Strife in succession: when estates divide
P.16

Biodiversity boost: duty on developers
P.18

To appeal or not to appeal? Contentious contact cases
P.22

Journal

Journal of the Law Society of Scotland

Volume 68 Number 12 – December 2023

Faces of the profession

With 64% of lawyers reporting some mental health issue, and 45% seeking a better work-life balance, the *Profile of the Profession* report sounds a call for action

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Bowing out

This is it, folks. I have run my race to the finish. Next month the Journal will be in new hands, as you can read on p 11.

I am quite bowled over by all the compliments that have been paid, and very grateful to everyone who has expressed their appreciation of my efforts over my 20 years as editor. I have made it my mission to try and keep the Journal relevant across the very wide spectrum of disciplines and types of work in our profession, with a mix of content intended to provide something of interest to as many readers as possible each month, while keeping up with the major events that have shaped the law and the profession over that time. Others can judge to what extent I have succeeded, but I admit it feels good to be leaving on a high of recognition.

I could never have done the job on my own, and huge thanks are due to all who have volunteered their time to write for the Journal, some very regularly. For me, this evidences that we still have a collegiate profession whose members are willing to share their expertise for the benefit of others, and I am proud to have played the coordinating role to make that possible. Long may that ethos continue.

Nor could I have done the job without the support of the team at Connect. I may be the public face of the magazine, but a whole succession of editorial, design, commercial, technical and production colleagues have all played essential parts in ensuring the magazine has come out on time and to a high standard every month; likewise the digital versions that we developed. (On press days we have taken everything in our stride from "Hurricane Bawbag" to the death of Queen Elizabeth! That's teamwork.)

Finally, I must thank the Law Society of Scotland itself. I know there are those who still regard the Journal as simply the voice of the Society. As is obvious, the Society does provide a proportion of the content, but it has always insisted that the Journal is its members' magazine and given me full independence over choice of features, briefings and much else each month. I am very grateful for the trust the Society has shown, and take full editorial responsibility for what has been published. I hope I have not given the Society much cause to question its approach; I am sure the Journal has benefited from it.

It only remains for me to wish each of you a happy and relaxing Christmas season, and success in the new year and for the future. Don't ask (yet) what I intend to do with my time – the big prize for now is freedom from the hamster wheel of publishing deadlines! All the best, and good luck to Rebecca Morgan as she takes over. J

Contributors

If you would like to contribute to Scotland's most widely read and respected legal publication please email: **peter@connectcommunications.co.uk**

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Stephanie Farrell senior associate, Corporate, and **Marianne McJannett**, head of Employment, Bellwether Green

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.68 NO.12 – DECEMBER 2023

Perspectives

Regulars

Features

Briefings

Society's climate action resource hub: Page 26

In practice

ONLINE INSIGHT

PUBLISHED ONLY ON **WWW.LAWSCOT.ORG.UK/MEMBERS/JOURNAL/**

No personal service, no employment
Deliveroo riders have failed in their attempt to claim employee status in order to achieve collective bargaining through a trade union. Chris Boyle examines the Supreme Court's decision.

Corporate directors: a stop-start reform
Proposals to curb the use of corporations as company directors, discussed for the past 10 years, may be about to become reality. Robbie Callander traces their history and the likely scope of the new law.

Separation and divorce: child benefit
Briefing by Norman Dalgleish and Kirsty McArthur on the child benefit implications where a couple separate, perhaps with new relationships, and the clawback that applies where one person involved earns more than £50,000.

Let's chat ChatGPT
Puneet Kaur explores how ChatGPT works, its potential applications in legal practice and the risks and ethical considerations to which it gives rise, particularly regarding sensitive data.

What is going on with the MIB?
Thomas Mitchell highlights an ongoing issue with staffing cuts at the Motor Insurers' Bureau, and lack of training, causing increasing delays in processing claims.

Journal Index 2023
The annual index for 2023, covering published articles in the paper and digital issues of the Journal magazine, is annexed to the digital versions of this issue and also available via www.lawscot.org.uk/members/journal

OPINION

Emma King

The *Profile of the Profession* report continues to show solicitor retention as an issue within the profession. We should all consider what we can do to improve its culture

I was lucky recently to be on a panel discussion entitled "So, you are about to become a solicitor", with an advance registered interest of 100. In contrast, a similar event entitled "So, you want to become a partner" attracted considerably less uptake, and at the date of writing it is unclear whether it will proceed.

That in turn led to discussion, and reflections, that everyone I know has a perception that we are losing members of the profession in greater numbers at earlier career stages, for a variety of reasons. Typically, this appears to be around the three to five year mark, often to other professions dedicated to assisting others, such as teaching, but universally outwith the law.

The *Profile of the Profession* report ("POTP") just released by the Society notes that 42% have considered leaving the profession for reasons other than retirement. This first key point on the executive summary is presented positively, as the number has decreased from 48% in 2018. I read it with considerable concern, however. A figure approaching anywhere like half must cause us to pause for thought. What are we doing, collectively, to safeguard our profession now and into the longer term, not just from external influences like AI but from our own rate of attrition?

The answer may well lie in the next key message: just under half – 45% – aspire to a better work-life balance. When I was a trainee it was standard practice that you were expected to stay until the job was done, at whatever time, without comment or complaint. There was no communication about my career aspirations or how to achieve them, or any work-life balance.

POTP is a vital read for anyone in the profession, and specifically for those recruiting and shaping others' careers, but in the findings and quotations there are definitely what I would define as "old school" themes throughout. It appears that these still cast a long shadow over our daily professional lives.

Now, as a principal of a firm, while I see the "head down, work for as long as it takes" approach as absolutely engaging from a purely fiscal perspective, I truly hope it is not one espoused by me or any in my firm. That is not to say that everyone should simply work as they please. Working to targets is commercially sound, astute, and ensures that a law firm is run as the commercial enterprise it ought to be. However, those targets must also be realistic, achievable and ensure that our businesses' most valuable assets – our lawyers – obtain a sense of satisfaction from achieving them or, where not, receive support and guidance rather than simply have to "work harder" or "work longer".

Turning to recruitment, we as a firm have grown exponentially in the last 12 months, with a 50% headcount increase. How we bring people in has evolved into a fairly unique strategy. Recruiting new trainees includes a process where, among other rigorous assessments, applicants are put in a room, asked three questions and given 60 seconds to construct cogent answers. We are not looking for straight A students; we want people who can think on their feet. Being brilliant academically doesn't mean someone will be a brilliant lawyer. Talented young people, as our recruitment is delivering, can be trained to become well rounded, and well managed, commercial lawyers.

When they join the firm it is for a prolonged period, to allow us to get to know each other before they embark on their traineeships. To date we have brought on and trained many exceptional lawyers. There have also been those who have identified we are not for them (a decision driven by the individual rather than us); perversely, I consider this a success. It is, I believe, significant when entering the profession that the right match is made. There should be an alignment of values and expectations and a conversation surrounding that.

Recently, we have applied the lessons from that extremely valuable process across the board. We are always recruiting, and not for specific positions. The reason? Finding that right fit is about far more than looking at a skillset in a CV, important though that is. Again, that's a two way process. For those joining we want to identify their goals and aspirations and how we assist them to achieve these. What makes them tick, and whether that aligns to us and the wider team is also hugely important. How they see, and want to achieve, their own work-life balance is a massive part of that conversation. Commercially it is working. We have since had our best ever financial year and all indications show that will continue.

Returning to where the profession is heading, I endorse the comments by Sheila Webster in the introduction to the report. We should all consider what can *we* do to improve our profession's culture – and not just consider but do it: talk. Too often, communication is what we do for our clients but fail to do so for ourselves. I hope that by shining this small spotlight and seeking to lead by example, I can make a small contribution.

Emma King is a partner with Clarity Simplicity Solicitors

VIEWPOINTS

Duty to advise?

In my article "Reasonable to whom?" (Journal, September 2023, 24) I suggested that the doctor's duty to advise on treatment alternatives, declared in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, might come under review. Lord Braid in *Ronnie O'Neill Freight Solutions v MacRoberts LLP* [2023] CSOH 75 (2 November 2023) confirms that there is no equivalent duty on solicitors.

In *Montgomery*, the Supreme Court sought to promote a dialogue approach to consent in medicine, identifying a duty to advise of reasonable alternative or variant treatments: "The doctor is... under a duty to *take reasonable care* to ensure that the patient is aware of any *material risks* involved in any recommended treatment, and of *any reasonable alternative* or variant treatments. The test of materiality is whether, in the circumstances of the particular case, *a reasonable person in the patient's position would be likely to attach significance to the risk*, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it" (para 87).

The law has since evolved via a series of hard cases ending in *McCulloch v Forth Valley Health Board* [2023] UKSC 26. Where some doctors would have considered an alternative and some would not, and the doctor complained of did not, that doctor escapes if a reasonable body of medical opinion agrees with their view, even if others would consider it.

In my article, I welcomed this retreat from the principle as originally expressed. However, problems remain. The approach assumes that the patient has the power and the desire to take an informed decision. It forces doctors to maintain a very wide understanding of alternatives. That assumes time and access to learning. In addition, it sets doctors against patients where treatment availability is restricted. That is destructive of trust. The current law may be acceptable where the vast majority of doctors are insured through the NHS or defence unions, but reputations are precious and any judicial finding of negligence attracts GMC investigation.

In *Ronnie O'Neill Freight Solutions* the court absolved the defender, applying *Hunter v Hanley*, so the point is *obiter*. *Montgomery* does not appear to have been cited. "To what extent must a solicitor, when advising a client involved in a contentious situation, give advice about all arguments which might be deployed? Is it negligent not to give advice about arguments which the solicitor thinks could be advanced, but are likely to fail?" (para 1). That sounds very close to a complaint that alternative treatment(s) were not discussed.

At para 54: "such a [duty] would be virtually meaningless and unworkable: to require advice on all statable arguments would be to set the bar far too low, and would set solicitors, particularly those advising on an urgent problem, a virtually impossible task. The depth of the advice must necessarily depend on the circumstances in which it is given... and is ultimately... a matter of judgment: a client who is about to embark on a certain course of action... may require to be advised on risks where there is a real scope for dispute...; whereas a client on the steps of the court may need to be told less... a client generally pays for advice, not a dissertation on the law".

The law for solicitors takes into account the factual context. Why do doctors deserve lesser protection?

John Stirling, partner, Gillespie Macandrew LLP

BLOG OF THE MONTH

thetimeblawg.com

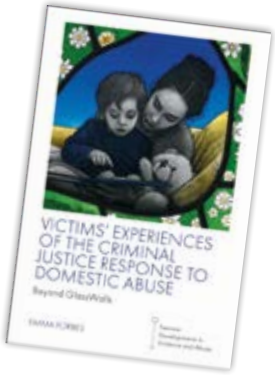
Brian Inkster is usually quick off the mark with legal tech, but he doesn't necessarily go along with Richard Susskind's views on how the future looks.

In a lengthy post following a talk by Susskind on the future of legal services, with particular reference to GenAI and ChatGPT, Inkster is considerably the more sceptical about the ability of ChatGPT either to get things right or to master the detail of what most lawyers do on a day-to-day basis. It seems an appropriate final choice of post, to let this debate run!

BOOK REVIEWS

Victims' Experiences of the Criminal Justice Response to Domestic Abuse

EMMA FORBES
PUBLISHER: EMERALD PUBLISHING
ISBN: 978-1801173896; £30



Police Scotland responds to a domestic abuse call every nine minutes. Scottish society is entitled to ask whether its criminal justice system is responding appropriately to those calls.

Dr Forbes is well placed to conduct that inquiry, as a Scottish prosecutor and the first in Glasgow's pilot domestic abuse court. What makes this work unique – and deserving of a wide readership – is that Forbes has surveyed the latest research on how domestic abuse is dealt by criminal justice systems and conducted her own in-depth interviews with victims. It appears that despite better policies and more attuned laws, implementation is patchy. Court practitioners are not exempt from criticism.

The strength of this book is a series of practical, policy and legal recommendations to improve the entire Scottish criminal justice process in responding to domestic abuse. Forbes' work uniquely combines intellectual rigour and deep empathy for its subjects. But she stops short of criticising the adversarial system itself. That is a pity. Scotland's mixed legal system surely must make it able to import the best of inquisitorial systems, with the greater protection and care for victims/complainers that can follow.

Proceeds from the book will, through the Daisy Project, fund rehabilitative art classes for victims of domestic abuse. That is a further reason to buy and read this impressive work.

Paul Harvey, advocate. For a fuller review see bit.ly/3T77ddH

The Lover of No Fixed Abode

CARLO FRUTTERO AND FRANCO LUCENTINI
TRANS. GREGORY DOWLING
(BITTER LEMON PRESS: £9.99; E-BOOK £7.99)

"Certainly the best book I've read this year, and one of the finest I've read in any other."

This month's leisure selection is at bit.ly/3T77ddH
The book review editor is David J Dickson

Holidays – not such a tradition

Looking forward to a long festive shutdown? Unless you are of a certain age, you may not be aware how recent a practice it is.

Christmas Day has been a bank holiday in the UK since 1871, but with such days having less significance in Scotland, it only became a public holiday in 1958. New Year's Day was the greater celebration after post-Reformation Scotland made Christmas celebrations illegal as being too Catholic, an attitude that survived long after. But New Year's Day only became a public holiday in 1974, along with Boxing Day (and 2 January in Scotland, which hadn't needed to be told to take the previous day off).

However long or short your break, enjoy it – and be grateful for it!

Is he coming yet?

We were delighted to discover that every Christmas Eve, the North American Aerospace Defense Command ("NORAD") adjusts its satellites to track Santa on his journey around the world. The tradition started in the 1950s when a young child trying to call Santa accidentally dialed a NORAD command centre.

PROFILE

Ally Thomson

Ally Thomson is director of Hey Legal and chairs the Lawscot Foundation's Fundraising Committee, now running its annual "Baublefest" appeal

1 Tell us about your career so far?

I worked as a lawyer in legal aid and high street practices. I developed some business interests in providing services to the legal sector and am now non-practising, working with law firms and other businesses. I tutor in legal innovation and technology on the Diploma at Glasgow University Law School. All these pursuits have shown me that diverse teams are the best.

2 What drew you to joining the Lawscot Foundation?

Through Hey Legal I got involved in helping with fundraising through our Christmas Charity Calendar. I saw the passion the team had to develop the Foundation, to help students from financially disadvantaged backgrounds into a career in the law. It just seemed the right thing to do to become more involved. I'm sure we all see merit in having a legal profession of talented people no matter their background or financial situation.

3 As you've recently joined the Foundation as a trustee, what are you most looking forward to?

I am looking forward to bringing new and innovative ways to raise funds, ones where it is really easy for law firms and lawyers individually to get involved and donate funds and time. We are only at the planning stage of hopefully many new initiatives, but you will be hearing more soon!

4 Tell us more about Baublefest and why readers should get involved?

I appeal to readers, as every donation could be decisive in making a legal career a possibility. Each year numerous applicants are unsuccessful, which can mean they do not pursue their dream legal career. We all have the power to change that. The bursary for each student per academic year is £2,750, and we'd love to raise even more through Baublefest so we can support as many as possible.

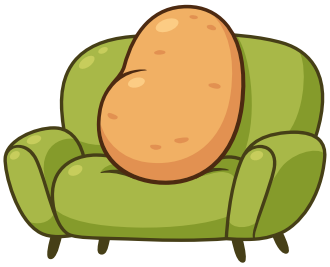
Go to bit.ly/3T77ddH for the full interview. Baublefest runs until 22 December; all the details are on the Foundation's website.

WORLD WIDE WEIRD

1 Couch potato

A suspected Florida drug dealer who had been on the run was finally caught after police found her hiding down the cushions of a sofa.

tinyurl.com/5n7e9yxy



2 Judgment with teeth

Neighbours of a Ghanaian businessman, who won court orders for removal of a pair of tigers kept on his property, have yet to secure implement, partly due to the enforcing authority's lack of expertise in handling the animals.

tinyurl.com/4y6yby4j

3 Watch the birdie

A pensioner was shocked to see an emu peering into her video doorbell which the bird, called Rodney, managed to ring after escaping from its home in Kent – in a place called Loose.

tinyurl.com/mrx7mpbr

TECH OF THE MONTH

WorryTree

Google Play and Apple Store – free (paid upgrades available)

If you're prone to anxiety and overthinking, then WorryTree can help. This free app lets you record your worries and supports you as you plan how to resolve them. It can also inspire you to improve your physical and mental wellbeing.

PRESIDENT

Sheila Webster

Halfway through the presidential term of office, some reflections on the highlights to date, in particular the benefits from meeting members in all parts of the country

Writing this just as I reach the mid-point of my presidency, I can scarcely believe that six months have passed since I took on this role. I feel really privileged to have had so many amazing experiences in that time. I've talked previously in this column about some of my priorities as President and we will continue to work on those over the next six months.

I was particularly delighted to release the results of our *Profile of the Profession* in November, and to note the progress in many important aspects of that research. The results of our questions around wellbeing were instructive, and confirm we have, as one of my predecessors says regularly, much still to do. The findings on threats and violence against our members should shock us all, and make us more determined to follow my exhortations to "be kind". How we all behave influences others, and if we, as a profession, do our best to demonstrate that aggression of any sort is not acceptable to us, the better we are as a community. As we approach Christmas, can that be our commitment for 2024?

It's good to meet

I was asked recently what I had, so far, enjoyed the most. I had no hesitation in answering. Meeting members is undoubtedly a highlight of my year to date. I'm conscious that some past Presidents have not had the privilege of meeting in person, and that makes it all the more important to me that I make the most of those opportunities. I have plenty of constituencies still to visit and I aim to fit in as many visits as I can, but I've been encouraged by the engagement in the Borders, Perth, Aberdeen, Orkney and Shetland. It's great to meet so many of you and to hear your thoughts and what we can do to help.

It's also been wonderful to meet with our larger firms across the country and hear from their leadership teams. I find it fascinating that the concerns are often the same for the larger firms as they are for high street firms, and that we can share our experiences for the benefit of us all. One large firm shared its experience with staff returning to the profession and what it does to encourage returners, which is so helpful in my determination to improve our statistics on equality, diversity and inclusivity. I've said before that we get much from our international engagement, and Murray, our Past President, will chair round table discussions about the future for high street firms, sharing information with our Northern Irish counterparts who have similar challenges with that part of the profession. Recruitment, retention, succession – I suspect they'll all come up! Meetings with our Fellows and Past Presidents are also a source of wisdom and experience we can share.

It's your Society, so you'll get most from it as you engage with your office bearers and the staff teams. We love to hear from you – brickbats as well as praise!

New beginnings

Meeting our newest entrants and future entrants to the profession is also a real privilege, and I've loved speaking not only at our own admission ceremonies, but also at ceremonies for presentation of the Diploma in Legal Practice, and paralegal certificates, and most recently at a dinner for first year LLB students. I spoke about my own background and entry into the profession, and several students talked positively about the importance of hearing of our profession being open to all, regardless of background. I was particularly delighted to meet a student who attended my own state school (there aren't that many of us!).

This is the last Journal column under the remarkable editorship of the outstanding Peter Nicholson, before he retires.

I cannot let that go without comment. Peter was conferred with Honorary Membership of the Society earlier this year and, more recently, last month, with a Lifetime Achievement Award at the 2023 *Herald* Law Awards, both so richly deserved. Peter, it has been a pleasure working with you. Thank you for your huge contribution to the Scottish legal profession. You'll be missed by us all.

At the same time, we welcome Rebecca Morgan, our incoming editor, following the appointment of Think Publishing as our new publishers – we're looking forward to working with you!

As the festive season begins, I wish every one of you peace, happiness and joy, however you plan to celebrate.

And, for my last Presidential Playlist of 2023:
Christmas Lights, Coldplay – not a traditional one, but a favourite.
It's Beginning to Look a Lot like Christmas, Perry Como – well, it is in our house!
New Year's Day, U2 – Happy new year to you all when it comes.

Sheila Webster is President of the Law Society of Scotland – President@lawscot.org.uk

No announcements, no flyers...

Just warm season's greetings from our team to yours!

lawware

lawware.co.uk

innovate@lawware.co.uk

0345 2020 578

People on the move

BLACKADDERS LLP, Dundee and elsewhere, has appointed **Gillian Donald** (who joins from BRODIES) as a partner in the Employment team in Aberdeen; and commercial property lawyer **John Elder** (who joins from SHEPHERD AND WEDDERBURN) as a partner in its Business Services team in Glasgow.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen, Inverness and London, has announced the election and appointment of **Stephen Goldie**, practice area leader for the firm's Litigation practice, as managing partner from 1 May 2024, succeeding **Nick Scott** whose second term of office ends in April 2024 and who has decided to retire from the law. Partner **Louise Shiels** will step up to lead the firm's disputes practice, and partner **Marion MacInnes** will succeed **Bruce Stephen** as practice area leader for Banking & Finance.

BTO SOLICITORS LLP, Glasgow and Edinburgh, has appointed solicitor advocate **Tim Edward** (who joins from MBM COMMERCIAL), as a partner in its Dispute Resolution team, leading the Professional Liability division; and **Euan Fleming** (who joins from BURNESS PAULL) as a partner in its Wills, Estates & Succession Planning team in Edinburgh.

CARPENTERS SCOTLAND, Glasgow has moved to new premises at First Floor, 10 Bothwell Street, Glasgow G2 6LU.

CLYDE & CO, Edinburgh, Glasgow, Aberdeen and internationally, has appointed accredited specialist in professional negligence law, **Beverley Atkinson**, as a legal director in its Edinburgh office. A solicitor advocate and dual qualified in Scotland and England & Wales, she joins from DAC BEACHCROFT.

CULLEN KILSHAW LLP, Galashiels and elsewhere, has assimilated the practice of JD CLARK & ALLAN, Duns, with effect from 1 December 2023. The combined firm will continue to trade under the name of CULLEN KILSHAW LLP and the office in Duns will remain open as a branch office of the firm.

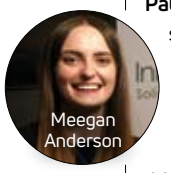
EVERSHEDS SUTHERLAND, Edinburgh and internationally, has appointed **James Gibson** as partner in its Planning & Infrastructure team. He joins from PINSENT MASONS.

GIBSON KERR, Edinburgh and Glasgow, has promoted **Karen Sutherland** to associate in its Family Law team; and appointed **Jamie Robertson** (previously with BLACKADDERS) as legal director in the Property Department, **Briege Valentine** (previously with MACLEOD & MACCALLUM) as a solicitor in the Personal Law team, and recently qualified solicitors **Gabriella Lipschitz** and **Laura Brown** to the Family Law team.

