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Journal

Journal of the Law Society of Scotland

Volume 67 Number 11 – November 2022

Creative lawyering

Paul Brown interviews on the causes he championed in a 40 year career at the forefront of the law centre movement in Scotland

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The Law Society of Scotland
Atria One, 144 Morrison Street,
Edinburgh EH3 8EX
t: 0131 226 7411 f: 0131 225 2934
e: lawscot@lawscot.org.uk

President: Murray Etherington
Vice President: Sheila Webster
Chief Executive: Diane McGiffen

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 07785 460743
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: +44 7795 977708
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts, telephone 0141 561 0300

Head of design: James Cargill (0141 561 3030)
james@connectcommunications.co.uk

Editorial board
Ken Dalling, Past President
Austin Lafferty, Lafferty Law
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Ayla Iridag, advocate
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The Journal of the Law Society of Scotland is distributed each month to more than 12,000 practising and non-practising Scottish solicitors, along with trainee solicitors, registered paralegals and non-lawyer subscribers.

Editor

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Click here to see Peter's welcome message

Budget blues

"Eye-wateringly difficult decisions" will have to be taken on UK tax and public spending in the Autumn Statement due later this month. The new, or latest, Chancellor, Jeremy Hunt, is attempting to steel us for painful news that is likely to affect all of us in various ways.

Already the Scottish Government has conducted an emergency budget review in the wake of the failed UK September mini-budget and its aftereffects, with priority spending commitments and recently agreed pay awards meaning that savings of £615 million have had to be found, over and above £560 million announced following the Programme for Government launch in September. If the spending brakes are applied at Westminster, that will have a further knock-on effect through the funding formula, just as an increase benefits the devolved governments in better times.

There are many warnings to be heard that the UK economy as a whole is in a parlous state, with continued unravelling due to Brexit – some of course continue to deny such an effect; and the Bank of England is now predicting recession until 2024, however committed to growth our governments may claim to be.

That is not a happy background against which to assess the prospects for public spending on matters of direct concern to the legal profession. Dire warnings have been given in evidence to Holyrood's Criminal Justice Committee of the effects of spending cuts now being mooted, such as predicting a 25% reduction in civil and summary criminal sheriff court sitting days, and the closure of another three or four court buildings. Some reforms on which COPFS is working, including in relation to how sexual offence cases are handled, would be halted, and the Crown Agent has warned of a risk of loss of confidence in the justice system.

I do not envy anyone in Government having to make tax and spending choices in the current climate. When essential services, support for the least well off, and – in the case of justice – public safety are at risk, however, sacred cows against new or higher taxes ought to be in line for a culling, at least where there is a prospect of them bringing in a reasonable return.

It is not a favourable time either to be calling for improved conditions for legal aid lawyers. The Scottish Government's £11 million package fell well short of what is needed to secure the future of the sector, but the chances of anything better look pretty slim. And the Society's new campaign to boost civil legal aid, even assisted by the considerable talents of Darren McGarvey, will also be pushing against strong headwinds. Indeed the profession should be on the alert for cuts to the justice budget that will feed through into fewer cases and lower remuneration. Such are the times in which we now live. J

Contributors

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

Kate Dowdalls KC (co-author with **Lucy Robertson**) leads on family law at the Scottish Law Commission

Rob Marrs is head of Education, and **Rachel Steer** is CPD projects officer, at the Society

Malcolm Combe is a senior lecturer in law at the University of Strathclyde

Alan Eccles is a partner with Bannatyne Kirkwood France & Co

David Bartos is a commissioner at the Scottish Law Commission

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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ONLINE INSIGHT

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

Payment notices under construction: cracks at the border
How strictly should the courts construe notices relating to payment under construction contracts, to follow the spirit of the statutory scheme? Ross Taylor considers the diverging authorities, and their implications.

Migrants' right to education: an unfair exclusion
Tim Haddow, Maisie Wilson and Annamaria De Felice report on a successful challenge to the Scottish Government's Students' Allowances Regulations, which impact unfairly on some migrants reaching university age.

Written pleadings: the importance of clarity
Scottish practice around written pleadings may be less strict than formerly, but as a recent Outer House case discussed by Ling Deng shows, the basis of the case must still be clear.

The Planning (Scotland) Act 2019: where are we now?
As a ninth commencement order, and further regulations, are made under the 2019 Act, Hazel Noble explains the latest changes and reminds us of what is still to come.

OPINION

Robin Moira White

Replying to a recent Journal column, the view that "sex" in the Equality Act means biological sex should be challenged as causing practical difficulties and as inconsistent with its provision for gender reassignment

Sex. Such a simple word, but...

In the September Journal, solicitor advocate Gordon Dangerfield defends, both in an article and a letter, the ruling by Lady Dorrian in *For Women Scotland v Lord Advocate and Scottish Ministers* [2021] CSIH 4 that "sex" within the meaning of the Equality Act 2010 means "biological" sex. This is a troubling ruling for a number of reasons, and one, in my opinion, unlikely to withstand further examination.

One may see that Mr Dangerfield has a partisan interest in the field because he uses the phrase "trans-identified-males" in his article when referring to trans women, persons who have transitioned from male to female. In passing, it should be easy to see why such individuals, who have worked so hard to reject masculinity and assert their femininity, would find being referred to as such troubling and offensive. It is important, in such a contentious and personally felt area, to be more careful about language.

But "biological" sex is particularly difficult when dealing with an Act which looks at practical matters such as the workplace, education, provision of services and the like. There is no definition of "biological" sex in the Act. Does this mean chromosomal sex? Gonadal sex? Perceived sex? Birth certificate sex? And if the latter, then what is the effect of a gender recognition certificate on birth certificate sex?

Chromosomal sex doesn't help, as the naughty little "SR-Y" gene, responsible for masculinity, has a bit of a habit of appearing on X-chromosomes, and also relying on a suite of other genes performing correctly to produce effective masculinity.

How is any of the above to be tested? I would ask the reader to pause for a moment and consider. Have they ever had their chromosomes tested? How would that be practically performed? Would it be carried out at the door of every public toilet, changing room or gymnasium? Similarly, inspection of gonads?

Perceived sex is interesting. I am a trans woman who is open about her history. Undoubtedly at times I am perceived as female, male or somewhere in between. So that means I could be subject to sex discrimination (male or female), gender reassignment discrimination *and* sexual orientation discrimination from those who find it difficult to separate sex, gender reassignment and sexuality.

Answers to these questions are needed if "biological" sex is to be the test. And such answers are singularly lacking from Lady Dorrian or Mr Dangerfield.

I transitioned from male to female over a decade ago. Although I appear regularly in the Scottish and Northern Irish tribunals, I am a member of the England & Wales Bar and a resident of England. I would qualify for a gender recognition certificate under the Gender Recognition Act, but have not applied for one as I regard it as a demeaning process. Were I gay, for example, I would not have to so apply and be tested to see if I am "gay" enough to qualify. But the relevant authorities can tell. I have an "F"-marker passport and a driving licence with the driver number figures scrambled in the female way. My bank details, utility bills and professional registration reflect my identity.

"Sex" is not even regarded as purely "biological" by the Equality Act. Section 7, dealing with the protected characteristic of gender reassignment, refers to "physiological or other aspects of sex". What are "physiological" aspects if not biological? – and so "other aspects", such as clothing, hairstyle, name, honorifics or pronouns are, according to the Equality Act, just as much part of "sex".

The Statutory Guidance to the Equality Act 2010 published in 2013, makes plain that those who have undergone gender reassignment should, without strong evidence supporting a justifiable reason not to, be accommodated in services which align with their affirmed gender. More recent pronouncements of the London Equality & Human Rights Commission to the contrary can (or should) be ignored, as the Scottish Human Rights Commission has said. I can't imagine that reliance on Suella Braverman's pronouncements (as Mr Dangerfield does) is the way to enlightenment. The old adage is that if you think the answer to a question is simple, you may well have misunderstood the question. Given that we don't carry our birth certificates around with us, cannot routinely be tested for our chromosomes or our wider genome, and tend not to have our gonads on show, is all we are left with "perceived sex" in the view of an alleged discriminator, and is that, therefore, really different from gender?

Robin Moira White is an English barrister and joint author of *A Practical Guide to Transgender Law*. She gave evidence to the Scottish Parliament committee considering the Gender Recognition Reform (Scotland) Bill and is quoted in the stage 1 report.

VIEWPOINTS

Unlawful eviction: law lacking

Last month, the Scottish Parliament passed the Cost of Living (Tenant Protection) (Scotland) Bill (it has since received Royal Assent). Among its measures to protect tenants during the current cost of living crisis are a reform of the law on damages for unlawful eviction.

Under s 37 of the Housing (Scotland) Act 1988, damages were calculated as the difference between the landlord's interest in the property with and without a sitting tenant. This outdated valuation method carried several problems. It often resulted in a nil valuation. Tenants had to pay for a valuation report – a burden which presented its own barrier to justice, especially to those ineligible for legal aid.

Legal Services Agency proposed a simplified measure of statutory damages for unlawful evictions: a multiple of the monthly rent. At a minimum of six months and a maximum of 36, this would remove the main problems associated with the current approach to valuation, allowing more victims of the crime of unlawful eviction to receive justice. We recommended this change in a 2020 report.

The new Act reflects LSA's proposals. However, we argue that it does not go far enough. The minimum threshold for damages is three times the monthly rent which, in our opinion, is too low. In addition, awards can be reduced further if the court or First-tier Tribunal "considers it appropriate to do so having regard to all the circumstances of the case". There is effectively no minimum award.

Unlawful evictions ruin tenants' lives. LSA continues to act on behalf of victims of unlawful eviction, and we support a further reform of the law to better reflect the impact on victims and deter unlawful eviction in the first place. The law is due to expire in April 2023. We look forward to engaging with the Scottish Government to ensure that it is strengthened.

Ben Christman, solicitor,
Legal Services Agency, Glasgow

Hacking the Land Register?

Having brought up five children, I would never deposit my favourite biscuits in the family tin. Those succulent personal crumbs are safer and best hidden in plain, but obscured sight.

The cloud, for a hacker, is the biscuit tin. It has been reported that one of Scotland's most profitable digital enterprises in the gaming world has been hacked. We must assume, then, no one is safe.

And so I look at our security as a firm, but also the security of the Land Register of Scotland. As we know, land law is at the top of the pyramid of laws. I can log into ScotLIS with a simple unchanging password, yet trying to submit a LBTT return is like breaking into Fort Knox. But an easy knox to overcome if you have hacked my email. Are we sure that this paradigm underpinning the whole of our financial system, is beyond encroach? I think no.

Can I suggest that each legitimate practitioner is issued with a keycard and a keypad to enter any Land Register system, similar to our now banking system, and not sent emailed codes that can be hacked. Hopefully then the biscuits, or the coveted succulent "bits", would be significantly safer.

Can I also suggest (again) that Land Register forms have an extra page to enter additional LBTT data, so that we do not have to input the same data twice, more so given that Registers collect the LBTT payments.

IMHO the threat exposed by this letter is real.

Ed Wright, Black & McCorry, Livingston

BLOG OF THE MONTH

www.thescottishlawyer.info

This website, the creation of enterprising NQ solicitor Nadia Cook, is more than just a blog, with resources, "how to" guides and templates she has created to share with others who may find them helpful.

The blog is guest contributions, including one from Harriet Hearns, a final year LLB student at Abertay: tips about things she wishes she had known in her junior years, in order to get the most from her degree and also have a life.

To find this blog, go to bit.ly/3FAIHkA

BOOK REVIEWS

Children's Hearings in Scotland

4TH EDITION
KENNETH McK NORRIE
PUBLISHER: W GREEN
ISBN: 978-0414098824; £75
(ALSO AVAILABLE AS E-BOOK ON PROVIEW)

This is simply the most comprehensive book currently available on this important area. It has been substantially updated since the previous edition in 2013. Shrewdly, the appendix containing the 2011 Act shows prospective amendments, italicised for ease. This edition is future proofed.

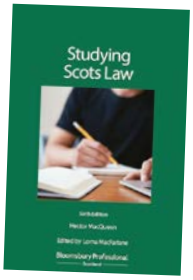
So what do we have? A thorough examination and consideration of the hearing system, written for panel members, practitioners and those engaged with what remains a unique system. The book should also be essential reading to prosecutors and defence lawyers, the former when they require to engage with the reporter, and the latter as they represent children and need to appreciate how the system operates. The author leads us through the procedure to ensure the child's protection, including a detailed consideration of legal aid. There follows an outstanding discussion around the consideration of whether compulsory supervision is needed. The role and duties of the reporter and panel, the decision making process, and the grounds and routes of appeal are all helpfully and clearly discussed.

The author sought to make his text accessible. He leaves it to readers to judge whether he has achieved that aim. The answer is an emphatic yes.

David J Dickson, solicitor advocate.
For a fuller review see bit.ly/3UpaoB3

Studying Scots Law

6TH EDITION
HECTOR MACQUEEN AND LORNA MACFARLANE
PUBLISHER: BLOOMSBERRY PROFESSIONAL
ISBN: 978-1526523372; £36
(E-BOOK £29.16)



"This book is a treasure trove of practical, insightful and carefully considered advice."

Read the review at bit.ly/3UpaoB3

With a Mind to Kill

ANTHONY HOROWITZ
(JONATHAN CAPE: £20; E-BOOK £6.99)

"This is the third and final James Bond novel penned by Anthony Horowitz... Horowitz knows the books inside out."

This month's leisure selection is at bit.ly/3UpaoB3
The book review editor is David J Dickson

Fairytale ending

Where would you most – and least – like to be, if a sudden COVID lockdown prevented you going anywhere else?

The question matters in China, whose notoriously strict zero-COVID policy has resulted, if even a small cluster of cases emerge, in people finding themselves confined to shops (and we know what it's like being unable to find your way out of Ikea) or their workplaces (some hard pressed juniors may also recognise that feeling).

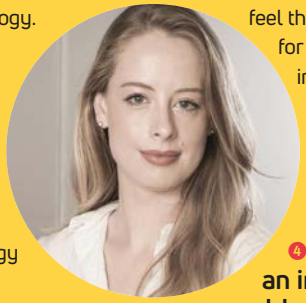
It happened also at Shanghai Disney. It may like to call itself The Happiest Place on Earth, but that didn't stop thousands rushing for the gates – too late – as the latest restrictions took hold. Those inside have to provide a negative test result before being allowed out, and then show three negative tests over consecutive days.

But for those confined, the rides continued to operate. So, trapped in a fairytale castle, or finding Never Never Land becoming a reality? We can hardly say you couldn't make it up, but perhaps the creators of these tales didn't quite foresee how they might play out...

PROFILE

Catriona McMillan

Dr Catriona McMillan is a lecturer in medical law and ethics at the University of Edinburgh, and convener of the Society's Health & Medical Law Committee



1 Tell us about your career so far?

Since I studied Scots law at the University of Glasgow I have had a particular interest in the legal and ethical issues associated with reproductive medicine and technology. I went on to a master's degree in law, then a PhD in medical law. My thesis discussed the regulation of in vitro embryos. I now have a postdoctoral fellowship from the British Academy to research issues arising from "femtech" (personal health tracking technology aimed at women).

2 As convener, you gave oral evidence to the Scottish Parliament COVID Committee. How was this experience?

I gave evidence about the vaccine certification scheme in September 2021. It was unusual to be asked to speak about an issue of such immediate relevance to the public to representatives of the Scottish Parliament, considering how controversial it was thought to be at the time. I found it interesting to hear the perspectives of others with very different backgrounds and experience.

3 Have you been surprised by anything you have gained from the committee?

It has not surprised me as such, but I certainly feel that I have even more appreciation for the range of expertise that exists in the field of health and medical law. I have learned a great deal from working with committee members over the past year or so.

4 As an academic, you bring an important perspective; what would you say to other lay people looking to take part in a committee?

I could not recommend it more, especially if public policy is something that interests you. It is an opportunity to put your knowledge and experience into policy and practice: one that academic lawyers do not always get. I am grateful to have the chance to do so.

Go to bit.ly/3UpaoB3 for the full interview

WORLD WIDE WEIRD

1 Neon frights

New York police are hunting a gang of women wearing neon green full bodysuits and said to look like "aliens", on the run after attacking two female subway passengers.
bit.ly/3UkkRgG

2 Safe space

A man who was evicted from his home in Rhode Island, USA built a secret flat in a space beneath a shopping mall and lived there for four years before security guards discovered the pad.
bit.ly/3NvdUrt

3 Slow patrol

Police in south Wales are fighting crime in a fleet of Asian-style tuk-tuk three-wheel vehicles. But with a top speed of 35mph, they're unlikely to feature in any high speed chases.
bit.ly/3NvpG50

TECH OF THE MONTH

Podcast: Bible John: Creation of a Serial Killer

Free to download from BBC Sounds

The case of Bible John has been a source of intrigue and mystery for more than 50 years. In this series of podcasts, journalist Audrey Gillan examines the stories of the three women who lost their lives after visiting the Barrowland Ballroom in the late 60s.
bbc.co.uk/programmes/p0d3f8jl/episodes/downloads

PRESIDENT

Murray Etherington

This month's theme is change: change in our political leadership; change behind the Society's new strategy; the need to lead on climate change; and not least, our campaign to change public perceptions around legal aid

Change. We are told that the only constant is change. That is certainly the case in our constitutional and political world at the moment. I have had the pleasure of being the President for six months and I have witnessed two monarchs, three prime ministers and I think six Home Secretaries! Change is unsettling, as the markets can show, but it can also be a force for good.

Our new CEO Diane McGiffen's influence has certainly been a positive one for the Society, and it was with this fresh impetus that we launched our new five-year strategy. The online launch and video talked about the Society's five key strategic areas and explored the level of consultation undertaken with the profession, committee members, the staff team at the Society and external stakeholders.

In case you haven't had a chance to look at the strategy yet, our aims in five key areas are:

1. Supporting our members to thrive.
2. Acting in the public interest through modern and effective regulation.
3. Innovation and efficiency.
4. Using our voice to enhance our legal sector and justice.
5. Leading the profession.

Climate: taking change seriously

It is within leading the profession and supporting our members to thrive that the word "change" has a significant impact – not least because when it follows the word "climate", it is, arguably, the single most important issue facing humanity today.

We want to help the profession become more sustainable, and to help influence our political leaders to take the climate change crisis even more seriously. With that in mind, we announced the creation of a new Sustainability Committee just last month to build on the success of our work in the lead-up to COP26. Our new committee will focus on leading the profession as a whole to do its part to reduce the impacts of climate change.

Of course, solicitors are already involved in advising clients and employers on matters related to climate change, while considering the impact on themselves. But we need to fully understand the challenges that lie ahead, and ensure we are prepared for opportunities to influence and inform relevant policy and legislative development.

It was therefore incredibly disappointing to read that our latest Prime Minister seemed reluctant to attend COP27 in Egypt. The climate crisis impacts each and every one one of us and we, as a nation, should be looking to lead just as we, as a law society, want to lead our members.

Legal aid: targeting public support

Looking for more opportunities to influence, inform and generate change is also at the heart of the Society's new public facing campaign on legal aid. We are engaging with author and commentator Darren McGarvey, and will be working with others for a wider media and social media campaign to raise awareness of legal aid.

How fundamental this is to providing legal advice to those in need at some of the most vulnerable times of their lives.

I am sure most legal aid practitioners reading this will agree that this sector has changed much over the years, with the only constant being the stagnated pay rates.

Indeed I reviewed the rate for a civil legal aid 125 word letter this week and compared it to my own firm's rate for a 125 word letter, and was shocked, but unfortunately not surprised, to find that I could only write 26 words of my 125 word letter if I was being funded by legal aid. That is 80% less than in private practice, and that was using the top rate. I know summary criminal rates are even lower. However if we want the Government to do more, and see the legal aid crisis as a true problem which only they can fix, then we need to try everything we can to change the perception of the public. As with climate change, only by having the support and backing of the public can we bring about meaningful change in this vital area of access to justice.

Murray Etherington is President of the Law Society of Scotland – President@lawscot.org.uk

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Death and Disputes: Litigating in the Private Client World

Breakfast seminar in conjunction with Brodies LLP.

For all those with an interest in private client matters, for whom litigating about them may be a possibility, come and hear Brodies' expert speakers, on a range of vital topics tailored to assisting you and your clients. The topics will be relevant to those in the field of personal law, and also for litigators who are instructed in contentious private client matters.

Speakers: Christine O'Neill, Jamie Reekie and Susie Mountain.
Chaired by Alan Barr. All Brodies LLP.

- 23 Nov - Edinburgh 9-11am

FEE: £25 per person, includes a light breakfast.

Conveyancing - What Happened in 2022

For the thirty-second successive year, this seminar will provide a comprehensive and indispensable review of the cases and statutory developments during the past 12 months which affect conveyancing law and practice. With no shortage of legislative changes and matters attracting the attention of the courts, this seminar is unmissable for anyone working in conveyancing.

Speakers: Kenneth Reid, George Gretton and Andrew Steven, University of Edinburgh.
Chaired by Alan Barr, partner Brodies LLP and Honorary Fellow, Law School, University of Edinburgh.

- 23 Jan - Dumfries 12-2pm
- 23 Jan - Glasgow 6-8pm
- 24 Jan - Zoom Webinar 5-7pm
- 26 Jan - Zoom Webinar 12-2pm
- 26 Jan - Edinburgh 6-8pm
- 30 Jan - Aberdeen 12-2pm
- 30 Jan - Perth 6-8pm

PLUS • 31 Jan - Q&A for all via Zoom Webinar 12-2pm

FEE: £186 per person (discounted rate available)*. Four hours CPD, includes seminar materials plus a copy of the published book.

