

**SCOTTISH CIVIL JUSTICE COUNCIL
PERSONAL INJURY COMMITTEE**

MINUTES

PARLIAMENT HOUSE, MONDAY 09 NOVEMBER 2015

Members present: Lord Armstrong (Chair)
Sheriff Principal Stephen
Sheriff Principal Abercrombie
Maria Maguire QC (Advocate)
Amber Galbraith (Advocate)
Gordon Keyden (Solicitor)
Fraser Simpson (Solicitor)
Ronnie Conway (Solicitor Advocate)
Alan Rogerson (Claims Manager)
Hazel Dalgard (Scottish Government)
Catriona Whyte (Solicitor, Scottish Legal Aid Board)

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)
Stephen Feltham (Rules Rewrite Drafting Team)
John Thomson (Deputy Legal Secretary to the Lord President)
Neil Deacon (Deputy Legal Secretary to the Lord President)
Anne Hampson (Policy Officer, Scottish Civil Justice Council)

Apologies: Sheriff Mackie (Edinburgh Sheriff Court)
Nicola Anderson (SCS Policy and Legislation Branch)

Item 1: Introduction, welcome, apologies and private papers

1. The Chair welcomed those present to the ninth meeting of the Personal Injury Committee (PIC). Lord Armstrong explained that he had taken over as Chair of the PIC and had met with Lord Jones to ensure a smooth changeover.
2. The Chair then welcomed:
 - Neil Deacon who was attending his first meeting as the Deputy Legal Secretary in the Lord President's Private Office (LPPO) appointed to

provide support to the PIC as regards general care and maintenance of the PI rules of the Court of Session and sheriff court rules; and

- John Thomson the Deputy Legal Secretary in the LPPO who supports the Costs and Funding Committee (CAFC) and who was attending to speak to agenda Item 3.2.

3. Sheriff Principal Stephen was then invited to provide an update on the Sheriff Personal Injury Court (SPIC). She informed members that 356 writs had been lodged since SPIC was implemented on 22 September 2015. In 40 of these cases defences had been received resulting in a timetable being generated and proof diets fixed for June 2016. E motion procedure is working well although numbers of such motions have been limited. Sheriff Principal Stephen recorded her thanks to Lord Jones, Kenny Htet-Khin, Stephen Feltham, Fraser Simpson, Maria Maguire and Tony Murray for their valuable input at the sheriffs' training day on 28 September 2015. She indicated that SPIC hope to hold an introduction event in December 2015.

Private Papers

4. **The Committee agreed that the following papers are to be considered private papers and will not be published:**
 - Papers 4.1 and 4.1B – Compulsory Pre-Action Protocols
 - Papers 4.2 and 4.2A – Simple Procedure Personal Injury Rules.

Item 2: Minutes of previous meeting (Paper 2.1)

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

Item 3: Forward Work programme

Item 3.1: Update from the Scottish Government [Oral]

6. Hazel Dalgard informed members that in relation to courts reform subordinate legislation to implement the Sheriff Appeal Court (civil) had been the focus of much recent work and that, as well as the Act of Sederunt providing for rules of court being laid by the Court of Session, a number of Orders had been prepared by the Scottish Government. She also advised that the Stage 1 Debate on the Succession 1 Bill had taken place on 4 November 2015; the Justice Committee of the Scottish Parliament had completed Stage 2 consideration of the Inquiries into Fatal Accidents and Sudden deaths etc. (Scotland) Bill on 3 November 2015; and the consultation on the Succession 2 Bill had closed on 18 September 2015. In

relation to time bar Hazel advised that a draft Bill would be published in spring 2016. Members queried the status of the proposed Damages Bill¹; Hazel agreed to clarify the position. **Members noted the update.**

Item 3.2: Update from CAFC 11 May meeting [Oral]

7. John Thomson spoke to this item. He advised that members of the Law Society of Scotland Remuneration Committee attended the CAFC 12 October meeting to discuss solicitors' fees in relation to personal injury proceedings in the sheriff court. The Remuneration Committee was concerned that the level of fees currently provided for would not adequately remunerate the work that will require to be done in relation to cases raised in the all-Scotland personal injury court. The Law Society therefore proposed an alternative table of Fees applicable to cases in the All-Scotland court.
8. The CAFC was not persuaded by the proposed approach of across the board increases. However, members agreed that consideration should be given to giving sheriff court auditors the power to increase or reduce inclusive fees in appropriate circumstances, in line with the position in the Court of Session. The Lord President's Private Office is currently preparing a draft amendment to the sheriff court fees tables for consideration at a future CAFC meeting. **Members noted this update but queried whether the differences between the Court of Session and the sheriff courts had been sufficiently recognised.**

Item 3.3: Update from 28 May meeting of the Personal Injury Reference Group Sub-Group on Clinical Negligence [Oral]

9. Stephen Feltham spoke to this item. He informed members that the sub-Group set up to develop a recommended compulsory Clinical Negligence Pre-Action Protocol (PAP) met on 28 October 2015. The Resolution of Clinical Disputes pre-action protocol applicable in England and Wales was used as a basis for discussion. The proposed features for inclusion in a draft PI Clinical Negligence pre-action protocol were agreed.
10. Stephen explained that, given the complex nature of clinical negligence claims, it was proposed that a Clinical Negligence PAP would benefit from being implemented to a slightly longer timeframe than the PI PAP and that a draft protocol will be prepared and submitted for consideration and approval by the

¹ In relation to the proposed Damages Bill Hazel has since confirmed that the policy remains under consideration, but there are no clear time-scales for any Bill.

full Committee at a future meeting. Members indicated that they were content with progress on, and the timing, of a Clinical Negligence PAP.