GOVAN LAW CENTRE announces the appointment of **Rachel Moon**, a senior solicitor at the law centre, as a partner in the firm of DAILLY, MOON & CO, solicitors at Govan Law Centre.

Alasdair Hardman, advocate has returned to practice at THEMIS ADVOCATES from 1 December 2023 after a year-long sabbatical.

INKSTERS, Glasgow and elsewhere, announces that **Alan Watt**, a sole practitioner of the firm of WATT LAW, Cumbernauld, has joined Inksters as a consultant solicitor under its Plug and Play Law model. He will continue to operate from his office in Cumbernauld and will be available for meetings in Inksters' Glasgow HQ.



INNES & MACKAY, Inverness has appointed recently qualified solicitor **Meegan Anderson** to its Family Law department.

Gillian Ralston Jordan has been appointed partner and head of the Family Office division in STONEHAGE FLEMING, Guernsey. She joins from JTC PLC where she was group director.

KEE SOLICITORS, Glasgow, and Aberdeen, has moved its Glasgow office to new premises at 146 West Regent Street, Glasgow G2 2RQ.

LINDSAYS LLP, Edinburgh, Glasgow, Dundee, Perth and Crieff, has appointed **Juan Casal**, qualified in Argentina and England, as an associate in the Corporate & Commercial department in Edinburgh. He joins from ASHURST.

LOW BEATON RICHMOND LLP, Glasgow and Largs, are sad to announce the retirement of the firm's founding partner, **Murdoch Charles Beaton**, after 52 years of dedicated service to the legal profession. All at the firm wish Murdoch a long and happy retirement and are eternally grateful to him for his wisdom, guidance and kindness throughout the years.

Paula Joanne Lutton intimates that she commenced practice in her own right, effective 1 November 2023, trading as PAULA LUTTON SOLICITORS, Unit 28, Coatbridge Business Centre, 204 Main Street, Coatbridge ML5 3RB (DX: 570501; t: 01236 373719; e: info@paulaluttonsolicitors.co.uk).

Sarah McCormick has been appointed as a legal counsel at THE SCOTCH WHISKY ASSOCIATION. She joins from BRODIES LLP.

MACDONALD HENDERSON, Glasgow has appointed **Sarah Sheldon** (previously with HOLMES MACKILLOP) as head of the Residential Conveyancing team, **Katherine Phillips** (previously with CLARK BOYLE & CO) as a solicitor in the Commercial Property team; and recently qualified **Emily Glen-Hencher** as a solicitor in the Corporate team.

MACLEOD & MACCALLUM LTD, Inverness and Portree, announce that their residential property associate

RCCW purchase Mackie & Dewar

Gemma McClelland has joined the board of directors on 1 October 2023.

MILLER SAMUEL HILL BROWN, Glasgow, has announced the promotion of **David Phinn** to senior solicitor in the Litigation & Dispute Resolution department.

RAEBURN CHRISTIE CLARK & WALLACE LLP, Aberdeen, Ellon, Inverurie, Banchory and Stonehaven ("RCCW"), has announced the purchase of the practice of MACKIE & DEWAR, Aberdeen. Partner **Alistair Marshall** will join RCCW as a consultant focusing on residential conveyancing and private client matters, and will oversee the transition of the business to RCCW's head office at 12-16 Albyn Place, Aberdeen. Senior partner and criminal defence lawyer **Mike Monro** has taken up a post as consultant with the GRANT SMITH LAW PRACTICE. Family law associate **Sharon McKilligin** has joined BROWN & MACRAE, Turriff.

RUSSEL & AITKEN, Denny, has announced the retirement of **William McIntyre** from the partnership. He remains with the firm as a consultant.

SHEPHERD AND WEDDERBURN LLP, Edinburgh, Glasgow, Aberdeen and London, has appointed **Jamie McRorie** as a partner in its Regulation and Markets practice. He joins from OFGEM, where he was deputy director – Legal.

Patrick Stewart, general counsel at MANCHESTER UNITED, has been appointed interim chief executive officer, while retaining his existing role.

WRIGHT, JOHNSTON & MACKENZIE LLP, Glasgow, Edinburgh, Inverness, Dunblane and Dunfermline, has announced the appointment of **Sarah-Jane Macdonald** as a partner at its Edinburgh office. She joins from GILLESPIE MACANDREW.

All change for the Journal in 2024

From January 2024 the Journal of the Law Society of Scotland will have a new editor, a new production company – and a new digital-only look.

Rebecca Morgan will take up the role as editor in January 2024, following the retirement of Peter Nicholson at the end of December after two decades at the helm.

Think Publishing has been appointed following a competitive tender process. They take up the reins from Connect, which has delivered the Journal every month for more than 25 years, winning many awards along the way, and launching the first digital Journal in 2004.

Rebecca Morgan has been writing and editing legal-related content for more than 14 years. She has experience working in law as well as creating content and delivering talks on a variety of legal and content related topics. She has worked with students and academics, lawyers, advocates, in-house, legal tech companies and more.

Under Think Publishing, the Journal will move from print and online to fully digital from January 2024. The magazine previously moved fully online for 10 months during the Covid-19 pandemic, returning to a limited print run in March 2022.

The Society hopes the digital based approach will enable content to be provided faster with more flexibility, while retaining the thought-provoking articles and features that the Journal is known for. The Society's legal recruitment website Lawscotjobs will also be developed to ensure it remains a key hub for legal recruitment in Scotland.

Diane McGiffen, chief executive of the Law Society of Scotland, commented: "The Journal plays a hugely important role at the heart of the legal profession in Scotland – keeping our members well informed and up to date on developments in law and legal practice. It has provided a forum for debate and discussion since it was first published almost 70 years ago. We are very excited by the proposals from Think and their compelling vision for the Journal and plans for our Lawscotjobs website.

"I want to thank outgoing editor Peter Nicholson for making the Journal such a success through its powerful and relevant content for an increasingly diverse profession. He has been an exceptional editor over the past 20 years and in June this year we were delighted to award him honorary lifetime membership of the Law Society, the highest accolade we can bestow on one of our members, in recognition of his work.

"Our 75th anniversary year marks the start of an exciting new era for the Journal. It continues to be a much-valued resource for our members and we're very much looking forward to working with new editor Rebecca Morgan and the team at Think on the next stage in its evolution."

That elusive balance

Progress on some fronts, but important issues for the Society and more especially employers to address: Peter Nicholson highlights some key findings from the 2023 *Profile of the Profession* survey

More flexibility since Covid, but no let-up in pressures, and a major issue to address over mental health: the picture of Scottish solicitors that emerges from the latest *Profile of the Profession* survey commissioned by the Law Society of Scotland.

It was the mental health findings that the Society chose to highlight when releasing the survey report. They are startling. Overall, 64% have experienced some form of mental health issue in the last five years, led by anxiety (51%), burnout (35%), physical symptoms due to stress (27%), depression (25%), and inability to cope (15%). The average masks the even higher 79% of females up to age 35 (73% for their male counterparts), and 81% of trainees; only males aged 56 or over score less than half (38%). Around half point to work as a cause, and as creating an unhealthy level of stress; yet 35% fear the reaction from managers (and 30% from colleagues) should they discuss their mental health.

What to do about it? The three biggest priorities for those who have experienced issues (other respondents say much the same), are reviewing workload pressures (54%), addressing staffing issues (40%), and improved flexible working (26%). Better peer or team support, and more regular catchups or appraisals, score next. In much of private practice, there is a feeling that employers talk a good game without making the necessary structural changes: several respondents found a significantly more supportive culture on moving in-house.

Quest for balance

Against that background, it is hardly surprising that improved work-life balance is the most frequently cited career aspiration, at 45% (women: 50%; men: 38%), compared with 41% for increased salary (women: 45%; men: 33%) and 34% for promotion or progression (women: 39%; men: 26%). Junior lawyers place more weight on the latter aspirations, but more than half still seek a better balance too.

Similarly, 42% have considered leaving the profession in the last five years for reasons other than retirement. (The figure is down from 48% in the previous (2018) survey, but still high.) Even among trainees the figure is 36%; it peaks at 56% for those qualified six to 15 years; and at almost all stages women are more likely to have done so. Again, work-life balance is the most frequently cited factor (69%), followed by disillusionment (60%), poor mental health or wellbeing (43%), and working practices (39%). Only after these do better pay or new opportunities (34%), or desire to change career (28%), feature as reasons.

The final chapter of the report looks more closely at the progression of women and ethnic minority solicitors, against the widespread belief (shared by 61% of respondents, and 76% of women) that there remains an issue with comparatively few women reaching senior positions compared with the number entering the profession in recent decades. Regarding the loss of women in their 30s and 40s from the profession, the dominant factors identified are better work-life balance elsewhere (77%), starting a family (68%), and negative views around maternity leave and part-time working (56%): nothing else scores more than 20%.

Easily the leading remedial change suggested is a greater acceptance by employers of flexible working (at 68% it scores more than twice the next placed proposal, broader performance metrics, at 32%). However there is also thought to be a role for the Society, through unconscious bias training, mandatory equality and diversity training, and training/mentoring for female solicitors seeking judicial appointment, all cited by close to a third of respondents, along with other support measures.

For ethnic minority solicitors, unconscious bias and other exclusionary factors are seen as the main issues, with targeted remedial measures proposed as the most effective changes that could be made.

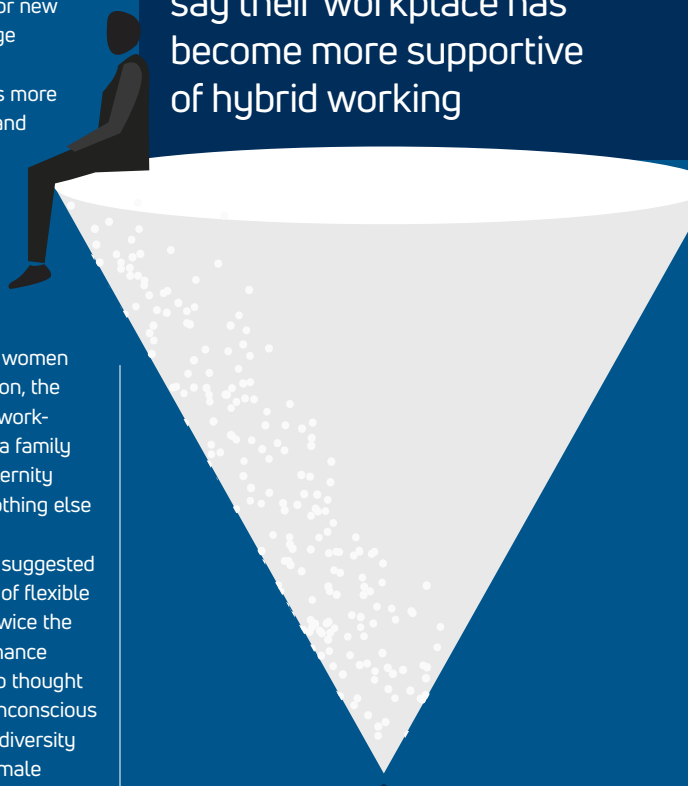
Unfair treatment

To what extent is actual discrimination in the workplace an issue in the profession of 2023? Here there is some positive news from the report, with the number of respondents claiming to have personally experienced discrimination down by more than half (from 20% to 8%) on the 2018 survey, and those who have witnessed it falling from 20% to 10%. Percentage wise, it is the disabled who are most likely to have suffered, followed by those of minority ethnicity or non-Christian religion, but all the Equality Act protected characteristics feature, along with working patterns, being a parent or caregiver, socio-economic background, mental health, "appearance", neurodivergency and more.

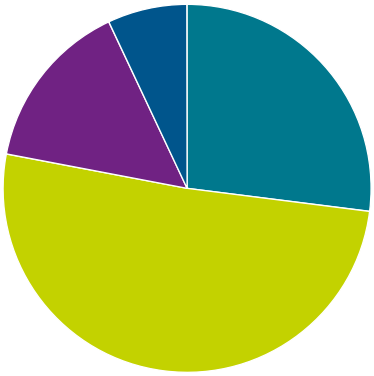
64%
have experienced some form of mental health issue in the last five years

42%
have considered leaving the profession in the last five years for reasons other than retirement

77%
say their workplace has become more supportive of hybrid working



Facts and figures behind the survey



- **27%** of respondents (and **64%** of trainees) work in the office full time
- **51%** are hybrid
- **15%** work remotely all or most of the time
- **7%** other

Most commonly, discrimination was experienced in work allocation, not being considered for development or training, being left out of communications, or in salary.

Separately, the report covers microaggressions – intentional or unintentional verbal or behavioural slights, snubs or insults which communicate hostile or negative messages. These are more common: 20% have personally experienced them at work and 18% have witnessed them. In this connection, instances of bullying were also frequently cited. Absence of repercussions for offenders, combined with fear of a backlash after reporting an incident, underline the report's finding that many workplaces lack effective measures such as gender sensitivity training or efficient reporting mechanisms. That brings an "urgent need for stronger, proactive measures" – among them the creation of a safe environment to report incidents.

Bullying and harassment return similar scores – 17% report personal experience and 21% having witnessed it. Most commonly this comprises "overbearing supervision", such as undermining of work output or constant criticism; misuse of power or position; ridicule or demeaning language; or being given too much/too little/low grade work. Exclusion or victimisation are also regularly cited. Sexual harassment is less common, experienced by 4% and witnessed by 5%.

As with the previous survey, only 20% believed that most or all incidents of unacceptable behaviours had been appropriately dealt with. And a higher percentage than last time, albeit a minority (varying with the type of behaviour), believe the issues are systemic in the profession.

Violent conduct in the course of their employment has been suffered by 4% of respondents, most often (73% of cases) from a client/former client or their associate, but also from an opposing party, a stranger or anonymously, and in one case in eight, from a person connected with a present or former workplace. Just over half of incidents were reported, but often without the bodies concerned taking effective action. Behaviour perceived as threatening or abusive was also reported by 20%, again often with a lack of effective response even if reported.

Changes since Covid

Has working life changed for the better due to the changes resulting from the pandemic? There are some clear positives: 77% say their workplace has become more supportive of hybrid working; for 73% it has adapted well; and for 70% having that ability is more important to them now. But while 59% feel as committed to their career as before, 18% do not, and 19% no longer feel as supported. Positive figures are lower for private practice than for other sectors.

Particular aspects that more people view as better post-pandemic than take the opposite view, are ability to serve clients effectively, support from managers, and compassion and empathy in the profession. With eight other factors, however, more think things were better before: these include feeling part of a team, workload pressures, stress levels, forming relationships with colleagues, training trainees, being able to switch off, and levels of loneliness or isolation. There is some correlation here with those who have experienced mental health issues. (It should be noted that for all 11 factors, between 50% and 65% believe things are about the same now as before.)

Whatever the reasons, 27% of respondents (and 64% of trainees) work in the office full time, 51% are hybrid, and 15% work remotely all or most of the time.

Money, and more

Turning to the financial picture, salaries are up since the 2018 survey: the most commonly mentioned bracket is now £45,001-60,000, rather than £30,001-45,000; and 27% compared with 18% earn more than £80,000. Assessing salary differentials by gender reveals a small advantage to males among those up to five years qualified, but a wider gap at more senior levels. Bonuses tend to follow. Depending how it is calculated, the gender pay gap is assessed at 22-27% (2018 = 23%). There is also an ethnicity gap of 25%.

The path to partnership still seems somewhat smoother for men – who are also significantly more likely to view the status as important. Reasons for not seeking partnership include work-life balance, job satisfaction from other factors, family commitments, and the added stress and expectations involved.

Over to employers

What key messages can we take from all the foregoing? The findings will have given the Society much food for thought, but it seems clear that the principal onus in remedying the issues identified falls on employers, particularly in turning fine words into meaningful action when it comes to wellbeing, fair and equal treatment, and eliminating unacceptable behaviour. With challenges continuing around the recruitment and retention of sufficient quality staff, employees are likely to seek better conditions elsewhere rather than put up with an unsupportive culture.

"These results show there is much progress to celebrate, but also much still to do", Society President Sheila Webster commented as the report was released.

"The results will feed into our future work and we'll be engaging closely with the profession to tackle the issues raised. Supporting legal professionals, including their mental wellbeing, stands to benefit law firms and other employers just as much as the individuals who work there."

About the survey

The 2023 *Profile of the Profession* survey attracted 3,138 responses, an increase on the 2,746 in the last survey in 2018. They break down as 60% women and 39% men (1% preferred to self describe, or not to state); quite evenly spread across the age brackets; with 5% from non-white ethnic groups (4% in 2018); and 5% who state they have a disability (but 28% who indicate "at least one physical or mental impairment or condition", for example menopause). As in 2018, 75% attended a UK state school; there was slightly higher social mobility among younger age groups, though professional occupations dominate for their parents. Exactly 30% work in-house.

The survey was carried out for the Law Society of Scotland by Taylor McKenzie Research.

Read the full report on the Society's website (currently linked from the home page; also from the news release of 2 November 2023).

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Making your charity's cash reserves work harder

Most charities will hold a portion of their reserves in cash to meet shorter-term expenses and capital costs. These may be for distributions to charitable causes or day-to-day operational expenses. This cash should be managed with the same care as an invested portfolio to maximise returns and ensure it meets cash flow needs.

The right weighting in cash is a balancing act. It needs to be sufficiently large to manage any necessary liabilities, but not so large as to compromise returns.

Long-term cash returns have historically been below those of stock markets or fixed income portfolios, so there may be an opportunity cost to holding cash. The returns available from shorter-term deposits have improved as global interest rates have risen. Nevertheless, cash savings accounts have not always kept pace with central bank rate rises.

Why use a liquidity portfolio?

Liquidity portfolios can be used to generate a stronger return than that available in a cash savings account with a commercial bank. They can also bring diversification and help with risk management. Rather than holding large amounts with a single bank, or smaller amounts spread across multiple banks, liquidity portfolios will have a range of exposures, reducing default risk.

A liquidity portfolio needs to be managed with a keen understanding of an organisation's short and long-term liabilities. Building a portfolio starts with the broader cashflow context of the organisation's operations, and the associated liquidity requirements. This helps us understand how much should be held in cash and when that cash needs to be available.

What type of securities would be held in a liquidity portfolio?

Liquidity portfolios will comprise a variety of sterling assets, depending on the risk profile and time horizons. However, the "core" assets for most liquidity portfolios will be short-term government debt, combined with cash funds, usually managed by the large fund groups.

For UK charities, we make extensive use of T-bills. These are UK Government bonds with a maturity of six months or less. Each T-bill is issued at a discount to its maturity value of £100, so the return is made up purely of capital growth back to that maturity value over the term of the bill.

They have some notable advantages over cash deposits with a commercial bank. For example, there is no secondary market for cash deposits, and many require a lock-in period until maturity. Interest rates are often higher than most cash deposits. Equally, the different maturities of a T-bill portfolio allow us to build a portfolio round a charity's liquidity needs.

While the default risk for the major UK commercial banks is low, it is even lower for the UK Government.

Cash funds provide access to a pool of very short-term money market instruments denominated in GBP. These funds are traded daily, allowing them to be used for short-term liquidity needs and have no entry or exit fees.

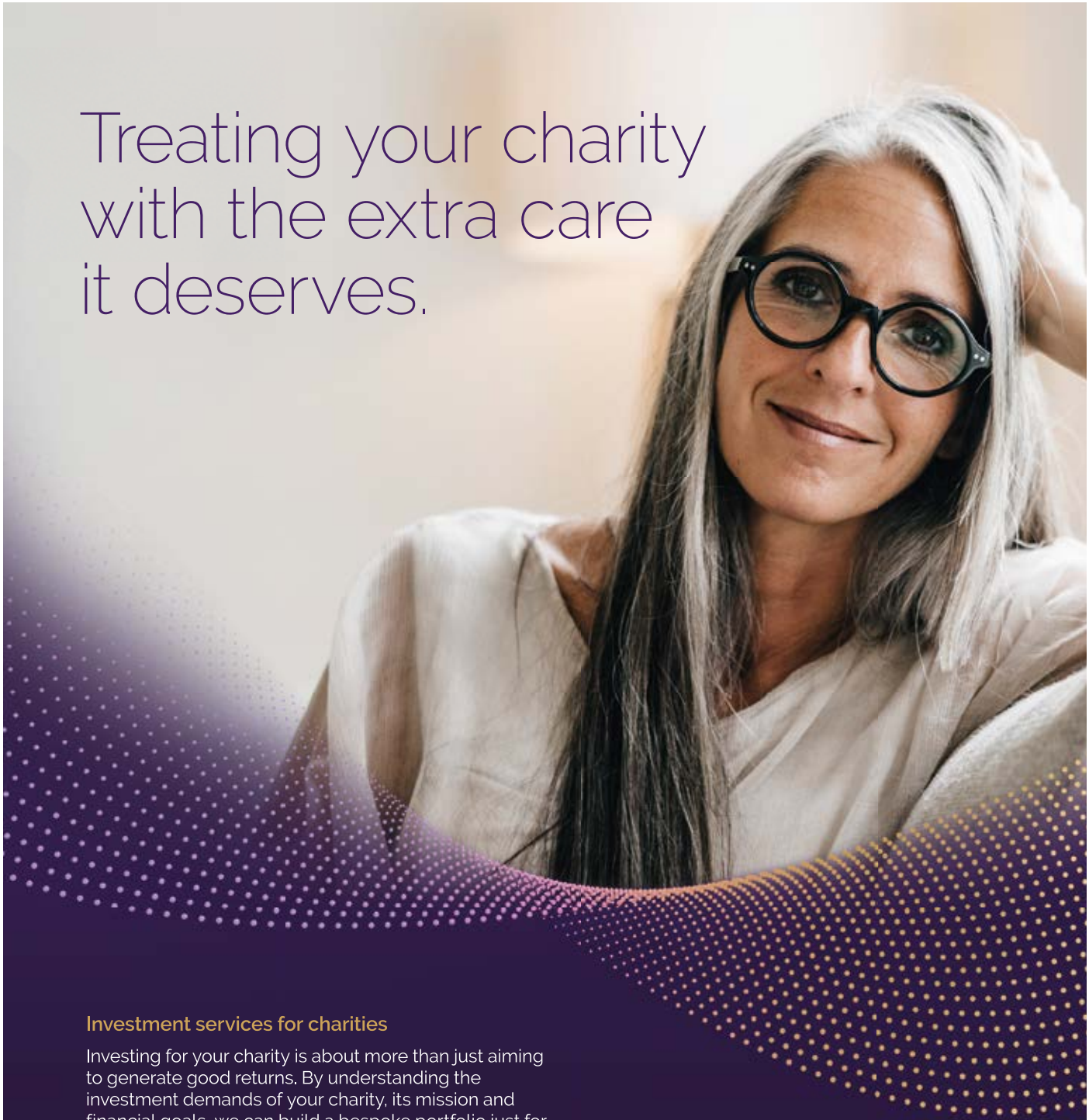
How flexible are liquidity portfolios?

