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Journal

Journal of the Law Society of Scotland

Volume 67 Number 1 – January 2022

Seeing the offender

Why the new guideline on sentencing young offenders deserves support from the public

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Editor

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Another year

As 2022 gets into its stride, how are we doing? I have heard various people say they had to curtail their Christmas plans, due to the interference, actual or suspected, of coronavirus. For some, the experience was worse than the previous year when we at least knew in advance that get-togethers would be very limited.

It is to be hoped, however, that the early months of this year will be less of an ordeal, without the lockdown restrictions that made their 2021 equivalent a struggle for many. That still depends to an extent on everyone doing what they can to limit the spread of infection, even if we weary of face coverings, distancing, testing and the rest after all this time. I have never subscribed to the view that face coverings are an infringement of freedom – an enabler of freedom, more like, if they permit more activities to be safely undertaken than would otherwise be the case, and if their use offers more reassurance to the vulnerable.

To achieve anything resembling normality, it seems to me, we have to assume the continuing presence of one or more variants of the virus in our midst, and not shrink from deploying a combination of measures, while seeking to avoid restrictions that are socially and economically unsustainable. It may be difficult, but it is a better strategy than, for example, founding on the latest variant being supposedly less severe than its predecessor as a reason for inaction, if that leads to transport and other vital sectors, as well as the health service, being crippled due to staff absence. Achieving freedom is not as black and white as the more libertarian politicians would have us believe.

Barring further disruption, what else can our profession expect of this year? On past form it will be several months before we hear the Scottish Government's proposals following the consultation on regulation. Hopefully, rather than Esther Roberton's solution in search of a problem, they will focus on the matters that clearly need fixing. Talking of which, can ministers continue to stall on legal aid, especially if the withdrawal from duty schemes now being announced by various local bars becomes widespread? The revelation before Christmas that payments to legal firms in the first year of COVID fell by 24% (£31.8 million), has only added to solicitors' determination to take a stand.

Court lawyers can expect further arguments over the proposed rules for remote and in-person hearings; and those in criminal work face ongoing debate over corroboration, not proven, and even jury trial itself, as the Lord Advocate has more than hinted in relation to sexual assaults.

In short, the year is unlikely to be a quiet one. My wish for us all is that it at least brings a positive feel.

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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All is fair in... disciplinary procedures?

Recent judicial suggestions that an employee's contract is subject to the implied term that any disciplinary process will be conducted fairly, sound reasonable but create a new risk for employers, Stephen Connolly believes

The exclusionary rule and pre-contract negotiations

Richard McMeeken welcomes the Outer House decision in *Dragados (UK) v DC Eikefet Aggregates* as restating the importance of the rule excluding pre-contract negotiations in settling questions of construction

The uneasy relationship between adjudication and insolvency

Iain Drummond considers a recent case that provides lessons for the construction sector concerning the enforcement of adjudicators' decisions by companies in liquidation

Where lightning strikes twice

Experience of representing injured cyclists following road traffic collisions suggests that police and local authorities are failing to act in relation to certain accident blackspots, Roz Boynton claims

OPINION

Adam Tomkins

The Human Rights Act is a work in progress; there are issues on which it is not working as intended, and the UK Government's plans to update the Act should be supported

The Human Rights Act 1998 ("HRA") may be fundamental but, like any other aspect of constitutional reform, it is work in progress, not the last word. Our devolution "settlement" is not settled, but fluid: the Scotland Act 1998 has been amended on multiple occasions. Likewise, the relationship between the courts and parliamentary government, of which the HRA is a key part, is dynamic, not static.

The UK Government's proposals to revise and update Britain's human rights laws, published by the Ministry of Justice last month, seek to build on, not to bury, the foundations laid by the HRA. Under the Government's plans, now out for public consultation, there will be no move to withdraw the UK from the European Convention on Human Rights. Convention rights will continue to form the bedrock of the UK's new Bill of Rights. As the consultation paper makes clear, the HRA was "a well-intentioned attempt to enhance rights protections in the UK". The Government will "leave in place those aspects of the Human Rights Act that have not proved problematic in practice". This is all to be welcomed.

