

## Winds of Change for Scottish Civil Courts

November 2010 saw the release of the Scottish Government's response to Lord Gill's Report of the Scottish Civil Courts Review. The Scottish Government broadly accepted Lord Gill's analysis of the problems facing Scotland's Civil Courts. In so doing, it stated that:



*"The current system of civil justice has served us well for more than a century, but there are now too many aspects of our civil courts that are in some respects and to differing degrees unsatisfactory, unaffordable or inefficient. Delays and excessive costs are unsatisfactory; the rising costs of the courts are unaffordable; rescheduled hearings are inefficient...The Scottish Government accepts the vision*

*provided by Lord Gill and broadly accepts the detail of Lord Gill's recommendations."*

Over the coming months, the Scottish Government will prepare proposals for the legislation necessary for reform. It will also consider the wider implications for court users and other justice organisations and interests. The Scottish Government has also agreed in principle to the establishment of a review of costs and funding of litigation, though a suitable chairman still has to be identified and the precise remit finalised.

Nevertheless, the Government stressed that the reforms recommended by Lord Gill must be viewed in the context of the current pressures on public spending which will constrain the scope for additional investment, and at the very least will require that reforms are managed carefully and phased in over a period of years. Change is most definitely in the air, albeit it is likely to be some time before the precise format and timescales for the implementation of any changes become known.

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## Voluntary Pre-Action Protocol - Increase in Costs

Insurers are familiar with dealing with personal injury, disease and professional indemnity cases in Scotland by way of the Voluntary Pre Action Protocol. When a matter is settled by way of the Protocol, the Pursuer (Claimant) is entitled to recover a certain amount of expenses (costs) in addition to the principal settlement sum.

For claims settled after 1 January 2011 the fee will be calculated as follows:-

### Instruction Fee

- £370 on settlements up to and including £1,500 (previously £358); and
- £810 on settlements over £1,500 (previously £783)

For professional negligence cases this fee has risen from £1,006 to £1,041.

**Completion Fee** (which remains the same regardless of the date of instruction):

- 25% on settlements up to £2,500;
- 15% on the excess over £2,500 up to £5,000;
- 7.5% on the excess over £5,000 up to £10,000;
- 5% on the excess over £10,000 up to £20,000;

VAT and outlays will also be payable.

One of the recommendations in the Scottish Government's response to Lord Gill's Report is that Pre Action Protocols become compulsory for all categories and all values of personal injury claims and disease cases. A recommendation has also been made for additional protocols for clinical negligence and family actions to be introduced.

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## In this edition

### Winds of Change for Scottish Civil Courts

A look at the Scottish Government's reaction to Lord Gill's Report of the Scottish Civil Courts Review.

### Voluntary Pre-Action Protocol - Increase in Costs

An overview of the new instruction and completion fees.

### "Nimrod" - Fatal Jury Awards

Consideration of the trend towards loss of society claims increasing in value.

### Attack on Compensation Culture

Key recommendations featuring in Lord Young's "Common Sense Common Safety" report.

### Update

Pre-litigation Offers & Expenses

Phasing out the Default Retirement Age ("DRA")

### Pre-litigation Offers & Expenses

In the case of **Mcllvaney v A Gordon & Co Ltd [2010] CSOH 118**, the Defenders moved for modification of their liability for expenses to nil on the basis that a pre-litigation offer in the same terms as the Tender that was ultimately accepted by the Pursuer had been made. Lord Tyre granted the motion and modified the award of expenses to nil. For more information, visit: <http://www.scotcourts.gov.uk/opinions/2010CSOH118.html>

### Phasing out the Default Retirement Age ("DRA")

A report issued this month by the Department for Business, Innovation & Skills has confirmed that the Government is proposing to remove the DRA from 1 October 2011 with a transitional period from 6 April 2011.

Each case must of course be looked at on an individual basis, however, generally speaking, whereas before Defenders could argue that heads of claim such as future wage loss ought to be calculated to age 65 for males and 60 for females, this argument is weakened by the removal of the DRA and will most likely lead to Pursuers seeking increased future wage loss payments as a result.

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## "Nimrod" - Fatal Jury Awards

The general trend in recent years has been that claims for loss of society are increasing in value. This is highlighted by the jury awards which have recently been made in Scotland in respect of claims arising from the Nimrod crash in Afghanistan in September 2006 which led to the deaths of the 14 personnel onboard.

Liability was not in dispute. Claims for compensation were made by various family members including claims for loss of society in terms of Section 1(4) of the Damages (Scotland) Act 1976.

In October 2010, a jury awarded £90,000 to the mother (aged 57) and £60,000 to the only sister (aged 29) of a 21 year old deceased male in respect of loss of society (**Young v Advocate General for Scotland**). In November 2010, a jury awarded the mother and father (aged 62 and 66 respectively) of a 27 year old deceased male the sum of £98,000 each for loss of society.

They also claimed for loss of services which was agreed at £2,000 (**Dicketts v Advocate General for Scotland**). This month, a further jury award was made to the mother of a Flight Lieutenant (aged 28) who also died in the accident. She was awarded £100,000. (**Swarbrick v Advocate General for Scotland**).

Whilst these jury awards may well be in excess of the award a Judge might have made sitting alone when faced with the same case, they will no doubt serve to increase the expectations of Pursuers in similar situations and result in many more jury trials being sought in similar cases involving the death of a loved one. In the "Nimrod" cases, the level of awards could perhaps have been impacted by the fact that the Defender was the Ministry of Defence, however, it will be interesting to see what impact these loss of society awards might have in other fatal claims.

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## Attack on Compensation Culture



In October 2010, Lord Young submitted a report to the Prime Minister following a review of Health & Safety laws and the growth of the compensation culture, entitled "Common Sense Common Safety".

Some of the principal recommendations are:

1. Clarify (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part;
2. Exempt employers from risk assessments for employees working from home in a low hazard environment;
3. Establish a web-based directory of accredited health and safety consultants;
4. Insurance companies should cease the current practice that requires businesses operating in low hazard environments to employ health and safety consultants to carry out full health and safety risk assessments;
5. There should be consultation with the insurance industry to ensure that worthwhile activities are not unnecessarily curtailed on health and safety grounds. Insurance companies should draw up a Code of Practice on health and safety for businesses and the voluntary sector, which failing,

legislation should be considered;

6. Local Authority officials who ban events on health and safety grounds should put their reasons in writing, and citizens should have a route for redress where they want to challenge local officials' decisions;
7. The current raft of health and safety Regulations should be consolidated into a single set of accessible Regulations;
8. Combine food safety and health and safety inspectors in local authorities; and
9. Police officers and fire fighters should not be at risk of investigation or prosecution under health and safety legislation when engaged in the course of their duties if they have put themselves at risk as a result of committing a heroic act.

The recommendation to simplify and reduce risk assessment in certain circumstances and the suggested combining of food safety and health and safety inspectors in local authorities is interesting, as the HSE have been asked to make savings of at least 35% in the Government's contribution to their budget over the next four years.

Although the PM was supportive of the recommendations in the report, Lord Young has since resigned from his post and therefore it remains to be seen whether his recommendations will be put into effect.

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