Estate Planning and Tax: Wills, Trusts and Executries

Alan Barr and Sandra Eden will cover legal and tax developments in relation to wills, trusts, gifts and other private client concerns. Important legislation has come into effect and more is to come on the whole Scottish law of trusts. IHT, CGT and relevant income tax will be covered; and the last year in particular has brought more Scottish cases than usual on the bread and butter of private client practice – executries, wills, trusts and other relevant matters. A vital review (with a bit of preview) for anyone working in this area.

Speakers: Alan Barr, partner Brodies LLP and Honorary Fellow, Law School, University of Edinburgh and Sandra Eden, former Senior lecturer in Private Law, University of Edinburgh.

- 20 Feb - Zoom Webinar 5-7pm
- 21 Feb - Aberdeen 12-2pm
- 21 Feb - Perth 6-8pm
- 23 Feb - Edinburgh 6-8pm
- 28 Feb - Dumfries 12-2pm
- 28 Feb - Glasgow 6-8pm
- 1 Mar - Zoom 12-2pm

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Garry Gibson, Fiona Scott and Stewart Dunbar

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has appointed **Julie Thomson**, formerly with energy firm PROSERV, as chief financial officer, and **Mike Fergusson**, previously with APEX INDUSTRIAL CHEMICALS, as the firm's first chief operating officer.

BALFOUR+MANSON, Edinburgh and Aberdeen, has promoted senior associate **Michaela Guthrie** to partner with effect from 1 November 2022.

BLACKADDERS, Dundee and elsewhere, has appointed **Leanne Gordon** as a director in its Rural Land & Business team. She joins from SCOTTISH LAND & ESTATES and was previously a senior associate at LINDSAYS.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen, Inverness and London, has appointed as partners two litigators: **Clare Bone**, a criminal solicitor advocate based in Glasgow, who joins from BTO, and **Malcolm Gunnyeon**, who joins from DENTONS and is based in Aberdeen.

CMS, Edinburgh, Glasgow, Aberdeen and internationally, has appointed **Wendy Nicolson** as a partner in its Competition & Trade practice, based in its Edinburgh office. She joins from PINSENT MASONS.

DALLAS McMILLAN, Glasgow, has promoted **Rosslyn Milligan** (Private Client) to partner, and **Craig Muirhead** (Litigation) and **Rachel Hendry** (Commercial Property) to senior associate.

GIBSON KERR, Edinburgh and Glasgow, has promoted **Katie Fulton** (on right in photo) to senior solicitor, and appointed recently qualified **Morgan Perrie** as a solicitor, both in its Family Law team.

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has announced the appointment as legal directors of rural lawyer **Fiona Scott**, who joins from BRODIES; **Stewart Dunbar**, a member of the Society of Trust & Estate Practitioners, who joins from BLACKADDERS; and **Garry Gibson**, who joins the Commercial Property team in Glasgow from LINDSAYS. The firm has also welcomed **Cheryl Gallagher**, senior solicitor – Housebuilder; **Elliot Johnston**, solicitor – Land & Rural; and **Rachel Dixon**, paralegal – Corporate, along with **Mariola Seeruthun-Kowalczyk**, tax associate in the Private Client team.

Michael Johnston has joined the SCOTTISH ENVIRONMENT PROTECTION AGENCY as a solicitor, moving from MILLER HENDRY.

LEGAL SERVICES AGENCY, Glasgow, has promoted **Aileen Miller** to partner in the Mental Health & Adult Incapacity department.

LINDSAYS, Edinburgh, Glasgow and Dundee, has appointed **Martin Bennett** as a director in its Commercial Property team. He joins from HARPER MACLEOD where he was a senior associate.

ALLAN McDOUGALL SOLICITORS, Edinburgh are pleased to intimate that **Gordon Milligan**, an accredited specialist in personal injury law, has been promoted to partner, effective from Monday 3 October 2022.

RRADAR, Glasgow and elsewhere, has promoted **Alastair Gray**, solicitor advocate and accredited specialist in anti-money laundering, to head of Scotland.


Clare Bone and Malcolm Gunnyeon have joined Brodies LLP

Fulcrum
insured employee benefits

Benefits package for the smaller firm

Confidential mental health support, and faster access to GP consultations, are key features of a new life insurance package for small businesses, as Fulcrum's MD Malcolm Brebner explains

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Long road to justice

As he retires from Legal Services Agency after a 40-year career dedicated to law centres, Paul Brown tells the Journal about his career highlights and the role he sees for the sector looking ahead

He wasn't quite in at the birth of the law centre movement in Scotland, but after a 40-plus year career spent building its expertise, Paul Brown is regarded as something of a father figure in the sector today.

Just retired as principal solicitor at Glasgow's Legal Services Agency, which he helped to found in 1989, Brown paused in a still-busy schedule to share with the Journal some reflections on his personal highlights and on the role of law centres today.

To begin at the beginning, did he come into the law wanting to do that kind of work? Yes, is the short answer, with a bit of explanation: influenced by a legal uncle fond of quoting the biblical injunction to do justice, and a first degree in the 1970s encompassing psychology and politics, which brought discussions about social justice and law as the first law centres in North Kensington and then Castlemilk were finding their feet, he soon joined the latter on qualifying.

Defining issues

A very small operation at that time, with funding for just two lawyers, Brown believes the main issue in Castlemilk becoming established was not so much funding as "the slow building up of a tradition about what law centres actually needed to do, which isn't the same as what private firms do, even the most progressive ones".

He explains: "Law centres have a different relationship with the community and ordinary people than private firms, because people have an expectation that if there is a problem, the law centre will deliver, and if it doesn't deliver by analysing the law and producing a remedy, it will campaign to introduce a remedy."

Castlemilk provided two defining issues for Brown – dampness in, and eviction from, local authority housing. With complex causes, and a tendency by authorities to blame dampness problems on their tenants, his interest in the former developed into a monograph he co-authored with Angus McIntosh. "It took some time for us to identify what the architectural problems were, what the health issues were, and what legal remedies there were – and they did exist."

These remedies, such as statutory nuisance, implement and damages, were pioneered by law centres along with others: Brown acknowledges that law centres have always had very good relationships with private firms, the bar, and academics.

On evictions, which he says were frequently pursued for "ridiculously small" amounts of money, with clerks of court telling tenants to go and see their housing manager rather than take up the court's time, "it was actually Jonathan Mitchell, now KC, who basically in about eight seconds told me, what do you mean, there's no defence to eviction from a secure tenancy? It's got to be reasonable. That's where that started from, a very simple legal remedy that nobody was aware of. And now there are thousands of cases done a year, taking that up".

LSA: the origins

How did Legal Services Agency come into being? It largely developed from Technical Services Agency, a tenant led community architectural practice and ginger group about (mainly, though not solely) public sector housing. Remedies were needed for issues the group identified, and after a business case was worked up to attract some initial grant funding, "we opened the door and the first day got four new clients: two defended evictions and two dampness cases".

From the outset, community legal education has been a major plank of LSA's work, again well supported by the private profession. Brown sees that as integral to its role. "Law centres aren't about using knowledge to build up exclusive powers and market placing of the firm – there may be some of that, but it's about encouraging other people to do it as well, and I think the legal profession has understood that, so one of the really great things, it really is very marked, is that the profession has supported thousands of seminars by coming and speaking at them.

"Another thing is making legal education as affordable as is decently practicable, and as open as possible: it's open to everybody; you don't have to be a solicitor."

But the casework soon took off. Helped by newspaper coverage of a successful claim for a child affected by dampness, within six months LSA had 35 actions on the go. On the eviction front, it has been said that over the last 30 years in Glasgow there has hardly been an eviction court in which the centre was not acting in at least one case.

Developing expertise

Much of note has happened beyond housing issues, however, as LSA – and Brown himself – spread into other areas of expertise as casework arose. Mental health was an early one. "People with users' experience said we should set up a mental health project, because it was just the beginning of representation at tribunal. We got a mental health specific grant from the Scottish Government. Private firms often provide very good service now, but then nobody was doing it.

"Also if you're a lawyer in this work, you've got to understand the medication and the technical terms – it's difficult to do mental health representation if you don't understand the basics of the medical and social work issues, and that's one thing our lawyers wired into and got a good understanding of it."

The 2001 Mortgage Rights Act was another achievement, the result of a lengthy joint campaign by LSA, the then Drumchapel Law Centre, and Govan Law Centre. "Colleagues in England were gobsmacked that people with mortgage arrears in Scotland could lose their house without any form of defence whatsoever", Brown recalls – "all you could do was plead. The Government did take it up eventually, all the parties. Everyone gained, and the public purse must have saved tens of millions because keeping people in their house while they address their problems really makes a difference."

LSA has also made a name for itself in criminal injuries compensation, where it has gained expertise in supporting people with complex needs, sometimes along with communication difficulties. On the campaign front, its first target was the former "same roof" rule, which prevented people claiming for abuse suffered (pre-1979) at the hands of a member of their own household. Parallel litigation in all three UK jurisdictions against this discriminatory provision culminated in the UK Government backing down as a Supreme Court appeal was about to be heard.

Less success has to date been seen in taking on the rule, current since 2012, that provides a complete bar to compensation, however big the award might have been, if the claimant has an unspent conviction resulting in a custodial sentence or community order, or receives such a disposal while their claim is pending. A particular disappointment for Brown was the failure of two judicial reviews against this rule ("I was hoping my career

"Law centres have a different relationship with the community and ordinary people than private firms"

Paul Brown reflects on his 40 year career in law centres

would end on a high point!"), the Outer House holding that it was a legitimate policy choice that the exclusion be consistently applied. But the Government has since invited LSA to submit views to a review of the rule.

Secure funding?

This last issue Brown uses to illustrate the need for law centres to work alongside private firms, if for example the claimant is facing criminal proceedings that could mean a claim being barred. More broadly, while fully supporting the case for better legal aid rates, he believes civil legal aid lawyers also need to work more closely together, for example through information sharing, in order to demonstrate that they are delivering value for money.

"Improved communication won't solve everything, of course, but it would make a very big difference and would build on the public service aspect of the legal aid model."

The point feeds into his views on the prospects for law centres, looking ahead. Finance he describes as "a medium issue". LSA's Glasgow City Council grant has declined; he hopes at least that it will now be held. Charitable foundation funding tends to be for two or three years; "the difficulty is, as lawyers know, if you're going to do test cases or whatever, they could run for five, six, even 10 years. So you've got to have core funding that lasts for more than that and it's really important that that continues. I'm also very committed to law centres having a community business element, trading; that means using legal aid".

"Improved communication won't solve everything, of course, but it would make a very big difference"

But both LSA, with its now 30 or so staff, and law centres generally, through their user involvement and community links, are thriving, Brown believes. "One thing I'm very proud of is that law centres are flourishing. It's so easy for professionals to become isolated and do what they have always done, without speaking to other professionals, or campaigning. It's easy to get so busy that 10 years pass and a problem with the law hasn't been taken up – you think writing to the Law Society is all you need to do; well you need to do an awful lot more. People are banging on the door saying solve it, and we need to campaign about it. It ebbs and flows but that is part of what a law centre does. That's one of the unique things."

Priorities for change

Asked what he would most like to see change next, Brown focuses on effective representation rather than strict legal rights. "I think there probably needs to be an implied and possibly explicit right to a full scale, suited and booted lawyer for everybody who's threatened with eviction, whether it's from private sector tenancy, public sector tenancy, or a home owner who needs the right to be affordable: legal aid for people with mortgage arrears can be very unsatisfactory because of recoupment.

"I think employment law access to services is developed, but provision of free or cheap legal advice, assistance and representation for employment law matters is very important. LSA has got one project with just the one lawyer; there is a real need for that.

"Also there is a need for lawyers who already do work for people who have multiple needs, to work together in different ways. That's not quite changing the law but it's changing the way of working so that all these needs can be gathered together and the person who is vulnerable knows they will get help. And the rollout of understanding what's new in rights, and what they mean to people is important, because otherwise people campaign about rights and the ordinary person has no idea how they relate to that."

The Scottish Parliament has made campaigning much easier. "I think Scottish politicians listen; sometimes they take things on board – there's no doubt that has happened. It's hugely more accessible than the UK Parliament was."

A kick where it's needed

Is there a particular case or campaign of which he is most proud? Brown mentions a few. "The reasonableness defence and the way we told everybody about it, has to have saved thousands of people from being evicted." A related campaign focused on helping people against whom decree for eviction had already passed, to seek a minute for recall: "People didn't know that an ordinary person can do that. It doesn't cost anything; you maybe need to get a sheriff officer to serve it, but it's doable."

Then there was the same roof rule – "a limited number of people benefited, several hundred, but we were very proud of that, in terms of individual test cases". In addition there are individual litigations: in one still current, Brown's team secured a big interim damages award in the Court of Session for a child of a disadvantaged family who was seriously injured in hospital; in another, following the Supreme Court win, they secured a six-figure settlement for a child in a same roof rule case who was "really badly abused by his father".

But he emphasises in conclusion: "A really important thing I want to say is that I've been part of lots of big achievements, but it was never me – it was always us. Always a team. I can't name all the people, but academics, volunteers, advocates, medical and other experts and community activists. The booting in the bum from community activists can be crucial, and I really think that needs more recognition – many of the people involved have now passed away, I'm afraid, but they really understood what a lawyer for ordinary people could and should do.

"My career has been founded on that, really. I think it's been reasonably successful, but it couldn't have happened without them."

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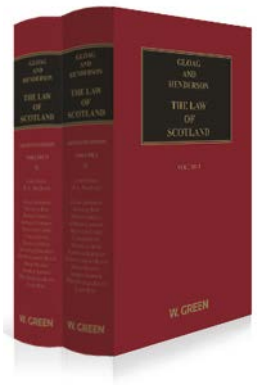

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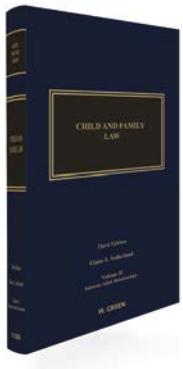

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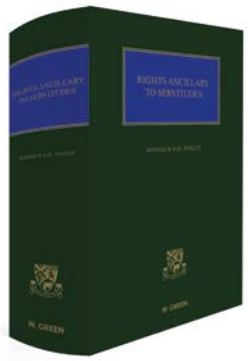

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Splitting up: a fairer scheme

An improved scheme for financial claims by separating cohabitants has been recommended by the Scottish Law Commission in a new report, following a consultation that attracted much interest. Kate Dowdalls KC and Lucy Robertson set out the key proposals

The Scottish Law Commission's much anticipated *Report on Cohabitation* (Scot Law Com No 261, 2022) was published on 2 November. The report recommends reform of the law relating to financial provision on cessation of a cohabiting relationship. This article sets out its key proposals, implemented in a draft bill appended to the report, which will now be considered by the Scottish Government.

The Commission's project

The Commission announced its review of aspects of family law in 2018. The first phase involved a review of the law relating to financial provision on cessation of cohabitation otherwise than by the death of one of the cohabitants, as contained in ss 25 to 28 of the Family Law (Scotland) Act 2006. A review of s 29, dealing with claims by surviving cohabitants on intestacy, was excluded from the scope of the project, as this forms part of the Scottish Government's ongoing review of the law of succession.

A *Discussion Paper on Cohabitation*, seeking views on possible reform, was published on 26 February 2020. There was a high level of engagement from consultees, whose responses have helped form the basis of the proposed reforms. The report's main recommendations are outlined below.

Who is a "cohabitant"?

The definition of the term "cohabitant", contained in s 25, has long been criticised as vague, inconsistent with that used in other legislation, outdated and not reflective of modern relationships. Reliance on an analogy with marriage and civil partnership – both relationships characterised by formal registration, the lack of which is the defining feature of cohabitation – has been the subject of particular critique. The need to read the section alongside s 4 of the Marriage and Civil Partnership (Scotland) Act 2014, which preserves the analogy with marriage, albeit between both same and different sex spouses, has also been criticised.

In the report a more modern and inclusive approach is recommended, such that "cohabitant" is defined as a member of a couple living together in an enduring family relationship. In determining whether this definition has been met, the court is directed to have regard to all the circumstances of the case including, but not restricted to, the following matters:

- the duration of the relationship;
- the extent to which the persons live or lived together in the same residence;
- the extent to which the persons are or were financially interdependent; and
- whether there is a child of whom the persons are the parents or who was accepted by them as a child of the family.

Cohabitants must be aged 16 or over, not spouses or civil partners of each other, and not closely related to each other (as defined in the revised s 25).

Household money and property

Sections 26 and 27, dealing respectively with rights in certain household goods and with money and property, have not been the subject of particular criticism or academic comment. However the language of s 27, in particular, is generally regarded as in need of modernisation. Recommended reforms include clarification of the meaning of "property" for the purposes of s 27, and removal of the reference to an allowance for joint household expenses – almost universally interpreted as a "housekeeping allowance" – in favour of a more modern formulation, which refers to money designated for use to meet household or joint expenditure or for similar purposes.

Guiding principles and relevant factors

As regards financial claims following a separation, there was consensus among consultees that the policy objective of s 28 as currently framed is not clear from the legislation,

that there is a lack of guidance as to how the court should determine a claim, and that the current test for financial provision is confusing and complicated, thus risking unfair outcomes. The Commission has therefore recommended the introduction of a principled approach to the making of orders for financial provision, whereby the court may only make such orders as are justified on the application of guiding principles and reasonable having regard to the resources of the parties.

The proposed guiding principles are:

- economic advantage derived by one cohabitant from the contributions of the other should be fairly distributed, and economic disadvantage suffered by one cohabitant in the interests of the other or of a relevant child should be fairly compensated;
- a cohabitant who seems likely to suffer serious financial hardship as a result of the ending of the cohabitation should be awarded such financial provision as is reasonable for the short term relief of that hardship; and
- the economic responsibility of caring, after the end of the cohabitation, for a child of whom the cohabitants are parents or who was accepted by them as a member of the family should be fairly shared between the cohabitants.

Lists of factors relevant to the application of each of the guiding principles, and a separate list of factors relevant to the application of all of the guiding principles are also provided; the court must have regard to the relevant factors when applying the principles.

Available remedies

Currently, the range of orders available to the court on an application for financial provision under s 28 is restricted to an order for payment of a capital sum, an order for payment of an amount in respect of the economic burden of caring for a child, and interim orders. There was consensus among consultees that these remedies are inadequate. The Commission recommends extending the range of available remedies to include property transfer orders, orders for payments for up to six months for the short-term relief of serious financial hardship resulting from cessation of cohabitation, and incidental orders.

Challenges to agreements

Currently, there is no provision in the 2006 Act for the variation or setting aside of agreements between cohabitants as to financial provision. Therefore, the court must give effect to the terms of a cohabitation agreement relating to financial provision unless it is reduced under the ordinary common law rules. Consultees supported the introduction of a provision similar to that available for spouses and civil partners under s 16 of the Family Law (Scotland) Act 1985.

The Commission has therefore recommended the introduction of a provision allowing the court to vary or set aside an agreement or any term of an agreement between cohabitants, which is wholly or partly concerned with financial provision after the end of the cohabitation, if the agreement or its term was not fair and reasonable at the time it was entered into. The Commission also recommends express provision prohibiting the making of an order for financial provision that is inconsistent with the terms of a cohabitation agreement, unless the agreement or a term of the agreement relating to financial provision is set aside or varied.

Time limit for claims

The broad consensus among consultees was that some flexibility should be introduced in relation to the time limit within which a claim for financial provision must be made. Currently, an application for financial provision under s 28 must be made within one year of the date of cessation of cohabitation. The Commission recommends that the one year time limit be retained, subject to judicial discretion to allow a late application to proceed on special cause shown, provided the application is made within a year of the expiry of the time limit. There would therefore be a two-year absolute deadline, beyond which the court would have no discretion to allow a late application to proceed.

Agreements to negotiate

During the consultation period, and in responses to the discussion paper, the view was expressed that a practical consequence of the rigidity of the current time limit for applications for financial provision is that parties are forced to raise actions, many of which will ultimately settle, in order to avoid the time bar. This, they said, amounts to a waste of court time and resources. Therefore, the introduction of a provision enabling parties to enter into a written agreement prior to raising an action, to continue negotiations for a limited period of six months with a view to settling claims for financial provision, has been recommended. Where an agreement to negotiate is entered into, the time limit for making a claim will be extended to 18 months from the date of cessation of cohabitation. The two-year backstop will continue to apply.

"The Commission has therefore recommended the introduction of a principled approach to the making of orders for financial provision"

What now?

The report and draft bill have been laid before the Scottish Parliament. It now falls to the Scottish Government to determine whether to bring the reforms into effect. The Commission's view is that the reforms, if implemented, will improve outcomes for cohabitants and their families by providing long overdue clarification of the policy aims of the legislation and the process for determining claims for financial provision, and will introduce flexibility, provide a wider range of remedies, and respect the autonomy of couples to make their own financial arrangements. J

Kate Dowdalls KC is lead commissioner on the Scottish Law Commission aspects of family law project; **Lucy Robertson** is a former legal assistant to the Scottish Law Commission

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I think it's safe to say when it comes to productivity in the workplace, we all have our issues. Interruptions to find documents, resources and general information that we use every day can often mean we spend a lot of time distracted and bouncing from one tech tool to another. We hear it all the time – law firms manually moving data between systems, constantly logging in and out, jumping from case management systems to websites, etc. Ultimately, you're dealing with a hell of a lot of admin that could, in many cases, quite easily be reduced.

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In 2022 it's almost impossible not to use different tools. Even for a business like ours, possessing the most comprehensive, all-in-one legal case management platforms in Scotland, we still can't do it all. We don't have all the tools and can't answer all the needs of every law firm. That's why we need integrations that significantly reduce the time spent on juggling separate tools. It also means your team are less tied up in manual data syncing, and your workflows are both more inclusive and more efficient.

