Scottish Law Commission

MULTI-PARTY ACTIONS: REPORT BY WORKING PARTY SET UP BY SCOTTISH LAW COMMISSION

JUNE 1993

This Report has been published by the Scottish Law Commission in 1994 to be read with the Commission's Discussion Paper (No 98) on Multi-Party Actions, published at the same time

FOREWORD

1. This is the Report of a Working Party of the Scottish Law Commission on the topics of court procedures and legal aid in multi-party actions. It is published together with the Commission's Discussion Paper No 98 on *Multi-Party Actions*.

2. The Commission's work on multi-party actions is being undertaken in pursuance of a reference which we received in 1988 from the then Lord Advocate under section 3(1)(e) of the Law Commissions Act 1965. The reference is in the following terms:

> "(a) to consider the desirability and feasibility of introducing in Scottish civil court proceedings arrangements to provide a more effective remedy in situations where a number of persons have the same or similar rights;
>
> (b) to consider how such arrangements might be funded; and
>
> (c) to make recommendations."

3. We generally begin a law reform project by studying the area of law in question, trying to identify its weaknesses and formulating a number of possible changes in the law. This stage of our work culminates in the publication of a Discussion Paper which sets out in detail the existing law and its defects and puts forward a number of options for reform. The Discussion Paper is circulated widely, not only to lawyers but also to other interested persons and bodies, whom we invite to comment. In the light of the comments received, and our own researches, we decide which solution seems to us to be the best and then prepare a Report to the appropriate Minister which contains our reasoned recommendations and a draft Bill designed to give effect to them. We are following this practice with the present reference, and our Discussion Paper is being issued along with this Report.

4. We commissioned this Report because our reference on multi-party actions is a major project which requires the careful consideration not only of broad issues of policy but of a number of technical problems related to court procedures and legal aid. It appeared to us that any proposals for dealing with these problems might be implemented by means of subordinate legislation in the form of rules of court or legal aid rules. We therefore decided to complement our consideration of the larger issues in our Discussion Paper and the subsequent Report with a separate study of court procedures and legal aid. We recognised that such a study could best be undertaken by a body of legal practitioners and others with relevant experience. We therefore set up a Working Party under the Chairmanship of Mr Roger Bland, a senior member of our legal staff, which consisted of advocates, solicitors and senior officials in The Scottish Office, Scottish Courts Administration and the Scottish Legal Aid Board.[1]

5. The terms of reference of the Working Party were as follows:

"To consider

(a) in general, the arrangements for the preparation and prosecution of claims, whether for reparation or other remedies, in situations where a number of persons have the same or similar rights involving common issues of fact or law arising out of the same cause or event; and

(b) in particular, court practices and procedures and the provision of legal aid (including advice and assistance under Part II of the Legal Aid (Scotland) Act 1986);

and to make recommendations for possible improvements other than those which would require to be implemented by Act of Parliament."

6. The Report of the Working Party brings together a great deal of useful information which is not readily available elsewhere. The Working Party have

[1]The members of the Working Party are listed in Annex B to the Report.

put forward many interesting views on possible reforms and we should like to take this opportunity to express our gratitude to them.

7. The views expressed in the Report are those of the Working Party and do not necessarily represent the views either of any of the institutions with which they are associated or of this Commission. We have nevertheless sent copies of the Report to the authorities responsible for court rules and practices and for legal aid, since it would be unfortunate if the Report's recommendations were to be superseded by other changes before they had been considered. We have also decided to publish the Report now because we consider that it can make an important contribution to informed public discussion about multi-party actions. Our Discussion Paper takes account of the Report and invites comments on the matters discussed in it. Further information about multi-party actions is provided in a Research Report on Multi-Party Actions in Scotland prepared by a team from the Department of Law of Dundee University which is being published by the Central Research Unit of The Scottish Office.

Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

July 1994

REPORT

by

WORKING PARTY ON MULTI-PARTY ACTIONS

To: The Hon Lord Davidson,
Chairman,

Scottish Law Commission.

We have pleasure in submitting our Report.

(Signed)

Peter M Beaton	James W McNeill
Roger Bland	Nigel M P Morrison
Andrew Dickson	B A Ritchie
Grant McCulloch	Gillian B Swanson
Iain F Maclean	M Turner-Kerr

June 1993

REPORT

by

WORKING PARTY ON MULTI-PARTY ACTIONS

Contents

PART 1: INTRODUCTION

1.1 The Scottish Law Commission set up this Working Party following discussion with the Faculty of Advocates, the Law Society of Scotland and the Scottish Legal Aid Board about how the Commission should handle its work on multi-party actions[1]. The membership of the Working Party and the Terms of Reference which we chose are given in Annexes B and C to this Report.

1.2 We understand that the Commission intends to follow its usual practice on a law reform project: the preparation of a Discussion Paper to foster ideas about what changes might be desirable and feasible, the circulation of that Paper to a wide range of consultees inviting comments, and, on receipt of their comments, the preparation of a Report (with draft Bill annexed) to Scottish Ministers containing the Commission's concluded views. Discussion about multi-party actions in other jurisdictions commonly relates to whether some sort of class action[2] procedure is needed. The Commission considered, however, that the Discussion Paper and the subsequent Report to Ministers should be complemented by another approach.

---

[1]This work derived from a Reference by the Lord Advocate in 1988, under s 3(1)(e) of the Law Commissions Act 1965. The Commission was asked to consider whether improvements could be made in the arrangements for Scottish civil court proceedings where a number of people have the same or similar rights. The terms of the reference are given in Annexe A to this Report. It will be noted that we do not consider proceedings in Tribunals, such as Industrial Tribunals. If the suggestions in Part 3 of this Report are acted on it would be for consideration by those responsible for the procedural rules of these tribunals whether similar changes should be introduced in these rules.

[2]By "class action" is meant a procedure by which claims can be pursued by litigation on behalf of a group of persons similarly affected. Initially the persons need not necessarily be individually identified. The procedure may have novel features, such as the opportunity for claimants to "opt in" or "opt out" of the litigation.

1.3 We were invited to carry out this approach, which concentrates on improvements which relate to relatively technical matters of court procedures and legal aid. The Commission thought it useful to invoke our assistance in view of our experience of multi-party actions.[1] The Commission had in mind that some relatively uncontroversial improvements might be possible without the need for primary legislation[2] eg changes in court rules could be made by the Court of Session acting on the recommendations of the Court of Session Rules Council and the Sheriff Court Rules Council.[3] We have of course concentrated on possible improvements in multi-party actions but have also considered improvements which, while particularly helpful in multi-party actions, might be introduced for all actions.[4] This has taken us wider than our remit but we thought it would be artificial and unhelpful to restrict our discussion.

1.4 We have taken account of judicial decisions in English multi-party actions[5] and developments there in connection with legal aid for such actions.[6] English innovations cannot of course be adopted in Scotland without proper consideration of their possible Scottish reference. However we think that it

---

[1]We use this general term, for convenience only, and discuss in this Report how a multi-party action might be defined.

[2]Primary legislation (an Act of Parliament) is generally needed for the more substantial reforms. Parliamentary Bills, incorporating proposed reforms, are subject to the various pressures on Parliamentary time.

[3]In exercise of powers in, for the Court of Session, the Court of Session Act 1988 s 5 and, for the sheriff court, the Sheriff Courts (Scotland) Act 1971, s 32. ("The 1971 Act").

[4]Either because the improvements would be helpful in all actions or could not be introduced only in multi-party actions.

[5]Such as the Opren litigation (see p 32, footnote 1 and p 71, footnote 4 below).

[6]Such as the introduction by the Legal Aid Board of Representation under Contracts (of which details are given in Annexe F to this Report).

would be wrong to disregard such innovations. We were also asked to take account of the Research Work being undertaken by the Team[1] from Dundee University Department of Law. Readers of the present Report may wish to study their Research Report which will be available later in 1993.

1.5 Our main concern has been to provide information, foster discussion and bring forward useful suggestions. We are grateful to colleagues[2] who have given us their views but what is said in this Report should not be treated as being the concluded views of the bodies of which we are members. In particular our discussion of legal aid does not reflect any views which might be held by the members of the Council of the Law Society of Scotland or by the members of the Scottish Legal Aid Board.

1.6 Our understanding of the allocation of lead policy responsibilities for the matters considered in this Report is set out in Annexe D to this Report.

---

[1]Professors McBryde and Willock, Dr McManus and Dr Barker. It is hoped that this Research will provide information, not otherwise readily available, about the characteristics of multi-party actions in Scotland. This research work includes interviews with claimants/litigants, practitioners, judges and others (eg officials of the Scottish Legal Aid Board) with experience of, and views about, multi-party actions. Accordingly we have not thought it necessary to carry out our own separate gathering of information and views. At the time of writing we have not seen the final results of the Research but have had the advantage of liaison with the Researchers.

[2]In particular Sheriff Iain Macphail QC, a member of the Scottish Law Commission.

PART 2 BACKGROUND

2.1 In this Part various matters are discussed to provide a factual background to our discussion in later Parts of possible improvements in multi-party actions. These matters are:

- The types of multi-party actions.
- The court procedures adopted.
- The financing of multi-party actions.
- Solicitors' Groups.
- The problems of multi-party actions and the aims of improvements.
- The actions in which improvements might apply.

Types of multi-party actions

2.2 An English study[1] has distinguished three different types of action. These are: claims for damages caused by a single event; personal liability claims; and consumer claims.

(a) Claims for damages caused by a single event

2.3 This is the "sudden disaster" type of case where a number of people are killed or injured in the same occurrence. There is an identical causal relationship between the event and the resulting damage. The claims are typically for damages in respect of death or injury. These cases arise where people are gathered together as: workers (eg the Piper Alpha North Sea Oilrig explosion in July 1988), travellers (eg the bomb explosion on Pan Am flight 103 over Lockerbie in December 1988; and the train crashes at the Bellgrove Junction and Newton Junction in March 1989 and July 1991, respectively), spectators (eg the Ibrox disaster of January 1971 when spectators leaving a

[1]National Consumer Council, "*Group Actions: Learning from Opren*", January 1989. We have added examples drawn from the Dundee University research referred to in para 1.4 above. The Research Report will provide further information and analysis.

football ground were killed or injured) or residents (eg the gas explosion in a tenement at Guthrie Street, Edinburgh in 1987). There is no doubt in these cases what caused the damage; contrast in this respect medical negligence cases ("creeping disasters") where a specific link between the particular medical treatment complained of and the patient's condition may be difficult to establish. Some cases may involve only Scottish defenders (eg the Ibrox disaster) or relatively few claimants (eg the Guthrie Street explosion). In other cases, however, there may be a large number of claimants (eg in the Lockerbie disaster 259 passengers and crew and 11 Lockerbie residents were killed) and the claims may involve defenders based outside Scotland (eg the manufacturers of the Chinook helicopter, which crashed in Shetland in 1986, were American).

(b) Personal liability claims

2.4 These are sometimes described as "creeping disasters". Typical cases are claims for damages in respect of allegedly defective drugs such as tranquillisers. It is likely that there is no connection between the claimants, other than that they appear to have been injured by the same thing. Damage will have occurred at different times. Liability may be difficult to determine eg is damage attributable to the drug prescribed or to the ailment for which it was prescribed? It may be difficult to identify issues common to a majority of cases so as to enable parties to agree on a test or lead case which can be taken forward on its own in order to establish liability. Recent Scottish cases have included those involving: tranquilliser drugs, in the family of related compounds called Benzodiazepines which are prescribed for anxiety and insomnia; and Myodil dye, inserted as a contrast medium into the spine before an X ray is carried out and said to have produced adhesive arachnoiditis. In such drug cases it is common for similar claims against the manufacturer to be made elsewhere, and particularly in England and Wales. Questions then arise as to whether the Scottish cases should be sisted to await the determination of the English cases;

and if so whether there should be a financial contribution (and if so how much) by the Scottish litigants to the costs of the English cases eg towards the expenses of the obtaining of medical reports.

(c) Consumer claims

2.5 These are typically claims by purchasers of defective goods or services for damage to property or financial loss. They may relate to relatively small sums of money, which may not be recoverable by individual claimants acting independently without undue (and possibly irrecoverable) expense.[1] In the Eurocopy cases allegedly dubious sales methods were used to sell photocopiers and photocopying services and these sales methods are at issue as defences to actions for recovery of unpaid monies. (Commonly however the multiplicity of parties is on the side of the claimants rather than that of the defenders.)

Court procedures adopted in multi-party litigation[2]

2.6 Multi-party litigation can take various forms. These include:

(a) an action by an individual (possibly affecting a group of people)[3];

(b) separate actions by individual members of a group against the same defender; and

---

[1]For legal aid in connection with "small claims" see para 38, p 89, footnote 2 below.

[2]This Report ignores criminal proceedings, but as the Scottish Consumer Council Report (1982) records (Para 2.1): "prosecution is an important means of securing or protecting the rights of members of the public" eg prosecutions under the Consumer Safety Act 1978. We have drawn here on Chapter Two (Existing Procedures) of the Scottish Consumer Council Report. ("This admirable report ... deserves a wider audience" Cooper, *Public Interest Law*, 1991, p 75).

[3]Eg by becoming, usually by agreement with the defenders, a leading action or test case on certain common issues eg of liability (see further para 2.17 below).

(c) one action by various members of a group against the same defender.

We have ignored a number of other civil procedures because of their rarity and special nature. These include: the *actio popularis*[1]; an action raised by the Lord Advocate in the public interest[2]; and an action raised by officials or public bodies[3].

(a) **Action by one individual affecting a group**

2.7 A remedy obtained by an individual may benefit others eg the declarator and interdict obtained by one resident in connection with the noise caused by the erection of Edinburgh Tattoo scaffolding, *Webster v Lord Advocate*[4]. In *McColl v Strathclyde Regional Council*,[5] it was held in an action by a Glasgow housewife that the duty to provide wholesome water did not allow the addition of fluoride. However the others are not parties to the litigation. In strict law the decision in the case does not give them direct rights such as obtaining damages for themselves because, for example, the defender may be able to rely on new arguments in subsequent litigations.

---

[1]This term is used to describe an action brought by a member of the public to vindicate a "public right" eg a right of way. It has been described as "somewhat special and limited", by Lord Clyde in *Scottish Old Peoples Welfare Council, Petitioners* 1987 SLT 179 at 184.

[2]But such actions are raised under the authority of a statutory provision rather than under common law eg the Lord Advocate can be a party to an action of declarator of nullity of marriage or for divorce (Court of Session Act 1988, s 19).

[3]Eg the Director-General of Fair Trading has enforcement powers, under Part III of the Fair Trading Act 1973.

[4]1984 SLT 13, 1985 SLT 361.

[5]1983 SLT 616.

(b) **Separate actions by members of a group against the same defender ("multiple actions")**

2.8 A number of individuals aggrieved by the same wrong (eg a train crash) or similar wrongs (eg a defective drug) can each raise separate actions. The main advantage of such multiple actions is that each action can be framed to suit the rights of each individual and the particular remedy (eg damages) sought.

2.9 There may be a number of disadvantages. "For the individual, however, the time and effort involved, particularly when the sum concerned is small, may be disproportionate to the benefit gained. The individual will have to take time to consult a lawyer, gather evidence and attend court. If he has to take time off work he will also incur greater financial costs. The preparation of a separate process for each claim in such a case obviously involves a considerable quantity of paperwork with considerable duplication and considerable expense".[1]

2.10 To save the expense involved in a number of separate actions, parties can either formally seek to have cases treated as "contingent" or informally agree to a working arrangement.

Formal arrangements: where contingency

2.11 Contingency means a degree of overlap or common subject matter among cases.[2] There are three contexts in which the court may need to

---

[1]Scottish Consumer Council Report (1982), para 2.3.2.

[2]In Maxwell, *Practice of the Court of Session* (p 240) the following illustrations of contingency are given: (a) where the same parties are in dispute about the same matter; (b) where there are cross-actions about the same subject; (c) where the second action arises directly out of the first action; (d) where the result in one case, though it may not negative the result in the other case, may seriously modify its consequences; (e) where, though the parties are different, the subject-matter in dispute is the same and the decision in one cause will decide the matter in dispute in both causes; (f) where, though the parties are different, the matter in dispute may turn out to be the same, and the decision in one cause will decide the matter in dispute for the parties in both causes; (g)

consider whether there is contingency among cases: (i) allocation *ob contingentiam* (similar cases put to the same judge); (ii) transmission or remit *ob contingentiam* (eg sheriff court case remitted to Court of Session to be dealt with along with similar case pending there); and (iii) conjunction (or conjoining) *ob contingentiam*. We now consider each of these.

Allocation on grounds of contingency

2.12 Where there are contingent cases in the Court of Session the Keeper of the Rolls can allocate them to a particular Lord Ordinary or Division; an Inner House reclaiming motion or appeal might be sisted to await the determination of a case in the Outer House. The Keeper may allocate a case to a Lord Ordinary or Division which has disposed of an earlier case relating to the same subject matter. In the Sheriff Court similar administrative arrangements would no doubt be made where there are related cases on the same roll in a single sheriff court or in various sheriff courts within a sheriffdom.

Transmission (remit)

2.13 Remits take place in a number of circumstances. Firstly, remits can be made from the Court of Session to the sheriff court where "the nature of the action makes it appropriate to do so".[1] Secondly, a sheriff court ordinary cause can be remitted to the Court of Session by the order of that court on the ground of contingency, or by the order of the sheriff on the grounds of "the importance

---

where, though the parties are different, it is expedient that the whole matter in dispute should be decided once for all by one tribunal, in the presence of all the parties who have an interest in the question.

[1]Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 s 14 (PH Book, p B199). See Macphail *Sheriff Court Practice* at para 13-70. Sheriff Macphail suggests that "nature of the action" refers to the circumstances of the particular case and not to the class of causes to which it belongs. See *Hamilton v British Coal Corporation* 1990 SCLR 42 (non-availability in Sheriff Court of Court of Session expedited (optional) procedure not a relevant consideration).

and difficulty of the cause"[1]. Thirdly, remits are competent from one sheriff court roll (ordinary, summary cause or small claim) to another. (These remits are made either on the joint motion of the parties or by the sheriff where he considers that the importance or difficulty of a case justify a remit[2].) The provisions in the Act of 1971 and the Rules do not make express provision for remit to allow contingent cases to be dealt with on the same roll but it would presumably be competent to move for such a remit on the grounds of contingency. Fourthly, there are rules allowing a transfer to another sheriff court "upon sufficient cause" (Ordinary Cause Rules) and "where the sheriff considers it expedient" (Summary Cause Rules)[3]. These provisions could be invoked where it was desired to have cases pending in more than one sheriffdom dealt with together.

---

[1]Sheriff Courts (Scotland) Act 1971, s 37(1)(b) (PH Book, p D87). As to what constitutes "importance" and "difficulty", and the difference between these criteria see: Macphail, *Sheriff Court Practice*, para 13-61. Sheriff Macphail suggests that difficulty might include "difficulty in procedure, preparation or presentation". The complexities of a multi-party action would presumably be argued to constitute "difficulty" and thereby justify a remit to the Court of Session. In the most recent reported case on this provision (*Mullan and Others v Anderson*, Court of Session, Opinions given on 17 March 1993; 1993 GWD 16-1080) a court of five judges, overruling an earlier case, held that the extra delay or expense in having a case dealt with in the Court of Session were among the various relevant factors which the sheriff should take into account. The Lord Justice-Clerk (Ross) suggested that the importance of a test case might justify a remit.

[2]The main provision is s 37 of the 1971 Act. The Sheriff Court Rules dealing with remits between rolls, or to or from the Court of Session, include: Ordinary Cause Rules. (1907 Act, First Schedule, as amended) Rule 20, Remit of Cause to the Court of Session, Rule 20A, Remit of Cause from the Court of Session; Summary Cause Rules (1976, as amended) Rule 23, Remit between summary and ordinary rolls; Small Claim Rules (1988) Rule 14, Remit between rolls.

[3]Ordinary Cause Rules, Rule 19 Transfer to another sheriff court; Summary Cause Rules Rule 22 Transfer to another court; Small Claim Rules, Summary Cause Rule 22 is applied by Rule 2(1) of, and Appendix 3 to, the Small Claim Rules.

Conjunction on the grounds of contingency

2.14 Actions which are conjoined become "one process". Any procedural steps taken are applicable to all the conjoined processes. Whether actions should be conjoined is a matter of convenience or expediency. Conjunction is ordered where the judge considers that the subject matters of the actions are similar or connected.[1] The modern tendency is to avoid conjunction and in most circumstances an informal or working arrangement for avoiding duplication of expense is more satisfactory.[2]

Authority for conjunction

2.15 Conjunction is done in exercise of the court's common law powers. There is no express authority in either primary legislation or court procedural rules. (However in the rules governing proceedings in Scottish Industrial Tribunals, express provision is made for consolidation[3]. This provision no doubt

---

[1]See, in particular, *Duke of Buccleuch and Others v Cowan and Others* (1866) 4 M 475 and (1876) 4 R (HL) 14.

[2]Thomson and Middleton, *Manual of Court of Session Procedure* (1937), p 388. See also Macphail p 441.

[3]The Industrial Tribunals (Rules of Procedure)(Scotland) Regulations 1985 (SI 1985 No 17), Schedule 1 (Rules of Procedure), Rule 15 provides -

"Consolidation of proceedings

15. Where there are pending before the industrial tribunals two or more originating applications, then, if at any time upon the application of a party or of its own motion it appears to a tribunal that -

(a) some common question of law or fact arises in both or all of the originating applications, or

(b) the relief claimed therein is in respect of or arises out of the same set of facts, or

(c) for some other reason it is desirable to make an order under this Rule,

derives from the equivalent provision in the rules for such tribunals in England and Wales.) In the English High Court there is an express provision in the Rules of the Supreme Court (Order 4, Rule 9(1).[1]

Informal arrangements where contingency

2.16 There are various informal arrangements which are available where formal conjunction is not resorted to. "An alternative arrangement is that the parties move the court to assign the same date as a diet of proof in each action; the parties agree to select one action as the leading action; and proof is led on all the branches of that case, parties further agreeing either that the proof in that action shall be held to be the proof in the others, or, where some supplementary evidence in each of the others is necessary, that the evidence to be led in the leading action shall so far as competent and relevant be held to be the evidence in the others. Such agreement is expressed by joint minutes lodged in each of the other processes. It is usually possible for parties' solicitors to

---

the tribunal may order that some (as specified in the order) or all of the originating applications shall be considered together, and may give such consequential directions as may be necessary: Provided that the tribunal shall not make an order under this Rule without sending notice to all parties concerned giving them an opportunity to show cause why such an order should not be made".

[1]Order 4, Rule 9: "(1) where two or more causes or matters are pending in the same Division and it appears to the court -

(a) that some common question of law or fact arises in both or all of them; or

(b) that the rights to relief claimed therein are in respect of, or arise out of, the same transaction or series of transactions; or

(c) that for some other reason, it is desirable to make an Order under this paragraph

the court may order those causes or matters to be consolidated on such terms as it thinks just, or may order them to be tried at the same time or one immediately after the other or may order any of them to be stayed until the determination of any other of them".

make some such arrangement with the approval of the sheriff. If that is not possible, the court may be moved to conjoin the actions"[1].

2.17 A further example of an informal arrangement is an agreement by the parties to two or more actions in which the same question of fact or law is raised that one of these actions should proceed as the leading action or "test case" ie that the decision of the court in that case should be accepted as determining the other cases.[2] In the Court of Session a leading action may be selected either by informal arrangements between the parties or by the Court on the application of any of the parties. After the record is closed "the court may ... in any action which is one of several actions arising from the same cause of action, on the motion on any party to any such cause after hearing parties to all such actions, appoint that action or any other of those actions to be the leading action and to sist the other actions pending the determination of that action".[3] The rule does not require the parties to the other actions to accept the decision in the leading action, although in practice they will generally do so.

2.18 There is no analogous provision in the Sheriff Court Rules allowing the court to order one case to proceed and the others to be sisted. This would need to be done by agreement of the parties to all the cases.

---

[1]Macphail, *Sheriff Court Practice*, para 13-44. He refers to an unreported Outer House case in 1972 where there were two actions raising related issues which were heard together and a joint minute was used to record the parties' agreement that the evidence led in each action should so far as competent and relevant be held to be evidence in the other (p 550, footnote 17).

[2]A test case differs from a leading action in that there is an agreement that the parties to other disputes will be bound by the outcome of the case (Mustill, LJ in *Giles v Thompson* 1993 2 WLR 908 at 913).

[3]Rule 91(6).

(c) **One action by members of a group against the same defender (combination of pursuers)**

2.19 A single action with several pursuers is competent where the ground of action by each pursuer is identical (eg arising out of a road accident: *Buchan v Thomson*[1]) and there is no material prejudice to the defenders (*Armstrong v Paterson Bros*[2]).

The Financing of Multi-Party Actions

2.20 The parties to multi-party litigation, like the parties to other litigation, may each have to pay at least part of the expenditure of financing[3] the litigation. Where one claim is pursued as a test case the expenditure will initially fall on that claimant, subject to any agreement among the litigants to share the costs or a court order to that effect. This possible unfairness has led to a number of suggestions of alternative ways of financing litigation in general[4] or multi-party litigation in particular. We summarise these below but have decided that

---

[1]1976 SLT 42.

[2]1935 SC 464; 1935 SLT 278.

