

SCOTTISH CIVIL JUSTICE COUNCIL

PERSONAL INJURY COMMITTEE

MINUTES

PARLIAMENT HOUSE, 2.00PM, MONDAY 09 DECEMBER 2013

Members present: Lord Jones (Chairman)
Sheriff Abercrombie QC (Dunfermline Sheriff Court)
Amber Galbraith (Advocate)
Maria Maguire QC (Advocate)
Gordon Keyden (Solicitor)
Fraser Simpson (Solicitor)
Ronnie Conway (Solicitor)
Alan Rogerson (Claims Manager)
Catriona Whyte (Solicitor, Scottish Legal Aid Board)
Hamish Goodall (Scottish Government)

In attendance:
Gillian Prentice (Deputy Principal Clerk of Session)
Chris Nicholson (Deputy Legal Secretary to the Lord President)
Lisa Gamble (Scottish Civil Justice Council Secretariat)

Apologies:
Frances MacPherson (Sheriff Clerk)
Sheriff Principal Stephen (Lothian and Borders) (papers member)
Sheriff Mackie (Edinburgh Sheriff Court)

Item 1: Introduction, welcome, apologies and private papers

1. Lord Jones welcomed those present to the second meeting of the Personal Injury Committee and noted apologies.

Private Papers

2. **The Committee agreed that the following papers are to be considered private papers and will not be published on the website:**

- Papers 5.2-5.2C (Recovery of Documents)
- Papers 6.1, 6.1C and D (Pre-action protocols)
- Papers 7.1. 7.1B and C (Taylor Review and Costs & Funding Committee)

Item 2: Minutes of previous meeting (paper 2.1)

3. **The Committee approved the minutes of the previous meeting.**

Item 3: Proceedings

Item 3.1: Standing Orders (papers 2.3 and 2.3A)

4. **The Committee noted that the amendments to the Standing Orders in respect of the regulation of SCJC committees, and dealing with FOISA requests.**
5. **The Committee noted the intention to review the standing orders in spring 2014.**

Item 3.2: Scottish Civil Justice Council update on activity [ORAL]

6. The SCJC has met twice since the PIC meeting of 02 September. Lisa Gamble provided an update on the activities of the SCJC, particularly the establishment of the Access to Justice and ICT Committees, and their respective remits.
7. The progress of the Rules Rewrite Working Group was also outlined, with regard to: the Group's research on other jurisdictions, priorities for civil courts reform, and plans for discussion with the Scottish Government and SCS as to the implementation timetable for the rules rewrite programme.

8. The Committee were also informed that the Group is considering, in particular whether there should be a single, unitary set of civil court rules, as in England and Wales, or whether separate rules for the sheriff court and the Court of Session should be retained.
9. The Committee noted that the RRWG will report in Spring 2014.

Item 4: Forward Work Programme

Item 4.1: Update from the Scottish Government on legislative developments [ORAL]

10. Hamish Goodall, Scottish Government representative, provided an update from the Scottish Government on policy initiatives with potential implications for personal injury actions, namely: draft Courts Reform (Sc) Bill; Damages (Sc) Bill; Apologies Bill (a proposal for a Members' Bill); Sheriff Principal Taylor's Review and the Scottish Government's consideration of the consultation on the recommendations of the No-Fault Compensation Review Group.

Item 4.2: SCJC Annual Programme (paper 4.2)

11. The Committee were apprised of the statutory requirement of the SCJC to prepare an annual programme and that the publication of the SCJC Annual Programme for 2013/14 had taken place at the beginning of November.
12. The Committee further noted:
 - **an annual programme will be prepared for 2014/15, which will include details of the timescales and phases for the rules rewrite project, following the consideration of these matters by the Rules Rewrite Working Group;**

- further work is underway in relation to the implications of the Scottish Government's 2013/14 legislative programme on the work of the SCJC and that further advice as to individual items of legislation referred to in the programme will be provided in due course;
- the plans for arranging court visits for SCJC members and lay committee members and that the Secretariat will provide further information on the proposed arrangements in due course; and
- the proposal to carry out a review of the SCJC's operations and structure, including its membership and the arrangements relating to committees, as part of the preparation of its annual report for 2013/14.

