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SCOTLAND'S CIVIL COURT REVIEW: INITIAL RECOMMENDATIONS



Summary

¹The Scottish Civil Justice Council (SCJC) is undertaking a comprehensive review of Scotland's civil procedure rules applicable in its civil courts. This follows the 2009 Scottish Civil Courts Review, in which a comprehensive review and rewrite of Scotland's civil procedure rules ("CPR") was recommended.

In May 2017 the SCJC published The New Civil Procedure Rules First Report ("the Report") setting out its recommendations. In the Report they emphasise that a balance needs to be struck between modernising our CPR, in order that they are readily understandable and effective, and protecting historic elements of Scotland's system which are perceived to have continuing utility. Consequently, reform will be ad hoc rather than wholesale.

A timetable has been set out by the SCJC, which anticipates the introduction of new CPR in 2019 or 2020. Over the next two to three years the SCJC intends to: tour the country, giving presentations and encouraging discussion and feedback with both lay people and legal professionals; publish a second report containing draft rules, and hold a consultation on those draft rules. At this stage we have only the initial recommendations of principle from the SCJC, which give us some indication of the direction we may be moving in.

Statement of Principle

The SCJC proposes the introduction of a general statement of principle applicable to the CPR, to assist the courts in interpreting specific rules. This would bring Scotland more into line with England and Wales ("E&W"), where the "overriding objective" applies, however the SCJC does not recommend that the principle should have an overriding or binding effect due to concern about potential satellite litigation, such as has been seen in E&W.

¹ For a full Glossary of Scottish Litigation Terms see: https://shepwedd.com/sites/default/files/English_Scottish_Litigation_Glossary_Scots_Counsel.pdf

Case Management

The introduction of case management rules is recommended by the SCJC, to allow judges the strongest possible powers to control the scope and pace of litigation. However, active judicial case management is recommended only for the cases where it is most necessary, due to the significant resource implications created by judges becoming more involved in proceedings.

It is proposed that a fast-track procedure be created for straightforward cases, such as those currently dealt with by Petition and Summary Application.

A key feature of the proposed case management model is that parties have the opportunity to inform the court of their preference by completion of a case management questionnaire. This is again similar to what already happens in E&W.

The introduction of a suite of standard orders is recommended, which would provide default case management orders for categories of cases and specialised types of action.

The SCJC also recommend that pre-action protocols should be introduced for all cases where there is a reasonable expectation that specific steps and disclosures will be made by the parties prior to litigation. Protocols are already in place through Practice Notes for Commercial Actions and a voluntary Pre-Action Protocol exists for personal injury actions.

Expert Evidence

The SCJC makes a number of recommendations which would bring Scottish procedure in relation to expert evidence much more into line with that in E&W.

Expert reports as evidence

In E&W the presumption is that an expert will provide their evidence in a written report, taken as their evidence in chief. The report does not have to be spoken to by the expert in order to become evidence, however parties can seek permission from the court for the expert to also provide oral evidence at trial and this is fairly common in high value and complex cases.

In Scotland, by contrast, an expert report is not evidence in and of itself. The expert must appear at the proof (trial) to give oral evidence and any report lodged in advance has the purpose of giving the court and other parties advance warning of what the expert's evidence will be.

The position in Scotland may soon become more in line with that in E&W as the SCJC recommend that parties should be required to lodge a witness statement for any expert witness and that the written statement be taken as the expert's evidence in chief, with oral evidence restricted to clarification of the report and cross-examination.

The Expert's Duty to the Court

Rule 35.3 of the E&W CPR states that an expert has an overriding duty to the court, which prevails over any duty to the party that has instructed and paid for the report. There is no equivalent written rule in Scotland, although in practice Scottish solicitors do alert experts to their duty to the court and experts tend to be well aware that they have such a duty.

The SCJC has proposed that the new Scottish CPR should follow the approach taken in E&W by setting out that an expert's duty is to the court. They are also considering the introduction of a code of practice for expert witnesses together with guidance as to the form of expert reports.

Joint Meetings and Joint Statements

Courts in E&W generally have a greater case management role than the Scottish courts and may instruct experts to hold joint meetings for the purpose of clarifying and narrowing the points on which they disagree. The court can instruct that a joint statement be submitted to the court following the joint meeting, in which the experts set out any matters upon which agreement was reached and what issues remain in dispute.

In Scotland there is generally far less active case management and parties are generally left to decide for themselves what is appropriate in terms expert reports, whether or not the experts ought to meet to discuss their views, and if it would be appropriate to instruct a joint report. However, in Commercial Actions the judge has similar powers to those in E&W and can order that expert reports be lodged and/or direct experts meet with a view to reaching settlement or narrowing the areas of disagreement. The SCJC considers that this power to require experts to confer in advance of the proof should be extended to all Scottish courts.