[3]By "financing" we mean all the expenditure which a litigant has to pay for: fees to solicitors and counsel; payments for medical and other reports, for the production of oral or documentary evidence and fees to witnesses (including travelling expenses); and all other necessary outlays (such as court dues payable on lodging documents etc). The amount of the liability may be affected in due course by a court order as to the liability for the payment of expenses.

[4]See, in particular, two recent Scottish Office discussion papers: "The Legal Profession in Scotland" (March 1989) and "Review of Financial Conditions for Legal Aid: Eligibility for Civil Legal Aid in Scotland" (July 1991). The proposals in the 1989 paper have been followed by, in particular, the provisions of Part II (Legal Services) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990.

consideration of them is outside our remit[1] and that we should concentrate on legal aid.[2]

2.21 **Methods of financing**

(a) **By the litigant**

(1) **On the ordinary fee basis**

The fees are generally[3] assessed on the appropriate Table of Fees and are payable, subject to a court order as to the liability for expenses, whether or not the litigant succeeds.

(2) **On a speculative fee basis**

On this basis the fees are payable only if the action is successful but the client and his lawyers will have agreed that an additional fee[4] is payable (to take account of the risk that the action may fail).

---

[1]See Annexe C for our Terms of Reference.

[2]The term "legal aid" is used in this paper as meaning advice and assistance (which includes assistance by way of representation in civil proceedings as defined in s 6 of the Legal Aid (Scotland) Act 1986 ("ABWOR")) and civil legal aid (ie representation by a solicitor (and counsel, if appropriate) in any proceedings covered by the 1986 Act), as defined in s 13 of the 1986 Act. As used here, the term excludes criminal legal aid. A Guide to Legal Aid, including the text of the 1986 Act and other legislation etc, is provided by the Scottish Legal Aid Board in The Scottish Legal Aid Handbook (July 1992).

[3]Unless there is a written fee agreement under s 36 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (ie s 61A(1) of the Solicitors (Scotland) Act 1980).

[4]The percentage increase of this additional fee must not exceed a prescribed limit. See: s 36 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (ie s 61A(4) of the Solicitors (Scotland) Act 1980); and the relevant Acts of Sederunt (Act of Sederunt (Fees of Advocates in Speculative Actions) 1992 (SI 1992 No 1897); Act of Sederunt (Rules of Court of Session Amendment No 8) (Fees of Solicitors in Speculative Actions) 1992 (SI 1992 No 1898); Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992 (SI 1992 No 1879)). The prescribed limit on the amount of the additional fee is 100% of the basic fee. These arrangements for speculative actions came into operation at the end of August, 1992.

(3) **On a contingency fee basis**

A contingent fee agreement is similar to a speculative fee agreement, except that the fee payable is directly related to the sum at issue.[1] In Scotland, such fees agreements are unenforceable at common law.[2]

On each of the above three bases, the source of the money to pay the fees could be either the litigant's own resources or borrowing by him or her.

(b) **By a third party (wholly or partly)**

(4) As a result of membership of an organisation (such as a trade union or an association of motorists.)

(5) Through private legal expenses insurance. (This is one of the three main funding options canvassed in the Scottish Office 1991 Paper. The others are a contingency legal aid fund and a legal aid safety net scheme (nos 7 and 10 below)).

(6) By a donor eg the *Opren* litigation in England was partly subsidised by a donor (Mr Geoffrey Bradman).

(c) **By a national scheme, not publicly funded**

(7) The main example of this is a contingency legal aid fund[3]. (This is not

---

[1]And a percentage of it.

[2]In the USA they are permitted and frequently resorted to, partly because of the "American rule" by which each party to a case meets his or her own costs with no award of costs in the event of success.

[3]A contingency legal aid fund (CLAF) would assist individual litigants with their legal expenses, regardless of means, and at no expense to the taxpayer. A successful litigant, supported by the fund, might pay a surcharge or percentage of any damages, money or property recovered by him This surcharge would pay the expenses of an

"legal aid" in the statutory sense.) Initial "pump priming" from public resources might be necessary to get such a scheme started by establishing the fund.

(d) **By a national scheme, publicly funded**

(8) Through State-subsidised insurance ie Government-purchased cover. This would in effect transfer the administration of the bulk of the Civil Legal Aid Fund to private concerns[1].

(9) Through legal aid.

(10) Through a legal aid safety net scheme. The litigant would initially rely on his or her own means until a stipulated level of expenditure was reached when the litigant would, subject to a means test, be eligible for legal aid. In other words, legal aid would be available only when the litigant was considered to have exhausted those of his own resources which could be considered to be reasonably available to finance the litigation.[2]

---

unsuccessful litigant (and any expenses awarded against him) as well as the administrative costs of running the CLAF. Alternatively, all those who applied for the support of the CLAF might be obliged to pay a non-returnable fixed fee paid at the start of the case. A CLAF has, strictly speaking, nothing to do with legal aid, as defined above, although it has been suggested that such a fund might be administered by the Scottish Legal Aid Board. A CLAF was most recently suggested in Scotland in The Scottish Office Legal Aid Consultation Paper, July 1991.

[1]See Scottish Office 1991 paper, chapter 3, para 15.

[2]See Scottish Office 1991 paper chapter 8.

2.22 Our remit[1] asks us to concentrate on relatively technical matters (which do not need to be implemented by primary legislation) and to leave on one side, for separate consideration, general policy issues which raise difficult or contentious issues. Such issues may need consultation with the legal profession or the public before changes are recommended. If an increase in public expenditure is required that would involve a decision about the allocation of scarce public resources and would be ultimately a matter for Government Ministers to decide[2]. For those reasons it seemed sensible for us to consider changes which would not, we hope, be regarded as controversial or involve a substantial increase in public expenditure. Accordingly we have confined our discussion about the financing of multi-party litigation to a consideration of possible changes in legal aid.

Solicitors' Group

2.23 Solicitors' groups are commonly formed in connection with "disasters" in order to co-ordinate the work of solicitors in formulating claims, carrying out negotiations for a possible settlement, and, if necessary, litigating.[3] The Law

---

[1]See Annex C.

[2]In speaking about plans for the future provision of publicly funded legal services, the Lord Chancellor commented on the need for him "to secure a balance between my responsibilities to the public to provide the means for reasonable access to justice and my responsibilities to the public as taxpayer in controlling what is now a very high level of expenditure." Address to the Conference of the (English) Law Society, 24 October 1992. Similar remarks have been made by Scottish Ministers. "Legal aid ... has almost doubled over the past five years". Lord James Douglas Hamilton (Commons Hansard for 31 March 1993, col 366).

[3]A succinct account of "Solicitors' groups in mass disaster claims" is provided in the article in the New Law Journal for 12 April 1991 (141 NLJ 484) by Professor William McBryde and Dr Christine Barker of the Faculty of Law at Dundee University. The article is based, in part, on the experiences of solicitors and victim support groups following the Chinook helicopter crash (Shetland, 1986) and the Piper Alpha explosion (North Sea, 1988). "The nature, scale and complexity of both disasters was sometimes outside the experience of most Scottish lawyers." The authors concluded that while there were features in these two disasters which contributed to the success of groups, groups

Societies in England and in Scotland[1] play an important part in the setting up of groups, providing information and being a contact point. (Once a group is set up the Law Societies tend not to have an active role.) Groups have a Steering Committee - with a chairman, secretary, treasurer and, possibly, press officer - and carry out generic work, such as research, liaison with experts, negotiations with the defenders and liaison with counsel. Sometimes, trade unions' solicitors form their own group[2]. The costs of the Steering Committee may be met in various ways[3]: from the individual members of the group, possibly on a wholly speculative basis; funded by the defender (eg Occidental Petroleum in the *Piper Alpha* cases); or from the legal aid fund.[4]

---

could be used in many disasters where there are several victims, provided there is a desire of several solicitors to co-ordinate their efforts.

[1]The Council Report of the Law Society of Scotland for March 1993 lists 12 recent matters brought to the Society's attention. (7 of these matters are medical).

[2]Geraldine McCool (Pannone Napier, Manchester), *Disaster Co-ordination, International Legal Practitioner*, March 1991.

[3]Patrick Davies (Milne, Mackinnon & Peterkins, Aberdeen) *Making the Group Work* lecture at Law Society of Scotland PQLE Seminar on Multiple Compensation Claims (Edinburgh, 4 December 1989).

[4]See the comments in the paper on *Medical Disasters* by Mr Kenneth Hogg (Messrs Caesar and Howie, Bathgate) at the PQLE Seminar mentioned in footnote (3) above:

"Legal Aid assumed a major importance to the Group to establish whether funding could come from that source and, as you will be aware, flexibility is not one of the [Scottish] Legal Aid Board's more notable attributes. In their dealings, they have rules which they must strictly adhere to and thus it was necessary in relation to Legal Advice and Assistance to agree specifically with the Legal Aid Board the wording of the authorised increase for expenditure which had to be followed in all circumstances. Potentially, significant numbers of applications could be made which will, of course, go to different people within the Legal Aid structure and, therefore, it was important that these things were agreed on. It was also important that an initial high spending limit be achieved and it was gratifying to ascertain that one of the Legal Aid Officers had in fact authority to grant up to £500 and did so after some negotiation. It was the position therefore that the Group had the potential for funds but, unfortunately, no mechanism was available to get these funds from the Legal Aid Board to enable present funding of the Group to take place on a day to day basis. It became necessary therefore for funding by levy and, unfortunately, such funding by levy relies upon each individual solicitor within the

2.24 Solicitors' groups vary very much in how they are set up, their degree of formality or informality and how they operate and are funded. Their organisation is not regulated or influenced by subordinate legislation (eg court rules or legal aid regulations)[1] Any changes in such legislation should, we think, take account of the recent burgeoning of solicitors' groups.

Problems of multi-party actions and the aims of improvements

2.25 Multi-party actions are likely to be complex and difficult for a number of reasons. These include: the existence of a large number of parties with the same or similar claims joined in a single action; or the raising of a number of actions at or about the same time in which similar grounds of action or defence are pleaded; in either case the pursuers' grounds of action may be so different as to require that each claim be dealt with separately to some extent; there may be difficult issues of fact or law[2]; the existence of related proceedings in other

---

Group making a complete declaration of all numbers of cases they have and paying the appropriate levy which, in certain circumstances, meant and does mean the Solicitors within that Group are paying out from their own practices on a debit balance basis quite significant sums of money. It is clearly a drawback to expect solicitors to fund litigation and, if anything could be achieved towards allowing a mechanism for advance payments to be made in this circumstances, that would clearly be of major assistance. As soon as levies are brought into force, it raises a problem for accountability of the funds, for enforcement of the payment of the levies and for penalties if levies are not paid. A more smooth running system is without doubt required to relieve those involved of the minutiae of detail required in legal aid discussions. A straightforward system would be preferable".

[1]It was suggested in 1988 that Solicitors' Practice Rules (ie Rule 5 of the Solicitors (Scotland) (Advertising) Practice Rules 1987), forbidding touting, might constrain solicitors in private practice in respect of collective actions. (Paul D Brown, letter to SCOLAG, June 1988, p 90).

[2]Two examples may be given. First, in the *Lothiansure Ltd* cases investors made claims against insurance brokers, and against the professional indemnity insurer of the brokers, in respect of moneys lost when Mr Ian Bell and 57 others had invested in bonds issued by an offshore company which had misappropriated the premiums. The pursuers' case against the brokers and, after liquidation, the professional indemnity insurer of the brokers, was that the brokers had not exercised reasonable care in advising the pursuer about the investments. (The cases are reported, on questions of the admissibility of "without prejudice" letters (*Bell v Lothiansure Ltd* 1990 SLT 58) and of professional

jurisdictions may lead to legal (eg *forum non conveniens*[1]) or procedural[2] problems which need to be resolved before the cases can proceed. Such complexities lead to delay, expense and trouble for parties, their lawyers (counsel and solicitors), the Scottish Legal Aid Board (where parties are legal aided) and the court (judges, court clerks and administrators). Some of this complexity may be inevitable, however, under any scheme that might be devised for dealing with multi-party actions.

---

indemnity insurance (1993 SLT 421).) Second, arising out of the Piper Alpha Oil Rig disaster in 1988, Occidental Petroleum paid out about £110 million to the families of the bereaved and survivors, within a short time of the accident. In 141 actions against 24 sub-contractors, Elf Enterprise Caledonia Limited, the successor of Occidental Petroleum, is claiming that the sub-contractors are liable, under an agreement, to compensate Elf for the amounts paid out. (The Herald Newspaper 3 March 1993). The assessment of the compensation paid raises questions about the applicable law of Texas. In a Scottish court questions of foreign law are questions of fact. (*Scottish National Orchestra Society Limited v Thomson's Executor* 1969 SLT 325). It is understood that the evidence about Texas law has been obtained by the oral examination in chief of an expert in the law of Texas. The alternative method of obtaining this evidence would have been to lodge a written report on which the expert could be cross-examined. This might have saved time in court but there is, at present, no obligation on the judge to read beforehand any report or other documentary production. The examination-in-chief of the expert witness informs the judge about the relevant issues.

[1]Ie that the case was more appropriate for the courts of another jurisdiction (see, for example, *Pan American World Airways Inc v Andrews* 1992 SLT 268).

[2]In *McInally v John Wyeth & Brother Ltd* 1992 SLT 344 the pursuer (who sought damages in respect of the failure of the manufacturers of Ativan to warn her of the dangers of addiction to the drug) sought a commission and diligence to recover documents some only of which the defenders said extended to about 2 million pages. The defenders argued, *inter alia*, that the sheer bulk of the documents sought should lead the court to refuse the pursuer's motion and that since the pleading in the parallel English cases could be completed without access to the document it was not necessary for the documents to be available in Scotland. It appears (see pp 349 and 350 of the report) that parties ultimately agreed a compromise with regard to access to the documents. The report mentions that the total number of potential claims in Scotland was in excess of 300 and in England writs had been served in 530 cases. (For the discussion in the parallel English Ativan/Valium litigation of how medical evidence should be presented in such group litigation, see: *B and Others v John Wyeth & Brother Ltd* [1992] 1 All ER 443).

2.26 Complexity, delay and expense appear to be the main problems with multi-party actions. Accordingly, we are taking "judicial economy"[1] as our main aim in considering improvements. We consider that other possible aims - such as greater "access to justice"[2] and "behaviour modification"[3] - are not of immediate importance.

Actions in which improvements might apply

2.27 Our terms of reference[4] relate to actions "where a number of persons have the same or similar rights involving common issues of fact or law arising out of the same cause or event". As mentioned earlier[5] we think that it would be artificial and unhelpful for us not to consider some improvements which might be particularly helpful in multi-party actions but which might be applied to all actions. For convenience we use the term "multi-party actions" in this

---

[1]Using this expression with the meaning given by the Sheriff Court Rules Council in its Consultation Paper on Ordinary Cause Procedures (issued in January 1990): "civil procedures in the sheriff court should avoid unnecessary complexity and contribute to the effective and economical dispatch of cases both in court and out of it (for example in the offices of solicitors and sheriff clerks) together with an avoidance of unnecessary delay."

[2]This general term is given various meanings, depending on the context in which it is used. These include access to legal services in general and in particular the public funding of the raising and pursuit of claims. In the context of multi-party actions there is discussion of "the potential of class actions to provide access to justice for aggrieved persons who would otherwise be denied the benefit of existing remedies." (Ontario Law Reform Commission Report, p 121).

[3]Ie the effect of a court order (whether for interdict or damages) in modifying what a potential defender (eg a manufacturer of goods) does; for example, encouraging the company to test products more thoroughly.

[4]Annex C.

[5]Para 1.3 above.

Report but in framing possible reforms the definition of the term needs to be related to the purpose or purposes[1] for which a definition is needed.

2.28 We discuss later[2] definitions which may be suitable in Scotland but it may be helpful to mention some definitions adopted in other countries. In those jurisdictions which have introduced special court procedures for class or representative proceedings[3] the legislation typically describes the characteristics of the claims which are to be aggregated and does so in terms of common questions or common issues.

2.29 Under the US Federal Rules of Civil Procedure[4] a prerequisite is that there must be "questions of law or fact common to the class". An action is maintainable as a class action if the court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."

2.30 The Ontario legislation defines "common issues" as meaning:

"(a) common but not necessarily identical issues of fact, or

---

[1]And, in particular, whether the new arrangements were mandatory or discretionary (eg applying only where a third party (such as the judge or SLAB) considered that the new arrangements should apply).

[2]Paras 3.26 (Court Procedures) and 4.37 to 4.39 (Legal Aid).

[3]In which one member of the group or class takes the proceedings forward on behalf of all those in the group or class. In England and Wales provision is made for such proceedings by O.15 r 12 of the Rules of the Supreme Court: "Where numerous persons have the same interest in any proceedings ... the proceedings may be begun by or against any one or more of them ..."

[4]Rule 23.

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts"[1].

2.31 Under the Australian federal legislation a representative proceeding may be commenced where:

"(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact."[2]

2.32 A "multi-party action" is defined in England and Wales, for legal aid purposes[3] as: "any action or actions in which ten or more assisted persons have causes of action which involve common issues of fact or law arising out of the same cause or event."[4] However that definition does not determine whether such actions are to receive legal aid under special arrangements. It is for the Legal Aid Board, in its discretion, to decide whether the Board's Multi-Party Actions Arrangements 1992 are to be invoked. In reaching that decision the Board takes account of whether there is "significant complexity".

---

[1]Class Proceedings Act 1992 s 1; follows Report by Ontario Law Reform Commission on Class Actions, 1982.

[2]Federal Court of Australia Amendment Act 1991 inserting new Part into Federal Court of Australia Act 1976 (quotation from new s 33C(1)); follows Report by Australian Law Reform Commission on Grouped Proceedings in the Federal Court, 1988.

[3]See further Annexe F to this Report, para 1.

[4]It will be noted that this definition is similar to that provided in connection with consolidation in the Rules of the Supreme Court (RSC O.4, r 9(1); quoted at p 12, fn 1 above).

PART 3: COURT PROCEDURES AND PRACTICES

3.1 In this Part we consider possible changes in court procedures, whether or not they are formally prescribed in court rules. Any changes in court rules would be made by an Act of Sederunt[1], while informal practices could be changed or introduced more readily e.g. by a Practice Note or Direction issued by the Lord President.[2]

3.2 We have concentrated on the Court of Session, principally because weighty and complex actions are more likely to be raised in that court. It is generally accepted,[3] however, that there should be harmonisation of the Rules of the Court of Session and the Sheriff Court Ordinary Cause Rules. If it is also accepted that changes should be made in the Rules to make better provision for multi-party actions we hope that such changes would be made in both sets of Rules.[4] We are aware that changes may be made in the near future in both the

---

[1]Made by the Court of Session on the recommendation of the Court of Session Rules Council or of the Sheriff Court Rules Council, as appropriate. See para 1.3, p 2, footnote 3 above.

[2]Or, for the Sheriff Court, issued by the Sheriffs Principal acting collectively or individually. It would be desirable for the sake of uniformity of practice throughout Scotland and between the Court of Session and the Sheriff Court that where appropriate Practice Notes or Directions in similar terms should be applicable to the Court of Session and all six sheriffdoms.

[3]See para 1.17c of the Consultation Paper (Review of Sheriff Court Procedures and Practices) issued by the Sheriff Court Rules Council in January 1990. That paper suggests that one of the benefits of harmonisation would be that remits from the Court of Session to the sheriff court or *vice versa* could be made more readily.

[4]Although changes might be introduced initially on an experimental basis only in the Court of Session.

Court of Session Rules[1] and the Sheriff Court Ordinary Cause Rules.[2] This Report has been prepared on the basis of the Rules in force at the end of May 1993.

3.3 We consider below:

A. Procedures in Multi-Party Actions;

B. Procedures in Actions generally before proof;

C. Procedures at proof; and

D. Miscellaneous Matters

A. Procedures in Multi-Party Actions[3]

Contingent causes[4]

3.4 There does not seem to be a satisfactory definition of "contingency" in the reported cases and there is no definition in Court Rules[5]. If there were to be further provision in court rules about contingent cases a definition might be based on Maxwell's illustrations[6]. There are three situations in which the court

---

[1]Following the work of the Court of Session Rules Review Group. The Group's terms of reference are given in 1984 SLT (News) 205.

[2]Following the Sheriff Court Rules Council Review of Ordinary Cause Procedure. (See p 25 footnote 3 above.) The intention is that the new rules will come into operation on 1 January 1994 (1993 JLSS 125).

[3]For a definition of "multi-party actions" which might be needed in court rules see para 3.26 below.

[4]See paras 2.11-2.18 above.

[5]For example Court of Session Rule 104A refers to an application for transmission to the court of a sheriff court cause "on the ground of contingency" with a Court of Session cause, without anything more.

[6]Maxwell *The Practice of the Court of Session*, p 240. Such a definition might be on the following lines: "The circumstances in which contingency may be held to exist include the following: (a) where the same parties dispute the same subject-matter; (b) where one action arises directly out of the other; (c) where the result of one action

may have to consider whether contingency exists. These are when the court has to decide whether a case or cases should be: allocated to a particular judge; remitted or transferred to another court (ie the Court of Session, the Sheriff Court or a different sheriff court); or joined up with other related cases (conjunction). We discuss these under the headings of allocation, remit and conjunction.

Allocation[1]

3.5 The arrangement of which cases are to be heard when and by which judge (or judges) is essentially a matter of court administration taking account, as appropriate, of the views of parties or their solicitors. There is provision in the Rules of the Court of Session about the putting out of causes for hearing or trial[2] but this is only a narrative of the duties of the Keeper of the Rolls.[3] The Rule does not prescribe any procedure enabling parties to make representations about hearing arrangements and the Rules do not refer to any special arrangements which may be necessary where several cases are contingent. We consider that this is appropriate and that there is no need for a formal provision

---

may affect the consequences of the other; (d) where the parties are different but the subject-matter is or may be the same and the decision in one will decide the dispute in both actions; and (e) where the parties are different but it is expedient to have the dispute decided once and for all in one action".

[1]Para 2.12 above.

[2]RC 16(a).

[3]This office is discharged by the Principal Clerk: RC 14.

in court rules, which might prove to be restrictive. We accordingly suggest that:

> **The Court of Session Rules and the Sheriff Court Ordinary Cause Rules need not make express provision with regard to the allocation of cases, where there is contingency. (Suggestion 1).**

Remit[1]

3.6 As noted already[2] there are four types of remit: from the Court of Session to the Sheriff Court; from the Sheriff Court to the Court of Session; from one Sheriff Court to another; and from one sheriff court roll to another. With the exception of RC 104A, which is concerned with remits from the sheriff court to the Court of Session by order of the latter Court, the current provisions regulating these various remits do not refer expressly to contingency. It may be that the conditions in the current remit provisions are such that in many cases a remit could be ordered where there was contingency because the existence of the contingency satisfied the relevant condition. On the other hand it seems possible that contingency might not necessarily constitute such "importance or difficulty" as would make appropriate a remit by the sheriff to the Court of Session in terms of section 37(1)(b) of the 1971 Act, or the "sufficient cause" or "expediency" necessary for a remit from one sheriff court to another under, respectively, the Ordinary Cause Rules and the Summary Cause Rules. It therefore seems to us to be desirable that these two sets of rules should be amended to include a reference to contingency. (Our remit does not extend to

---

[1]Para 2.13 above. The Court of Session Rules (RC 104A and 104B) use the word "transmission" (except in referring to remits under s 14 of the 1985 Act) of both causes and processes. For convenience we use the word "remit" and do not consider the arrangements for the transfer of processes from another court (eg RC 104).

[2]Para 2.13 above.

the recommendation of reforms in primary legislation such as the 1971 Act.) We also think it would be helpful for the Court of Session to be able to order a sheriff court case to be transferred to the Court of Session on an application to the Court whether or not there is contingency between the sheriff court case and the Court of Session case. Such a power would, we think, be a useful complement to the power to apply to the Sheriff for a remit on the grounds of the importance or difficulty of the cause. (We assume that the conferment of such a power would be *intra vires* of the Court of Session's rule making power[1]; otherwise an appropriate provision in primary legislation would be needed). We suggest that this new power should also be exercisable with reference to the importance or difficulty of the case. We accordingly suggest that:

(a) **that the Sheriff Court Ordinary Cause and Summary Cause Rules should be amended to state expressly that contingency, (defined in the Rules) is a ground on which cases may be remitted from one sheriff court to another and**

(b) **consideration should be given to whether the Court of Session should have a power to order a sheriff court case to be transferred to the Court of Session where the importance and difficulty of the case justify the remit (and whether or not there is contingency) (Suggestion 2).**

Conjunction[2]

3.7 As noted already[3], conjunction is ordered under the Court's common law powers. It would seem desirable for the matter to be regulated expressly in

---

[1]Court of Session Act 1988 s 5. (P.H. Book p B296).

[2]Paras 2.14 and 2.15 above.

[3]Para 2.15 above.

Court Rules which should also contain a description of the circumstances (ie contingency[1]) in which conjunction may be ordered. It would be desirable for the rule to provide for intimation to parties of the proposal to conjoin (with an opportunity to object). We accordingly suggest that:

> **The Court of Session Rules and the Sheriff Court Ordinary Cause Rules should be amended to provide expressly for conjunction where there is contingency; the Rules should define contingency and provide an opportunity for parties to be heard on the proposal to conjoin. (Suggestion 3).**

Leading action or "test case"[2]

3.8 A leading action or test case may be selected by agreement among parties or, in the Court of Session, by the Court.[3] We consider that the rule empowering the court to do so is useful and should remain in the Rules of Court. We have, however, considered some questions as to possible amendments of the rule.