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So, the question you've got to be asking yourself is - do you have a case management system which not only has the integrations you need, but the best version of those integrations, on a platform that you can truly make your own? If you're not using Denovo's legal software integrations there's a very good chance you are not seeing the true benefits.

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Steven Hill, Operations Director at Denovo and the person at the forefront of developing the partnership with the M&B team, said: "As legal technology evolves and businesses look to operate on hybrid working models, we're seeing more law firms in Scotland place emphasis on software and integration. Nowadays systems integrations play a fundamental role within law firms. The great work that's been done between our incredible software developers and the fantastic team at M&B facilitates communication between our platforms, where before the systems would not normally communicate.

"One of the main benefits an integration like this does is provide critical available information quickly into our CaseLoad platform. This allows the law firm to take advantage of faster and more efficient processing of orders. We are giving firms hours of time back while making solicitors and their support teams more productive. That's always been our goal and that's why we will continue working with the best organisations, like M&B, to create integrations that help the Scottish legal community."

Richard Hepburn, Managing Director of Millar & Bryce, commented: "Together with our parent, Landmark Information Group, we've been committing significant investment in evolving and upgrading our search order and production technologies, very much sharing Denovo's vision of the benefits that can be yielded from greater integration between systems. Legacy integrations with search firms' order platforms were largely based on a simple link to their online order platform, with users still needing to rekey information and transfer reports received back into case files. Our new integration with Denovo goes far beyond that, leveraging M&B's order API technology to take that pain away, reducing errors and allowing much better efficiency."

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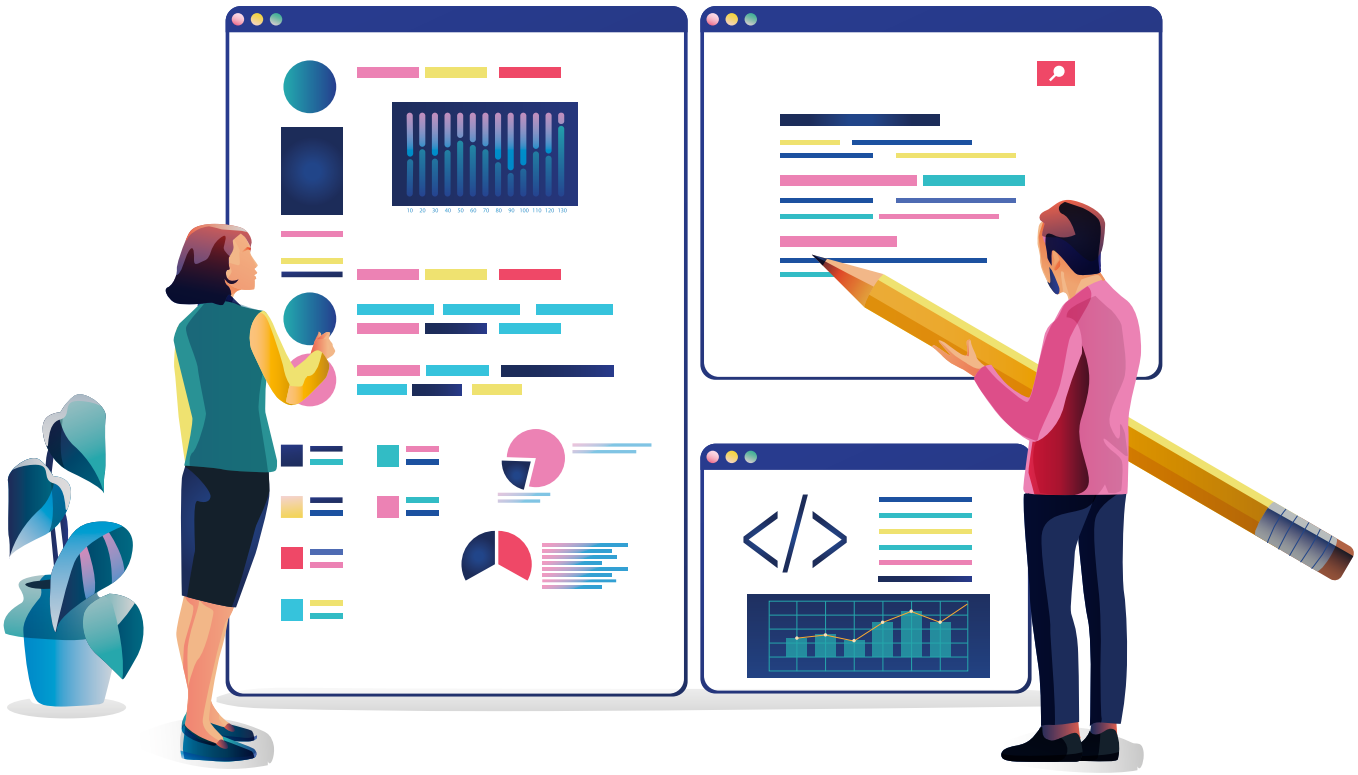

Legal tech: a focus on skills

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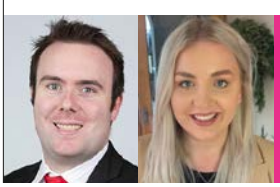
Things have changed, and the legal sector has evolved as much as any other. Whether in the form of electronic signatures, online hearings or the online submission of documents, the use of technology to solve the problems created by the pandemic has advanced at a rapid pace.

The legal sector advances

By and large, we have all adopted these new technologies: a few false starts, quite a lot of "You're on mute", but, in general, we have adapted. While the perception has been that the legal sector has been slow to embrace technology, the evidence shows that the profession continues to invest in technology (legal or otherwise).

Experience during the pandemic has shown how quickly the legal profession can adapt to technology when the need arises. What should be our learning goals to make the most of what we have invested?



Rob Marrs, head of Education, and **Rachel Steer,** CPD projects officer, Law Society of Scotland

For that investment to be fully realised, there must be a parallel commitment to technology training. Practitioners need both to have an understanding of the latest system being introduced, but also, given how fundamental technology is to the delivery of legal services, a more general understanding of how the technology works, its capabilities and limitations.

Ultimately, we use technology to provide solutions to those perennial questions: "How can we make it a better experience for the client?", or "How can we be more efficient in the way we work?" Having a better understanding of what technology can offer, and how it works for us, gives us a greater range of options when considering how best to answer these questions.

Learning goals

Those in the legal profession, and those hoping to join it, will have to learn how to use technology to help them do routine or predictable tasks, and also consider how they can make themselves more effective when it comes to doing less predictable ones (e.g. using project management methodologies etc). This shouldn't be scary, but, in reality, we know that it can be a little daunting.

Everything seems a little impersonal nowadays!

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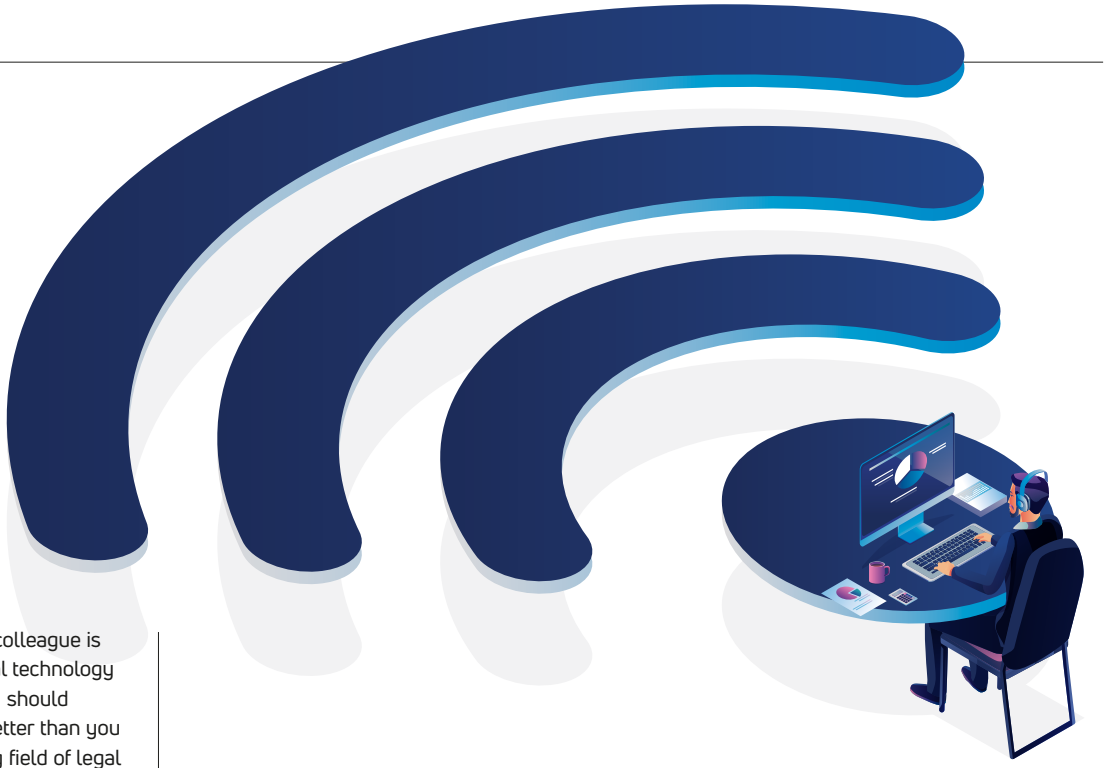

It's never comfortable when a colleague is talking about some aspect of legal technology and you have the feeling that you should probably understand it slightly better than you do. In the diverse and fast-moving field of legal technology, with no end of buzzwords, alien terms, and potential for information overload, it is easy to get lost. And the risk is that, rather than embrace something that might make your life or your client's life easier, you shy away from it and stick to the systems and processes that you are familiar with.

Even before the pandemic, great strides were being made in increasing tech skills in the legal profession. We have seen the emergence of new legal tech roles such as legal process engineer, legal analyst and legal technologist. We believe that this trend will continue and intensify over the coming years.

Similarly, the introduction of legal technology training has become more widespread. Several undergraduate LLB courses have introduced modules in legal technology, so when students become trainees, they are coming to law firms and in-house legal teams with at least a basic understanding of this area. Most DPLP courses now have a legal technology element either as a mandatory part of the course or as an elective. We are optimistic that the generation of digital natives who are qualifying now are well placed to master similar seismic changes over the coming decades.

For those already in practice, there are increasing and varying technology training options available. How many in the profession have undertaken a technology course is less certain. It is a challenge for senior management to determine what training is best to ensure greater tech skills among their colleagues – different colleagues may need different types or levels of training. It is not just a question of who in the firm should attend, but also what level the training should be pitched at.

People matter most

There's a lot of chatter about "Do lawyers need to code?" The answer is – for the vast majority of lawyers – no. Ultimately, a focus on really understanding what the people at your organisation do and how they work (and how they would like to work), and then on the processes they operate, before focusing on technology will be far more fruitful. It is more important that all employees have a more general understanding of legal technology.

"Improved communication won't solve everything, of course, but it would make a very big difference"

It is likely that everyone will need to improve a little in terms of their technology skills, but a small band of professionals will go further and have hybrid careers where they span the divide between law and technology more obviously – for instance, helping to build systems in the organisation so legal advice can be delivered in different, quicker, more efficient ways. For those individuals our accredited legal technologist status may well be of interest – this is a growing band and we hope will grow more.

People will always remain at the heart of a solicitor's business. Technology at its best can only complement the skills that solicitors and their staff can offer their clients. It is solicitors who provide advice to people at crucial times in their lives. It is solicitors who guide companies faced with opportunities or difficulties. But if technology can improve the service you offer your clients, or free up your time so you can concentrate on the advice you provide, so much the better.

Legal tech – at your own pace

Recognising the challenges of legaltech training, the Society has teamed up with Hey Legal to introduce a two-hour Legal Tech for All Lawyers Foundation Course, a new online offering designed to equip solicitors with a basic level of understanding across a wide range of legal tech concepts.

Hosted by Sam Moore, the Society's first accredited legal technologist, the course will start at the beginning by asking high-level questions such as "What is legal technology?", and "How will this change the way I operate?", before moving on to more specific questions like "What is document automation?", "Who are the biggest players in the legal tech field?", and "What on earth is a hackathon?"!

The goal of the course is to provide you with baseline knowledge. It is intentionally designed to be flexible, with each course module split into 15-minute micro-lessons, allowing attendees to complete them whenever it suits.

Find out more information about the course by emailing cpd@lawscot.org.uk

IN ASSOCIATION WITH

Clio

The new legal competitive advantage

Legal Trends Report highlights changes in lawyers' working habits, and client expectations, that mean cloud-based software provides a vital advantage

What should law firms prioritise as we move toward 2023? As new research from legal software provider Clio reveals, the answer above all else is adaptability. Ever-evolving working habits, new client expectations, and challenging market conditions mean that standing still in today's landscape is the same as going backwards.

Clio's brand-new *Legal Trends Report* shows just how profound an impact this constant change is having on law firms. It also highlights how firms can make themselves adaptable (and even antifragile) by adopting legal technology. The right solutions will allow law firms to meet both their clients' and staff's expectations – which will play a key role in helping law firms survive in what may be turbulent times ahead.

Why firms must adapt to lawyers' changing working habits

The pandemic forever changed how lawyers want to work. Indeed, the 2022 *Legal Trends Report* shows that:

- 44% of lawyers are more likely to want to work throughout the day rather than a traditional 9-to-5 schedule;
- 45% prefer meeting clients virtually;
- 49% of lawyers say they prefer to work from home.

Client expectations also continue to change

While firms must increasingly cater to their lawyers' working preferences (especially if they want to keep hold of top talent), client demands are also a paramount concern.

The *Legal Trends Report* found that:

- 35% of clients prefer virtual meetings, compared to 28% who prefer meeting in person;
- 70% of consumers want the option to pay a lawyer via a payment plan;
- 68% want to communicate with their lawyers over the weekend.

The solution? Cloud-based legal software

Cloud-based legal software plays a vital role when it comes to law firm adaptability. These tools enable seamless virtual collaboration between law firm colleagues, and between lawyers and their clients. They automate administrative work – meaning no more precious hours wasted on low-value tasks. In fact, Clio's research shows that the impact of legal software extends beyond helping lawyers fulfil their work commitments.

Lawyers using cloud-based legal software to manage their practice were:

- 60% more likely to have positive relationships with their clients;
- 44% more likely to have positive relationships with colleagues;
- 29% more likely to be happy with their professional life.

These findings are just a snippet of those contained in Clio's in-depth 2022 *Legal Trends Report*, the seventh iteration of this industry-leading publication. Based on aggregated and anonymised data from tens of thousands as well as surveys of thousands of legal professionals and consumers, it highlights some of the most pressing issues facing law firms today.

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New Year's resolution?

With 2023 coming up over the horizon, you may be inspired to go your own way and start your own law firm. If you are, it's worth taking a little time out both to plan and to look at the key decisions you have to make.

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The benefits of running your own law firm are clear: you control your own destiny, reap your own rewards and determine your work / life balance. With these come clear responsibilities...

Always remember: you are running a business.

Life in the legal world can be hectic. It's a demanding profession where day-to-day work can mean that business performance considerations can slip.

Being a great lawyer does not automatically mean you are a great business person. It's prudent to take on board the advice of professionals:

- Employ a good accountant who can take you through the key financial considerations.
- Focus on your profit and loss statement regularly.
- Get a firm grip on cashflow.
- Ease your burden by using the right practice management software.

Pay particular attention to cashflow. Businesses don't go bust due to a lack of profitability. They go bust because they can't pay the bills. You should know your precise cashflow position at the end of every working day.

Invoice regularly.

The art of maintaining positive cashflow is to invoice clients regularly. If you do this each month, or even more often, you are more likely to get paid on time and in full. Don't be afraid to use interim billing. Clients find it easier to afford and pay for your services in bite-sized chunks – and it will keep your bank manager happy. The longer you wait before sending out the bill, the less likely you are to get paid.

Market yourself professionally.

The starting point for all promotion is your website. It's your brochure, directory entry, online storefront, client care mechanism and your newsletter all rolled into one. Websites are not a one-off transaction. They require maintenance to maintain your position on Google.

That requires advice and input from web professionals who manage search engine optimisation on a daily basis and who can help you write blog articles that will generate traffic for your site.

Of course, it's not all just about e-marketing – the more traditional methods count too. Don't overlook these when developing your plan.

Top tips.

- Contact LSoS early, they have plenty of information to help your new start and will support you through the process.
- Contact your bank early as well, it can take a while to setup a new business bank account.

Invest in the right software.

Keeping track of profit and loss, cashflow and managing your client marketing, time recording and billing is easy with the right practice management software.

It pays to opt for a PMS system where accounts and case management are in a single system and you can access all the relevant financials and case information without duplication of effort.

If you are thinking about striking out on your own, good luck, take care and contact us.

0345 2020 578 or innovate@lawware.co.uk.

Mike O'Donnell. lawware V5

MITIGO CYBERSECURITY

Cybercrime: stay one jump ahead

Technology adoption creates cyber risk for the legal profession, with criminals creating new techniques all the time. David Fleming of Mitigo advises how to respond

Technology makes life easier and more efficient. But as our reliance grows, so does cyber risk. Understanding and controlling this risk is vital, as is understanding that as our technologies and behaviours develop, the criminals evolve to take advantage. Failure to identify new threats could be catastrophic.

This article will explore how technology is attacked, why today's cyber solutions might not provide protection tomorrow, and how to keep one step ahead of the bad guys.

How does the adoption of technology increase vulnerability?

Your device

As we use more technology, we increase our attack surface area. With remote working, "bring your own device", remote desktop policy, and mobile phones, we're no longer safely tucked in behind the office firewall. Cybercriminals are exploiting this increased opportunity to take over your device with techniques like malware, phishing, spyware and even calling you up (vishing).

The cloud

With the progressive shift towards cloud-based services, data is stored and accessible all over the place. Between SharePoint, OneDrive, Dropbox, email, hosted servers, and case management systems, the cloud facilitates a huge portion of your firm's matters.

There's a common misconception that working in the cloud makes you safer. This is false. It just means your risk is different. The rush to move data and applications to the cloud means firms have multiple front doors which all need to be protected. The increase in digital technology means more access to more data via more routes. Strong authentication and data loss prevention policies become increasingly important.

Automation

Arguably the best thing about modern technology is that so much is automatically done for us, so we don't have to worry about it. We expect our mobile phones to update automatically, we assume our antivirus is scanning in the background, and you might also expect that you would get an alert if someone else logged into your email account. It's brilliant when it works, but, when these systems are infiltrated, it can be months before companies become aware. It's important not to become solely reliant on the automations in place – humans are still needed. Humans can understand the risk associated with the tech and configure alerts to those who need to verify suspicious activities.

Today's cyber solutions won't last forever

Cybercrime is worth billions – by 2025 the global cybercrime industry will be worth an estimated $10.5 trillion annually. As the world tries to protect itself from attack, criminals create new sophisticated techniques to bypass security.

The two most common types of attack for law firms are email account takeover ("EAT") and ransomware.

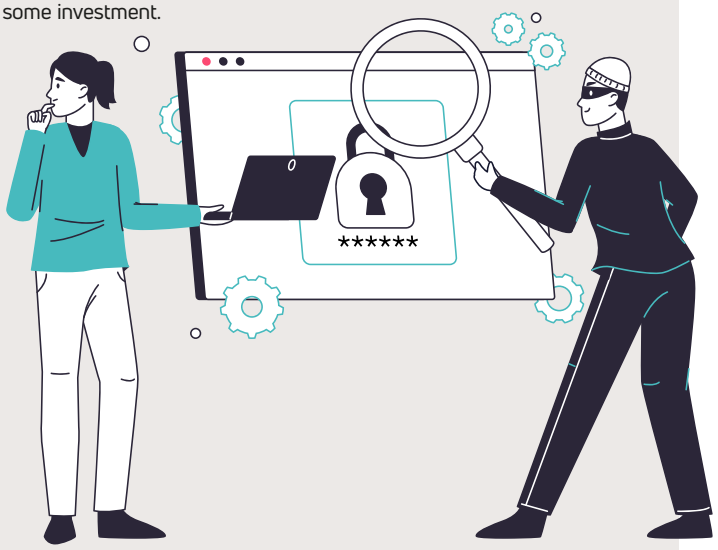
With EAT, criminals can divert payments, tricking clients into transferring money to faked accounts. Multi-factor authentication ("MFA") is a vital control against this attack, but it is already being successfully circumvented by the criminals. Their phishing attacks take you to a login page via the criminal's website, which enables them to capture the MFA code as well as your credentials, and you have literally logged them into your account.

In a ransomware attack the criminals make your systems unusable unless you pay for a code to unlock them. Investment in good backup services is a control against this, but criminals now steal your data as well as locking it, then threaten to sell it in marketplaces on the dark web unless you pay up. A backup won't help you here. Ransomware is growing faster than ever.

How to stay one step ahead

In summary, your cybersecurity strategy needs to have layers. The criminals can peel back or work around a layer or two, but the more layers in place, the harder it becomes. Train your staff, add another layer of authentication to every cloud-based account, and configure system security alerts, to name just three layers. Operate a zero-trust policy, remove unnecessary privileges, and reduce document access where possible.

Our reliance on technology isn't going away any time soon, and neither are the criminals. Preventing this risk needs some investment.



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Tenants' rights: the scales tip further

Now in force, the Cost of Living (Tenant Protection) (Scotland) Act 2022 will have a big impact on the residential tenancy sector at least into next year. Malcolm Combe outlines the new scheme

On 27 October 2022, the Cost of Living (Tenant Protection) (Scotland) Act received Royal Assent. This latest residential tenancy reform operates to restrict rent increases and narrow the circumstances for securing eviction. There is also provision regarding private sector rent adjudication. The new scheme could have a profound effect in both private and social rented sectors in the coming months.

