

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
PERSONAL INJURY COMMITTEE
MONDAY 01 FEBRUARY 2016 AT 3.15 PM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE**

MINUTES

Members Present: Lord Armstrong (Chair)

Walter Drummond- Murray (Scottish Government)
Marie-Louise Fox (Director of Operations, SLAB)
Sheriff Principal Stephen
Sheriff Mackie
Maria Maguire QC (Advocate)
Amber Galbraith (Advocate)
Gordon Keyden (Solicitor)
Fraser Simpson (Solicitor)
Ronnie Conway (Solicitor Advocate)
Alan Rogerson (Claims Manager)

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)

Support: Stephen Feltham (Deputy Legal Secretary, Rules Rewrite Drafting Team)
Anne Hampson (Policy Officer, Scottish Civil Justice Council)

Apologies: Sheriff Principal Abercrombie
Nicola Anderson (SCS Policy and Legislation Branch)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present to the tenth meeting of the Personal Injury Committee (the Committee) and noted apologies from Sheriff Principal Abercrombie and Nicola Anderson.
2. The Chair then welcomed:
 - Walter Drummond-Murray who was attending his first meeting of the Committee following his appointment to Hazel Dalgard's post in the Scottish Government (SG); and
 - Marie Louise- Fox who has been appointed as the Scottish Legal Aid Board (SLAB) representative as Catriona Whyte's replacement; and
 - advised members that this was Anne Hampson's last meeting as her secondment to the Scottish Civil Justice Council (the Council) Secretariat comes to an end in April and she will be returning to the SG.

3. **Members recorded their thanks to Anne for all she had done in supporting the Committee.**
4. Members agreed not to publish the following papers: 3.2, 3.2A, 4.1, 4.1A-C, 4.2, 4.3, and 4.4.

Item 2: Previous meeting

Item 2.1 – Minutes of previous meeting (Paper 2.1)

5. **Members agreed the minutes from the previous meeting with the insertion of “fair, just and timely” before “joint settlement” at bullet point one of paragraph 12.**

Item 3: Forward Work Programme

Item 3.1 – Update from the Scottish Government (Oral)

6. Walter Drummond-Murray provided members with an update on legislative developments in the Scottish Government. Implementation of the Courts Reform (Scotland) Act 2014 is progressing and the Sheriff Appeal Court took up its civil jurisdiction on 1 January 2016. In the middle of January orders for the abolition of Stipendiary Magistrates and the transfer of Judicial remuneration arrangements were laid in Parliament and will come into effect on 1 April. The Apologies (Scotland) Bill lodged by Margaret Mitchell, MSP completed Stage 3 on 19 January 2016 and the Succession (Scotland) Bill completed Stage 3 on 28 January 2016 following an evidence session on 26 January 2016 on amendments recently lodged regarding caution. The Inquires into Fatal Accidents and Sudden Deaths etc (Scotland) Bill completed Stage 3 on 10 December 2015 and it is likely that the Act will be implemented towards the end of this year. The Bankruptcy (Scotland) Bill is due to complete Stage 1 by 5 February 2016.
7. In relation to the Human Trafficking and Exploitation (Scotland) Act, the first commencement order is to be laid by the end of March 2016. The next tranche of implementation of the Courts Reform (Scotland) Act will include the introduction on simple procedure and is likely to include the provisions in the Act concerning vexatious litigants and extended interdicts. The phased implementation of the Tribunals (Scotland) Act 2014 is currently planned to commence later this year with a suite of SSIs to bring the housing jurisdiction within the new tribunals structure. The consultation ‘Review of Civil Partnership’ closed on 15 December 2015 and the responses are currently being considered. Regarding a Damages Bill, policy considerations are currently underway, but there are no plans to take forward a Damages Bill at present. **Members noted the update.**

Item 3.2 – Membership (Paper 3.2)

