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# Insurance POST

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## North of the Border: Reform of the civil court



### The changes to Scotland's civil court system have taken effect – what exactly do they entail and how is the transition going?

In September 2015, changes to Scotland's civil court system under the *Courts Reform (Scotland) Act 2014* commenced. A significant change was that the exclusive jurisdiction of the sheriff courts increased from £5000 to £100,000.

A specialist All-Scotland Sheriff Personal Injuries Court at Edinburgh was introduced, giving parties the option to litigate personal injuries actions in the new court, where jury trial is available, or at their local sheriff court. With new Simple Procedure and a compulsory Pre-Action Protocol still to come.

### Volumes and remit

There was a rush to raise Court of Session actions worth under £100,000 just before the change, but attempts by defenders to have those cases remitted to the sheriff court were unsuccessful (*Wakeford v Advocate General for Scotland*). The Court of Session rolls for personal injury cases are now much shorter, indicating a considerable downturn in business – one of the stated aims of the reforms.

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SPIC has seen a large number of new cases but pursuers are also still raising personal injuries actions in local sheriff courts, in particular those represented by solicitors without a base in Edinburgh.

### Sanction for counsel

In a Court of Session action, it is necessary to instruct counsel but a sheriff court action may be run by a solicitor alone. The recovery of counsel's fees in the sheriff court requires a motion for sanction. The court shall grant sanction if reasonable, considering difficulty or complexity, or issues of importance or value. The court must consider equality of arms and other relevant factors. It was hoped that less use of counsel would

see a reduction in costs in SPIC cases.

There have been three reported SPIC decisions on sanction: *Dow v M&D Crolla, V v M&D (Leisure)* and *Cumming v SSE*.

Each decision turns on its own facts and circumstances but taken together, the decisions point away from concluding a monetary value at which sanction will be granted.

Anxiety regarding further future potential asbestos-related illness (*Cumming*) justified sanction where settlement was under £10,000. The annual income of the pursuer may be compared to the settlement sum in considering value and the prospect of redundancy in relation to importance (*Dow*).

In *V*, while disputed issues of duty, foreseeability and causation were of moderate complexity and could be dealt with by a competent solicitor, sanction was granted due to the nature of the injury and issues relating to taking evidence from the child (aged 10) at proof.

Equality of arms is likely to be significant only if a party obtained an unfair advantage by instructing counsel (*V*).

The question of whether solicitors who hold themselves out as personal injury specialists should require input from counsel was explored in *Cumming*, but the court concluded that the decision by the pursuer's solicitors to involve counsel was reasonable and so granted sanction. The court agreed that asbestos litigation is an increasingly specialist area.

Although each of the decisions so far has been based on its own facts, none have refused sanction for counsel, which would tend to indicate a general willingness on the part of SPIC to sanction counsel in a variety of different situations. It looks likely more of the same can be expected.

It is still early days and the civil court system in Scotland remains in transition. The new All-Scotland SPIC has successfully reduced volumes in the Court of Session, but the decisions so far regarding sanction for counsel would not tend to indicate that the hoped-for cost savings can be anticipated in all cases.

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