Passed as an emergency bill, like the Coronavirus (Scotland) Acts, this new measure also makes time-limited changes. The earlier emergency provisions making previously mandatory eviction grounds discretionary (i.e. subject to a reasonableness test) have been re-enacted in the general law, as explained at Journal, August 2022, 20. The latest Act continues the trend of fortifying the tenant's position, though also incorporates some consideration for landlords.

Again, two possible time extensions are built into the scheme. The so-called rent freeze and evictions moratorium (the links are to briefings by the Scottish Parliamentary Information Centre, which adopts this terminology) are programmed to end on 31 March 2023, which failing 30 September 2023, which failing 31 March 2024 (although other dates are possible under regulations). The provisions relating to rent adjudication end on 31 March 2024.

Schedules effect the changes by amendments to the social renting regime in the Housing (Scotland) Act 2001 and the three extant private renting regimes, found in the Private Housing (Tenancies) (Scotland) Act 2016, the Housing (Scotland) Act 1988, and the Rent (Scotland) Act 1984 respectively.

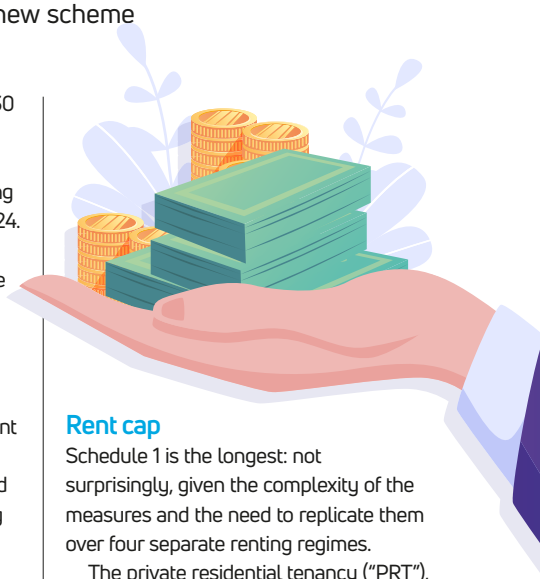
At the time of writing, reports emerged about four representative bodies seeking a legal opinion on whether this measure might amount to a breach of landlords' rights under article 1 of the First Protocol to the ECHR. No detailed consideration of this potential challenge will be made at this stage.

Background

The Act has retrospective effect from 6 September 2022, the date when the rent freeze and eviction moratorium were first aired in the Programme for Government. This means that, for example, rent increase paperwork properly served by landlords before 6 September can take effect, but papers served since then will be subject to the Act.

As explained below, there is no blanket freeze on rent or complete moratorium on evictions. Standalone eviction grounds have been created, which are in effect more rigorous existing grounds requiring a landlord to establish additional circumstances or a higher level of rent arrears than previously. Duties are placed on ministers to report on the law in action and consult with stakeholders at intervals in this law's time-limited life, including further consideration of rent control in the social sector before 31 March 2023.

Schedules 1-3 are entitled "Rent Cap", "Protection from Eviction", and "Rent Adjudication" respectively. These will now be considered in turn.



Rent cap

Schedule 1 is the longest: not surprisingly, given the complexity of the measures and the need to replicate them over four separate renting regimes.

The private residential tenancy ("PRT"), the main player in the Scottish private rented sector, will be given particular attention here. There are also changes to the social sector, student residential tenancies, and assured tenancies, which will be covered for completeness.

Curiously, the first thing sched 1 caters for is more rent increases in a 12-month-period than would normally be permitted, but only if ministers allow this by regulations. Ordinarily, PRTs can be subject to one rent increase per year, on three months' notice. This reform is a nod to pragmatism, and enables the Parliament to react to spiralling costs that might affect a landlord (discussed below).

Next, a new s 22A of the 2016 Act provides that from 6 September 2022 the landlord under a PRT may not increase the rent payable by more than the permitted rate. That rate is set at 0%, thus no rental increases are possible unless regulations substitute a different percentage. Ministers must review the permitted rate relatively soon in the social sector, but not in the private sector. Absent such regulations, any rent increase notice given on or after 6 September is of no effect – any landlord who speculatively gave such notice after reading the Programme for Government is caught by this section.

Subsequent amendments to the 2016 Act suitably constrain the rent variation provisions when the permitted rate is 0%, or modify them to (for example) stay a rent officer's hand when it comes to ordering any increase when the permitted rate is more than 0%. Another curious effect is that the scheme removes the theoretical possibility of a rent officer *reducing* the rent after a landlord seeks an increase and a referral is made. Again this appears to be a pragmatic attempt at keeping the overall scheme fair to landlords.

The permitted rate of increase is not the full story. By a new s 33A, a landlord may apply to the relevant rent officer to increase the rent in a PRT by more than the permitted rate, in order to recover up to 50% of the increase in any "prescribed property costs" incurred during the relevant period. "Prescribed property cost" is relatively tightly defined, to include: (a) interest payable in respect of a mortgage [*sic*] or standard security relating to the let property; (b) an insurance premium (other than general building and contents insurance) relating to the let property; and (c) service charges paid by the landlord for which the tenant is responsible (in whole or part). "Relevant period" means the six months immediately before the day on which the application is made.

Assuming an application is all properly documented, the rent officer can approve an increase of no more than 50% of the hike in a landlord's costs. This percentage can be increased or reduced by regulation.

Finally in relation to PRTs, the never used provisions on rent pressure zones (2016 Act, s 38) are suspended. These are not needed with this new scheme in play.

Analogous changes are made to the 1988 Act in relation to assured and short assured tenancies, also with up to 50% prescribed property cost increases allowed. No such changes were needed to the 1984 Act with its different rental regime.

In the social sector, where rent increases are comparatively less regulated, normally the only direct regulation of rent comes from s 25 of the 2001 Act. That only asks for proper consultation with tenants, and then four weeks' notice before any increased rent comes into effect. Under the new Act with its permitted rate of 0%, no rent increase will be possible. There is no comparator for prescribed property costs. The concession offered to the social sector is the required prompt review of the provisions.

The last category catered for in sched 1, the student residential tenancy, normally escapes specific regulation, being carved out from the PRT provisions of the 2016 Act, but that carve-out now serves as the basis of a definition of this sector. As with the social sector, no rent increase is possible for leases to students while the permitted rate is 0%.

Protection from eviction

Schedule 2 restricts the effectiveness of decrees for removing from 6 September 2022, including decrees obtained but not yet actioned. It applies until either (a) the expiry of six months from the day on which decree was granted, or (b) the expiry or suspension of the restriction in accordance with part 2 of the Act.

There are some exceptions. First, student residential tenancies have their own eviction grounds. Students who engage in relevant criminal or antisocial behaviour in the regulated time period can be evicted.

Next, specific grounds from existing regimes may apply, notwithstanding what has loosely been termed a moratorium. For PRTs, these grounds include: the *existing* grounds of property to be sold by lender, tenant no longer being an employee, tenant not occupying let property, criminal behaviour, antisocial behaviour, and association with a person who has a relevant conviction or engaged in antisocial behaviour; and the *new* grounds of landlord intention to sell the property, or to live in the property, in order to alleviate financial hardship, and substantial rent arrears.

While these latter grounds are technically new, they can be fairly described as existing grounds on steroids. The existing grounds relating to a landlord's plans for the property, already subject to a reasonableness test, are now made subject to a financial hardship criterion, properly evidenced. Evidence tending to support such grounds could include an affidavit from the landlord, or letter of advice from an approved money adviser, local authority debt advice service, independent financial adviser or chartered accountant.

Being in rent arrears for three or more months would normally be an eviction ground. The Act now asks for "substantial rent arrears", defined as a situation where cumulative arrears equate to, or exceed, the equivalent of six months' rent when notice to leave is given to the tenant.

In the other private sector regimes similar changes are made. The same is largely true in the social sector, although with a set figure for substantial rent arrears: £2,250.

Schedule 2 concludes with an amendment to the unlawful eviction regime in the 1988 Act. Currently the quantum of statutory damages is the difference between the value of the landlord's interest with the "residential occupier" in occupation and the value with vacant possession at the time occupation ceased. Under the new formula, an award is to be made of between three and 36 months' rent, the court or tribunal taking into account the manner of the unlawful eviction and the impact on the tenant, with relevant regulatory bodies and the police being informed of any award. The separate regime that can apply when a tenant, or tribunal, is misled into thinking that a PRT should be brought to an end when in fact the landlord was not entitled to recover possession, with its penalty of up to six months' rent, has not been amended.

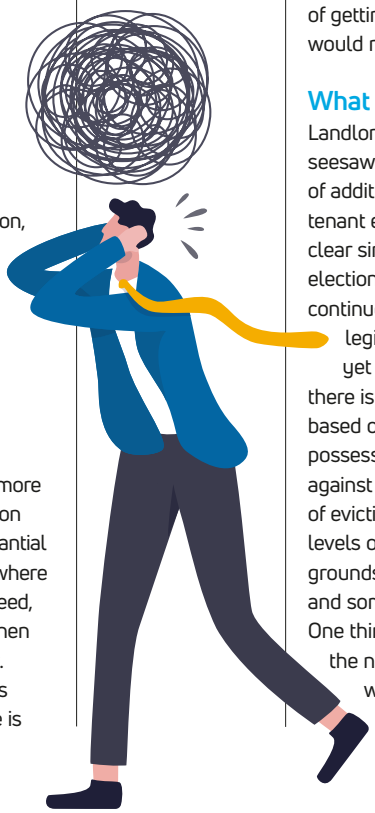
Malcolm Combe is a senior lecturer in law at the University of Strathclyde.
See also Viewpoints, p 6 of this issue.

Rent adjudication

The final schedule provides for regulations relating to the determination of private sector rents under the 2016 and 1988 Acts, which may set out matters to be taken into account, matters to be disregarded, and assumptions to be made. They may also end the possibility of a tenant challenging a notice and then finding that the adjudicated rent is higher than the landlord asked for in the first place. That seems sensible, although it might also lead to landlords aiming high in a notice, knowing there is no chance of getting anything higher. Rent setters would need to be wise to this.

What next?

Landlord and tenant rights have been seesawing for many years. The prospect of additional weight being added to the tenant end of that seesaw has been clear since the last Scottish Parliament election. This new, temporary, Act continues that trend; more permanent legislation about rent control may yet be swapped into position. While there is a possible ECHR challenge based on peaceful enjoyment of possessions, the Act contains safeguards against challenge, such as the possibility of eviction proceedings with certain levels of arrears, the financial hardship grounds for recovery of possession, and some possible increases in rent. One thing is certain, though: for at least the next few months, this statute will weigh heavily in the residential tenancy sector.



Back in the real world

Dorothy Bain KC

The Law Society of Scotland's first in-person Annual Conference for three years took place last month, with the rule of law featuring prominently in the presentations. Peter Nicholson reports

"The rule of law cannot be upheld, where, as a society, we cannot secure justice for certain groups." So declared Lord Advocate Dorothy Bain KC, giving the keynote address at the opening of the Society's 2022 Annual Conference, which returned on 21 October to the Edinburgh International Conference Centre.

Delegates retained the option to join online, which has been the only way to hold the event for the past two years, but yes, it did feel very good to be meeting people face to face again after so long facing a screen.

Gender-based violence

Taking as her title "Upholding the rule of law: Achieving fairness in the justice system", the Lord Advocate devoted much of her talk to the related themes of violence against women and girls, and historical child abuse – which together mean "a huge number of people" who have not experienced justice.

With sexual violence now accounting for over 70% of High Court casework, she recognised both the "severe and lasting impact" on victims and their families, and the continuing concerns about the way such cases are prosecuted, including the low conviction rate in trials for rape and attempted rape (51%, compared to 91% for trials overall).

These concerns should be "a clarion call to the profession", she continued. "As head of the system of prosecution in Scotland, I am keenly aware of the need to transform the way we prosecute sexual offences and domestic abuse. Dealing with these cases is the challenge of our generation."

Bain proceeded to describe several Crown Office initiatives, including the current review by Susanne Tanner KC of how prosecutors deal with reports of sexual offences; increased specialist training; work on developing a "single point of contact" approach to help support victims; and piloting videorecorded interviews of rape complainers, and forensic medical examinations by experienced nurses.

On the wider front, the Scottish Government is taking forward various recommendations by Lady Dorrian (proposals regarding judge-only trials would however require "extensive consultation and careful consideration"); non-means-tested legal aid is available for complainers if recovery is sought of sensitive personal records – something Bain wanted to highlight as she believed some lawyers remain unaware of this; consultation is coming on the Kennedy report on misogyny offences; and Police Scotland is taking a multi-agency approach to violence against women.

Other rule of law issues

Regarding historic child abuse, the Lord Advocate stated: "As with violence against women, the widespread and consistent denial of justice to those who were abused, is a failure to uphold the rule of law." The true extent of the problem was only coming to light with the work of the Scottish Child Abuse Inquiry, in response to which COPFS was reviewing cases previously reported and, where appropriate, instructing specialist teams within Police Scotland to investigate further.

Referring also to the "public health emergency" of drug deaths, she stated that the rule of law required that law and the criminal justice system serve every member of society. Changing understanding of crime and its causes has "underlined the need to find innovative solutions": hence her revision to guidelines on the police warning scheme, to allow the police to take decisions in relation to some types of offending. Prosecutors will regularly review procedures and

continuously seek innovative solutions to provide justice.

Bain's concluding passage focused on the role of lawyers in upholding the law. She recognised both the commitment of her own service and "how incredibly committed defence agents and defence counsel are to providing progressive and humane justice by ensuring the respect of the most basic of rights – the right to a fair trial".

Taking a global perspective, she added: "As the situation unfolds in Ukraine, it has never been more important to adhere to the international rules-based order, to the rule of law. Now more than ever, we need strong institutions both in Scotland and abroad, which uphold the rule of law. And crucially, we need lawyers and citizens to hold those institutions to account." The Ministerial Code was mentioned as setting out the overarching duty to comply with the law, including international obligations.

Returning to her main theme of the justice system delivering for women and girls, the Lord Advocate acknowledged that society as a whole had to address the violence problem, but added: "I think the legal profession itself has a crucial role to play. As lawyers, we are perhaps most well-versed in the principles of law, justice and fairness. That is why we must be at the forefront of the debate on new and innovative models to achieve justice in both our legislation and in our courts. Accepting the status quo is no longer an option."

Ethical dimension

The first panel session was expansively titled "Professional Ethics, the Rule of Law and International Conflict". Advocate Frances McMenamin KC and former International Criminal Court judge Sir Howard Morrison KC took up the challenge.

"The most important asset any lawyer has is integrity", was McMenamin's opening shot. Honesty cannot be emphasised enough: if you lose your reputation, you will be lucky to get it back – and if you can't be trusted by other professionals, what good is that to the client?

Turning to the rule of law, she stressed its role in ensuring that government is not above the law – and the importance of an independent judiciary upholding it. She had a dig too at the possible removal of juries from a limited category of sexual offence cases: could we still ensure fair play for all?

Morrison's perspective was that fundamental to the rule of law is not just the mechanism, but the fairness of proceedings. The ICC had to counter the view held by some that it would only be judged a success if it had a high conviction rate. Its cases attracted great publicity, and nothing less than a fair and proper investigation would do.

Asked how we could promote to the wider public the importance of the rule of law, both agreed this was difficult. McMenamin thought

Diane McGiffen celebrates meeting in person again

"As lawyers, we are perhaps most well-versed in the principles of law, justice and fairness"

it really a PR exercise and it was important for the courts to be open again. Morrison described defence counsel's duties to the client, the court and the rule of law as "joined at the hip". Prosecutors and judges also had to ensure a fair trial. (As an aside, he let it slip that as an outsider he would be sorry to see the end of the not proven verdict.)

Trainee talk

What might we learn from the second panel session about trainees and training? Large firms and organisations recognise the "multidimensional" nature of a good traineeship, helping create a sense of belonging in the trainee and an awareness of the business's ethos, and its commercial drivers, along with one's own personal skills and the need to ask questions and be receptive to feedback. And they offer further opportunities, for example taking part in specific interest groups in the organisation. One business formulates its package as a "delta [three cornered] model" of practice, process and people skills.

Another speaker highlighted the "real differences" in how generations learn, and interact with each other – it's a challenge for more senior people to keep up with what works for today's emerging lawyers! Though sometimes their expectations do have to be managed, it was generally felt that the calibre of trainees is very high today, candidates often having previous commercial or paralegal experience. Another point: hybrid learning is here to stay, whether or not we have yet fully discovered its effects, but supervision remains critical.

Wellbeing in the law?

"Wellbeing and its compatibility with working in the law" was the somewhat disconcerting title of the final main session, a panel discussion featuring two private practice lawyers (at different career stages) and a procurator fiscal. Were they really suggesting that the two are incompatible? Fortunately no, but the team did set out to scotch a few myths, which presumably enjoy some currency.

First, "We all need to be more resilient to have a successful career in law." If that means acceptance of long hours, it seems today's new lawyers are more likely to dig their heels in, which the panel reckoned was a good thing. So is the fact that students are perhaps more prepared to share with someone if they feel they are struggling: it shows insight, and opens up the possibility of support. We should also be thinking in terms of organisational as well as individual resilience, meaning the ability to reach out and offer support.

Myth 2 was "Solicitors don't make good natural managers and leaders." Why shouldn't they? "Management in its simplest form is about the use of resources in order to achieve objectives", it was said. Putting yourself in the other person's shoes works in the management as well as the legal context. Honesty is crucial – you need to be able to have an honest conversation with those you are managing. That builds trust; and you need to be able to trust them too. (Don't overlook the importance of clear instructions either.)

The final myth challenged was "Client delivery and wellbeing can't go hand in hand." Sure, client demands can lead to long days; and the billable hour "doesn't help". But we all need the ability to stop when we need to. And if the boundaries are set by a more senior person, they ought to be someone who will take care of the team. That should include setting rules about out of hours contacts, otherwise tech becomes the enemy.

"Nothing we have talked about here is expensive or complicated to put in place", session chair Olivia Moore commented in concluding.

More...

These were only the main sessions. Half a dozen breakouts through the day covered topics ranging from neurodiversity, to successful regulation, to using strategic litigation to further the rule of law. Space does not permit further coverage, except that you can read about the in-house session on p 48.

"The rule of law has been put centre stage, and we must all work to uphold it", the Society's chief executive Diane McGiffen declared on winding up the conference. Because, she might have added, it is constantly under threat.

Charity law: all change?

The Scottish Government has promised legislation following its Scottish charity law review, through which wider issues were also raised for consideration. Alan Eccles reviews these, along with the latest judicial guidance on charity investments

A year ago we had COP26 in Glasgow and climate change was top of the agenda. We were also reflecting on the Programme for Government, which gave an indication for forward momentum on the Scottish charity law review, but not much more detail. We were still in the teeth of the pandemic restrictions, which focused the mind on governance and conduct of charity business. Fast-forward a year, and there have been a number of charity law and governance developments, including the announcement of forthcoming legislative reform. Here we consider some of these.

Alan Eccles, partner, Bannatyne Kirkwood France & Co

Regulation and supervision

The latest Programme for Government says there will be a Charities (Regulation) Bill, which "aims to strengthen and update the current legislative framework provided by the Charities and Trustee Investment (Scotland) Act 2005. The bill will increase transparency and accountability and maintain public trust and confidence in Scotland's vital charity sector". So, what might it include? We can expect that the bill will primarily address topics covered in the Scottish charity law review undertaken over the last few years.

Matters consulted on covered:

- publication of annual reports and accounts, in full and unredacted, for all charities on the Scottish Charity Register;
- an internal database and external register of charity trustees, to enable OSCR to hold key information on trustees and for some information to be publicly available (akin to Companies House or the Charity Commission). It might be that data requirements mean there is further finessing on the implementation of elements of these. It will also be no mean feat to capture and keep updated information on the trustees of around 25,000 charities;
- updated rules on disqualification of charity trustees *and* individuals employed in senior management positions in charities;
- a power for OSCR to issue *positive* directions to charities. Currently it can only issue *negative* directions telling a charity not to do certain things. This will be seen as untying OSCR's hands on some matters. There would be connected protections for those who could be subject to such directions;
- a power to remove from the Scottish Charity Register charities that persistently fail to submit annual reports and accounts;
- requiring Scottish registered charities to have and continue to have a connection with Scotland. To date, a charity with no connection whatsoever with Scotland can obtain Scottish registration. Some might be doing that to support regulation. In other cases, the reason will have been less clear;
- the ability to make inquiries into the *former* charity trustees of bodies which have ceased to exist and bodies which are no longer charities;
- creating a new requirement that a de-registered charity's assets must be used not only to further charitable purposes but also to meet the public benefit test. This avoids a potential quirk that charitable funds could be used in a way that sat outside the 2005 Act's charity test, through the charity taking the step to de-register, a step which OSCR cannot ordinarily prevent happening;
- updates to OSCR's powers to gather information when making inquiries;
- reform to give charities established under private legislation etc a more streamlined process for updating their governance and constitutions, it is to be hoped through an OSCR-only process instead of requiring Holyrood procedure, as far as charity law matters are concerned.

"We can expect that the bill will primarily address topics covered in the Scottish charity law review undertaken over the last few years"

More fundamentally?

For many, however, the most eagerly awaited potential parts of the bill are matters that were not initially subject to consultation. Many respondents raised wider issues that could be in need of reform. These included a rethink of the fundamentals of the Scottish charity test; a renewed look at what "public

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These services help turn an empty shell into 'my home', two small words our service users will not have used for a long time.