Liquidity portfolios are very flexible and can take advantage of shifting market opportunities. Likewise, if a charity's cash flow needs change, the structure of the portfolio can be adapted accordingly.

Liquidity portfolios can be established as a separate portfolio, segregated from the primary investment portfolio. They are an efficient way for a charity to manage its short-term cash needs and liabilities.

Please get in touch if we can help: Keith Burdon, Head of Charities, Scotland & NI
Evelyn Partners Investment Management Services Ltd
keith.burdon@evelyn.com

Treating your charity with the extra care it deserves.



Investment services for charities

Investing for your charity is about more than just aiming to generate good returns. By understanding the investment demands of your charity, its mission and financial goals, we can build a bespoke portfolio just for you. One that considers your risk tolerance, accommodates ethical requirements and reflects your own values.

Evelyn Partners has been supporting charities for almost 200 years and our dedicated team understand the challenges faced by charities and the obligations of trustees.

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E: **keith.burdon@evelyn.com**
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When estates divide

For various reasons, executry disputes are becoming more common. Stephanie Hepburn surveys the issues that arise most often, and what must be proved if a case goes to court

Contentious executry work is growing. Why is this? Family dynamics are evolving, with "blended" families prevalent in today's society. Property ownership is also commonplace, resulting in larger and more valuable estates. These factors, combined with an aging population, the rise in cross-border estates, the use of DIY wills, and a cost of living crisis, can add layers of complexity and emotion to the distribution of estates, with the potential for disputes.

Of course, disputes do not just occur between beneficiaries. Tensions among executors may need to be resolved, and issues can also arise as a result of lost or poorly drafted wills and unidentifiable beneficiaries.

Our dedicated Contentious Executry, Trusts and Tax team has experience in a plethora of executry disputes and associated actions. This article explores the most common.

Removal of executors and trustees

It is sometimes necessary to take steps to remove an executor from their position. This may be achieved administratively if an executor is willing to resign voluntarily, but if not, an interested party may ask the sheriff court or Court of Session to order their removal under s 23 of the Trusts (Scotland) Act 1921. This is only available in four limited circumstances, where the executor sought to be removed is:
(1) insane;
(2) incapable of acting by reason of physical or mental disability;
(3) absent from the UK continuously for a period of at least six months; or has
(4) disappeared for a period of at least six months.

It is up to the applicant to provide sufficient evidence to satisfy the court that removal is appropriate pursuant to one of these grounds. This can prove difficult, particularly in relation to grounds 1 and 2, when the applicant may not have access to medical records or other evidence in support of their case.

This option is unlikely to be helpful in the types of situations removal is normally desired, for example where an executor is refusing and/or delaying to carry out their duties, or there is deadlock between two or more executors.

The only other potential way to remove an executor (at present) is a petition to the Court of Session's *nobile officium*. The court is only likely to grant removal if there has been serious malversation of office and it would prevent, prejudice or obstruct the execution of the executry were the executor to remain in office.

The Trusts and Succession (Scotland) Bill is currently making its way through the Scottish Parliament. Its provisions have been the subject of much debate, but once enacted this legislation is likely to extend the potential grounds for removal of executors.

Proving the tenor

There may be significant consequences if the principal will cannot be found after someone dies, particularly if there is a prior will in different terms, or the distribution under the laws of intestacy would differ. An action of proving the tenor can be brought, either in the sheriff court or the Court of Session, as a means of reviving the lost will with the same force and effect. The action can be raised by the executor(s) or a beneficiary under the lost will.

The 2022 case of *RW v JW* [2022] SC GLW 2 is a helpful reminder of what needs to be established, on the balance of probabilities, before an action to prove the tenor of a lost will can be successful:
(1) the terms (or tenor) of the will;
(2) the execution (i.e. signing) of the will; and
(3) the circumstances of the loss.

Even if the tenor of a will is proven, this does not prevent a challenge to the validity of the will.

Challenging wills

There are a number of grounds of challenge to wills.

Lack of formal validity

A will may be challenged on the grounds it is invalid. In order for a will to be valid in Scotland it needs to be put in place by a person aged 12 or over (the testator), be in writing and be signed by the testator at the end of the last page. If not, the will is likely to lack formal validity and be open to challenge. The will should also be probative. This is achieved if it is signed on every page in the presence of an independent (adult) witness who has also signed the will on the last page. If the will is not probative, it will need to be set up by leading evidence in court proving that the will is valid and was signed by the testator, before confirmation will be granted.

Incapacity

A will is not valid if the deceased lacked the requisite capacity when it was signed. There is a presumption in favour of capacity and there are often evidential challenges in establishing that the testator was not capable of understanding the nature and consequences of what they were signing.

Facility and circumvention

Someone may suffer a degree of mental deterioration which, without amounting to incapacity, may leave them easily imposed on by others. Facility and circumvention may occur if someone takes advantage of this. Three requirements are necessary:
(1) the testator had a weakened mental state (facility);
(2) someone has taken advantage of this to their benefit (circumvention); and
(3) the person challenging the will has suffered loss as a result.

Undue influence

Undue influence can occur if someone acting in a position of trust takes advantage of their position to secure a benefit under the will. A challenge to a will based on undue influence is very fact specific and rare in practice.

Fraud

If a will has been prepared fraudulently or has been forged, it may be challenged. For fraud, you must be able to prove that the testator was deceived into acting in a way they would not otherwise have acted.

Legal rights claims

A possible alternative to challenging a will is for a surviving spouse or child to insist on their legal rights. Regardless of the terms of a will, the children, spouse or civil partner of a person who dies domiciled in Scotland are entitled to legal rights, which are a fixed share of a person's moveable estate. These rights are automatic (although they can be discharged both during life and after death), and executors have a duty to advise those having legal rights of their entitlement to the estate.

Claims can be brought against executors who have failed to pay legal rights timeously, and an executor's duties in this regard should be borne in mind.

Professional negligence claims

A concern for those advising on the drafting of wills is that they may find themselves on the receiving end of professional negligence proceedings by disappointed beneficiaries. The duties owed by solicitors to third parties is a vexed topic, but the law has recognised that a duty of care can extend to a disappointed beneficiary in certain circumstances. Claims could arise if there has been undue delay in finalising drafting or implementing instructions and the client has died before this is done. These cases will all turn on their own facts and the test requires to be met that the act or omission was one no ordinarily competent solicitor acting in that field would make. Similarly, loss of testamentary writings might give rise to a negligence claim, although the position can usually be rectified with a proving the tenor action.

Lost legacies

What happens when a legatee cannot be identified when the estate comes to be distributed? This is often seen when a charity is not named correctly in the will. Who should receive the legacy?

The case of *Brownrigg's Executor (Vindex Trustees Ltd), Petitioner* [2021] CSIH 46 is a good example. Estelle Brownrigg left a legacy to "Nelson Mandela Educational Fund, South Africa", about which no information could be found on her death. However, a likely intended recipient could be found (the Nelson Mandela Children's Fund). The executor petitioned the Inner House for directions as to the distribution of the legacy. While the court declined to make directions on the basis it "does not consider that it should adjudicate or give advice on the matter", the court noted that counsel had advised that it seemed that the Nelson Mandela Children's Fund was the intended beneficiary, and that if the executor was of the same opinion, counsel was of the view that the executor could proceed accordingly.

The court considered it was ultimately a question that fell to be resolved by "the exercise of the executor's managerial discretion and good judgment", but in making the distribution, the executor would be acting on the advice of counsel.

What about the situation where a charity was correctly named, but no longer exists when the legacy comes to be distributed, or has changed its identity or merged with another charity?

Often, wills contain a clause giving power and discretion to executors to distribute a legacy to a similar charity. If there is no such clause, thought needs to be given to whether the will indicates a general charitable intention. Much will turn not only on the facts and circumstances but also on the interpretation of the will and the testator's intention. It is possible the legacy may become a "lost legacy" and fall to other beneficiaries, or into intestacy, or even to the Crown.

Avoiding and resolving contentious executry cases

Of course, the ideal situation is to avoid disputes arising in the first place, and clients should be encouraged to revisit their wills as circumstances and family dynamics change. If a dispute does arise, supporting clients to resolve matters between themselves, sometimes using formal alternative methods like mediation, can help settle disputes without the need for court action. There are, however, matters where court action is unavoidable, such as where it is necessary to prove the tenor.

A role for caveats

A caveat can be an effective tool in executry disputes. Its purpose is to provide notice to the caveator if an application for (i) confirmation, (ii) the appointment of an executor or (iii) restriction of caution in respect of an executor, is made. It can give an interested party the opportunity to object to an application for confirmation and allow the dispute to be heard, and potentially resolved, at an early stage.

Stephanie Hepburn is a partner in Litigation & Dispute Resolution with Shepherd and Wedderburn.

Planning by nature

Enhancing biodiversity is now a central aim of Scotland's planning system. A metric developed in England will be adapted to support its delivery. Ashley McCann explains how this might work, and the opportunities for landowners

The Scottish Government has announced, following the adoption of our fourth National Planning Framework (NPF4) in February 2023, that an adapted version of Natural England's Biodiversity Metric 4.0 will be used to support the delivery of biodiversity net gain ("BNG") as part of all significant development proposals in Scotland. In this article, I consider how the biodiversity metric is designed to work in practice and explore how it might be adapted for use in Scotland. But first, it is important to understand why BNG matters and how the means of achieving it through the development planning process differ north and south of the border.

The state of nature

The *State of Nature Report 2023*, published by the UK State of Nature Partnership, lays bare the seriousness of Scotland's biodiversity crisis. With one in nine species facing the threat of extinction and the abundance of 407 terrestrial and freshwater species decreasing across the country by 15% on average since 1994, Scotland is regarded as a "highly nature-depleted country". The potential repercussions of this extend beyond immediate ecological concerns: essential resources such as food, building materials and medicines are derived from a variety of plants, animals and other organisms, and their decline puts human health and economic stability at risk.

NPF4 gives Scotland's planning system a crucial role in reversing this crisis, with NPF4 policy 3a in particular requiring planning authorities across Scotland to seek to ensure that all proposals (other than those involving individual household development) "contribute to the enhancement of biodiversity, including where relevant, restoring degraded habitats and building and strengthening nature networks and the connections between them".

How can BNG help?

BNG aims to ensure that development delivers a quantifiable increase in biodiversity in a given area. The idea is that when development takes place, it should result in a net positive effect on biodiversity compared to the baseline pre-development state. This does not mean the development cannot result in any loss of biodiversity, but that any losses should be outweighed by gains in biodiversity elsewhere, either onsite or offsite. In practical terms, developers or landowners are expected to measure the existing baseline on a site before development occurs. They then implement measures as part of the overall development that are designed to enhance existing or create new habitats to the measured baseline position. This concept, also referred to as "additionality", is key. Mitigation of adverse effects is no longer enough.

Measures employed are varied and include planting native vegetation, creating wildlife habitats, or restoring ecosystems. Quantification is also key: the overall goal is to leave the natural environment in a measurably better state than it was in before the development was implemented.

The Scottish approach: broad brush

Prior to the adoption of NPF4, Scotland's planning system focused on avoiding, minimising, restoring or offsetting negative impacts of development (an approach referred to as "the mitigation hierarchy"), rather than leaving nature in a better state. In practice that meant efforts to enhance biodiversity were treated as "desirable" rather than an essential requirement of development. NPF4 policy 3a now makes it a policy requirement that such efforts are applied so far as reasonably practicable at the design stage.

More stringent efforts are expected from the promoters of national and major development projects (i.e. larger scale projects). NPF4 policy 3b provides that proposals involving these categories of development should only be supported by a planning authority where it can be demonstrated by the applicant that the proposal will deliver "significant enhancements" to biodiversity within a reasonable timescale and with reasonable certainty. Appropriate management arrangements for the "long-term" retention and monitoring of the proposed enhancements are also expected to be provided.

There is no guidance as yet from the Scottish Government on what is to be regarded by planning authorities as a "significant" enhancement, or for how long they should expect a "long-term" maintenance arrangement to last – matters which have potentially significant on-costs for developers. Nor is there, as yet, any nationally accepted methodology for quantifying or measuring BNG. This has resulted in a degree of uncertainty among developers, their consultants and Scottish local planning authorities as regards what precisely they are expected to do at the development management stage to ensure that the new national policy requirements in relation to biodiversity are met.

The English approach: prescriptive

England has taken a much more prescriptive approach. From January 2023, pursuant to s 6 of the Environment Act 2021, all new planning permissions granted in England (with a few exemptions) have to deliver at least 10% BNG to ensure that development leaves the natural environment in a measurably better state. Developers are required to carry out a pre-development baseline assessment of the application site and then provide sufficient

STOP PRESS

On 30 November the Scottish Government published Draft Planning Guidance: Biodiversity

(gov.scot/publications)

new habitat creation (preferably onsite), demonstrating how the minimum statutory BNG additionality will be achieved.

To assist that assessment, Natural England has developed the biodiversity metric, a biodiversity accounting tool which quantifies pre- and post-development biodiversity losses and gains in order to calculate BNG. It applies a habitat-based approach that assesses an area's existing value to wildlife, using habitat features to calculate its biodiversity value. It considers the site, quality, location, distinctiveness and condition of the existing land and intertidal habitats, including hedgerows, rivers and streams. Each type of habitat is given a score; the developer will be required to identify how a 10% increase on the score can be achieved and incorporate that into the development. The tool relies on a competent person (an ecologist, rather than a lawyer) to assess the extent, condition and distinctiveness of current habitats, while maintaining a transparent user-friendly interface. The interface allows developers and planners to explore different scenarios, and in doing so drives innovation in meeting BNG.

The UK Government's clear preference is that the net gain is achieved onsite, although mechanisms allow the gain to be achieved offsite if necessary. Developers should, in the following order:

1. Avoid or reduce biodiversity impacts through site selection and layout.

2. Enhance and restore biodiversity onsite, such as by sowing wildflowers along road verges or managing grassland within a housing development to support wildlife.

3. If onsite measures are insufficient, use biodiversity "units" from ecological improvements elsewhere, ensuring the replacement habitat is of equal or greater conservation value than the development site. Some units may be obtained from the emerging "net-gain market", where land managers create units resulting from conservation actions (referred to as "habitat banks") and sell them to developers. Alternatively, developers can establish their own habitat banks, generating biodiversity units in one location to offset impacts elsewhere. These sites will be bound by a planning obligation or conservation covenant (similar to conservation burdens in Scotland) which requires habitat enhancement works to be carried out on the land and maintained for at least 30 years following completion. Such sites must be registered on a biodiversity gain site register. The habitat enhancement may be allocated to one or more developments in accordance with the terms of the obligation or covenant. Landowners with sites which would benefit from habitat enhancements can work with developers seeking to achieve the BNG objective offsite.

4. As a last resort, purchase statutory biodiversity credits from the UK Government, which will be priced higher than the open market cost of biodiversity units.

The guiding principles of England's BNG policy therefore align with Scotland's commitment to deliver positive effects for biodiversity, albeit statutory requirements for 10% BNG linked to frameworks for the purchase of Government credits will not apply here.

Issues for a Scottish biodiversity metric

The Scottish Government's decision to commission NatureScot to adapt Natural England's biodiversity metric follows the recommendations of a report titled *Research into Approaches to Measuring Biodiversity in Scotland*, published in September this year as part of the NPF4 delivery programme. It found that with refinement, Natural England's biodiversity metric is largely applicable for use in the planning sector in Scotland, and several companies are using adapted versions in Scotland to account for biodiversity during site development.

The report underscores the distinctive land cover in Scotland compared to much of the rest of the UK. While over half of England, Wales and Northern Ireland consist of pastures and arable land, Scotland is characterised by peat bogs, moorland and forests, presenting both challenges and opportunities.

One significant challenge identified by the renewable energy sector involves achieving BNG for projects affecting bog habitats, such as upland wind farm projects. Blanket bog, listed as an "irreplaceable" habitat in Natural England's metric, holds high value and its loss cannot be offset. However, practical considerations, including the nature of the impact, the condition of the blanket bog, and the broader environmental context, may influence whether certain areas are deemed irreplaceable. In Scotland, there is a need for more discussion and guidance on approaching impacts to bog habitats concerning BNG, to establish a transparent and effective way forward.

Whatever form it takes, Scotland's new biodiversity metric is unlikely to satisfy all stakeholders. The English model has faced criticism for not adequately considering factors beyond habitat, with some arguing it is overly subjective, that it neglects the value of transitional habitats (such as early succession scrub evolving into mixed woodland), and lacks a connection with species of conservation concern.

Striking the right balance between simplicity and complexity is a difficult task. Currently, there is no single metric that encompasses all factors relevant to BNG. Metrics commonly overlook socially important species, red list status, and genetic diversity. At the local level, it could become challenging, if not impossible, to assess the effectiveness of mitigation or intervention, resulting in the continued implementation of potentially ineffective actions without a robust evidence base. Despite these challenges, the report warns against delaying implementation in pursuit of a perfect solution, owing to the urgent need for an aid to decision making under policy 3b.

On a positive note, the abundance of semi-natural habitats in Scotland offers a greater opportunity than in other parts of the UK for large-scale habitat enhancement and creation. As in England, landowners in Scotland can leverage the biodiversity metric to establish habitat banks. This involves providing developers in their local planning authority with high-integrity habitat units in exchange for a favourable financial return. Given the lower population density and scale of development in Scotland, those representing landowners should make them aware of this prospect before the market becomes saturated with an oversupply.

Ashley McCann is an associate in Gillespie Macandrew's Dispute Resolution team who specialises in public, planning and environmental law

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Executry evolution: from the Wild West to...

Denovo Business Intelligence emerged as a trailblazer in the early 2000s, setting the stage for a transformative shift in executry processes. At the heart of this revolution was the groundbreaking Executry software module, a pioneering addition to the Legal Intelligence Software platform that would forever change the way executry law firms managed estate information.

The origins of this innovative software can be traced back to a crucial intersection of factors. In the early 2000s, the legal landscape resembled the Wild West, with executry processes lacking the regulatory sophistication and streamlined efficiency that modern practitioners now take for granted. Executry law firms in Scotland faced the challenges of managing vast amounts of estate information, juggling details of beneficiaries, assets, and liabilities in what could only be described as a tumultuous and unpredictable terrain.

Denovo's visionary approach to software development, led by David Hardie, Denovo's senior software developer, took shape as the company responded to the needs voiced by executry lawyers across Scotland. The timing aligned with the launch of step.org's Advanced Certificate in Wills and Executries: Law and Practice (Scotland), reflecting a broader industry recognition of the necessity for enhanced tools and knowledge in this specialised field.

The Executry module introduced by Denovo was a game-changer. It not only allowed for the seamless capture of all estate information within easily navigable cases but also brought a new level of automation to the process. One of its standout features was the ability to generate HMRC forms directly from within the software, streamlining the often cumbersome task of populating forms with data from the case. This not only saved time for executry law firms but also significantly reduced the risk of errors associated with manual data entry.

The analogy of the executry process being akin to the Wild West highlights the chaotic nature of the pre-regulatory era. Denovo's Executry software acted as a sheriff in this legal frontier, bringing order and efficiency to an otherwise unpredictable landscape.

Next leap forward

Fast forward to 2023, and Denovo has once again elevated the executry software landscape. The latest iteration of their software is widely considered the next step in the evolution of executry efficiency. Denovo's CaseLoad Case Management System reimagines a full solution for administering executries to easily create and work with full and complex estates, as well as all the assets, such as property, any bank or building society accounts, insurance policies, premium bonds, and personal effects – essentially creating a one stop shop for all features related to executry estate administration in one easy to use window.

With a keen understanding of user needs, coupled with advancements in technology and a commitment to simplifying complex processes, Denovo continues to be at the forefront of shaping the future of executry management.

David Hardie, who has played a major role in revolutionising the executry software over the past 20 years, said: "On this journey, stretching over 20 years, we remained attuned to the evolving needs of our users, understanding that the key to excellence lies in continuous adaptation. We tirelessly seek superior ways to empower legal professionals.

"CaseLoad Executry stands as a testament to our unwavering pursuit of excellence. We understand that the modern legal professional is faced with multifaceted challenges, and to address these, we have meticulously crafted an unparalleled user experience. With an acute focus on user needs, we have seamlessly integrated CaseLoad Executry with Microsoft Office, elevating the user interface to new heights.

"This integration not only facilitates a more intuitive and cohesive workflow but also serves as a catalyst for transformative visual insights. We believe that true empowerment comes not just from functionality but from a profound understanding of the intricacies of legal processes. Our commitment extends beyond mere software; it encompasses a holistic approach to redefining how legal practitioners manage their executries.

"In our relentless pursuit of efficiency is not merely a technical feat but a testament to our dedication to making lawyers' lives easier."

Paving the way

In conclusion, Denovo Business Intelligence's journey from the early 2000s to the present day is a testament to the power of innovation in the legal tech space. The development of their Executry module not only revolutionised estate management but also paved the way for a more efficient, regulated, and user-friendly executry process, ultimately redefining the standards for excellence in the legal software industry.

For more information about Denovo visit denovobi.com. To speak to the team, you can call 0141 331 5290, or if you prefer, email info@denovobi.com.

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Under review: when to challenge

A Sheriff Appeal Court ruling on interim orders in a child contact dispute highlights the care needed in considering whether to appeal a ruling, without resolving all the concerns to which the case gives rise, Nadine Martin believes

The Sheriff Appeal Court decision in *F v M* [2023] SAC (Civ) 29 considers taking the views of an older child ("H") in a contentious case where an order for delivery was sought and granted at a pre-service hearing. H was 12 at the time that the orders appealed were granted, and 13 by the time the appeal was heard.

The pre-service hearing

At the time of their divorce in 2021, the father/appellant ("F") and mother/respondent ("M") entered into a joint minute which regulated residential contact between F and H. H thereafter exercised regular residential contact with F. H was neurodivergent and required support with schooling and other day-to-day activities. The relationship between F and M was contentious.