3.9 Should the rule define a leading action and specify any consequences for the other actions of the selection of a leading action? We doubt whether a definition is needed. (If one was wanted it might contain some or all of the following elements: the presence of common or related questions of law or of fact, the determination of which will determine wholly or partly questions at issue in other related cases, which may involve the same parties on one side.)

---

[1]See para 3.4 above. The definition might, compare RSC Order 4 Rule 9(1) (para 2.15, p 12, footnote 1 above), include a general "for some other reason" ground.

[2]Para 2.17 above.

[3]RC 91(6); for text see para 2.17 above.

We consider that it would be undesirable for the rule to prescribe any consequences for other actions beyond the current provision for sisting them. The parties to these actions may have good reasons for opposing the selection of the leading action or for accepting it as deciding only a particular issue or issues.

3.10 Should the rule be widened to provide for a similar order to be made at a stage earlier than the closing of the Record or for an order to be competent not only on the motion of a party but also on the initiative of the judge (ie *ex proprio motu*)? We doubt whether the issues would be sufficiently focused at an earlier stage in many cases. By their nature multi-party actions are likely to be complex and we consider that the judge would not normally have sufficient information to enable him, *ex proprio motu*, to select a leading action. (No doubt if the judge considered that a leading action should be selected he could suggest that to parties.)

3.11 We think it would be useful for a counterpart rule to be added to the Sheriff Court Ordinary Cause Rules.

> Accordingly, we suggest that:
> **No amendment be made to Court of Session Rule 91(6) but a counterpart rule should be added to the Ordinary Cause Rules. (Suggestion 4).**

Master pleadings[1]

3.12 It is very likely that where a number of cases arise from the same event, such as a "sudden disaster", eg an airline crash, the pleadings will contain

[1]Sometimes referred to as a "Master Statement of Claim" in English discussions about this matter.

averments and pleas-in-law as to the facts and ground of liability which will be virtually identical. It seems unnecessarily wasteful (notwithstanding the almost universal use of word processors today) for such averments to be repeated at length. We think there will be general agreement that this should be avoided if at all possible and that appropriate provisions should be included in the procedural rules.[1] In such cases in the Court of Session it is likely that a single solicitor will be acting on behalf of a number of parties (typically pursuers) but we think that any court rule should not assume this.

3.13 We suggest that the rule should provide for the lodging, with leave of the court, of a "master summons" or, where there is a multiplicity of defenders, "master defences". Each party would be entitled to adopt and hold as repeated in his own pleadings such of the averments and pleas-in-law in these documents as he considered appropriate to his own case. For example, in litigation arising from a "sudden disaster" a pursuer would conclude for the amount of damages which he claimed should be awarded to him, and would make averments as to the nature of his loss, injury and damage and any other matters which were special to his case. He would be entitled, however, to adopt, by reference to the relevant articles or paragraphs, the averments in the condescendence of the master summons as to the jurisdiction of the court, the circumstances of the accident and the grounds of liability, and any appropriate pleas-in-law.

---

[1]See in this connection the English Opren case: "[T]he courts must be as flexible and adaptable as possible in the application of existing procedures with a view to reaching decisions quickly and economically. At an early stage it was realised that one essential requirement for achieving this result was that a nominated judge should take charge of all the interlocutory applications which are necessary before the action can be tried, and Hurst J. was nominated for this purpose. With his assistance and under his guidance considerable progress has been made. Thus, for example, a system of "master pleadings" has been evolved, as a result of which individual plaintiffs do not have to incur the expense of pleading those aspects of their claim which are common to others. Again arrangements have been made for "lead actions" to be selected which raise common issues and for these actions to be heard first, thus settling those issues for the benefit of all." Sir John Donaldson M.R. in *Davies v Eli Lilly & Co* [1987] 1 WLR 1136 at 1139.

3.14 We envisage that the use of master pleadings would be discretionary: it would be for the parties (pursuers or defenders) to decide whether to apply for leave to use them, for the court to decide whether to grant leave, and for each individual party to determine the extent to which he would adopt them.

3.15 We do not think it would be appropriate for the rule, as initially drafted at least, to allow for the order to be made by the judge *ex proprio motu*. The rule should, we think, permit the court to extend any time limit prescribed in the rule for lodging the master document, in order to adapt it to the circumstances of the cases concerned. Such a rule might be preferable to leaving the matter of time limits entirely to the judge's discretion.

3.16 We suggest that if specific provision is to be made for master pleadings in the Rules of the Court of Session there should be a counterpart provision in the Sheriff Court Ordinary Cause Rules.

> Accordingly we suggest that:
> **There should be a rule in the Court of Session and the Ordinary Cause Rules which makes express provision for reliance by a number of parties on a single master summons or defences. To suit the various circumstances of multi-party actions the rule should be discretionary, and flexible as to time limits.**
> **(Suggestion 5).**

Split hearings

3.17 In some circumstances, a single hearing dealing with all the issues which arise in a case may be undesirable. This matter was considered in the Report of the Committee, chaired by Lord Kincraig, on Procedure in the Court of

Session in Personal Injuries litigation.[1] The Committee noted that at that time the relevant Court of Session Rule (RC 108)[2] was used very rarely and in practice the three issues which can arise in personal injuries actions[3] were disposed of at the same stage of the action. "It seems to us that what is wanted is procedure whereby parties could have the matter or matters which are at issue between them disposed of at the earliest possible moment. Ideally this should involve separating the three issues from each other and making provision for an enquiry on each separately. We envisage that if this were done and a determination made the other issues may never require to be settled by the Court and thus a speedier result may be achieved ... We recognise, however, that in the majority of cases such separation of the issues on the merits, ie facts and law, would be inappropriate and would lead to greater delay by having to be dealt with by two separate stages. We consider therefore that the proof should be separated into two parts, proof on liability and proof of loss."[4] The

---

[1]The Lord President's Court of Session Committee on Procedure was invited in July 1977 to consider what reforms should be made in Court of Session personal injury litigation "for the more expeditious and economic disposal of such litigation." The Committee's Report ("Kincraig Report") was published in April 1979 in a consultative document issued by Scottish Courts Administration. Following that consultation new rules were added (as Chapter III, Section 11) to the Court of Session Rules prescribing "optional procedure in certain actions of reparation" ie for personal injuries or for the death of a relative in which an election has been made to adopt the procedure in the Section (RC 188 E (1)). (P.H. Book p C 74/2).

[2]This Rule enables the court in an action with pecuniary conclusions (eg seeking an order for payment of compensation) to "separate the proof on the merits from proof on the question of the amount for which decree should be pronounced".

[3]These three issues are:

1. The facts of the incident giving rise to the claim;
2. The law to be applied to these facts; and
3. The amount of the damages to be awarded.

[4]Kincraig Report p 13 (as printed in Consultative Document).

Committee recommended a new "Diet Roll" at which, among other things, the court can now[1] appoint a proof on both the question of liability and the quantum of damages or on either of these matters.[2] The Kincraig Committee's recommendations were designed to achieve the aim "that once an action has been raised the court ought in the interests of the parties to it to exercise a stricter control over the proceedings, and the timing of them, with a view to cutting out unnecessary delays."[3] This aim of the Kincraig Committee may be regarded as appropriate also for multi-party actions[4]. Indeed there may be a greater need in such actions for the court to exercise control.

3.18 As we have mentioned[5], Rule 108 is restricted to actions with pecuniary conclusions. We think it would be helpful if the power to order proof on particular issues was extended to apply to all actions. We would also suggest two further amendments: clarifying that separate parts of a proof can be ordered either of the court's own motion or on the motion of any party; and expressly allowing the court to determine the order in which proofs should be heard. A counterpart rule in the Sheriff Court Ordinary Cause Rules would be helpful. Accordingly, we suggest that:

Amendments should be made to clarify and extend the scope of the Court of Session Rule (RC 108) about separate parts of proof and a

---

[1]Under RC 188J(6)(b). (P.H. Book p C 74/3).

[2]Under a 1992 Amendment of the Rule the court can also separate the proof on liability from the proof on quantum of damages. (New sub-paragraph (6)(d) inserted by Act of Sederunt (Rules of the Court of Session Amendment)(Optional Procedure and Miscellaneous) 1992 (SI 1992 No 88); 1992 SLT (News) 39 at p 40.

[3]Kincraig Report p 16.

[4]Although the optional procedure has been "designed for factually and legally straight forward cases": "Optional Procedure in the Court of Session" by Robert D Sutherland 1991 SLT (News) 20.

[5]Para 3.17, footnote 1.

counterpart Rule should be introduced into the Sheriff Court Ordinary Cause Rules (Suggestion 6).

Nominated judges

3.19 There is a distinction between a system by which particular judges are nominated to hear all the cases of a particular type (eg judicial review[1] or commercial causes[2] in the Court of Session) and a procedure by which a particular judge is nominated to take all the stages of a particular case or group of cases. The former arrangement - a list of judges to hear all multi-party actions - seems to us to have no substantial advantages for the court or for parties and might indeed be restrictive. We do not recommend it.

3.20 There might however be instances where the latter arrangement - a judge nominated *ad hoc* for the particular case or group of cases - would be useful, as in England and Wales,[3] in achieving prompt and efficient dispatch of complicated related cases.[4] We understand that in England this sort of nomination *ad hoc* is done on an informal application to the Lord Chief Justice for a judge to be assigned to hear all the interlocutory applications in a group

---

[1]RC 260 B (6). (P.H. Book p C 122).

[2]RC 149. (P.H. Book p C 56).

[3]Where there is also the facility of having certain matters dealt with by the Master. We understand that in the Benzodiasepine litigation the Lord Chief Justice assigned Mr Justice Kennedy to hear all matters arising in this litigation. He has appointed master Prebble to hear such interlocutory matters as Mr Justice Kennedy thinks appropriate. Thus a hearing before Mr Justice Kennedy can set a precedent which the Master can apply, as appropriate, to the individual cases. If the Master has a difficulty in any particular case he can confer privately with the judge before reaching his decision.

[4]We are aware of one large multi-party litigation where the separate cases came before 6 Lords Ordinary; 5 were content that the matter be dealt with without a hearing but the sixth insisted on a hearing. Such inconsistencies are undesirable.

litigation in the Queen's Bench Division.[1] It is understood that the Lord President has indicated that he might be prepared to consider similarly assigning a Court of Session judge. We would suggest that, in order to inform practitioners that applications for such nominations may be made, the appropriate procedure should be described in a Practice Note. It may be that an acceptable course would be for a letter written on behalf of all the parties to be addressed to the Principal Clerk, who would bring it to the attention of the Lord President.

3.21 In the sheriff court, we consider that the appropriate procedure would be an application to the Sheriff Principal through the appropriate sheriff clerk.

Accordingly, we suggest that:

Practice Notes (or a similar document) should describe the preferred arrangements by which an application may be made for a judge or sheriff nominated, respectively, by the Lord President or the Sheriff Principal to be allocated to take charge of all the stages of a particular multi-party litigation. (Suggestion 7).

Cut-off date for claims

3.22 In a multi-party litigation there may be doubt as to whether all potential pursuers are in the process, or it may be known that certain potential pursuers have not yet entered the process. In such cases it may be desirable for the court to fix a "cut-off date" by which no further parties will be entitled to join in the litigation. The object of fixing a cut-off date would be to enable progress to be made in the litigation. From that date it would be possible to identify precisely all the parties to the litigation, to choose a leading action or actions and to

[1] *Davies v Eli Lilley & Co* (CA) [1987] 1 WLR 1136 at 1139 (Sir John Donaldson, MR), quoted in para 3.12 p 32 footnote 1 above.

regulate the progress towards proof. A cut-off date would thus be helpful to the court, the parties and the legal aid authorities. It would not extinguish the claim of any person who had not joined before the cut-off date: he would remain free to raise his own action, so long as his claim was not extinguished by prescription or (as would more usually be the case) by the rules as to limitation of actions. However, in the event of success he might have to justify the reasonableness of pursuing a separate action in response to arguments that he should be at least to some extent liable for the defenders' expenses in presenting a separate defence in his case.[1] Cut-off dates have been ordered in multi-party litigations in England: in the Benzodiazepine[2] cases and in the group action against Glaxo in connection with the drug Myodil[3].

3.23 While cut-off dates have been fixed in these "creeping disaster" cases, they seem likely to be at least equally useful in cases of "sudden disaster" (such as the Piper Alpha disaster). In view of the variety of the circumstances from which multi-party litigation may arise we consider that the court's power to fix a cut-off date should be discretionary, rather than mandatory. We think that the matter should be regulated by a rule of court: partly because such a rule would be a helpful addition to the various powers considered above whereby a judge may regulate a group of cases; and partly because it seems at best doubtful whether he could fix a cut-off date without the authority of a rule.

---

[1]Also, it might be that SLAB would wish to consider in connection with an application for civil legal aid whther it appeared "reasonable in the particular circumstances of the case" (1986 Act s 14(1)(b)) that legal aid should be granted.

[2]*AB and Others v John Wyeth & Brothers Ltd and Others* Times Law Report 14 May 1991.

[3]Legal Aid Board's "Legal Aid Focus", 7th issue December 1992, p 5 ("Myodil cut-off dates").

3.24 In principle, if there is a Court of Session rule on this matter there should be a counterpart provision in the Sheriff Court Ordinary Cause Rules.[1] However, weighty multi-party actions, such as drugs negligence cases, are more likely to be raised in the Court of Session than in the Sheriff Court; hence it may be considered that a sheriff court Ordinary Cause Rule is unnecessary.

We accordingly suggest that:

A Court of Session Rule and a Sheriff Court Ordinary Cause Rule should be made expressly permitting the court to impose a cut-off date by which actions intended to join in the multi-party litigation should be commenced.
(Suggestion 8)

A separate Section for Multi-Party Actions in the Rules

3.25 We are impressed by the useful range of discretionary powers conferred by the rules on the Lord Ordinary in optional procedure[2] and in judicial review[3] and would favour any Court of Session rules for multi-party actions being similarly gathered in a Section of the Rules.[4] So far as the sheriff court is concerned, we think that there should be a similar separate section in the

---

[1]See para 3.2 above.

[2]RC 188 J (6)(a). The introductory words make clear the discretionary nature of these provisions: "the court may make such order or orders as it thinks fit for the further progress of the action and in particular -"

[3]RC 260 B. See particularly RC 260 B (4) and RC 260 B (16)(b).

[4]Even if this involves some repetition of provisions which appear elsewhere in the Rules.

Ordinary Cause Rules. This Section might include the rules which we have suggested earlier in this Part[1] dealing with:

- The Court of Session's power to order a sheriff court case to be transferred (Suggestion 2);
- conjunction of cases where there is contingency (Suggestion 3);
- the selection of a leading action or test case ie an amended version of RC 91(6) (Suggestion 4);
- master pleadings (Suggestion 5);
- split hearings (Suggestion 6);
- cut off date (Suggestion 8).

3.26 A Section of the Court of Session Rules and the Ordinary Cause Rules devoted to Multi-Party Actions would need to make clear the actions to which it applied. As already mentioned,[2] the applicability of the Section would need to have regard to the nature of the rules and in particular to whether they were discretionary or mandatory. Unless there are cogent reasons for not doing so it would seem appropriate that the same definition be adopted for court procedures and for legal aid.[3] An application provision might be framed in various ways. These include

[1]But not necessarily, of course, in the same sequence as discussed in this Part.

[2]Para 2.27 above.

[3]See discussion at paras 4.37 to 4.39 below. (Pages 88 to 90).

(a) A definition alone[1]

A definition might adopt some of the elements used in the definitions in other jurisdictions[2]: the existence of "common issues" (which would need to be defined)[3]; the predominancy of common questions of fact or law over questions affecting only individual claimants;[4] a prescribed number of persons having claims against the same person[5]; and a restriction to certain types of action eg claims for personal injury or death.[6]

(b) A definition combined with election[7]

It might be considered that a definition alone would not serve to distinguish satisfactorily multi-party actions from other actions. A definition might therefore need to be combined with election. The election provisions[8] in the Court of Session Rules provide for election only on the commencement of the action and it would be necessary for the purposes of the multi-party actions for election to be possible at later stages of the action also. (One possibility would be at any stage before the record was closed.) It would need

---

[1]Compare the definition of "simplified divorce applications" in RC 170 E(2).

[2]Paras 2.29 to 2.31 above.

[3]As in the Ontario legislation. (Para 2.30 above).

[4]As in US Federal Rule 23. (Para 2.29 above).

[5]As in the Australian federal legislation. (Para 2.31 above).

[6]As in the English Legal Aid Arrangements (Annexe F, para 1).

[7]Compare RC 148 which lists various mercantile actions in which when an election has been made by the pursuer marking the Summons "Commercial action" the "Commercial Causes" section of the Rules (RC 148 to 153) applies and the action is, under RC 148, assigned to a special "Commercial Roll".

[8]See, for example, RC 148 (Commercial Causes) and RC 188 E (Optional Procedure in Certain Actions of Reparation).

to be possible for election to be competent by either the pursuer or the defender.

(c) A definition combined with election and a right to the other side to object to the application of the special rules in the section[1]

A provision on these lines would make the applicability of the special rules, if challenged by the other side, a matter for the exercise of judicial discretion in terms of the provisions in the rules. The rule might possibly provide that the Lord Ordinary (or sheriff) might order that the special rules would apply where he was satisfied (a) that the litigation fell within the definition in the rule and (b) there was "significant complexity"[2] (or other suitable criterion) to justify the special rules being applied.

We suggest that:

Consideration should be given to devoting a separate Section of the Court of Session Rules and of the Sheriff Court Ordinary Cause Rules to provisions relating to multi-party actions including a definition of such actions or other means for determining the actions to which the Section might apply.

(Suggestion 9).

Documentary evidence: use of information technology

3.27 It is notorious that multi-party actions raise unusual problems due to the volume and type of documentary evidence. For example, in the Scottish Ativan

[1]Compare the arrangement in Optional Procedure: a pursuer elects to adopt the procedure by serving a summons with condescendence and pleas-in-law in a prescribed form, in terms of RC 188 F, but in reply the defender can resist the deemed waiver of his right jury trial by expressly applying for jury trial in terms of RC 188 I.

[2]This term is taken from the (English) Legal Aid Board's Multi-Party Actions Arrangements 1992 (see Annexe F to this Report, para 1).

litigation a commission and diligence for the recovery of documents was resisted by the drug company partly because of the sheer bulk of the documents which might fall to be recovered.[1] (In English cases, questions have arisen as to the use of a person who was neither a party's legal adviser nor qualified as an expert to undertake inspection of the documents[2] and as to the appropriate procedures for disclosure to the defendants of the plaintiffs' medical histories[3].)

3.28 The authors of the "Guide for Use in Group Actions"[4] produced by the (English) Supreme Court Procedure Committee comment[5] interestingly on the use of information technology:

> "The efficiency of the organisation of both plaintiffs and defendants from the outset will make or mar the case throughout the interlocutory preparations and through the trial itself. For example, if in a drugs case it is possible at the touch of a few buttons on a computer to identify all females aged between 65 and 70 who took the drug between 1974 and 1980 and who suffer from side effects A and B but not C and who live in Humberside, it will assist in the drafting of pleadings, in the instruction of experts, in the organisation of transport to take plaintiffs to the nearest and most appropriate expert, and in the division of the trial into stages: and at the trial it will assist in the conduct of cross-examination, provided the whole computerised litigation support system has been devised from the outset with a view to use in court at the trial as well as in the many functions before trial.
>
> Rather than have masses of documents in court at the trial, it would be better to plan to have all the trial documents except for a few "core documents" on computer storage systems. To achieve that will require planning from the outset so that all parties concerned, including the

---

[1] *McInally v John Wyeth & Brother Ltd* 1992 SLT 344.

[2] *Davies and Another v Eli Lilly and Co and Others* [1987] 1 All ER 801.

[3] *B and Others v John Wyeth & Bishop Ltd and Another* [1992] 1 All ER 443.

[4] See paras 3.59 and 3.60 below.

[5] In the Section of the Guide dealing with the conduct of the trial.

judge (if the judge wishes to use a computer), are working on compatible systems. A note of caution is required. Loading documents onto a computer is expensive and time-consuming. Any decision to load more documents than are likely to be used at the trial should be approached with caution.

It would also be desirable from the outset to agree what court display system is to be used for the display of evidence so that from the outset the experts, for example, will prepare their illustrative exhibits in a form best suited to that system.

Use of Computer Assisted Transcription (CAT) at the trial would also probably result in a large saving of money. Several firms of shorthandwriters now use CAT and by its means load onto the computers of the parties and the judge at the end of each working day the whole of the transcript of the day's evidence.

All this requires financial and administrative planning. Without such planning, money will be wasted.

The Legal Aid Board has the power to consider grants or loans for computer equipment in certain cases.

Whether and how capital and running costs of computer hardware and software can be recovered on taxation of costs either as between party or between solicitor and client remain unresolved problems. In this, as in many other aspects of this type of litigation, much work remains to be done."[1]

3.29 We have not done any detailed work on the possible use of computer and information technology generally but it would seem that further work[2] would be worthwhile in order to ensure that multi-party litigation is conducted as efficiently and economically as possible. In addition to technical studies by

[1]Guide pp 42 and 43.

[2]For example in England and Wales a study has been commissioned to identify the information technology needs of the judiciary, with a view to installing a number of pilot systems in 1992/93. (Lord Chancellor's Department: Court Service Annual Report for 1991/92, Para 11.13). In Scotland, the Lord President's Working Party on Commercial Causes, chaired by Lord Coulsfield, has expressed an interest in information technology (1993 JLSS 116).

computer and other experts it would be necessary to determine various practical matters such as how the costs of use of information technology should be shared among the court and the various parties to each particular litigation.

B. Procedures in Actions generally before Proof

3.30 Some of the questions which arise in multi-party actions are peculiar to such actions. Others are not, but may be particularly relevant to these actions. For example how interventionist should the judge be in multi-party actions? Should he be more, or less, interventionist than in other actions? In an English multi-party action, it was said that "the sporting theory of justice ought to have no place" in complex multi-party litigation. "In the public interest, the concept of *dominus litis* ought, as far as possible, to be subordinated to case management techniques controlled by the court. Subject to preserving the protections offered by the adversarial system, the court ought to control the pace of the litigation".[1]

3.31 Discussion of the adversarial system and the proper approach to be adopted by the judge in multi-party actions leads to a discussion of procedures in actions generally. We mentioned earlier[2] that we thought it would be artificial and unhelpful to restrict our discussion to multi-party actions if we thereby ignored changes in all actions which might be particularly helpful in multi-party actions. Such discussion takes us outside our remit. There appears however to have been less public discussion of these matters in Scotland than

---

[1]Mr Justice Steyn in *Chapman v Chief Constable of South Yorkshire and Others* Times Law Report 20 March 1990 (1990) 134 Sol Jo 726. See also the views expressed about litigation in general by the Royal Commission on Legal Services in Scotland (which reported in 1980): "We wonder ... whether the present procedures [to ensure that each party has fair notice of his opponent's case] are unnecessarily sophisticated and whether, again, perhaps by greater intervention on the part of the court, the required result could be achieved with less delay and formality" (Report para 14.8).

[2]Para 1.3.

in other jurisdictions[1] and we offer our comments as a contribution to informed discussion.

3.32 Discussion in England may have been fostered by Sir Jack Jacob's Hamlyn Lectures[2] and by the Lord Chancellor's Civil Justice Review. The Report[3] of the Review comments on the court management of litigation and suggests certain objectives which should be met:

> "220. Once proceedings have been started the progress of a case, although primarily in the hands of the parties, especially the plaintiff, is also a matter for the court. In particular public policy requires that certain objectives be met, by virtue either of rules of court or of specific intervention by the court. Those objectives are that:-
>
> (i) Cases should be disposed of within a reasonable time, whether by settlement, trial[4] or otherwise.
>
> (ii) Each side should have full information about the other's case in order to assist settlement or preparation for trial.

---

[1]However the Justice Charter for Scotland, published in November 1991, recognises that "there is room for continuing improvement" in the administration of justice in Scotland and notes that "court procedures should not be needlessly complicated and should take account of users' needs". (Ministerial Foreword and p 11, respectively). Whether improvements can be made no doubt depends partly on the availability of scarce public resources for the provision of judges, court staff and accommodation as well as for the legal aid fund.

[2]Sir Jack I H Jacob *The Fabric of English Civil Justice* (Hamlyn Lectures 1986) 1987. In particular he suggested the open system of pre-trial procedure, "so that the parties become fully informed of each other's cases at as early a stage as possible to enable them to make a realistic appraisal of the respective strengths and weaknesses of their cases which should lead to earlier and fairer settlements". (p 267).

[3]Report of the Review Body on Civil Justice (Cm 394), June 1988 pp 39 and 40. A number of the Review Body's recommendations have now been implemented by amendments to the Rules of the Supreme Court and to the County Court Rules.

[4]Ie a hearing of evidence.

(iii) In all other respects there should be adequate preparation for trial and identification of the relevant issues and of evidence required to resolve those issues.

(iv) Cases which are ready for trial should come on without delay.

(v) The conduct of trials should be expeditious, with issues, evidence and argument presented in as economical a manner as justice permits.

221. Very often the interests of the parties, and the wish to conduct their cases effectively, will lead them and their professional advisers to pursue and achieve these objectives. Moreover, rules of court by themselves can provide guidance as to what is required. It is, however, clear that for some cases, at least to some extent, direct intervention by the court is also required. In order to render this intervention effective a general framework of court management is necessary, to be brought into play when required, but with minimum inconvenience to litigants and the court"."

