

NOTE OF MEETING
CAFC WORKING GROUP ON PRE-ACTION PROTOCOL FEES
10 MAY 2022 at 4PM VIA WEBEX

Present

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

Support

- Karen Stewart
- Graeme Welsh
- Paula Preston

Apologies

- Michael Stewart

Note of Discussions & Outcomes

Welcome, introductions and agreement of private papers

1. The chair welcomed members and noted an apology tendered from Michael Stewart. Members agreed the following papers would remain private: 2, 3, 3A, 3B, 4.

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 to note progress on the following action points from the previous meeting:
 - Darren Deary, Lynn Beattie, Michael Stewart held meetings with relevant practitioner colleagues to discuss the components of a potential fee model to support the clinical negligence protocol. The sub-group provided a paper for members' consideration (**Paper 3A**).

- Fraser Simpson, Alan Rogerson and David Tait held meetings with relevant practitioner colleagues and discussed the components of a potential fee model to support the disease protocol. A paper from the sub-group was provided as a late item for today's agenda (**Paper 4**).
- Stewart Mullen agreed to provide feedback on the sub-group proposals for potential fee models - A critique of the key proposals from the clinical negligence sub-group is provided for members consideration in **Paper 3B**.
- The Secretariat updated the work timetable to include all actions points and issued a note of the meeting outcomes to members. The note was published on the SCJC website.

Implementation timetable

4. Members considered the updated work timetable provided in **Paper 2** and discussed progress to date. Changes to the timetable to incorporate additional policy development were discussed and agreed. The secretariat will issue a revised timetable to members.

Discussion Papers

- Paper 3: Summary of sub-group feedback
 - Paper 3A: Clinical Negligence sub-group discussion paper
 - Paper 3B: Critique Note by Stewart Mullan on Paper 3A
 - Paper 4: Disease sub-group discussion paper.
5. A summary of relevant feedback from the sub-groups was provided in **Paper 3** along with policy background on the issue of resolving disputes about expenses. Members considered and discussed the papers with a view to agreeing the key policy principles to underpin the clinical negligence and disease protocol fee models.
 6. Members noted the key issues discussed by the disease sub-group:
 - a time and line approach with the ability to jointly remit to the auditor could potentially encompass the wide variation of conditions and exigencies that arise in industrial disease work.
 - recognition that defenders/insurers would prefer the certainty of an agreed structured approach which would need to reflect the variables of time and complexity involved in these cases.
 7. In considering whether a structured approach is a viable, a variable scaled fee with 3 elements was considered:
 - i. an instruction / investigation fee element (with potential for additional uplifts in specified circumstances)

- ii. a variable fee element (relating to specialised activity and based actual amount of investigation time); and,
- iii. a settlement fee (noting that claim value cannot be the driver for assessing a suitable settlement fee in a disease cases).

8. In considering a “variable fee element” the sub-group had liaised with colleagues and law accountants and an informal internal audit was conducted to see if a structure for this element could be discerned. Thus far, it was noted that efforts to devise a suitable formula had proven unsuccessful due to the variety and range of disease work which the protocol is designed to cover.

9. A further prospective model was considered which includes requisite uplifts within the instruction/investigation fee for those types of case which are more onerous. This model includes 2 fee elements:

- i. An instruction / investigation fee (determined at a level proportionate to average time in pre-litigation settlement disease cases), with agreed uplifts based on:
 - Number of potential negligent exposers investigated;
 - Number of defenders;
 - Number of specialist reports required; and
- ii. A settlement / completion fee (scale fee based on defender(s) liability for cumulative agreed damages).

10. It was noted by the sub-group that additional matters will require agreement:

- The pursuer’s ability to litigate in the event of non-compliance with the PAP
- Recognition that costs of outlays reasonably incurred will often not be proportionate to value of damages;
- The ability for parties to ‘opt out’ of the scale fee where this can be justified.

11. Members noted the key issues discussed by the clinical negligence sub-group:

- A prospective core fee model
- A prospective fee model for fatal cases
- How disputes about protocol expenses are to be resolved

12. The sub-group provided a discussion paper (**Paper 3A**) and Stewart Mullan provided a critique of the sub-group proposals in **Paper 3B**. The sub-group propose a core fee model based on the Professional Negligence Fee Scale fixed by the Law Society of Scotland and consisting of 3 fee elements:

- i. an instruction fee:
- ii. a variable fee element (additional charges based on either or both (a) the complexity of the proceedings and the number, difficulty or novelty of the questions raised; (b) the skill, time and labour and specialised knowledge required; and
- iii. a settlement fee (sliding scale based on value of the settlement)

13. The sub group propose that a separate model be implemented for fatal cases which would see cases treated as separate claims for each family member (falling within the protocol if under £100,000). The fees model would consist of 3 elements:
- i. an instruction fee (for each category of relative);
 - ii. a variable fee element (additional charges based on either or both (a) the complexity of the proceedings and the number, difficulty or novelty of the questions raised; (b) the skill, time and labour and specialised knowledge required; and
 - iii. a settlement fee (based on the cumulative value of all claims)

Mechanism for resolving disputes about expenses

14. The sub groups noted that agreeing expenses/fees relies on co-operation between parties and that at present there is no proper mechanism to resolve disputes (whether that be in relation to the fee element or outlays, including Counsel's fees).
15. Members noted that in England & Wales whilst some conditions are the subject of specific agreements, costs based on a time and line account are usually agreed between parties, failing which a costs order is sought from a court.
16. Both sub-groups suggested there was potential for a similar approach to E&W to be implemented here with a joint remit to the auditor being the default position in the absence of agreement. Such an approach would enable defenders to challenge unreasonable expenses and pursuers to seek expenses which are reasonably incurred. Both sub-groups acknowledged that this approach may not deliver the desired level of costs predictability which insurers desire. SCTS will also have a view on the potential impact upon resources.
17. The Working Group considered the policy background to the development of each pre-action protocol in particular in relation to the matter of disputed expenses. Members noted that the court's decision in *Tomczak v Reid [2017] SC EDIN 63 (which centred on a dispute arising about pre-litigation expenses)* was considered by the Personal Injury Committee and the Council when approving the protocols. On each occasion, the wording on 'reasonably incurred outlays' was retained. Both sub-groups felt that a mechanism for resolving disputes would be essential if the aims of the protocols are to be realised.
18. Members noted that any proposed departure from the Council's agreed policy approach would require a robust rationale and would likely require legal advice and drafting amendments to each protocol.
19. Mr Mullan highlighted a number of issues of principle in relation to the prospective fee models as well as potential procedural barriers. Members agreed that the wider impact of the proposals will require more detailed scrutiny and that it would be beneficial to obtain data with a view to undertaking modelling of the fees frameworks.

Action Points

20. The following actions were noted:

- Fraser Simpson, Alan Rogerson, David Tait will undertake data gathering of judicial accounts with a view to fees modelling utilising the proposed disease frameworks.
- Darren Deary, Lynn Beattie, Michael Stewart will undertake data gathering of judicial accounts with a view to fees modelling utilising the proposed clinical negligence frameworks.
- Stewart Mullan will provide practical expertise to assist the sub-groups in their deliberations.
- Both sub-groups will provide a paper detailing their findings to the secretariat **by 10 June 2022**.
- The Secretariat will update the work timetable to include the above actions and will issue a note of this meeting to members.

AOB

21. There was no other business.

Date of next Meeting

22. The next meeting is scheduled for 28 June 2022 at 4.00pm via Webex.

**SCJC Secretariat
May 2022**

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