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benefit" means; the role and regulation of social enterprise; payment and remuneration for trustees; the process for existing charities to incorporate (often to become a SCIO); updated rules on SCIO member duties (member duties in the context of charitable companies having been considered by the Supreme Court: see Journal, August 2020, online article); winding-up procedures; reducing the risk of "lost legacies" in wills due to changes at charities (see Journal, November 2021, 28); the interaction between rules and regulatory requirements across UK jurisdictions and regulators; developments (on a statutory footing) of the notifiable events framework; and whether trustee duties are focused on acting in the interest of the charity (as an entity) or its underlying charitable purposes.

The Law Society of Scotland's response is one which considered wider areas for reform. Those involved with charities will be awaiting with interest to see the published bill.

In addition to the Charities (Regulation) Bill, some charities will also be looking out for the Trusts and Succession Bill noted in the Programme for Government. Charities set up as trusts would then be subject to the new statutory framework for trusts. Beyond the general, there will be specific points for these charities to consider, such as any updated rules on accumulation of income, a rule which does not sit well for charities as it dictates how charity trustees spend their funds.

"For charities, trustees have been grappling with interaction of financial and ethical matters for some time"

Trusts make up a tiny proportion of new charities. Charities that are trusts should be considering whether the trust remains the right fit for them, or a change (most likely to a SCIO) would be appropriate.

Investments: planet before profit?

Everything seems to be about ESG now. Environmental, social and governance matters are front and centre of many initiatives – and some advertising and marketing, leading to issues with "greenwashing". For charities, trustees have been grappling with interaction of financial and ethical matters for some time.

While it is a wider topic, ethical issues have often been viewed through the prism of trustee investment duties. The recent decision in *Butler-Sloss v Charity Commission for England & Wales* [2022] EWHC 974 (Ch) attracted much attention. There, the court accepted the approach a charity took in adopting an environmental focused investment policy. It is an English case dealing with an English charitable trust, and different considerations apply to Scottish charities (trusts or otherwise). But it gave an opportunity to reflect on the Scottish position.

Butler-Sloss considered the well known case of *Harries v Church Commissioners for England* [1992] 1 WLR 1241 (the "*Bishop of Oxford* case"), and set out an approach trustees should adopt when considering these matters. Very briefly, the court's starting point was the charity's constitution, proceeding to a focus on (1) having regard to the purposes of the charity, and (2) considering and balancing carefully the impact of all relevant factors to the charity (pure financial return and otherwise).

It seems to be an approach which sits well with the duties and expectations of Scottish charity trustees, the order of the day being purposes-led decision-making based on care and diligence. In many ways, from a Scottish perspective, *Butler-Sloss* confirms how trustees should already be tackling such matters, as opposed to offering a revolutionary moment in trustee investment duties and decision-making.

Saying that, the *Butler-Sloss* formulation does appear to take a positive and proactive view. The *Bishop of Oxford* schematic was couched in negative terms such as conflicts with purposes or discouraging donations: you needed to find a negative reason to then base a decision to invest in an ethical manner. The approach in this new

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They also proudly conduct thousands of funerals annually that celebrate and reflect lives lived in a non-religious way. It is very comforting for families to receive a ceremony that truly reflects their loved one, rather than an impersonal service.

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case is more rounded and looks at the overall formulation of an investment policy.

Its methodology seems to attempt to empower charity trustees to make decisions that they consider are right for the charity and its purposes. And it emphasises that trustees need to go through a full and proper consideration of matters when making decisions. Investments might be an important example of trustee decision-making, but that basic formula of purposes plus duties would seem to underpin all trustee decisions.

We very much agree with *Butler-Sloss* that a charity's governing document is the place to start. A charity's constitution is central to its governance. One reason for *Butler-Sloss* arising was the perceived ambiguous nature of the underlying law in this area. To avoid that ambiguity, a charity could have a constitution which expressly allows it to take into account wider ethical and societal factors across all decision-making (an "ethical constitution", if you like). This will help provide a clearer legal basis to support such an approach.

While not introducing anything that seems overly novel, *Butler-Sloss* is a welcome opportunity to reflect on ethical decision-making and provide some greater clarity on the trustee approach to policy.

Good governance and good meetings

The pandemic put in sharp focus the running of meetings and governance: positive and effective working in an adverse situation. To help with governance, there has been for a number of years the Scottish Governance Code for the Third Sector, emanating from the Scottish Third Sector Governance Forum. As the name suggests, it is designed to be useful for all third sector bodies, including charities. The code features five core principles: purposes, leadership, board behaviour, control and effectiveness. This year saw a consultation on an update to the code, an opportunity to consider any developments to support robust and effective governance. One area covered was the place of an additional specific core principle on diversity and inclusion.

The code is a valuable document to guide charities' approach to governance. Many charities build it into codes of conduct or trustee handbooks. The topics covered provide a reminder of the blend of high-level or strategic matters, technical legal governance points, and how board members and others work together.

If charity boards wish a live example of how not applying the core principles of governance can cause issues, the infamous Handforth Parish Council Zoom meeting is a good port of call. The event underlined the importance of legal clarity over the basis of conducting business (the "Does Jackie Weaver have authority?" point), the effectiveness of output from that business, and the role of *how* the business is conducted – more a board interrelationship-based matter.

The last point is perhaps less technical and structural, but one which is fundamental to successful working. The code features (under "Board behaviour") the place of listening to each other, respecting roles and creating an environment to consider different, and even conflicting, views. In that we would also suggest basic politeness and manners as in themselves a good governance indicator. Returning to Handforth, it started with a technical point on authority and then, it seems, through a less than positive handling of the committee member relationship, an environment was created where effective outcomes were less likely to be achieved. Such situations also underline the key role of the chair of a meeting.

The code is a very worthwhile read. It offers a reminder of a mix of points that help governance, and more importantly help produce good work and impact. We look forward to output from the consultation exercise.

All change?

New legislation will provide some changes. In other areas, there is perhaps greater clarity being offered for trustees undertaking their work, without strict change. On governance, it is always a case of striving for change that has positive outcomes for the charity's activities. With that, the law can assist.

Music helps dementia

Playlist for Life is a national dementia charity that provides vital support to families living with dementia by using music to improve their quality of life.

Dementia is one of the biggest public health issues of our time. 900,000 people live with dementia in the UK and that number is growing rapidly. Currently, there is no cure for dementia.

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Playlist for Life is a charity that operates UK-wide and is registered as a SCIO at Unit 419, The Pentagon Centre, 36 Washington Street, Glasgow G3 8AZ. Reg no: SC044072

Muirfield Riding Therapy

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Muirfield Riding Therapy (MRT), a member group of RDA UK, provides pioneering equine facilitated therapy, involving activities with horses to promote our participants' physical and mental health. The East Lothian based Centre is volunteer-led and self-funded. Sessions are free to ensure they are accessible to all.

Our service is in demand now more than ever with both adult and children's waiting lists and an increase in mental health enquiries. We continue to develop innovative ways of including people with various and complex mental and physical disabilities. Our NHS partnership service makes use of our Mechanical Horse to assess children before they get on a live horse, ensuring they get the maximum benefit for their individual condition.

Our Quiet Corner was launched during the pandemic, aimed at people who are unable to ride, allowing them to enjoy the benefits of bonding with our special ponies. We're now expanding our mental health programme using this approach to people living with PTSD.

Over three decades, thanks to our incredible community of specially trained volunteers and ponies, physiotherapists, occupational therapists, families and supporters, we can now accommodate 120 participants each week in purpose-built Indoor facilities. Together, we can offer the best therapeutic benefit.

Fiona Thompson, Senior Associate at Dickson Minto, has volunteered and coached our Teens & Young Adult session for 14 years. A member of our Board, her Dickson Minto colleagues have supported MRT in many ways from providing funding, to building show jumping courses.

Board member Anna Holland started volunteering in 2001. She coached our Saturday session while working at Shepherd and Wedderburn. Anna has now moved to a more commercially focussed role at Northland Project Management allowing her to balance work, family life and volunteering.

Dorothy Kellas, Partner at Gilson Gray, also volunteers, "The participants have taught me so much and it is amazing to see their progress." Gilson Gray were sponsors, and winners, of our Charity Golf Day 2022 at Renaissance.

Thank you to all our friends within the Law Society, who also include sponsors of our annual Summer Horse Show fundraiser, Paris Steele, Simpson & Marwick and Garden Stirling Burnet.

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Briefings

Civil Court

CHARLES HENNESSY, RETIRED SOLICITOR ADVOCATE, PROFESSOR AND CIVIL PROCEDURE EXPERT

The range of cases decided in the sheriff courts lately is a reminder of just how wide their jurisdiction is. Recent examples include an appeal about a debt arrangement scheme, divorces with residence and financial issues, applications under the Adults with Incapacity Act and the Housing (Scotland) Act, a claim under the Equality Act, personal injury claims, a multiplepoinding, and a claim involving allegations of fraud, facility and circumvention. Although individual cases may not call for much comment here, the variety strikes me as quite noteworthy in itself.

You may also note that Latin phrases feature in a few of the cases. What will happen to them when we all have to express ourselves in simple English? "*Quis scit?*" – as they used to say in the bar common room at Glasgow Sheriff Court.

Proofs, 2022 style

In *Gacek v Gacek* [2022] SC ABE 22 (18 August 2022), the court heard a preliminary proof to determine the relevant date in terms of s 10(3) of the Family Law (Scotland) Act 1985. It is interesting to note how evidence was heard. The proof was conducted virtually via WebEx. The evidence consisted of affidavit evidence from the parties and sworn translated statements from the pursuer's sister and niece. Each adopted their affidavits or statements as their evidence in chief. Additional oral evidence was led from all four, some through an interpreter. No shorthand writer had been booked; the sheriff instructed the recording of evidence using the WebEx functionality. Connection and sound difficulties were encountered for part of the proof; the sheriff requested that the recording covering that period be sent to him before he prepared his judgment. In addition, the parties were ordained to draft written submissions, exchange them, revise them if appropriate, and then lodge them with the court.

Clubs: title to sue

Anyone involved in an action for or against a club and/or its members will be interested in the decision in *Club Los Claveles v First National Trust Co* [2022] CSIH 35 (18 August 2022), taken in conjunction with an earlier decision in the case, reported at 2020 SC 504. Guidance is also available in Macphail, para 4.122.

The action ran in the name of the club and "three members of the committee… as representing the club and as individuals". The background is complex, but one issue before the court was whether, in terms of the club's constitution, there was a validly constituted committee with appropriate authority to do certain things. The defenders challenged the pursuers' title to sue. The Inner House rejected their argument, Lord Doherty dissenting.

All the relevant cases are cited in the opinions given, which merit detailed reading. It was noted that the situation in sheriff court actions is slightly different from the Court of Session. On the particular point raised, pragmatism seems to have won through in the end, the Lord President endorsing the approach that "when tackling problems which arise with rules and resolutions [of an unincorporated association], general concepts of reasonableness, fairness and common sense [should] be given more than their usual weight… In other words, allowances should be made for some play in the joints".

Ex turpi causa non oritur actio

A Latin maxim always adds a bit of gravitas, I think, and in *DD v NHS Fife Health Board* [2022] SAC (Civ) 27 (20 September 2022), the SAC revisited one of the classics. The pursuer sought damages for allegedly negligent medical treatment affecting his mental health, claiming that, as a consequence, he had committed certain crimes to which he had pled guilty. Proof before answer was allowed by the sheriff, who deleted the averments about criminal behaviour, agreeing with the defender's submission that the pursuer could not recover damages arising from his criminal conduct, in accordance with the maxim. The SAC upheld the decision.

It is interesting to note the SAC's justification: "It seems to us that the major public policy issues referred to… before the sheriff are relevant. That involves inconsistency between judgments of the criminal courts and the civil courts. As has been pointed out in a number of the authorities, the criminal in such a case as this becomes a pursuer. Having pled guilty before a criminal court, the pursuer now seeks to recover damages from another party for conduct for which he has accepted responsibility before a criminal court. It involves opening up matters which have already been decided. That does result in an undermining of confidence in the law."

Expenses: reasonable conduct

In *Kirkwood v Thelem Assurances* [2022] CSOH 53 (10 August 2022), Lord Menzies had to consider a note of objections to the auditor's ruling on a judicial account of expenses. His decision will have caused more than a ripple of interest among claimants' lawyers on both sides of the border. The pursuer, a Scottish resident, was knocked down by a French motorist in France and suffered apparently quite serious injuries. She raised an action in the Court of Session. She instructed an English firm ("IM") to conduct the litigation; they used a Scottish firm

("B") to attend to procedural matters. The action settled and the defenders were found liable in expenses on a party/party basis. B lodged an account in the sum of £260,629.11, comprising their own fees of £8,671.57 plus VAT of £1,734.29, and outlays of £250,223.35, of which all but £46 related to IM's account, prepared on the English equivalent of the agent and client basis. The auditor determined that, in terms of RCS, rule 42.10, it was not reasonable for conducting the cause in a proper manner to instruct foreign solicitors. He taxed B's account in the total sum of £136,783.20, disallowing IM's charges.

Lord Menzies upheld this decision. "In the exercise of [the auditor's] wide discretion, he took the view on the preliminary point of objection that the charges of English solicitors did not meet the test in rule of court 42.10(1), which was the relevant test for the purposes of this action. The rule provides that: 'Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed.'"

He approved the auditor's observations that it was not immediately apparent that it was reasonable for conducting the cause in a proper manner that the pursuer instruct English solicitors. She was entitled to, but it did not follow that the expense should fall on the defenders. The auditor was "not persuaded that there was anything gained in respect of the specialism of the English agents that was not readily available with a number of Scottish based agents".

Pleadings

The second report of the SCJC on the new civil procedure rules makes certain recommendations about the form and structure of written pleadings, and outlaws "traditional pleadings" for civil cases. I suggest however that the real problem is "not very good" pleadings, and these exist whether they are in a traditional language and form or not. While nitpicking about semantics, style and format of pleadings is to be discouraged, experienced practitioners appreciate that there are real advantages to the court, and all parties, in requiring parties to set out their respective positions intelligibly in writing.

A few recent cases might help to underline this point. First, although the English system is much less formal than ours (more "modern" if you like), that does not mean they have no pleadings problems. See, for example the recent case of *HXA v Surrey County Council* [2022] EWCA Civ 1196, in which the Court of Appeal felt bound to record "that the task facing this court, and I am sure the courts below, has been hindered by the manner in which both claims have been pleaded". See the full decision for details of the inadequacies of the particulars of claim.

Similarly, in commercial actions in Scotland where the parties are required to focus their dispute pre-litigation and encouraged to plead in a "modern" way during the litigation itself, that is no guarantee of clarity and concision. In *CSG Commercial v AJ Capital Partners* [2022] CSOH 60 (30 August 2022), the pursuers claimed certain sums from the defenders for fees and expenses allegedly arising out of arrangements for acquiring commercial properties in Scotland. Aspects of the claim were described by Lord Braid as "nebulous", and he commented: "The fundamental problem with the pursuer's case is not that its pleadings are brief but that it invokes a number of different, and in some respects contradictory, legal principles without nailing its colours to any particular mast... These criticisms are not tempered by the fact that the action is a commercial action. If anything they are exacerbated, in that by the time a commercial action reaches debate, the court is entitled to expect that the issues will have been properly focused and analysed, and can be readily understood, or at least gleaned, from the pleadings."

While struggling to identify the legal basis of any claim, he did not dismiss the action entirely, but observed: "beneath the muddy waters of its present pleadings there may be lurking the basis of a legally sound case based upon contract". I think he showed remarkable restraint in permitting the pursuers to have another go at clearing those muddy waters.

Another commercial action where parties and court conducted a microscopic search of the pleadings to try and identify a coherent case

"Although the English system is much less formal than ours... that does not mean they have no pleadings problems"

can be seen in the debate in *SSE Energy Supply v Stag Hotel* [2022] CSOH 54 (10 August 2022). The pursuers sought payment for electricity supplied. The defenders contended that the meter on the premises did not function properly, was not properly calibrated, and gave grossly excessive readings. They made no averment about what was actually wrong with the meter. The pursuers contended that the defences were irrelevant and lacking in specification.

There was discussion of another Latin maxim, *omnia praesumuntur rite et solemniter acta esse* (i.e. a presumption that everything has been done validly and in accordance with the necessary formalities – a principle which has been applied to circumstances including the normal functioning of mechanical instruments, devices and tools), and what effect that might have on the interpretation of the pleadings. Lord Clark rejected the argument that the pleaded defence was irrelevant (but only just), and made it clear that positive evidence that the defenders could lead about any defect in the meter would be severely restricted by the pleadings.

On a separate point, in the course of the debate, the defender referred to affidavits by two of their witnesses as being pertinent to the issue of specification. Lord Clark said: "While in commercial actions there can be circumstances in which sufficient specification is given in an affidavit or witness statement, the broad principle of the need for fair notice in the pleadings remains in place." Hopefully, those circumstances will be few and far between, lest anyone is encouraged to think that phrases plucked out of a meandering witness statement or affidavit might be allowed to fill in the gaps.

Personal injury pleadings

Personal injury actions are worth considering in this same context because, of course, their rules reflect a less traditional culture and include a more "modern" form of pleadings. In *Fenwick v Dundas* [2022] CSOH 62 (7 September 2022) the pursuers were window cleaners who fell and suffered serious injuries when they were working at a block of flats of which the three defenders were proprietors. In broad terms it was suggested that there was some defect in the outside fabric of the building. They raised an action under chapter 43. RCS, rule 43.2 requires the pursuers to annex to the summons a brief statement containing averments relating only to "those facts necessary to establish the claim". The defenders debated the pursuers' pleadings and made very detailed submissions arguing for dismissal. Lord Menzies agreed that there were "several gaps" in the pursuers' pleadings, but the change of culture in the PI rules meant that the many issues raised "can only be properly resolved after the evidence has been led".

While the PI approach enables a pursuer to get to proof more easily, it may not necessarily benefit them overall. Lord Menzies observed that the "gaps... may cause difficulties for the pursuers at proof". Furthermore, the pursuers' case based on *res ipsa loquitur* was excluded from probation: "Where there are possible explanations for an accident which do not infer negligence on the part of defenders, I do not consider that the pursuer can rely on the maxim." He also excluded other averments about the history and condition of similar neighbouring flats, which he felt might add to the length of the proof and cause unnecessary additional expense including the need to instruct experts, with no clear explanation of why it might have any bearing on the issues relating to the pursuers' accident. So perhaps the defenders did ultimately achieve something from their traditional debate on these pleadings.

Clinical negligence

SD v Grampian Health Board [2022] CSOH 63 (7 September 2022) was a very sad and difficult action for clinical negligence in which the pursuer was unsuccessful. There were allegations of negligence against midwives, doctors and an obstetric registrar. The claim arose from the birth of the pursuer's son with cerebral palsy in 2008. The proof took place 14 years later. It was observed by Lady Wise that none of the witnesses had any direct recollection of events, which is hardly surprising. The proof was conducted over five weeks, clearly with considerable skill and sensitivity on both sides. In the 87 page judgment, the complex evidence of fact and opinion was meticulously analysed and assessed. All of the legal professionals must be commended for the way in which the case was

dealt with, but I cannot help thinking that there must be another – and better – way to try and resolve these types of claim.

Interim damages

In *Murphy v Dumbia (UK) t/a Highland Meats* [2022] CSOH 65 (9 September 2022), the pursuer had already received a voluntary interim payment of £40,000 and interim damages of £10,000 in April 2022, but in September 2022 moved for a further interim award of £30,000 in terms of RCS, rule 43.11. Lord Lake was satisfied that such an award, taken with the earlier payments, would not exceed a reasonable proportion of what the pursuer would ultimately be likely to recover, but refused the motion on the basis that rule 43.11(6) only permits a subsequent motion where there has been a "change of circumstances". The intention of the rule was to require a change that was "material and directly relevant to the key issues", which was not the case here.

Proving the tenor

I will finish with one for the geeks. Section 38(2)(h) of the Courts Reform (Scotland) Act 2014 gave the sheriff court jurisdiction in actions for proving the tenor of a document. *Carswell v Skelton* [2022] SAC (Civ) 28 (28 September 2022) was an appeal which, *inter alia*, raised this issue (among other procedural factors which it is not necessary to go into). During the appeal it was noted that each party had misunderstood, for different reasons, the effect of an action of proving the tenor. The court explained the correct position, adding some guidance about how such actions should be framed. "A crave seeking to prove the tenor should so far as possible reproduce in its entirety the document to be proved, avoiding any lack of clarity in the decree or extract. *Begbie v Fell* (1822) 1 S 391 remains authority for the proposition that the terms of the deed should be incorporated in the crave; the decree and subsequent extract, which takes the place of the deed, will require to be a stand-alone document which *in gremio* narrates the tenor of the deed: *RW v AW* [2022] SC GLW 2; Macphail (4th ed), para 20-22." J

Employment

LAURA MORRISON, MANAGING PRACTICE DEVELOPMENT LAWYER, DENTONS UK & MIDDLE EAST LLP

With various pressures contributing to the current cost of living crisis, practitioners and clients may be considering what support they can offer to employees and how to respond to requests to take on extra work.

Benefits

Businesses are also facing challenging trading conditions, so offering generous pay rises may not be financially viable. However, employers may be able to offer help in more indirect ways:

- make more use of salary sacrifice schemes;
- provide access to discounts;
- offer employer loans e.g. for season tickets;
- reduce the time between claiming and paying expenses;
- organise money management sessions with external advisers; and/or
- offer free or subsidised meals.

These schemes and vouchers have a financial cost, but the benefit to employees may be greater than the cost of paying the equivalent as additional salary.