3.33 We would hope that most Scottish court practitioners would agree in principle with these general objectives. To achieve these objectives, whether in multi-party actions or generally, needs positive, but flexible[1], case management. The way in which a party handles his case can for example be influenced by an award of expenses. The Court of Session's Practice Note[2] with regard to the procedure roll, warns that if parties do not comply with certain suggestions (to avoid cases being taken off the roll before any hearing) this may be taken into account in determining any question of expenses. (A further way of influencing the way parties handle their cases would be appropriate alterations in the Tables of Solicitors Fees and of Court Dues.)

---

[1]Cases can be taken forward faster than parties or their solicitors and counsel can cope with eg earlier dates for a proof can cause avoidable difficulties since at that stage the details of the oral and documentary evidence to be adduced may be unclear.

[2]No 3 of 1991 (P.H. Book p C 539).

3.34 We note below various issues in order to focus discussion of them. We also make some specific suggestions.

A procedural hearing before proof?

3.35 US pre-trial conference.

It may be helpful to record US experience[1] with such a conference of counsel and the judge which may be held before trial and usually after the pleadings and discovery stage. The uses to which the pre-trial conference may be put are various. Some courts use it primarily as a technique to encourage settlement, and usually schedule the conference after discovery is complete but before trial is immediately imminent. Some courts schedule pre-trial conferences early in the life of a case, to establish guidelines for discovery. Others schedule them on the eve of trial, to organize the issues and presentation of proofs. Others use multiple pre-trial conferences, especially in "big" cases. Many experienced judges and lawyers believe the conference procedure, judiciously administered, can be effective in all of these applications. On the other hand, there is strong experimental evidence that requiring a pretrial conference in routine cases is largely a waste of time. A controversial question is whether the court should schedule pre-trial conferences for the purpose of encouraging settlements. By and large, the bar opposes the settlement-orientated pre-trial conferences, on the premise that a truly voluntary settlement can be reached by the parties themselves. Many judges, however, believe that settlement-orientated pre-trial conferences can produce settlements that otherwise would fail or would occur only on the commencement of the trial.

The main purpose of the conference is the simplification of the issues. This can be done effectively by requiring each party to state what he expects to prove or disprove, indicating what the testimony of his witnesses is expected to

[1]This material is condensed from *Civil Procedure* by F James and G C Hazard (1977), pp 212/218.

be and what exhibits he will offer to support his claims and defenses. This will reveal the areas where there is no real dispute. Experienced trial counsel sometimes simplify issues in this way by mutual co-operation, but the presence of the judge and his probing often act as catalysts in bringing about agreement. Examples of simplification are: the obtaining of admissions of fact and of documents which will avoid unnecessary proof; and the limitation of the number of witnesses.

Another purpose is the consideration of the necessity or desirability of amending the pleadings. The judge should make sure that the pleadings will accommodate all the claims and defenses that are revealed at the pre-trial conference, and thus obviate the need for amendment at trial. The pre-trial conference should culminate in a definite order embodying all the admissions and stipulations of the parties and all other matters settled at the conference.

Lessons to be learnt from US experience

3.36 In considering whether US practices should be adopted in Scotland the peculiar features of Scottish civil court procedures need to be taken into accunt. A major difference between Scotland and America (and England and Wales) is the traditional Scottish system of written pleadings.[1] The functions of pleadings are to define the issues for the benefit of the court and parties and to provide the basis[2] for the court's decisions on procedural questions. 'The function of our system of written pleading is ... to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree; and thus to

[1]We draw here from Ch 9 (Written pleadings) of *Sheriff Court Practice* by Sheriff I D Macphail.

[2]Particularly in the closed record; see Macphail, para 8-41.

arrive at certain clear issues on which both parties require a judicial decision."[1] A properly drawn closed record is a great advantage in a complex case and should serve in Scotland to simplify the issues in much the same way as a pre-trial conference does in the USA. In a run-of-the-mill case however the system of written pleadings culminating in the closed record may be unnecessarily sophisticated[2]and our impression is that the optional procedure in the Court of Session[3] is generally regarded as working well. Accordingly, general lessons that may be drawn are the need for the court to have available a range of suitable techniques for clarifying the issues among parties and to have available adequate information about the particular case to determine which techniques should be used.

3.37 If the pre-proof by order hearing were to be built up into an important stage in a multi-party or other complicated action, the judge would have to instruct himself beforehand by reading what would probably be a very long record. However, he would not be able to, or it might not be desirable that he should, instruct himself as to the law[4] or as to some difficult issue in the law of negligence. Also, if important concessions or other arrangements are to be discussed at the hearing, senior counsel for each of the parties would have to be instructed (and available). This might be difficult to arrange (in which case avoidable delay would be introduced) and would add to the expense. These are not conclusive reasons against the introduction of a pre-proof by order hearing

---

[1]Macphail, para 9-03.

[2]To adopt the words of the Royal Commission on Legal Services in Scotland quoted above (para 3.30, fn 1).

[3]RC 188E-188P. In this simplified procedure the Rules, for example, provide for a succinct summons (in Form 27A), require the defences to include "brief answers" and may dispense with a closed record.

[4]Eg as to the applicable law of Texas in the recent Piper Alpha hearings before Lord Caplan (see para 2.25, fn 2 above.)

not conclusive reasons against the introduction of a pre-proof by order hearing but are matters which would need to be taken into account in deciding whether such a hearing should be introduced and whether it would be useful in any particular non-party litigation.

Court of Session procedure

3.38 The Practice Note of 1991 about the Procedure Roll[1] records the court's expectation that (a) on the closing of the record, parties will discuss further procedure, and particularly the possible resolution of points at issue without a procedure roll hearing, and (b) where a case is on the procedure roll, the party whose plea is to be argued will tell his opponent what his proposed argument is likely to be. If the court's expectations are confounded, this may be taken into account by the court in an award of expenses. We understand that the terms of this Practice Note may be incorporated in the Rules. We think this would be helpful.

3.39 An earlier Practice Note of 1991,[2] now withdrawn, provided for a "pre-proof by order hearing in long causes" and contained provisions which expressly acknowledged the views mentioned already about the desirability of the court encouraging parties to make progress in focusing the issues in dispute and discussing the evidence likely to be adduced, if there was not a settlement. The Practice Note had the aim of "expeditious resolution of the proceedings" and encouraged parties to tell the court what the prospects of settlement were. The Note was issued for an experimental period and applied in all cases (other than those under the optional procedure[3]) in which a proof (or proof before answer)

---

[1]Practice Note No 3 of 1991: 26 April 1991 (P.H. Book p C 539).

[2]Practice Note No 2 of 1991: 21 February 1991. For text see 1991 SLT (News) 85. Discontinued 14 May 1992 (1992 SLT (News) 155).

[3]In certain actions of reparation: RC 188 E/F (P.H. Book pp C 74/2 to 74/4).

of five days or more[1] had been fixed. The by order hearing before a Lord Ordinary was to be held approximately six weeks before the proof.

3.40 The two main paragraphs of the Practice Note read:

> 2. At the by order hearing, the court will expect to be informed about: (a) the outstanding issues in dispute between the parties and the steps (if any) which have been or are being taken to resolve them before the diet; (b) the prospects of settlement before the diet; (c) the extent to which agreement has been or can be reached on any photographs, sketch plans, statements, documents or other evidence; (d) the appropriateness of intimation by each party to the cause to the other parties of (i) a list of witnesses whom he intends to call to give evidence, and (ii) any written report of a skilled witness; and (e) whether the proof is likely to require the number of days allotted to it, or whether it is likely to require additional days.
>
> 3. The court may recommend that, before the diet, parties should: (a) exchange lists of witnesses whom they intend to call to give evidence, (b) exchange written reports of skilled witnesses, (c) lodge a joint minute agreeing any evidence, (d) take such other steps as may appear appropriate with a view to the expeditious resolution of the proceedings."

3.41 The Practice Note was issued for an experimental period and had a number of aims; in particular the Note was not aimed solely at encouraging settlements. The permissive nature of the Note[2] meant that it was unlikely that any of the parties to the action would be prejudiced.[3] Experience in other jurisdictions seems to indicate that such a hearing can be useful but that the actual procedures adopted may need to be adjusted to cope with experience of

---

[1]This application provision would have served to catch complex multi-party actions without the need of a possible complex definition.

[2]Para 2 records the court's expectations and para 3 confers a power, rather than a duty, on the court.

[3]The Kincraig Report refers to the "understandable reluctance on the part of the court to insist on rigid compliance with the timetable laid down in the Rules of Court for fear of causing prejudice to one or other of the parties" (Report p 16).

the operation of the procedure and to allow expertise in the conduct of such hearings[1] to be acquired by judges and practitioners. We would hope that the Court of Session authorities may re-introduce such an apparently worthwhile innovation. We wonder, for example, whether the restriction to a 5 or more days expected proof is appropriate and whether the Practice Note ought to include a facility for cancellation of the hearing. (In some US jurisdictions a pre-trial conference although mandatory can be obviated by court order in a particular case; in other jurisdictions it is discretionary, on the motion of a party or on the court's own motion.[2])

3.42 In Sheriff Court procedure, the ordinary cause rules do not at present provide for a procedural hearing but the Sheriff Court Rules Council has argued the case for such a hearing[3]. "At the hearing the sheriff, having had an opportunity to consider the pleadings in final form, will be able to discuss with parties, and decide on, the future progress of the case. The sheriff adopting a more interventionist role than under present procedures could, for example, suggest that parties might lodge a joint minute of admissions or agreement so as to ensure that the proof is limited to the matters in dispute. Decisions would be made about whether a proof or debate could be fixed, and where a party requests a debate on preliminary pleas the sheriff might ordain that party to lodge a note of the proposed argument ... The sheriff when fixing a diet of proof could also require parties to provide information about the anticipated duration of the proof." It is understood that this proposal is to be proceeded with.

---

[1]And in deciding in a particular litigation, having regard to the possible disadvantages mentioned in para 3.37 above, whether the likely advantage of such a hearing outweighed the disadvantages.

[2]James & Hazard p 213.

[3]Sheriff Court Rules Council: Consultation Paper: Review of Sheriff Civil Court Procedures and Practices (January 1990) para 3.44.

We accordingly suggest that:

Experiments should be carried out to devise suitable procedures (and appropriate Rules or Practice Notes as necessary) for pre proof hearings in both the Court or Session and the sheriff court (Suggestion 10).

We also suggest that:

The Court of Session Practice Note No 3 of 1991 should be redrafted in the form of a Rule of Court. (Suggestion 11).

Preliminary pleas

3.43 The Grant Committee on the Sheriff Court[1] estimated that four-fifths of pleas to the relevancy had no substance and were intended only to delay matters. Sheriff Macphail[2] considers that in spite of the procedures adopted in the Court of Session (Practice Notes of 1 June 1967 and 16 December 1968) and in the sheriff court (Ordinary Cause Rule 63) they do not "prevent the party insisting on an unfounded preliminary plea until the diet of debate". Sheriff Macphail mentions a second ground of criticism that "the party whose case is attacked by the plea frequently does not receive sufficient notice of the points which will be taken against him at the debate". (Sheriff Macphail mentions in this connection Professor Robert Black's earlier "trenchant criticism"[3].) We think that these criticisms remain valid.

---

[1]1967; Cmnd 3248.

[2]In "Summary Adjudications in Civil Proceedings in Scotland", a chapter in *International Perspectives in Civil Justice*, Essays in Honour of Sir Jack Jacob, London 1990.

[3]Robert Black, *An Introduction to Written Pleading*, (1982) ("The general standard of written pleadings in the sheriff court today is, to put it mildly, low.")

3.44 This matter was considered in the Sheriff Court Rules Council's consultation paper.[1] In a factual survey it was found that 78 per cent of (240) diets of debate fixed were discharged. "What appears to happen in practice is that, more often than not, parties will include in their pleadings what are called 'general pleas to the relevancy' which state that the averments or statements of facts made by the other party are irrelevant or lacking in specification. No notice is given to the other party about the grounds of the alleged deficiency in the pleadings, and it is only at the debate hearing that the party whose pleadings are being attacked learns for the first time the nature of the complaint against the pleadings. In the majority of cases an offer is made to amend the pleadings to meet the complaint and the debate is discharged. This situation is, of course, very wasteful of court time, contributes to delay and adds to the cost of litigation."

3.45 The Rules Council accordingly proposed[2] that provision should be made in the Ordinary Cause Rules to require the sheriff, at the procedural hearing:

(1) To ascertain from parties who have stated general pleas to the relevancy, the nature of the complaint against the pleadings; and

(2) When fixing a debate hearing to order[3] that party taking the plea should lodge a concise note of his proposed argument within such time as the sheriff considers appropriate in the case, failing which the plea may be repelled.

---

[1]Para 3.42 p 53 Footnote 3 above; Consultation paper paras 3.67 to 3.70 and Proposition 17.

[2]Proposition 17.

[3]In Proposition 18, the Rules Council asked whether this proposed provision should be mandatory or discretionary.

3.46 We agree with these proposals.

Greater disclosure of information

3.47 The Sheriff Court Rules Council proposes[1] the adoption in ordinary causes of certain Court of Session procedures[2] for the disclosure of certain information.

3.48 It was noted that in the Court of Session optional procedure and in the rules for commercial causes provision is made that, after the allowance of proof, a party must intimate to any other party in the action a list of documents in their possession or control relating to matters at issue between them. Provision is also made for the inspection or copying of these documents.[3] Similarly, provision is made for the exchange of lists of witnesses to be called to give evidence,[4] and under the optional procedure for disclosure of the substance of any evidence of skilled witnesses.[5] "The effect of this greater disclosure is that it enables parties to agree on matters not in dispute. Moreover, it helps to focus the issues on which evidence will require to be led at the proof, and as a result saves the parties calling unnecessary witnesses, which consequently saves expense and court time."[6]

---

[1]Consultation Paper paras 3.72 to 3.75; Proposition 19.

[2]RC 188 E-P (optional procedure for certain actions of reparation); and RC 148-151F (Commercial Causes). See also the Rule introduced in April 1990 with regard to the lodging of documents founded on: RC 134E.

[3]RC 188K (1),(2); 151 C (1),(2),(3).

[4]RC 188L, 151 D.

[5]RC 188 M (1).

[6]Consultation paper, para 3.74.

3.49 The Rules Council therefore proposed[1] that provision should be made in the Ordinary Cause Rules that, where a proof has been fixed, parties should be required to:

(1) Intimate to every other party in the action a list of the documents in the possession or control of the party, relating to matters at issue between them, which documents may be inspected or copied; and

(2) Intimate to every other party in the action a list containing the names and addresses of the witnesses whom the party intends to call to give evidence; and

(3) Disclose the substance of any evidence of a skilled witness to every other party in the action.

3.50 We agree also with these proposals[2].

---

[1]Consultation Paper, proposition 19.

[2]In England and Wales the Rules of the Supreme Court were amended in 1988 (Rules of the Supreme Court (Amendment) 1988 (SI 1988 No 340)) to implement a recommendation of the Civil Justice Review Body that there should be a mandatory exchange of witness statements (Recommendation 22; Report paras 229-235); it was thought that it should not be permissible, without the special leave of the court or agreement of other parties, to call a witness whose statement had not previously been served on other parties. Such a requirement would be alien to present Scottish procedures.

Extended use of affidavit evidence

3.51 The Sheriff Court Rules Council also favoured discretionary[1] provisions with regard to the extended use of affidavit evidence.[2] The Rules Council noted that in the Court of Session optional procedure provision is made for a party to apply by motion for evidence to be received by way of affidavit[3] and that consideration is being given to the introduction to the Court of Session Rules of Court of a more general provision for the receiving of affidavit evidence so that, at the discretion of the court, affidavit evidence could be received in all categories of action.

3.52 The Rules Council accordingly propose that:

(1) provision should be made in the Ordinary Cause Rules that a party may apply by motion in any action proceeding under the Ordinary Cause Rules for evidence (as specified in the motion) to be received by way of affidavit; and

(2) the Ordinary Cause Rules[4] should be amended to extend the application of affidavit evidence to the hearing of motions for interim orders (eg, interim interdict, custody etc) and at the hearing of appeals in connection with such orders.

3.53 We agree with these proposals.

---

[1]Mandatory provisions would of course remove the possibility of questions of credibility being explored in oral cross-examination.

[2]Consultation Paper paras 3.76 and 3.77; Proposition 20.

[3]RC 188 M (2).

[4]OCR 72(1)(a).

Notices to admit and notices of non-admission

3.54 Two of the rules of the Court of Session make provision for the service by one party upon another of a notice calling upon that party to admit certain matters. Rule 99, which applies to ordinary actions, provides that either party may call upon the other to admit, within such time as the Court may appoint, the date, signature, transmission or receipt of any relevant document, or the verbal accuracy of a copy; and the other party, if he refuses or delays to do so, may have to pay the expense of any proof which is thereby rendered necessary.[1] In the section of the Rules dealing with causes relating to patents, designs, copyright and trademarks, Rule 253 enables one party to serve on another a notice calling on him to admit, for the purposes of that cause only, specified facts relating to an issue averred in the pleadings, or the authenticity or contents of a specified document lodged in process. The other party may, within 28 days, intimate a notice of non-admission, thereby rendering himself liable to pay the expense of proving the matters specified in the notice if the Court holds them to be established in evidence; or he may fail to serve a notice of non-admission and thus be deemed to have admitted the matters specified unless the Court, on special cause shown, otherwise directs.[2] There are no similar rules in the sheriff court.

3.55 We have considered the question whether it would be advantageous to have in both the Court of Session and the sheriff court a general rule in terms

---

[1]Cf Rule 41(1) of the Scottish Land Court Rules 1992 (SI 1992, No 2656; PH Book p L616) which entitles a party to call upon his opponent to admit, as between themselves and for the purposes of the application, any specific fact or facts relating to the subject-matter of the application; and the opponent may be liable for the expenses of the proof of any such fact which he has refused or delayed to admit.

[2]Cf Rules of the Supreme Court 1965, Ord 27, r 2(1), (2); Ord 62, r 3(5); *Halsbury's Laws of England* (4th ed), vol 37, para 313.

similar to Rule 253. In the Court of Session such a rule would supersede Rule 99. We have found it difficult, however, to predict the extent to which such a rule would be effectively invoked in practice. Such limited experience as we have tends to suggest that Rules 99 and 253 are seldom resorted to at present. There may be two reasons for that. First, in a properly drawn closed record responsible counsel will have made all the admissions which, in their judgment, may properly be made. Secondly, it might be difficult to persuade a Lord Ordinary to make a particular award of the expenses incurred in proving a matter which has not been duly admitted in terms of either Rule, if only because such expenses might be small or the Auditor might find them difficult to assess. On the other hand it may be thought that a general rule on the lines of Rule 253 would save court time and expense by requiring a party who had withheld an appropriate admission in his pleadings to admit facts or documents which were not in dispute. It is possible to envisage a case in which, when the pleadings were drafted and adjusted, no admission of a particular fact or document was made for perfectly sound reasons, but when the preparations for proof have been completed it becomes clear that the fact or document is not in dispute. In such a case responsible counsel may be expected to enter into a joint minute of admissions, but a general rule might be helpful where a party refused to enter into a joint minute about a particular matter and his opponent considered that there was no good reason for his withholding an admission. We have not arrived at any concluded view on this matter, but we think it is worthy of further consideration by the appropriate rule-making bodies. We therefore suggest that:

Consideration should be given to whether a general rule in terms similar to Rule 253 of the Rules of the Court of Session should be introduced for ordinary actions in the Court of Session and the sheriff court.
(Suggestion 12)

C. Procedures at proof

3.56 In Scotland and in other jurisdictions courts commonly adopt a number of practical expedients to ensure that good use is made of court time eg arranging for judges to read case papers before the hearing as an alternative to counsel or solicitors unnecessarily taking up time by reading them aloud in court.[1] These expedients may be particularly necessary in multi-party actions which are likely to be complex and time-consuming. The extent to which time can be saved by the judges reading of written material in advance depends, of course, on the extent to which there is reliance on oral advocacy in open court. We note that the Lord President has said that a greater emphasis on written material, requiring more of the out of court time of the judges, "would be likely to put at risk what we have achieved so far in making provision for the more efficient disposal of our business."[2]

3.57 The English Civil Justice Review suggested[3] a number of points which ought to be recognised in the conduct of trials[4]. These are:

(i) a firm obligation on parties to organise and summarise case papers to assist the judge;

---

[1]For example, in the English Chancery Division plaintiffs are required by a Practice Direction of 1989 to lodge, at least 7 days before the trial, a "reading guide" which "should be short, non-contentious and if possible agreed". For text of Direction see Solicitors Journal 26 January 1990 at p 109.

[2]"Judicial Business - A Review", Address by Lord President Hope to Scottish Universities Law Faculties Conference at St Andrews 1991 (1991 JLSS p 266 at p 267).

[3]Report (Cm 394), June 1988, para 264.

[4]Ie proofs in Scotland.

(ii) pre-reading of relevant material by the judge, either before the trial starts or after the opening by counsel and before evidence is heard;

(iii) flexibility as to counsel's speeches;

(iv) avoidance of unnecessary repetition by witnesses when statements have been exchanged; and

(v) judicious use of written argument and avoidance of lengthy quotation from written material.

3.58 These points are not necessarily relevant in Scotland but may be helpful in discussion of what similar points should be recognised in Scotland in the conduct of proofs, particularly in multi-party actions. We do not think it appropriate for us to make any specific suggestions.

D. Miscellaneous Matters

A Guide to Multi-Party Actions

3.59 We quoted above[1] from the "Guide for Use in Group Actions"[2] produced by the English Supreme Court Procedure Committee.[3] The authors note that while there have been calls for reform of the procedures for bringing group actions it will take some time for changes to be brought about and the Guide,

---

[1] Para 3.28.

[2] Supreme Court Procedure Committee, *Guide for Use in Group Actions*, London, May 1991. The three authors (a judge, a QC and a solicitor) of this publication include Mr Rodger Pannone who is very experienced in disaster and similar group litigation on both sides of the Border.

[3] Set up by the Lord Chief Justice in 1982 to ensure "that suggestions for changes in practice and procedure are considered systematically by persons with the necessary expertise" and then put before the (Supreme Court) Rule Committee. (For membership, terms of reference and Statement by Lord Chief Justice see 1982 NLJ 543.) There is no similar body in Scotland for the Court of Session and/or the sheriff court. In effect the Committee functions as a procedural "think tank".

in the meantime, is concerned with the adaptation of existing procedures to new demands.[1] The Guide appears to us to be eminently practical and very useful, particularly for solicitors who find themselves involved at short notice in complex disaster cases.

3.60 We are not aware of any comprehensive and practical written discussion of the conduct of multi-party litigation in Scotland. In principle, such a Guide would be helpful, and we suggest that:

> **Consideration should be given to the preparation of a Guide for solicitors to the conduct of multi-party litigation in the Scottish courts. (Suggestion 13)**

We recognise, however, that it may be too early to prepare such a guide until there has been more experience of multi-party actions.[2] One of the matters which the Guide might cover would be the application of information technology.[3]

Masters in the Court of Session

3.61 We mentioned earlier the possible nomination of a particular judge to deal with all the stages of a complex multi-party litigation.[4] Another possibility would be the introduction into the Court of Session of a Scottish equivalent of

---

[1]Foreword to Guide.

[2]It may also be argued that other publications, applying to litigation generally, should be given priority eg annotated versions of the Rules of the Court of Session and of the sheriff court (counterparts of the English "White Book" and "Green Book").

[3]Para 3.28 above.

[4]Para 3.20 above.

the Masters who deal in England and Wales with procedural ('interlocutory') matters.

3.62 This possibility was considered in 1986 by the Review Body, chaired by Lord Maxwell.[1] It had been proposed (by the WS Society and the SSC Society) that such appointments should be made from legally qualified and experienced practitioners from either branch of the profession.[2] The Review Body was not in favour of this proposal.

3.63 In their Report they narrated the arguments in favour of, and against, the proposal.

> '8.5 The possible introduction of a Scottish equivalent of Masters or Registrars is superficially attractive in that this should relieve judges of interlocutory and other ancillary matters and thus save judicial time. However, the kind of interlocutory applications involving hearings which would form the bulk of the workload of Masters/Registrars in the superior courts do not at present occupy a significant amount of judge time and the 'de-starring' measures[3] which we recommend in Chapter 7 would reduce even further the judicial time required for hearing such motions. Moreover, most applications not requiring the attendance of counsel are dealt with by clerks of court; only a relatively small number of such applications are dealt with by judges in chambers. The available workload would therefore only justify part-time appointments and we doubt whether the nature of such posts would attract candidates of the right calibre.

---

[1]Report of the Review Body on the Use of Judicial Time in the Superior Courts in Scotland 91986), paras 8.3-8.7. ("Maxwell Report").

[2]In 1986 only advocates had a right of audience in the Court of Session but solicitors can now obtain such a right under s 24 of the Law Reform (Miscellaneous provisions)(Scotland) Act 1990.

[3]Under which certain unopposed motions would be added to the list of motions dealt with by depute clerks of session under RC 93A. See also Court of Session Practice Note of 10 December 1986 (PH Book p C529).

