonably necessary for the conduct of the case), these costs will generally be included at taxation as an allowable cost recoverable from the losing party. These costs are likely to form a significant part of the overall costs of litigation, and the fact that the instructing party (usually the pursuer) may have to settle these outlays months or even years before being reimbursed is perceived to be a weakness in the existing system. The Gill Report recommends taking at least some cognisance of the hardship which may be associated with having to fund such outlays by allowing interest to be recovered on them.<sup>8</sup>

I.5 The great majority of civil suits settle without the need for a formal determination by the court. As is the case in England and Wales, reliable statistical information is not available, but it is widely estimated that some 90 to 95% of cases are concluded without the need for a final judicial determination.<sup>9</sup> If parties settle their dispute by the acceptance of a judicial tender (i.e. a formal offer to settle the case lodged in court by the defender), then the defender will be bound to pay the pursuer's costs incurred up to the point when the tender was lodged. If an extra-judicial settlement is reached outside the tendering framework, costs are a matter for agreement between the parties, but it would ordinarily be the case that at least some agreed contribution towards costs would be made by the defender. A relatively common way of addressing this issue is for the parties to agree that the defender will pay the pursuer's costs on a party to party basis, which costs will be determined after the event by the Auditor of Court in the event that they cannot be agreed upon by the parties themselves.

## **II. Exceptions and Modifications to the Basic Rule**

II.1 There are a number of situations where the basic rule is deviated from. A special category of Small Claims is recognized (consisting of defended claims worth less than £200) where an award of costs will only be granted if a party has behaved unreasonably or has not

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<sup>8</sup> The Gill Report Vol 2 at p. 87.

<sup>9</sup> See Prof Richard Moorhead, *Cost and Fee Allocation in Civil Procedure: National Report for England*

defended the action in good faith. Similarly, awards of costs are granted only very rarely, and for similar reasons, in proceedings before Employment Tribunals.

Where the losing party to a litigation enjoyed the benefit of Legal Aid,<sup>10</sup> awards of costs are competent and indeed costs may be applied for against either the losing party itself or the legal aid fund. However, such applications are not determined in accordance with the usual rules; statutory guidelines require the court to limit any award of costs. In determining an application for costs against a legally aided party, the court must limit any award to the amount “that is reasonable [for the party] to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute”.<sup>11</sup> In practice this means that, in the absence of wholly unreasonable conduct by the losing litigant, the court will generally find that no or at most very limited costs are payable by a legally aided party. In the case of an award of costs against the legal aid fund, the test for making an award is that it is “just and equitable in all the circumstances”.<sup>12</sup> Such awards are made only rarely, and usually only when the party seeking the award can demonstrate that he or she will suffer serious hardship if an award is not made, and if the conduct of the party having legal aid can fairly be subjected to criticism.<sup>13</sup>

In the context of civil litigation, the reporter is aware of no other special or protected categories of litigant.<sup>14</sup> For instance, no rule exists stating that award of costs cannot be made against consumers, or that an award of costs are incompetent against the state.

II.2 The Scots approach to pre-litigation procedures is rather fragmented. Traditionally there was no structured pre-litigation procedure (although a party who issued proceedings with absolutely no warning might very well find itself denied some or all of its costs on the basis that the basis of misconduct in raising proceedings prematurely<sup>15</sup>), and in areas where there has been no reform, this continues to be the law. However, piecemeal reforms have led to the introduction of pre-action protocols for certain types of action in certain types of court. Only one such protocol is mandatory: the one which has been put in place for litigants using the specialist commercial procedure in the Court of Session.<sup>16</sup> However, there is no pre-action protocol in place for litigants who use the (in other respects very similar) specialist commercial procedure in the Sheriff Court. Voluntary pre-action protocols (promoted by the Law Society of Scotland, the professional association with jurisdiction over the solicitor branch of the profession, and followed as a matter of good practice only) exist for mid-to-low value personal injury, professional negligence and industrial disease claims.<sup>17</sup> The Gill Report is somewhat guarded about the benefit of pre-action protocols: it supports the ongoing use of such pre-action

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<sup>10</sup> Legal Aid is discussed more fully in section VI, below.