In early 2023, difficulties arose. After a period of residential contact with F, H did not return to M. F reported that H stated more than once that he did not want to return and could not be persuaded otherwise. M's position was that F was simply refusing to return H and was influencing him.

M commenced minute procedure in February 2023 seeking delivery of H within 48 hours, interdict to prevent H's removal from her and the reduction of contact between F and H to nil. A pre-service hearing was fixed at which only M was represented. There was no submission that H's welfare would be immediately prejudiced if he remained in F's care for a short time. The sheriff ordered delivery of H within 48 hours and granted interim interdict. No order was made to ascertain H's views. A post-service hearing was fixed to call a week later.

In granting the pre-service orders the sheriff had, without any representation from F or knowledge of H's views, determined that H should be returned to M, even if only temporarily. The sheriff did not have the benefit of submissions on how such a decision would impact this 12 year old with additional support needs, who had (per F's position) clearly stated and firmly held views.

Sheriff officers attended at F's home. H declined to leave and remained in F's care.

The post-service hearings

At the first post-service hearing, the sheriff ordered delivery and authorised the opening of lockfast places for H's removal. He considered that F had purposely failed to obtemper the previous order. A child welfare report was ordered so that H's views could be taken, and a child welfare hearing fixed.

"Under the practicability test, the taking of views was mandatory but the timing was an exercise of discretion"

H again declined to return to M.

A further motion was enrolled for delivery and suspension of contact between H and F. Another post-service hearing was fixed for the next day. The sheriff ordered delivery and suspended contact *ad interim*. H returned to M's care.

Subsequently the child welfare reporter took H's views, which were that he wanted to have extensive residential contact with both F and M. Notwithstanding this, M refused to allow any contact, whether direct or indirect, from the suspension of the order. By the time of the appeal, H had had no contact with F for approximately six months.

Appeal submissions for F

H's views

F submitted that the sheriff had not allowed H any opportunity to express his views about returning to M, despite being told that H had a clear view and there having been a number of hearings on the issue of delivery. Nor had he fully considered the impact on H of suspending contact with F, even if only for a short period.

In the circumstances the sheriff had a duty to investigate H's views before making such important decisions. There was no suggestion that H was at risk in F's care, and there was no pressing urgency that required the sheriff to take immediate steps. H's views would be a determinative factor in the orders to be made.

Pre-service hearing/article 8 rights

Granting an order for delivery pre-service was exceptional. Respect for article 8 rights required those whose rights were or might be affected by decisions in a particular case to be sufficiently engaged in the decision making process. A decision based on *ex parte* submissions by M without affording F the right to be heard should only have been made if there were significant and compelling reasons in the sense of article 8(2). No such reasons were provided at the pre-service hearing; this constituted a breach of s 6 of the Human Rights Act 1998.

The sheriff's actions at the pre-service hearing created a presumption in advance of the later hearings on other child welfare decisions. He had made a determination when there was insufficient information available for him to be satisfied that it was in H's best interests.

Suspension of contact – punitive?

The sheriff had erred in suspending contact between F and H. His decision to suspend contact was, on the face of it, carried out as a penalty against F, as the sheriff considered he had not obtempered the earlier orders for delivery (F maintained that it was H who had declined to return to M with the sheriff officers, in accordance with his expressed views).

Nadine Martin is a partner with Gibson Kerr. Gibson Kerr acted for the appellant in the case discussed.

Appeal submissions for M

M argued that the status quo was that she was H's main carer. The sheriff had to deal with a situation where F had already failed to comply with court orders – immediate steps were therefore necessary to re-establish that status quo, which had been unilaterally altered by F.

It was reasonable and practical for the sheriff to issue the interlocutors challenged without taking H's views. The sheriff had sufficient information. F had failed to cooperate in returning H to M. Suspending contact between F and H served to remove H from the dispute between his parents and was only for a short period. Any suggestion that a child's views must be taken in every instance was unsound. The real issue was F's conduct, and the appeal was about F "vindicating himself".

Decision

Section 11 engaged?

The Appeal Court was not necessarily persuaded that an order for delivery would fall within the definition of a s 11 order. It proceeded however on the basis that s 11 was engaged. It is hard to see how an order for delivery would not engage s 11, as it necessarily involves deciding with whom a child is to live (or spend the majority of their time), even if only on a temporary or emergency basis.

Suspension of contact also engaged s 11 because it regulated arrangements for contact between H and F.

The Appeal Court proceeded on the basis that because the parties had agreed, and had obtained an order based on a joint minute, that F was to have residential contact with H, it logically followed that there was an agreement that H's principal place of residence was with M. The sharing of parental rights and responsibilities in relation to H did not entitle either party to take any action unilaterally in respect of the arrangements for H.

H's views

The court accepted that H's views would be an essential component before a court could make a substantive order. Cases referred to in the appeal related to decisions made after proof and arose in circumstances where the court either did not take the views of the child or applied the wrong test. The current case could be distinguished as it involved steps taken at a very early stage. There was no requirement to take the child's views in relation to "every decision, hearing, or step in procedure in a s 11 action. The requirement is to take the view during proceedings".

Under the practicability test, the taking of views was mandatory but the timing was an exercise of discretion.

It was unfair to criticise the sheriff for not "articulating the complete thought process in electing not to take the views of H before making any order". He had "competently and intelligibly" acted to reinstate the status quo by ordering delivery to M. That order was not a substantive, conclusive or determinative decision of the competing interests of the parties and preserved their right to advance their positions in the context of the minute procedure.

Issues of welfare and urgency rendered the immediate taking of H's views impracticable. In any event, the sheriff had fixed a child welfare hearing and arranged for H's views to be taken.

Failure to allow F to be represented

The sheriff was faced with an application based on a failure to obtemper an order which had been maintained over a number of days, with no application being made by F to vary. Therefore, his decision was not taken in a vacuum but informed by the existing decree and M's wish to reinstate the status quo. These were cogent and compelling reasons for the sheriff's decision to proceed in F's absence and created no presumption about where H's best interests would lie in the future.

Suspension of contact

M's argument that the suspension of contact was "protective" rather than punitive was preferred. This was based on the fact that there was a court order reflecting arrangements agreed between the parties and in spite of that, F did not return H to M when he should have done, did not return H despite an order for delivery, and the sheriff officers reported him as being, in their view, unhelpful.

Suspension was a "holding exercise" pending more information and it gave no rise to a presumption against contact being reinstated. In that context, the Appeal Court held that the sheriff was entitled to suspend contact.

Court's postscript

It was observed that a consequence of the appeal was that F was precluded from reinstating contact with H, as the first instance proceedings were put on hold pending determination.

Per the decision in *JM v Taylor* 2015 SC 71; 2015 SCLR 143, "litigation should have a purpose". The Appeal Court considered that this appeal did not have a purpose. The allocation of resources, financial and otherwise, was "entirely futile".

If F had chosen not to appeal, there would have been a child welfare hearing informed by a report which included H's views. As it stood, M had refused to consider any contact between H and F and a significant number of months had passed. Whatever the outcome of the appeal, it could not have advanced F's "quest" for residence or contact, as the suspension of contact could only properly be regulated at first instance.

The privately funded appellant was found liable in expenses to the legally aided respondent. F had elected to appeal and was unsuccessful, and therefore was liable in expenses.

Observations and considerations for practitioners

Practitioners should note the court's view that the appeal was "entirely futile". It should serve for those representing parties in either position as a decision to reflect on, but perhaps also to rely on only with care.

A significant consequence of appealing was that the issue of contact between F and H was effectively halted. By the time the appeal was heard, H had been delivered to M, was resident with her and had provided his views to a child welfare reporter. Despite the report reflecting that the parties should work to share H's residence in accordance with his views, M continued to refuse to allow any contact whatsoever.

It is at least arguable that determination of the appeal issues would not have prevented an interim decision about contact being made at first instance. This would have prevented the disruption of the close and loving bond that H had with F (apparent by the care arrangements that had been agreed by the parties and in place for a number of years). H was instead isolated entirely from one parent.

It is appropriate that appeals which are purely academic are discouraged. The issue of whether this appeal was in fact academic is worth consideration. Appeals have both private and public functions. It is a function of an appeal court to provide guidance for future cases by reviewing the conduct of cases in the lower courts. Privately, appeals provide accountability to individual litigants (and the children who are the subject of litigation). Their public function serves to enhance citizens' confidence in the justice system.

From H's perspective, the decision to remove him from F's care without consulting him and to suspend his contact with F (no matter how short lived) would have been far from "academic". The orders made will undoubtedly have had a significant impact on the lives of H, F and M.

It is imperative that we continually monitor and review processes, procedures, and judicial approaches in child law cases to ensure that the best outcomes possible are delivered. The legal profession is becoming increasingly aware of the (potentially lifelong) negative impact of contentious litigation on children. The positive outcomes for children in being engaged in major decisions about their lives are recognised as a mitigating factor. All cases will still turn on their individual facts and circumstances – including whether there is any potential harm to the child in a short period being allowed for their views to be taken.

For practitioners making or opposing such applications, the requirement to resolve matters expeditiously must almost always be balanced by the importance of ensuring that the views of children, particularly older children, are taken appropriately and at the right time.

Those seeking review of decisions made at first instance run the risk of significant delay in determining ongoing welfare issues. A process for assessing first instance decisions without halting the overall consideration of a child's welfare is something that is worthy of consideration. Scotland is celebrated for its approach to the promotion and protection of the rights of children – particularly those whose lives intersect with the application of public law. The approach that we take to children involved in private law disputes between their parents must be subject to a similarly robust and rights-based approach – failure to do so risks their wellbeing in a fundamental way.

After completion: the practical issues

Keeping employees engaged is a crucial aspect of any corporate acquisition. Stephanie Farrell and Marianne McJannett highlight some key considerations

Acquisitions are never easy. There are many details and moving parts during the sale process, from heads of term to completion, whether it's a business transfer or a sale of shares.

Getting acquisitions right on the people side is absolutely critical to an organisation's success after the deal – staff are a key asset in most businesses. Integrating and aligning two businesses and their cultures may seem daunting, but putting the key elements in place early during the sale process sets a transparent, collaborative and inspiring tone for the journey. After all, future success will depend on key players remaining and continuing to perform following the completion date.

Here we look at the legalities involved in a business change, and how companies can use the time before transfer to prepare for a smooth transition.

Transferring the workforce

The lead time to completion in a sale will vary depending whether it is a share sale or full business and asset transfer. Either way, however, the essential first step for all parties in bringing people together post-completion is understanding the impact on the workforce. There's a lot of disruption and uncertainty for employees on both sides, but especially within the acquired company. In both cases, communication is essential, but the timing will vary depending on the type of transaction.

In a business sale, the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") will apply where there are affected employees. TUPE provides protection when ownership changes: employees' terms and conditions are preserved, along with their continuity of employment.

Where TUPE applies, the current (transferor) and new (transferee) employers must inform and consult with affected staff. While there is no statutory timescale, this needs to be done in sufficient time ahead of the transfer date. The whole workforce will therefore be aware of the transfer weeks before completion. This is a key opportunity for both parties to work together to inform staff and provide reassurance on the impact on them.

While TUPE does not apply to a share transfer, it could apply to an asset transfer carried out as a precursor to a share sale, or a transfer of the business or part of it to the holding company following a share transfer.

Communication priorities

There can be wider issues to consider, such as proposed redundancies or changes to employment following the sale. Even where these are not planned, employees (in both companies involved) will want to know about the practical aspects: where they will be based, who their team will be, how they will be integrated, will systems be different etc. These concerns may not seem the priority for either company, but are typically key for the staff on the ground, and the future of the new organisation will depend on them being engaged and feeling valued during and after a transaction.

In a share transfer the lead-up is usually highly pressured and highly confidential, with both parties wanting to inform only those directly involved in the transaction. The wider workforce will likely only be told of a change in ownership after completion, but again, communication with staff will be key, both before and after completion. During due diligence, the seller will want to identify their key talent who will be actively involved in that process, ensuring they are not only engaged in aiding the process (a key element to a sale) but still feel invested in the business beyond completion.

The buyer will want to meet these key individuals during this stage and ensure they feel committed to the future of the organisation post-completion. Parties should also plan what will be communicated to the wider staff about the deal and their role in the "new" company, and how that will be presented – whether at an all staff townhall or via smaller meetings. Practically, once the deal has closed, the parties will want to deal with staff communications within 24 hours.

After completion

The next stages will likely be around ensuring that the cultures and values of the "new" (combined) company and its staff are aligned. This might be through formal sounding boards, social events or specific training to ensure everyone has an understanding of where the company is post-deal, what the future looks like and what its values are. This is also an opportunity to update any relevant policies and processes to ensure continuity in the combined workforces of the buyer and seller. Although in a business and asset transfer TUPE protects employees from changes to their terms and conditions, if any proposed changes were identified during consultation they must be implemented now.

Ultimately, the difficulty – or otherwise – of integrating the new workforce will largely depend on efforts and planning during the run-up to completion. If details of the transaction have to remain confidential, a plan should still be considered key by the senior management and board of both buyer and seller to ensure their entire workforce continue to feel valued and connected to the new organisation, with an understanding that there may be bumps in the road but that the journey should be worth it.

Stephanie Farrell is a senior associate, Corporate, and **Marianne McJannett** head of Employment, at Bellwether Green

Climate action? Start here

The Law Society of Scotland, through its Sustainability Committee, is developing a climate action resource hub to support members looking for help with a climate change strategy

Climate change is one of the most pressing issues of our time, but for legal professionals wondering how they can help, it can be hard to know where to start.

After the Society's Council passed a climate resolution, the recently formed Sustainability Committee (pictured) set its sights on helping every corner of the legal sector by producing a climate action resource hub.

With the effects of climate change being seen around the globe and the issues coming under the spotlight at COP-28, from its inception the committee has prioritised tangible, practical action through the resource hub.

In the ever-evolving landscape of environmental responsibility, the hub has been designed to support legal professionals by: (1) signposting useful resources to help firms and organisations consider potential changes they can make to reduce their carbon footprint; (2) suggesting ways in which climate-consciousness may be built into client advice; and (3) recognising the increasing prevalence of climate anxiety and the need for individuals to address the impact of the crisis on their own wellbeing.

Strategies for all

The hub is by the legal profession, for the profession. As the President, Sheila Webster said: "The climate crisis is not just an issue for larger firms, but one which needs to be tackled by every corner of the Scottish legal system." To that end, the Society recognises that many larger firms and in-house teams have well developed ESG (environmental, social and governance) strategies, but smaller firms may lack resources to create and implement their own strategies. For that reason, elements of the resource hub have been specifically targeted at smaller firms who are looking for ways to mitigate their environmental impact.

Committee member Anne Littlejohn, partner at Raeburn Christie Clark & Wallace, observed: "SMEs will play an integral role in society's drive to net zero. For business owners the task may seem overwhelming, especially at a time when they are facing higher overheads, taxes and workforces with similar domestic issues. However, there are various ways we can all tackle this challenge if we break the task down into manageable targets. The benefits from reducing your carbon footprint are not just environmental: they can foster greater employee satisfaction, attract people (both staff and clients) to your business, and in some cases reduce costs."

Change is hard, but as the magnitude and urgency of the climate crisis continues to grow, it becomes increasingly necessary.

Peter Brash, partner at Grigor & Young and also on the committee, commented: "It's easy to get overwhelmed by the apparent scale of climate change, and on some days I do. But I try to focus on taking small steps in the right direction, both personally and in business. Most people understand that adapting our behaviour is a journey and not everything can be made perfect immediately. I think people – whether clients, employees or the general public – just want to know that firms are taking their duty of care seriously. Talking openly about opportunities, initiatives and progress in relation to sustainable practices is a great way to initiate action. It's what I hope the resource hub will help to foster."

In-house angle

Working in-house can present its own challenges when having agency over your organisation's ESG methods, and in all areas of working life it can be easy to think that the climate crisis is not something we can tackle individually at work.

As committee member Hannah Gardner, legal counsel in the Outsourcing, Technology & IP team at NatWest, put it: "As a technology lawyer I didn't initially feel there were obvious links between my day job and supporting ESG initiatives. This was just not true! I have learnt during my years at NatWest where we can use our influence to promote meaningful change, such as my team's work with the Chancery Lane Project on using our contracts to monitor the bank's scope 3 emissions. Working with the committee has further fueled my desire to share these learnings with the profession.

"We are proud of the content we have pulled together for the resource hub and I would love it to be part of a success story where we have influenced real meaningful change through being part of the Society. We hope the hub will grow and inspire as we continue to learn."

On a journey

With the climate crisis, collaboration is key. No single action or approach is enough, yet working as a community, the legal profession can effect positive change. The resource hub, together with CPD training and events run by the committee and the Society can, if members choose, lead to a sustainability journey that produces meaningful results for individuals, firms, in-house teams, and clients, across the country.

There is no doubt that climate change is intimidating and there is a large mountain to climb when it comes to seeing positive results. However, raising awareness, having conversations and making a start on doing things differently, can have considerable effects not only within our legal system but beyond.

Find the climate hub at lawscot.org.uk/members/sustainability/

Anne Littlejohn | Peter Brash | Hannah Gardner

If you, your firm or your in-house team want to join the conversation by sharing your experiences of sustainability (whether challenges or successes), please get in touch with the Sustainability Committee by emailing sustainability@lawscot.org.uk

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Boundaries of corroboration

Our criminal court briefing considers the seven judge decision on distress as corroboration, arguing that rather than effecting a revolution it applies well established principles already given effect in criminal cases generally

Criminal Court

ADRIAN FRASER,
SUMMARY SHERIFF
AT EDINBURGH

There have been two significant developments since my last article.

The first is the seven judge decision in *Reference by HM Advocate v CLB* [2023] HCJAC 40 ("*CLB*"), which overruled *Smith v Lees* 1997 JC 73 and *Cinci v HM Advocate* 2004 JC 103 on the role of distress in proof of a crime, and disapproved *obiter dicta* in *Morton v HM Advocate* 1938 JC 50 on *de recenti* statements so far as bearing on proof of a crime.

In a journey from the institutional writers Hume, Burnett and Alison through the past authorities, textbooks and Commonwealth and Irish cases, the High Court clarified what corroboration means in the law of Scotland. The twists and turns in the development of the law are clearly set out at paras 1-151 and it makes comprehensive and interesting reading.

The second is the Scottish Sentencing Council guideline on *Statutory offences of causing death by driving*, approved by the High Court on 31 October and applying to all offenders sentenced on or after 16 January 2024 who have been convicted of causing death by dangerous driving; causing death by careless driving when under the influence of drink or drugs; causing death by careless, or inconsiderate, driving; and causing death by driving: unlicensed, uninsured, or disqualified drivers. This is the first offence-focused guideline as opposed to setting out general sentencing principles. I hope to consider it in a future article, but draw attention to its existence now.

Effect of *CLB*

In *CLB*, the Lord Advocate referred two questions to the court following a majority not proven verdict on an accused charged with assault and rape by supplying the complainer with alcohol and an unknown substance at his flat, rendering her heavily intoxicated, and then assaulting her.

Evidence was led from the complainer's boyfriend and another witness of the complainer's distressed state immediately following the alleged incident, and of statements by her that she had been raped and that the accused was responsible.

The trial judge directed the jury that if they accepted that the complainer's distress was genuine, it could both corroborate her lack of consent and support her general credibility, but it could not of itself corroborate that penetration had occurred; and that the complainer's *de recenti* statements could not corroborate her testimony about what had happened.

The Lord Advocate asked whether (1) the trial judge erred in directing the jury that distress of itself could not corroborate a complainer's direct testimony that penetration had occurred; and (2) independent evidence of distress was sufficient to corroborate a complainer's direct testimony that penetration had taken place.

In consequence of *CLB*, not only in rape but in other cases too, distress shown by a complainer shortly after an alleged incident, which the factfinder is satisfied arose spontaneously due to the nature of the incident and is genuine, can corroborate a complainer's direct testimony, including testimony of penetration in a rape case; and there is a role for *de recenti* statements, the extent of which may merit further consideration in a suitable case.

At the moment, in terms of para 239 of the opinion: "the value of a *de recenti* statement depends on the context in which it occurs. Where it occurs in the context of observed distress, the statement has corroborative value in enhancing and strengthening the corroborative effect of the distress; and... in any event, a *de recenti* statement alone is evidence which reflects favourably on the reliability and credibility of the complainer as showing consistency of approach from a moment close to the events in question".

Looking back, for a moment, to *Jamal v HM Advocate* 2019 SLT 479, Lord Justice General Carloway said at para 20: "There is no sound reason for restricting the availability of corroboration of the act of rape to the type of scientific, medical or other evidence set out above. In relation to penetration, corroboration can be found in facts and circumstances which 'support or confirm' the direct testimony of the commission of the completed crime by the complainer (*Fox (Richard John) v HM Advocate*, LJG (Rodger) at 1998 JC, p 100...). In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in *Smith v Lees* (LJG (Rodger) at 1997 JC, p 79...). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an extreme nature, as a significant factor which, at least when taken with other circumstances, 'supports or confirms' a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape, in whatever form, can be seen as being corroborated when all the surrounding facts and circumstances are taken into account."

The words "accepting for present purposes" that a Crown concession was properly made are significant, as is the remainder of the paragraph in providing a foretaste of things to come. When I first read *Jamal*, I realised that *Smith* was living on borrowed time, and its fate was inevitable at the hands of a modern interpretation of existing law.

Principles applied

CLB relies on and clarifies well established principles that have to some extent, and from time to time, been misinterpreted. Taking centre stage in *Jamal* and *CLB* is *Fox v HM Advocate* 1998 JC 4, which is authority for the proposition that corroborative evidence is evidence which supports or confirms the direct evidence of a witness.

Also pivotal is the concept of a case either wholly or partly circumstantial:

- The evidence in a circumstantial case must be looked at as a whole. Each piece does not need to be incriminating in itself. What matters is the concurrence of testimonies. Whether a single piece of evidence, or a number of pieces of evidence are incriminating or not is a matter which can only be judged in the whole circumstances taking all the evidence together.
- Corroboration is to be found in the cumulative effect of evidence.
- The nature of circumstantial evidence is such that it may be open to more than one interpretation, and it is the role of the factfinders to decide whether the inference of guilt is drawn.
- It is open to the factfinders to reject evidence, e.g. alibi evidence, because it is inconsistent with other evidence they have decided to accept. Factfinders are entitled to reject evidence which is inconsistent with the guilt of an accused precisely because it was inconsistent with circumstantial evidence pointing to guilt which they had decided to accept.