8.6 The Civil Sub-Committee of the Joint Law Society and Faculty Working Committee considered it to be impracticable to introduce Masters/Registrars on the basis that it was more convenient for the Motion Roll to be disposed off by several members of the judiciary in the morning, rather than the Motion Roll being restricted to one or two Masters and taking all day. They, and the Dean of Faculty of Advocates, also foresaw potential problems of conflict of interest if senior counsel were to fill such posts on a part-time basis since they would frequently find themselves adjudicating in cases in which they had previously received instructions. Moreover, although the Dean considered that the introduction of Masters/Registrars might be acceptable in principle, particularly as a means of giving suitable senior counsel judicial experience, he expressed doubts about the availability of senior counsel at present given the extent of their other commitments.'

3.64 Experience in the United States suggests that a Master would be particularly useful in relation to pre-proof recovery of evidence.[1] In this connection there may be noted the Scottish practice of appointing a commissioner where the recovery of documents is likely to be difficult or contentious.[2] In the Court of Session the Lord Ordinary selects and appoints a member of the Bar of appropriate experience. (For example, in one case,[3] where the issues were complicated, the commissioner appointed was a very senior silk.) It may be argued that this procedure, where the commissioner may

---

[1]"There is one area at least where reference of pretrial matters to a master can and should be used with great advantage to both the court and the litigants. This is in the pretrial discovery phase in the special 'big cases' where, because of the size and extent of documents and testimony to be examined, the court is unable to dispose of the discovery aspects with the necessary dispatch." (Irving R Kaufman, *Masters in the Federal Courts: Rule 53* 1958 Columbia Law Review, p 452). A more recent discussion is: Linda Silberman, *Judicial Adjuncts Revisited; Masters and Magistrates in the Federal Courts of the United States in International Perspectives in Civil Justice*, Sweet and Maxwell, London 1990.

[2]In terms of, in the Court of Session, RC 95 and in the Sheriff Court Ordinary Cause Procedure, OCR 78(3). See also Macphail, *Sheriff Court Practice*, paras 15-71 to 15-78.

[3]*Santa Fe International Corporation v Napier Shipping* SA 1985 SLT 430. (Mr J T Cameron QC; now Lord Coulsfield, was appointed as Commissioner).

be a senior silk or other suitably qualified person, works well and throws doubt on the need for the creation in Scotland of a Master post. That argument overlooks, however, the intention that the postholder should be available for all interlocutory and similar matters and would be well informed on all the issues in the developing litigation.

3.65 We accept that a number of practical matters[1] would need to be considered if the possible creation of a Scottish equivalent of a Master was to be considered further. However we do think that such further consideration would be worthwhile. Our main reasons for saying so are the following. First, the intention would be that the Master should be readily available on reasonable advance notice. (Contrast, in this respect, a nominated Court of Session judge who might be on criminal circuit when required.) Second, most interlocutory matters in a selected cause would come before the same judicial officer[2] (and not different judges with no knowledge of the particular circumstances of the case and perhaps a different approach). Third, more might be achieved in the preparation of cases for proof, particularly at pre-proof hearings, in the slightly more informal atmosphere of appearance before a Master as opposed to appearance in court before a Lord Ordinary. These reasons would be applicable in multi-party actions and in other complex litigation and if this suggestion is to be considered further, we think that consideration should not be confined to multi-party litigation.[3]

---

[1]some of which were discussed in the paragraphs of the Maxwell Report, quoted in para 3.63 above. We do not think that the perceived problems are insuperable.

[2]In describing the post as a "judicial officer" we do not imply that the post might be held by a member of the Scottish court service. Although senior members of that service have considerable experience the post requires, in our view, an experienced practising advocate (or solicitor).

[3]The Dundee University research appears to confirm that there are in Scotland relatively few multi-party actions which would justify special procedures or practices. We very much doubt whether a part-time appointment would be satisfactory.

3.66 We do not think it would be feasible for such a post to be created in the sheriff court.

We suggest that:

Further consideration be given to the establishment in the Court of Session of the post of a judicial officer who might be assigned by the Lord President to deal with all procedural (interlocutory) matters which might arise in a particular multi-party litigation.

(Suggestion 14).

PART 4: LEGAL AID

4.1 In this Part we consider changes which might be made in civil legal aid[1] for multi-party actions. There are broad similarities between the legal aid arrangements in Scotland and in England and Wales and we refer in particular to the Legal Aid Board's Arrangements for representation under contracts in multi-party actions[2].

An Overview of Legal Aid for Multi-Party Actions

4.2 The legal aid code has been steadily refined, extended and improved[3] since its introduction under the Legal Aid (Scotland) Act 1949. As the cost of legal aid has risen there has been increasing emphasis on the need to ensure that the legal services provided, in return for the public money spent on them, represent good value. In the interests of economy and efficiency there has been increasing supervision of the nature and, particularly, the quality, of the legal aid provided. The setting up of the Legal Aid Boards[4] has been an important stage in this development. It appears that the Boards are not merely seen as the agencies through which public funds are made available to lawyers and abuses of the system prevented. Recent statements by the Chairman of the Scottish Legal Aid Board and the Chairman of the Legal Aid Board indicate the present approach. "Quality of service ... is of paramount importance. In order to achieve

---

[1]Ie legal aid for civil proceedings.

[2]Para 4.8 below and Annexe F.

[3]To adopt Stoddart's words (para 11-28 of *Legal Aid in Scotland*). Annexe E (p 115 below) provides an outline of legal aid in Scotland as a background to the discussion in this Part.

[4]The Scottish Legal Aid Board under the Legal Aid (Scotland) Act 1986 ("the 1986 Act") and the (English) Legal Aid Board under the Legal Aid Act 1988 ("the 1988 Act).

this, the [Scottish Legal Aid] Board has to be aware of, and react to, the needs expressed by the profession and the public and also to be proactive in terms of making its own proposals for improvements to the legal aid system in Scotland"[1]. "As a major purchaser of legal services on behalf of the tax payer and for the benefit of the consumer, the [English] Legal Aid Board is seeking to ensure that the legal advice and assistance given within the Legal Aid Scheme is of assured quality, and gives value for money."[2]

4.3 This approach is significant for multi-party actions for two reasons. First, multi-party actions are complex and therefore expensive. There is likely to be a desire for detailed analysis of this expenditure and closer supervision of what is done in the conduct of such litigation than in other litigation. Second, there are legal aid problems which are peculiar to multi-party actions. These problems arise from the need to reconcile the traditional pattern of legal aid[3] with the needs of group or multi-party actions[4]. Examples of this are the English Opren litigation and the impact of the statutory charge on the legally-aided test case plaintiffs in that case[5]; and the need to share the costs of generic research[6] in drugs cases.

---

[1]Mrs Christine Davis, Chairman of the Scottish Legal Aid Board ("SLAB"), SLAB Annual Report 1991/92.

[2]John Pitts, Chairman of (English) Legal Aid Board ("LAB") in Foreword to "Transaction Criteria" [for franchising], by Sherr, Moorhead and Paterson, HMSO 1992.

[3]In which each litigant is granted legal aid to run an action separately from other litigants and other actions.

[4]For example, where "generic evidence" is obtained on behalf of all the litigants, they should all contribute to the cost.

[5]See para 4.6 p 71, footnote 4 below.

[6]Ie research into matters common to all the cases.

4.4 There are no statutory provisions[1] expressly regulating legal aid for multi-party actions.[2] This absence raises the question of whether there should be, in order to ensure that there are adequate and clear arrangements[3] for coping with legal aid problems in such litigation.[4] It may be that the ingenuity of the Scottish Legal Aid Board,[5] Scottish Legal Aid Board staff and Scottish solicitors enables problems to be dealt with adequately, without express provision. A further consideration would be whether there are sufficient multi-party actions in Scotland to justify the drafting of what may need to be complicated provisions.[6] Another possibility which those responsible for legal

---

[1]In the Legal Aid (Scotland) Act 1986 or the subordinate legislation applying to Advice and Assistance and to Civil Legal Aid: Appendices B, C and D of the Scottish Legal Aid Handbook, published by SLAB.

[2]However s 31(8) of the 1986 Act could be invoked if it was decided to make arrangements on the lines suggested by the Scottish Home and Health Department in its 1986 paper. (Reproduced in Annexe G to this Report).

[3]For this reason lawyers in England involved in multi-party actions welcomed the Regulations enabling representation under contracts. "It will make the rules transparent so that people will know where they stand." Mr Mark Mildred of Pannone Napier quoted in Solicitors Journal for 27 March 1992.

[4]Some solicitors, particularly in Edinburgh, are acquiring considerable expertise in the management of multi-party litigation but it does not seem desirable that there should be this concentration of expertise. It cannot be assumed in any event that the same solicitors will be instructed for all multi-party litigation.

[5]"Progress has been made in regard to multi-party actions, with a transitional agreement being reached between the three UK legal aid jurisdictions in respect of cost sharing of generic research in the cases relating to the benzodiazepines and Myodil dye litigation. Agreement has also been reached with the Scottish solicitors' groups dealing with these actions. The Board welcomed invitations to participate in a research study being commissioned by the Scottish Office on the topic of multi-party actions, and also in a review on the subject by the Scottish Law Commission." Statement by Chairman of SLAB, SLAB Annual Report 1991/92.

[6]In either statutory or non-statutory material (compare the LAB's (non-statutory) Arrangements and Notes for Guidance).

aid in Scotland might wish to consider is the introduction of "representation under contracts".[1]

4.5 The precise changes to be made will depend on the general policies which might be adopted with regard to the provision of civil legal aid in Scotland.[2] Possible changes may be controversial.[3] We therefore confine ourselves to discussing some difficulties and a range of possible solutions, taking account of what has been done in England and Wales, without expressing a preference for particular changes.

Legal Aid in England and Wales

4.6 Following the Opren case[4] and the discussion about it, the Lord

---

[1]This has been available in England and Wales from 1 April 1992 in multi-party actions (ie where there are 10 or more cases) which include a claim in respect of personal injuries. See further paras 4.6 to 4.10 below and Annexe F (p 123 below).

[2]Eg taking account of the consultation on Eligibility for Civil Legal Aid in Scotland; consultation paper issued by Scottish Office Home and Health Department in July 1991.

[3]Eg some misgivings were expressed in England and Wales when LAB's initial report to the Lord Chancellor on representation under contracts was published in September 1991. The proposals then made required competitive tendering and it was argued that "this would lead to a monopoly of just a few firms". (Mr John Curle of LAB quoted in Solicitors Journal for 27 March 1992.) Similar misgivings about reduction of consumer choice (particularly in rural areas) could be expected to be expressed in Scotland, particularly if it was to be proposed that "franchising" (at present being introduced by LAB) should be introduced in Scotland.

[4]*Davies v Eli Lilly & Co Ltd* [1987] 1 WLR 1136 (CA). In this litigation arrangements were made for "lead actions" to be selected which raised common issues and for these actions to be heard first thus settling those issues for the benefit of all the litigants. The costs of these lead actions were likely to be considerable; estimates were from £3m to £6m. The solicitors for the claimants therefore decided to choose as their plaintiffs for the lead actions claimants who would be eligible for legal aid with a nil contribution. It was hoped that this would mean that the whole cost of the lead actions "could be transferred to the broad shoulders of the State in the form of the legal aid fund" (Sir John Donaldson MR at pp 1139-1140.) It also meant, however, that if the lead actions were successful, the defenders would pay the plaintiffs' taxed costs and damages to the legal aid fund, which would use the damages to meet the other costs incurred in fighting the plaintiffs' cases; and since these costs were likely to be high the lead case

Chancellor introduced provisions into the Legal Aid Bill[1] to cope with the legal aid problems of multi-party actions.[2] In particular, the Legal Aid Board ("LAB") were enabled to enter into contracts with solicitors to provide legal aid in classes of cases prescribed in regulations and in these cases the legal aid certificate would be limited to the use of a particular solicitor.[3] In July 1988 the Lord Chancellor asked LAB to consider how representation under contracts might work "in respect of multi-party actions in which there are particular issues common to all cases involved and no likelihood of a conflict of interest".[4] The LAB decided to concentrate on the legal aid aspects of cases involving victims of disasters or allegedly defective medicines and not to consider cases involving large groups of tenants or social security claimants.[5]

4.7 After public consultation, the LAB made an interim Report to the Lord Chancellor's Department ("LCD") in February 1990. The LCD then asked the LAB to consider whether arrangements other than contractual arrangements might be suitable. The LAB concluded that the proposed arrangements "could only be fully effected in a contractual situation".[6] This was because the Board's right[7] to assign solicitors to assisted persons applied only where the Board

---

plaintiffs would get nothing.

[1]Now the Legal Aid Act 1988.

[2]As mentioned below (para 4.10) the Secretary of State for Scotland announced about the same time that he considered that his regulation-making powers under the Legal Aid (Scotland) Act 1986 were adequate for such regulations as he might wish to make.

[3]See 1988 Act: ss 4(2) and 4(5); and ss 15(5) and 32(2).

[4]LAB Report to Lord Chancellor (1989) Annexe A.

[5]LAB Report (1989) Annexe D, paras 6 and 7.

[6]September 1991 Report para 1.7.

[7]Under s 32(2) of the 1988 Act: "Where the Board limits a grant of representation

limited a grant of representation to representation in pursuance of a contract made by the Board.

4.8 The necessary regulations[1] were made by the Lord Chancellor and came into force on 1 April 1992. It is provided that the power of the Legal Aid Board to secure the provision of representation by means of contracts is to be exercisable in a multi-party action which includes a claim in respect of personal injuries. The regulations are complemented by non-statutory material issued by the Board ie the Multi-Party Action Arrangements[2] 1992 and the Notes for Guidance issued by the Board.[3] These arrangements mean that the legally aided litigant will be obliged to use the solicitors with whom the LAB has a contract. The LAB regards these arrangements as enabling it to ensure that only suitable firms carry out the contracted work and that the work is managed in an effective and co-ordinated way.[4]

4.9 These LAB arrangements for representation under contracts are to be distinguished from contractual arrangements as part of franchising. The franchising proposals made by the LAB involve a system under which solicitors, in exchange for meeting certain efficiency and other criteria, would be given a franchise to do legal aid work (either advice and assistance - "green form work" -

---

under Part IV to representation in pursuance of a contract made by the Board, it may, as it thinks fit, assign to the legally assisted person one or more legal representatives or direct that he may only select a legal representative from among those with whom such a contract subsists."

[1]The Civil Legal Aid (General) Amendment Regulations 1992 (SI 1992 No 590).

[2]In this Report "Arrangements" means this non-statutory paper issued by the English Board.

[3]Further information is given in Annexe F.

[4]"Enabling Multi-Party Actions" by John Curle of the LAB Policy and Secretariat Department, Law Society's Gazette, 24 June 1992.

or civil legal aid). In return the franchised firms might be entitled to an improved system of payments (eg monthly) and more administrative responsibility (eg delegation of some powers such as the granting of green form extensions).[1] One distinction between the Arrangements and franchising is that the former applies only to a particular action or group of actions and is invoked by the LAB after legal aid has been granted in the normal way in at least 10 actions. Neither the multi-party action Arrangements nor franchising involve tendering by solicitors to provide legal services for fees different from those generally applicable.[2]

Legal Aid in Scotland

4.10 Discussions about the (English) Legal Aid Bill prompted the Secretary of State for Scotland to consider whether his powers under the Legal Aid (Scotland) Act 1986 were adequate to enable him to make appropriate provision for multi-party actions by Regulations made under the 1986 Act. He considered that they were[3] and that regulations would be needed only if the Scottish Legal Aid Board made a solicitor available, under section 31(8) of the 1986 Act, for a multi-party action.[4] The Board has not invoked section 31(8).

---

[1]The most recent papers by LAB are: "Franchising: The Next Steps", October 1992; and Transaction Criteria" by Avrom Short, Richard Moorhead and Alan Paterson, HMSO, 1992.

[2]See in this connection the Lord Chancellor's remarks at the (English) Law Society's Conference in October 1992: "I want to see firms entering into long-term contracts with the Legal Aid Board to undertake blocks of cases, both civil and criminal. This could be done following competitive tendering and would, of course, be against defined quality standards".

[3]Parliamentary Question and Answer by Lord James Douglas-Hamilton, 25 May 1988, Commons Hansard, Vol 134 Written Answers, Col 192.

[4]Scottish Home and Health Department letter of June 1988, circulating a paper discussing in detail what the regulations might cover. (A copy of this letter and the paper are at Annexe G, p 132.)

4.11 Since June 1988 legal aid has been granted for a number of multi-party actions such as the tranquilliser drug litigation.[1] In such litigation it is common for litigants to co-operate by their solicitors forming a group with a Steering Committee.[2] The Group's main functions are to obtain the necessary generic evidence to support the separate applications for civil legal aid. Once legal aid has been granted the Group takes the claims forward by litigation (and concurrent negotiations for a settlement) possibly on the basis of a leading action or test case. The expenses of the group are met by successive levies on each of the group members. For the purposes of advice and assistance SLAB treats the levy as an outlay incurred by each solicitor. SLAB's prior authority must be obtained for an increase in the authorised expenditure limit[3]. This need to obtain SLAB's authority enables SLAB to insist that all legally aided claimants should join the group. Once civil legal aid has been granted SLAB, for administrative purposes, treats one legally aided case as the lead certificate. Group expenses are paid out by that litigant's solicitor who is then reimbursed by the other legally aided litigants whose payments are treated by SLAB as akin to payments to experts. There is some artificiality in these arrangements but so far as they have been tested to date[4], they have worked relatively satisfactorily. However, potential problems have raised the question of whether existing arrangements can cope. If the present arrangements are left broadly unaltered, should SLAB's powers be increased? More radically, should the present arrangements be superseded by a comprehensive scheme? In particular (a) by

---

[1]See para 2.4 above.

[2]See paras 2.23 and 2.24 above.

[3]1986 Act s 10.

[4]Our understanding is that none of the recent large multi-party actions has yet been finally disposed of after a hearing on the merits. In the drugs cases this is partly because the Scottish actions are sisted pending the parallel English litigation against the same defenders.

a scheme on the lines suggested by SHHD in 1986,[1] or (b) by representation under contracts on the basis now introduced by LAB in England and Wales[2]?

Problems with legal aid in Scottish multi-party actions

4.12 We have already mentioned[3] the rather artificial arrangements for settlement of the expenses of a Solicitors' Group. Some other problems, or possible problems, should be mentioned.

Non-recognition in Scottish legal aid legislation of a group of claimants or litigants

4.13 The device of "payments to experts" is needed partly because the Scottish legal aid legislation does not expressly recognise the group of solicitors engaged in the multi-party litigation. In this respect the English representation under contracts arrangements may be contrasted: the group is recognised and the LAB can choose the most suitable firm of solicitors to undertake the generic work.

The importance in Scotland of advice and assistance

4.14 The statutory criteria for the grant of civil legal aid by LAB and by SLAB are significantly different.[4] The result is that civil legal aid to raise an action is granted later in Scotland than in England and Wales. In Scotland difficult questions as to proof of negligence, and the obtaining of evidence to support claims, may arise while the client is in receipt of advice and assistance and may

---

[1]Para 4.10 footnote 4 above and Annexe G.

[2]Para 4.8 above and Annexe F below.

[3]In the preceding para 4.11.

[4]LAB: 1988 Act s 15(2) and (3); SLAB: 1986 Act s 14(1). See further para 4.26 to 4.28 below.

lead to the need to apply for increases in authorised expenditure. This may be inconvenient and time-consuming for parties' solicitors, particularly if limitation time limits are approaching. On the other hand, it provides SLAB with a useful opportunity to keep itself informed of the progress of the solicitors' work.

No SLAB power to grant a "limited" civil legal aid certificate

4.15 In the past SLAB has granted limited certificates for the purpose of making special inquiries (or to seek counsel's opinion). The Board no longer grants limited certificates for this work but advice and assistance is available.[1] The only purpose for which limited certificates are now granted is for representation at an inquiry under the Fatal Accident and Sudden Deaths Inquiry (Scotland) Act 1976. The fatal accidents inquiry is commonly a prelude to civil litigation (eg for damages) and if the litigation is legally-aided the practice is to lift the limitation on the legal aid certificate.

4.16 It may be thought that SLAB should be able to grant a limited certificate in other circumstances eg for the purpose of making special inquiries.

Legal aid applicant with a joint interest etc with other persons

4.17 This is dealt with in Regulation 16 of the Civil Legal Aid (Scotland) Regulations 1987[2] which reads:

> "Where it appears to the Board that a person making application for legal aid is jointly concerned with or has the same interest in the matter in connection with which the application is made as other persons, whether receiving legal aid or not, the Board shall not grant legal aid if it is satisfied that -

---

[1]See generally Stoddart at para 11-12 onwards.

[2]SI 1987 No 381. Scottish Legal Aid Handbook at p D 13 and 14.

(a) the person making the application would not be seriously prejudiced in his own right if legal aid were not granted; or

(b) it would be reasonable and proper for the other persons concerned with or having the same interest in the matter as the applicant to defray so much of the expenses as would be payable from the Fund in respect of the proceedings if legal aid was granted."

4.18 Stoddart[1] gives instances of where the Regulation would or would not apply.

> "So, for example, where a number of persons consult a solicitor about a common matter, such as flooding to a row of houses, legal aid might not be granted to all applicants unless neither of these conditions could be invoked. But where a number of persons could have a claim for damages, eg arising from a common calamity, and each individual has his own distinct claim, these provisions would not apply as the interests of the parties, while similar, are not 'the same'."

4.19 This Regulation provokes some questions. First, when is an applicant caught by the "joint concern/same interest" verbal formula? This may raise questions of the interpretation of the wording of the Regulation. Second, in what circumstances would a person be "seriously prejudiced" if legal aid was not granted? This may raise factual questions as to whether some other remedy is available or whether, in any event, the case is likely to succeed. Third, in what circumstances would it be "reasonable and proper" for other persons to share in meeting expenses (ie legal fees and outlays) which would otherwise be payable from the Legal Aid Fund? If a case such as McColl[2] arose today, could it be successfully argued that it would be "reasonable and proper" to expect the pursuer to recover from those having "the same interest" as her? Would such persons be all those in receipt of a public water supply in Strathclyde? If so, the

---

[1]Para 9-22.

[2]*McColl v Strathclyde Regional Council* 1983 SLT 616 (see para 2.7 above).

recovery of a proportionate amount from each of them might be impossible. Also, would people with low means be exempt since it would not be "reasonable" to recover from them?

The incidence of the statutory charge on a legally aided pursuer in a leading action or test case

4.20 Where one case is selected to be a test case and the other cases are sisted, the legally aided pursuer in the test case will bear the whole of the statutory charge.[1] There is no provision in legal aid legislation recognising that the one case is being used to create a precedent and therefore expressly enabling the costs of the case borne by the test case pursuer to be shared among all the legally aided claimants. Where some of the claimants are not in receipt of legal aid the position is more complicated. It is customary for all the claimants to agree to share the costs of the litigation but this will not prevent a late claimant attempting to be a "free rider" with no contribution towards the costs.[2]

SLAB funding of the cost of obtaining generic evidence for the purpose of litigation in Scotland and in another UK law district

4.21 There may be legally aided litigation in each of the three UK jurisdictions: for example, reparation/tort claims in respect of defective drugs. The Scottish cases may be sisted to await the decisions in the parallel English cases.[3] Contributions may be sought from the Scottish legally aided claimants towards the cost of the obtaining in England of evidence on generic issues for

---

[1]As in the English Opren case; para 4.6 p 65 footnote 4 above.

[2]In addition to the "late joiner" problem there is the "early leaver" problem: the litigant who settles his action and drops out without a due contribution to generic costs.

[3]Or *vice versa*: the English case might be stayed.

use, in the first instance, in the English cases. If necessary, the evidence will be used in the Scottish cases. Various questions arise: On what basis is the expenditure to be shared? Who liaises with those making the evidence available? Who owns the evidence, eg reports from medical experts?

4.22 To cope with some of the problems in the litigation by the Benzodiazepine and Myodil groups[1] a legal aid costs sharing agreement has been entered into among the SLAB, the LAB and the Northern Ireland Board.[2] Under the agreement the generic evidence (and any relevant opinions of counsel and pleadings obtained by the groups) will be mutually available and the cost of this shared information will be apportioned on a *pro rata* basis among all the litigants in the three jurisdictions and paid for on a *pro rata* basis out of the three legal aid funds. Non legally aided claimants are also expected to contribute.

Possible changes in the provision of legal aid

Introduction

4.23 Our terms of reference[3] asks us "to make recommendations for possible improvements other than those which would require to be implemented by Act of Parliament". The exclusion of changes in the 1986 Act reflects the fact that changes in legal aid primary legislation are likely to be more complex and controversial than other changes (eg in legal aid regulations or in administrative practices of SLAB) and accordingly are likely to require fuller consideration, including possibly formal public consultation. Also it is uncertain whether and

---

[1]See para 3.22 above.

[2]SLAB Annual Report 1991/92, Chairman's Statement. Quoted above: para 4.4, footnote 5.

[3]Annexe C.

when there would be an opportunity for the introduction of the necessary amending legislation. Nevertheless, while this report does not make firm recommendations on changes to legal aid, it may be difficult to draw a clear distinction between possible changes which would require primary legislation and those which could be implemented by regulations (secondary legislation). The following discussion does not imply a considered view that none of the possibilities mentioned in it would require primary legislation.

The aims of improvements

4.24 The principal aim of improvements should be, we think, to clarify and remove doubts about the circumstances in which, and the means by which, legal aid is available in multi-party actions.[1] A further aim would be to secure value for money for SLAB and hence for the taxpayer.[2]

Should changes apply in all legally aided cases or only in multi-party actions?