Second or multiple jobs

There is already a trend towards more employees asking to take on a second job. This raises a host of HR, wellbeing and health and safety concerns.

Exclusivity clauses: Some employment contracts prohibit employees from taking on another job; others require the employee to seek consent (exclusivity clauses). Exclusivity clauses are unenforceable against zero hours workers. They will also soon be unenforceable for workers whose average earnings are on, or below, the lower earnings limit (currently £123 per week). If these workers breach an exclusivity clause, they will be protected from unfair dismissal (with no qualifying period of service) and from detriment.

It is not only those who are lowest paid, or on the least secure types of contract, who are worried about making ends meet. Where an employer has an exclusivity clause that is (in theory) enforceable, they will have to decide whether to enforce it or consent to their employees working elsewhere. This will involve weighing up the organisation's interests against its employees' needs. Work with a competitor will cause more concern than an unrelated second job. As ever, it is important that decisions on these requests are consistent and made fairly, to avoid the risk of discrimination complaints.

"There is a trend towards more employees asking to take on a second job"

Health and safety: For clients in particular, there may be health and safety implications in allowing a worker to take on another job. Do they work with heavy machinery? Do they drive as part of their role? Employers should review their risk assessments and consider whether to introduce extra supervision or breaks.

Compliance perspective: The guidance on the Working Time Regulations indicates that the 48-hour limit on average weekly hours applies to an individual's total working hours, if they have more than one job. Ask employees taking on a second job to sign an opt-out agreement, or advise them to ensure their weekly hours do not, on average, exceed 48 hours. It is a criminal offence for an employer to fail to take reasonable steps to comply with the limits on working time, or keep the necessary records.

Secret second jobs: If an employee does not seek consent before taking a second job (or does so despite lack of consent), this is likely to be grounds for disciplinary action. Much will depend on their contract and the extent of the obligation to obtain consent. Is agreement only required where the duties are similar or where the second employer is a competitor? As always, it is important to follow a proper and reasonable process and ensure that decisions on similar situations are consistent. If the decision-maker is considering dismissal, they will need to reflect on whether that is a reasonable sanction. This includes examination of the wider circumstances, which will encompass not only the employee's length of service and disciplinary record, but also the social context of the cost of living crisis.

Wellbeing: Financial worries have a significant impact on employees' overall mental and physical health and wellbeing. It is important to ensure managers are on the alert for signs of stress and burnout, just as they were during the height of the pandemic, and take particular care where they know an employee is working multiple jobs. They should take into account the exceptional circumstances caused by the cost of living crisis when dealing with a dip in the employee's performance, for example. The stress of being unable to make ends meet, if the employer withholds consent, might be just as detrimental as the strain caused by working multiple jobs. Both scenarios have the potential to lead to increased absence levels.

It would also be advisable to remind employees of the general wellbeing support the organisation offers, such as access to employee assistance programmes. With businesses feeling the pinch as well, now may not feel like the right time to invest in new initiatives. Taking preventative steps, however, such as training mental health first aiders, may be a prudent long-term investment.

Family

NIKKI HUNTER, ASSOCIATE AND SOLICITOR ADVOCATE, MORTON FRASER LLP

New rules have been developed by the Family Law Committee of the Scottish Civil Justice Council for defended family and civil partnership cases in the sheriff court.

Under the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022 (SSI 2022/289), chapter 9 (standard procedure in defended causes) and chapter 10 (additional procedure) will no longer apply to family actions, the relevant provisions being accommodated within amended chapters 33 and 33A instead. The current chapter 33AA is removed and the relevant provisions incorporated into the new rules.

Options hearings replaced

Under these new rules, family actions are saying goodbye to options hearings. Instead we will have "initial" and "full" case management hearings. Under the current rules, an options hearing is assigned no sooner than 10 weeks after expiry of the notice period. Under the new rules, the "initial" case management hearing must be assigned no sooner than 21 days and no later than 49 days after that expiry. Where a party craves a s 11 order, a child welfare hearing can – at the sheriff's discretion – call alongside the initial hearing. Depending on the circumstances, agents may wish to address the timing of a child welfare hearing in their covering letter to the court.

As with options hearings, the rules require parties to attend at a case management hearing (both initial and full). In practice, parties are (in my experience) rarely in attendance at an options hearing despite the terms of OCR 33.36. It seems unlikely that this will persist at an initial case management hearing where it calls alongside a child welfare hearing, but it will be interesting to see if the courts insist on parties' attendance otherwise.

These case management hearings (initial and full) have a checklist and parties will be expected to address the court on each point. It is fuller (and arguably clearer and more focused) than the checklist under the current OCR

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Work-life balance

The Scottish Government's "Once for Scotland" Workforce Policies Programme for good employment practices, using NHS Scotland as the exemplar, seeks to develop best practice in flexible work pattern, career break, parent-related and other policies. See consult.gov.scot/health-workforce/work-life-balance-nhs-scotland/
Respond by 25 November.

National parks

The Scottish Government will designate at least one new national park by 2026. NatureScot seeks views on the role of and the criteria required to assess new national parks. See consult.gov.scot/environment-forestry/have-your-say-on-the-future-of-national-parks/
Respond by 30 November.

Taxing online sellers

The UK Government will implement the OECD's Model Reporting Rules for Digital Platforms from January 2024, requiring platform operators to report details of sellers' activities to HMRC. For draft regulations see www.gov.uk/government/consultations/draft-regulations-the-platform-operators-due-diligence-and-reporting-requirements-regulations
Respond by 13 December.

Patient safety

Holyrood's Health, Social Care & Sport Committee seeks views on the Government's Patient Safety Commissioner Bill. See yourviews.parliament.scot/health/patient-safety-commissioner-for-scotland-bill/
Respond by 14 December.

School qualifications

The Scottish Government intends to reform school and college qualifications and assessments. See consult.gov.scot/education-reform/professor-haywards-independent-review/
Respond by 16 December.

Social care

The Scottish Government has established an Independent Review of Inspection, Scrutiny and Regulation [of social care] in Scotland. Evidence is sought to inform that review. See consult.gov.scot/health-and-social-care/inspection-scrutiny-and-regulation-of-social-care/
Respond by 23 December.

Skills delivery

An independent review of "the skills delivery landscape" in Scotland has been set up with a view to ensuring that the skills system is fit for purpose. See consult.gov.scot/fair-work-employability-and-skills/skills-delivery-independent-review/
Respond by 23 December.

Small landholdings

The Scottish Government wants to retain small landholdings as part of the agricultural mix. Views are sought on legislation to support such tenants. See consult.gov.scot/agriculture-and-rural-economy/small-landholdings-modernisation/
Respond by 14 January.

HMRC statistics

HM Revenue & Customs wishes to understand what users of its statistics publications are looking for, so as to produce quality information in the context of limited resources. See www.gov.uk/government/consultations/consultation-on-changes-to-hmrc-statistics-publications
Respond by 16 January.

Dog theft

Conservative MSP Maurice Golden seeks views on his proposed bill to create a new statutory offence to tackle the problem of dog theft. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-dog-abduction-scotland-bill
Respond by 16 January.

33.AA4 and now applies to all family actions, not just those including a s 11 crave.

In advance of a full case management hearing, the procedure under current OCR 33.AA.3 broadly remains the same. The parties must hold a pre-hearing meeting (no longer a "conference") to discuss settlement; agree – as far as possible – the matters not in dispute; discuss the checklist; and thereafter, lodge a joint minute of the pre-hearing meeting. The only real change is that parties must lodge the joint minute no later than two days before the full case management hearing. Currently, lodging is only required "prior to the case management hearing".

A list of witnesses must also be lodged, seven days before a full case management hearing. This must include a summary (up to 50 words) of each witness's evidence. This will allow the court to ascertain what evidence is to be given and if necessary, request that experts confer.

Who is to lodge a form F9, and when, is also changing slightly. Currently, the defender only needs to draft and lodge a form F9 if a s 11 order is craved by the defender but *not* by the pursuer. Where both parties crave a s 11 order, only the pursuer lodges a form F9. That form is then amended (in my experience by the pursuer) to narrate the s 11 order sought by the defender, and sent to the child (sometimes without the defender ever having seen the form). Under the new rules, where the defender craves a s 11 order, a draft form F9 must be lodged at the same time as the NID, irrespective of whether the pursuer also craves a s 11 order. Where both parties crave a s 11 order, this appears to result in two form F9s. No amendments have been made to OCR 33.19C (views of the child where orders sought by both pursuer and defender), so it is unclear how this will work in practice.

Further provisions

Under the new rules, sists in family actions will be until a specific date, with a "review of sist hearing" being assigned for no later than 30 days following expiry of the sist. In my experience, some courts currently resist (sometimes to the point of refusal) sisting a family action for fear it drifts into the abyss. This sometimes has the effect of numerous procedural hearings being assigned while negotiations are ongoing, or a legal aid application is pending. The new rule will hopefully provide security to both the court and parties that the action will not fall by the wayside, as well as potentially reducing the number of procedural hearings.

The rules on mediation have also been expanded to include all family actions, not just those including a s 11 crave. The sheriff must have regard to averments of domestic abuse when considering the appropriateness of the referral, which in my experience is almost always considered under the current rules (although the need to do so is not explicit).

One of the most welcome additions, in my opinion, is in relation to judicial continuity. The new rules say that "where possible" the same sheriff shall preside over the case management hearing (initial and full), the pre-proof hearing, any child welfare hearing and any proof, proof before answer or debate. Some may say that doesn't go far enough: what about opposed motion hearings or review of sist hearings, for example? My own view is that it is certainly a good starting point, although I wonder how often judicial continuity will prove to be possible.

It is anticipated these rules shall afford greater judicial case management, resulting in cases being resolved faster. They apply to actions raised on or after 25 September 2023, presumably to allow courts to address any scheduling requirements which may arise. In theory, the additions all seem positive, but it will be interesting to see if they are applied consistently across the sheriffdoms.

Human Rights

JAMIE DEVLIN, ASSOCIATE, ANDERSON STRATHERN LLP

In *Attorney General's Reference No 1 of 2022* [2022] EWCA Crim 1259 (28 September 2022), the Court of Appeal (Criminal Division) addressed whether a protester's Convention rights are engaged when facing prosecution for the statutory offence of criminal damage.

Background

Following the trial in Bristol Crown Court of four protesters for alleged criminal damage to the statue of Edward Colston, a reference was made by the Attorney General on, *inter alia*, the extent to which the European Convention on Human Rights sanctioned the use of violence against property during protest, thereby rendering lawful damage to property.

On 7 June 2020, protestors tied ropes around the statue and pulled it to the ground. They then rolled the statue through the streets to the harbour where it was heaved into the water.

Causing damage to property is a statutory offence in England & Wales, pursuant to the Criminal Damage Act 1971, s 1. It is subject to a defence of "lawful excuse". The definition is comparable to both the Scots common law offence of malicious damage, and vandalism as defined in the Criminal Law (Consolidation) (Scotland) Act 1995, s 52. The statute provides the defence of "reasonable excuse". In Scotland, it is for the Crown to meet the defence. This article does not intend to dissect the nuances between the law in each jurisdiction, but to consider the potential application of this judgment in Scotland.

"The court concluded that prosecution and conviction for causing significant damage to property would fall outwith the Convention"

On 5 January 2022, a jury acquitted the four protesters. While a range of defences were run at trial, the subject of the Attorney General's reference was whether conviction for damage to the statue amounted to a disproportionate interference with the right to protest, as protected by the Convention.

The Attorney General raised three questions:

1. Does the offence of criminal damage fall within that category of offences, identified in *James v DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin), for which conviction is – intrinsically and without the need for a separate consideration of proportionality in individual cases – a justified and proportionate interference with any rights engaged under ECHR articles 9-11?
2. If not, and it is necessary to consider human rights issues in individual cases of criminal damage, what principles should judges apply when determining whether the qualified rights in articles 9-11 are engaged by the potential conviction of defendants purporting to be carrying out an act of protest?
3. If those rights are engaged, under what circumstances should any question of proportionality be withdrawn from a jury?

Question 1

The court concluded that prosecution and conviction for causing significant damage to property would fall outwith the Convention, either because the conduct was violent or not peaceful, or (even if not) because prosecution and conviction would clearly be proportionate (para 115). While the offence of criminal damage encompasses causing damage which is minor or temporary, Strasbourg case law suggests there would need to be a case-specific assessment of the proportionality of conviction at least in connection with damage to public property.

There are circumstances, albeit limited, whereby the decision-maker should complete a fact-specific proportionality assessment to justify any conviction as a proportionate interference with rights engaged under articles 9-11 (para 116).

Questions 2 and 3

Addressing questions 2 and 3 together, the court confirmed that the Convention does not provide protection to those who cause criminal damage during protest which is violent or not peaceful, and accordingly articles 9-11 are not engaged. Moreover, prosecution and conviction

for causing significant damage to property, even if inflicted in a way which is "peaceful", could not be disproportionate in Convention terms (para 120).

Given the nature of cases that are heard in the Crown Court, it is inevitable that the issue should not be left to the jury, the court added. The relevant conduct in question would on any view not be peaceful; alternatively the damage was significant; or both (para 120).

Emphasis was placed on the careful exercise of prosecutorial discretion when deciding to proceed to trial. The Code for Crown Prosecutors should be applied in the context of the principles governing articles 9, 10 and 11 with a clear eye on the proportionality of prosecution and conviction (para 121).

Commentary

While a decision of the Court of Appeal, this judgment reiterates the important role of prosecutors in deciding whether to take proceedings against an individual for malicious damage and vandalism caused when protesting.

It will be interesting to observe (1) whether accused persons place reliance on Convention rights as a defence to these offences; and (2) in what circumstances will a fact-specific proportionality assessment be undertaken when considering conviction as a proportionate interference with an accused's Convention rights. Whether reliance on rights such as the freedom of protest will suffice, will depend on the facts and circumstances of each case.

To aid practitioners and decision-makers, the Court of Appeal helpfully provided one example whereby prosecution or conviction may be a disproportionate response. In paras 29 and 116, the court identified that scrawling a message on a pavement using water soluble paint might technically suffice to sustain a charge of criminal damage, but to prosecute or convict for doing so as part of a political protest might well be a disproportionate response.

Pensions

COLIN GREIG, PARTNER, DWF LLP

A decade on from the requirements of the automatic enrolment ("AE") regime coming into operation, the Pensions Regulator ("TPR") has issued a "timely" warning to employers that they must comply with their duties under the regime.

That warning is understood to follow on from a series of in-depth inspections carried out earlier this year of 20 large employers based across the UK and covering nearly 1.5 million staff.

Those inspections apparently highlighted a number of common errors in relation to the calculation of pension contributions and communications to staff. While the inspected firms had successfully enrolled eligible staff into an appropriate AE scheme and had made contributions, administrative errors in complying with their ongoing pensions duties were identified – putting staff at risk of missing out on benefit and employers at risk of unintended non-compliance, with all that might follow.

TPR reports that the relevant employers have either now corrected or are working to correct errors (including making backdated contributions).

Common errors

Key errors identified included:

• **Using incorrect earnings thresholds for the calculation of contributions.**

Broadly speaking, under defined contribution type pension schemes the minimum contributions required are a total of 8% of "qualifying earnings", with the employer paying at least 3% and the employee making up the shortfall. For those purposes "qualifying earnings" are earnings between the lower level and upper level as reviewed annually by the Secretary of State (tax year 2022-23: £6,240 and £50,270 respectively), with earnings being gross earnings, including sick pay and statutory maternity, paternity and adoption pay.

Alternatively, minimum contributions can be made on the basis of one of three alternative sets:

Set 1 – 9% total (with minimum 4% employer) where pensionable pay is subject to a minimum of basic pay;

Set 2 – 8% total (with minimum 3% employer) where pensionable pay is subject to a minimum of basic pay and constitutes at least 85% of total pay across all relevant jobholders; or

Set 3 – 7% total (with a minimum 3% employer) where all earnings are pensionable.

Clearly, given the complexity of the different contribution bases, care requires to be taken by employers in first of all selecting the most appropriate basis to apply and then regularly checking that contributions are being calculated and paid over appropriately and in line with that.

• **Incorrectly calculating maternity pay, leading to incorrect calculation of contributions.**

While maternity pay calculation was specifically identified, clearly for the purposes of AE compliance it is important that any calculation which might impact on the pension contribution calculation is completed correctly.

• **Inaccurate/inadequate communications to staff.**

These included inaccurate wording, and using online portals or communicating general pension information, rather than emails to staff about how AE affects them.

On this aspect TPR reminds employers of their guidance about communications to staff, which guidance helpfully includes template letters that employers can use (including where writing to staff about whether their scheme uses relief at source or net pay arrangements).

Care of course should be taken that any template letters provided by TPR (or for that matter any AE scheme provider) are appropriately tailored, to ensure they accurately communicate what is intended and are in line and consistent with AE and employment contract requirements and whatever arrangements (including under payroll) are in place or to be put in place.

Consequences

While TPR recognises that certain of the errors identified were technical in nature, TPR's stated position is that these types of compliance oversights can indicate to them broader non-compliance issues.

Furthermore, aside from exercise by TPR of its AE powers (including compliance notices, unpaid contributions notices and penalty notices), correcting such mistakes can prove costly for employers. Even where any identified shortfall in contributions is small, the cost of identifying and calculating that shortfall and any loss to staff can be significant. Additional cost to employers in taking advice on appropriate methods of correction and the overall cost of implementing correction (both hard cost and staff/management time and including communications to those staff affected) should not be underestimated.

Review processes

TPR highlights that when completing re-enrolment, which employers must carry out every three years, employers should check their systems are up to date and running smoothly.

However, depending on their circumstances, it would seem sensible for employers to complete a review more regularly to ensure ongoing compliance with the requirements and with a view to ensuring that in the event of any error arising, correction costs are minimised..

New lease of life for commercial lets

Troublesome and unclear rules regarding the continuation and termination of Scottish commercial leases would be replaced under proposals in a new report from the Scottish Law Commission

Property

DAVID BARTOS, COMMISSIONER, SCOTTISH LAW COMMISSION

Leases are fundamental to the Scottish economy and society. The basic rules governing them continue to be in the common law, though modified by statute. Statutory intervention has been most noticeable for agricultural holdings, residential leases and crofts. In other leases, typically of commercial premises, there has been little inroad by statute, except in relation to irritancy.

Unfortunately, in one area statutory rules have caused more doubt than clarity: notices to quit on the expiry of the lease. The notice to quit provisions of the Sheriff Courts (Scotland) Act 1907 have been criticised almost from their outset (*Campbell's Trustees v O'Neill* 1911 SC 188 at 191-192). As long ago as 1989 the Scottish Law Commission recommended their repeal and reform (*Report on Recovery of Possession of Heritable Property* (Scot Law Com Report No 118)), but no legislative time could be found. Practitioners have had to resort to "belt and braces" practices in giving notice, failure to comply with which has led to unnecessary challenges with consequent uncertainty for clients.

Notices to quit form part of the common law of tacit relocation. However that law is itself scarcely clearer. While the concepts of a 40 day notice to quit period and the periods of continuation of a lease in the absence of a valid notice are largely understood, important areas of doubt remain. A glance at the textbooks reveals telling doubt over whether parties can contract out of giving notice to avoid the lease being continued. Nor is it clear whether the presence of a subtenant excludes the need for notice to the tenant. Which leases are covered? That too is unclear.

"Notices to quit form part of the common law of tacit relocation. However that law is itself scarcely clearer"

It was therefore no surprise that the Commission was approached for a project to review the law and recommend change. The outcome is the *Report on Aspects of Leases: Termination* (Scot Law Com Report No 260), published on 5 October. It follows extensive consultation including a discussion paper in 2018 and a consultation on a draft bill in 2021. So what does the report recommend?

Leases covered by proposals

The report covers "commercial leases". However that expression must be understood broadly. No new category of lease is recommended. Rather, the reforms are to cover all leases that are not covered by agricultural holdings, residential, crofting or council allotment legislation which provides statutory rules on termination. Thus leases of subjects ranging from offices, retail and industrial units to holiday lets and lets of fishing rights are affected.

Tacit relocation: modernisation

The Commission considered whether tacit relocation should be retained at all. The doctrine applies in two situations: (1) on the expiry of the lease in the absence of a valid notice where the tenant remains in place; or (2) if the tenant remains in place after expiry without the landlord's agreement and the landlord does not take reasonable steps within a reasonable period of time to remove them.

For the first situation, some consultees expressed support for the abolition of tacit relocation altogether and that there should be no entitlement to notice unless the lease so provided. However the Commission was persuaded by the majority of consultees that a default rule requiring the giving of notice provided a useful safety net for tenants, and a useful warning to landlords, of the need to obtain a fresh tenant or negotiate a fresh lease. In the second situation it was persuaded that the doctrine remained sound, in order to protect a tenant from liability for violent profits incurred through unreasonable inaction of the landlord in pursuing removal.

Further, if notice is required, the Commission concludes that the rules on its form, content, and the means of communication should also be reformed. Accordingly the report recommends that the common law rules of tacit relocation, together with the relevant provisions of the 1907 Act and the Removal Terms (Scotland) Act 1886, be replaced by rules of "automatic continuation" in a modern statutory code.

Automatic continuation: duration and exclusion

As at present, automatic continuation, if it applies, will be for one year for leases of one year or more, or for the duration of the lease if for less than one year. However if the lease contains a written term, however expressed, the purpose of which is to provide that the lease cannot continue beyond its termination date, that term will exclude any automatic continuation even in the absence of a valid notice. There should therefore be no doubt that a "traditional" provision that the tenant leave

"Leases can continue for many years. A dual system of law for pre- and post-enactment leases would be unsatisfactory"

without any warning should be effective to prevent the lease from continuing beyond its agreed termination date, entitle the tenant to leave without notice, and entitle the landlord to commence proceedings to recover possession should the tenant not leave.