Item 5: Secondary Legislation

Item 5.1: Recovery of Documents (papers 5.2-5.2C)

13. The Committee considered three instruments that had been prepared in respect of the recovery of documents in personal injuries actions.
14. The first instrument (paper 5.2A) proposed to amend the Ordinary Cause Rules (OCR) and the Summary Cause Rules (SCR) and would replicate in those rules the Court of Session optional procedure for the recovery of documents. The second instrument (paper 5.2B) proposed to amend the Rules of the Court of Session (RCS) in respect of an ambiguity noted in the RCS when the first instrument was being drafted. The third instrument (paper 5.2C) was a version of the first instrument prepared in what could be considered a more modern style of drafting.
15. In respect of the third instrument, the committee noted that the rules were more readily understood. That being said, their usefulness was limited by the fact that the optional procedure was convoluted. It was also noted that to introduce one rule in the modern

style would look out of place and that a full re-draft would be more appropriate. **It was therefore agreed that the first instrument was the preferred style.**

16. In relation to the first instrument, members discussed the benefits of reproducing Court of Session procedure in the SCR without further modification. **It was agreed that progress required to be made in respect of the OCR and the RCS. On this basis the proposed amendment of the SCR would be removed from the first instrument and that instrument (as amended) together with the second instrument would be submitted to the Council for approval.** However, it remained preferable to have the same procedure available for the recovery of documents in each procedure.
17. **On this basis an instrument would be prepared for the next meeting of the Committee which would seek to replicate the relevant provisions of the RCS in the SCR with the necessary modifications for the former not to look out of place in the latter.**

Item 6: Civil Courts Reform

Item 6.1: Pre-action protocols (Paper 6.1-6.1D)

18. At the last meeting of the Committee members discussed the advantages of pre-action protocols. Members agreed that their usefulness was limited by the fact that they are not mandatory.
19. In response to a question the secretariat informed members that it was their understanding that the Courts Reform (Scotland) Bill proposes to give to the Court of Session the power to introduce pre-actions protocols by means of rules (i.e. the ability to make them mandatory).
20. **Members noted the position provided for in paper 6.1A, highlighting the proposed amendment of section 5 of the Court of Session Act 1998. In**

particular section 5(2) (b) (ii) which will allow for pre-action protocols to be provided for in Rules of Court (paper 6.1B).

21. Gordon Keyden addressed the Committee regarding the working group formed within Simpson & Marwick, following the last PIC meeting, with a view to looking at pre-action protocols in England and Wales (paper 6.1D).
22. The Committee discussed a potential model for pre-action protocols (paper 6.1C), submitted by Lord Jones.
23. **Following discussion, the Committee indicated that they wished to propose that the SCJC would use its powers to approve research into the use of the Law Society's voluntary pre-action protocols in Scotland.**
24. **Members agreed to feed any thoughts on how this research should be conducted and what it should encompass back to the SCJC Secretariat.**

Item 7: Sheriff Principal Taylor's Review and the establishing of a Costs & Funding Committee [Paper 7.1-7.1D]

25. The Committee noted that the SCJC will be establishing a Costs and Funding Committee to consider the recommendations of Sheriff Principal Taylor's review, and discussed whether there were areas relating to personal injury which should be prioritised for implementation.
26. It was suggested by members of the PIC that the introduction of qualified one way costs shifting should be considered as a priority.

27. **The Committee agreed to report to the SCJC that qualified one way cost shifting will come in, but there may be a need to look at fees, and that cost implications should be considered.**

Item 8: A.O.C.B

28. The Committee enquired as to the Scottish Government's plans for the privative limit. Hamish Goodall confirmed that there was no intention to divert from the £150,000 privative limit recommended by the Scottish Civil Court Review.
29. There was a discussion amongst Committee members regarding chapter 43 and the issue of appointment of a commissioner following the optional procedure. **It was agreed that the issue should be raised with the PIUG.**

Item 9: Future business

9.1 Dates of future meetings (Paper 9.1)

- **The Committee noted that the next PIC meeting, originally scheduled for 31 March 2014, has been reinstated.**
- **The next meeting is 10-12pm, 03 February 2014.**