Hot Tubbing

Hot tubbing, or the practice of expert witnesses giving evidence concurrently in response to questions posed by a judge, is fairly common practice in E&W, whereas in Scotland it was not used until very recently. The SCJC has proposed that the power to order experts to give concurrent evidence be provided in all cases.

Certification

In E&W the general principle is that the court should control the giving of expert evidence and no party may call an expert or put into evidence an expert's report without the court's permission. In Scotland on the other hand, no certification is required from the court prior to instructing an expert; the parties decide what expert evidence is necessary, how many experts are required and on what issues they ought to give evidence. However, certification is required in order to recover the cost of instructing the expert from the other party and certification cannot be sought until after the court has determined the merits of the dispute, when an award of expenses (order for costs) is made.

The New Civil Procedure Rules

Foreword

by

Colin Sutherland, Lord Carlway
Lord President of the Court of Session

Scottish Civil Justice

An advocate from the 19th century would find the Edinburgh of 2017 a bewildering place: the way people dress; the way they communicate with each other and socialise; the way they travel around the city and further afield; and, maybe more than anything else, the way in which they work. If they tried to take a bus, or visit a café or book a theatre ticket, they would be lost. If they were to make their way to Parliament House, however, they would, once recovered from the shock of seeing women at the bar and on the bench, find our courts to be comfortably familiar. They might even feel up to the task of taking some instructions.

Can this be right? Have we fallen into the trap of thinking that, because the present court system is fair, it is the only way to achieve fairness? At the heart of the ambitious project, which this report introduces, is this question: what will fairness mean in our courts in the year 2020 and beyond? Court rules seem to last for 25 or 30 years (a generation) before they are replaced, albeit largely repealed from what has gone before. If the new civil procedure rules are introduced in 2 or 3 years' time, we can expect them to last until nearly the middle of the 21st Century.

The courts must provide a system of justice to the public. The public's changed expectations of what services should look like, and how they should work, are therefore key to understanding what fairness will mean in 2020. The public has become used to services which are increasingly swift and responsive, automated, available anywhere and accessible in a variety of different ways. Platitudes about justice being seen to be done are not a complete response to a generation that sees no unfairness in transacting some of its most important business entirely online.

This first report of the project to prepare new civil procedure rules sets out the initial thinking of the Scottish Civil Justice Council on a number of important and over-arching matters. The form and structure of the rules is addressed. A bold vision for active judicial case management of defended actions is set out. A set of principles for civil procedure is recommended.

Some of the changes that must be made challenge existing ways of working, business structures and habits. I am, nevertheless, confident that Scottish lawyers will respond to these challenges with the same vigour and creativity that they have to every other reform in the last 200 years: by treating them as opportunities. The concrete improvements to the experiences of all those that want to, or have to, use the courts should be the guide to the success of these changes. But that success will depend also on the profession: their flexibility, their imagination and their active participation in contributing to the debate, and making their voices heard. This is an opportunity to reshape civil justice and the Scottish



The SCJC considered whether any changes ought to be recommended and concluded that as no real concerns had been raised and any issues could be addressed by the courts refusing certification, they would not recommend introducing greater judicial control of expert evidence or a requirement for permission to instruct an expert. For the moment it appears that this key difference in procedure will remain.

Form, Style and Language

Scotland continues to use esoteric terminology, such as 'reclaiming' (appeal) and 'prayer of petition' (the order sought), which makes the CPR less accessible. There appears to be debate within the SCJC as to what extent the language should be updated, with reference being made to the "romance and history" behind Scotland's legal terms, with some of the modern equivalents said to be "bloodless and leaden".

Scotland currently has separate sets of rules for each court, with similar but distinct procedures depending where a case is being heard, and the Report comments on the challenge of having multiple sets of rules and puts forward arguments in favour of consolidation. No recommendation is yet made for consolidation and the Report concludes that "all options" will be considered.

Technology

The Report proposes that the new rules should provide for a shift from our current default paper-based system to one where there is a presumption that every step in procedure can be taken electronically. This would be a significant change for Scotland.

Blind Offers

The SCJC is to consider the introduction of online bidding, where either party could lodge a blind bid online, only be seen by the other side if it came within a set percentage of their bid. The current procedure of lodging a tender, which is intimated to the other side, is seen as having the disadvantage of one party having to reveal their hand or lose face, whereas the proposed blind bidding system would encourage parties to make realistic bids and thereby promote settlement.

Conclusion

Given the recommendations of the SCJC it is likely that we will see significant changes in Scotland within a few years, which will bring our civil justice system much more into line with the existing system in E&W. However, the proposals made by the SCJC are merely recommendations at this stage. Whether or not the recommendations are adopted, some key differences will remain.

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