<sup>11</sup> Legal Aid (Scotland) Act 1986 s 18 (as amended)

<sup>12</sup> Legal Aid (Scotland) Act 1986 s 19 (as amended). If the application for an award of costs relates to first instance proceedings, there are additional criteria to satisfy, namely that the proceedings must have been commenced by the legally aided person, and the court must be satisfied that the unassisted party will suffer financial hardship unless an order is made.

<sup>13</sup> *Clegg v Clegg* 1999 Scottish Civil Law Reports (Sheriff Court, Notes) 773.

<sup>14</sup> It may be worth noting in passing that there is very little scope for an award of costs against the state in criminal or administrative proceedings, but a discussion of these areas lies outside the scope of this paper.

<sup>15</sup> *Cellular Clothing Co v Schulberg* 1952 Scots Law Times (Notes) 73.

<sup>16</sup> Court of Session Practice Note 6 of 2004, paragraph 11, available for download from [http://www.scotcourts.gov.uk/session/practiceNotes/pn06\\_2004.pdf](http://www.scotcourts.gov.uk/session/practiceNotes/pn06_2004.pdf) (last accessed 12 January 2010).

<sup>17</sup> The Gill Report, Vol I at 175.

procedures as currently exist, but recommends further consideration before requiring more widespread use of pre-action protocols.<sup>18</sup>

Existing pre-action protocols require only the exchange of information prior to commencing litigation. None go so far as to require mandatory mediation, and nothing in the Gill Report would suggest that such a requirement is in contemplation. This Report's qualified support of mediation has been criticized by some ADR providers.<sup>19</sup>

II.3 Contractual agreements about who will bear certain legal costs are relatively common in Scotland in some commercial contexts: commercial leases, for instance, will often contain clauses to the effect that some of the landlord's legal costs will be borne by the tenant. However, party agreements on who will bear the cost of litigation are unknown in this reporter's experience and must be, at most, very rarely used. It is unlikely that the courts would consider themselves bound by such agreements, particularly if they produced a manifestly unjust result, and any clause in a standard form contract which provided that a consumer was required to bear the costs of a commercial organization would in any event be potentially unenforceable as a result of consumer protection legislation.<sup>20</sup>

II.4 Parties are permitted to represent themselves in all civil cases. Self-representation is commonplace in Small Claims and Summary Cause procedure and in some Sheriff Courts advisors are on hand to guide party litigants on court presentation and procedure. Self-representation is also commonplace before some specialist tribunals (the most relevant of which, for present purposes, is the Employment Tribunal; most of the rest of these would be considered to be administrative in nature). Self-representation is relatively uncommon in mainstream civil litigation for a (ie under Sheriff Court Ordinary Cause procedure and in the Court of Session) but has still been identified as a significant waste of court time, particularly at appellate stage. The Gill Report is at best agnostic about party litigants, and perceives a need both for strong case management powers to control the unruly,<sup>21</sup> and the enhanced use of in-court advise services to encourage and assist the responsible.<sup>22</sup>

### **III. Encouragement or Discouragement of Litigation**

III.1 The most commonly given justification for the special rules which exist for very Small Claims and in the Employment Tribunal (discussed at paragraph II.2 above) is that they encourage claimants to bring claims which would otherwise be uneconomic. To that rather limited extent only, the rules governing cost and fee allocation encourage litigation.

The "loser pays" rule is not really designed to discourage litigation, for, as we have seen in paragraph I.1, above, the purpose of the rule is to ensure that the winner suffers as little loss as possible as a result of a litigation which he or she has won. The rule nevertheless has the effect

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<sup>18</sup> The Gill Report, Vol I at 177ff.

<sup>19</sup> Charlie Irvine, *The Sound of One Hand Clapping: The Gill Review's Faint Praise for Mediation* (2010) 14 Edinburgh Law Review p. 85.

