

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL
PERSONAL INJURY COMMITTEE
MONDAY 17 OCTOBER 2016 AT 3.15 PM
JUDGES DINING ROOM, PARLIAMENT HOUSE

MINUTES

Members Present: Lord Armstrong (Chair)

Walter Drummond- Murray (Scottish Government)

Sheriff Principal Stephen

Maria Maguire QC (Advocate)

Amber Galbraith (Advocate)

Fraser Simpson (Solicitor)

Ronnie Conway (Solicitor Advocate)

Alan Rogerson (Claims Manager)

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

Anne Hampson (Policy Officer, Scottish Civil Justice Council)

Apologies: Marie-Louise Fox (Director of Operations, SLAB)

Sheriff Principal Abercrombie

Sheriff Mackie

Gordon Keyden (Solicitor)

Gillian Prentice (Deputy Principal Clerk of Session)

Nicola Anderson (SCTS Legislation and Implementation Team)

Item 1: Welcome, apologies and agreement of private papers

1. The Chair welcomed those present and introduced Norman Munro of the Rules Rewrite Drafting Team, who is providing legal advice to the Committee and David Ross who will be providing Secretariat support to the Committee following Anne Hampson's return to the Scottish Government. He thanked Anne for her support.
2. The Chair noted apologies from Marie-Louise Fox, Sheriff Principal Abercrombie, Sheriff Mackie, Gordon Keyden, Nicola Anderson and Gillian Prentice.
3. **The Committee agreed that the following papers will be treated as private and not published: 2.2, 4.1, 4.1A-B, 4.2, 4.2A.**

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 (Oral)

6. Walter Drummond-Murray provided members with an update on legislative developments in the Scottish Government. Walter advised that the Government's Programme for Government for 2016/17 confirmed that in the current Parliamentary year there would be a Bill to implement a Scottish Law Commission report on third party rights in contracts; to remove the limitation period for survivors of historical child abuse; and to implement Sheriff Principal Taylor's review of costs and funding in civil litigation. Orders are being made in relation to Simple Procedure and consequential Legal Aid changes to bring provisions into force in November 2016. Walter advised that around thirty responses were received to the consultation on court fees and the Minister is currently considering the way forward. **The Committee noted the update.**

Item 4: Justice System: Rules Rewrite

Item 4.1: Simple Procedure – Personal Injury Rules (Papers 4.1 and 4.1A-D)

7. The Committee considered the policy advice provided in **Paper 4.1B** and the revised draft Act of Sederunt set out at **Paper 4.1A** which was amended in light of comments received from members following consideration of the initial draft rules by correspondence.

8. **In relation to the application and the structure of the rules, the Committee agreed:**

- **the draft rules should not contain provision for more complex cases (e.g. mesothelioma claims, claims following a death, or provisional and further damages claims) which, due to their anticipated value, would be unlikely to be raised or proceed in simple procedure; and**
- **the personal injury rules should be a separate Part of the Simple Procedure Rules.**

9. **Following detailed consideration of the provisions and suggested forms in the draft rules, the Committee agreed that:**

- **further amendments were required to ensure the rules were as consistent as possible with other personal injury rules;**
- **some of the rules and forms should be removed in light of the decision to remove more complex cases from simple procedure;**
- **the rules should not include a presumption that only evidence from a medical practitioner who treated or examined the claimant as it is important that proportionality should be taken into account in relation to medical records (this was unanimously agreed by the Committee);**
- **some additional guidance should be incorporated into the forms to ensure lay persons fully understand what is being asked of them; and**
- **there should be further clarity around the personal injury timetable and the simple procedure timetable (i.e. the rules which provide for the last date of service of the Claim Form and the last date for a response);**
- **the requirement that a pre-trial meeting take place face to face either by meeting or by way of video conference is an important step where both parties are represented, however, if either the claimant or the respondent are unrepresented it may not be appropriate and as such a rule should be added allowing the pre-trial meeting to be dispensed with if either of the parties is not legally represented.**

10. **The Committee indicated that they were content for the draft rules, once amended in the manner suggested, to be submitted to the Council for approval of a consultation exercise with stakeholders.**

11. **It was also agreed that the matter of fees in a simple procedure personal injury claim should be discussed with the Costs and Funding Committee.**