The general approach is set out in the five judge decision in *Al Megrahi v HM Advocate* 2002 JC 99 at paras 31-36. The propositions set out are also supported in *Mitchell v HM Advocate* 2008 SCCR 469 at paras 91 and 106, and *Gage v HM Advocate* [2006] HCJAC 7 at para 75.

The significance of proof of the "crime" from different "sources" of evidence, heralding the approach to corroboration set out in *CLB*, can also be seen in the opinion in the Crown appeal from the Sheriff Appeal Court under s 194ZB of the Criminal Procedure (Scotland) Act 1995, *HM Advocate v Taylor* [2019] HCJAC 2, where

at para 18, referring to *Wilson v HM Advocate* 2017 JC 64, it was stated: "The crucial facts... the commission of the crime and the identity of the perpetrator, must be proved by evidence 'from at least two separate sources'. The principle of mutual corroboration is not an exception to this, but an example of it where, in the case of charges involving a course of criminal conduct, 'the testimony of one witness concerning one charge may corroborate, and be corroborated by, testimony of another witness speaking to another charge linked with it in time, character and circumstance'. There is no suggestion in that passage that the application of the principle is limited to cases where there is more than one complainer. What is required is that there be more than one source of evidence capable of providing the requisite corroboration."

In *Gal v PF Edinburgh* [2022] SAC (Crim) 1, the Sheriff Appeal Court upheld a conviction for forcing open a lockfast staffroom door and stealing a quantity of cash. It was held that it was not necessary for proof of theft for there to be evidence from two separate sources, each describing the precise nature of the missing item and its disappearance. The complainer's evidence was clear and there was sufficient supporting/confirmatory evidence to prove the crime and that it was committed by the appellant.

A note of appeal to the High Court was lodged, but leave to appeal was refused at first and second sift. At second sift, it was made clear that the nature of corroboration had been misunderstood, and that there was clear evidence from the complainer with supporting/confirmatory evidence primarily from CCTV footage that the theft of money had taken place and that the accused was the perpetrator, i.e. evidence of the crime alleged and the identity of the perpetrator.

In *CLB*, the court's starting point was Hume (ii, 383): "no one shall in any case be convicted on the testimony of a single witness". At para 191 the court states: "In any criminal *case* there requires to be more than the testimony of one witness, but there need not be two eyewitnesses speaking to the case against the accused. A sufficiency may be derived either from facts and circumstances, spoken to by another witness, which 'confirm the story' given by the one eyewitness, or alternatively from a combination of facts and circumstances alone, provided that there are at least two witnesses in the case. Two questions, which arise from these two situations, have continued to perplex judges and practitioners. They can be spelled out relatively simply. First, in a case where there is only one eyewitness, as will often be the position in sexual offences, what must the surrounding facts and circumstances, which must be spoken to by one or more witnesses (other than the complainer), actually do? Is it necessary to look at these facts and circumstances in isolation and decide whether they point towards the guilt of the accused? Alternatively, is it enough that the facts and circumstances, when taken together, support or confirm the eyewitness's testimony? Ultimately, as will be seen, it is the alternative that is correct. Secondly, in a wholly circumstantial case, it is clear that the facts, when interlinked, must point to the guilt of the accused".

From paras 194-206 and 234-236, it is clear that what is required is corroboration of the "case". There may for example be two eyewitnesses, or one eyewitness whose testimony is supported by facts and circumstances so as to prove the case as a whole, or the case may be wholly circumstantial; it is not individual facts that require to be proved by evidence from more than one source, it is proof of the crime as a whole that is important and the corroboration required is corroboration of the crime and who it was committed by.

Focusing on rape cases, and applying the reasoning and logic in *Fox*, what is required is evidence supporting or confirming the complainer's account, and there is no reason why distress should not be regarded as supporting or confirming the complainer's account, including her account of penetration without consent (*CLB*, paras 207-221 and 234-236).

Next step

Why *Cinci* met the same fate as *Smith* can easily be understood from the factual matrix of that case and the reasoning succinctly stated at para 230 of *CLB*: "In *Cinci* the evidence might reasonably be described as overwhelming... finding that a statement of a naked woman, who was 'scrunched up' in the corner of a shower in which the appellant was still present and also naked, that 'he raped me' was not evidence of the fact of rape defies common sense, as did, at that time, the idea in *Cinci* that the '*mens rea*' of the appellant was not proved. The trial judge's directions on treating the complainer's statements as an extension of the *res gestae* were correct."

It is worth noting that in *O'Shea v HM Advocate* 2015 JC 201, the court held that any witness can speak to statements forming part of the *res gestae* and it is for the factfinder to determine the parameters of the incident so far as the application of the *res gestae* is concerned. That is the point being made about the trial judge's directions. What was said should have been determined to have been part of the *res gestae*, on a proper understanding of the endpoint of the incident in *Cinci*.

For the moment, then, if my understanding of *CLB* is correct, in the search for corroboration of the case and identification of the perpetrator, available are the *res gestae*, the parameters of which are for the factfinder, we have distress itself, and we have distress not forming part of the *res gestae* but intrinsically supported by *de recenti* statements.

The next logical step, given the reasoning in *CLB*, is for the High Court to consider whether *de recenti* statements on their own without distress, not forming part of the *res gestae*, can provide corroboration of the case. There is an argument to be made, which no doubt will now be made when a suitable case arises, given what can be seen as an invitation by the court (paras 223-226).

For those who see *CLB* as revolutionary rather than evolutionary, a clear foundation exists for evolution, applying well established principles going back to the institutional writers, principles which are clear and simple and applied since *Fox* in the courts day in and day out.

Corporate

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Regulators across the globe are increasing their focus on the user experience ("UX") for websites, in particular deceptive digital design practices (sometimes called "dark patterns"), which are various means to persuade or make users take certain actions.

We have probably all had experience of not being able to carry out an action we wanted to on a website, whether rejecting cookies or cancelling a subscription. Now regulators are combining their approach, to make it easier to put an end to obstructive behaviour online.

The European Union has announced a raft of legislation. Online interfaces that deceive

or manipulate users are already banned in the Digital Services Act, and further legislation on deceptive patterns is proposed in the future AI Act and Data Act. The US has also begun to consider this issue in more detail, including the California Privacy Act which defines "dark patterns".

In the UK, the Digital Regulation Cooperation Forum (made up of the Competition & Markets Authority ("CMA"), the Information Commissioner ("ICO"), the Financial Conduct Authority and Ofcom) has been established to ensure greater cooperation on online regulatory matters.

Earlier this year the ICO and CMA issued a joint paper, "Harmful design in digital markets: How Online Choice Architecture practices can undermine consumer choice and control over personal information". Online choice architecture ("OCA") means the techniques, designs and methods as to how a website developer influences a user's decision making. The paper details how certain forms of OCA could breach the relevant laws regulated by both offices.

OCA as deceptive practice

Several different types of deceptive patterns were identified by UX expert Harry Brignull some years ago. The joint paper notes certain OCA practices of concern, but also states that they are not a comprehensive list and only intended to demonstrate how the ICO/CMA could consider the data protection, consumer and competition implications. The practices listed include "confirmshaming", "biased framing", "bundled consent", "default settings" and "harmful nudges and sludges". Although there are various classifications of the different practices, the name given tends to illustrate the type of design that is likely to constitute a deceptive practice: for example "confirmshaming" is where the user is manipulated into a choice by being pressured or shamed.

To expand on "harmful nudges and sludges", a "nudge" is where an ill-considered or inadvertent decision is made easy, and "sludge" is where unjustified friction stops a user from getting what they want, such as refusing consent to cookies, if "reject all" buttons are less accessible than "allow all" and the user ends up clicking the latter to make the pop-up go away. An example of a justified sludge would be friction or delays to confirm an important decision, such as transferring money.

The ICO considers that reg 6 of the Privacy and Electronic Communications Regulations 2003 ("PECR"), as amended, is likely to be infringed if a cookie banner that incorporates these practices is used to obtain consent for placing cookies. If there is an "accept all" button, the ICO wants equivalent ease to "reject all". The CMA has concerns that use of these nudge/sludge techniques can lead to users disclosing more personal information than they would otherwise want to, which can in turn allow a competitive advantage to larger businesses over smaller ones.

Regulatory action

At the moment, there are no laws which specifically reference deceptive digital practices. However, as detailed by the ICO and CMA, there are a variety of laws which could be breached indirectly. These include:

- ***Privacy and data protection legislation and guidance***, for example GDPR, Data Protection Act 2018, PECR. Data protection by design is supposed to be a fundamental part of compliance, along with the principle of transparency and valid consent (which "bundled consent" practices are likely to breach given the consent is unlikely to be freely given and informed). The ICO has also for years championed specific guidance and appropriate digital design methods for children (see the Children's Code).
- ***Consumer protection legislation***, for example Consumer Rights Act 2015 ("CRA"), Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 ("Cancellation Regulations"), and Consumer Protection from Unfair Trading Regulations 2008 ("CPUT"). The CRA could provide a means to find contract terms unfair or invalid, if deceptive patterns are used to manipulate consumers into the contract. The Cancellation Regulations contain a prohibition against additional payments which appear as a default option. CPUT could be breached if a deceptive practice constitutes an unfair commercial practice or is likely to distort the economic behaviour of the average consumer.

Although in the past it has appeared that the ICO has been more focused on enforcement in relation to security breaches and marketing contraventions, the joint paper indicates an increased focus on deceptive practices and an intention to work with other regulators, going forward.

The CMA has been focusing on harmful online practices; its campaign "Online Rip-Off Tip-Off" aims to allow consumers to spot and avoid misleading online sales tactics. It is also worth noting that the Digital Markets, Competition and Consumers Bill would give the CMA several new statutory powers, including levying fines of up to 10% of global turnover and conducting trials of certain remedies to determine their final format.

Scan the horizon

Certain OCA practices, despite also being deceptive patterns, will provide benefits to consumers and businesses, such as allowing for improvement to their goods/services.

However, if businesses use OCA or digital design practices which could be considered to fall into the dark pattern/deceptive practice ambit, these should be reviewed to make sure that they comply with current law. In particular, marketing and website teams should take care at the outset of any project which could be considered to be a deceptive pattern, particularly in light of the forthcoming increased statutory powers of the CMA and its intention to enforce matters in this area. J

Intellectual Property

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Netflix ("ta-dum" noise that plays at the start of the service), PlayStation ("zing" when switched on), and MGM (the roaring lion) are all companies that have a clear and distinct sound at the centre of their branding. Sounds can be a powerful marketing tool, and it is important that they can be protected for marketing purposes, but how easy is it really to benefit from protection?

A sound can be afforded trade mark protection if it meets the necessary requirements; recent case law, however, suggests that this is an uphill battle, with many sound mark applications being rejected for a lack of distinctiveness. This article considers the law in this area and some of the recent decisions.

Trademarking a sound

A sound can be protected as a trade mark if it has the characteristics of a trademarkable sign, so the sound must be distinctive in nature and be capable of distinguishing a product or brand from a competitor. The requirements for registering a trade mark have been clarified by EUIPO and the General Council (these reforms apply to the UK post-Brexit). Typically, a trade mark needs to be represented graphically in order to be registered; however this was recently disregarded in relation to "sound marks" and replaced with a test of clarity and precision. This allows applicants to upload digital sound files to the relevant register. Musical notations can also be uploaded, but applicants cannot upload both files and must choose their preferred form of representation.

A sound mark must demonstrate distinctive character, this being whether "an average consumer" will perceive the sound as a memorable one that serves to indicate that the goods or services are exclusively associated with one undertaking. Specifically, it must be non-functional in nature (i.e. not essential to the operation of the product), non-descriptive, and not deceptively misdescriptive.

Sound marks that are unlikely to be afforded trade mark protection without evidence of additional factual distinctiveness include:

- very simple pieces (consisting of one or two notes);
- sounds that are in the common domain (as seen in the "*Johnny Johnny Yes Papa*" case and examined more fully in the "*Für Elise*" case);
- sounds that are too long to be considered an indication of origin; and
- sounds typically associated to specific goods and services (e.g. doorbell).

Key connections

Two key issues which regularly cause a sound mark application to be rejected are lack of distinctiveness and the inability to indicate a commercial origin from simply hearing the sound. This is exemplified in a number of recent applications to EUIPO, including by Berliner Verkehrsbetriebe ("BVG") and Porsche.

BVG, the operator of the Berlin public transport system, wished to trademark a two second bell-like jingle with EUIPO under class 39, which covers transportation and passenger transport. The examiner rejected the application due to a lack of distinctiveness, stating that consumers, would struggle to infer the commercial origins of a simple sound mark, in comparison to words and figurative signs. Overall, the sound, according to the examiner, was too short, not sufficiently memorable, and monotonous. BVG contested EUIPO's position, stating their sound was sufficiently complex (containing multiple noises and pitches), and an artificial bell was used which was not present in any other transportation companies' jingles. Defending its reasoning, EUIPO said jingles are common in the transport sector, and the more sounds used in the relevant sector, the more an application must stand out and differentiate itself.

In a similar decision, Porsche had its sound mark application (an electronically generated accelerating engine noise) rejected on the basis it lacked distinctiveness and complexity and was too short, therefore consumers would not be able to perceive Porsche as the commercial origin. Porsche gave examples of other recognisable short sounds from 80s/90s film and television, such as the lightsabre sound from *Star Wars* which is known globally and is successfully trademarked. EUIPO explained that Porsche's sound mimics the sound of a real combustion engine and does not contain any unique or memorable elements to associate it to a specific origin or distinguish it from similar goods offered by competitors. Therefore, it lacks the ability to indicate a commercial origin. In terms of Porsche's other examples, the EUIPO explained that these sounds were recognisable in a different context and time with limited consumer choice, which is no longer relevant in today's world.

Conclusion

These judgments clearly depict the difficulties entities are having with registering sounds as trade marks. While sound marks should not be assessed more strictly than traditional trade marks, practically speaking it is harder for distinctiveness and commercial origin to be established. However, EUIPO did suggest that Porsche's sound mark could serve commercial origin in the future if consumers are informed of it through extensive market use. This seems to suggest that Porsche may simply have made the application too early, and provides a glimmer of hope for future sound mark applicants. Furthermore, with both BVG and Porsche appealing their EUIPO decisions, the door remains open for EUIPO's current approach to be re-evaluated.

The UKIPO appears to be more forgiving in its approach to sound mark application requirements, allowing the simple jingle of Hisamitsu Pharmaceutical's sound mark to be registered in 2019 – though it is worth noting that this mark is represented on the register as sheet music rather than an audio, so it may have been simpler to evidence its distinctiveness.

Agriculture

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Readers who practise agricultural law will be aware of the cycle of continuations for limited duration tenancies ("LDTs") under the Agricultural Holdings (Scotland) Act 2003, which supplants common-law tacit relocation. Less well known is the procedure for serving notice to quit during a second short continuation, which differs from that which applies at other times. This will become important in 2024.

A landlord wishing to terminate an LDT on expiry of the initial term must give two notices to the tenant: a notice of intention to terminate, not less than two years nor more than three years before the expiry date, and a notice to quit, not less than one year nor more than two years before that date, with at least 90 clear days between notices (2003 Act, s 8(3)-(5)): the "double notice procedure". (For tenants, only a notice of intention to quit is required, served not less than one year nor more than two years before expiry date.)

A tenancy not brought to an end after the initial term is continued for a first short continuation of three years. The same double-notice procedure for landlords applies during this phase. If the tenancy is not terminated, there is a second short continuation for a

further three years; after that it enters a long continuation of a further 10 years. The cycle then repeats.

Second continuation terminations

Introduced by the 2003 Act, LDTs originally had to be for a minimum of 15 years, so the first to be granted, if not terminated, will have entered their second short continuation in November 2021, and could enter a long continuation in November 2024 which would run (unless terminated by agreement) until November 2034. Few practitioners will yet have needed to serve a notice to quit during a second short continuation, but this may become more common during 2024 as landlords may not wish a further 10-year extension.

The procedure is set out in s 8(8)-(10) of the Act. The key difference is that a notice of intention to terminate *is not required*. A landlord only has to serve a notice to quit, at any time during the continuation, presumably since the consequence of missing the deadline again is a 10-year extension. However, there is a catch, and with it comes an awkward pitfall.

In order to ensure tenants still have at least two years' notice, s 8(10) provides two methods of calculating the "relevant day" on which the tenant is to quit the land. If notice is given during the first year of the continuation, it is the day on which the continuation expires; if after the first year, it is the date two years after the notice is given. The second short continuation is then extended and deemed to expire on that date, which could be any day of the year.

An example

A worked example may be helpful. Say an LDT was granted for 15 years from 28 November 2005, and is still in force. The second short continuation will have begun on 28 November 2023 and will expire on 27 November 2026. You receive instructions from the landlord in October 2024 to terminate the tenancy. You can do this by sending a notice to the tenant stating "you are to quit the land on 27 November 2026", provided it arrives by 27 November 2024.

Here comes the pitfall. Say you receive instructions in December 2024. What date should you put on the notice? Not 27 November 2026 – you are too late. By s 8(10)(b), the relevant day is "the day on which the period of two years from the giving of the notice expires". A notice is generally considered "given" when the addressee receives it. But how can you know, when preparing your notice, the date when it will arrive?

In our first example, if the landlord's agent accidentally wrote "you are to quit the land on 26 November 2026" instead of 27 November, the notice would be invalid – potentially an expensive mistake for the agent. But when the date to be stated depends on correctly

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Online safety super-complaints

The Department for Science, Innovation & Technology is consulting on "eligible entity criteria" and procedure for the Online Safety Act 2023's super-complaints function. See gov.uk/government/consultations/super-complaints-eligible-entity-criteria-and-procedural-requirements
Respond by 11 January.

Social security powers

Holyrood's Social Justice & Social Security Committee calls for views on the Social Security (Scotland) (Amendment) Bill, which would create a framework to introduce new benefits for children and care experienced people among other amendments. See parliament.scot/about/news/news-listing/views-sought-on-proposed-changes-to-the-scottish-governments-social-security-powers
Respond by 12 January.

Building standards

The Scottish Government is consulting on proposed changes to building standards recommended by the working group following the fire at Grenfell Tower. See consult.gov.scot/local-government-and-housing/building-standards-enforcement-and-sanctions/
Respond by 15 January.

Strikes

The UK Government seeks views on facilitating employers' use of agency workers during strikes. See gov.uk/government/consultations/hiring-agency-staff-to-cover-industrial-action
Respond by 16 January.

Utilities regulation

The Department of Business & Trade seeks views on specific proposals to improve the economic regulation of the water, energy and fixed telecoms sectors by Ofwat, Ofgem and Ofcom. See gov.uk/government/consultations/smarter-regulation-strengthening-the-economic-regulation-of-the-energy-water-and-telecoms-sectors
Respond by 17 January.

Debt mental health moratorium

The Scottish Government is consulting on the mental health moratorium which may be introduced in the Bankruptcy and Diligence (Scotland) Bill. See consult.gov.scot/accountant-in-bankruptcy/mental-health-moratorium-consultation/
Respond by 22 January.

Climate change agreements

The Department for Energy Security & Net Zero seeks views on proposals for a new six-year Climate Change Agreements scheme to begin in 2025. See gov.uk/government/consultations/climate-change-agreements-consultation-on-a-new-scheme
Respond by 14 February.

COVID criminal procedures

The Scottish Government proposes the retention of some criminal justice measures introduced during the pandemic, including electronic signing and sending of documents, virtual attendance at court, national jurisdiction for callings from custody, and a £500 maximum level of fiscal fine. See consult.gov.scot/justice/covidpermanency/
Respond by 29 January.

Water industry regulation

The Scottish Government seeks views on principles and considerations on policy for the water industry in response to the climate emergency. See consult.gov.scot/energy-and-climate-change-directorate/water-wastewater-and-drainage-policy-consultation/
Respond by 21 February.

Democracy

The Scottish Government has instigated "Democracy Matters conversations" as part of its wider Local Governance Review, with the aim of increasing local community engagement. See consult.gov.scot/local-government-and-communities/democracy-matters/
Respond by 28 February.

predicting when the notice will arrive, how do you avoid that mistake?

One might be tempted to allow slightly more time than necessary, since doing so does not prejudice the tenant. But this is at odds with the accepted view that a notice to quit must match exactly the legally correct expiry date.

Can you say "you are to quit the land on the day falling two years after your receipt of this notice"? Perhaps, but that would be a novel concept, and it would be a brave solicitor who tries it before there is a precedent. To play it safe, you need to ensure that the date the notice is (or is deemed to be) given is certain when you send the notice.

Methods of service

The Interpretation and Legislative Reform (Scotland) Act 2010, s 26 says, in brief, that you can serve a notice: (a) by personal delivery (not always practical); (b) by registered post; or (c) by email, if the recipient has agreed in writing and provided an address. With (b) and (c) the notice is taken to have been received 48 hours after it is sent, *unless the contrary is shown*.

This still leaves the possibility that the notice arrives on a different day, and the recipient is able to prove that. The solution I have adopted was to send the notice by 0900 guaranteed delivery, for maximum certainty as to the date of arrival. The relevant day was therefore two years and one day after the date of posting. On this approach it is necessary to prove that the notice did in fact arrive the next day, to overturn the 2010 Act presumption.

You could also give notice by email, as long as you have a way of overturning the 48-hour presumption. Perhaps your firm's IT department can help. Readers may come up with other solutions and I will be interested to hear them.

With the first LDTs granted, to avoid a long continuation, a notice to quit must be served by 27 November 2024. If that were done on the last day possible, the LDT would end on 27 November 2026; failure would mean an extension to 27 November 2034. It is likely that many solicitors acting for landlords will receive last-minute instructions of this nature, and need to work out how to do it correctly. (For tenants, the procedure is the same as at other times.)

One suspects that the drafters created this catch-22 by accident rather than design. Nonetheless, practitioners should beware, especially as the first major batch of long continuations approaches.

Succession

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It had long been thought that an attorney appointed under the Adults with Incapacity (Scotland) Act 2000 could not act or seek appointment as an executor on behalf of the adult they represented. However, this belief was largely based on the fact that *Currie on Confirmation of Executors* emphatically states that it is not possible. The decision of Sheriff Philip Mann in *Gordon, Petitioner* [2023] SC ABE 26 suggests that it might be.