<sup>20</sup> Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083). See in particular Schedule 2(1)(e) and 2(1)(q).

<sup>21</sup> The Gill Report Vol 1 pp. 234-238.

<sup>22</sup> The Gill Report Vol II 17-19

of discouraging litigation. In particular, it can act as a barrier to the bringing of cases which break new legal ground. The idea, discussed at paragraph I.1 above, that “the rights of the parties are to be taken all along such as the ultimate decree declares them to be” is particularly artificial – and the consequences flowing from it especially harsh – in that context. However, the courts still continue to apply the general rule and order the loser to pay in such cases. In *Quantum Claims Compensation Specialists Ltd v Powell*,<sup>23</sup> for instance, Powell, who had been seriously injured in an accident at work, employed the pursuers to handle his claim against his employers. Upon settlement of the action he refused to pay the pursuer’s fee, which had been calculated on a contingency basis, and sought a declaration from the court that he was not obliged to pay. The rule against *pactum de quota litis* was well known,<sup>24</sup> but the question of whether the prohibition extended to claims handling agencies had never previously been determined. Mr Powell lost the case when the court held that the rule did not apply to claims handling agencies but only to qualified legal professionals (solicitor and advocates). Given the importance and the novelty of the point, and given that the courts purport to enjoy a discretion in the matter of costs allocation, one might have expected the court to cap the amount of costs awarded, or to find that no costs should be payable to or by either party. However, the court, although clearly aware of the difficulties which Mr Powell would likely face as a result of having to meet an award of costs, nevertheless awarded costs against him but expressed the pious hope that the winning party would not seek to enforce the award in full.

The chilling effect of an approach to expense which, whatever its apparent subtleties, generally reduces down to a loser pays rule is problematic, not only from the perspective of the individual litigant, but also from the perspective of the systemic interest. The point has recently been made by Lord Rodger, a Justice in the UK’s new Supreme Court (which has taken on the judicial functions previously enjoyed by the House of Lords), that Scotland, a small jurisdiction with a low throughput of cases, can ill afford to deter litigation if its law is to develop.<sup>25</sup> The Gill Report has recommended the institution of a procedure, modeled on the Protective Costs Orders of the law of England and Wales, whereby, where litigation involves a serious matter of public interest, an order clarifying the issue of costs (generally by stating that no costs are to be awarded to or by either party) can be obtained *ab initio*, thus providing the pursuer with a degree of certainty on costs.<sup>26</sup>

III.2 The up-front court costs associated with initiating an action are relatively small in Scotland. The fee for initiating a Small Claims action is either £15 or £65 (depending on the value of the claim), a Summary Cause costs £65 to initiate, an Ordinary Cause £100 and a Court of Session action £175. It is in addition common for solicitors to demand a certain amount of money “up front” to cover the initial stages; the amount taken will vary depending on the size and degree of complexity of the action. A solicitor might request as little as £2,000 to allow him to take steps to initiate an Ordinary Cause action worth around £100,000. He or she would be likely to seek a retainer measured in tens of thousands of pounds to initiate a more complex commercial action. Most solicitors will now also issue interim bills as the case progresses.

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<sup>23</sup> 1998 Scots Law Times 228.

<sup>24</sup> The rule is discussed further at paragraph V.1, below.

<sup>25</sup> Lord Rodger of Earlsferry, *Where Have We Come From, Where To Next?*, (2008) 53.8 Journal of the Law Society of Scotland, p. 14.

<sup>26</sup> The Gill Report Vol II pp 37 to 44.

Evidence taking, in Scots procedure, is a two-stage process. Statements (known as precognitions) are noted by solicitors from the parties and all potential witnesses. These statements play no formal role in proceedings (they are not for instance equivalent to depositions) but are used by the solicitor as an indication of what that witness is likely to say when giving oral testimony. Evidence is given orally by witnesses in court during the course of a trial known, in Scots procedure, as a proof. Thus there is not really a self-contained evidence taking stage in Scots procedure. Statement-taking falls into the general rubric of preparation of the case, and the presentation of the evidence is part (usually the major constituent part) of the proof.