By and large, the HRA has indeed worked well in practice. But, as with any general rule, there are exceptions – and it is on these that the core of the Government's proposals are focused. They concern the relationship of domestic precedent to decisions of the Strasbourg court; the extent to which domestic courts may effectively rewrite legislation; and the strength of the protection our law affords to freedom of speech. Let us consider each in turn.

The first is governed by s 2 of the HRA, which requires that in appropriate cases relevant Strasbourg authority "must" be taken into account. Our courts have tended not merely to take into account decisions of the European Court of Human Rights, but to follow and apply them. This is not a uniform practice – there are well-known exceptions – but it has become the general pattern. This is not what was intended when the HRA was written. The independent review of the HRA (whose report was published alongside the Government's proposals) was of the view that s 2 required amendment, and the Government is wise, in my view, to put a number of options as to how this may be achieved to public consultation.

However it is done, the result will in the end be the same: namely, to empower our own courts to interpret and apply human rights law as best befits the interests and circumstances of the United Kingdom. This is an important aspect of what Jack Straw and Lord Irvine of Lairg 20 years ago called "bringing rights home" – although it is noticeable that that kind of jingoism does not feature in the current Government's consultation.

The relationship between legislation and rights is governed by ss 3 and 4 of the HRA. Section 3 provides that, where possible, legislation is to be interpreted compatibly with Convention rights; s 4 that, where this is impossible, a declaration of incompatibility may be granted. In practice, few such declarations have been issued. One of the reasons for this is that s 3 has been widely used to interpret – or, sometimes, straightforwardly to rewrite – legislation to render it rights compliant. Again, this is not what was intended by those who wrote the HRA and it needs to be corrected. The courts should not be in the business of disregarding what legislation says in order to ascribe to it a meaning at odds with what Parliament intended.

Let us grant that, at present, the courts do this not of their own free will but because they consider that Parliament mandated it in s 3. It follows that s 3 needs to be recrafted in order to make it clear that this is not what Parliament wants. If Parliament enacts legislation incompatible with Convention rights, the remedy lies in s 4 and not in s 3.

Finally, on free speech, you would have to have been living in a bunker not to appreciate that free speech is increasingly fragile in modern Britain. Hate crime legislation and the popular desire to ban all speech deemed offensive are but two instances of this. Our human rights law does need to offer greater protections for free speech, and not only when speech clashes with the right to privacy. The Government is right to take this opportunity to consult on how best this may be achieved.

If enacted, the Government's proposals will sharpen and improve our human rights laws, offering increased protection while at the same time clarifying that all-important balance between the power of the courts and the authority of parliamentary Government to set public policy.

Adam Tomkins is the John Millar Professor of Public Law at the University of Glasgow; from 2016-21 he was a Scottish Conservative MSP for Glasgow

The consultation is at consult.justice.gov.uk/human-rights/human-rights-act-reform/, and runs until 8 March 2022

A response to this article is planned for February

VIEWPOINT

Success fees: an anomaly

The last 12 months have seen a surprisingly large number of claims for augmented solicitors' fees reach the courts, particularly in England. Most would be void and unenforceable at common law, as *pacta de quota litis* (contracts under which solicitors are to receive an agreed portion of clients' litigated winnings).

However, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, s 2 has legalised such "success fee" agreements, which nowadays are usually enveloped in lengthy letters of engagement.

Of course, success fees are inherently something of an anomaly, seeing that solicitors routinely strive for their clients' success. What distinguishes success fees from other augmented fees was lucidly set out by Lord Doherty in *A & E Investments v Levy & McRae* [2020] CSOH 14: "The success fee elements are not conditional fee arrangements. They do not provide that a certain fee will be paid in the event of success. They are contingency fees. The amount payable varies depending not just upon success but also upon the amount recovered. They are not speculative fee arrangements. At common law such fee arrangements involve no fee being due if the litigation does not succeed, but payment of an ordinary fee in the event of success. By contrast, here the amount of the success fee varies not merely according to whether the litigation is successful, but in proportion to how successful it is."