4.25 It is possible that improvements might be made which would apply in all actions but be of particular benefit in coping with the problems which have arisen in multi-party actions. We therefore now discuss some possible changes which might be made in all cases[3] and others which would be applicable only in multi-party actions.[4] Changes restricted to multi-party actions would require, of course, a statement or definition of the actions to which the changes

---

[1]And, if necessary, issues relating to contributions, recoveries, the statutory charge and any other relevant matters.

[2]Discussion of value for money sometimes refers to the legal aid stakeholders: "the applicant (or assisted person), the legal adviser, the court and the Government (the taxpayer)". (LAB Chairman's Preface to Legal Aid Handbook 1992.)

[3]Paras 4.26 to 4.35 below.

[4]Paras 4.43 to 4.45 below.

applied.[1] In considering possible changes which might affect all legally aided cases, there is a distinction to be made between (a) mandatory changes which would apply "automatically" to all cases, eg a change in the *probabilis causa* requirement and (b) discretionary changes which would give SLAB new powers available in all cases, although in practice likely to be exercised only in multi-party actions.

A. Possible changes applicable in all cases

Should SLAB be enabled to grant civil legal aid earlier?

4.26 If civil legal aid was granted earlier this might avoid some of the problems which have arisen by enabling solicitors to deal with more matters under civil legal aid. In terms of the Scottish legislation SLAB has to be satisfied that the applicant has a *probabilis causa litigandi* and it has to appear to SLAB that it is reasonable that the applicant should receive legal aid.[2] However the LAB has to be satisfied only that the applicant has "reasonable grounds for taking, defending or being a party to the proceedings".[3]

4.27 On one view if the Scottish claimant gets civil legal aid later than the English claimant does he may be in a worse position to pursue his (or her) claim.[4] That may be regarded as a reason for relaxing the Scottish criteria for

---

[1]Para 4.37 to 4.42 below.

[2] 1986 Act, s 14(1). The earlier statutory criteria did not require SLAB to be satisfied about reasonableness but allowed legal aid to be refused where it appeared unreasonable that the applicant should receive it in the particular circumstances of the case (Legal Aid (Scotland) Act 1967, s 1(6)). Reasonableness is now one of the two tests of whether to grant, rather than a reason for refusing; the applicant would appear to have a higher hurdle now to overcome.

[3]1988 Act, s 15(7).

[4]However the expenditure limits on advice and assistance provide SLAB with greater financial control ie need for solicitors to seek authorisation of further expenditure.

granting civil legal aid. Also, the proposed changes in sheriff court Ordinary Cause Rules[1] may have the effect that the solicitor must be ready to go to proof before he raises the action. More work may therefore have to be done while the client is on advice and assistance. Solicitors might consider it desirable for this work to be regarded as part of the litigation and therefore covered by civil legal aid.[2]

4.28 If it was decided that legal aid should be granted earlier, this might be done by altering the requirements of section 14(1)[3] or by enabling SLAB to grant a limited certificate[4] to, for example, carry out inquiries as to whether the claimant has a case which would satisfy the requirements of section 14(1). If it was thought that section 14(1) should be amended this would of course require a suitable legislative vehicle.[5]

Should SLAB's power to grant a limited certificate be clarified or extended?

4.29 We noted earlier[6] that, in practice, limited legal aid certificates are granted only for representation at a Fatal Accident Inquiry (FAI). It might be thought desirable (a) that SLAB should have a statutory power to issue limited

---

[1]Likely to be made later in 1993, following the Sheriff Court Rules Councils 1990 Consultation. See para 3.3 footnote 2 above.

[2]On the other hand, it may be considered that SLAB's administrative procedures in connection with advice and assistance are simpler than those for civil legal aid and give SLAB more influence over the steps taken by the claimant's solicitor.

[3]Eg substituting a "reasonable grounds" requirement for the present "*probabilis causa*" test.

[4]See further Stoddart, para 7-20.

[5]And is in any event outwith our terms of reference (Annexe C). See para 4.23 above.

[6]Para 4.15 above.

certificates and (b) that this power should be available to enable civil legal aid to be granted earlier than at present.[1]

Should the statutory power to prescribe "distinct proceedings" (civil legal aid) and "distinct matters" (advice and assistance) be used to enable SLAB to grant legal aid for part only of the work involved in formulating or pursuing a claim?

4.30 Regulations may be made by the Secretary of State[2] which "make provision as to the proceedings which are or are not to be treated as distinct proceedings for the purposes of legal aid, and as to the matters which are or are not to be treated as distinct matters for the purposes of advice and assistance". (A separate legal aid application is required for each "distinct proceeding".[3]) This power appears not to have been exercised so far as advice and assistance is concerned. In connection with civil legal aid, Regulations[4] set out the proceedings to be treated as distinct proceedings. In the sheriff court and the Court of Session, the whole of proceedings at first instance, including any remit to the other court, are treated as distinct proceedings.

4.31 It might be considered appropriate to split the existing "distinct proceedings" into separate proceedings. This would provide SLAB with an opportunity to reconsider whether it remained appropriate for legal aid to be

---

[1]It would be for consideration whether it might be *intra vires* of the Regulation-making power in section 36 of the 1986 Act; in particular the power to modify the Act (section 36(2)(h)) in one of the "special circumstances" mentioned in subsection (3), eg applicant having the same interest as others (section 36(3)(c)).

[2]In terms of s 36(2)(c) of the 1986 Act.

[3]Stoddart, para 7-20.

[4]Civil Legal Aid (Scotland) Regulations 1987, Regulation 4. Scottish Legal Aid Handbook p D6.

available.[1] The client would however be put to the expense, and trouble, of re-applying for legal aid. A further disadvantage might be that the statutory charge[2] would operate only with regard to each distinct stage.[3]

Should SLAB's powers to attach conditions to a grant of civil legal aid be extended?

4.32 The Board has a general power to attach conditions as to the conduct of the case. For example, assuming the Board was satisfied that legal aid should be granted to an applicant, it might nonetheless impose a condition that the action should not proceed subsequent to a particular point (*eg* raising the action, or closing the record) without further reference to it. This method of "secondary control" is a novelty in legal aid legislation, and its implications are still being worked out."[4]

4.33 SLAB can presumably competently attach conditions under section 14(2) at any time and can discontinue civil legal aid whenever it considers, in its discretion, that it is no longer reasonable for the person to continue to receive

---

[1]An alternative way of achieving that result might be for SLAB to attach conditions under section 14(2) of the 1986 Act.

[2]1986 Act s 17(2B), inserted by the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, Schedule 8, para 36(6).

[3]Compare the situation where legal aid is granted for an FAI and, separately, for the subsequent reparation action. The findings in the FAI may be relied on in the reparation action but the statutory charge in the action extends to the action only and cannot take account of the legal aid expenditure for the FAI.

[4]Stoddart, para 11-21. He gives no statutory authority for this statement but is presumably relying on section 14(2) of the 1986 Act. This reads: "(2) The Board may require a person receiving civil legal aid to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive civil legal aid."

it.[1] The reference to "reasonableness" in section 14(2) in effect makes reasonableness a continuous condition, ie initially on granting (section 14(1)(b)) and thereafter (section 14(2)). The scope of section 14(2) is not entirely clear. For example, could it be used to impose a condition that certain expenditure (say beyond a certain financial limit or involving "unusual expenditure") either needs the Board's prior consent or may lead to a withdrawal of legal aid? The provision recently included in the Civil Legal Aid (Scotland) Regulations[2] of an express requirement for the Board's prior approval of unusual work or unusually large expenditure suggests that the imposition of conditions of this sort might be outwith the scope of the Board's powers under section 14(2). If SLAB wished to rely more on section 14(2) for "secondary control" (in Stoddart's phrase) of multi-party actions, it might be necessary to clarify the Board's powers under this provision.

Should SLAB's powers to require prior approval (of particular steps or certain expenditure) be enlarged?

4.34 Stoddart suggests[3] that SLAB could require the Board's approval to be obtained before the action proceeded beyond a certain point. A similar result has been achieved by the recent amendment[4] to the Civil Legal Aid (Scotland) Regulations which expressly requires SLAB's prior approval "for work of an unusual nature or likely to involve unusually large expenditure". The terms of the paragraph raise questions as to what is the norm against which abnormality

---

[1]See in this connection: Scottish Legal Aid Handbook, Commentary, para 2.26.

[2]New paragraph (e) inserted into Regulation 21(1) by SI 1992 No 753 (effective 3 April 1992), Scottish Legal Aid Handbook p D 5 and PH Book, p G 532. For the interpretation of this requirement see: *Venter v Scottish Legal Aid Board* 1993 SLT 147; 1993 SCLR 88 (Commentary by Sheriff Stoddart).

[3]Para 11-21.

[4]Mentioned in the preceding para 4.33. See footnote 2 above.

is to be measured. In particular, intended expenditure in a multi-party action (eg reparation for defective drugs) might not be unusual in litigation of such complexity but abnormal for other reparation actions where a similar medical condition had been caused by alleged negligence.

4.35 The recent case of *Venter*[1] illustrates that if SLAB are to seek a greater control of expenditure this will inevitably entail taking a view on the prudence or necessity of particular aspects of the conduct of the litigation by the assisted person's lawyers. This will increase the importance of the Board having all relevant information before it. The Board's difficulties may be exacerbated if the circumstances in which the Board's "secondary control" can competently be exercised are not set out clearly in the relevant legislation and, ideally, in terms which are clear to solicitors and unlikely to make the Board vulnerable to suggestions that its discretion has been exercised improperly. With this in mind it may be that Regulation 21(1)(e) should be amended; perhaps to include a non-exhaustive list of matters where prior Board approval was needed. Alternatively this information could be provided by SLAB informally, eg in the Legal Aid Recorder.

B. Possible changes applicable only in multi-party actions

4.36 We now consider changes in legal aid which might apply only to multi-party actions.[2] Changes might be piecemeal or might take the form of a complete scheme. This makes it necessary to distinguish, for legal aid purposes, multi-party actions from other actions.

---

[1]Para 4.33, footnote 2.

[2]Of course the changes already discussed for all actions might be restricted to multi-party actions only.

To what actions might the changes apply?

4.37 We mentioned earlier[1] descriptions in other jurisdictions of claims which are grouped, for the purpose of civil procedures[2] or legal aid. The elements of these descriptions include:

(a) the existence of questions of law or fact which are common to the class or group of claimants;[3]

(b) a requirement that these common issues are more important than, or predominate over, issues affecting only individuals;

(c) a requirement that a stipulated minimum number of claimants have claims against the same person or that the claims arise out of the same cause or event;

(d) the conferment of discretion on the court or another body to decide whether particular claims qualify for the court procedure or a special legal aid scheme;[4]

(e) such a discretion may be exercisable with reference to subjective criteria eg that separate actions would have a significant

---

[1]Paras 2.28 to 2.32 above.

[2]See our discussion of a possible definition of Multi-Party Actions for the purposes of the Rules of the Court of Session (para 3.26 above).

[3]The class or group would also need to be defined eg as being those with a claim against the same person or arising out of the same cause or event.

[4]Presumably there would be separate decisions as to whether a particular court or procedure (if there was one for Scottish multi-party actions) or a special legal aid scheme should apply. However it would be possible to provide that a court's decision as to the applicability of the court procedure influenced in part or determined the application of the legal aid scheme.

disadvantage (eg "create a risk of ... inconsistent or varying adjudications with respect to individual members of the class."[1])

4.38 Further elements which might be incorporated in a qualifying description are:

(f) a description of the actions by reference to their type eg personal injury claims;

(g) a description of the claims by reference to the amount claimed either in each action or in the actions as aggregated.[2]

4.39 For example, the elements used for the purpose of the Legal Aid Board's Arrangements[3] are (a),(c),(d),(e) and (f) mentioned above ie actions in which 10 or more assisted persons[4] have causes of action which involve common issues of fact or law arising out of the same cause or event; which include a claim in respect of "personal injuries" (which are defined); and which are considered (by

---

[1]US Federal Rule of Civil Procedure 23(b)(1)(A).

[2]Legal aid is not available (Legal Aid (Scotland) Act 1986 Sch 2 Part II, para 3) for small claims which include claims for payments of money not exceeding £750 in amount (Small Claims (Scotland) Order 1988). One of the justifications of this exclusion of claims under £750 is that small claims do not raise complicated questions of law or of fact which make legal representation desirable. However multi-party small claims may be complex. This raises the question of whether some small claims should be eligible for legal aid in certain circumstances eg where the aggregate of the amount of the claims in the various small claims exceeds £750 and/or where SLAB considers that legal aid is appropriate because of the complexity of the issues raised and the importance for other similar claims of obtaining a precedent creating decision from the sheriff. We express no view on this important legal aid policy question.

[3]See Annexe F para 1, p 123 below.

[4]It should be explained that the Arrangements are applied to cases where at least 10 legal aid certificates have already been issued. The Legal Aid Board's multi-party action committee then considers whether the Arrangements should be invoked. See Part III, Procedures prior to Contract, of the LAB Multi-Party Action Arrangements 1992; Legal Aid Handbook 1992 pp 411/413.

the LAB Multi-Party Actions Committee) to involve "significant complexity". Under the Arrangements it is, in the last resort, for the Legal Aid Board to decide, exercising its discretion, whether this special legal aid scheme should apply. The verbal definition usefully enables LAB to pick out those actions in which the Board should consider whether to exercise its discretion. In effect there are two discretionary decisions made: whether legal aid should be granted; and whether the Arrangements should apply to certain legally aided claimants. A decision not to invoke Arrangements does not remove the entitlement to legal aid. Another feature of the Arrangements is that the claimant does not, in the first instance, apply for the Arrangements to be invoked. The Board's Committee decides whether to invoke the procedures; if so, those firms of solicitors which "have submitted *bona fide* written applications for legal aid in the action by such date as the Committee may specify ... will be invited to submit reports detailing their proposals for co-ordinating and progressing the action."[1]

4.40 We think it inappropriate[2] for us to attempt to describe those multi-party actions in which a special legal aid scheme should apply.[3] In any event those preparing such a scheme would no doubt wish to carry out appropriate prior consultation with the Law Society of Scotland and other interested bodies.

4.41 We should however comment on the types of action in which a special scheme might be appropriate. Disaster claims, whether sudden or creeping, are essentially reparation cases involving claims for personal injuries and death.

---

[1]Arrangements para 11.

[2]And premature since the scope of a Scottish MPA legal aid scheme must be related to the nature of the scheme.

[3]A suitable definition would draw, as thought fit, on the elements mentioned in paras 4.37 and 4.38 above.

While a particular disaster may be regarded as exceptional[1] the sequence of North Sea incidents and railway accidents indicates that it should be expected that such disasters will occur from time to time. Similarly, creeping disasters - such as drug cases - can be expected to be repeated over the years, notwithstanding the advance of medical and scientific knowledge. Since the numbers of people treated with each drug runs into thousands, improved and more efficient legal aid arrangements would be well worthwhile.[2]

4.42 A possible problem which we should mention is the identification of those multi-party actions which may fall within the definition. How does the solicitor for a particular claimant know[3] that other similar actions exist and that he should consider whether to seek to obtain for his client the benefit of a special legal aid provision or arrangement? It is clearly unsatisfactory, particularly where cases are likely to be raised in various sheriffdoms, for the matters to be left to the solicitor hearing by word of mouth from colleagues of the existence of the other cases. The Law Society of Scotland, as already mentioned,[4] has taken on the role of co-ordinating the work of solicitors involved in "multiple claims"[5]; in particular putting claimants' solicitors in touch with each other to enable them to consider whether a group should be formed. That group could then ensure that whatever is necessary with regard to legal aid is done either by the group or by the individual solicitors. Another possibility would be for court

---

[1]Eg the Lockerbie disaster of 1988.

[2]However, legal aid is not available where the applicant's claim does not exceed £750. See para 4.38, footnote 2 above.

[3]Whether initially, on applying for legal aid, or later after legal aid has been granted.

[4]Para 2.23 above.

[5]The term used by the Law Society.

staff to identify the actions and to inform parties' solicitors accordingly.[1] A third possibility would be for SLAB to undertake this responsibility on the basis of the information available to it in legal aid applications. We have not investigated in detail how each of these possibilities might work in practice.

Possible piecemeal changes

4.43 We discussed earlier a number of possible changes which might be applicable in all cases[2] or could be applied only to multi-party actions, suitably defined. We should mention here two other possible statutory changes with regard to: the giving of express statutory recognition to solicitors groups; and the sharing of the cost of a multi-party action or the incidence of the statutory charge.

Solicitors Groups

4.44 As noted already[3], there are some artificialities in the present administrative arrangements among SLAB and the solicitors for the various parties who are co-operating in a solicitors' group. However, it is doubtful whether conferring some statutory recognition on such groups would, by itself, remove the difficulties and artificialities which have arisen.

---

[1]This would be an unusual function to entrust to court staff, particularly if the consequences of a failure to identify actions were significant. It is unlikely that the court authorities would be content to accept this task.

[2]Para 4.26 and subsequent paragraphs.

[3]Para 4.11 above.

Changes with regard to the cost of a multi-party action or the incidence of the statutory charge

4.45 The SHHD paper of 1988 suggested[1] that if it was desired to make Regulations with regard to multi-party actions[2] the Regulations would have to prescribe the arrangements for dealing with contributions and recoveries. (The paper said that the general principle was that the costs of the case should be apportioned among all the Assisted Persons but the apportionment might not necessarily be on an equal basis.) There has been, so far as we are aware, no further public discussion since the 1988 paper about this matter and no substantial multi-party litigation has been completed recently in Scotland. The Scottish cases with regard to the Drugs Ativan (a Benzodiazepine) and Myodil are sisted pending the resolution of the similar English cases. The Scottish claimants are contributing regularly to the cost of the obtaining of generic evidence in the English litigation.[3] These administrative arrangements appear to work satisfactorily. Where litigation has been completed the court's order on expenses should regulate satisfactorily the apportionment of the cost of the litigation among all the litigants, whether or not legally aided. It seems doubtful whether Regulations are needed on these matters alone.

C. Comprehensive schemes as an alternative to piecemeal changes

4.46 It may be considered that piecemeal changes of the sort which we have discussed would not make satisfactory provision for legal aid in multi-party

---

[1]Annexe G, Paper para 2.3.

[2]Particularly in exercise of the power in s 31(8) of the Legal Aid (Scotland) Act 1986.

[3]In the Ativan case the Legal Aid Board apportions costs quarterly among the legally aided claimants in the three UK law jurisdictions. The Scottish Legal Aid Board reimburses the solicitors for the Scottish claimants what they pay to the Legal Aid Board.

actions. Accordingly we now discuss the paper[1] circulated by the Scottish Home and Health Department[2] in June 1988 and the representation under contract arrangements[3] made by the Legal Aid Board, which came into operation on 1 April 1992.

SHHD Paper

4.47 We discuss the SHHD paper - and, for ease of reference, reproduce it in Annexe G - because it is the only extended statement on behalf of Scottish Office ministers about what might be needed in Scotland. The paper deals with three matters: the Secretary of State's power to make regulations; what the regulations might have to cover; and where the onus lies in deciding whether to make regulations. The main provisions in the Legal Aid (Scotland) Act 1986 are section 31(8) and (9).[4]

Secretary of State's power to make regulations

4.48 The SHHD paper notes[5] that if the Scottish Legal Aid Board decided to make a solicitor available under section 31(8) of the 1986 Act to provide legal aid or advice and assistance, the Secretary of State was empowered under

---

[1]Reproduced in Annexe G.

[2]Now known as the Scottish Office Home and Health Department.

[3]Further details are given in Annexe F.

[4]S 31(8) reads: "The Board may arrange that, in such circumstances as it may specify, a solicitor shall be available for the purpose of providing legal aid or advice and assistance." S 31(9) of the 1986 Act enables the Secretary of State to provide by regulations that the assisted person's statutory freedom of selection of a laywer under s 31(1), is disapplied, and legal aid or advice and assistance is to be provided only by the solicitor made available by SLAB. ("So far, these provisions have not been used at all, but they are clearly intended as a "long stop" where legal services cannot, for some extraordinary reason, be otherwise provided." (Stoddart, para 3-08).)

[5]SHHD Paper para 1.4.

section 31(9) to make regulations disapplying the provision (section 31(1)) allowing the assisted person to choose which solicitor (and counsel) he wishes to act for him. The paper also noted the general power (under section 36) to make Regulations which it was thought could be used to deal with special circumstances, such as multi-party actions. The paper therefore concluded[1] that no amendment of the 1986 Act was needed.

The possible content of the Regulations

4.49 This is discussed in Part 2 of the SHHD Paper. It was considered that a number of significant changes might have to be made. These included changes with regard to: financial eligibility for legal aid (making legal aid available to persons not otherwise eligible); contributions by assisted persons to the legal aid fund; payments out of property recovered ("the statutory charge" ie recoupment under section 17(2B) of the 1986 Act); and tendering arrangements (enabling SLAB to pay fees different from those payable in other cases). The SHHD Paper refers to the solicitors who would act for assisted parties in multi-party actions as "contracted solicitors".[2] This term implies that part, at least, of the legal relationship between the Scottish Legal Aid Board and the individual solicitor could be the subject of negotiation and contract, rather than be laid down in Regulations. The paper refers to two particular difficulties which Regulations might have to deal with: the sharing of the costs of the case[3]; and the problem of litigants who attempt to take advantage of the legally aided litigation by, for example, applying for legal aid or attempting to raise similar actions after the multi-party action is settled.[4] The SHHD Paper says that

---

[1]SHHD Paper, para 3.1.

[2]SHHD Paper, para 2.6.

[3]SHHD Paper, para 2.3.

[4]SHHD Paper, para 2.8.

specification of the category or class of cases to which the contracting arrangements will apply would be done by Regulations.[1] The Act however says that the Board may specify "the circumstances" in which it makes a solicitor available;[2] the term "circumstances" presumably includes those cases in which the solicitor would be made available. It would therefore appear to be competent (a) for the Board to make a solicitor available to provide legal services in connection with certain multi-party actions and (b) for those actions to be specified by the Board itself, without the need for this to be done in regulations made by the Secretary of State.

On whom does the onus lie in deciding whether Regulations are needed?

4.50 The SHHD Paper concludes that the Secretary of State would need to make regulations[3] only if the Scottish Legal Aid Board decided not to make a solicitor available.[4] Hence the Secretary of State had no immediate plans to make regulations. The Paper implied therefore that the onus was on the Board to decide whether provision needed to be made, by regulations or otherwise, for multi-party actions.

4.51 The SHHD paper records[5] the Department's belief that it is possible, without amending the 1986 Act, to introduce by regulations "essentially the same arrangements for providing legal aid in multi-party actions as proposed by the

---

[1]SHHD Paper, para 2.1. Compare the (English) 1988 Act s 4(5). See para 4.52, footnote 2 below.

[2]1986 Act s 31(8).

[3]under ss 31(9) and 36 of the 1986 Act.

[4]under s 31(8).

[5]Para 1.4.

Lord Chancellor for England and Wales." It may therefore be helpful to note some of the features of the English arrangements.[1]

The Legal Aid Board's Arrangements of 1992

4.52 The present English arrangements originated in the amendments[2] to the Legal Aid Bill moved by the Lord Chancellor at the Report Stage of the Bill in the House of Lords in February 1988. The Lord Chancellor said:

> "What I am now proposing in these amendments is that the board should have the power to enter into contracts with a particular firm or firms of solicitors for them to provide representation in categories of civil proceedings specified in regulations by the Lord Chancellor. The way I see this working is that the board would identify particular groups of cases - possibly all cases relating to a particular action or perhaps a more general category - which could with advantage be dealt with in this way.
>
> Perhaps I may take as the leading example the multi-party action. This could take place because there were particular issues common to all the cases involved and no likelihood of a conflict of interest. Once such a category had been identified in regulations, the board could contract with particular solicitors with a view to their providing representation, and assisted persons with a case coming within the category would be directed to those solicitors. This would involve some restriction necessarily on the freedom of choice of solicitor by individuals involved in those cases, but that is a price that I think must be paid for greater co-ordination of multi-party actions anyway in order to secure the strength of a common representation.
>
> These arrangements could, if the board and the Lord Chancellor thought it appropriate, provide for special arrangements for eligibility and means testing for some or all of the group. Separate provision could also be

---

[1]The Legal Aid Board's Arrangements and Guidance Notes are detailed and should, of course, be read in full for a complete understanding. They, together with the 1988 Act and the 1992 Regulations, are most conveniently found in the Legal Aid Handbook 1992 (Sweet & Maxwell 1992).

[2]Particularly what is now s 4(5) of the Legal Aid Act 1988: "The power to secure the provision of representation under Part IV by means of contracts with other persons shall only be exercisable in the classes of case prescribed in regulations."

made, by means of the power given in Clause 32(2)(f) to enable the statutory charge to be taken from the totality of the money recovered.

It might also be necessary to have a rather different merits test, though it could well be possible to achieve this through guidance on how the existing test is to be applied. It might well be possible, for example, to justify taking an action which had as its purpose recovering perhaps comparatively small amounts of damages for a large number of people when the cost involved for each of them taken separately would not justify proceeding with the action.