There is little evidence that up front payments (in the sense of payments required to commence a litigation) have a significant deterrent effect upon potential litigants. However, the fact that the overall cost of litigation is so large, and the risk that the litigant may not be able to recover all of his or her costs or, in worst case scenario, may have to make a significant contribution towards the costs of the other side, have a notable deterrent effect upon potential litigants.

#### **IV. The Determination of Costs and Fees**

IV.1 Court fees (which are not charged to litigants who have the benefit of Legal Aid, or who are in receipt of certain welfare benefits) are fixed by delegated legislation.<sup>27</sup> Different fees apply for different courts and for different forms of procedure within individual courts. Small Claim and Summary Cause fees are cheaper than Ordinary Cause or Commercial proceedings in the Sheriff Court, and fees in the Court of Session are somewhat higher again. However even in the Court of Session court fees are not especially high, and rarely will court fees comprise the main or even an especially significant part of the overall cost of litigation.

IV.2 Scots law operates a hybrid system where, for most forms of civil litigation block fees are set out in delegated legislation stating what will be payable in respect of the various constituent phases of the litigation if the party entitled to costs wishes to proceed on a block fee basis. However, and except for the cases of Small Claims and Summary Cause procedure, where the block fees are ordinarily mandatory, the successful party has a choice: he or she may accept payment on the block fee basis, or may opt to submit a “time and line” account, which seeks to weigh up with greater precision the amount of work done by the parties’ lawyer(s) in the case. It is usually the case that parties will opt for block fees where a case was reasonably straightforward and will opt for a time and line account where the case was more complex. Either way, the account will have to be taxed (see paragraph IV.3, below) before it will be approved by the Sheriff.

IV.3 The final determination of the amount to be paid to the entitled party/parties is a multi-stage (not to say cumbersome) process. A judge will make a determination, usually at the same time as determining on the merits of the case, but possibly at a subsequent hearing

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<sup>27</sup> The current fees chargeable in the Sheriff Court are to be found in The Sheriff Court Fees Amendment Order 2008 (SI2008/236). Court of Session fees may be found in The Court of Session Fees Amendment Order 2008 (SI2008/239).

convened specifically to address the question of costs, on the question of who is to bear the costs of the cause. The judge may, for instance, pronounce that the loser is found liable in the costs of the cause; or that the winner be found liable for certain stages of procedure rendered necessary only because of the manner in which he conducted the case, but that the loser is responsible for the remainder of the costs in the cause. Any party who has received an award of costs will then prepare accounts setting out what it believes itself to be entitled to. If agreement is not reached between the parties, these accounts are remitted to the Auditor of Court (or the Sheriff Clerk in the case of Small Claim or Summary Cause procedure) who “taxes” (i.e. tests, or assesses) the account. The Auditor reports the outcome of the taxation back to the court, and a further hearing on the taxation will take place before a judge, at which the parties can make representations to the court before the court finally pronounces a decree fixing the amount of costs awarded in the case. The Gill Report notes the rather cumbersome nature of this procedure and proposes some relatively minor amendments (principally the enhanced use of IT and telephone taxations), but it appears that the current system will otherwise remain substantially in place.<sup>28</sup>

## **V. Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance**

V.1 Contingency fees cannot be charged by qualified members of the legal profession (i.e. by solicitors, advocates or solicitor-advocates). This is known as the rule against *pactum de quota litis*. This rule, which is civilian in origin, has been recognized in Scotland since at least the Seventeenth Century and exists as it is thought to be undesirable for lawyers to have a direct financial interest in the outcome of a litigation.<sup>29</sup> A contingency fee, if levied, would be void and legally unenforceable, and attempting to levy such a fee would be unethical and likely to render a qualified legal professional liable to be proceeded against for professional misconduct by their professional body.<sup>30</sup> However, it has been held that contingency fees are not invalid when levied by an unqualified or quasi-legal advisor, such as a claims handling agency.<sup>31</sup> In Scotland, a considerable amount of personal injury claims are handled by such agencies on a contingency fee basis. If the agency is unable to settle a case before advancing to litigation, it will employ professionally qualified lawyer(s) to commence litigation. The qualified lawyer(s) cannot directly share in the contingency fee, but will usually be employed on a no-win, no-fee basis.