Item 4: Justice Reform

Item 4.1: Compulsory Pre-Action Protocols [Papers 4.1 and 4.1A-B]

11. At its 25 August meeting, the PIC PAP Reference Group considered the features of the proposed compulsory PAP and made a number of recommendations as detailed in **Paper 4.1**. The Committee considered the proposed PI PAP outlined at **Annex A** alongside the issues discussed in **Part B of Paper 4.1**.

12. Following discussion, the Committee indicated it was content with the following aspects of the proposed compulsory protocol:

- the protocol should include an overriding statement of principle. This should include the aims of advancing a fair, just and timely joint settlement without recourse to litigation and encouraging good practice;
- it should apply to cases where the amount of damages sought does not exceed £25,000;
- where the amount of damages sought subsequently increases beyond £25,000, the protocol should require the claimant to advise the defender that the protocol threshold has been exceeded. However, it should be open to parties to continue to adhere to the protocol requirements on a voluntary basis;
- the proposal to adopt the features of the voluntary PI protocol as regards the content of the letter of claim, the time allowed for the defender/insurer to acknowledge and investigate a claim and the binding nature of admissions of liability for all cases up to the value of £25,000 (other than in cases where the claim is proved to be fraudulent);
- that parties be able to (but not be compelled to) send documents under the protocol by email. A Practice Note could be issued alongside the rules stating that delivery by email is preferred;
- the proposals for disclosure of relevant documents and medical reports;
- the proposed requirement on the claimant to issue a Statement of Valuation of Claim to the insurer where the Insurer has admitted liability;
- the period of 5 weeks given to the Insurer to consider the Statement of Valuation and issue a settlement offer;
- that parties should be required to pay damages and agreed expenses within 5 weeks of settlement. Interest is to be payable at the judicial rate where payment is not made within 5 weeks;

- that settlement offers can only be made following submission of medical evidence of injury (except in cases where the claimant's injuries are minor and no medical treatment sought);
- that cases which are raised having not settled under the protocol should be subject to the existing procedures set out in the Summary Cause or Ordinary Cause Rules; and
- that the pursuer should include an averment in their initial writ setting out a summary of the steps taken to reach settlement under the protocol and the extent to which parties have complied with the protocol requirements.

13. The Committee also indicated that:

- the general PI protocol should not apply to cases where there is a specific voluntary protocol or court management system in place (such as disease cases);
- consideration should be given to publishing the email addresses of the main insurers online in order to provide an initial point of email contact for issuing letters of claim – the ABI might be willing to assist with this;
- data protection issues surrounding the emailing of confidential documents should be taken into account;
- the court should have discretion to impose sanctions for non-compliance with the protocol. The sanctions available to the court should be to make awards regarding expenses and/or punitive interest on awards of damages. In exercising this discretion, the court is to take into account the conduct of the parties during the protocol stages and the punitive effect of the sanction. Minor or technical breaches are not likely to amount to a default attracting a sanction.
- As regards cases where an award of damages fails to better a settlement offer made under the protocol, the Committee agreed that it should be open to the court to exercise its discretion to impose a sanction.

14. Regarding party litigants, 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. 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. Draft proposals should be developed and submitted to the AtJC for consideration at a meeting in early 2016.

15. The Reference Group had recommended that it should not be open to the claimant to simply refuse any offer of settlement made by the insurer; they should be obliged to either accept the offer or issue a counter-offer. The Committee considered this proposal. It was noted that this process works without difficulty in England and Wales; it forces parties to finalise their position and encourages a negotiated settlement. However, some members expressed concern about forcing claimants to issue a counter-offer on the basis that this devalues the figure entered in the Statement of Valuation of Claim; this could lead to a situation where unreasonably low offers are made in the knowledge that a counter-offer is likely to be issued seeking a higher figure.
16. The Committee agreed that a sensible approach would be to require the claimant to issue a reasoned response to the offer within 14 days. Unless the offer is accepted, there would be a compulsory moratorium or 'stocktaking' period of 14 days after receipt of the response during which it would not be open to the claimant to raise proceedings. Further negotiation could take place during this period if desired.
17. With regard to the issue of fees recoverable for work undertaken during the compulsory pre-action protocol 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. Parties who are negotiating a settlement entirely under the protocol would therefore need to deal with the matter of expenses as part of their settlement negotiations. 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 paper should be drafted and submitted to the 21 March 2016 meeting of the CAFC. PI Committee members said they would be happy to meet with members of the CAFC to discuss this matter if that would be helpful.
18. Members concluded that draft rules of court in relation to a PI PAP be developed for consideration at the next PIC meeting, taking account of the discussions at the 09 November PIC meeting.

Item 4.2: Simple Procedure Personal Injury Rules [Papers 4.2 and 4.2A]

19. Section 72 of the 2014 Act 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. **Paper 4.2** provided an update for members on a revised timetable for developing the rules of court for the new simple procedure.

20. Members noted the current position on the rules for the new simple procedure and the proposal to provide a first draft of the rules for PI simple procedure for consideration to the next PIC meeting.

Item 5: A.O.C.B.

21. The Chair noted that at the 08 June 2015 meeting members agreed that the PIC meetings should continue to be held on a Monday. He asked members whether they were content that these meetings be held at 3.15pm rather than at 4.15pm. **Members agreed that future meetings should take place at 3.15pm.**

22. No further business was raised under this agenda item.

Item 6: Dates of future meetings

23. The Committee noted that the next meeting of the PIC will be held on:

- Monday 01 February 2016 at 15.15.

24. The Chair closed the meeting and thanked members for their attendance and contributions.