12. The Chair then advised members that Maria Maguire had agreed to lead the stakeholder consultation personal injury focus group and invited consideration of a set of possible consultation questions to be posed as part of that consultation exercise. **The Committee noted that many of the possible questions had been covered in the previous discussion and requested that an amended version be circulated for comment by correspondence prior to the consultation taking place.**

13. **The Committee noted that, following the consultation exercise, final consideration of the Simple Procedure (Special Claims) Rules was scheduled to take place at an Access to Justice Committee meeting in April 2017 and agreed that Amber Galbraith, Alan Rogerson and Fraser Simpson should represent the Personal Injury Committee at that meeting. The Chair indicated that it was important for there to be shrieval representation and that Sheriff Mackie should be asked to also attend the meeting.**

Item 4.2: Compulsory Clinical Negligence Pre-Action Protocol (Papers 4.2 and 4.2A)

14. The Committee considered proposed features of a compulsory Clinical Negligence Pre-Action Protocol (CN Protocol) developed by the Pre-Action Protocol Reference Group Clinical Negligence Sub Group (sub-group) and noted that the NHS National Services Scotland Central Legal Office is currently piloting a voluntary clinical negligence pre-action protocol (VP).

15. Maria Maguire advised members that at the June 2016 Ampersand Clinical Negligence conference there was a session on the ideas behind the proposed compulsory CN Protocol and whether there was an opportunity to trial a VP. The discussion at the conference raised awareness in this specialist area that practitioners will need to be prepared for a compulsory CN Protocol. There was a consensus that there would need to be the opportunity to pilot a VP scheme and Practitioners hoped there would be sufficient time to do so in order that any compulsory scheme would reflect, in so far as possible, the realities of practice and ensure that the scheme worked as efficiently as possible. Maria advised that she would support a period of time for the trial, which started at the beginning of September 2016, before the compulsory CN Protocol is finalised. She anticipates constructive feedback and advises that there have been offers from agents and representatives of the medical defence organisations to become involved in providing such feedback with a view to developing a robust protocol.

16. **The Committee agreed that the introduction of a compulsory Clinical Negligence Pre-Action Protocol should be postponed to allow the trial of voluntary protocol time to bed in and for it to be monitored and evaluated. Members also agreed that those involved in piloting the voluntary protocol should be invited to a meeting with the sub-group. The Chair noted his thanks to the sub-group.**

Item 4.3: Compulsory Disease Pre-Action Protocol (Oral)

17. The Scottish Civil Courts Review 2009 recommended that existing pre-action protocols in relation to personal injury and industrial disease claims should be compulsory and that a protocol on clinical negligence actions should be developed.

18. The Chair suggested that, as the model of establishing smaller reference groups for developing policy in relation to the Personal Injury and Clinical Negligence Pre-Action Protocols was successful, a working group may also be a suitable means of progressing work in the development of an Industrial Disease Protocol.

19. **The Committee agreed that a small reference group be set up to develop policy in relation to a compulsory Industrial Disease Pre-action Protocol. Alan Rogerson, Gordon Keyden, Amber Galbraith, Ronnie Conway and Fraser Simpson agreed to sit on the group and to consider whether there are other experienced practitioners in the field of industrial disease, who do not sit on the Committee, who could be invited to sit on the reference group.**

Item 5: A.O.C.B.

20. The Committee agreed at its 09 November 2015 meeting that parties should be able to (but not be compelled to) send documents under the compulsory Personal Injury Pre-Action Protocol by email and that consideration should be given to publishing the email addresses of the main insurers online in order to provide an initial point of email contact. Alan Rogerson advised that, if members are content, he will contact the Law Society of Scotland with a view to requesting that they host such a list. **The Committee agreed that this was a suitable way forward.**

21. Amber Galbraith suggested that an amendment is required to Chapter 36A of the Sheriff Court Ordinary Cause Rules. At rule 36A.10(1)(c) 'reports' should be replaced with 'records'. This will be brought to the attention of the Lord President's Private Office.

Item 6: Dates of future meetings

22. Members noted the dates of the next meetings:

- Monday 05 December 2016 at 3.15 pm
- Monday 16 January 2017 at 3.15 pm
- Monday 20 March 2017. at 3.15 pm

23. **The Chair thanked those attending the meeting.**

Scottish Civil Justice Council Secretariat

October 2016