

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
PERSONAL INJURY COMMITTEE
MONDAY 1 APRIL 2019 AT 3.15 PM
JUDGES CONFERENCE ROOM, LEVEL +2 PARLIAMENT HOUSE

MINUTES

Members Present: Lord Armstrong (Chair)

Lord Boyd of Duncansby

Ronnie Conway (Solicitor Advocate)

Marie-Louise Fox (Director of Operations, SLAB)

Amber Galbraith (Advocate)

Hamish Goodall (Scottish Government)

Gordon Keyden (Solicitor)

Sheriff McGowan

Campbell Normand (Solicitor Advocate)

Alan Rogerson (Claims Manager)

Fraser Simpson (Solicitor)

Sheriff Principal Stephen

In attendance: Christina Bardsley (Court of Session, SCTS)

Support: Andrea Campbell (Secretariat Business Manager, Scottish Civil Justice Council)

Roddy Flinn (Legal Secretary to the Lord President)

Kelly Jack (Policy Officer, Scottish Civil Justice Council)

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

Apologies: Maria Maguire QC (Advocate)
Mark Kubeczka (Legislation and Implementation Team, SCTS)
Walter Drummond-Murray (Scottish Government)

Item 1: Welcome, apologies and agreement of private papers

1. The Chairman welcomed those present and noted apologies from Maria Maguire QC, Mark Kubeczka and Walter Drummond-Murray.
2. The Chair welcomed Hamish Goodall, who is attending on behalf of Walter Drummond-Murray as the Scottish Government representative.
3. **The Committee agreed that the following papers will be treated as private and not to be published: 2.2, 4.1, 4.1A-B, 5.1 and 5.1A-C.**

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 considered **Paper 2.2**, which provided an update on progress on a number of items since the last meeting.
6. The Committee noted that the sub-group which is taking forward the clinical negligence pre-action protocol had a productive meeting on 25 October 2018; the Committee will be invited to consider a draft protocol in due course.
7. The Committee noted that at its March 2019 meeting, the Council agreed that the development of a clinical negligence pre-action protocol and a disease compulsory pre-action protocol will remain on its work plan for the next year. The Committee also noted that the review of personal injury pre-action protocol will also be incorporated in the Council's work plan for the next year.
8. **The Committee noted the progress that had been made on actions since the last meeting.**

Item 3: Work Programme

Item 3.1 – Update from the Scottish Government on legislative developments (Oral)

9. Hamish Goodall provided the Committee with an update on legislative developments in the Scottish Government.
10. He advised that the Damages (Investment Returns and Periodical Payments) (Scotland) Bill passed Stage 3 on the 19 March 2019 and awaits Royal Assent. He intimated that written evidence had been received in respect to Children (Equal Protection from Assault) (Scotland) Bill and oral evidence is now being taken.

Item 4: Legislation

Item 4.1 – Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018: Section 8: Qualified One Way Cost Shifting (Papers 4.1 and 4.1A-B)

11. Roddy Flinn introduced these papers on behalf of the Costs and Funding Committee which invited the Committee to consider and comment on a first draft of the proposed Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules, Ordinary Cause Rules and Summary Cause Rules Amendment) (Qualified One Way Costs Shifting) 2019 (**Paper 4.1A**). The draft instrument introduces a new chapter to each set of court rules; the Rules of the Court of Session, the Sheriff Appeal Court Rules, the Ordinary Cause Rules and the Summary Cause Rules.
12. The Costs and Funding Committee considered the draft rules at a meeting on 4 February 2019 and agreed to share the draft instrument with the Personal Injury Committee for comments.
13. The Costs and Funding Committee also invited the Personal Injury Committee to consider whether an uninsured defender should be subject to the QOCS regime. Having considered this point, the Personal Injury Committee remained of the view that there should be no exception to the QOCS regime for uninsured defenders. It noted that the issue would be kept under review by Scottish Ministers, in terms of the provision in the Act, which requires Scottish Ministers to review the operation of Section 8 after a period of 5 years from the date of Royal Assent.
14. Mr Conway raised some concerns about the provisions in the rules setting out the grounds upon which the protection of QOCS might be lost, in particular the ground of abandonment. He did not think the matter should be left to unguided judicial discretion. The Committee agreed check whether the reference to Summary Cause Rule 8 was appropriate. Mr Conway noted his preference that summary dismissal rules similar to those in Ordinary Cause Rule 17.2 be introduced in the Court of Session and for summary dismissal to be made a ground for dis-applying QOCS in the Court of Session as well as the sheriff court. He thought that where a

case was abandoned and the defender sought to dis-apply QOCS and seek expenses, the court should apply a form of retrospective 'summary dismissal' test, where the question could be whether the case ever had any realistic prospects of success.

15. The Committee discussed the issues raised. Members considered that the circumstances in which case would be abandoned could vary widely; it might be reasonable to dis-apply QOCS in one case, but not another. On balance, members were of the view that it was appropriate for the judge to have complete discretion in the matter of dis-applying expenses following abandonment. The Committee agreed that there was an expectation that judges would use their discretion reasonably.

16. The Committee considered the draft rule dis-applying QOCS where a defender fails to beat a tender. There was a question raised on whether, if QOCS was dis-applied, the defender would be able to recover the whole expenses of the case, or only post tender expenses. The Committee were of the view that as there is no change to the law of expenses behind the QOCS instrument, only post tender expenses could be recovered. However, the Committee agreed that the relevant rules should be amended to make this clear.

17. The Committee noted other drafting points which LPPO will address.

18. The Committee agreed the principles of the QOCS regime set out in the draft rules, subject to an amendment making provision for the recovery of post tender expenses only; the Secretariat agreed to circulate the revised instrument to members.

Item 5.1 – Amendment to Chapter 42A RCS (Papers 5.1 and 5.1A-C)

19. Ian Vickerstaff spoke to these papers. The Committee considered **Papers 5.1 and 5.1A-C**, which invited members to further consider proposals to amend Chapter 42A of the Rules of the Court of Session 1994 ("RCS") and to agree the next steps for taking this work forward. The Committee had approved the substantive reforms of Chapter 42A at previous meetings and were now invited to consider various miscellaneous and technical amendments which have been made to the draft rules.

20. The Committee approved the proposed amendments subject to one minor point raised by Sheriff Principal Stephen in respect of the use of the term "useful" in the Rules (which is noted as currently appearing in rule 42A.4(4) of the RCS).

21. The Committee agreed that the draft rules should be considered by the group of individuals, which had been recommended, led by Maria Maguire and including one addition, Amber Galbraith. This group will also consider an

amended draft Practice Note for Chapter 42A cases and whether it will be appropriate for the equivalent Sheriff Court Rules (Chapter 36A of the Ordinary Cause Rules) to also be amended as part of this exercise.

Item 6: A.O.C.B

22. No other business was raised.

Item 9: Dates of future meetings

23. The Committee noted that the date and time of the next meeting would be circulated by the Secretariat in due course.

**Scottish Civil Justice Council Secretariat
April 2019**

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