Thomas Rae died testate but the executors appointed in his will had both predeceased him. The residue of his estate was left to his wife, Eleanor Rae, who would, had she had capacity, have been entitled to seek appointment as executor nominate according to s 3 of the Executors (Scotland) Act 1900. Mrs Rae did not have the requisite capacity to seek appointment herself, so it became necessary to consider who might be appointed and on what basis.

Mrs Rae had granted a power of attorney in favour of Susan Gordon, who decided to seek appointment as executor dative *qua* attorney. She had originally sought appointment *qua* representative, but the sheriff considered that appointment *qua* attorney was the more appropriate approach.

The sheriff, anticipating that the Public Guardian and the Lord Advocate might wish to make representations for their respective interests, granted warrant to have the petition intimated to them; neither entered proceedings. The petition was not opposed so there was no hearing.

Public interest

Faced with what was said in *Currie*, the sheriff noted that appointment in the capacity sought by Mrs Gordon was not thought to be possible. While *Currie* quotes unreported authority to the effect that someone cannot seek appointment *qua* attorney on behalf of an ill but otherwise capax person, there is no authority cited for the proposition that it is impossible to seek appointment in that capacity for someone who is incapax. Reference is made in the paragraph dealing with incapacity to the earlier paragraph citing the unreported authority, but it is not clear that that is because both propositions depend on the same authority. That, however, is the view that the sheriff took.

Sheriff Mann also noted that it was possible for a guardian appointed under the 2000 Act to seek appointment as executor dative *qua* guardian, and pointed out that guardians and attorneys are both supervised by the Public Guardian and by the court (though in the case of attorneys, that supervision is much less active in nature). That a guardian might be so appointed was not new law, because it had long been recognised that a curator *bonis* could seek appointment though, again, that relied on various unreported sheriff court decisions. Noting that it was in the public interest that people's estates should be administered efficiently, the sheriff's view was that requiring the appointment of a guardian to act as executor dative where an attorney was already appointed was not in the public interest.

Having come to the view that it was possible or, at least, not precluded as *Currie* might suggest, the sheriff granted the petition and appointed Mrs Gordon as executor dative *qua* attorney.

Briefings

Attorney's powers

That a sheriff has now held that such an appointment is competent begs the question whether a particular attorney is empowered to seek appointment and then to act if appointed. The sheriff relied on another passage in *Currie* to the effect that if a person is empowered to raise judicial proceedings – a power that is found in most powers of attorney and which is worded in a fairly standard way – that power will be sufficient to allow the attorney to raise the necessary petition. *Currie* notes that it would be preferable that the power included a reference to commissary business, but that the more general power would suffice.

The question of whether an attorney has the powers required to act once appointed was not addressed by the sheriff. It might depend on whether it is correct to take the view that a power of attorney is strictly construed and so an attorney may only do what they are expressly empowered to do, or whether one can rely on the general power that almost all powers of attorney contain allowing the attorney to do anything the adult might themselves have done. There might be some support for the latter view in Lord Sandison's judgment in *Johnstone v Johnstone* [2023] CSOH 30, discussed in the briefing at Journal, June 2023, 31; however practitioners may decide to update their styles to include explicit powers allowing an attorney to act as an executor should the need arise and should the decision made here prove to be enduring.

Sport

BRUCE CALDOW, PARTNER, HARPER MACLEOD LLP

Participation in sport carries inherent risk consented to by the participant and from which no liability can arise (per the principle *volenti non fit injuria*). Sport must otherwise be as safe as it reasonably can be, to be welcoming, safe and inclusive. While participants can self-regulate the safety and fairness of any given contest, the surrounding environment relies on governing bodies, associations and clubs creating and implementing the correct framework and protections. This article offers a summary of key thoughts on important developments to keep sport safe.

Safeguarding sets the standard

Obtaining disclosure checks and adhering to the PVG scheme and Protection of Vulnerable Groups (Scotland) Act 2007 is embedded across Scottish sport. The Disclosure (Scotland) Act 2020 will take effect by April 2025 and enhance protections within sport, with a mandatory PVG system and more ways in which participation can be restricted if a person is under consideration for listing. These changes will need to be understood, planned and embedded within the regulatory framework.

Recent studies and reports (including the Whyte review and the Sheldon report) illustrate that demonstrable institutional commitment across all levels of sports organisations is essential to creating the correct culture. If safeguarding is properly embedded, further evolution of important issues such as transgender participation, and more significantly, appropriate equality measures addressing both sexism and racism, will be readily addressed.

Regularly reviewing rules; appropriate training and communication; and mechanisms in place to react to concerns, should allegations occur, are all key to maintaining a safe sporting environment. Transparent publication of disciplinary decisions is an evolving area with multiple issues to consider, while sharing details with third party sports, clubs and agencies should preferably have a basis in the sport's rules, with continued regard to confidentiality, victim interest and the terms of the Data Protection Act 2018.

Managing complaints

Third party involvement in private sports matters is growing, whether through investigators, supporting processes, or decision making. The rules within the sport must permit this, otherwise good work can become undone if challenged. Advisory bodies to assist with safeguarding, or behavioural assessments, or in resolving disputes, must also be provided for, otherwise wide ranging complaints could arise from a breach of data protection requirements, confidentiality concerns, and reduction of any decisions on a challenge for non-compliance with the agreed framework. Rules should be reviewed and adjusted to empower these steps, where necessary.

The manner by which a governing body, association and/or club communicates and engages when difficulties arise is as important to risk as it is to culture, as the body must display leadership and stewardship of the sport. Preparing and adopting a crisis management policy is key.

Online abuse

Online safety is beyond the absolute control of sport, but ensuring that the sport's conduct rules can be used to address allegations of misbehaviour by participants within the sport, is important. Often rules are outdated. Accusations of wrongdoing by participants should be addressed to correct, discipline and deter. Protective measures can include signposting to support, and referring matters to the authorities. World Rugby, in the aftermath of the men's

Rugby World Cup 2023, provided a dossier of information to the police, illustrating extensive online abuse of match officials, seeking further action against deplorable conduct which included death threats. In doing so, World Rugby has not only taken steps to fulfil its duty of care to those it employs, but has publicly sought to deter such behaviour.

When the Online Safety Act ("OSA") takes effect (after Ofcom has finalised and published various codes of practice, and secondary legislation is enacted), there will be more opportunity for sport to press to protect participants, who are often exposed to online abuse, impacting wellbeing. The OSA requires platforms to take various steps to address illegal and priority illegal online content, which can include inciting racial hatred and harassment – extending to behaviour likely to cause alarm and distress.

The OSA creates new offences for abuse that is false and/or threatening, thus becoming an enforcement mechanism to regulate platforms if they fail to respond, where abuse occurs. The most serious behaviour should always be reported to the authorities timeously. The Protection of Harassment Act 1997 will continue to be available, as will any civil court remedies against unwanted conduct. Particular emphasis will fall on platform providers to protect against behaviour that is abusive and targets protected

characteristics under the Equality Act 2010 (e.g. race, religion, sex, transgender, etc). Such abuse is very common – almost one third of all abuse reported to the Professional Footballers Association in a study, involved race.

Hopefully, the OSA will help correct the difficulty experienced by many at present, of platform providers being less than accessible and responsive to issues of concern raised, by obliging providers to have clear and accessible ways to report problems online and to then deal with said complaints. Governing bodies should inform themselves and help educate their sports as to what steps can be taken, should online abuse occur. A clear policy and process to respond will be helpful. That policy should be wide ranging and signpost all steps that can reasonably be taken, including counselling and therapy sources.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Gerard John Robert McMahon

A complaint was made by the Council of the Law Society of Scotland against Gerard John Robert McMahon, solicitor, Bothwell. The Tribunal found the respondent guilty of professional misconduct in respect that (a) on or around 30 April 2020 he, on behalf of the pursuer, signed and served a statutory demand for payment on Albarr Facility Management Solutions (*sic*) for £10,572.57, on which he designed himself as "solicitor" despite not having in force a practising certificate, thereby holding himself out to the recipient of the statutory demand to have a status as a practising solicitor which he did not at that time possess; (b) on 21 May 2020 and on subsequent dates, he purported to hold the qualifications or status "LLB. Dip LP, NP" as appended to a letter to the defender and emails to the court, despite not having in force at that time a practising certificate and consequently not holding the status of notary public, per the operation of s 58(5) of the Solicitors (Scotland) Act 1980; (c) on or around 8 June 2020, he prepared, signed and presented to the court electronically an initial writ within which he designed himself as a solicitor, craving the liquidation of the defender company, despite not having in force at that time a practising certificate; (d) he having improperly obtained the court's authority by knowingly or recklessly presenting misleading documents to it seeking warrant, served and advertised notice of the pursuer's petition in the *Edinburgh Gazette* and *Metro* newspaper; and (e) on or around 16 June 2020, he requested that the sheriff clerk appoint an interim liquidator to the defender company in reliance knowingly or recklessly on the defective and misleading documentation previously submitted to the court, and on which the court had granted warrant to serve the petition on the defender company.

The Tribunal ordered that the name of respondent be struck off the roll of solicitors in Scotland.

It is essential that solicitors act honestly and with integrity. The respondent's conduct in holding himself out to be a solicitor to his client and the court (his name remained on the roll but he last held a practising certificate in 1998), was dishonest. Seeking the interim appointment of a liquidator could have had serious consequences for the defender company. The court system could only work if the trust placed in representatives was well placed. As was noted by the sheriff, the court and parties to a litigation are entitled to expect that a representative lodging a writ is qualified to do so. Solicitors with practising certificates are part of a regulated profession. They have to undertake continuing professional development. They pay professional dues and they must be insured. When things go wrong, the regulatory bodies and insurers provide a route for the aggrieved. Standards are maintained and the public is protected. The public interest and the reputation of the profession are harmed if unqualified persons carry out work reserved to solicitors with practising certificates. The respondent's conduct had resulted in public criticism of him as a solicitor. His actions were a serious and reprehensible departure from the standards of competent and reputable solicitors. When considering protection of the public and upholding the reputation of the profession, no sanction other than strike off was appropriate in the circumstances of this case.

Thomas C Steel

A complaint was made by the Council of the Law Society of Scotland against Thomas C Steel, Brunton Miller, Glasgow. The Tribunal found the respondent guilty of professional misconduct in respect that he failed or at least delayed unduly since the death of AM in 2011 in progressing the winding up of the executry, in particular with regard to the marketing and sale of the property at Nithsdale Road, Glasgow, owned by the deceased.

The Tribunal censured the respondent and directed in terms of s 53(5) of the Solicitors (Scotland) Act 1980 that for an aggregate period of three years, any practising certificate held or issued to him shall be subject to such restriction as will limit him to acting as a qualified assistant to such employer or successive employers as may be approved by the Council.

The respondent admitted that he unduly delayed in winding up an estate for over nine years. There were some challenges such as an action for specific implement of missives in relation to another property the deceased had been planning to buy, and failure by one beneficiary, LH (the deceased's partner), to engage with the respondent over the sale of Nithsdale Road. However, these were not insurmountable, and they did not excuse or explain the inordinate amount of time it had taken to wind up the executry. The respondent's actions caused bank fees and penalties to be charged to the estate. The delay in selling the properties meant that repairs were necessary. The respondent ought to have discharged his functions as executor much more quickly. He should have been much more vigilant and followed up his correspondence to LH with action. He did not take control of the situation, even when it became clear that there might be a petition to sequestrate the estate. The Nithsdale Road property ought to have been marketed for sale at a much earlier stage. It was of great concern to the Tribunal that the respondent agreed, following SLCC mediation in December 2018, to market the property in January 2019, but that this was not done by the agreed deadline and was still outstanding in 2021. The respondent delayed in answering the secondary complainer's correspondence. This kind of conduct brings the profession into disrepute, not just with the individual beneficiaries in this case, but also the wider public.

The real deal

Our latest in-house interviewee wanted from an early stage to be actively involved in steering businesses, and is now as at home on the financial and operations side as on the legal

In-house

DEBBIE HARDING, CHIEF PEOPLE AND CORPORATE OFFICER, DOBBIES

Tell us about your career path to date. What prompted you to work in-house?

I trained in a progressive private practice firm and spent a lot of time working directly with businesses – I quickly realised that I didn't want to be an adviser on the sidelines but to be actively involved in driving businesses forward.

I then joined Scotia Gas Networks and SSE, where I had a great grounding in several business areas, before moving to an independent energy supplier and then across to retail in 2018.

What were your main drivers for working for Dobbies?

Behind a traditional, well known brand in Scotland sits a fast paced, multi-faceted UK retail business with huge growth opportunity and ambition. The business spans retail, services and restaurants and when I joined had huge growth plans which were attractive to me. At that point there were 37 stores and there are now 77. I felt it was a unique opportunity in Scotland for me to join the company and support the business's growth. Also – I love scones!

As Chief People and Corporate Officer, what are your main responsibilities?

I'm a board director, leading all of our central support teams across the UK (People, Legal, Procurement, ESG, Health & Safety, Technical, operational compliance teams and information security teams). We're tasked with ensuring the business runs safely and efficiently, and identifies opportunities to scale.

I've also acted as interim CFO of the business twice. Although perhaps an unusual role for a lawyer to step into, because I have a good understanding of all aspects of the business and had worked very closely with the previous CFOs it felt like a natural step. It also taught me a lot about how to run a team effectively without necessarily getting involved in the minutiae, and by trusting my colleagues.

Separately, in a departure from a core legal role, I'm on the Scottish Government's Retail Industry Leadership Group and have also recently been appointed as the chair of the Scottish Retail Consortium, having been on the board of the SRC for three years, promoting the story of retail, shaping debates and influencing the issues that matter to everyone in the industry.

Why would you encourage young lawyers to consider a career in-house?

It's a great opportunity to take the skillsets and discipline from private practice into an environment where you are challenged to think differently every day – and to make a difference to how your business runs and prospers. There is also huge opportunity to move into wider roles, which you are less likely to do in private practice as it is not generally set up that way by design.

What advice would you give lawyers who want to start a career in-house? What makes a good in-house lawyer?

Be prepared to get comfortable working with a degree of flexibility – no two situations are the same and a textbook answer is of no use to any business. Often common sense provides the answer. Always think about opportunities as well as risks, which can be very rewarding. Learn the financials and operations of your business end to end. A good in-house lawyer doesn't think "as a lawyer" but as a business partner who thinks business first and uses their legal toolkit to support whatever needs done.

How does the future look for in-house lawyers? What are the key challenges and opportunities?

There are lots of opportunities to do interesting work with tangible outcomes in a variety of sectors, whether that is working for a local authority and assisting with children in care, or licensing applications, or working on end-to-end projects for a business. The value of in-house lawyers is becoming better understood, with 30% of Scottish lawyers now working in-house. I think there needs to be continued focus on illustrating the opportunities an in-house role can give – varying from a support function to becoming a business leader in a non-legal role.

Are there any pieces of legal work over your career that you are particularly proud of?

There are two in particular, before my time at Dobbies, which both involved tangible outcomes for people which was extremely rewarding for me. One was seeing a previous business safely through a difficult period which involved the business being bought out of administration by new owners, and as a result we managed to safeguard a lot of jobs. The other was completion of a new subsea electricity cable between a rural community in Scotland and the mainland. I worked with great teams in SSE and Norway, and together we delivered a secure energy supply for thousands of people. A section of that cable can now also be found at SSE's visitor centre in Pitlochry.

How have you approached growing your legal teams throughout your career? Have you faced any particular hurdles with securing the go-ahead from your senior management?

I've been the first in-house lawyer for several businesses. The first thing is to build relationships and trust, and demonstrate the

"There were 37 stores and there are now 77. I felt it was a unique opportunity in Scotland for me to join the company and support the business's growth. Also – I love scones!"

value you bring to the business. That takes time. Build a pipeline of work and make yourself indispensable. Partner with key roles across the business, picking up whatever needs to be done ("legal" or otherwise). Then show how developing your team will safeguard and support delivery of the business's priorities, and the business case is easily justified (the savings on external legal spend always help!). I've always had the support of CEOs and CFOs on this basis. Sometimes the harder challenge lies in finding candidates with the right mindset who are happy to embrace the ups and downs of a business.

What does success look like for your team and how do you measure this?

Success means three things for my team:

(1) working across multiple teams to deliver business objectives, providing a rounded support to the business on whatever matters are at hand;

(2) thinking and planning forward in relation to upcoming risks and opportunities; and

(3) looking for opportunities to improve or simplify things within the business.

We measure this in both big and small ways – a thank you from another team, up to delivery of major projects, always taking on learning points along the way.

What do you love about your role, and what do you love doing when the working day is done?

I love being at the heart of the business – no two days are the same. In any one day, it is possible to hop between strategy, investor relations, menu tasting, store visits and spending time with my team on day-to-day priorities. At the end of the day, I love to be outside, so you are likely to find me running, or playing with the kids. I'm also a gardener in training...

How have attitudes and working practices in the legal profession changed since you started out?

Accessibility to the profession and flexibility within has improved, together with better recognition of the diversity of in-house roles. I think that in-house is now recognised as a career path in itself, but also that it presents the opportunity to diversify into wider business roles, using a legal background as a strong foundation. I have also found that private practice firms now make a real effort to understand their clients and work proactively with other professional advisers, which is really helpful for complex transactions. I've found that even the forced move to Zoom/Teams calls has helped to facilitate more collaboration between private practice firms and other advisers.

Do you think there is scope for in-house lawyers to make a sideways move, away from a purely legal role? What skills do you think lawyers can bring to roles that are not purely legal?

Absolutely – and to move forward using transferable skills. A legal training teaches you to be an objective, critical thinker together with the ability to balance differing views. Attention to detail is always important, as long as you ensure this doesn't detract from the bigger picture. The core skills you learn as an in-house lawyer allow you to build skills for a lifetime, whether that is in a non-legal, business facing role or as a non-executive director. My role is a good example of that, and there are so many others.

How can solicitors build good mental health, increase resilience and manage stress successfully?

Lawyers are in a fairly unique position in the business – you have a profile and engagement at all levels. This should allow you to show leadership by setting the right example. Manage your workload, prioritise and delegate effectively, and trust others to take ownership. To manage stress and increase resilience, you need to have an outlet and someone to speak to. For me, running before work sets me up for the day, and a walk or cycle with my kids in the evening helps me unwind. Always remember to take things one day at a time.

And finally:

Best advice you've ever been given? Money spent travelling is never money wasted. Absolutely true; you should take every opportunity to see the world and experience different cultures.

Top 3 dinner party guests? Michelle Obama; Sir David Attenborough; Neil Armstrong.

If you had a superpower, what would it be? Truth detector – in a world where fake news is becoming so prevalent, always able to see through stories, fibs and misconceptions to know what is actually based in fact!

Questions put by Jennifer Malcolm, head of Legal, Offshore Wind at BayWa r.e

Pat Thom in line for top office

Court lawyer Pat Thom is the sole nominee for Vice President of the Law Society of Scotland in 2024-25 and President in 2025-26.

A Council member since 2015, representing solicitors in Haddington, Peebles, Jedburgh, Duns and Selkirk sheriff court districts, her career has spanned criminal and civil legal work in both Canada and Scotland and she has worked in-house and in private practice. She is currently convener of the Civil Legal Aid, and Children & Family Law Committees, also sits on the Civil Justice Committee and is a former member of the Admissions Committee.

Congratulating her, current President Sheila Webster said: "Pat is a hugely experienced solicitor and has a deep understanding of the issues facing the legal profession and the needs of people who rely on the advice and services provided by solicitors.

"Pat has played a central role in our legal aid work in recent years, articulating just how necessary Legal Aid is to access to justice and highlighting how fragile the current system is. As a longstanding Council member, in addition to her committee roles, she has had an instrumental role in shaping the work of the Society and how we move forwards as an organisation."

Current Vice President Susan Murray will become President in May 2024.


Pat Thom


Susan Murray

32 challenges in Society's 2023-24 plan

Supporting the legal profession and protecting the public interest lie at the heart of the Law Society of Scotland's annual plan for 2023-24.

The plan outlines 32 key projects which align with the Society's overarching strategic goals set out in its five-year strategy 2022-27.

Projects for 2023-24 include:

- promoting and protecting the public interest and ensuring public trust in our regulation;
- licensing of new legal services providers with alternative business structures;
- leading the conversation on legaltech in Scotland through the new LawscotTech Advisory board and its revised strategy;
- reducing the stigma around mental health throughout the profession, and provision of new resources for member firms and organisations to enable them to support their staff employee wellbeing;
- working with the profession on climate change related issues through the Lawscot Sustainability initiative;
- promoting the benefits of increased diversity throughout the profession.


Diane McGiffen

Chief executive Diane McGiffen commented: "The 32 projects we have set out in this year's annual plan aim to support our members to thrive, ensure we are a strong regulator and to use our voice on behalf of our members and wider society when speaking out on human rights and the rule of law, and in supporting access to justice."

She added: "The successful delivery of each of these projects relies on all my colleagues at the Law Society and the hundreds of volunteer solicitors and non-solicitors, who give their time and expertise as Council and committee members. I want to thank them for the huge contribution that they make to the Society and the work we do, and I look forward to discussions with our members and others as we make progress on our annual plan projects."

MSPs criticise bill's delegated powers

Delegated powers in the Regulation of Legal Services (Scotland) Bill should be curtailed or amended, Holyrood's Delegated Powers & Law Reform Committee has reported.

The MSPs believe the proposed powers to modify the regulatory objectives and professional principles (which present constitutional issues), and to move a regulator to a different category (of questionable necessity), should not be delegated, even under the affirmative procedure. They are also "not content" with proposed ministerial powers in the event of a regulator's performance being considered inadequate, having insufficient information on how proposed safeguards would operate, and sharing the Lord President's view that much more information is needed about how the proposals are intended to operate.

In response the Society stated: "The fact that this cross-party committee of MSPs has come out so strongly against many of these proposed powers shows why the legislation needs to change before Parliament gives its final approval."

Trainee numbers stay close to record

Trainee recruitment has remained strong for a third consecutive year, with another 765 traineeships commencing in the practice year ending 31 October 2023, the Society has revealed.

The total registered fell just short of the record of 788 set last year, but beat the 744 in 2020-21. Only in these years has the number of new traineeships exceeded 700 in a single practice year.

President Sheila Webster commented: "This unprecedented level of trainee recruitment shows that Scotland's legal profession is in good health, and also indicates that law firms and other legal employers are feeling confident in the need for a growing pool of skilled people for the future.

"The legal sector's resilience in bouncing back from subdued trainee numbers in the first year of the Covid-19 pandemic has exceeded even the most optimistic expectations. On that basis it's very hard to predict what will happen from here, though the sector remains well placed to thrive and succeed."