These are matters which will have to be considered in the light of whatever court procedures, including class actions if such a procedure is introduced, can appropriately be dealt with in this way. This is a matter I shall invite the board to keep under review."[1]

4.53 In his letter of 29 July 1988 to the Legal Aid Board the Lord Chancellor asked the Board to consider how representation under contracts "might work in respect of multi-party actions in which there are particular issues common to all cases involved and no likelihood of a conflict of interest."[2] The Regulations made in 1992 are limited to a provision[3] that the power of the Legal Aid Board to secure the provision of representation under Part IV of the 1988 Act by means of contracts with other persons is to be exercisable in a multi-party action which includes any claim in respect of personal injuries.

4.54 The relationship between the Legal Aid Board and the solicitor is regulated by: primary legislation (eg the Legal Aid Act 1988 part IV); Regulations (the Civil Legal Aid (General) Regulations 1989, Regulation 152); the non-statutory Arrangements made by the Legal Aid Board (the Legal Aid

---

[1]House of Lords Hansard for 29 February 1988, Col 20.

[2]Annexe A to the Legal Aid Board Report 1989.

[3]Regulation 152 of the Civil Legal Aid (General) Regulations 1989, inserted by the Civil Legal Aid (General) (Amendment) Regulations 1992. (Legal Aid Handbook 1992 p 281.)

Board Multi-Party Action Arrangements 1992, which include "Standard Contracting Provisions" in Part V); and the contract entered into between the Legal Aid Board and a firm or group of firms (which specifies the work to which the contract relates eg only generic work (as defined in para 3 of the Arrangements)). The contracts entered into are to specify the work to which the contract relates and may either: (i) limit representation under the contract to the generic work[1]; (ii) cover all representation in the action; or (iii) cover such representation as may be specified in the contract.[2] The Standard Contracting Provisions, in Part V of the Arrangements, contain provisions dealing with the apportionment of costs.[3] Principles are stated which, subject to any costs sharing order made by the court, will operate as guidance in the apportionment of costs. Generic costs are to be shared among all (legally assisted) claimants regardless of when they joined the action, but "early leavers" (eg those who accept a settlement) are liable only for their share of generic costs.[4] There are no provisions, either in the Regulations or the Arrangements, dealing with the merits test, financial eligibility, means testing, or the statutory charge. The Legal Aid Board's Notes for Guidance emphasise that most contracts will cover generic work only[5] and that the Board's contracting power will be applied only in appropriate cases.[6] Contracting firms are asked to state

---

[1]Defined in the Legal Aid Board's Arrangements 1992 as meaning "representation in respect of the issues common to all claimants or to a particular group of claimants and includes: (i) the selection, preparation and trial of lead issues and lead cases; and (ii) any work determined to be generic work by the Board."

[2]Arrangements para 19.

[3]Arrangements para 53 to 55.

[4]See also the Notes for Guidance, para 16-07 (under the heading "Early leavers").

[5]Notes for Guidance, para 16-02.

[6]Notes for Guidance para 16-03.

in their tender reports how they propose that private clients should contribute to the costs of the action.[1]

Conclusions with regard to a possible comprehensive scheme

4.55 From the discussion in the immediately preceding paragraphs some conclusions may be drawn with regard to a possible Scottish comprehensive scheme. These are:

(a) The types of actions to be covered would be specified by the Scottish Legal Aid Board in exercise of its powers under s 31(8) of the 1986 Act. It appears that this matter would not need to be dealt with in Regulations made by the Secretary of State.

(b) A main aim would be to enable a single solicitor (or firm of solicitors) to act in connection with generic issues. This would be inconsistent with the assisted person's freedom of choice of a solicitor. Hence if the Board invoked section 31(8) to make a solicitor available, it would appear that Regulations would be necessary under section 31(9).

(c) Contrary to earlier suggestions (by the Lord Chancellor and in the SHHD Paper) it appears that a number of matters would not need to be covered in Regulations, which could be kept relatively simple. Other matters might be dealt with in a SLAB counterpart of the LAB'S 1992 Arrangements.

[1]Notes for Guidance, para 16-07 (under the heading "Private Clients").

(d) It is likely that the relationship between SLAB and a Scottish solicitor (or firm of solicitors) would be contractual. This was assumed in the SHHD 1988 Paper although the LAB concluded[1] that non-contractual arrangements could produce the same benefits as contractual arrangements. (The LAB were obliged to adopt contractual arrangements because the terms of the 1988 Act[2] allowed a restriction of the claimant's choice of solicitor only if contractual arrangements had been made.) It seems desirable to define as clearly as possible what the Board expects (or requires) solicitors to do and what service clients can reasonably expect. Such clear definition may be more likely to be achievable where the relationships between the Board and solicitors are expressed in contractual terms.

D. Conclusions with regard to Legal Aid

4.56 We have considered three sets of possible changes in legal aid:

- changes applicable in all cases
- changes of a piecemeal nature, applying only to multi-party actions
- changes by way of a comprehensive scheme applying only to multi-party actions.

4.57 As already indicated, we do not think it appropriate for us to put forward specific recommendations for changes in connection with legal aid. The precise changes which might be made are matters for decision by the Secretary of State for Scotland and the Scottish Legal Aid Board. Before deciding what changes

---

[1]September 1991 Report paras 1.6 and 1.7.

[2]S. 32(2).

should be made the Secretary of State (or the Scottish Office Home and Health Department on his behalf) and the Scottish Legal Aid Board would no doubt wish to carry out consultation with the Law Society of Scotland, the Faculty of Advocates, the Scottish Consumer Council and other interested bodies and individuals. Whether changes should be made will, no doubt, depend on

(a) the overall policy aims adopted for legal aid for civil actions (including the availability of public financial resources);

(b) the assessment of the severity of problems in the provision of legal aid for multi-party actions; and

(c) whether the relatively few multi-party actions in Scotland justify the making of formal changes (such as amendment of legal aid Regulations) for such actions only.

PART 5: SUMMARY OF CONCLUSIONS

I. Court procedures and practices: suggestions

Allocation of Cases (Paragraph 3.5 above)

1. The Court of Session Rules and the Sheriff Court Ordinary Cause Rules need not make express provision with regard to the allocation of cases, where there is contingency.

(Suggestion 1).

Remits (Paragraph 3.6 above)

2. (a) The Sheriff Court Ordinary Cause and Summary Cause Rules should be amended to state expressly that contingency (defined in the Rules) is a ground on which cases may be remitted from one sheriff court to another and

   (b) Consideration should be given to whether the Court of Session should have a power to order a sheriff court case to be transferred to the Court of Session where the importance and difficulty of the case justify the remit (and whether or not there is contingency).

(Suggestion 2).

Conjunction (Paragraph 3.7 above)

3. The Court of Session Rules and the Sheriff Court Ordinary Cause Rules should be amended to provide expressly for conjunction where there is contingency; the Rules should define contingency and provide an opportunity for parties to be heard on the proposal to conjoin.

(Suggestion 3).

Leading Action or "test case" (Paragraphs 3.8 to 3.11 above)

4. No amendment should be made to Court of Session Rule 91(6) but a counterpart rule should be added to the Sheriff Court Ordinary Cause Rules.

(Suggestion 4).

Master Pleadings (Paragraphs 3.12 to 3.16 above)

5. There should be a rule in the Court of Session and the Ordinary Cause Rules which makes express provision for reliance by a number of parties on a single master summons or defences. To suit the various circumstances of multi-party actions the rule should be discretionary, and flexible as to time limits.

(Suggestion 5).

Split Hearings (Paragraphs 3.17 and 3.18 above)

6. Amendments should be made to clarify and extend the scope of the Court of Session Rule (RC 108) about separate parts of proof and a counterpart Rule should be introduced into the Sheriff Court Ordinary Cause Rules.

(Suggestion 6).

Nominated Judges (Paragraphs 3.19 to 3.21 above)

7. Practice Notes (or a similar document) should describe the preferred arrangements by which an application may be made for a judge or sheriff nominated, respectively, by the Lord President or by the Sheriff Principal to be allocated to take charge of all the stages of a particular multi-party litigation.

(Suggestion 7).

Cut-off date for claims (Paragraphs 3.22 to 3.24 above)

8. A Court of Session Rule and a Sheriff Court Ordinary Cause Rule should be made expressly permitting the court to impose a cut-off date by which actions intended to join in the multi-party litigation should be commenced.

(Suggestion 8).

A separate Section for Multi-Party Actions in the Rules (Paragraphs 3.25 to 3.26 above)

9. Consideration should be given to devoting a separate Section of the Court of Session Rules and of the Sheriff Court Ordinary Cause Rules to provisions relating to multi-party actions including a definition of such actions or other means for determining the actions to which the Section might apply.

(Suggestion 9).

A Procedural Hearing before Proof (Paragraphs 3.35 to 3.42 above)

10. Experiments should be carried out to devise suitable procedures (and appropriate Rules or Practice Notes as necessary) for pre-proof hearings in both the Court of Session and the sheriff court

(Suggestion 10).

11. The Court of Session Practice Note No 3 of 1991, designed to reduce the number of cases being appointed to the procedure roll unnecessarily, should be redrafted in the form of a Rule of Court.

(Suggestion 11).

Notices to Admit and Notices of Non-Admission (Paragraphs 3.54 and 3.55 above)

12. Consideration should be given to whether a general rule in terms similar to Rule 253 of the Rules of the Court of Session, dealing with notices to

admit and notices of non-admission, should be introduced for ordinary actions in the Court of Session and the sheriff court.
(Suggestion 12).

A Guide to Multi-Party Actions (Paragraphs 3.59 and 3.60 above)

13. Consideration should be given to the preparation of a Guide for solicitors to the conduct of multi-party litigation in the Scottish courts.
(Suggestion 13).

Masters in the Court of Session (Paragraphs 3.61 to 3.66 above)

14. Further consideration should be given to the establishment in the Court of Session of the post of a judicial officer who might be assigned by the Lord President to deal with all procedural (interlocutory) matters which might arise in a particular multi-party litigation.
(Suggestion 14)

II. Legal Aid: Comments

A. Possible Changes applicable in all cases

(1) Should the Scottish Legal Aid Board ("SLAB") be enabled to grant legal aid earlier? (Paragraphs 4.26 to 4.28 above).

(2) Should SLAB's power to grant a limited certificate be clarified and/or extended? (Paragraph 4.29 above).

(3) Should the statutory power to prescribe "distinct proceedings" (civil legal aid) and "distinct matters" (advice and assistance) be used to enable SLAB to grant legal aid for part only of the work involved in formulating or pursuing a claim? (Paragraphs 4.30 and 4.31 above).

(4) Should SLAB's powers to attach conditions to a grant of civil legal aid be extended? (Paragraphs 4.32 and 4.33 above).

(5) Should SLAB's power to require prior approval (of particular steps or certain expenditure) be enlarged? (Paragraphs 4.34 and 4.35 above).

B. <u>Possible Changes applicable only in multi-party actions</u>

(6) The suggestions mentioned above could be applied to multi-party actions only (Paragraph 4.43); two further possibilities would be (a) giving statutory recognition to solicitors' groups (Paragraph 4.44) and (b) changes with regard to the cost of a multi-party action or the incidence of the statutory charge (Paragraph 4.45).

(7) Changes made applicable to multi-party actions only would make it necessary to define, for these purposes, a multi-party action; the basis of such a definition is discussed (Paragraphs 4.37 to 4.39).

C. <u>A Comprehensive Scheme for multi-party actions as an alternative to piecemeal changes</u>

(8) If it was decided that a comprehensive scheme was needed, comparisons with the arrangements now introduced in England and Wales, prompt the following conclusions (Paragraph 4.55 above):

(a) The types of action to be covered would be specified by the Scottish Legal Aid Board if the Board exercised its powers under section 31(8) of the Legal Aid (Scotland) Act 1986 to make a solicitor available;

(b) if section 31(8) was invoked it would appear to be necessary for the Secretary of State to make Regulations under section 31(9) to disapply section 31(1) (which enables the assisted person to select the lawyer he wishes to act for him);

(c) it appears that, contrary to earlier discussions, the matters which would need to be covered in Regulations are relatively few; and

(d) on the basis of the SHHD paper of 1988 and the Arrangements now introduced in England and Wales it is likely that the relationship between SLAB and a solicitor selected to act in connection with generic issues would be contractual.

(9) However in deciding whether to make changes the Scottish legal aid authorities will no doubt wish to take account of wider policy considerations in connection with legal aid for civil proceedings and whether the severity of problems encountered in the relatively few multi-party actions in Scotland justifies the making of formal changes. (Paragraph 4.57 above).

SCOTTISH LAW COMMISSION

WORKING PARTY ON MULTI-PARTY ACTIONS

Annexes to Report

Addendum

ANNEXE A: REFERENCE FROM LORD ADVOCATE TO SCOTTISH LAW COMMISSION

The Lord Advocate's Reference asked the Commission:

"(a) to consider the desirability and feasibility of introducing in Scottish civil court proceedings arrangements to provide a more effective remedy in situations where a number of persons have the same or similar rights;

(b) to consider how such arrangements might be funded; and

(c) to make recommendations."

ANNEXE B: MEMBERS OF THE WORKING PARTY

Mr Derek W Batchelor,[1] Faculty of Advocates

Mr David Bartos[2], Legal Assistant to Lord President (1991/92)

Mr Peter M Beaton, Deputy Director, Scottish Courts Administration

Mr Roger Bland, Scottish Law Commission (Chairman)

Mr W Davidson,[3] Scottish Office (Head of Legal Aid Branch of Law and General Division of The Home and Health Department)

Mr Andrew G Dickson, Scottish Office

Mr A Grant McCulloch, Messrs Drummond Miller, WS

Mr Iain Maclean,[2] Legal Assistant to the Lord President (1992/93)

Mr James W McNeill QC, Faculty of Advocates

Mr Nigel M P Morrison QC, Counsel to the Lord President

Mr Malcolm Turner-Kerr, Director of Finance and Administration, Scottish Legal Aid Board

Mr S P Riddell,[4]
Senior Deputy Secretary, Law Society of Scotland

Mr Bruce A Ritchie, Law Society of Scotland

Mrs Gillian B Swanson, Scottish Law Commission (Secretary)

---

[1]Mr Batchelor resigned in November 1992 due to pressure of other commitments.

[2]Mr Bartos was succeeded by Mr Maclean in August 1992.

[3]Mr Davidson was succeeded by Mr Dickson in February 1993.

[4]Mr Riddell resigned in March 1993 on his retiral from the Law Society.

ANNEXE C: TERMS OF REFERENCE AGREED BY WORKING PARTY

"To consider (a) in general, the arrangements for the preparation and prosecution of claims, whether for reparation or other remedies, in situations where a number of persons have the same or similar rights involving common issues of fact or law arising out of the same cause or event; and (b) in particular, court practices and procedures and the provision of legal aid (including advice and assistance under Part II of the Legal Aid (Scotland) Act 1986); and to make recommendations for possible improvements other than those which would require to be implemented by Act of Parliament."

ANNEXE D: POLICY RESPONSIBILITIES

Lead policy responsibilities for matters which arise in a consideration of possible improvements in multi-party actions in Scotland appear to be:

Court procedures:	Policy in general:	Lord Advocate and Scottish Courts Administration (see Note (1) below)
	Rule making: (See Note (2) below)	Court of Session; Court of Session Rules Council; Sheriff Court Rules Council
	Administration:	Lord President and Sheriffs Principal
Legal aid: (See Note (3) below)	Policy:	Secretary of State and Scottish Office Home and Health Department (HHD) and Scottish Legal Aid Board
	Administration:	Scottish Legal Aid Board
Solicitors' fees: (See Note (4) below)	Policy:	Secretary of State for Scotland and HHD; Court of Session
Organisation of solicitors:		Law Society of Scotland
Matters concerning advocates:		Faculty of Advocates
Court resources: (See Note (5) below)		Secretary of State for Scotland and Scottish Courts Administration

Notes

1. Ministerial responsibility for civil court jurisdiction and procedure rests with the

Lord Advocate (advised by Scottish Courts Administration), having been transferred from the Secretary of State on 1 February 1973.

2. See in particular: Court of Session Act 1988, section 5; and Sheriff Courts (Scotland) Act 1971, section 32.

3. See: Scottish Legal Aid Handbook (July 1992) and in particular Legal Aid (Scotland) Act 1986 and related subordinate legislation (which are also printed in the Parliament House Book, Volume 2, Division G.) For the powers and duties of the Scottish Legal Aid Board see sections 2 (Powers) and 3 (Duties) of the Legal Aid (Scotland) Act 1986.

4. There is a distinction between fees payable to solicitors acting for legally-aided parties in civil court proceedings and fees payable where the client is not legally aided. Regulations made by the Secretary of State (under section 33 of the Legal Aid (Scotland) Act 1986) regulate the fees and outlays allowable to solicitors (and the fees allowable to counsel) from the legal aid fund (on the agent and client, third party paying basis). The taxation of accounts between party and parties is regulated by tables of fees made by the Court of Session (under section 5(g) of the Court of Session Act 1988 and section 40 of the Sheriff Courts (Scotland) Act 1907).

5. So far as the sheriff courts are concerned the Secretary of State has a specific statutory duty (under section 1 of the Sheriff Courts (Scotland) Act 1971) to secure their efficient organisation and administration.

ANNEXE E: LEGAL AID IN SCOTLAND

1. This Annexe summarises the arrangements for the supply of advice and assistance under Part II of the Legal Aid (Scotland) Act 1986 and of civil legal aid under Part III of the 1986 Act. It does not consider the employment of solicitors by the Scottish Legal Aid Board (SLAB) under Part V of the Act. (The Scottish Legal Aid Board Handbook (1st Edition July 1992), prepared by the Scottish Legal Aid Board provides a Guide to Legal Aid in Scotland. It includes a commentary on the legislation with Appendices containing published Notes for Guidance and the full text of the relevant statutory provisions.)

Part One: Advice and Assistance

2. Advice and assistance includes advice on a matter of Scots law, including on any steps which might be taken in pursuing a claim in Scotland, and assistance in taking such a step. Its availability depends on the means (income and capital) of the client. There is an initial limit of authorised expenditure (currently £80), which can be increased to £150 or more. Payment of the solicitor's fees and outlays is sought first from the client's contribution, any expenses recovered and any property recovered for the client; thereafter from SLAB.

3. Where there is multi-party litigation and Solicitors' Groups are formed with a Steering Committee, the appropriate proportion of the expenses of the Group may be recouped from each of the legally aided parties. If the authorised expenditure limit[1] is likely to be exceeded, prior authority is sought from SLAB.

---

[1] 1986 Act, s 10.

4. Assistance by way of representation (ABWOR) is part of advice and assistance under Part II of the 1986 Act. Matters for which it is available include (a) appeals to the Sheriff under the Mental Health (Scotland) Act 1984 and (b) unopposed petitions for the appointment of an executor.[1] ABWOR is not considered further here.

Part Two: Civil Legal Aid

5. Civil legal aid consists of representation by a solicitor, and where appropriate, by counsel, in any proceedings covered by the Act.

A. Persons to whom legal aid is available

6. Legal aid is available to a person ie a natural person.[2] A juristic person such as an association of consumers is not eligible to apply for legal aid. An applicant need not reside in Scotland; the Regulations expressly provide for applications from someone residing outside the United Kingdom[3]. Any natural person may apply for legal aid to allow him (or her) to become a party to proceedings in a Scottish court.

7. An applicant is, in general, free to choose whom - solicitor, solicitor-advocate and junior counsel - he wishes to act for him, if legal aid is granted.[4]

---

[1]See The Scottish Legal Aid Handbook Commentary para 1.2.1.

[2]See the negative definition of "person" in 1986 Act, s 41.

[3]Civil Legal Aid (Scotland) Regulations 1987 (SI 1987 No 381) Regulation 5(2).

[4]1986 Act, s 31(1).

B. Courts in which legal aid is available

8. These include: the Court of Session and the sheriff court.[1]

C. Proceedings in which legal aid is not available ("excepted proceedings")

9. These include: defamation cases; simplified divorce applications; and small claim proceedings at first instance.[2]

D. Conditions on which legal aid is available (other than relating to applicant's financial eligibility)

10. These conditions include:

(a) the existence of a *probabilis causa litigandi*;

(b) that financial or other assistance is not available from elsewhere; and

(c) that it is reasonable that the applicant should receive legal aid.

These are discussed in turn below.

(a) *probabilis causa*

11. "You must have substantial grounds for taking, defending, or being party to the proceedings".[3] This condition is laid down in the 1986 Act[4] but there is no statutory guidance as to what constitutes probable cause. Whether there is probable cause "depends on an assessment by the trained staff of the Board of what the case looks like on paper".[5]

---

[1]1986 Act, Sched 1, Part I.

[2]ie claims for under £750. Small Claims (Scotland) Order 1988 (SI 1988, No 1999), Article 2; 1986 Act, Sched 2, Part II.

[3]SLAB Guide to Legal Aid in Scotland, May 1991, p 8.

[4]1986 Act, s 14(1)(a).

[5]Stoddart "Legal Aid in Scotland" (3rd ed, 1990) para 9.13).

(b) Financial or other assistance not otherwise available

12. The Civil Legal Aid Regulations have three provisions dealing with situations where the applicant might reasonably be expected to be assisted by some-one else:-

(1) where the applicant is in a representative, fiduciary or official capacity (Regulation 15);

(2) where the applicant has a joint interest etc with other persons (Regulation 16); and

(3) where the applicant has rights and facilities in relation to litigation (Regulation 17 and 17A).

(1) Applicant in a representative or other special capacity

13. There are two provisions where the applicant is applying in a representative, fiduciary or official capacity. The first relates to the assessment of resources: the applicant's personal resources are disregarded and regard is had to the resources of any indemnifying fund or of any person who might benefit from the proceedings.[1] The second relates to the grant of legal aid: the Board is not to grant legal aid where the applicant can reasonably be expected to be indemnified for his legal expenses by a fund or a third party.[2]

14. The Regulations do not define "representative capacity". In the 1983 Edinburgh Tattoo case - *Webster v Lord Advocate*[3] - the owner of a flat at Ramsay Gardens sought legal aid for an interdict in connection with the noise of the Tattoo. This action benefited potentially all the adjoining proprietors without the need for them to do anything but no formal indemnity arrangements

---

[1]Regulation 15(1).

[2]Regulation 15(2).

[3]1984 SLT 13.

appear to have been entered into. In any event, in such circumstances, SLAB could invoke the "reasonableness" condition.[1]

(2) Joint interest

15. Where the applicant has a joint interest ("is jointly concerned with or has the same interest") the Board is not to grant legal aid if (a) the applicant would not be seriously prejudiced or (b) the other people interested could be expected to contribute as much as the Legal Aid Fund would have.[2]

16. Stoddart[3] discusses the application of this provision to a "disaster" which affects a number of people eg where a number of persons are all affected by flooding to a row of houses. He suggests that legal aid might not be available to all the claimants if the claims were virtually identical; if the claims were dissimilar, the Regulations would, he considers, not be considered applicable.

(3) Other rights and facilities available

17. The Board is not to approve an application for legal aid (a) where it appears that other rights and facilities are available to the applicant making it unnecessary for him to obtain legal aid or (b) where he is a member of a body which the applicant might reasonably expect to provide financial or other assistance.[4]

---

[1]1986 Act s 14(1)(b).

[2]Regulation 16.

[3]Para 9-22. "In such circumstances legal aid might be granted to all but one applicant, limited to raising and sisting the application [case], while the remaining applicant might have full legal aid so that the merits of the claim might be tested" (Footnote 1 to the paragraph).

[4]Regulation 17(1).

18. This provision is designed for those whose litigation would normally be supported by a trade union or under an insurance policy or where there is some other right of indemnity. The form of application asks the applicant to state whether he has a right to help in litigation of the type in the application, and in particular whether he is a member of a trade union. If the applicant does have such a right, it appears that legal aid would be refused only if the alternative facilities were reasonably equivalent to those available under legal aid.[1]

(c) Reasonableness test

19. The 1986 Act makes civil legal aid available where it appears to the Board that "it is reasonable in the particular circumstances of the case" that the applicant should receive legal aid.[2] The Board now considers that, in the absence of special reasons, legal aid should not be granted for a divorce action in the Court of Session.[3] Further the Board may impose conditions on a person receiving civil legal aid so as to enable the Board "to satisfy itself from time to time that it is reasonable" for the person to continue to receive legal aid. Presumably such conditions can be imposed, or withdrawn, at any time. In general, the Board does not impose any specific conditions at the time of granting legal aid but "has done so in a number of specific cases some time after the grant of legal aid, when it has appeared, on the basis of information coming to the notice of the Board, that it may become unreasonable for the assisted person to continue in receipt of legal aid".[4]

---

[1]Stoddart, para 9.28.

[2]S 14(1)(b).

[3]Note for Guidance, published in the Journal of the Law Society of Scotland, July 1988; Scottish Legal Aid Handbook p A21.

[4]Scottish Legal Aid Handbook, Commentary, para 2.26 (p 30).

20. There is no statutory guidance as to what is reasonableness or unreasonableness. "The provision is designed to stop frivolous or worthless actions being pursued at the public expense and generally to prevent abuses of the system".[1] See also the comments of Lord Jauncey in the Fluoride case (*McColl v Strathclyde Regional Council*[2]):

> "There can be no doubt that the petitioner, through the granting of legal aid, has been able to pursue litigation of unprecedented length and expense which only an individual with unlimited means at his disposal could have afforded to pursue. Whether such an individual would have considered that expense on this action was the most cost-effective way of avoiding the effects of fluoridation must be open to question. The petitioner has thus been placed in a position far superior to that of the normal person litigating at his own expense, a result which it is extremely doubtful whether the legal aid legislation was designed to achieve."