8. At its 16 November 2015 meeting the Scottish Civil Justice Council (SCJC) considered **Paper 3.2A** which proposed some changes to the current members, and nominations for alternative representation, for the SLAB, the SG and the Scottish Courts and Tribunals Service (SCTS). It also proposed that Craig McCorkindale, Director for Civil Courts Reform, SCTS be appointed as a paper member to the Access to Justice, Costs and Funding, Family Law, Personal Injury and Rules Rewrite Committees. SCJC members approved the changes proposed.
9. **Members noted that, although Hamish Goodall was appointed as the new SG representative in place of Hazel Dalgard, since then Walter Drummond-Murray has been appointed to Hazel's post. The Lord President agreed that it would be appropriate for Walter to attend this meeting with a view to formal approval of his appointment being sought at the 14 March 2016 meeting of the Scottish Civil Justice Council.**
10. **Members also noted that Marie-Louise Fox is the new SLAB representative; Gillian Prentice and Nicola Anderson will continue to attend PIC meetings as the SCTS representatives; and Craig McCorkindale has been appointed as a paper member to the PIC.**
11. **The Chair recorded the Committee's thanks to Hazel Dalgard the previous SG representative, and the previous SLAB representative, Catriona Whyte who had served the Committee well.**

Item 4: Justice Reform

Item 4.1: Personal Injury Compulsory Pre-Action Protocol [Papers 4.1 and 4.1A-C]

12. At its meeting of 09 November 2015 the Committee considered in detail an overview of the main steps of a proposed Personal Injury Pre-Action Protocol (the Protocol). Members concluded that a revised protocol along with draft rules be developed for consideration at the next Committee meeting taking account of discussions at the 09 November meeting. Members considered the draft Act of Sederunt and Protocol alongside the issues discussed in **Paper 4.1**.
13. **Following discussion, the Committee indicated it was content with the following aspects of the proposed rules and the compulsory protocol:**
 - **the Protocol should be commenced at the same time as the introduction of the simple procedure rules;**
 - **as there are features which make fatal claims less suited to the application of the Protocol, they should be excluded from the Protocol;**
 - **the general approach taken with regard to the powers available to the sheriff for failure to comply with the Protocol;**

- the matters which the sheriff must take into account when exercising the power in the rules;
 - the provision contained in the Protocol regarding the application of the Protocol;
 - the addition of the words “fair, just and timely” before “settlement” in the provision contained in the Protocol regarding the aims of the Protocol;
 - the provision contained in the Protocol regarding the initiation of a Protocol claim;
 - the provision contained in the Protocol regarding the disclosure of documents and the instruction of medical reports;
 - the provision contained in the Protocol regarding the Statement of Valuation of Claim; and
 - the provision contained in the Protocol regarding settlement.
14. With regard to requiring an averment to be included in the initial writ summarising the steps taken under the protocol and the pursuer’s assessment of the extent to which the protocol was complied with, the Committee agreed that it would make more sense to require a party applying by motion for the sheriff to take steps under draft rule 3A.3(2) to include such information in the motion form. If necessary, a Practice Note could be developed advising parties of the level of detail to be included in the motion form.
15. In relation to the inclusion of a provision giving the sheriff power to order the party at fault to make a penalty payment for breaching the protocol, the Committee indicated that it was difficult to see what defaults could not be dealt with under existing measures and that adding another layer to the list of consequences may be an unnecessary complication. Members concluded that this matter should be kept under review following the introduction of the Protocol and revisited if necessary.
16. In line with the Committee’s recommendations, provision was included allowing the sheriff to take steps where a party unreasonably fails to accept an offer made in settlement. Subsequently, concerns were raised about leaving this to the discretion of the court and a paper was provided for consideration which suggested provision to the effect that a settlement offer made under the Protocol is to have no effect unless it is repeated as a judicial tender within 28 days of service. Following discussion, the Committee agreed with this suggestion but concluded that the timeframe for making the tender should be “no later than the lodging of defences”.
17. The Committee also noted that the issue of pursuers’ offers is due to be considered by the Costs and Funding Committee (the CAFC) at its 21 March meeting. The question of whether to apply provision on pursuers’ offers to

protocol cases should be considered at a later date once the CAFC have developed general proposals relating to pursuers' offers.

