

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
PERSONAL INJURY COMMITTEE
MONDAY 13 NOVEMBER 2017 AT 3.15 PM
JUDGES DINING ROOM, PARLIAMENT HOUSE

MINUTES

Members Present: Lord Armstrong (Chair)

Marie-Louise Fox (Director of Operations, SLAB)

Walter Drummond- Murray (Scottish Government)

Sheriff Mackie

Maria Maguire QC (Advocate)

Amber Galbraith (Advocate)

Fraser Simpson (Solicitor)

Ronnie Conway (Solicitor Advocate)

Alan Rogerson (Claims Manager)

In attendance: Diane Machin (Court of Session, SCTS)

Mark Kubeczka (Legislation and Implementation Team, SCTS)

Support: Ian Vickerstaff (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Norman Munro (Deputy Legal Secretary, Rules Rewrite Drafting Team)

Lauren Gibb (Policy Officer, Scottish Civil Justice Council)

Apologies: Lord Boyd

Sheriff Principal Stephen

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and noted apologies from Lord Boyd and Gordon Keyden.
2. The Chair welcomed Ian Vickerstaff (Deputy Legal Secretary, Rules Rewrite Drafting Team) to his first meeting.
3. **The Committee agreed that the following papers will be treated as private and not be published: 2.2, 4.1, 5.1, 5.1A**

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

4. **The Committee approved the minutes from the previous meeting.**

Item 2.2 – Progress of actions from previous meetings (Paper 2.2)

5. **The Committee noted the progress made on actions since the last meeting.**

Item 3: Work Programme

Item 3.1 – Update from the Scottish Government on Legislative Developments (Oral)

6. Walter Drummond-Murray updated the Committee about recent legislative developments. He advised that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill has been introduced and is progressing through parliament. He advised that the Bill, which aims to create a more accessible, affordable and equitable civil justice system by making the costs of court action more predictable, increasing the funding options for pursuers of civil actions and introducing a greater level of equality to the funding relationship between claimants and defenders in personal injury actions, is currently at Stage 1.
7. Walter also advised that ministerial consideration is currently being given to a Damages Bill which was announced in the programme for government for this year. He advised that this Bill will amend the law on the personal injury discount rate and enable the courts to impose periodical payment orders when making an award of damages in respect of personal injury.

Item 4: Justice system reform: Rules rewrite

Item 4.1 – Compulsory Clinical Negligence Pre-Action Protocol (Paper 4.1)

8. Members considered **Paper 4.1** which invited the Committee to note the progress that has been made on the pilot of the voluntary clinical negligence pre-action protocol and, if content, agree that work resumes on the compulsory clinical negligence pre-action protocol.

9. Members noted that given the complex nature of clinical negligence claims, it was previously agreed by the Committee that a compulsory clinical negligence pre-action protocol would benefit from being considered separately to the core personal injury pre-action protocol. Accordingly, a compulsory clinical negligence pre-action protocol sub- group met in October 2015. However, members of the profession considered that there would be merit in piloting a voluntary pre-action protocol. Members noted that this was against a background that, unlike personal injury cases, there had never been a pre-action protocol in place in Scotland for the resolution of clinical negligence disputes.

10. Members noted that invitations to take part in the pilot pre-action protocol were issued in the summer of 2016 at a clinical negligence conference and the pilot commenced around September 2016. The pilot pre-action protocol was based largely on the principles of the proposed compulsory protocol. In order to allow for the trial of the protocol to continue for a reasonable period, work on the development of the compulsory clinical negligence pre-action protocol was paused by the Committee.

11. Members noted that the members of the voluntary protocol group had met several times over the course of 2017 and that the pilot period of approximately one year has now come to an end. Members also noted that the Secretariat has recently assisted the chair of the voluntary protocol sub group, Committee member Maria Maguire QC, in the development of a questionnaire to collate feedback on the pilot protocol. Members noted that it is intended that this feedback is used to inform the development of the compulsory protocol.

12. **The Committee considered Paper 4.1 and:**

- **noted the progress that has been made on the pilot of the voluntary pre-action clinical negligence protocol;**
- **approved work resuming on the compulsory clinical negligence pre-action protocol; and**

- **extended its thanks to the members of the voluntary pilot group for their valuable assistance with the trial.**

Item 4.2 – Compulsory Disease Pre-Action Protocol (Oral)

13. Amber Galbraith updated the Committee on the progress of the compulsory disease pre-action protocol sub group, which is tasked with developing policy relating to a compulsory pre-action protocol for disease cases.