The benefits underlying the giving of notice are inapplicable to leases of under three months, or certain leases where no party would contemplate automatic continuation (such as a holiday or student let or short-term fishing or shooting let). Such leases will require no notice.

Notice to quit: duration, form and communication

Should parties not exclude the need for notice, the Commission proposes reforms for the period, form, and communication of notices. A 40 day period does not give sufficient time either for tenants to obtain premises or for landlords to obtain new tenants. Instead, a three month period for leases of six months or more, and a one month period for leases of three months to under six months, are recommended. These are alterable by parties in the lease.

Turning to the form of notice, landlords' notices also form the basis for potential court proceedings for removal. Accordingly they should always be in writing and require removal on a specified termination date. Tenants' notice of their intention to leave at the end of the lease can remain oral (as at present) if the lease is for one year or less (unless the lease requires writing), but must be written for longer leases. With the aim of reducing what some consultees described as the "mini-industry" of challenges to notices based on minor defects, the mandatory content of notices will be kept to a minimum, with provisions for relief from types of error that cause no prejudice to a reasonable recipient.

The code allows written notice to be communicated by any method, but electronic communication is conditional on the express or implied consent of the recipient. Statutory presumptions for timing of receipt apply if certain methods are used. For example, if notice is emailed, it will be presumed to have been received on the date of sending unless it is a bank holiday or weekend.

Notice to quit: multiple parties, subtenants, and withdrawal

Notice will be valid even if from one of a number of landlords, reflecting the current position for tenants' notices. Contracting out is permitted. Subletting will not prevent automatic continuation, while a tenant will require to notify head lease notices to the subtenant, with failure giving rise to a potential damages claim. Withdrawal of notice will require the consent of all parties.

Termination notices: miscellaneous

Aside from automatic continuation, the report recommends a statutory obligation on parties with foreign addresses in a lease to provide a UK postal address for the service of all documents necessary to terminate a lease, including irritancy-related notices and break notices. Breach will enable service on the tenant at the let property or on the Extractor of the Court of Session, or the retention of rent. In order to protect creditors holding long leases as security, it is recommended that notification to them be a condition of irritancy. Finally, the report recommends a statutory presumption that a lease operates for one year from a date of entry of 28 May.

Transitional provisions

Leases can continue for many years. A dual system of law for pre- and post-enactment leases would be unsatisfactory. Accordingly, following a transitional period of one year, the new law should apply to all leases, subject to express terms in pre-enactment leases remaining governed by the old law.

Apportionment of rent

At present, if a lease ends either on its break or termination date and rent has been paid in respect of a subsequent period, absent an express obligation to reimburse such rent is irrecoverable. The Commission recommends a statutory implied term into post-enactment leases obliging a landlord to repay overpaid rent covering such a period.

Tenancy of shops, and *confusio*

The report also discusses reform of the Tenancy of Shops (Scotland) Act 1949, as well as termination of leases where a tenant acquires the landlord's interest. Reform in both areas is desirable, but further consultation is necessary before detailed recommendations can be made.

Conclusion

The report contains a detailed draft bill which gives concrete form to these recommendations. It repays close study. If enacted the proposed reforms will bring about valuable improvements in the operation of commercial leases in Scotland. The necessity for reform goes back many decades. It is important that the Scottish Government considers the recommendations at the earliest opportunity and takes steps to bring them into effect.

Advisers or leaders?

The in-house session at the Law Society of Scotland Annual Conference last month saw a panel address the issue of how in-house lawyers can come to play a strategic role in an organisation

In-house

BETH ANDERSON, HEAD OF MEMBER ENGAGEMENT, LAW SOCIETY OF SCOTLAND

"From legal advice to legal leadership: how in-house lawyers are driving critical business needs." This was the theme for the Law Society of Scotland's in-house stream at the 2022 annual conference. Chaired by Vlad Valiente, head of Governance & Assurance at Dumfries & Galloway Council and co-convener of the In-house Lawyers' Committee, a panel of three in-house solicitors in senior roles shared their experiences of delivering much more than just black letter law answers for their internal clients.

The session began with introductions from the panel:

Candice Donnelly: I am the Director of Corporate within the legal team at tech company Skyscanner, where I have worked since March 2020. I'm responsible for everything from leading corporate transactions and managing Skyscanner's global governance obligations, to advising on the group's employee share schemes, intellectual property and real estate. I'm fortunate to be part of Skyscanner's leadership team, which gives me scope to understand and influence the company's strategy and to support growth of the business going forward.

Shareen Gault: I'm general counsel, head of Risk & Compliance at accountancy firm Johnston Carmichael. I'm responsible for governance, risk and compliance within the firm, handling its internal legal matters, regulatory compliance and risk management strategy. I've held various in-house roles over the past 15 years from legal and compliance manager at a non-departmental public body to GC at an offshore wind company. Despite the obvious differences in sector, the roles have been similar. And I've generally been able to go in and shape the type of activities that my role includes.

Fraser Bell: I'm the interim chief operating officer at Aberdeen City's Health & Social Care Partnership. Following my traineeship with a large firm, I've worked at local authorities in Shetland, Orkney and most recently as chief legal officer at Aberdeen City Council. I've recently moved to the COO role and am currently responsible for leading several health and local authority services in Aberdeen. It's been an exciting time to work at Aberdeen City. The council changed its operating model. That's allowed me to explore what that means from a governance perspective and put in place proportionate arrangements and good risk management strategies to ensure those operational changes are delivered.

VV: What obstacles or hindrances are there for in-house solicitors looking to get into strategic roles?

CD: Traditionally, legal teams have been seen as a blocker to getting stuff done. Raising challenges is a fundamental part of the role, but there are certain ways to phrase those questions so that legal gets the reputation of *unlocking* a project rather than *blocking* it. In-house solicitors have a really advantageous strategic position: we're one of the few teams to have a broad overview of the business and we have a key role to play in horizon scanning. However, we're not always good at celebrating our own successes and, if we want to enable, and benefit from, those cross-functional interactions, we need to change the narrative on that.

FB: It's also about making clear what you can offer. Organisations have their own set of governance rules. Clearly the legal team's role sometimes is to say "you need to stick to the rules". However, as you begin to understand the risk appetite, you can say "maybe it's time to change the rules, and I can help you do that".

SG: For me, the only obstacle to getting into that strategic role is yourself. Initially I thought of myself just as the solicitor. I felt I could only comment on matters of law where my advice was being sought. I soon realised that actually it's okay to step out of your comfort zone and contribute to non-legal aspects of the discussion. Lawyers have great training and transferable skills which frankly can be invaluable in coming up with solutions.

VV: Agreed. As in-house counsel we need to call it as we see it and that, in turn, will build trust with our internal client. However, does the panel see any danger to commenting beyond your brief and that your authority as legal adviser skews decisions in non-legal areas?

CD: No, I'm more concerned about not having a strong enough voice! In-house lawyers should be confident about what they can bring to the table, whether from a legal, commercial or practical perspective, and we should recognise the value of our contribution.

FB: I've learned over time that building good relationships with your internal clients is absolutely key. As those relationships develop, so does a strong sense of trust and that makes working with the legal team more attractive. Other service areas aren't slow to give their opinion. Having the confidence to comment beyond your brief and make suggestions on how to do things differently is really important. If you see scope for improvement, don't just let it lie – even if it's nothing to do with the law. There's great responsibility in that, but also great opportunity. It allows you to shape your role and the part you play in senior management decisions.

VV: Is there any conflict between contributing to strategic decisions and giving dispassionate legal advice? And how do you reconcile the two?

SG: There can be conflict, but I find an effective way of managing that potential tension is to metaphorically wear different hats. My role is really varied, and I do need to differentiate my advice. I'll often say "the strict legal answer is X, but commercially my advice would be Y". It's one of the main differences with working in private practice. Your internal client isn't looking for a perfectly structured advice note with authorities, they want a succinct view of potential issues and proposed solutions. There are better technical lawyers than me, but my value is often as a problem solver. My colleagues might ask: "What do you think we should do?", and I'm comfortable to say: "Based on my experience, my knowledge of the law *and* my commercial understanding – here's what I would do..."

VV: How should an in-house legal team deal with cost cutting by non-legal managers, and does the panel have any advice on growing an in-house team?

CD: I'm lucky that legal expenditure is already seen as worthwhile by my organisation, but equally we do need to get value for money on external spend. I'll also consider whether some work is better placed being managed by our procurement or HR colleagues or through an automated process. The legal team needs to think laterally and grasp opportunities to grow. For example, at Skyscanner, we've taken on responsibility for sustainability and ESG initiatives – these are growth areas where the legal team can add real value and insight.

"I'll consider whether some work is better placed being managed by our procurement or HR colleagues or through an automated process"

FB: We've seen over a decade of cuts in local government budgets, so it's really important for the legal team to be able to demonstrate value and evidence the impact of reducing the number of solicitors. I've also had to give careful consideration to what we can stop doing safely – either completely or by giving this to another department. But I think in-house legal has a really bright future. We're best placed to be the experts on the organisation's operating environment and to build those essential relationships with our internal clients.

SG: The private sector is also facing pressure on budgets. It has to be about demonstrating value and that's not just what is saved by what can be done internally versus what is outsourced. As in-house counsel, you are crucial to connecting the dots that might often not be visible if it is legal advice in isolation. But equally, it's sometimes more efficient to outsource if it's discreet packageable advice. In terms of growing a team, in my last two roles there was no legal presence before I joined. By the time I left, I'd grown the legal function into larger teams. The only way to make the case to do that is to show what value you're adding.

VV: In my view, in-house lawyers are the ultimate smoke detectors for their organisations. We're good at prevention and we need to be able to demonstrate the value in that, even when budgets are tight. If you reach out to your client departments, you'll soon realise they're always looking for more support from legal, not less! And that can help you make the case for growing the team.

VV: A final question for the panel: how can you measure the legal team's value in terms of KPIs?

CD: This is a great question! To some parts of the business, numbers mean a lot, but it often can be difficult to quantify what the legal team does. Developing bespoke metrics and finding different ways to measure legal output can be useful. For example, putting a value on litigation costs avoided or money saved by not outsourcing legal work can help underscore our results from a commercial point of view.

SG: I find that impact stories are useful. The legal role can often be backstage. "Our counsel done well", is often not visible. If you can demonstrate the impact that your intervention or support has had, that can be a good way of highlighting the legal team's achievements.

FB: KPIs are something I've certainly grappled with. I look at the bigger organisational picture and how much time we've spent fixing things that have gone wrong, versus delivering part of a project. The less time spent on unravelling problems, the better the job we're doing on prevention. I also put the team forward for awards and use that as evidence of our value.

VV: Thank you all for taking part.

In practice

Council to call out abuse against members

The Society's Council has agreed a four point plan in response to increasing reports of threats, harassment and abuse against members undertaking their professional obligations. Council will:

- support members and call out all forms of intimidation and derogatory language which can incite abuse against the legal profession as unacceptable, no matter where that abuse comes from;
- continue to work closely with LawCare as the principal wellbeing charity for the legal community and ensure its services are communicated widely;
- seek to better quantify levels of abuse and intimidation through the upcoming *Profile of the Profession* survey in 2022-23; and
- use that updated data to consider what changes may be required to the Lawscot Wellbeing programme.

Trainee numbers hit another record

For the second year running, a record number of traineeships have been registered with the Law Society of Scotland, as 788 trainee solicitors began their office training during the practice year 2021-22, across 274 private practice and in-house organisations.

The figure is a 5.9% increase on the previous record of 744 traineeships, set only last year. After a notable decline in the first year of the COVID-19 pandemic, the numbers since have been significantly higher than the long-term average.

As with last year's figures, numbers have been boosted by the Scottish Government's legal aid traineeship scheme, providing up to 40 additional trainees over two years.

Liz Campbell, the Society's executive director of Education, Training & Qualifications, said the figures were "good news for Scotland's young lawyers", as well as an indication of the strength of the legal sector, but added: "Given how strong the numbers have been in the past two years, we wouldn't be surprised if momentum moderates at least somewhat next year."

ACCREDITED SPECIALISTS

Construction law
Re-accredited: SHONA McNAE FRAME, CMS Cameron McKenna Nabarro Olswang LLP (accredited 3 September 2002); JANE ELIZABETH FENDER-ALLISON, CMS Cameron McKenna Nabarro Olswang LLP (accredited 7 July 2017).

Family law
Re-accredited: JOHN ALEXANDER MACKENZIE, Thorntons Law LLP (accredited 23 October 2007); JENNA THOMSON, Macleod & MacCallum Ltd (accredited 26 October 2017).

Family mediation
Re-accredited: LISA GIRDWOOD, Brodies LLP (accredited 9 July 2004); DENISE HOOPER, Wright & Crawford (1906) Ltd (accredited 18 September 2019); LOUISE MARY GILLIES, Ness Gallagher Solicitors Ltd (accredited 27 September 2019); ROWENA MARIE McINTOSH, McIntosh Family Law (accredited 2 October 2019); LEONIE BURKE, Aberdein Considine & Co (accredited 18 October 2019).

Medical negligence law (defender only)
Re-accredited: SUSAN ANNE HOPKIN, STEFANO CARLO ROMEO RINALDI (both National Health Service Scotland and accredited 23 October 2017).

Personal injury law
Re-accredited: STEPHEN CHARLES McLAREN, Ledingham Chalmers LLP; JONATHAN ISLAY CORNWELL, Lindsays LLP (both accredited 17 September 2012); MATTHEW WILLIAM LECKIE, Digby Brown LLP (accredited 10 October 2017).

Planning law
Re-accredited: FRASER ANTHONY BRIAN GILLIES, Wright, Johnston & Mackenzie LLP (accredited 10 October 2017).

Private client tax
Re-accredited: PETER JAMES MURRIN, Turcan Connell (accredited 23 June 2017).

Over 600 solicitors are accredited as specialists across 33 diverse legal areas. If you are interested in developing your career as an accredited specialist see www.lawscot.org.uk/specialisms to find out more. To contact the Specialist Accreditation team email specialistaccreditation@lawscot.org.uk

FOCUS: IP LAW ACCREDITATION

Graeme McWilliams and Mark Cruickshank of the Society's Intellectual Property Specialist Accreditation Panel write: "At the panel's first post-COVID in-person meeting, members reviewed the current IP specialist accreditation scheme, the application form and process, and considered any scope for improvement. While the process generally works well, we agreed to make minor updates to the application guidance and take steps to promote the IP accreditation scheme to fellow solicitors.

"There are currently 16 accredited IP law specialists on the Society's records, of which four are in-house and 12 in private practice. For IP law, the panel are looking for evidence of knowledge and application of the law, procedures, knowledge sharing and thinking outside the box. There is more guidance available at the Society's "Areas of specialism" web page.

"Having an IP accreditation can help improve your CV, focus your personal and professional development, raise your professional profile, and add to your promotion and recruitment prospects. We welcome applications from anyone who meets the current IP specialism criteria, and all members of the panel are happy to discuss what is involved with those who are interested in applying."

Current panel members are Fiona Nicolson, Keystone Law; Roisin Higgins KC; Mark Cruickshank, RBS; Paul Chapman, Marks & Clerk; and Graeme McWilliams, retired in-house lawyer.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the last few weeks are highlighted below. For more information, see www.lawscot.org.uk/research-and-policy/

Disabled young people

The Mental Health & Disability Committee responded to the detailed call for views on the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill. The response was supportive of the aim of the bill to improve outcomes for disabled children and young people in the transition to adulthood, and of legislative measures to achieve its aim. However it highlighted a need for clarity regarding certain provisions, including the definitions of "child" and "young person", and regarding interaction with the Adults with Incapacity (Scotland) Act 2000 for those aged 16 and over. The response also called for clear, effective and accessible mechanisms for disadvantaged persons to seek redress or remedy under the bill, including the availability of a mediation service. In addition it highlighted other current legislative developments which may interact with the bill, and called for care to be taken to avoid any inconsistency or duplication in legislation.

Economic crime

The Society issued a briefing on the Economic Crime and Corporate Transparency Bill ahead of its second reading in the House of Commons on 13 October.

Seeking to complement the Economic Crime (Transparency and Enforcement) Act 2022, and to address the use of corporate structures in the UK being used for the purposes of economic crime, the bill reforms Companies House, improving its functionalities and the accuracy of companies data, and the law on limited partnerships, by amending the powers of the Registrar of Companies.

It also proposes to provide law enforcement with new powers to seize cryptoassets, and to enable businesses in the financial sector to share information for the prevention and detection of crime. The briefing commented on the position of Scottish limited partnerships, noting that they are a popular vehicle for use in investment, primarily for operating funds or holding commercial property. It noted that the Society is keen to support the Government in ensuring that limited partnerships are not open to abuse by those engaged in criminal activity.

Parole Board Rules

The Scottish Government launched a consultation on the proposed changes to the Parole Board (Scotland) Rules 2001. The consultation aims to update and modernise the rules relating to parole in Scotland.

The Society's Criminal Law Committee and Mental Health & Disability Law Committee responded at the closing date in October, welcoming the Government's commitment to consolidating and simplifying the 2001 Rules to ensure they are clear and fit for purpose. The response welcomed:

- a proposed update to the rules to provide for the preparation of an up to date risk management plan, prior to consideration by the Parole Board;
- a proposal to provide a checklist to ensure that individuals appearing before the Parole Board are fully prepared;
- proposals relating to decision notes providing reasons for release;
- proposals to appoint a representative for prisoners who lack capacity.

Concern was expressed in relation to proposals to appoint special advocates in cases where information is withheld for reasons of national security. Further, the response noted that any proposal to alter victim notification requirements should not be considered until the conclusion of an ongoing independent review.

The response also requested clarity in respect of proposals to implement a review of the decision of the Parole Board, as it was not clear whether this was intended to provide an additional step in the process or to replace the current system of judicial review.

See the website for more about the Policy team's work with its network of volunteers to influence the law and policy.

OBITUARIES

Gavin John Law, Edinburgh
On 26 June 2022, Gavin John Law, formerly of Levy & McRae, Glasgow and latterly an employee of the Directorate of Army Legal Services, Andover.
AGE: 33 ADMITTED: 2012

Nicholas Thornton Hooke, Edinburgh
On 11 September 2022, Nicholas Thornton Hooke, formerly a partner of McKay & Norwell WS, Edinburgh.
AGE: 57 ADMITTED: 1989

Philip Rooney, Glasgow
On 23 September 2022, Philip Rooney, formerly a partner of Philip Rooney & Co, Glasgow and latterly a consultant to the firm.
AGE: 76 ADMITTED: 1972

David John Mair, Glasgow
On 4 October 2022, David John Mair, formerly of Glasgow City Council.
AGE: 60 ADMITTED: 1987

Alastair John Keatinge, Edinburgh
On 18 October 2022, Alastair John Keatinge, formerly a partner of Lindsays LLP, Edinburgh.
AGE: 65 ADMITTED: 1982

Euan Fearon David, Glasgow
On 19 October 2022, Euan Fearon David, formally an associate of Mitchells Roberton Ltd, Glasgow.
AGE: 64 ADMITTED: 1981

McGarvey backs legal aid campaign

The Law Society of Scotland is calling on the Scottish public to contact their MSPs over the growing gaps in civil legal aid provision across the country, in a new campaign – #AccessToLegalAid – backed by social commentator, activist, and award-winning author Darren McGarvey.

New analysis by the Society shows that of the 139 most deprived communities in Scotland, home to around 100,000 people, 122 have no civil legal aid firms, and there are just 29 in these 139 areas in total. A contribution is also required from anyone with a disposable income of more than £293 per month.

The Society has described the Scottish Government's recent £11 million package, covering both civil and criminal legal aid, as "a short-term sticking plaster [that] won't address the deep wounds to the legal aid system caused by a generation of underfunding".

Darren McGarvey said: "In a nation that prides itself on progressive social values, these figures should act as a stark warning. Those who are already most disadvantaged are having their last line of defence pulled away from them. The Scottish Government has let inflation quietly chip away at legal aid fees over the last two decades – now we need to catch up."

STRATEGY

From here to 2027

Following extensive consultation, the Society has launched its new five-year strategy – one that it hopes to follow whatever regulatory changes the Government may pursue

Five key priority areas underpin the Law Society of Scotland's strategy for 2022-27, unveiled last month ahead of the new practice year.

Opening by setting out the Society's mission, "to support a thriving profession of high quality and trusted solicitors in Scotland with access to justice for all", the strategy covers both the Society's own operations and its fundamental role in leading the Scottish legal sector to serve the public. Central objectives include addressing the climate crisis (on which the Society commits to leading by example), providing effective regulation and advocating for good policy underpinned by the rule of law.

In a document that explains the political, economic etc context within which it has been developed, the strategy outlines the five key priority areas as:

#1 Supporting our members to thrive

Under this heading the Society will focus on wellbeing resources to sustain positive mental health; guidance and support for members; the best CPD training; and strategic collaboration on technology.

#2 Providing modern and effective regulation acting in the public interest

Against the background of the Scottish Government's promised legislation on a new regulatory framework, this heading will see the Society deliver independently exercised (through the Regulatory Committee), proportionate and risk-based regulation; promote innovation through new alternative business models; maintain robust education, training and admission standards; and protect the public interest to ensure public trust.

#3 Striving for innovation and efficiency

The Society will reflect and represent a diverse society; practise "excellent social and environmental responsibility"; ensure its own proper resourcing through financial and commercial activity; and invest to work innovatively and efficiently.

"The Society plays a pivotal role in the Scottish legal landscape and for the public generally"

#4 Being an influential voice that enhances our legal sector and justice

This involves evidence for good public policy decision-making; speaking up for the profession and the rule of law; and promoting policy reform to help revive the legal aid sector and access to justice.