18. Regarding admissions of liability, members noted that the Court of Session's rule making powers are limited to making provision for or about procedure and practice to be followed in civil proceedings (or matters ancillary to such proceedings). They cannot be used to alter the substantive law relating to civil proceedings and cannot therefore provide that any admission of liability made under the Protocol is binding on parties for all purposes. However, the Committee agreed that the Protocol should continue to apply in cases where an admission of liability is made by the defender which (i) the defender intends as a binding admission and (ii) the claimant accepts. Otherwise, the parties will no longer be expected to follow the Protocol.
19. Members concluded that the draft rules of court and the proposed Protocol be revised for consideration at the 25 April 2016 Committee meeting, taking account of the discussions at:
- the 01 February Committee meeting;
 - the 01 February AtJC meeting regarding unrepresented parties; and
 - the 21 March CAFC meeting in relation to fees recoverable.

Item 4.2: Compulsory Pre-Action Protocols – Application to Party Litigants [Paper 4.2]

20. At the Committee 09 November meeting, most members considered that there would be merit in requiring party litigants to follow the steps of the protocol, so far as possible, as it would provide a structure for pre-litigation settlement negotiations. However, some members were of the view that applying the protocol to party litigants would not be beneficial as they may struggle to adhere to strict time limits and produce an accurate Statement of Valuation of Claim. Members were in agreement that if the protocol is to extend to party litigants, additional safeguards should be built into the rules as they may be tempted to accept a settlement offer which is significantly lower than the value of their claim.
21. The Committee agreed to seek the views of the Access to Justice Committee (AtJC) on the application of the protocol to party litigants and the safeguards which might be added to provide some protection.
22. **Members noted that, as the AtJC meeting was also taking place on 01 February 2016, Paper 4.2 had been submitted to it for consideration.**

Item 4.3: Compulsory Pre-Action Protocols – Fees Recoverable [Paper 4.3]

23. At the Committee 09 November 2015 meeting, with regard to the issue of fees recoverable for work undertaken during the compulsory PAP stages, the Committee noted that the power in section 106 of the Courts Reform (Scotland) Act 2014 was limited to making provision for fees in civil proceedings in the sheriff court.

24. The Committee agreed to ask the CAFC to consider whether the block fee in the table of fees for pre-litigation work should be adjusted to take account of work undertaken during pre-action protocols. A draft paper, which also summarised the approach taken with regard to sanctions for non-compliance, was prepared inviting comments from the CAFC.

25. Members considered the draft paper and indicated that:

- **they were content that the paper be submitted, subject to amendments agreed at this meeting, to the CAFC for consideration at its 21 March 2016 meeting;**
- **a joint meeting with the CAFC would be beneficial; and**
- **that the issue noted at paragraph 23 above be brought to the attention of the Council.**

Item 4.4: Simple Procedure [Paper 4.4]

26. Section 72 of the Courts Reform (Scotland) Act 2014 provides that certain types of proceedings, including proceedings for payment of a sum of money not exceeding £5,000 must be brought subject to simple procedure. Accordingly, actions of damages for personal injury valued at £5,000 or less will, once section 72 is commenced, require to be brought as a simple procedure case (except for actions of less than £5,000 proceeding in the all-Scotland court by virtue of section 73 of the 2014 Act). A special PI procedure will therefore require to be developed for PI actions in the sheriff court valued at or below £5,000. Members were advised at the 09 November Committee meeting that the timetable had been revised and that draft rules would be submitted to the 01 February meeting of the Committee. **Paper 4.4** provided an update for members on a further revised timetable for developing the rules of court for the new simple procedure.

27. Members noted that, in light of the revised timetable for the completion, approval and implementation of the simple procedure rules, a first draft of the Personal Injury Simple Procedure rules will be submitted to the Committee meeting on 25 April.

Item 5: A.O.C.B.

28. No other Business was raised.

Item 6: Dates of future meetings

29. Members noted the dates of future meetings:

- Monday 25 April 2016 at 3.15 pm
- Monday 06 June 2016 at 3.15 pm

**Scottish Civil Justice Council Secretariat
February 2016**