

**MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL  
PERSONAL INJURY COMMITTEE  
MONDAY 09 APRIL 2018 AT 3.15 PM  
JUDGES CONFERENCE ROOM, PARLIAMENT HOUSE**

**MINUTES**

**Members Present:** Lord Armstrong (Chair)

Marie-Louise Fox (Director of Operations, SLAB)

Hamish Goodall (Scottish Government)

Lord Boyd

Sheriff Principal Stephen

Maria Maguire QC (Advocate)

Amber Galbraith (Advocate)

Fraser Simpson (Solicitor)

Gordon Keyden (Solicitor)

Ronnie Conway (Solicitor Advocate)

Campbell Normand (Solicitor)

Alan Rogerson (Claims Manager)

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

**Support:** John Thomson (Deputy Legal Secretary, Lord President's Private Office)

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

Lauren Keillor (Policy Officer, Scottish Civil Justice Council)

**Apologies:** Walter Drummond-Murray (Scottish Government)  
Sheriff McGowan  
Mark Kubeczka (Legislation and Implementation Team, SCTS)

**Item 1: Welcome, apologies and agreement of private papers**

1. The Chair welcomed those present and noted apologies from Walter Drummond Murray, Sheriff McGowan and Mark Kubeczka.
2. The Chair welcomed Lord Boyd, Campbell Normand and Christina Bardsley to their first meetings.
3. The Chair advised the Committee that Sheriff Mackie has recently retired and that the Lord President has written to her thanking her for her valuable contribution to the Committee.
4. **The Committee agreed that the following papers will be treated as private and not be published: 2.2, 4.1, 4.2, 4.2A, 5.1, 5.1A, 5.1B, 5.2, 5.2A.**

**Item 2: Previous meeting**

*Item 2.1 – Minutes of previous meeting (Paper 2.1)*

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

*Item 2.2 – Progress of actions from previous meetings (Paper 2.2)*

6. **The Committee noted the progress made on actions since the last meeting.**

**Item 3: Work Programme**

*Item 3.1 – Update from the Scottish Government on Legislative Developments (Oral)*

7. Hamish Goodall provided the Committee with an update on legislative developments. He advised that the Children (Equal Protection from Assault) (Scotland) Bill is expected to be introduced in May. He also advised that the Domestic Abuse (Scotland) Bill and the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill have both now been passed at Stage 3 and await Royal Assent. The Prescription (Scotland) Bill was introduced in February and the Damages (Scotland) Bill will be introduced before the summer recess.

8. Hamish also advised that the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is scheduled to begin stage 3 in late April 2018.

#### **Item 4: Justice system reform: Rules rewrite**

##### *Item 4.1 - Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill – Qualified One Way Cost Shifting (Paper 4.1 - 4.1A)*

9. The Committee considered **Paper 4.1** and **4.1A**, which invited members to consider the Committee's preferred policy for rules of court in relation to section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ('the Bill').

10. The Committee noted that a number of the provisions in the Bill will require consequential provision in the rules of court. Whilst it is proposed that the Costs and Funding Committee (CAFC) should be the lead committee for these, CAFC has agreed that the Personal Injury Committee should be invited to consider and recommend policy for the rules concerned with Qualified One-Way Costs Shifting.

11. The Committee noted that Section 8 of the Bill provides that a court should generally not make an award of expenses against a pursuer in personal injury proceedings. This protection is dependent on the pursuer having conducted the proceedings in an appropriate manner and, as the Bill stands, proceedings are deemed to be conducted in an appropriate manner unless the pursuer acts fraudulently; behaves in a manifestly unreasonable manner; or otherwise conducts the proceedings in a way that amounts to an abuse of process.