SLCC reminder: change your terms!

The Scottish Legal Complaints Commission is reminding solicitors that their terms of business must be updated to show its new address: Capital Building, 12-13 St Andrew Square, Edinburgh EH2 2AF.

PUBLIC POLICY HIGHLIGHTS

UNCRC Bill

The Society responded to the amendments introduced by the Scottish Government at reconsideration stage for the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, and was then asked to give evidence to the Scottish Parliament Equalities, Human Rights & Civil Justice Committee.

After the Parliament passed the bill in March 2021, it was referred under s 33 of the Scotland Act to the Supreme Court, which ruled that some elements were not within the Parliament's powers. This is the first time a bill has gone to reconsideration stage. A motion to reconsider the bill must be agreed to by the Parliament. Standing orders do not set out a formal role for committees to conduct scrutiny; in this case, the committee asked for written evidence followed by an invitation to stakeholders to give evidence in person.

The Society is pleased to see UNCRC incorporation being reconsidered, and remains supportive of the bill's intentions. It highlighted the importance of duty bearers having the necessary resources and capacity to comply meaningfully, balancing this with the importance of furthering rights in Scotland for children and young people.

The response discussed complexities and the need to take into account children's rights under the new Act, relevant provisions in Acts of the Scottish Parliament, and compatibility and relevant provisions in Acts of the UK Parliament, their impact and effect. It said that the Scottish Government could provide detailed guidance, taking into account each article of the UNCRC and identifying the relevant Scottish and UK legislation. The Society favours post-legislative scrutiny, and discussed lessons to be learned from the UNCRC Bill process, ahead of any Scottish Human Rights Bill.

Once a bill has been approved on reconsideration, it is subject to a four week period during which there can be a legal challenge under s 33 or s 35 of the Scotland Act, failing which it may be submitted for Royal Assent by the Presiding Officer.

Find out more at the Society's page on the bill

Investigatory powers

The Society issued a briefing on the Investigatory Powers (Amendment) Bill ahead of its second reading in the House of Lords.

The bill seeks to update parts of the Investigatory Powers Act 2016 ("IPA") to ensure the UK's investigatory powers structure can adapt to evolving circumstances and threats, and that the IPA is effective for intelligence services, law enforcement and other public authorities.

Welcoming the bill, the Society noted that it seeks to amend s 23(3) of the Freedom of Information Act 2000 regarding bodies dealing with security matters, and commented that the proposed amendments should be consistent with freedom of information legislation in the UK, and the bill should include the implications of any proposed amendments to the Freedom of Information (Scotland) Act 2002.

It also commented on investigatory powers legislation in the UK, as the bill seeks to amend ss 1 and 2 of IPA and s 65 of the Regulation of Investigatory Powers Act 2000. However the bill does not include the Regulation of Investigatory Powers (Scotland) Act 2000, and the Society believes the proposed amendments should be consistent with the regulation of investigatory powers legislation in the UK.

Find out more at the Society's page on the bill

Funeral director licensing

The Society's Consumer Law and Licensing Law Subcommittees responded to the Scottish Government consultation *Funeral director licensing scheme for Scotland*, which sought views on a licensing scheme for funeral directors.

The Burial and Cremation (Scotland) Act 2016 gives Scottish ministers the power to establish an inspection regime for burial authorities, cremation authorities and funeral directors, and to set up a licensing scheme for funeral director businesses. A key aspect is the development of regulations and codes of practice in ensuring minimum standards of care of the deceased.

Ministers propose to bring into force part 5 of the Act, to introduce a licensing scheme which will apply to anyone who carries on business as a funeral director in Scotland. The Society supports the proposal to publish and maintain a directory of licensed funeral directors, and agreed that ministers should be designated as the licensing authority.

Rather than the proposed three-year duration of a licence, the Society suggested that due to the sensitive nature of business practices, licences should be granted for one year to ensure funeral directors maintain practice standards and continually review their processes. The Society also commented on the proposed approach to licence suspensions and revocations; it did not consider that granting a licence to a business title as opposed to a named individual would be advisable, as any disbarred individual could simply acquire the licensed business.

Find out more at the Society's consumer law page

Find out more about the Society's work in its research and policy section

ACCREDITED SPECIALISTS

Agricultural law

Re-accredited: EMMA ROBERTSON, Shepherd and Wedderburn (accredited 14 November 2018).

Child law

Re-accredited: NADINE MARTIN, Gibson Kerr (accredited 31 October 2018).

Construction law

Re-accredited: NEIL KELLY, Morton Fraser MacRoberts (accredited 27 October 2003).

Employment law

LAURA MACDONALD, Jackson Boyd (accredited 31 October 2023).

Re-accredited: DAVID MORGAN, Burness Paull (accredited 23 October 2008); ANDREW GIBSON, Morton Fraser MacRoberts (accredited 15 November 2018).

Family law

Re-accredited: KIRSTEN KNIGHT, Balfour+Manson (accredited 3 July 2018); LUCY METCALF, Thorntons Law (accredited 16 November 2018); DEBORAH REEKIE, Brodies (accredited 16 November 2018); CAROLINE MILLAR, SKO Family Law Specialists (accredited 29 November 2018).

Family mediation

MELISSA INMAN, Drummond Miller (accredited 2 November 2023).

Personal injury law

Re-accredited: HEATHER TIERNEY, Watermans Solicitors (accredited 1 November 2018).

Planning law

JACQUELINE COOK, Davidson Chalmers Stewart (accredited 17 November 2023).

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THE ETERNAL OPTIMIST

We are all going to die...

Nothing quite so morbid, but Stephen Vallance believes there are ways to encourage a more positive outlook if we fear making an exit from something in our life

The end of the year is approaching, I've noted an uptick in colleagues at various firms executing on their exit plans, and even here at the Journal, Peter Nicholson's long and illustrious career finishes this month. There is, for me, a sense of endings in the air at the moment and with it perhaps a little bout of melancholy. Are endings, though, such a bad thing, and why do we at times shy away from them?

As a case in point, I had decided to step down from a charity position at the end of this year. At a recent meeting I and my co-chair were asked to whom future emails should be sent, and I felt a slight sense of dread when I said "the co-chair, not me". I am though delighted to be stepping away from the role, having served my time, progressed the organisation and hopefully added some value. I have a multitude of other things to be getting on with. Why, then, my feeling of dread in relation to this ending, and so many other business, personal and other areas in life when they draw to a close?

Endings are an inevitable part of life. We know both on a personal and professional level that they are unavoidable and will be forced on us either by nature or the decisions of others. For some reason, though, that is still something that doesn't register fully, and we often delay, avoid or simply shy away from making decisions around them. We do know that if we don't make decisions eventually, they will be made for us by circumstances, others or both. At times we seem almost happier to cede that power rather than exercise it. Why, and is there anything we could do to be more in control of this inevitability? Within the confines of this article, I'll give a few suggestions and perhaps some things to ponder during the dark months ahead.

Two threads

Trust and control, I suspect, are two threads intertwined with many of the issues around endings. Trust that others will be able to look after things when we are gone, and control in that we will still believe we are the only ones able to direct matters in the ways we know are best.

So much of both of these, though, remains down to us and the actions that we take leading up to the end. Have we trained those remaining properly, and have we given them real opportunities to grow, and to make and to learn from their mistakes in the way that we did through our careers? If so, we should be comfortable that they can deal with what lies ahead. If not, the fault surely lies with us and the only question remaining is whether it is now too late to do so. Similarly on control, do we expect to be able to influence the actions of others eternally, or how can we equip them to make great decisions when we are no longer around? Finally, are we even best placed any more to deal with these things? On matters of technology, for example, with my mother we are considering replacing her iPhone with an abacus, and I fear that some days I am heading in that direction. The truth of all of these is as relevant to our children and partners as it is to our firms.

Have we done all that we need to do? I like to

do things to excess and, in some ways, it makes stopping them easier. I got tired, bored or sick of things and was then able to put them aside knowing that I had had more than enough (or at least for that period of my life). If that applies to you and you can't deal with the ending, then the question would be, what remains for you and what is stopping you doing it?

There is the converse position that everything in moderation might be better. Can you arrange your work or life so that you don't burn out? Can you enjoy doing whatever it is you do for longer with appropriate support?

Jump before you're pushed

Fear is the root of so many things. Fear is of course irrational and often can revolve around loss. Loss of control, loss of income, loss of status etc, can all be very much tied in with our occupations. I'm very much a numbers person. I'm embarrassed to admit I have a spreadsheet and I can tell you how long I can afford to live for after I retire. What, though, if inflation stays at 6% rather than 4%, or my investments fail to perform as anticipated? That is (by my own admission) the path to madness. Life is uncertain, and while you do need to build in some wriggle room for eventualities, worrying about how you will fund yourself at 103 really shouldn't prevent you making decisions today.

To look ahead is wise; to try and see over the brow of the hill is just stupid, and to allow fear to stop you making decisions is certainly in that latter part. If fear is holding you back from any of life's decisions, can I direct you to a Ted talk on fear setting I mentioned in a previous article. It really can transform the way you make decisions and brings into focus that the things you are worrying about can all be identified and mitigated.

Finally, there are those of us who just don't like to jump: we need to be pushed. That thought of leaving safe ground to jump out into the void is simply too frightening to face. At a recent HM Connect conference I was able to ask five very entrepreneurial practitioners whether they jumped or were pushed when it came to setting up their own practices. The unanimous answer, to my surprise, was that they were all pushed. Similarly, they all wished they had jumped, and jumped sooner.

There is perhaps something about that edge, the finality of crossing it, and the thought that there is no going back to what there was before. If, though, we could all reframe our thoughts about endings it might help. If we thought about endings as simply a doorway to a new beginning filled with new opportunities and challenges, I wonder whether we might embrace them better? Likewise, the road back is never truly closed (well, not all of them), and there are often opportunities to revisit or even reimagine what we did previously. For me, my excesses in sport have found me returning to them at a much more sustainable and enjoyable level in my later years. Ultimately, if we did all that came before correctly, these "roads" are unlikely to be ones that we would want to go back down again!

"There's a trick to the 'graceful exit.' It begins with the vision to recognise when a job, a life stage, or a relationship is over – and let it go. It means leaving what's over without denying its validity or its past importance to our lives. It involves a sense of future, a belief that every exit line is an entry, that we are moving up, rather than out." (Ellen Goodman)

Stephen Vallance works with HM Connect, the referral and support network operated by Harper Macleod

Editor bows out on a high at Law Awards

Winners at *The Herald* Law Awards of Scotland 2023 celebrate after receiving their trophies at the Awards Dinner. Among them were Thompsons Solicitors (Law Firm of the Year – Scottish Independents), Andy Sirel of JustRight Scotland (Solicitor of the Year (not present on the night)), Frances McMenamin KC (Chairman's Award), Trevor Ormiston of Ormiston Mental Health Law Practice (Outstanding Contribution Award) – and retiring Journal editor Peter Nicholson, honoured with the Lifetime Achievement Award for more than four decades of service to the profession through the *Scots Law Times* and other standard tools, as well as 20 years on the Journal.

MONEY LAUNDERING

AML: reshaping the landscape

Treasury proposals could bring major changes regarding responsibility for anti-money laundering supervision: could they have merit, or would they be a regressive step, as the Law Society of Scotland believes?

Although it represents a potentially fundamental shift in the regulatory landscape for Scottish solicitors, the recent Treasury consultation on how the professional body supervisors ("PBSs") of AML in the UK should be structured seems to have passed by many.

You can read the options on the Government website, but, for the purposes of Scottish legal professionals reading this, they can essentially be read as "stay roughly the same", "possibly be AML-supervised by the SRA", or "possibly be AML-supervised by some new UK-wide HMRC-style body". It was interesting to speak to various researchers and legal professionals and attend round tables on the topic.

There was a general view that the first option (OPBAS+) was most universally palatable, partly because it was the one which actually led to the least change. I suspect (and was occasionally told) that this wasn't intended as a vote for a good option, but rather for the least bad. When I thought about the purpose of this consultation, and the resource being put into the process and subsequent analysis, I wondered whether a vote effectively for the status quo just because it was least troublesome was in the spirit of a consultation on change at all.

Consolidation?

There are two similar consolidation options on the table, one being a single legal sector AML PBS within each devolved nation, and the other being a single legal sector PBS for the whole of the UK. The SRA writes: "We believe that the effectiveness of this option would be maximised if we were selected as the consolidated supervisor". The SRA already supervises 76% of firms across the UK and might ostensibly be better placed to use existing sizable resource to create economies of scale in absorbing further supervision duties.

However, the Law Society of Scotland ("LSS"), perhaps an intrepid little brother to the SRA in PBS terms, of course has a strong view here. The LSS writes in its own response that it believes "that any amalgamation into a single sectoral

supervisor may be a regressive step, may undermine our approach and the flexibility we currently have to respond to risks and challenges specific to this jurisdiction". It also raises the more pertinent point that the entire legal framework through which it supervises Scottish solicitors is distinct and would take quite some unpicking in order to have the SRA enforce any disciplinary proceedings on Scottish solicitors outside of the Solicitors (Scotland) Act 1980.

Both SRA and LSS appear content that consolidation may be a positive (and probably likely) outcome. It's the extent of consolidation in which the discomfort lies.

Nuclear option

The more nuclear option tabled is the creation of a new UK-wide supervisor for AML, either as a single professional services supervisor ("SPSS") or as a whole-country, all-businesses supervisor – a single AML supervisor ("SAS"). Either would likely be a new structure within the public sector, rather than a branch of any private or membership body. This would naturally be a huge upheaval to AML supervision in practical terms alone, with the transfer of data, knowledge, staffing, legislative elements etc all to be considered. But the positives, should they materialise, are undeniably attractive too – enhanced coordination and use of data, economies of scale, coordinated intelligence and security clearances, increased transparency, consistency of approach. It's also notable that the Treasury's own paper on the consultation highlighted that the only two G20 countries which were regarded as having "substantially effective" AML regimes were Canada and Saudi Arabia; both use government/public sector bodies to supervise their non-financial sector businesses.

A recurring theme from both PBSs mentioned above, in response to the notion of a new UK-wide public body AML supervisor, is that we would lose an abundance of knowledge, lose deep-level expertise forged in the nuanced risks and operations of law firms, and collaborative relationships built between the supervisors and the supervised over years would all be wasted. It's irresistible to compare those vested-interest responses to recent independent research carried out by the Royal United Services Institute, which found over the course of hours of interviews that there is a "lack of trust across the system", that "There is no sense that everyone is 'on the same side' or has common objectives", and that "There is a perception among firms that supervisors do not have the necessary experience of the sector".

Whoever is analysing the responses and planning for the future has their work cut out. The responses are a mixed bag of self-preservation and good points all vying for attention. Almost all of the options tabled will make somebody unhappy; some of them will lead to existential changes to current PBSs; and some have substantial theoretical positives attached which would take years to effect and may never materialise at all. God willing, though, there will always be someone to pontificate about it all briefly in a magazine.

Fraser Sinclair is head of AML for Morton Fraser MacRoberts LLP and runs the AML consultancy brand AMLify

Trauma-informed from the outset

With trauma-informed practice gaining traction in the profession, how should we educate our students in that respect? Elizabeth Comerford describes initiatives at the University of Dundee

In my role as Diploma director and senior lecturer at the University of Dundee, I aim to ensure that law students are aware of recent developments in practice. As such, I recently completed the excellent Trauma-Informed Lawyer Certification course run by the Law Society of Scotland.

Trauma-informed practice is a new area of growth in legal practice which recognises the impact of trauma on an individual's neurological, biological, psychological and social development. In May this year, the Scottish Government unveiled its Trauma-Informed Justice: A Knowledge and Skills Framework, intended to support the changes in the Victims, Witnesses and Justice Reform Bill now before the Parliament.

Sharing understanding

I felt a sense of enormity on reflecting what I had gained from the course. I learnt that the brain scans of PTSD sufferers appear different from those of the general population. I learnt how to identify potential symptoms of trauma and vicarious trauma. I also gained an understanding of the effect of trauma on memory and how this might impact on credibility of evidence. On completing the course, I resolved to consider how best we might embed teaching trauma-informed practice in both the LLB and Diploma curricula here at Dundee.

Over the last few years, in addition to creating the certification course, the Society has worked closely with prominent trauma-informed lawyers, assisting in promoting their work to LLB and Diploma students through guest lecture events and online offerings. Currently trauma-informed practice is not one of the mandatory learning outcomes set by the Society in the route to qualification as a Scottish solicitor. Within the Diploma programme, however, individual providers can deliver a substantial amount of elective content. We plan to create a trauma-informed practice elective at Dundee next academic year as part of our continued drive to help forge more fully rounded new lawyers who can make a difference to society.

For Diploma students

The planned elective will only be chosen by those students for whom it has appeal, but I feel passionate that the whole Diploma cohort should have an introduction to the topic. I am fortunate to work with Dr Anke Kossurok, a psychology colleague, who has professional interest in the field of adverse childhood experiences and delivered a joint lecture to all current Diploma students on trauma-informed practice this semester.

In preparing for the lecture we had to establish ground rules in terms of creating a confidential safe space for students. Students were also directed to sources of dedicated follow-up support, if needed. In the talk, in addition to exploring the extent of trauma in the general population, how it might present itself and its impact, we looked at how best to support a client who makes a disclosure and avoid their re-traumatisation. The importance of offering affected clients a sense of control and choice in matters was also discussed.

The lecture further sought to provide students with a toolkit for possible future vicarious trauma they might experience on entering practice. Vicarious trauma recognises that lawyers who deal regularly with traumatic accounts of events or experiences are themselves at risk, and may experience symptoms such as intrusive thoughts or inability to concentrate. Students were encouraged to recognise their own responses to stress and create their own strategies to build resilience. This direction was intended to support students in terms of the growing awareness of mental health issues within the profession. Students were also asked to consider what actions law firms and organisations should take in terms of creating or enhancing a whole system approach to better understand the challenges faced by those affected by trauma and identify collective action to support resilience of their staff.

Starting the LLB

An adapted and abridged version of the Diploma lecture is planned for first year LLB students in their criminal law module, to highlight the current momentum behind trauma-informed practice and build knowledge and understanding of the nature and impact of trauma. This revision is thought necessary since Diploma students are on the cusp of legal practice, whereas for first year students the idea of interviewing a client is more remote. Dedicated training for our new student law clinic volunteers is also planned.

The importance of empathy

As a broader question and against the background of growing traction for trauma-informed practice, should legal educators do more to promote the value of an empathetic approach, particularly in undergraduate legal education? Currently, developing awareness of empathy is generally restricted to Diploma teaching, where recognition is given to the central importance of relationships. In undergraduate studies the approach of taking a detached stance to enhance problem-solving skills is encouraged. At the outset, should there be an aim to instil a more empathetic problem-solving approach? Against the backdrop of the Scottish Government's drive to embed trauma-informed practice in many sectors of the workforce, there is value in our students being equipped with the ability to look confidently ahead to legal practice through a trauma-informed lens.

Elizabeth Comerford is a senior lecturer in law and director of the Diploma in Professional Legal Practice at the University of Dundee

DISABILITY

Can we take down the barriers?

Disabling Barriers Scotland aims to build its presence within the legal profession following its in-person launch event, as Peter Nicholson reports

Disabling Barriers Scotland has held its first in-person event, as it explores the next steps to take the organisation forward. Founded by Fraser Mackay, trainee solicitor at the Scottish Social Services Council, and Tom McGovern, trainee at McGovern Reid solicitors, the group aims to focus on the barriers that prevent someone from accessing and sustaining a career in the legal profession – including but not necessarily limited to all forms of personal disability.

As Rob Marrs, the Law Society of Scotland's Director of Education, observed, there is a richness of groups supporting those who might be disadvantaged in seeking a career in law, but this is the first that seeks to represent disabled people.

The launch event heard from a succession of speakers on the application of an inclusive approach at different stages of a career, and how talent can reside in any sector of the population.

Meeting at Morton Fraser MacRoberts' office at Quartermile, Edinburgh, the audience heard the talent message from Martin Glover, the firm's HR director. He described how the firm's recruitment practice and selection criteria had changed over his time there to adopt the RARE system, which identifies traineeship applicants who have outperformed in relation to their background, many offers now also going to applicants who are neurodiverse.

Survey findings

Marrs noted that the Society's recent *Profile of the Profession* survey found that 28% of respondents claimed to have some form of impairment or condition – which might cover matters such as long Covid, menopause effects or neurological conditions – and for the first time had asked this question ahead of whether they considered they had a disability, which received a 5% yes response, similar to the 5% in 2018 and 4% in 2013.

That there is still a reluctance to disclose a condition, for fear of stigma or rejection, or to ask for reasonable adjustments, was borne out by Alan Sinclair of Addleshaw Goddard, now one of Disabling Barriers' team, who concealed his dyslexia until last year when his firm's diversity agenda encouraged him to go public; his article in *The Herald* had met with a "fantastic reaction".

Marrs told us that he hears a constant response that things are getting better but we are not there yet. "Anyone who works in diversity and inclusion should want to be out of a job", he remarked. The biggest single thing we can all do is to become more inclusive in our mindset, so that people don't even have to request reasonable adjustments – he hoped more able bodied and neurotypical people would attend events like this.

Lindsay Jack, director of Student Experience at Edinburgh Law School, described the extremely broad reach of the school's disability and learning support service, with more than 150 different adjustments students can request. "What about the organisations they go on to work for?" she asked. "Do applicants have to mask their needs just to get in? Or once they are in?" She urged us not to talk about organisational fit, but whether our organisation fits those with lived experience.

Next steps

In addition to seeking charitable status, Disabling Barriers' ambitions are "to create partnerships with legal firms to help us take our next steps as an organisation", Fraser Mackay told the Journal. "We are working on having a website where we can expand our student membership, offer anonymous Q&A advice, post direct opportunities from legal firms and survey our members to ensure that their views are represented.

"We have and will continue to host regular insight events, discussions with employers, and partnerships with disabled people organisations. We are a growing community, the first of its kind in Scotland, to represent and advocate for the views of disabled solicitors.

"The *Profile of the Profession Survey 2023* demonstrated that the proportion of solicitors identifying as having a disability has only increased 1% since 2013. This demonstrates a significant disability employment gap in our sector which we at Disabling Barriers are confident we can help to increase, but we need the backing of the profession to do so."