Cabot Financial (UK) v Weir [2021] CSIH 64 concerned the success fee element in the defender's solicitors' letter of engagement, and whether an award of expenses on an agent/client, client paying basis could include a success fee. The letter provided that, if the client should win, she would have to pay the stipulated success fee, and further, that "win" meant "any resolution to the litigation that results in an agreement or a court award which reduces your liability to the pursuers..., whether this be partial or full... The Court, through the Auditor... will decide how much you can recover... If the amount... does not cover all our work, you pay the difference." In my view the most intense inequity resides in the word "partial".

Holding that the award of expenses did not include the success fee, the court stated: "The 'success fee' in this case is not an expense which is part of, or directly related to, the process. It is a private arrangement between solicitor and client which is outwith the boundaries of the process; it is an extrajudicial item. It is a form of incentive to the agent to represent the client in the litigation. It is not related to the work which the solicitor does in carrying out that task."

One can only wonder that a principle so well entrenched in both English and Scots law was taken all the way to the Inner House – probably propelled by the involvement of the auditor. The sum unsuccessfully sued for was £7,277.52. The auditor originally allowed a success fee of 70% of the recoverable taxed fees against the pursuers, or £3,942.40. However, the court held that in terms of the letter of engagement, the success fee was limited to 25% of the sum sued for, or (indulge me) "only" £1.819.38.

Hence, the defender cannot recover her solicitors' success fee from the pursuers. To further embitter matters, she failed to obtain sanction for the employment of her senior counsel.

All in all, surely rather more of a Cadmean than a Pyrrhic victory.

George Lawrence Allen, Edinburgh

BOOK REVIEWS

European Criminal Law: An Integrative Approach (4th edition)

ANDRÉ KLIP
PUBLISHER: INTERSENTIA
ISBN: 978-1780689685; €125

In this fourth edition of the authoritative text on European criminal law, the author takes the subject matter from strength to strength.

What use is it to a lawyer in Scotland, post-Brexit? Such a question risks exposing a narrow view of the law. There are many Scottish decisions where foreign law has been referred to as an aid to interpretation. Cross border criminality is being vigorously exploited by organised crime groups and others. With clarity of thought, analysis and language, Professor Klip leads us through the development of EU criminal law and procedure and its envelopment of the different agreements now in place.

UK practitioners will still need to advise clients in the grip of the judicial authorities in EU states. Consideration of EU criminal law and practice will aid greater understanding of the new agreement and insight into the approach taken by our European partners. UK nationals no longer have EU citizenship; in EU criminal law, one cannot underestimate the significance that citizenship plays, not least in the area of surrender of fugitive offenders. It will be interesting to observe how the UK-EU relationship progresses but this book, addressing as it does so clearly the developments in EU criminal law, shines a light on future challenges that may be faced.

David J Dickson, solicitor advocate. For a fuller review see bit.ly/3JHj66t

Chewing the Fat

Tasting Notes from a Greedy Life

JAY RAYNER
(GUARDIAN FABER PUBLISHING: £6.99; E-BOOK £2.19)

"Luxury is, of course, expensive. This volume, on the other hand, is... the price of a not very large drink. It's also much more fun."

This month's leisure selection is at bit.ly/3JHj66t
The book review editor is David J Dickson

BLOG OF THE MONTH

www.lawscot.org.uk

"Where are all the men?"

The question is posed by Darren Kerr, careers and wellbeing manager at the Society, as he reveals that only two men (one not even a solicitor) responded to a call to contribute to the International Men's Day mental health campaign. Even completing an anonymous survey seems to be beyond many. But recalling recent tragic circumstances, more of us men should at least attend sessions to hear others' experiences – and find a way to talk about our own.

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

Hi ho, hi ho...

The boom in homeworking since the pandemic has brought with it much comment around employers' liability, workplace health and safety and the like.

But at what point does work activity begin? A German federal appeals court for social security has allowed a claim by a man who slipped and broke his back while descending a spiral stair from his bedroom to his home office. His employer's insurance company refused the claim, but the court held that cover applied to the same extent as to an incident on the company's premises. Here the stairs were being used to start work, and the fateful journey was a "service in the interests of the employer".