12. The Bill allows the Court of Session to provide in rules for further exceptions to the costs protection afforded by section 8. **The Committee considered potential further exemptions in this regard and agreed to recommend the following to the CAFC:**

- **That there should be an exception to costs protection for post-tender expenses, but that the pursuer's liability in expenses should be capped at 75% of the damages awarded;**
- **That the cap should be applied to the post-tender liability in expenses taken in isolation, rather than the net liability in expenses once the pre-tender expenses have been taken into account;**
- **That the above exception should apply with equal effect where the liability in expenses was occasioned by late acceptance of a tender;**
- **That in a situation in which a pursuer incurs a liability in post-tender expenses to multiple defenders, and where the aggregate liability in expenses exceeds 75% of the damages awarded, the apportionment of**

**the capped expenses as between defenders should be left to the court's discretion;**

- **That in cases involving multiple pursuers and in which early tenders in settlement of certain claims had been beaten while others had not been beaten, no attempt should be made to provide in rules for how the cap on expenses would be applied;**
- **That the appropriate stage for a motion for modification to give effect to the cap on post-tender expenses would be after the defender's account of expenses had been taxed;**
- **That the introduction of costs protection did not require any corresponding adjustment to the rules on pursuers' offers;**
- **That rules should provide for an exception to costs protection in the event of summary dismissal, but in a way that does not remove the court's discretion in relation to expenses;**
- **That there should be an exception to costs protection where a pursuer abandons. In cases where the pursuer seeks decree of dismissal, The Committee agreed that the exception should allow for the continuation of the present rule under which payment of expenses is a condition precedent. Where the pursuer is willing to concede decree of absolvitor, the Committee agreed that the exception should be framed in a way that does not remove the court's discretion in relation to expenses.**

13. **The Committee also agreed to recommend to CAFC that it should consider the possibility of giving the Inner House and the Sheriff Appeal Court a discretionary power to remove an appellant's costs protection on a prospective basis, i.e. the loss of costs protection would only apply to expenses incurred after the date of any such order.**

14. **The Committee discussed the possibility of providing for an exception where the pursuer was indemnified against any potential liability in expenses (e.g. under legal expenses insurance). The Committee agreed that the case for such an exception should be kept under review.**

15. **The Committee discussed whether the exceptions allowed for by section 8(4) of the Bill should include exceptions by reference to the status or circumstances of the defender in the proceedings ( i.e. whether QOCS to be excluded where, for example, the defender is an uninsured individual). The Committee agreed that the case for such an exception should also be kept under review.**

*Item 4.2 - Compulsory Disease Pre-Action Protocol (Papers 4.2 – 4.2A)*

16. The Committee considered **Papers 4.2 and 4.2A**, which invited members to consider and, if content, approve the procedure contained within a draft Compulsory Disease Pre-Action Protocol.

17. The draft protocol was developed by a sub group, comprising of Committee members Amber Galbraith, Alan Rogerson, Ronnie Conway, Gordon Keyden and Fraser Simpson. These Committee members also nominated Laura Blane (Thompsons Solicitors), Iain Elliot (NFU Mutual), David Tait (Clyde and Co) and John Barrie (Plexus Law) to sit on the sub group. The sub group met several times throughout 2017.

18. **The Committee approved the procedure contained within the draft Compulsory Disease Pre-Action Protocol at Paper 4.2A for submission to the CAFC for the development of a fee structure and, thereafter, Council.**

19. The Committee discussed the possibility of trialling the protocol before it was fully implemented. **The Committee agreed that the protocol should not be piloted, but that it was important that a post commencement review of the draft protocol was carried out after an appropriate period of time to allow for necessary amendments, if any, to be made to the protocol.**

## **Item 5: Research and Consultations**

### *Item 5.1 - Amendment to Chapter 42A (Paper 5.1 – 5.1A-B)*

20. The Committee considered **Paper 5.1 and 5.1A-B**, which invited the Committee to further consider proposals to amend Chapter 42A of the Rules of the Court of Session 1994 (RCS).

21. The Committee noted that the operation in practice of Chapter 42A of the Rules of the Court of Session (Case management of certain personal injuries actions) was discussed at a meeting of the Personal Injury Users Group ('PIUG') in July 2016. An issue highlighted in these discussions was the insufficiency of time between the closing of the record and the By Order Adjustment Roll ('BOAR') taking place. Accordingly, it is often the case that the BOAR is continued to another date rather than a proof being fixed.