#5 Leading the legal profession

The Society will promote: social mobility and diversity across the profession; climate conscious and socially responsible action through Lawscot Sustainability; a thriving profession in all parts of Scotland; and high standards through specialist training, certification and accreditation.

Introducing the strategy via a webinar, President Murray Etherington said it had been developed through wide consultation with members, volunteer committee members, staff, MSPs and other stakeholders. It was most important that members felt well supported. He commented: "The Society plays a pivotal role in the Scottish legal landscape and for the public generally. We take that responsibility incredibly seriously, both in our daily work and in considering how to work towards an even brighter future."

In response to a question about how it is possible to plan, given the uncertainty about the future for the Society, Vice President Sheila Webster said the Society was committed to its preferred model of regulation and would be working to try and further that. Even if the Government opted for something different, the Society would seek to achieve as much of its model as possible.

Chief executive Diane McGiffen added that the Society had lived with the uncertainty since the Roberton review, and it was good that there was now some timetable. The team was organised to respond quickly to more detailed proposals as they came, and the Society would be speaking up for the profession all the way through the process.

"At its heart," she said, "this new strategy supports our members to thrive in a growing and well-regulated sector. It sets out how we will work to enhance society and the profession while being a guardian of access to justice and the independence of our legal system.

"We are committed to modernising regulation to benefit the public and the profession, while retaining the Society as the professional body responsible for standard setting, financial compliance and professional conduct."

IN ASSOCIATION WITH

CASHROOM
Specialist Accounting for Law Firms

Kings with cash

How a Scottish-born firm is leading the way in revolutionising legal accounting

Where it all began

Cashroom: a Scottish born company proud of their roots. In 2008, accountant Catherine O'Day founded Cashroom to relieve fee earners she was working with of the responsibilities of accountancy, cashiering and regulatory compliance. Since then, Cashroom has grown significantly, now working across the UK with over 250 clients, more than 4,500 users and a growing team of expert cashiers and accountants.

A leading supplier for legal cashiering

Cashroom are a leading provider for legal cashiering throughout Scotland. Cashroom also hold a preferred supplier accreditation from the Law Society of Scotland. Working with law firms of all shapes and sizes means they understand that law firms have varying demands, and can scale services depending on the firm's needs. Their unique experience in the legal sector has shaped their service offering, allowing them to provide a service that meets the demands of the market.

Cashroom expanded into the English and Welsh market in 2014, and most recently this year into the United States. Working with Cashroom, clients will have a dedicated member of their cashiering team as their main point of contact who they can liaise with daily. Cashroom place a great importance on developing close working relationships with all clients and have a dedicated customer care team contributing to their constant development to better their service offerings to the ever-changing legal market.

Clear expertise

Cashroom's cashiers consist of SOLAS and ILFM qualified cashiers, solicitors and chartered accountants, providing clients with a unique support network for all aspects of managing their accounts department. Cashroom also support their accounting teams with AAT and CIMA qualifications, allowing them to increase their service offering and provide additional resource to clients.

They have also recently launched their own in-house academy; the purpose of this academy is to continuously develop staff skills and refresh training, allowing them to provide the best possible service to clients.

A main benefit of outsourcing to Cashroom is that firms have a full team of qualified and experienced cashiers and accountants working on their account, which means resource is not an issue. This sophisticated service could not be replicated in-house for most firms.

Innovation

Cashroom have designed a unique and secure web portal that removes the insecurities of email communication for their clients. The portal has been developed in its entirety in-house and is robust, secure and efficient. Firms can communicate easily and securely with Cashroom and there is always a clear audit trail for their visibility and compliance.

Their system expertise means that they can help firms optimise their processes for their own system use, helping with data flow, accuracy of data and efficiency, all as part of their standard way of working with clients. Cashroom's portal has integrations with leading practice management systems such as LEAP, Denovo, Clio and Klyant and is system agnostic.

Winning the Technology Award at The Scottish Legal Awards this year confirms they have succeeded in creating an excellent product for the industry.

"Winning this award is great recognition of not only the hard work of the technology team, but also the wider organisation in embracing change and new technology available. We encourage a culture of continuous development and improvement at Cashroom and are always looking at how we can do things better. We love to hear feedback from clients to allow us to adapt and improve our portal to deliver the best legal accounting service possible. Our technology team at Cashroom work hand in hand with our accounting experts and clients as we continue to revolutionise legal accounting!" –

Paul O'Day, Head of Product Development.

To find out more about Cashroom's services get in touch:
Alex Holt – Business Development Director | email: alex.holt@thecashroom.co.uk | www.thecashroom.co.uk/contact-us/

RISK MANAGEMENT

Claims never change

Alan Eadie and Jamie Robb of BTO Solicitors, on behalf of Master Policy brokers Lockton, look at the lessons to be learned from some recent claims

Over the past couple of years there has been a sudden (at least from the legal community's perspective) transition to hybrid working. Indeed in their 2021 law tech report, the Law Society of England & Wales noted that "By some estimates there have been 5.3 years of digital transformation in the last year". This transition has brought increased reliance on IT, and a corresponding susceptibility to cyberattacks. Numerous articles and guidance notes have already been produced on this topic; however cyberattacks represent a risk in the *methodology* of business. The purpose of this article is to consider the underlying *causes* of claims which, sadly, remain relatively unchanged; and what lessons can be learned from that.

In 2014, the SRA in England & Wales released data suggesting the main causes of claims and complaints comprised a mixture of both delays and technical errors. Almost a decade later, the landscape remains all too familiar, with the SRA reporting that delays remain the top reason for client complaints, while the SLCC's most recent report shows that the majority of complaints continue to stem from conveyancing (with executries a close runner-up).

As one of the Master Policy panel solicitors, our experience reflects that of the regulators, and the trends show no signs of changing. Below are some examples of the types of claim we see on a relatively regular basis.

Case study 1: The back burner

We've all heard the culinary metaphors: transactions or court cases are either being cooked with gas or relegated to the back burner depending on the speed with which they are progressing. Of course the problem is, if you leave a pot on the back burner for too long, your food gets ruined.

In this case the solicitor was instructed in the purchase of a large rural property including several fields and a servitude right of access over a road owned by the seller. An application was submitted to the Keeper for registration of title. Several years later the Keeper indicated that the access road failed to identify a benefited and burdened property. The error was a simple drafting error which could have been readily resolved by amending the original application.

The solicitor raised the matter with the seller; however there were several delays in obtaining documentation and the matter was not progressed quickly. As a result of the delays, the Keeper cancelled the application.

Eventually, a fresh application was presented to the Keeper for registration. Sadly, in the intervening period, the seller had sold part of the access road. This prevented the Keeper from registering the servitude contained in the new application.

Had the original problem been dealt with timeously, the new owner of the access road would have taken it subject to the servitude of access. As a result of delays, however, the original problem became irretrievable. The purchaser sued the solicitor for negligence.

This is not an isolated incident and we have been instructed in several recent cases where a failure to act timeously, particularly in relation to title issues, has either caused or complicated disputes between agent and client. When in doubt, remember only to take on matters where you have capacity, and the Latin maxim, *tempus fugit*!

Case study 2: Style over substance

It is likely not a stretch to say that most of us have, on occasion, asked a colleague the time saving and innocuous question, "Do you have a style I can use?" The problem with styles is that their essence runs contrary to the solicitors' mantra that "no two cases are the same".

Nevertheless, in an effort to maximise efficiency, the reach for styles can be tempting. This can be particularly so when the drafter lacks experience and looks to others for support. The problem is that the greater the complexity, the greater the need for flexibility in adapting a boilerplate style; or, paradoxically, the greater the need for reliance on a style, the less likely that a style can safely be relied on.

In this case a solicitor was tasked with preparing a commercial lease between landlord and tenant. The lease was designed to regulate (amongst other things) a restriction on the tenant assigning or selling the lease. In its original incarnation, the lease was nothing out of the ordinary and one which was perfectly suited to the use of a style.

When originally prepared, the lease envisaged the tenant company attempting to assign the lease to a third party and nothing more. During the course of the transaction, the tenant changed and became a special purchase vehicle company. The problem was that, at that point, the possibility of a change of control higher up the corporate structure became a possibility – one which ultimately bore out in reality.

The case had a number of complex problems associated with it, but central to the pursuer's argument was that, at the point when the tenant changed, the lease ought to have been changed to reflect the new reality and, in the pursuer's case, the new risks associated with any change of control. The original style never envisaged this occurrence and couldn't be expanded to cater for the complexity of this new reality. The drafting

ultimately failed to achieve what the pursuer sought, and litigation ensued.

While deferring to styles and examples, remember that every situation or transaction is very much fact sensitive, and just because it worked for someone else does not mean it will work for you.

Case study 3: Staying in your lane

An unrestricted practising certificate entitles solicitors to engage in any area of law they choose without restriction. That being said, just because you can do a thing, does not necessarily mean that you must do that thing or that you can do it well.

Throughout my formative legal years it was impressed on me that there was a distinction between so called "high street" and "big firm" solicitors. The former were characterised as generalists, imbued with an ability to turn their hand to anything that came through the door. The latter were specialists, spending their entire careers devoted to increasingly niche areas of law. In the years since, I have seen an increase in specialisation, and a general decline in the role of the generalist solicitor.

The SRA notes that since July 2010 the number of sole practitioners declined from 37% of the profession in England & Wales to just 18% in September 2022. This division has been cemented in both case law and regulatory rules (see, for example *Moy v Pettman Smith* [2005] 1 WLR 581 and the Law Society of Scotland's rule B1.10); however for the ordinarily competent professional the question arises: what is a specialist area?

"Just because you can do a thing does not necessarily mean that you must do that thing or that you can do it well"

To illustrate the point, albeit by reference to other professionals, in one of our cases an engineer had signed off on a professional consultant certificate ("PCC"), confirming that a property had been built generally in accordance with the building drawings etc. The property turned out to be defective and the client sued the engineer for failing to inspect the property properly.

There was nothing which specifically prohibited engineers from executing PCCs; in practice, however, this task almost invariably falls to architects who are more specialised and experienced in this area. As it transpired, that is for good reason.

The issue which followed was the extent to which an engineer could be expected to know what defects to pick up on and whether the engineer in question should be held to the same standard as an architect carrying out the same activity. This then raised the difficult question of what standard the engineer ought to be judged against.

We have seen increasing examples of cases where solicitors have turned their hand to matters which on the face of it appeared to be within their competence, but once the transaction was under way specialist input has been required – the commercial lease with renewable elements; the will with crofting elements; the litigation involving offshore trust issues. In each of these the generalist would be well advised to seek specialist input rather than try to "muddle through" and risk coming a cropper.

With more areas of law becoming ever more specialised, the risk for the generalist is that they find themselves trying to negotiate areas of law which, if touched, might leave their fingers badly burned.

Conclusion

There's a lesson to be learned from each of these case studies, but the concern is that, with the same causes of claims often repeating themselves, it appears we're not as good as we should be at taking heed from the past misfortunes of ourselves and of others.

For those of us who carry responsibility as complaints or claims partners or who are responsible for disseminating risk management guidance, please make sure that you analyse and keep a record of the causes of your own firm's bad experiences and "near misses", and take a note of those you read or hear of other firms experiencing, identify any recurring issues or trends and regularly share all of this valuable learning material with your colleagues... because the only other way to learn a lesson is the hard way.

Alan Eadie is a partner, and Jamie Robb an associate, with BTO Solicitors

FROM THE ARCHIVES

50 years ago

From *"Taxation of Capital on Death: A possible inheritance tax in place of estate duty", November 1972:* "While we are glad... to be... consulted, consideration of the alternative methods of imposing an onerous tax is inevitably a somewhat melancholy task. Conditioned as we are to acceptance of the fact that much of what we inherit shall dissolve in death duties, we can scarcely be expected to find the choice of the most appropriate dissolving agent an exhilarating exercise... The desirability of adopting a system of inheritance tax on the ground that it will facilitate concessions which cannot in practice be afforded becomes something of an academic question."

25 years ago

From *"Smoking in the Office", November 1997:* "The UK is the only EU country without general legislation or restrictions on smoking in public places... A While Paper on smoking is expected in the New Year. It is submitted, however, that the government is likely to balk at the implementation of compulsory measures on smoking in public places. In all probability a strengthening of voluntary controls well be preferred. Such a conclusion now appears inevitable, but would be most regrettable, in light of the general trend towards regulation in the western world, and the UK's already unenviable reputation as the sick man of Europe."

CHARITY


At Glasgow Sheriff Court


Outside the V&A in Dundee

In good company

Graeme McWilliams reports on the return of the Legal Walks in Scotland, in aid of the Access to Justice Foundation

This autumn, we welcomed the return of the Glasgow and Edinburgh Legal Walks and the inaugural Dundee Legal Walk, in aid of the Access to Justice Foundation Scotland ("ATJFS") and local legal advice charities.


Old College, Edinburgh

27.9: Glasgow Legal Walk

Austin Lafferty, Dean of the Royal Faculty of Procurators in Glasgow, ATJFS committee member and lead GLW organiser, comments: "Charity events come in all shapes, sizes and speeds. As lawyers and others promoting access to justice, we walk – for companionship, charity, and a visible joint commitment to our cause of justice for all. The Glasgow Legal Walk takes in local points of legal historical significance – including the High Court, the Glasgow Tolbooth, and the address of notorious murder accused Madeleine Smith."

We had a good turnout, enjoyed a very sunny evening, guided by Austin's maps and notes, starting outside Glasgow Sheriff Court where Sheriff Principal Turnbull welcomed and inspired us on our way. There was a real sense of rapport on the walk, and in our closing reception in the Royal Faculty, where Austin proposed the thanks. Austin and I thought it was the best Glasgow Legal Walk yet!

5.10: Edinburgh Legal Walk

Rebecca Samaras, ATJFS committee chair and lead ELW organiser, sums it all up: "A real highlight in the access to justice calendar and even the rain didn't dampen spirits! Thank you to all the legal professionals and justice advocates who walked together to raise funds for Scottish frontline legal advice services."

Our evening was actually mostly dry. Lord Tyre provided the inspirational address and walked with us. Our closing reception was in the Upper Signet Library, where the Society's Vice President addressed us and Rebecca proposed the thanks. Another great turnout for a very social walk enjoyed by all.

23.10: Dundee Legal Walk

Dr Sarah Hendry, head of Dundee Law School, says: "We were delighted to be able to organise Dundee's first Legal Walk for Access to Justice. Many thanks to Thorntons for their assistance and hosting a welcome cuppa at the end. We had the pleasure of the company of both the current President of the Law Society of Scotland and a past President who is now our chair of Court. Thanks also to Libby Findlay for leading the organisation. We look forward to this being an annual event, bringing together the universities and the local profession for such a worthy cause."

We set off on a dry but foggy Sunday afternoon from Dundee University, and posed by the iconic V&A Dundee. We finished up in Thorntons' office, where the President reminded us of why we were there. It was a great inaugural turnout, with plenty of networking on the way.

In total, £6,350 has been raised so far in Scotland (and will stay in Scotland); and donations for teams and individuals on each of the three walks can still be made via atjf.enthuse.com

Many thanks to all the organisers, sponsors, walkers, guest speakers and supporters of these events, which are genuinely great fun for super local causes.

ATJFS is looking for volunteers, and new committee and working group members. Roll on the Scottish Legal Walks 2023, and perhaps we can try to add a fourth Scottish city? J

Graeme McWilliams is an ATJFS committee member and Fellow of the Law Society of Scotland
e: gmmcw@aol.com

Notifications

ENTRANCE CERTIFICATES ISSUED 4 OCT-2 NOV 2022

BECK, Amy
BOYD, Katie Jackson
BRYCE, Sophie Elizabeth
CAMPBELL, Ben Morgan Connor
CARLIN, Michael Daniel
COMERFORD, Alannah McCall
CROLY, Daniella-Jane
DOOEY, Aidan Michael
EWEN, Ross James
GAMBOA, Ma. Carmella Berniz Javier
GREENAN, Conor Scott Hugh
HALEY, Kym Megan
HARLEY, Emily Patricia
HASSARD, Natasha Louise
HUGHES, Caitlin Kerstin
HUTCHINSON, Noreen Katrina
JAGGER, Rhoan David
JOSEPH, Mark Scott
KARUNWI, Funbi Sophia
KELLY, Emma
LAIRD, Richard David
McDADE, Aidan Patrick
MACDONALD, Lynn
McKANDIE, Danielle Rebekah
MACPHERSON, Annabelle
MACHOWSKI, Radoslaw
MALLOY, Hannah Hope
MARSHALL, Paul
MATTHEWS, Chloe Eden
MILLER, Annie
MILLS, Carly
MILNE, Zoe Elizabeth Violet
PICKEN, Robert Boyd
RAFFERTY, Bethany May
RASHID, Shahrez
ROBERTSON, Kayla-Leigh Margaret
SHARPE, Mhari Jane
STAFFORD, Rebecca Catherine
STEEL, Kyra-Alison
THOM, Sophia Grace
YOUNGER, Ellie
ZECCHINO, Daniella

APPLICATIONS FOR ADMISSION 4 OCT-2 NOV 2022

ALLAN, Emily Linda
BALLANTINE, John Donald
BOYLE, Deborah Anne
BRUCE, George Andrew
CALLENDER, James
CORDINGLEY, Columba Cecelia Texeira
DAVIDSON, William James Scott
DICKSON, Anna
DONNELLY, Harry
DUFFUS, Lisa Marie
FORSYTH, Alasdair Kuusik
GATENBY, Iona Lucia Bronte
GODDEN, Fraser Donald Doherty
HANCOCK, Beth Katie
HENRY, Michael John
LAING, Ethan Ian Gordon
MacASKILL, Jill Catherine
McCORQUODALE, Anna Catherine
McGIRR, Hannah Elizabeth
McKILLOP, Rebecca
McLEAN, Clement Jack
McMILLAN, Hayley Elizabeth Joan
McSHERRY, Eilidh
MILLAR, Louise Emma
MITCHELL, Ryan Robert
MUKIT, Myeda
MUNRO, Clare
O'DONNELL, Clare Marie
OZBAY, Cisel
PATIENCE, Hannah Charlotte
PEREIRA SANTOS, Valtemes
RAMSAY, Robert Gordon
RENNIE, William John
RICHARDSON, Kay Lindsay
ROLLINSON, James
SAMARAS, Zoe
SERCI, Iolanda Gemma Julia
SLAYFORD, Holly Shona
SMART, Kathryn Ann
SNOP, Patryk
SPEAR, Rhiannon Valentine
STEER, Hilary Catherine
STEVEN, Olivia
STOTT, Beth Louise
THOMSON, Hannah Margaret
TOOLE, Robert James
WILSON, James Gordon
WILSON, Marianne Jenny MacKenzie

ASK ASH

Effect of a life event

My junior appears affected by a bereavement

Dear Ash,

I have taken on a junior lawyer recently, who is very compliant and keen to impress but unfortunately just doesn't seem to understand the complexities of certain cases and seems constantly to make silly errors in documents. I have tried to sit down and explain things on a one to one basis, but sometimes I get the impression that he is not grasping key issues and seems somewhat distracted.

I appreciate that I need to be able to give him time to settle into his role, but I am getting embarrassed in front of clients by his silly mistakes. I am also making more work for myself by scrutinising his work in more detail than I would for others.

He is a nice person and I understand that he recently had a close family bereavement, so I am conscious about approaching the matter with a degree of sensitivity.

Ash replies:

I am pleased that you seem to have highlighted the need for a degree of sensitivity in this matter; and you seem to have picked up on what may be the core issue behind this person's current lack of focus.

It is perhaps stating the obvious, by saying that a close bereavement can cause significant impact on a person's reasoning and priorities in life – although in our working world we do, to a degree, expect people to "normalise" after such life events across a relatively short period of time.

On a personal level, as a junior lawyer I was expected to return to work within a couple of weeks of unexpectedly losing a parent; and there was little sympathy for any subsequent lack of focus or upset on my part, despite the tragic and unforeseen circumstances.

I therefore encourage you to ask the person in question whether he needs to take time out to be able to grieve properly, and emphasise that there is no shame or stigma associated with this.

It is important that we do recognise that personal tragedy is something we can all experience from time to time, and to varying degrees, and that time out from normal work pressures is sometimes required to help cope with such life events.

Having a period of time out and reflection will hopefully help him to refocus and recharge, as it seems that he is currently struggling to juggle work pressures and deal with the grief at the same time. You may suggest that bereavement counselling could be an option too; and there are good sources of support from organisations such as Cruse. Assurance from you in his abilities is also key to help minimise any stigma he may have about not being able to cope at present.

It is important he knows that he has your support and understanding at this time to allow him to better manage the impact of this significant life event.

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Any Solicitor having knowledge of a Will for the late Lawrence Findlay who formerly resided at 37 Thomson Road, Currie, Midlothian, EH14 5HT and he was late of Northcare Suites, Care Home, Edinburgh who was widower to the late Helen Hunter Findlay please contact Joan Matthew, M J Brown Son & Company Solicitors, 10 Dean Bank Lane, Edinburgh EH3 5BS. Telephone 0131-332-1220. Email: jmat985725@aol.com. The family is aware of a Will prepared by McKay & Norwell in 1986

Would any person holding or having knowledge of a will by David Alexander Bryce, late of 24/2 Whitson Road, Edinburgh, EH11 3BU who died on 10 July 2022 please contact Findlay Glynn, Balfour + Manson LLP (findlay.glynn@balfour-manson.co.uk)

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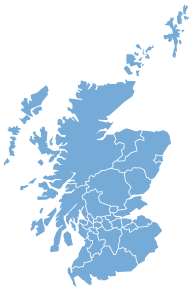

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