Mediation Consultation.

I am a member of the Personal Injury Committee, which is a sub committee of the Scottish Civil Justice Council, but the following reflects my personal view as an individual. My practice is limited to the area of personal injury claims, and my knowledge and experience relate to the civil justice system only in respect of those claims. I do not profess to know about mediation for other practice areas, and I defer to those who do. I am clear that personal injury cases should be amongst the excepted categories in the Consultation proposals.

Executive Summary

- The mischief described in the paper (slow, costly and inefficient courts) does not exist in the area of personal injury law and practice. There is no possible justification for the major upheaval proposed.

- At present almost all personal injury cases where proceedings are raised are resolved by bilateral negotiation "in the shadow of the law" i.e. experienced lawyers meet face to face, advocate for each side, then reach an agreement based on the predicted outcome of full adjudication. This takes place after full disclosure and discovery of evidence with a cards on the table approach. That way the law and the facts likely to be found at trial are factored into each negotiation and settlement. This kind of settlement is a proxy for justice. Mediation treats each case as a problem to be solved consensually. Its primary concern is with settlement not justice.

- The typical symmetry of personal injury cases is that of "one shotter" and "repeat player" i.e. an individual and an insurance company. These cases well nigh exclusively involve the transfer of money. There is generally no ongoing relationship to be preserved. Claimants without lawyers will do worse under the proposals.

- The proposal for a mandatory mediation interview will cause insuperable practical problems.

- The proposals will involve a significant diversion of court funds to the private mediation industry without any discernible benefit to the public.

- If there is money in the Civil Justice budget it would be better spent elsewhere

1. The Civil Justice system and Personal Injury Claims.

It is a matter of some surprise that the Consultation comes at this time. The Scottish courts civil justice system has recently undergone its most profound analysis and reform in 100 years following the Gill Civil Court Review. ADR was considered in the Review and although approved as a possible adjunct to the court system, it was emphatically not put front of house. That should remain the position. The Gill Review was followed by the Taylor Review on Expenses. In each case substantial legislation has been the result, namely The Court Reform (Scotland) Act 2014 and the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.
One of the effects of the former is the drive towards specialisation at sheriff court level, and in particular the establishment of the All Scotland Personal Injury Court in Edinburgh with specialist sheriffs. Procedural change has already taken place with caseflow management now the prescribed norm in both the court of session and the sheriff court. As is stated in the Sc.Government's Civil Justice Statistics (2nd April 2019)
"This change has occurred in the context of far-reaching **reforms** to the conduct of court business. These reforms are intended to make the resolution of civil disputes simpler and cheaper.
Overall, reforms appear to be taking effect:

- Business has moved out of the **Court of Session**, decreasing by 48% since 2015-16. Some of this business will have been displaced to sheriff courts, where the exclusive competence[*] for cases on which sheriffs can rule has increased to £100,000.
- The specialised **Sheriff Personal Injury Court** has expanded its caseload since its inception in 2015-16 and now covers over a third of personal injury cases in Scotland."

The description of the civil justice system as costly, inefficient and slow does not remotely describe the current system for personal injury cases. It is not clear that the proponents of this legislation fully understand current practice.
A brief explanation of the current system is as follows;

1. All cases with a value of £25,000.00 or less must proceed in terms of a statutory Pre-Action Protocol. The Protocol encourages detailed

specification of the facts and consequences of the accident by the claimant, an investigation and adequate response to liability and any issue of contributory negligence by the insurer, and disclosure of medical evidence to enable the claim to be valued and realistically settled without litigation.

2. Although compliance with the Protocol is not compulsory for cases with a value above £25,000.00 in practice there will generally be an attempt to settle high value claims using the Protocol tools of exchange of information and disclosure.
3. Where cases do not settle pre-action, they become subject to caseflow management in both the court of session and the sheriff court. Almost all cases settle at various stages pre-proof.
   The timetable prescribes the rate of progress so that all cases should be dealt with not later than 9 months from the date of issue.

4. If settlement without trial is to be the measure of efficiency the current system is spectacularly successful. There is a general consensus that 98% of cases raised settle without trial.

2. Bilateral Negotiation

A key procedural requirement is the pre-trial meeting. This takes place between lawyers or counsel for both sides. It must be face to face for the legal teams, with their clients either present or contactable to give settlement instructions. It must take place not later than 8 weeks before the proof date. This is not an arbitrary provision or date. By that time the pleadings will be settled, all reports will be disclosed, and witness lists will have been exchanged. Discovery in the sense of the courts power to ordain parties to disclose documents and evidence will also have occurred.

The negotiation will then take place between experienced agents who will advocate for their client's position in the light of the facts as likely to be found at trial and the law as applied to those facts. That is what is meant when the jurisprudence writers say that settlement takes place "in the shadow of the law." Each party takes a view on the hypothesised outcome with regards to liability, contributory negligence, damages for pain and suffering, damages for past and future wage loss, damages for necessary services and nursing costs and any other heads of claim. Whilst settlement achieved in this fashion is not the perfect justice that an adjudicated trial might bring, it is the closest approximation minus the risk for both sides.