22. This issue was then considered by the Chapter 42A judges, who agreed that the rules ought to be amended to provide for a longer period before the BOAR takes place, and to require written proposals for further procedure at an earlier stage than is the case now. In light of these discussions, Lord Armstrong asked the RRDT to prepare an initial draft of the proposals. An earlier version of these proposals was considered by the Committee at its November 2017 meeting, where it was agreed

that the proposals required further consideration and that the Secretariat and the Rules Rewrite Drafting Team (RRDT) should meet with Committee members Maria Maguire QC and Amber Galbraith to consider any potential amendments, with a view to alternative proposals being considered by the Committee at its next appropriate meeting. This meeting took place in late 2017.

23. The Committee considered the further proposed amendments in detail and discussed whether these amendments would appropriately address the issues being encountered in practice. The Committee noted that the policy aim of these amendments is to facilitate the efficient exchange of information between the parties.

24. The Committee discussed whether or not the rules of court should expressly set out the steps parties must carry out within the 13 week period before a case management hearing, or whether the rules should simply set out the court's expectations of the parties. **The Committee agreed that the rules should expressly set out these steps to encourage compliance.**

25. **The Committee agreed that the Chapter 42A rules should include provision that a Lord Ordinary may make an order in relation to expenses.**

26. **The Committee agreed that once the draft keeling schedule had been further amended, the Secretariat should informally consult with the Central Legal Office of the NHS to seek their views on the proposals.**

27. The Committee noted that the amended draft keeling schedule would be presented to the Committee for further consideration at the next appropriate meeting.

*Item 5.2 - Compulsory Personal Injury Pre-Action Protocol Expenses – Tomczak v Reid (Paper 5.2 – 5.2A)*

28. The Committee considered **Papers 5.2** and **5.2A** which provided members with an overview of its previous discussions in relation to an issue arising from expenses in claims dealt with under the compulsory pre-action protocol.

29. At the November 2017 Committee meeting Committee member Ronnie Conway raised an item under AOB in relation to a recent sheriff court case in which the issue of pre-litigation expenses had been discussed. This claim arose from a road traffic accident in which the voluntary pre-action protocol was agreed, liability was admitted and the sum of damages was agreed. However, settlement could not be achieved because the defender's insurers refused to meet the fees claimed for police and medical reports. The claimant subsequently litigated and the defender immediately lodged a tender for the agreed sum. The tender was accepted and the case called in court for an argument regarding the disputed outlays. The claimant sought all costs whereas the defender maintained that the litigation was unnecessary

and, accordingly, the defender should be awarded costs. The view of the presiding sheriff was that the litigation was not necessary or appropriate as parties could have agreed a joint remit to the auditor instead of litigation. As neither party had sought to resolve the issue in this way, Sheriff McGowan found that neither party was entitled to costs.

30. At the November 2017 meeting the Committee considered the issues raised by this judgment. The Committee agreed that the Secretariat and the RRDT should consider the issues raised in the case and prepare a paper for consideration by the Committee at its next appropriate meeting.

31. The Committee noted that it has previously considered the best way in which to deal with this matter when it was asked to consider a draft compulsory pre action protocol at its meeting on 06 June 2016. At this meeting the Committee agreed that the protocol should provide that all reasonably incurred outlays are recoverable as part of the settlement and if parties cannot agree what is reasonable then this means that there is no valid settlement for the purposes of the protocol and the claimant would be entitled to raise proceedings. The court could then make an assessment of the parties' conduct in deciding whether to make an order as to expenses, etc.

32. The Committee discussed this matter and noted that there were ongoing discussions between representative bodies to establish a voluntary framework to deal with this issue.

**33. In light of the previous decisions made in relation to this matter by the Committee and Council, the Committee agreed that no amendment to the protocol should be considered at this stage.**

#### **Item 6: A.O.C.B**

34. No other business was raised.

#### **Item 7: Dates of future meetings**

35. 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 2018**