

NOTE OF MEETING
CAFC WORKING GROUP ON PRE-ACTION PROTOCOL FEES
15 MARCH 2022 AT 4PM VIA WEBEX

Present

- Sheriff Hughes (Chair)
- Alan Rogerson
- Darren Deary
- David Tait
- Lynn Beattie
- Andrew Henderson
- Stewart Mullen
- Michael Stewart
- Fraser Simpson
- Steven Carrie

Support

- Karen Stewart
- Paula Preston

Note of Discussions & Outcomes

Welcome, introductions and agreement of private papers

1. The Chair welcomed all members who introduced themselves to the group. The Chair clarified the Working Group's terms of reference and what is required of the members. Members agreed that all papers would remain private.

Implementation Timetable

2. Members considered the timetable of work required to take forward the Working Group remit. This includes policy development, legal drafting and supplementary rule making activities. The Chair noted that whilst the timetable would be challenging, he was keen to progress work and remain flexible on individual activities with a view to meeting the timescales set. Members noted the caveat that there may be a potential requirement for undertaking consultation and this would need to be factored into the timetable if so advised.

Discussion Papers

3. Members considered the papers produced and discussed various matters relating to disease and clinical negligence cases. The following is a summary of the discussions and decisions taken:
4. Members noted that 80% of CN cases in England & Wales are settled during pre-litigation. The exact opposite is the case in Scotland. CN cases do not have scale fees, instead the fees are dealt with by law accountants. The intention of the PAPs is to bring these settlement figures into alignment by moving away from litigation into a settlement culture. . Members recognised that this approach will require a change of mind-set by litigators and that the fee structures developed should encourage defenders to respond properly to claims and will be key to achieving these aims.
5. Members agreed that both disease and clinical negligence cases were very different in nature to standard personal injury cases. It was recognised that these cases each had a certain level of more 'straightforward' case types within their respective categories but that overall there were other aspects which differentiated them both from each other and from standard personal injury cases. In this regard, members were of the view that modification elements will be required in each of the fee structures. It may also be the case that the less complex cases (for example, 25% of CN actions are 'dental cases'), are likely to settle more easily and could benefit from a separate fee model.
6. Members noted that the approach taken in the other UK jurisdictions and elsewhere may provide helpful insights and experience to draw from. It was noted though that costs system in E&W differs from Scotland in respect that we do not have proportionality built into our tables of fees.
7. It was noted that many of the costs associated with pre-litigation work are not that of solicitors' fees but are outlays for reports etc. Members noted that in certain cases, various reports are necessary to progress the investigations and that the fixed investigation fee does not cover outlays, which in certain types of case are necessary work that is undertaken. Members noted that consideration will be needed about making provision for outlays incurred from third parties in any fee model developed.
8. Members agreed that as a general principle, the key elements which require to be considered in the development of a viable fees structure for each protocol are:

- Issues of proportionality which will include considering the value of the claim, the savings in court time involved and that remuneration is relative to the degree of complexity/specialist knowledge of the work undertaken.
- Any fee model will need to consider provision for outlays incurred from third parties.
- Issues of fairness to both parties including provision of a clear mechanism for resolving disputes about fees.
- Open exchange of information is a key part of the policy underpinning the PAPs – sanction for lack of compliance with PAPs will be necessary.

9. Members noted that buy-in from practitioners will be need if the aims of the PAPs policy are to be realised and that informal consultation with practitioner's firms would be helpful at this stage. It was agreed that the key issues would be canvassed with some firms.

Action points

- Fraser Simpson, Alan Rogerson, David Tait and will discuss the disease protocol with relevant practitioner firms.
- Darren Deary, Lynn Beattie, Michael Stewart will discuss the clinical negligence protocol with relevant practitioner firms.
- Both groups will provide a paper detailing their findings and proposals for fee models to the secretariat **by 19 April 2022**.
- Stewart Mullen agreed to provide feedback on the proposals for potential fee models when received.
- The Secretariat will update the work timetable to include the above actions and will issue a note of this meeting to members.

SCJC Secretariat
March 2022