"Work" has its limits all the same. The previous month, the Italian Supreme Court overturned two lower tribunals in ruling that a woman who engaged in the time-honoured national practice of leaving her desk for an espresso with colleagues, and tripped in the street and broke her wrist as she returned, was not acting in the context of her work – despite her claim that she was "satisfying a physiological need connected with her work activities". A bitter cup, indeed.

PROFILE

Antony McFadyen

Antony McFadyen, the Society's acting head of Professional Practice, leads a team of solicitors offering support and advice on the Society's rules and guidance

1 Tell us about your career so far?

I began my career at Gallen & Co, Glasgow. I did sheriff court work there for just over a decade, before joining the Professional Practice team as a senior solicitor in September 2018.

2 What for you are the most significant events for the profession since you joined?

It feels like a bit of a cheat of an answer, but it has to be the pandemic. Its impact on how firms of all types offer legal services, how the courts have adapted, and on home/hybrid working has been immense. I think the profession has squeezed about 20 years' worth of progress into the last 20 months and its response has been fantastic. But for that, the reforms on the horizon following the Legal Services Review would top the list.

3 What are you most proud of in your career?

It sounds slightly hackneyed, but I am proud of the profession for coming through the last couple of years in the way it has. I like to think I helped in my own way via the Professional Practice team's work. The documents on new

ways of working were produced very quickly, greatly assisted by the Society's committees. These helped solicitors to give clients badly needed assistance in extremely trying times.

4 What's your top tip for new lawyers?

Take every chance you get to learn from somebody more experienced who is willing to help you. Nobody likes having to admit they don't know the answer or how to do something, but there is a strength in recognising where you can benefit from others' experience.

Go to bit.ly/3JHj66t for the full interview

WORLD WIDE WEIRD

1 Faster food?

McDonald's has introduced exercise bikes as seats for diners at two restaurants in China. Diners can generate electricity to charge their phones while trying a healthier way to eat fast food.
bit.ly/3n11Z9Z

2 Hoist for a heist

A man has been charged with stealing an 18metre footbridge from a park in Akron, Ohio, paying a trucking company for crane service. Police searching under warrant found parts of the structure.
ab.co/3JJHLdi

3 Political bruisers

Two politicians in Brazil decided to settle a dispute over a waterpark by having a fight in a Mixed Martial Arts (MMA) boxing ring. It seems they shook hands and hugged afterwards – but did it settle anything?
bit.ly/3FXWgbh

TECH OF THE MONTH

Houzz

Free: Apple store; Google play

If you're planning to redecorate or improve your home this year, you might find Houzz useful. It's a free app that has a library of millions of photos, showing exteriors and interiors of various styles. And if you're planning to do the work yourself, you can ask the Houzz community for advice.

PRESIDENT

Ken Dalling

With COVID-19 still prevalent as we begin another year, let us resolve to be more aware of any need for support through the stresses it brings, whether for ourselves or those around us

A new year should bring thoughts of optimism, a fresh start and the opportunity to be better and do better. Regrettably, with the ongoing COVID-19 situation, it is likely that any optimistic sentiments are rather swallowed up in what seems to be a recurring Groundhog Day of risks, fears and general unhappiness.

I have written here before of the pride which I have taken in the perseverance and fortitude of the profession and of the profession's achievements throughout the pandemic – and I don't expect that to change – but I am well aware that such achievements can come at a cost. As we approach the second anniversary of the first lockdown, it remains important that each of us consider, for ourselves and for those around us, the extent to which we may need help or support in coping with the inevitable stress that COVID-19 imposes on us all. Such stress only adds to that which inevitably comes with the responsibilities on each of us practising as a solicitor, whether in crime or family law, commerce or private client work, in-house or public sector.

So what can we do about that? Well, the serenity prayer calls upon a higher power to let each of us accept the things we cannot change, courage to change the things we can, and the wisdom to know the difference. So far as COVID-19 goes, the power to change does rest with individuals whose positive engagement with safety measures should be of benefit to us all. Beyond that, and as a counter to the sometimes inevitable anger and madness brought on by those feelings of risk, fear and unhappiness, we each need to be self aware and sympathetic to those with whom we work.