3. Mediation

By contrast the approach of mediation is to see the claim as a problem which can be solved consensually. The mediator has no coercive power but can seek to find compromises and accommodations which both parties can accept. The mediator comes new to the problem, does not seek to fix normative settlements for heads of claim and does not purport to have the expertise to assess heads of claim with reference to substantive justice. This approach has been the subject of trenchant academic criticism notably by Dame Hazel Genn in the Hamlyn Lectures 2008 "ADR and civil justice. What's justice got to do with it?" and more recently in "What Is Civil Justice For? Reform, ADR, and Access to Justice"

(see the Yale Journal of Law & the Humanities
Volume 24 | Issue 1 Article 18 2013)

As she pointedly states in the latter article

"Mediators are not concerned about substantive justice because the mediator's role is to assist the parties in reaching a settlement of their dispute. The mediator does not make a judgement about the quality of the settlement. Success in mediation is defined in the mediation literature and **by** mediators themselves as a settlement that the parties "can live with." The outcome of mediation, therefore, is not about *just* settlement it *is just about settlement.*"

4. The Parties in a Personal Injury Claim

Much is made in the mediation literature about the redemptive power of a mediated settlement which enables parties to maintain or resume relationships. But the typical symmetry in a personal injury action is a claimant pursuer whose only experience of the legal system is his or her own case and an institutional defender such as an employer, an occupier of premises, a landlord, a local authority or public utility. The literature categorises such litigants as "one shotters" and "repeat players." The repeat player will almost universally be represented by an insurance company or in-house lawyer who will take over the conduct of the case. The latter has little or no personal involvement with the claimant but their role is primarily to police the costs of settlement. If I have been knocked down by a car, I will be litigating against the driver in name only. The

case will be run by Aviva insurance or the like. They will not allow their driver to appear anywhere unrepresented, let alone personally agree a settlement with me at a mediation conference.
This makes the mediation industry claims of intangible relationship benefits irrelevant for this area.

5. The Mandatory Mediation Interview

Despite all attempts to proselytise for it, mediation throughout the UK resolutely refuses to lift off. The unspoken allegation in the Consultation paper is that is the fault of lawyers who will not allow their clients to enjoy its benefits. The implication is that reluctance is fees rather than principled driven (ie the idea that it might conceivably be in the better interests of the clients not to mediate does not appear anywhere.) See the suggestion in the Consultation paper that lawyers could preserve their incomes by becoming mediators.
Unable to persuade, the only method by which mediation can take hold is by compulsion. So the proponents of the Bill suggest that each party must undergo a compulsory one hour mediation introduction. There seems no appreciation of the practicalities here. 9,433 personal injury actions were raised last year (Civil Judicial Statistics 2nd April 2019) , meaning a total just short of 19,000 parties who are told wherever they might live that they must attend at a mediation introduction at the court where proceedings are raised. Alternatively, they must make arrangements for remote access. Given that the bulk of sheriff court actions are now raised in the All Scotland Personal Injury Court in Edinburgh for persons who are resident throughout the whole of Scotland, this will mean at least a day off work or domestic commitments if they are to attend. Very many persons do not have remote access facilities, or are uncomfortable with it.
And what will they be told ?
Is it that if they continue to litigate the overwhelming likelihood is that their case will settle within a year without their having to attend at court at all, and that it will settle with regard to their legal entitlements and the strength of their case?

Or that they will be required to appear yet again at the same court for the full mediation session, for which they will have to pay , and that if they wish their lawyer to be in attendance they will have to pay for her or him also.
The one shotter/ repeat player dynamic also makes this a non-starter. The institutional defenders will not permit their insured persons to attend

at any mediation session but will take over conduct of the case themselves.

6. **The Costs of Mediation for the Individual**

The kind of privately funded dispute resolution proposed by the Consultation for personal injury actions is not cheap. I have seen figures from a major provider varying from £1,500.00 for each side to around £2,750.00 for each side and that is per day. There will be own lawyer costs. These sums are outlays which will be payable in advance by each party. Unlike other court costs they will not be recoverable if the case is successful.

The Scottish Government already knows that unrepresented claimants do badly in the legal system. The claimants do not know about concepts such as duty of care, common law and statutory liability, and contributory negligence. They do not know how damages are assessed. They do not know what evidence to collect and how to present it . (See Elaine Samuel "In the Shadow of the Small Claims Court.") They know the harm they have suffered, but they do not know whether their case is weak or strong, or how much it is worth. The potential for undersettlement at a mediation is obvious. So the overwhelming choice will be for the claimant pursuer to be represented at any mediation, which will be an additional unrecoverable cost relating to lawyer preparation and attendance.

The recent Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, (which relates to Damages Based or No Win No Fee Agreements) provides at s.6(2)

"(2)The agreement must provide that the recipient of the relevant services is not liable to make any payment (including outlays incurred in providing the services) to the provider in respect of the services, apart from the success fee, regardless of whether any damages are obtained."

What this means is that in No Win No Fee cases, the lawyers will have to bear the claimant mediation costs in all cases where there is a Damages Based Agreement, with no prospect of recovery from the other side. It is not an exaggeration to say that such a provision will severely undermine the market for DBAs to the consumer detriment.

The privatisation of dispute resolution will also mean significant diversion of public funds into the mediation industry.
The continuing income derived from the service the court system provides for personal injury claimants and defenders contributes to a significant extent to the whole Civil Justice budget.

The Civil Justice Budget

I recently (July 2019) appeared in a proof in the All Scotland Personal Injury Court in Edinburgh. ("ASPIC"). This is the National Personal Injury court. The courtroom does not have the facilities to play either a CD rom video or the downloaded footage, which had to be shown to the court on counsel's laptop. A major procedural advantage of the court of session and ASPIC is the availability of email motion procedure, whereby incidental matters are speedily dealt with electronically. There does not seem to be any progress on extending the availability of email motion procedure to courts other than the court of session and ASPIC. Court broadband facilities are rudimentary throughout Scotland. These are priorities which have already been identified. So I am bemused to learn there is a budget for the current Consultation proposals. Such money would be better spent on existing targets.