Fraser Mackay (left) and Tom McGovern

Tradecraft tips

Some further practical points, drawn from the author's years of experience

Client sensitivities

Clients owned a holiday flat in Spain outright, so it was available throughout the year. They were about to sell their house near Aberdeen in a sticky market. I was looking for some sort of "attention getter" in promoting the house and I suggested that it should be advertised with holiday entitlements, bearing in mind that many people are starry eyed about holidays.

The idea was to make the flat in Spain available to the purchasers of the house for a fortnight each year for three years, with my clients paying their air fares to Spain for the first year, giving the purchasers one free holiday followed by two cheap holidays. The total cost to my clients would be the first year's air fares, but the value to the purchasers would be much more.

My bright idea found no favour at all with the clients. I would not have made the suggestion in the first place had the clients themselves not mentioned previously that they were thinking of renting out the flat to generate some income. Clients can have sensitivities about certain things, and if you are suggesting an unorthodox way of dealing with something and the clients are unhappy about it for whatever reason, you cannot take the suggestion any further.

Keep it simple

In the middle of the 19th century, the Government introduced legislation so that everyone could get the benefit of railway travel. They obliged every railway company to run at least one train per day over all parts of their systems at the statutory fare of a penny a mile. Everyone knew what a penny was and everyone knew what a mile was. Gilbert & Sullivan lampooned such "parliamentary" trains in *The Mikado*, but for sheer simplicity the scheme could not be bettered.

When sending out deeds to clients for signature, the firm I used to work for enclosed their style of particulars of signing form, which ran to two full pages with a total of 627 words. I used my own style of form which was just over half a page long with only 75 words. I just felt that a client faced with the full two page version might lose the will to live before they reached the foot of the first page.

In our line of work, complication is unavoidable but anything you can do to simplify matters for the client should be done.

Biting your tongue

Solicitors act as agents for clients and we take instructions from our clients and act upon them. I attended a closing date many years ago where the selling solicitor appeared to be bending over backwards to reject the top offer and accept my client's offer which was about £1,200 less. The logic behind this was that the parties who were offering the most were former clients of his who had taken their business elsewhere when he had given them an estimate of the value of their house which they were unhappy with. He just wanted to pay them back for their apparent disloyalty. The fact that he was costing his current clients £1,200 in the process did not appear to enter into consideration.

In email exchanges with other solicitors I sometimes get the impression that a slightly belligerent tone is being used by the other party, but I suppress my instinct to blast back at them in like manner because I am acting on behalf of a client and not dealing on my own account. You cannot let your own feelings colour the way you deal with a matter for fear of prejudicing your client, and in the last analysis it is the clients who pay our wages and they have to be the sole priority in carrying out legal work.

Beam me up, Scotty

Many years ago, before the advent of home reports, a client was selling a flat but because he worked offshore his partner was attending to the viewings. A prospective purchaser had the flat surveyed and a problem with a beam apparently came to light. The client's partner contacted him on his oil rig and between them they appeared to be up to high doh about this beam. I telephoned the surveyor and asked "What is the problem with this beam?" He replied "What beam? I never mentioned anything about a beam."

I never did find out if it was a sunbeam or a moonbeam which had triggered off the furore.

Buying and selling property can be an anxious time for clients, and misunderstandings can arise and then grow arms and legs. Part of your job is to keep the clients on the straight and narrow, and if you see them starting to go off at a tangent you may have to cut through all the waffle to get to the core of the problem and sort it out for them.

Ashley Swanson is a solicitor in Aberdeen. The views expressed are personal.

RISK MANAGEMENT

Remotely concerned

In the age of working remotely and flexibly, wellbeing, supervision, and training, particularly for trainees and junior colleagues, present new challenges which employers need to consider fully

The Covid-19 pandemic saw a near-overnight move across the UK to full-time remote working in response to Government restrictions. This rapid adjustment demonstrated a capability to move from the norm of in-office working. Since then, the Scottish legal profession, like many others, has seen widespread changes in how, where and when we work, with many adopting a hybrid model.

The benefits from a more flexible approach cannot be overstated. The Law Society of Scotland's *Profile of the Profession 2023* reported an increasing desire for an improved work-life balance among the legal profession. The flexibility to decide how best to manage competing responsibilities in private and home life can result in significant improvements to wellbeing for parents and carers. Colleagues who previously commuted for long periods can maximise their productivity in utilising that time in their home offices. Employees who are more vulnerable for health reasons may choose to limit their time in the office, and we are all probably more conscious of keeping coughs and sneezes to ourselves at home!

We must, of course, remain alive to the potential risks emerging from a new model of remote and flexible working, particularly for junior colleagues. In this article we outline some key risks for the legal profession to be aware of while utilising the benefits of this age of agile working, including risks to wellbeing, effective supervision and training, tracking key dates, and data security and privacy.

Managing wellbeing

Hybrid working is here to stay, to the benefit of many. *Profile of the Profession 2023*, however, demonstrates a need for firms and their senior staff to remain cognisant of the challenges faced as trainee solicitors and junior lawyers enter the profession. It reports that 36% of respondents considered their ability to form or maintain close relationships with colleagues was better pre-pandemic (only 13% took the opposite view); this rises to 40% (against 10%) for trainees. The clear conclusion is that in-office working better facilitates an environment within which to forge collaborative working relationships.

Many law firms and organisations have responded to these, and other wellbeing concerns, by introducing initiatives such as the Lawscot Wellbeing Community and promoting an open, inclusive culture. Going forward, law firms will need to take such steps to foster colleague connection, which may not occur as organically as before. Mindful of this, the Law Society of Scotland has undertaken significant work surrounding wellbeing in the profession, and has recently launched its *Guide to creating a Wellbeing Strategy*. The guide outlines steps firms can take to support their employees with their mental wellbeing.

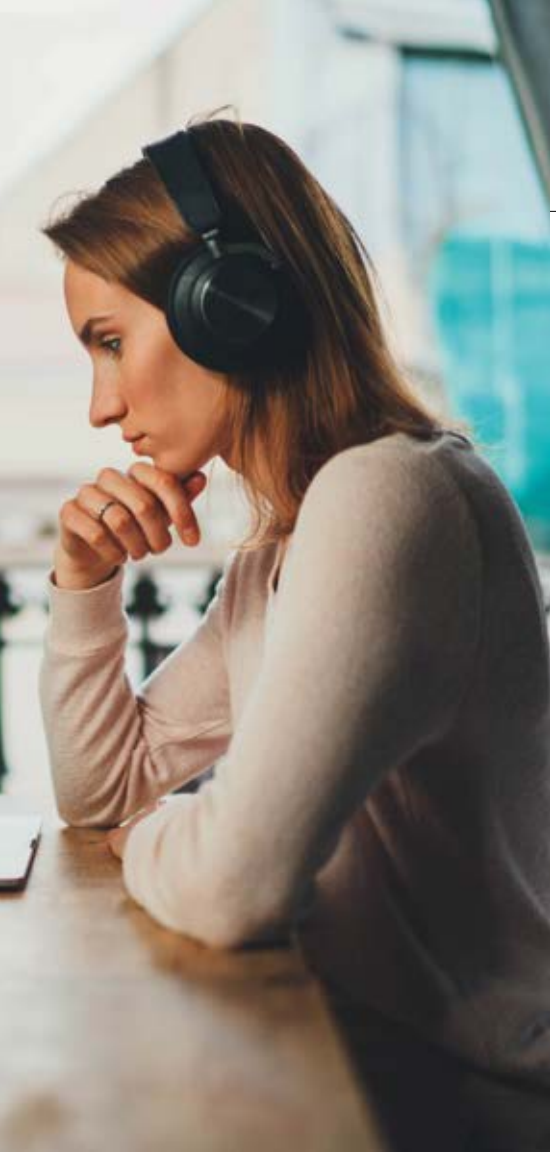
Training

Many legal professionals would say their work varies greatly from day to day. There is a risk that one by-product of increased social isolation is that junior lawyers will be less likely to be exposed to all the variety of work to be found in the office. Gone are the days of *ad hoc* client meetings where a trainee solicitor might be invited on short notice to take notes, which often leads to ongoing involvement in a range of client work. Remote working also removes the opportunity for junior lawyers to overhear and participate in discussions between colleagues as to the best approach to take to a complex legal problem.

How, then, can supervisors ensure their mentees receive the same exposure to a varied range of work in this flexible world as was available before it? Trainees and junior lawyers will likely benefit from attending the office as much as possible to learn from their colleagues, build relationships and raise their profile. Supervisors should maximise delegation of work where appropriate and prioritise collaboration across teams to ensure that junior colleagues have exposure to a variety of complex and interesting legal work. Simply remembering to involve a trainee even where a meeting, call or court hearing is taking place online is also key.

The potential for decreased exposure may result in less awareness of other practice areas, business sectors, and the legal market more generally for junior colleagues, making focused training sessions ever more important. Most workplaces offering in-house CPD adapted quickly to the need for virtual seminars and training, particularly for trainee and junior solicitors, by arranging webinars and utilising online training platforms. While online training provides more

Contributed for Lockton by **Rachael Jane Ruth**, associate, and **Laura Fell**, legal director, Brodies LLP.



flexibility, it can reduce levels of engagement and interaction. Employers may wish to consider providing online training in smaller, focused groups, or making use of breakout rooms to encourage discussion. Holding in-person sessions where possible is usually also beneficial to increase engagement and relationship building.

Supervision

Agile working may also mean less direct supervision for junior colleagues. One recent Discipline Tribunal finding saw an allegation of professional misconduct against a solicitor in their capacity as a supervising solicitor for a trainee regarding a potential conflict of interest. Supervisors should provide a clear chain of management and support, and build strong, collaborative relationships to ensure that trainees and junior lawyers feel empowered to obtain input, guidance and approval. Clear governance should be in place, ensuring supervisees know the bounds of their autonomy and what work is subject to review or approval.

Supervisors also need to have an understanding of supervisees' workloads to ensure they are manageable, particularly where they report into several lawyers. Failure to take such steps may lead to avoidable mistakes for which supervisors may be held accountable.

Similarly, where supervisors have less in-person contact with the solicitors they work with, the risk of missed deadlines and communication errors increases. Regular check-ins with colleagues, even virtually, remain crucial. Diarising key dates in multiple calendars, not just that of the main handling solicitor (avoiding a single point of failure) is nothing new, but again, important. Firms may also elect to utilise the numerous technological developments available to assist in case management, and should ensure all colleagues are fully trained to make the most of those tools.

Security and privacy

Data and privacy risks are increasingly prevalent in an agile workplace. Many employers have dedicated IT and office management teams working round the clock to ensure security of data in the physical and cyber spaces. However, when working remotely or outside of core working hours, colleagues require to take proactive individual steps to manage and mitigate those risks.

Physical security of documents and data is ever more important as remote and hybrid working increases. Laptops and papers will be on the move more often, requiring care to be taken by staff, extra security on devices, and reduced printing where possible. As colleagues work in more varied spaces, including those shared with friends and family, steps need to be taken to limit and ideally exclude what is seen and heard by others, for example by locking screens, stepping away to take certain phone calls and turning off voice recognition assistants.

Phishing and other fraudulent cyber activity is on the rise, and cyber breaches can result in serious consequences for the legal profession. As remote working practices have become more sophisticated, so too have the attacks of scammers. Employers should ensure firm-issued hardware such as laptops and mobile phones have updates regularly pushed out.

Employers should ensure that robust data security policies are in place, supplemented by regular training to educate and enforce those. Processes should be established to confirm completion of (and engagement with) training by all colleagues, particularly those working with client and business confidential information and those handling funds. All colleagues working in or adjacent to the legal profession with access to payment and finance systems are increasingly vulnerable to cyber attacks. Employers should therefore implement robust procedures for approvals and cross-checking of payments to minimise the opportunity for fraudsters to intercept funds.

Potential

Agile working in the post-pandemic world has the potential to improve working life and productivity for many. To maximise the benefits of the hybrid and agile models, firms will need to ensure their risk management strategies are similarly flexible and adaptive to the changing workplace.

FROM THE ARCHIVES

50 years ago

From "Changes in the law – notification to clients", December 1973: "the Council approved on 26th October 1973 the following recommendation, although it is to be stated clearly that the recommendation is permissive and not mandatory... Transmission of [the information referred to below] should not be used for touting for business. The recommendation is as follows: 'That for the avoidance of doubt, and as the contrary has hitherto been suggested, solicitors should be advised that, provided the information is appropriate to their clients' affairs, there is no objection to them, on their own initiative, informing their clients of changes in the law or in Statutory Regulations.'"

25 years ago

From "Aim for the top, says Lady Cosgrove", December 1998: "Speaking at the Law Society of Scotland's admission ceremony, Lady Cosgrove [Scotland's first female judge] said that although more than 50 per cent of new legal recruits are female, senior positions are still male dominated. Welcoming more than 90 new recruits to the profession, she said: 'My own intention to join the Faculty of Advocates in 1966 was met with much shaking of heads and sharp intaking of breath from both sides of the profession. Even the university professor in whose class I had done rather well told me I was making a mistake and that the Bar was not a place for women.'"

APPRECIATION

Doris Littlejohn

19 March 1935-16 October 2023

Doris Littlejohn, or "Wee Doris" as she was affectionately known, was in fact a giant of a person in every respect – in what she achieved and what she gave to others.

She began life on 19 March 1935 in Glasgow, in a tenement flat with a shared toilet on the landing and weekly trips to the bath house, until her parents were given a council house when she was 16. Her parents were bright but had no opportunity for further education. They were of modest means but, realising that Doris was bright, determined that whatever sacrifices it took, they would find a way for her to go to university. Doris never forgot how much they did for her and her younger sister Ann, and all her life she was driven by a desire to see equality of opportunity for all.

Doris studied at Glasgow University while undertaking her legal apprenticeship with Russell & Duncan, graduating in 1956. She was in private practice and distinguished herself as a court practitioner, until in 1976 she was invited by Lord Mayfield (Ian MacDonald), then President of Industrial Tribunals, to become a tribunal chairman. She became the first female chairman in the UK.

She served as a chairman in Glasgow, travelling there from her home in Bridge of Allan daily, while raising her three daughters and looking after her husband, who was a lawyer in Stirling but suffered crippling rheumatoid arthritis. She became President of Tribunals in 1990 until retirement in 2000. She successfully combined a full family life with an impressive and inspirational legal career and an enviable reputation as a hostess due to her excellent cookery skills and knowledge and enjoyment of good wine.

Her dedicated public service was recognised in 1998 when she was made a Commander of the British Empire, and in 2015 she received the Saltire Society Outstanding Women of Scotland Award. The University of Stirling awarded her an honorary doctorate in 1993. These awards are in stark contrast to the way many people will remember her as a sharp, insightful thinker who was very modest and loved nothing more than making time for people and extending hospitality to friends, family and work colleagues.

In an active retirement she was a non-executive director of Law at Work, and a Citizens' Advice Bureau volunteer. She was a member of the Leggatt Committee set up by the Lord Chancellor to review the UK tribunal system. She also served on a Scottish Executive review of post-mortem practice in Scotland, in particular in relation to organ retention; and on the BBC Advisory Council, the Human Genetics Advisory Commission, and the General Council of the BBC. She chaired the court of the University of Stirling, the Forth Valley Primary Health NHS Care Trust, and was a vice chair of the MacRobert Arts Centre at Stirling University Campus. She also travelled extensively, visiting China, Seattle and New Zealand to see some of the many friends she had collected throughout her life.

Many tributes have been paid to "Wee Doris", which almost without exception recognise her as an inspirational figure, who was modest, yet warm and hospitable with an infectious laugh and an unstinting curiosity and ability to engage with people and welcome them to share delicious home-made food, good wine and good company. She will be sorely missed by friends, family, colleagues and the many organisations which benefitted from her sharp intelligence and quiet wisdom.

Doris lived life absolutely to the full and passed peacefully away on 16 October 2023. She is survived by three daughters, nine grandchildren and two great-grandchildren.

Rhona Ulyett

ASK ASH

The bully above

My treatment by my new manager is making me afraid

Dear Ash,

I am now being managed by a new lawyer in the department and although he is really clever and charismatic with clients, he has a tendency to lose his temper with me quite abruptly. I have now been shouted at a couple of times by him and am fearful of it happening again. I don't feel anyone else will believe me as he puts on the charm offensive in front of others, especially more senior managers. I'm finding the situation is impacting upon my mental health, and I have taken some days off work and don't want to go back.

Ash replies:

I am sorry you are being treated in this way and it is not acceptable.

Your manager is seemingly able to keep his cool and apply the charm in front of senior managers but chooses to act in a less professional stance towards you. He seems to be a poor manager as he is choosing not to focus on investing time and effort into his staff to inspire and motivate them, and instead is effectively acting as a bully.

I appreciate that speaking to the manager may seem too much at this stage, so I encourage you to speak to others to help get some support.

This is not your fault and you should call out his behaviour to someone in your firm, as it is clearly impacting your confidence and wellbeing. I appreciate it can feel overwhelming to speak out, but perhaps start off by speaking to another colleague in your department as you may find that you are not alone in the way you are being treated. This in itself could give you some assurance and help you take the next step of speaking up to a more senior manager or HR.

Many firms are increasingly focused upon the importance of mental health and wellbeing, and you should be able to rely on support to address this issue. However, if you do not receive such support then do take steps to get external support such as LawCare, and speak to your GP too.

The key message I would relay is that you do not have to accept such behaviour, and that no job is worth your mental health being impacted in this way; therefore please reach out and seek support.

Notifications

APPLICATIONS FOR ADMISSION 26 OCT-16 NOV 2023

ADAMSKA-PATERSON, Katarzyna Anna
AHMED, Ayub Anjum
ALEXANDER, Craig
ALHAJJAJ, Jude Moneef Hassan
ANDROUTSOS, Sokratis Panagiotis
BAILLIE, Kim
BARR, Rachel Susan
BASU, Sharmika
BOYS, Katarina Anna
BROCKLEBANK, Ana Elizabeth
BROZ, Jiri
BRUCE, Kathleen Anna
CAMPBELL, Hugh Van Woerden
CHENG, Laura Ka Wai
CHRISTIE, Shona Lindsay
CRAIG, Oliver Stephen
CRAINEY, Stephen
CUTHBERTSON, Robyn Louise
DICKSON, Katie
DOUGALL, Robert Fergus Arbuthnott
DOUGLAS, Abigail Catherine
DOWNHAM, Bethany Louise
DUNCAN, Hannah Louise
EDMOND, Steven Alexander
FERGUSON, Catherine Wilson
FINLAYSON, Ellen Mary
FOCKLER, Alanna Mary Victoria
FORBES, Emily Catherine
FRANCHI, Monica
GALBRAITH, Daisy Lesmoir Sheila
GAMBOA, Ma Carmella Berniz Javier
GARCIA MORENATE, Amanda
GIBSON, Florence Jane Mair
GILLIES, Christie
GOMEZ-LLORENS, Victorie-Anne Carole Stéphanie
GRANT, Deborah Sandra Jean
HEER, Sukhjeet Kaur
HENDERSON, Allana
HILL, Sorcha Josephine
HUMMERSTONE, Matthew Charles
HUSSAIN, Sohaib
HUTCHINSON, Noreen Katrina
JAGGER, Rhoan David
JAMES, Taylor Jane
JOHNSTON, Andrew Grant
JUDGE, Sarah June
KANE, Becky
KELLY, Nicole Stephanie
KENNEDY, Erin Margaret
LANG, Gordon Douglas
LYLE, Aaron Gavin
McCAFFERTY, Liam John
McDONALD, Emily Rose
MACGREGOR, Grant Hamilton
McGUIRE, Samantha Jo
MACKAY, Kirstin Ailie
MACKENZIE, Andrew Iain
MacLEOD, Finlay Grant
McMILLAN, James David
McQUADE, Shelby
McSHERRY, Morgan Margaret Malloy
MACHOWSKI, Radoslaw
MAIN, Alice Rosemary
MATTHEWS, Chloe Eden
MELROSE, Laura Jayne
MILNE, Paige Elizabeth
MILNE, Zoe Elizabeth Violet
MURIE, Kaela
NEWLANDS, Katie Louise
OATES, Morgan Freer
PEPPER, Katie Elizabeth
PRIMROSE-ROURKE, Kathleen Ann
RAE, Alexander
RAMSAY, Louise
REID, Steven Campbell
RHYND, Leanne
ROULSTON PLANT, Meredith Evelyn
ROWAN, John James
SHAND, Millie Grace
SHARPE, Bethany Jane
SHEPHERD, Levi
SINCLAIR, Alison Dorothy
SMITH, Gregor Mitchell
SMITH, Natalie Colette
TIMMINS, Katie
WALKER, Rachael Robertson
WALLACE, Georgia Chloe
WATTS, Euan Alistair
WHYTE, Archie Alexander Mitchell
WILSON, Lewis Jackson Christy
WOODS, Christie

ENTRANCE CERTIFICATES ISSUED DURING 26 OCT-21 NOV 2023

ACKERLEY, Dylan Luke
BARR, Pauline
BRIGGS, Scott Forbes
CARMODY, Megan Katy
CONSTANT LAFORCE, Vanessa
COSSAR, Rebecca Alexa
CRAWFORD, Hannah Elizabeth
CRONIN, Samuel Thomas MacDonald
DAVIS, Andie Nicole
DZIEDZIC, Karolina
FORD, Ellysa
FRASER, Lauren Anne-Louise
HARLOW, Charlotte Jade
KAUR, Taranveer
McGILL, Ryan
MEEK, Lauren
OLUSZCZAK, Eliza Alicja
PIRIE, Mairi Jane
PROVAN, Alasdair William
QUIGLEY, Victoria Grace
ROBERTSON, Hugh Douglas
RODGER, Colleen Emma
SIWELA, James Sean Nikosana
STEEL, Abby Frances Helen

Classifieds

Ewen Campbell MacKenzie - Deceased
Would any person holding or having knowledge of a Will by Ewen Campbell MacKenzie, late of 15 Langrig Road, Newton Mearns, East Renfrewshire, G77 5AL who sometimes resided at 14 Balmoral Road, Portree, Isle of Skye, IV51 9DX, who died on 16 September 2023 please contact James W. Craig, Archibald Sharp Solicitors, 270 Dumbarton Road, Glasgow, G11 6TX

David Jenkins (Deceased)
Would any firm holding a Will or having knowledge of a Will for the late Mr Jenkins, latterly of 23 Macewen Court, Inverness, IV2 3PD please contact Emma Haverstock, Aberdein Considine, 18 Waterloo Street, Glasgow, G2 6DB (0141 616 7000 or ehaverstock@acandco.com)

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