Self awareness and kindness to others may be an easy prescription to write but a more difficult one to have dispensed. However, any difficulty in following good advice doesn't undermine the value of that advice. It is all too easy to be self absorbed, but that is dangerous for each of us and risks us being blind to the troubles of others.

Offering support

The Law Society of Scotland has a number of resources available by way of Lawscot Wellbeing and LawCare. These are signposted on our website and I would urge you all to have a browse. An understanding of what support is available may just make the difference in recognising that either you or someone you know would benefit from that support. Only once the need for action is recognised can action be taken.

Past President Amanda Millar, an accredited specialist in the field of mental health law, with extensive experience interacting with people who are at a low point in their lives, shared with Council in December the value of just talking. She told us that people were often reluctant to involve themselves in the lives of even their closest friends for fear of saying the wrong thing. That is a mistake. There is no "wrong thing" that can be said and, actually, just prompting the opportunity to listen is all important.

Jerry Springer had a life as a serious politician before he became a chat show host. Whatever prompted his catchphrase, the sentiment expressed by it is of value. So, in the year ahead, please "Take care of yourselves, and each other."

Ken Dalling is President of the Law Society of Scotland – President@lawscot.org.uk

People on the move

Intimations for the People section should be sent to peter@connectcommunications.co.uk

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ANDERSONBAIN LLP, Aberdeen announces the appointment of **Laura Youngson**, previously with RAEBURN CHRISTIE CLARK & WALLACE, as a new partner to the firm, **Katie Burns** (previously with McEWAN FRASER LEGAL) as a senior solicitor, and **Paul Flecher-Herd** as a solicitor.

BELL + CRAIG, Stirling and Falkirk announces the retirement of its director **George H Craig** with effect from 31 October 2021. He will continue to be associated with the firm as a consultant.

D & J DUNLOP, Ayr announces the retirement of **George A Hay** as a partner with effect from 30 November 2021. He will continue to be associated with the firm as a consultant.

CULLEN KILSHAW, Galashiels, announces the retirement of consultant **Gavin Hamilton**, with effect from 31 October 2021, after more than 40 years in legal practice, much of it with IAIN SMITH & PARTNERS. Cullen Kilshaw wishes Gavin a long and healthy retirement.

Ian Forrester QC has returned to practice following his appointment as the UK nominated Judge to the General Court of the European Union ending due to Brexit. He has joined AMPERSAND ADVOCATES and expects to concentrate on advisory and arbitration work, including appointment as an arbitrator.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has appointed **Laura Marie Meldrum** as a business development associate with its HM Connect support and development network. She joins from ANDERSON STRATHERN where she was a senior solicitor in the Employment Law team.

Gordon Lindhorst, advocate has rejoined WESTWATER ADVOCATES. From 2016 to 2021 he was an MSP for the Lothian region.

Neil Kennedy

David McLaughlin

Lee Qumsieh

James McMackin

Jo Clancy

Gurjeet Singh

McCASH & HUNTER, Perth, announce the promotion of **Susan Scott** to partner with effect from 1 January 2022.

MACKINNONS, Aberdeen, Aboyne and Cults, has announced the following appointments and promotions. **Pamela Bursill**, formerly partner and latterly consultant at RAEBURN CLARK CHRISTIE & WALLACE in Aberdeen and Banchory, and **Gregor Sim**, previously a partner with JAMES & GEORGE COLLIE in Aberdeen and latterly a senior associate with BRODIES, join the Property team as senior associates. **Laura Totten**, a one time property adviser at Mackinnons, returns to the firm from SAVILLS, Aberdeen as assistant property manager, while **Jackie Cocker** joins as a property adviser, based in the Aboyne office, from JAMES & GEORGE COLLIE. **Hollie Hutchison** has been promoted to senior solicitor in Private Client, and **Anna Kaparaki** and **Rachael Bain** to senior solicitor in Dispute Resolution. **Charlotte Arthur** becomes a senior accredited paralegal in Private Client, and **Susan Fulton** a paralegal in Property/Private Client.