21. In England, it has been stated that: "The legal aid scheme is an instrument for ensuring that a person who would, if he had the resources, invoke the aid and protection of the courts, can do so despite the lack of those resources ... What is not entertained is the use of an applicant for legal aid as a guinea pig for resolving doubtful law or the raising of issues of public policy".[3]

E. Financial consequences of the outcome of the action

22. These depend on whether the legally-aided litigant is successful. "Legal aid helps those who lose cases not those who win them. Legal aid makes 'out and out' grants to those who lose cases. It only makes loans to those who win

---

[1]Stoddart, para 9.19.

[2]1983 SLT 616 at pp 617-618; see also Sheriff Stoddart's Commentary on *Venter v Scottish Legal Aid Board* 1993 SCLR 88 at 102/103.

[3]Pollock quoted in Paterson and Bates: "The Legal System of Scotland: Cases and Materials" (2nd edn, 1986).

them".[1]

23. Where the legally-aided litigant has been successful SLAB can recover amounts paid out (for example as fees or outlays to the solicitors acting) from three sources: from any expenses recovered by the assisted person; from any contributions paid by him into the Fund; and from any damages or other property or sums recovered or preserved for him.[2] The legally aided litigant's solicitor's account of expenses is generally rendered to, and paid by, the Board. The fees allowed to solicitors and counsel (and the outlays allowable to solicitors) are prescribed.[3] These are less than those normally payable when the litigant is not legally-aided.

---

[1]Sir John Donaldson M R in the *Opren* case, *Davies v Eli Lilley & Co* (Court of Appeal) [1987] 1 WLR 1136 at 1140.

[2]1986 Act, s 17; Stoddart, para 16.16.

[3]By the Secretary of State for Scotland in the Civil Legal Aid (Scotland) Fees Regulations 1989.

ANNEXE F: LEGAL AID IN ENGLAND AND WALES: REPRESENTATIONS UNDER CONTRACTS

Main features

1. The powers of the Legal Aid Board ("the Board") apply to (a) a "multi-party action" (which is defined as meaning "any action or actions in which ten or more assisted persons have causes of action which involve common issues of fact or law arising out of the same cause or event"[1]) which (b) includes a claim in respect of personal injuries.[2] If the Board's Multi-Party Actions Committee is satisfied that such a personal injury multi-party action involves "significant complexity",[3] the Committee may invoke the procedures set out in the "Legal Aid Board Multi-Party Actions Arrangements 1992".[4] (The invocation of the procedures is entirely discretionary.)

2. The procedures are as follows. Firms of solicitors which have applied for legal aid in the action are invited to submit "tender reports". These reports

---

[1]The Civil Legal Aid (General)(Amendment) Regulations 1992 (SI 1992/590) which inserts a new Part XVI into the Civil Legal Aid (General) Regulations 1989 (SI 1989/339). This Part consists of a single regulation (Regulation 152). The term "multi-party action" is defined in para (3) of Regulation 152.

[2]1989 Regulations, as amended (footnote 1 above), Regulation 152(2). The term "personal injuries" is as defined by Regulation 4(5) of the Civil Legal Aid (Assessment of Resources) Regulations 1989 (SI 1989/338) as amended, ie "In this regulation 'personal injuries' includes any death and any disease or other impairment of a person's physical or mental condition".

[3]Arrangements (see footnote 4 below), para 10(ii): "significant complexity in terms of assembling statements, undertaking research, obtaining expert evidence, examining and processing large volumes of documentation, or otherwise".

[4]Legal Aid Board Multi-Party Actions Arrangements 1992, approved by the Legal Aid Board 1992. The text of these is given in the Board's Multi-Party Actions Manual and in the Legal Aid Handbook 1992. (There does not seem to be an express power in the Legal Aid Act 1988 for the Board to make such quasi delegated legislation.)

detail the firms's proposals for co-ordinating and progressing the action.[1] The Committee will also consider applications from groups of firms.

3. If a contract between the Board and a firm or a group of firms is entered into, the contract will specify the work to which it relates.[2] The work may relate to generic work only or may cover all representation in the action. (The Arrangements make clear[3] that representation includes (i) the co-ordination of the action on behalf of the claimants and (ii) any steps which contracting firms are required to take pursuant to the contract. Otherwise, "representation" has the meaning assigned by section 2(4) of the Legal Aid Act 1988.) Where the contract relates to generic work, the assisted person can be represented by one firm for generic work and by another firm (eg a local firm) for non-generic work. The term "generic work" is defined in the Arrangements[4] as meaning: "Representation in respect of the issues common to all claimants or to a particular group of claimants and includes: (i) the selection, preparation and trial of lead issues in lead cases; and (ii) any work determined to be generic work by the Board."

4. The fees paid to contracting firms are the same as those otherwise paid under legal aid regulations. There is provision for payments to account. The Arrangements provide[5] guidelines for the apportionment, subject to any cost-sharing order made by the court, of costs among all claimants ie including non-

---

[1]Arrangements, para 11. Para 12 lists what the tender should include.

[2]Arrangements, para 19.

[3]In the definition of "representation" in para 3.

[4]Arrangements, para 3.

[5]Arrangements, paras 53 to 56.

legally aided claimants.

Detailed provisions

Board's administrative arrangements

5. The Board has set up a Multi-Party Actions Committee which has both policy functions and operational functions, eg deciding whether to invoke the contracts procedures and which firm to award a contract to. When performing operational functions the Committee includes one member nominated by the Law Society and one member nominated by the National Consumer Council.[1] When at least ten legal aid certificates have been issued, the Board nominates one area office to deal with all applications and that Area Director reports to the Multi-Party Actions Committee on the action and also nominates a liaison officer in the area office. The Notes for Guidance acknowledge that a multi-party action normally comprises not one action but several sets of proceedings which may brought against different defendants. They may even be commenced in different courts.

Cases in which Board will consider entering into contracts

6. In general these are only those personal injury multi-party actions which are of "significant complexity".[2] The Board's Notes for Guidance[3] add:

> "(i) The number of contracts will initially be limited while the new procedures become established;
>
> (ii) Contracts are more likely to be awarded in newly emerging actions rather than those which are well established under existing

---

[1]Arrangements, paragraphs 4 to 6.

[2]For the definition of "significant complexity" see para 1, footnote 3 above.

[3]In Part 3 of the Legal Aid Board's Multi-Party Actions Manual ("the Manual") and now included in the Legal Aid Handbook 1992 (p 112). This quotation is from Para 16-03, as printed in the Legal Aid Handbook.

procedures;

(iii) Only an action which requires a high degree of co-ordination in management by one firm or steering committee is likely to be chosen;

(iv) Contract will be more appropriate where the complexity of the case stems primarily from the common or generic issues rather than the individual claims. Once the main generic issues in a case have been decided a contract may no longer be appropriate;

(v) Contracts will be intended to cover substantial and effective litigation. This would not be the case where, for example, liability was not in dispute and the action raised no difficult issues of causation;

(vi) An action must include personal injury claims to be eligible for a contract but it can also include other types of claim. However, the Board will only consider a contract where personal injury claims are the essence of the action; and

(vii) A contract is unlikely to be awarded if only a minority or a small proportion of the Plaintiffs have legal aid.".

Contents of firms tender to Board

7. The Board's Multi-Party Actions Committee, if it decides to invite tenders[1], will do so for generic work and from any firm which (before a set closing date) has submitted at least one written *bona fide* application for legal aid in connection with the claims. The Tender Reports include:

(a) details of how the litigation is to be co-ordinated and the firm's proposals for consultation and liaison with claimants and local firms;

(b) details of the firm's resources and experience; and

[1]The Board's draft letter inviting tenders is reproduced in Part 7 of the Manual.

(c) proposals as to how private clients will contribute to the costs of the proceedings.

Contractual obligations: standard contracting provisions

8. Under the standard contracting provisions[1] contract firms are obliged:

(a) to send a detailed six-monthly report to the Board[2] (The report has a legal and financial section and a management and administration section.);

(b) to send three-monthly reports to the claimants;[3]

(c) to keep local firms informed of progress and to give them sufficient guidance and information to enable them properly to advise and assist their clients;[4]

(d) to supply claimants with details of the contracting firms' complaint procedure.[5]

Benefits for contracting firms

9. One of the Board's stated aims is to "achieve better cash flow for the contracted firms."[6] In return for undertaking the contractual obligations mentioned in the preceding paragraph: "The contract firm will be eligible for advantageous payment on account arrangements. They will not have to wait 12 months from the issue of proceedings before applying for payments, nor prove

---

[1]Arrangements, Part V.

[2]Arrangements, paragraph 29.

[3]Arrangements, paragraph 35.

[4]Arrangements, paragraph 36.

[5]Arrangements, paragraph 44.

[6]Article ("Enabling Multi-Party Actions") by John Curle of the Legal Aid Board Policy and Secretariat Department in the Law Society's Gazette for 24 June 1992.

hardship. The [Board] will pay 75% of what is considers to be a reasonable amount for work reasonably done."[1].

10. The Board's Notes for Guidance explain[2] how the contract relates to existing regulations and procedures:

> "The contract is to provide representation under Part IV of the Act. Therefore the general rule is that all regulations which apply to civil legal aid also apply to representation pursuant to a contract, and contractual obligations are additional to obligations under regulations. The exception is that remuneration of solicitors and counsel is determined by the contract and not by regulations [see section 15(7) of the Legal Aid Act 1988]. The remuneration provisions of the Arrangements which form part of the contract set out special rules, particularly as regards payments on account, but provide that fees are still subject to taxation and that in other respects remuneration is determined in accordance with the provisions of the regulations.".

Publicity for multi-party actions

11. There is provision in the Arrangements[3] that the Board may, in consultation with contracting parties, take such steps as it considers appropriate to publicise a multi-party action.

Meetings of claimants

12. The Board recognises that meetings of claimants and of committees may in exceptional circumstances be an important and necessary means of progressing a multi-party action. Accordingly, provision is made in the

---

[1]Article by John Curle mentioned in footnote 2 above.

[2]Notes for Guidance, page 4.

[3]Arrangements, para 46.

Arrangements[1] for the payment of the travelling costs of claimants in connection with claimants' meetings organised by contracting firms and committees organised by contracting firms which include claimant representatives.

Termination

13. The Board reserves the right to terminate any contract.[2] Examples of grounds for termination are set out in the Schedule to the Arrangements.

Relevant documents

(a) Statutory documents

Legal Aid Act 1988

14. Section 4(5) of the Legal Aid Act 1988 provides:

> "The power to secure the provision of representation under Part IV by means of contracts with other persons shall only be exercisable in the classes of case described in regulations.".

Other relevant provisions in the 1988 Act are: section 15(5), 15(7), 16(10), 32(2) and 40(4). The 1992 Amendment Regulations (see paragraph 15 below) are made in exercise of the powers conferred, *inter alia*, by section 4(5) of the 1988 Act.

The Civil Legal Aid (General) (Amendment) Regulations 1992 (SI 1992 No 590)

15. Paragraph 8 of these Amendment Regulations inserts a new Part XVI (Representation by means of contracts) in the Civil Legal Aid (General) Regulations 1989.

---

[1]Arrangements, para 42.

[2]Arrangements, para 49.

(b) Non-statutory documents

16. These are conveniently brought together in the Board's Multi-Party Actions Manual. (The Manual includes in Section 6, a draft standard contract). The main document is the Multi-Party Action Arrangements 1992 (Section 3 of the Manual).

Note: Legal Aid Handbook 1992

17. The Legal Aid Handbook 1992, prepared by the Legal Aid Board, and published by Sweet and Maxwell, provides the text of all the relevant documents, including:

Legal Aid Act 1988: page 143

Civil Legal Aid (General) Regulations, 1989: page 222

Legal Aid Board Multi-Party Action Arrangements, 1992: page 410

Notes for Guidance: Multi-party Actions: page 112

ANNEXE G: LEGAL AID FOR MULTI-PARTY ACTIONS: PAPER BY SCOTTISH HOME AND HEALTH DEPARTMENT

Letter from Mr P M Russell of Scottish Home and Health Department of June 1988 and paper sent with that letter.

SCOTTISH HOME AND HEALTH DEPARTMENT
St Andrew's House Edinburgh EH1 3DE
Telephone 031–556 8501 ext

Our Ref: LGB/1/57

Circulation List
Attached

June 1988

LEGAL AID FOR MULTI-PARTY ACTIONS

Since the Lord Chancellor moved amendments to the Legal Aid Bill which will open up the possibility of legal aid for multi-party actions, we have given consideration to how that result might be achieved for Scotland. The Secretary of State has concluded that his existing regulation-making powers are sufficient to enable him to provide for legal aid for multi-party actions without further amendment of the primary legislation.

I enclose for your interest a paper which sets out the background and identifies the key areas which the regulations would have to cover. Since the need for regulations will arise only if the Scottish Legal Aid Board make a solicitor available for a multi-party action, the Secretary of State has no immediate plans to make the regulations.

Yours sincerely
PM Russell

P M RUSSELL

Enc

LEGAL AID FOR MULTI-PARTY ACTIONS

PAPER BY SHHD

This paper sets out the Department's views on the adequacy of existing powers to enable the Secretary of State to provide for legal aid for multi-party actions [MPAs] in Scotland. It does not deal with court procedures relating to such actions.

1. Primary Legislation

1.1 The Lord Chancellor introduced amendments to the Legal Aid Bill during Report Stage in the House of Lords with the specific intention of permitting legal aid in multi-party actions in England and Wales. In broad terms, the amendments give the new Legal Aid Board power to enter into contracts with a particular firm, or firms, of solicitors to provide representation in categories of civil proceedings specified in regulations. The Board would identify particular groups of cases - possibly all cases relating to a particular action or perhaps a more general category - which could with advantage be dealt with in this way. Within the prescribed category, the Board would direct Assisted Persons [APs] to the contracted solicitors. This will involve, therefore, some restriction on choice of solicitor.

1.2 The Lord Chancellor also indicated that the regulations could, if appropriate, provide special arrangements for means testing for some or all of the groups. Separate provision could also be made to enable the statutory charge to be taken from the totality of any sums recovered or awarded. In effect, the Legal Aid Board would apportion the legal cost of the action to all of the APs involved.

1.3 As it is desirable to maintain broad consistency in scope, eligibility and coverage of legal aid both north and south of the border the Department is considering how provisions to permit legal aid for multi-party actions might be introduced in Scotland.

1.4 Scotland differs significantly from England and Wales in its legal, court and legal aid administration systems. In particular, the Legal Aid (Scotland) Act 1986 does not contain specific 'contracting-out' powers analogous to those in the Legal Aid Bill. However, it contains provisions [section 31] which would allow the Scottish Legal Aid Board (SLAB) to restrict the choice of solicitor by APs to a solicitor nominated by SLAB in specific circumstances, subject to regulation. Further, section 36 of the Act contains wide-ranging regulation making powers which could be used to deal with special circumstances such as MPAs. In particular, section 36(3)(c) provides that the Act can be modified by regulations where applicants have a joint interest. Accordingly the Department believes it possible to introduce by regulations essentially the same arrangements for providing legal aid in MPAs as proposed by the Lord Chancellor for England and Wales but without creating any more general power for SLAB to contract out.

2. Points to be Covered in Regulations

2.1 The Regulations will need to specify the category or class of cases to which the contracting arrangements will apply. The Lord Chancellor's proposal is that the Legal Aid Board will identify these. Section 31 of the Scottish Act envisages a similar approach.

2.2 The Regulations will also have to deal with the eligibility tests for prescribed cases. This may mean providing discretion to SLAB to include applicants who might otherwise not be eligible on financial grounds, or might have other rights and facilities available. Alternative or modified means assessment procedures may be required, allowing contributions from applicants who would be beyond the scope of 'normal' legal aid. This would require amendment, by regulation, of sections 15 and 17 of the 1986 Act to increase or remove the upper income and capital limits in MPAs, and introduce modified provisions for contributions.

2.3 Regulations will also have to prescribe the arrangements for dealing with contributions and recoveries. The general principle should be that the total costs of the case be apportioned over all the APs. However, the method of apportionment may vary according to the category of the case and the composition of the APs as between those subject to contribution and those on free legal aid. The regulations would have to make appropriate modifications to sections 17-20 of the 1986 Act.

2.4 Regulations will also have to deal with tendering arrangements. SLAB may need to be given discretion not to apply the legal aid fee tables applicable to ordinary cases, although its clear duty must be to achieve the most efficient and effective arrangements. Again the precise details of the arrangements may vary with circumstances.

2.5 The Regulations will need to require advertisement of the decision to proceed with a multi-party action funded through legal aid. Responsibility for advertising may fall to SLAB or the contracted solicitors; or may otherwise vary according to circumstances.

2.6 Regulations should also make clear that legal aid for cases falling within the prescribed category, can only be provided by the contracted solicitor(s). Sections 31(8) and (9) of the 1986 Act already provide powers to restrict the choice of solicitor in prescribed cases. Regulations may also have to amend section 33 of the 1986 Act to ensure that appropriate fees can be paid.

2.7 Regulations may also have to deal with international aspects of any MPA. It is possible that Scottish residents may wish to take action abroad, or vice versa. It is also possible that an action in one jurisdiction may involve residents of several countries. Such details will depend on the circumstances of the case.

2.8 Finally, the Regulations will have to cover the contingency that applications may arrive after the action has been settled, or that litigants attempt to raise similar actions without legal aid after the MPA is settled. To cover these eventualities may require some form of sanction against or inclusion of, litigants who seek subsequently

to benefit from the action raised by the APs, and funded through Legal Aid.

3. Conclusions

3.1 This paper builds on the recognition, at section 36(3)(c) of the Scottish Act, that cases arise where one litigant has joint interests with another (or others). It suggests that the primary legislation governing legal aid is widely enough drawn to permit adaptation by regulation to the practical consequences of any foreseeable arrangements for multi-party actions; and indicates the scope of the regulations that would be required. The Department considers that there is no need to amend the terms of the Legal Aid (Scotland) Act 1986 before legal aid could be made available for multi-party actions.

Scottish Home and Health Department
May 1988

ANNEXE H: REFERENCES AND ABBREVIATIONS

Australian Law Reform Commission, Report on Grouped Proceedings in the Federal Court Canberra 1988.

Black, Robert, An Introduction to Written Pleading, Law Society of Scotland, 1982

Cooper, Jeremy, Keyguide to Information Sources in Public Interest Law, Mansell, 1991

Cullen, Hon Lord, The Public Inquiry into the Piper Alpha Disaster, Department of Energy and HMSO, December 1990 (Cm 1310).

Jacob, Sir Jack IH, The Fabric of English Civil Justice (Hamlyn Lectures 1986) Stevens & Sons, 1987.

James F and Hazard, GC, Civil Procedure [in the USA], Little, Brown and Company, 1977.

Kincraig, Hon Lord (Chairman), Report of the Committee on Procedure in the Court of Session in Personal Injuries Litigation, published in Consultative Document issued by Scottish Courts Administration, April 1979. ("Kincraig Report")

Legal Aid Board, Legal Aid Handbook 1992, Sweet and Maxwell, 1992.

Lord Chancellor's Department, Civil Justice Review, Report of the Review Body on Civil Justice (Cm 394), June 1988. HMSO.

Macphail, I D. Sheriff Court Practice, W Green & Son Ltd 1988 ("Macphail").

Maxwell, David. The Practice of the Court of Session, Scottish Courts Administration, 1980. ("Maxwell").

Maxwell. Hon Lord (Chairman), Report of the Review Body on the Use of Judicial Time in the Superior Courts in Scotland. Scottish Courts Administration, 1986. ("Maxwell Report").

McBryde, Professor William and Barker, Dr Christine, "Solicitors' Groups in Mass Disaster Claims"; 1991. New Law Journal 484.

McCool, Geraldine, Disaster Co-ordination, International Legal Practitioner, March 1991.

National Consumer Council, Group Actions: Learning from Opren, Report by Mark Mildred (of Pannone Napier) and NCC staff. January 1989.

Ontario Law Reform Commission, Report on Class Actions, Toronto, 1982.

Parliament House Book, W Green & Son.

Scottish Consumer Council. Class Actions in the Scottish Courts: A New Way for Consumers to Obtain Redress?; Report of a Working Party chaired by Mr James Clyde QC (now Lord Clyde) 1982. ("Scottish Consumer Council Report").

Scottish Office Home and Health Department, The Legal Profession in Scotland, Discussion Paper (March 1989) ("Scottish Office 1989 Paper").

Scottish Office Home and Health Department, Review of Financial Conditions for Legal Aid: Eligibility for Civil Legal Aid in Scotland Discussion Paper (July 1991) ("Scottish Office 1991 Paper").

Scottish Legal Aid Board, The Scottish Legal Aid Handbook (July 1992).

Sheriff Court Rules Council. Review of Sheriff Civil Court Procedures and Practices, Consultation Paper, January 1990 ("SCRC Consultation Paper 1990").

Stoddart, CN, Legal Aid in Scotland, Third Edition, W Green & Son Ltd 1990 ("Stoddart").

Supreme Court Procedure Committee (England and Wales) Guide for Use in Group Actions, London May 1991.

Thomson and Middleton, Manual of Court of Session Procedure W Green & son 1937 ("Thomson and Middleton").

Other Abbreviations

"Arrangements":	Legal Aid Board Multi-Party Arrangements 1992
"LAB":	Legal Aid Board (for England and Wales)
"LCD":	Lord Chancellor's Department

"MPA":	Multi-Party Actions
"PH Book":	Parliament House Book
"SCA":	Scottish Courts Administration
"SHHD":	Scottish Home and Health Department (now Scottish Office Home and Health Department)
"SLAB":	Scottish Legal Aid Board
"1971 Act:	The Sheriff Courts (Scotland) Act 1971 c 58
"1986 Act":	Legal Aid (Scotland) Act 1986 c 47
"1988 Act":	Legal Aid Act 1988 c 34

ADDENDUM

The Working Party's Report was completed and submitted in June 1993. The Court of Session Rules ("RC") and the Sheriff Court Ordinary Cause Rules ("OCR") referred to in the Report have now been superseded by, respectively: the Rules of the Court of Session 1994, contained in Schedule 2 to the Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No 1443) which come into force on 5 September 1994; and the Ordinary Cause Rules 1993, contained in Schedule 1 to the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 (SI 1993 No 1956) which came into force on 1 January 1994. The table below on this and the next page indicates the correspondence between the rules referred to in the Report and the new rules.

Report (Page)	Reference in former Rules	Reference in new Rules
10 footnote 2	OCR 20	OCR 26.2 and 26.3
10 footnote 3	OCR 19	OCR 26.1
13 footnote 3	RC 91(6)	RC 22.3(6)
15 footnote 4	Fees of solicitors in speculative causes	RC 42.17
26 footnote 5	RC 104A	RC 32.2
27 footnote 2	RC 16(a)	(No corresponding rule)
28 footnote 1	RC 104A	RC 32.2
28 footnote 1	RC 104B	RC 32.1
30 footnote 3	RC 91(6)	RC 22.3(6)
31 Suggestion 4	RC 91(6)	RC 22.3(6)
34 footnote 1	RC 188E (Optional Procedure)	RC Chapter 43, Part V
34 paragraph 3.18	RC 108	RC 36.1
35 footnote 2	RC 188(6)(d)	RC 43.24(6)(c)
36 footnote 1	RC 260B (Judicial Review)	RC 58.5 (nominated judge)
36 footnote 2	RC 149 (Commercial causes)	RC 47
39 footnote 2	RC 188J(6)(a)	RC 43.24(5)
39 footnote 3	RC 260B(4)	RC 58.4
	RC 260B(16)(b)	RC 58.9(2)
41 footnote 7	RC 148 (Commercial causes)	RC 47.1 (Commercial actions)
	RC 148	RC 47
41 footnote 8	RC 188E	RC Chapter 43,Part V

Contd Report (Page)	Reference in former Rules	Reference in new Rules
42 footnote 1	RC 188F	RC 43.19
47 footnote 2	Practice Note No 3 of 1991	(Not incorporated in RC 28.1)
50 footnote 3	RC 188E-188P Form 27A	RC Chapter 43,Part V RC Form 43.18
51 footnote 1	Practice Note No 3 of 1991	(Not incorporated in RC 28.1)
51 footnote 3	RC 188E-F RC 188E-P	RC chapter 43, Part V RC Chapter 43,Part V
56 footnote 2	RC 148-151F RC 134E RC 188K(1),(2)	RC 47 RC 27.1 and 27.2 RC 43.25
56 footnote 3	RC 151C(1),(2),(3) R 188L	RC 47.8 RC 43.26
56 footnote 4	RC 151D RC 188M(1)	RC 47.9 RC 43.27
56 footnote 5	RC 188N(2)	(None)
58 footnote 3	OCR 72(1)(a)	OCR 33.28
58 footnote 4	Rule 99	RC 36.6
58 paragraph 3.54	Rule 253 Rule 253	RC 36.6 {
60 Suggestion 12	(Notices to admit and Notices of non-admission) RC 93A	{RC 36.6 {OCR 29.14 { RC 4.15(3)
64 footnote 3	RC 95	RC 35.2
65 footnote 2	OCR 78(3) RC 91(6)	OCR 28.2 RC 22.3(6)
104 Suggestion 4 Suggestion 6 105 Suggestion 12	RC 108 RC 253	RC 36.1 {RC 36.6 {OCR 29.14