No-win no-fee arrangements (usually coupled with success premiums, discussed further below) are permissible and increasingly commonplace. They are seen most commonly in actions for personal injury but are competent across the board.

Success premiums are permitted,<sup>32</sup> but cannot be recovered from the other side. This has allowed Scots law to avoid some of the difficulties caused to defenders (and arguably the systemic interest in justice) in systems where success fees are recoverable from the losing party, but of course gives rise to the converse problem of markedly increasing the successful pursuer’s unrecoverable element of costs.

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<sup>28</sup> The Gill Report Vol. II pp 89-92.

<sup>29</sup> James Dalrymple the Viscount Stair, *The Institutions of the Law of Scotland*, Edinburgh, 1693, paragraph I.10.8

<sup>30</sup> Alan Paterson and Bruce Ritchie, *Law Practice and Conduct for Solicitors*, Edinburgh, 2006 at pp234f.

<sup>31</sup> *Quantum Claims Compensation Specialists Ltd v Powell* 1998 Scots Law Times 228.

<sup>32</sup> Solicitors Scotland Act 1980 s. 61A(3) and (4).

V.2 Claims may be sold for the purposes of litigation, but the only context in which this occurs commonly is the sale of commercial debts for a certain proportion of their value; this is commonly done by companies in order to enhance liquidity.

The questionnaire specifically asks if claims may be sold to client's attorneys. This is unknown in the reporter's experience. Such action could very well give rise to professional misconduct proceedings against the lawyer on the basis of a conflict of interest between the lawyer and the client, and would probably be prohibited by the rule against *pactum de quota litis*, discussed above.

V.3 There are no special rules for class actions, group litigation or actions brought by consumer organizations. The Gill Report considers Scots law to be underdeveloped in this area and recommends the introduction of a new dedicated multi-party procedure. The Gill Report does not propose to deviate from the default position on costs for such actions.<sup>33</sup>

V.4. It is possible to obtain insurance against the cost of litigation. This may take the form either of specific insurance litigation (used primarily in the context of personal injury actions) or coverage under other policies such as automobile or homeowners insurance. Although specific litigation insurance is available, it is used somewhat less commonly in Scotland than in other jurisdictions (for instance, England and Wales) because of the continued availability of civil legal aid (discussed in further detail, below). Where used, specific litigation insurance is generally organized for the client by his or her solicitor, who will require to certify that probable cause exists. The cost of the premium for buying the insurance is responsibility of the claimant and is not a recoverable expense in the event that the pursuer wins an award of costs. Where legal costs insurance is obtained as part of another policy, this usually involves the payment of an additional premium, the total amount payable in any one claim will usually be capped (often at £100,000 or £250,000) and the pursuer will usually be obliged to make use of the services of a lawyer recommended by the insurance company. Certain types of litigation (for instance family disputes and claims relating to inheritances) will usually be excluded from the scope of cover.

## **VI. Legal Aid**

VI.1 A publicly funded legal aid system has existed in Scotland since the 1950s. The system is currently administered by the Scottish Legal Aid Board (generally abbreviated to SLAB). Only registered legal aid practitioners can act in cases supported by Legal Aid. The system operates by providing means-tested financial support on a sliding scale, with those on the lowest incomes receiving the greatest amount of support and the amount of assistance provided "tapering off" for those with more means. In consequence, someone who only just satisfies the means test will still require to make a significant contribution towards the cost of his or her litigation. Claw-back provisions also exist whereby the cost of legal aid will often be deducted from any damages awarded in the litigation.

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<sup>33</sup> The Gill Report Vol 2 at 66f.