14. Amber advised members that the sub group, which is comprised of purser agents, defender agents and insurer representatives, has met four times throughout 2017. She advised that the sub group has now largely agreed on the main overarching policy decisions about the disease protocol and that the most recent meetings have involved detailed consideration a draft protocol and discussion around some more complex issues. Amber advised, for example, that the sub group had recently had an in depth discussion around how the protocol could best deal with the issue of multiple defenders when one or more defenders refuse to engage properly in the protocol, or are unable to agree negligent exposure, apportionment or overall quantum of damages.

15. Amber advised that it is intended that the Committee will be invited to consider and, if content, approve the procedure in the protocol before it is passed to the Costs and Funding Committee for consideration of expenses.

16. **The Committee noted this update.**

Item 5: Research and Consultations

Item 5.1 – Amendment to Chapter 42A (Paper 5.1 – 5.1A)

17. Members considered **Papers 5.1 and 5.1A**, which invited the Committee to consider draft proposals to amend Chapter 42A (case management of certain personal injuries actions) of the Rules of the Court of Session 1994 (RCS).

18. Members noted that the operation in practice of Chapter 42A was discussed at a meeting of the Personal Injury Users Group ('PIUG') in July 2016. An issue highlighted in these discussions was the insufficiency of time between the closing of the record and the By Order Adjustment Roll ('BOAR') hearing taking place. Accordingly, members noted that it is often the case that the BOAR is continued to another date rather than a proof being fixed.

19. Members noted that this issue has also been considered by the Chapter 42A judges, who have agreed that the RCS should be amended to provide for a longer

period before the BOAR takes place, and to require written proposals for further procedure at an earlier stage. In light of these discussions, Lord Armstrong has asked the Lord President's Private Office to prepare the draft keeling amendments shown at **Paper 5.1A** for initial consideration by the Committee.

20. Members noted that the several amendments proposed in **Paper 5.1A** included changing the name of the BOAR to a "case management hearing" and providing that the case management hearing must take place not less than seven weeks from the date on which the record is closed.

21. Members considered the proposed amendments in detail and discussed whether these amendments would appropriately address the issues being encountered in practice. Members also noted that any change made to RCS could potentially require a substantial lead in time to allow SCTS to make any necessary system or process changes.

22. Members discussed whether or not the Committee should recommend that rules of court should require parties to provide precognition facilities. Members noted that the Scottish Law Commission had previously looked at this matter in relation to the substantive law. **Members agreed that an approach should be made to Scottish Law Commission to discuss this issue.**

23. **Members agreed that the proposals at Paper 5.1A required further detailed consideration and that the Secretariat and RRDT should meet with Committee members Amber Galbraith and Maria Maguire QC to further consider any potential amendments, with a view to a further draft paper being considered by the Committee at its next appropriate meeting.**

Item 6: A.O.C.B

24. Ronnie Conway raised an item in relation to a recent sheriff court case in which the issue of pre-litigation expenses had been discussed. Members noted that the claim arose from a road traffic accident in which the voluntary pre-action protocol was agreed. Members noted that liability was admitted, and the sum of damages was agreed. However, settlement could not be achieved because the defender's insurers refused to meet the fees claimed for police and medical reports. The claimant subsequently litigated and the defender immediately lodged a tender for the agreed sum. The tender was accepted and the case called in court for an argument regarding the disputed outlays.

25. Members noted that the claimant sought all costs whereas the defender maintained that the litigation was unnecessary and, accordingly, the defender should be awarded costs. Members noted that the Sheriff's view was that the litigation was not necessary or appropriate as parties could have agreed a joint remit to the auditor

instead of litigation. As neither party had sought to resolve the issue in this way, members noted that he found that neither party was entitled to costs.

26. Members considered the issues raised by this judgement and discussed whether an amendment should be made to the compulsory pre action protocol to provide a procedure for expenses to be dealt with in this kind of action.

27. Members agreed that the Secretariat and the RRDT would consider the issues raised in the case and would prepare a paper for consideration by the Committee at its next appropriate meeting.

Item 7: Dates of future meetings

28. Members noted the dates of the next meeting:

- Monday 9 April 2017 at 3.15 pm in Parliament House, Edinburgh.

**Scottish Civil Justice Council Secretariat
November 2017**