

NOTE OF MEETING
CAFC WORKING GROUP ON PRE-ACTION PROTOCOL FEES
26 OCTOBER 2022 at 4.15 PM VIA WEBEX

Present

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

Support

- Karen Stewart
- Paula Preston

Apologies

- David Tait

Note of Discussions & Outcomes

Welcome, introductions and agreement of private papers

1. The chair welcomed members and noted an apology tendered from David Tait. Members agreed the following papers would remain private: 2 – 9 inclusive.

Previous meeting

2. Members noted Paper 1, which provides a note of the outcomes of the previous meeting and has been published on the SCJC website.

Work programme

3. Members noted progress on the following action points from the previous meeting:
 - The sub-groups continue policy development in order to finalise fees frameworks ahead of a modelling exercise being carried out.
 - Stewart Mullan carried out a fees modelling exercise of the frameworks.
 - The sub-groups and Mr Mullan provided papers detailing their findings to the secretariat by the agreed date.

- The Secretariat updated the work timetable and issued a meeting note.
- The Secretariat consulted Lord Harrower with a view to scheduling a meeting of CAFC.

Implementation timetable

4. Members considered the updated work timetable provided in **Paper 2** and discussed progress to date. Members noted that this would be the final working group meeting and the Chair thanked all those present for their considerable work in developing the policy proposals for each fee model.
5. Members noted that when the Working Group proposals are formally submitted in a report to the Costs and Funding Committee, the timescales for next steps including future drafting work and any potential consultation will be discussed and decided in the context of wider SCJC business priorities.

Discussion on Fee Models

- Paper 3: Clinical Negligence PAP fees model
 - Paper 4: Disease PAP fees model
 - Paper 5: Stage 2 Report by Stewart Mullan
6. Members discussed the papers produced and acknowledged that the key aims of the PAPs and their supporting fee regimes are to create policy solutions which will increase extra-judicial settlement in these types of personal injury actions. Members discussed the policy approach adopted within each model which is directed at achieving this overarching policy aim.
 7. Each prospective fee model is to be applied in cases up to £100K. A table incorporating prospective figures accompanies each fee model. The figures can be converted into whole units in order to maintain the unitised approach to fees. The tables are designed assist the CAFC in comparing the content and understanding the practical aspects of how each prospective fee model could work in practice. Each Sub-Group has put forward specific proposals on:
 - The Investigation Fee element;
 - The Settlement Fee element (identifying the range and the % values that would apply);
 - The basis upon which other reasonably incurred outlays may be claimed; and
 - How fatal cases and multi-party claims are to be handled
 8. It was noted that in the criteria adopted in determining a settlement fee, the Clinical Negligence fee model has upwardly varied the mid-range rates currently found in the Law Society of Scotland's voluntary scheme to reflect additional factors. The Disease fee model favours a settlement fee based broadly on the existing elements of the Law Society of Scotland's existing scheme. Both sub-groups noted that the scales are designed to provide certainty for parties and incentivise parties to co-operate effectively with the protocols and to avoid taking up litigation.

9. Members discussed whether fatal cases should be included within the scope of each protocol fee model. It was noted that the preference was that fatal cases be incorporated into the fee model for Clinical Negligence cases. Three options for calculating pre-action expenses were identified by the CN sub-group. These are:
- Permit an Instruction fee and completion fee per category of relative
 - Permit an Instruction fee per category of relative and a global completion fee based on total settlement or
 - Allow only one instruction fee and a global completion fee based on total settlement.
10. The sub-group proposed that the CN fee model should incorporate option 2 on the basis that this achieves a fair balance between parties. It was noted also that the CNPAP fee model could also potentially be employed voluntarily by parties in any case where the value exceeds the proposed £100K procedural limit.
11. The Disease sub group noted that there are very many problems in applying a Disease PAP in fatal cases and from the outset of the protocol development, it was not anticipated that fatal cases would fall within the scope of the Disease PAP. For this reason, fatal cases have not be incorporated within the scope of the Disease Protocol fee model.
12. The Working Group considered and discussed the content of the second stage report provided by Stewart Mullan (Paper 5). Members noted that the sub-groups have been unable to devise a clear policy mechanism for handling the issue of potential disputes over fees. In particular, it was noted that practical ways have been considered as to when and on what basis specialist Counsel could or would be instructed in these claims (e.g. on issues of quantum or liability). Members felt that some practical operational experience and authority from the courts may be useful in due course and that in the longer term, preparation of a practice note could potentially assist.

Fees modelling exercise

- Paper 6 - Note on modelling exercise
 - Paper 7 - Clinical negligence fees modelling
 - Paper 8 - Disease fees modelling
 - Paper 9 - PAP Briefing Paper – Stewart Mullan
13. Mr Mullan conducted a modelling exercise on a range of scenarios considering how different settlement figures/numbers of participants would impact upon the fee element of recoverable expenses. He provided an overview of the outputs of that exercise (Papers 6-8) including information on how these figures compare with the corresponding Judicial Tables of Fees and the impact upon the level of expenses claimed where specialist Counsel is instructed. As noted previously, the question of how any potential disputes over fees are to be addressed remains unanswered.

14. Members noted that data sampling had been an ongoing problem during the development of the fees proposals, mainly due to low numbers of cases settling extra-judicially and other issues relating to data protection. It was noted by all that in lower value cases, expenses may be greater than the claim value. Mr Mullan noted that lack of robust data is likely to be problematic for the CAFC going forward due to the need for a clear evidence base to underpin how the fees will be set.
15. Members discussed the PAP briefing paper (Paper 9) provided by Stewart Mullan and provided some comments on the content.
16. The Secretariat advised that a Working Group Report will be drafted for submission to the Costs and Funding Committee. In due course, the draft report will be issued to members for approval by correspondence.

AOB

17. There was no other business.

**SCJC Secretariat
October 2022**