VI.2 Pro bono work is undertaken by some lawyers, sometimes because of sympathy for a particular cause (some lawyers, for instance, have a reputation for offering pro bono work for charities or other causes for which they feel a particular empathy or association) or on occasions where they consider the law to be unjust or in need of reform. The relevant professional bodies support the undertaking of pro bono work. There is however no enforceable professional obligation to undertake pro bono work and this remains a matter for the conscience of the individual lawyer.

VI.3 In order to qualify for civil legal aid, an applicant must pass a means test; cases must in addition pass a probable cause threshold. There are a small number of civil wrongs in respect of which it is impossible to obtain legal aid (defamation is the most important and commonly-given example) but (subject to the civil legal aid is otherwise available across the broad range of potential civil litigation (always assuming that the means test is satisfied and probable cause can be shown).

VI.4 Litigation costs and fees are considered by many to be excessive and as such a serious barrier to justice,<sup>34</sup> especially for small businesses and for private individuals who earn too much money to get any significant benefit out of the legal, but not enough to enable them to be described as wealthy. The differential between actual charges and the recoverable element has been identified as especially problematic, and as noted above there are proposals in the Gill Report to close that gap.

VI.5. Litigation costs (and in particular the risk of potentially having to bear a significant proportion of the costs of the other party to the litigation) are widely perceived to act as a barrier to litigation. In particular, they are thought to make parties reluctant to litigate novel or unusual cases the outcome of which would be hard to predict with certainty.

## **VII. Examples**

VII.1. The questionnaire asks for the total costs and fees of the costs and fees of litigation to first instance final judgment routine claims of certain size. This is difficult for two reasons. Firstly, outside of a limited number of situations where the amount of costs awarded is fixed by statute, it is in the nature of the Scots system that it is difficult to state with great precision the level of costs likely to be incurred in a litigation of a given size; a great deal depends upon the amount of work involved, which varies tremendously from case to case. Secondly, as we have already seen, civil procedure in Scotland presents a rather fragmented picture, with a variety of different courts available and a multiplicity of different forms of procedure to choose from even within individual courts. Generalization is difficult in these circumstances, but good faith and relatively conservative estimates of costs are provided below.

A Small Claim of \$1,000 (approximately £600 at time of writing) would be pursued under Small Claim procedure in the Sheriff Court. It is perhaps unlikely that either or both parties would use professional legal advice; however if they did, and if their lawyers were unwilling to significantly abate their fees (which they may be willing to do, particularly for a regular client), the fees would be likely to greatly exceed the value of the claim. The total cost would be

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<sup>34</sup> See e.g. Law Society Remuneration Committee, *Evidence to Gill* at 10.

unlikely to be less than £3,000 (\$5,000). Of this, the winner (who would probably have spent some £1500 on legal costs) could expect to recover only allowable outlays of perhaps £200 and a contribution of £150 (\$250) towards legal costs.

One would expect a small to medium claim of around \$10,000 (approximately £6,000) to be pursued as an Ordinary Cause in the Sheriff Court, although there is – at present – nothing stopping a claim of such value being pursued in the Court of Session.<sup>35</sup> Again, unless the parties' lawyers were willing to significantly abate their fees, in all but the simplest of such actions the total costs and fees would be likely to approach the sum sued for. **Unless a party is very sure of its prospects of success (and therefore of winning back at least some of its legal costs) it will often be forced to conclude that it is uneconomic to pursue such a claim with the benefit of legal counsel. This frequently leads either to self-representation or simply giving up the claim.** In the Sheriff Court, a reasonable estimate of the total fees and costs would be in the range of £5,000-£7,000 (\$8,350-\$11,700). Of this, the winner (who would probably have spent some £3,500 on legal costs) could expect to recover around £2,000 (\$3,500) towards legal costs. If the case happened to be litigated in the Court of Session, each of the figures quoted should be increased by at least 40%.

A medium to large claim of around \$100,000 (approximately £60,000) could very well be pursued in either the Sheriff Court or the Court of Session. In the Sheriff Court, a reasonable estimate of the total fees and costs would be in the region of £20,000-£28,000 (\$33,000-\$46,000). Of this, the winner (who would probably have spent some £14,000 on legal costs) could expect to recover around £8,000 (\$13,500) towards legal costs. If the case happened to be litigated in the Court of Session, each of the figures quoted should be increased by around 40% - 50%. If the case was factually and/or legally complex, the costs would rise sharply and could easily approach or exceed the sum claimed. **Thus, in the absence of a point of principle making the litigation worth fighting whatever the cost, parties will not uncommonly be forced either into self-representation or to surrendering even a claim on this scale.**

A very large claim in the region of \$1,000,000 (£600,000) could competently be raised in the Sheriff Court, but is far more likely to be raised in the Court of Session. In the Court of Session, a reasonable estimate of the total fees and costs would be in the region of £150,000-£250,000 (\$250,000-\$400,000). Of this, the winner (who would probably have spent some £90,000 on legal costs) could expect to recover around £50,000 (\$85,000) from the losing party. If the case was factually and/or legally complex, the costs would rise sharply and could easily reach £400,000-£500,000. If the case were raised using the commercial procedure of the Court of Session, then the costs would be perhaps 10% higher but the recoverable costs would be unlikely to increase.

VII.2 The questionnaire asks what the costs and fees liability of a plaintiff (pursuer) losing a \$100,000 claim after litigation. It is assumed that as in VII.1, above, the question assumes that the action is a relatively straightforward example of its type. Reference is made to the general disclaimer contained at paragraph VII.1, above. Due to the number of variables in play here it is difficult to be precise. But it is likely that the total fee liability of a losing

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<sup>35</sup> If implemented, The Gill Report proposals will prevent such cases from being litigated in the Court of Session: see The Gill Report Vol I at eg. pp. v-vi and 17-21.

plaintiff/pursuer in an action worth around £100,000 and pursued in the Sheriff Court would be in the region of £25,000. If the action had been pursued in the Court of Session, the liability would be likely to be in the region of £35,000 to £40,000. A more complex case, especially one which involved significant pre-litigation work and/or the use of expert evidence, could easily cost the losing pursuer a sum equal to the amount claimed.

VII.3 The questionnaire asks what the costs and fees liability of a defendant (defender) losing a \$100,000 claim after litigation. It is again assumed that the question assumes that the action is a relatively straightforward example of its type. Again, it is difficult to be precise but it is likely that the total fee liability of a losing defender in an action worth around £100,000 and pursued in the Sheriff Court would be in the region of £18,000-£20,000. This figure is somewhat less than for the losing pursuer because the defender's own costs are likely to be somewhat lower than the pursuer, who has the burden of proof, and also because less of the winning pursuer's costs are likely to be recoverable from the losing defender, because the pursuer is likely to have extensive pre-litigation costs, very little of which can, under present procedure, be recovered. If the action had been pursued in the Court of Session, the liability would be likely to be in the region of £24,000 to £30,000. A more complex case, especially one which involved significant pre-litigation work and/or the use of expert evidence, could easily cost the losing pursuer a figure in the region of £45,000-£50,000.

*In Conclusion:*

Scots civil procedure is likely to be entering a period of considerable upheaval and change over the next few years. The proposals of The Gill Report, if implemented, will effect the most radical structural alteration to the machinery of civil justice since at least the 1850s. Yet it is clear from the fact that the Gill Report recommends the institution of a Civil Justice Council and expressly calls for a watching brief to be kept on the English and Welsh Jackson Civil Litigation Costs Review that the authors of the Gill Report consider it to be but the first phase of an ongoing programme of reform. It is to be hoped that the Scottish authorities will take this opportunity to reduce costs and improve access to justice. It is also to be hoped, however, that they will not make the error of modernizing simply for the sake of being seen to be modern, and without due regard to the consequences. The (it is submitted) thoughtful and thorough approach which characterizes the Gill Report gives one considerable hope that this error will be avoided.