MACNABS, Perth, Pitlochry and Blairgowrie, has opened a new office at 40 Henderson Street, Bridge of Allan FK9 4HS (t: 01738 623432). The firm has also appointed as partner **Rachael MacDonald**, an accredited specialist in family law, who joins from HARPER MACLEOD, and promoted **Sarah Mitchell** to partner in the Private Client team.

MACROBERTS, Glasgow, Edinburgh and Dundee, has re-elected **Neil Kennedy** as managing partner for a second four-year term, from 1 May 2022. MacRoberts has appointed **Jonathan Gaskell**, who joins from DWF, as a partner in its Construction team, and **Rod Hutchison**, previously with LEDINGHAM CHALMERS, as a legal director in its Corporate Finance team.

MORTON FRASER, Edinburgh and Glasgow, has appointed as partners **Chris McLeish**, who joins the Real Estate team from DWF, and **Andrew Walker**, who joins the Corporate team from ADDLESHAW GODDARD, and promoted **Jack Kerr** to partner in the Private Client team.

Michael Nicholson has been appointed chief executive of CELTIC FOOTBALL CLUB. He was formerly Celtic's director of legal and football affairs and has been with the club since 2013.

PATERSON BELL LTD, Edinburgh, Kirkcaldy, Cupar and Methil, criminal defence and criminal appeal specialists, announce three promotions to associate: **David McLaughlin** and **Lee Qumsieh** in Tayside and Fife; and **James McMackin** in Edinburgh.

ROAD TRAFFIC ACCIDENT LAW (SCOTLAND) LLP, Edinburgh, Glasgow, Aberdeen and Peebles, announces the appointment of **Jo Clancy**, who joins from THORNTONS, as an associate working on cycling and pedestrian injury claims, and the promotion to senior solicitor of **Thomas Mitchell** and **Zara Jones**.

Gurjeet Singh, of Glasgow, has launched a new practice, SINGH & CO SOLICITORS, specialising in employment law and immigration (t: 07541 950585; e: info@singhandcosolicitors; w: singhandcosolicitors.com).

denovo

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Over the last 300 years, Scottish scientists, engineers, and technology innovators have made discoveries and inventions that have changed our very relationship with the world around us.

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That's an incredible accolade, but earned. As a small example of Scottish innovation, today, we take it for granted that surgery will be quick and pain-free, that mechanics and robotics can support the human body and that the water from our taps will be safe to clean and cook with. Yep, there's a Scot behind all of those world-changing innovations.

From the simple processes of everyday life to the cutting edge of 21st century medicine and modern tech companies like Rockstar North (think *Grand Theft Auto*) and, if we may be so bold, ourselves – Scotland remains at the heart of scientific and technological innovation. Think about it: who was the chief engineer tasked with powering the *Starship Enterprise* to split the infinitive and "to boldly go"?

We Scots definitely "give it all we've got... (Captain)!".

Denovo: our passion

OK, so we haven't been around for as long as the *Starship Enterprise*, but over the last 30 years, our team of Scottish software developers, legal case management specialists, legal accountants, cashiers, and legal technology experts at Denovo Business Intelligence have been engineering and innovating software for the legal profession, and we believe even James T Kirk would approve.

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Open, friendly, and helpful is how we Scots like to see ourselves, and it's built into our ethos here at Denovo. Indeed, this seems to be one of the main reasons that law firms are drawn to work with us – we're just nice, normal folk, who know their stuff and who really want to help. Our software is incredibly impressive, of course, but the compliment we get more than any other is how fantastic and supportive our team are. You see, on top of their tech skills, Denovo people innovate, listen, support, guide and advise. Some legal tech companies make much of features like digital resources, online academies and virtual content. To be honest we do that too, but we genuinely believe that human interaction is the key to our success. Law firms want to talk, to make sure this kind of software works for them, and we guarantee we'll listen and work with them to ensure it always does.

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Scotland is at the forefront of a future which will be forged in a digital world. It's a world in which data and digital technologies are transforming every element of our working and personal lives. Here at Denovo, we feel incredibly proud to be part of an industry that understands the importance of technological advancement in a modern society.

At Denovo, we also understand that it still needs that human connection to work, and we do that very well.

If you want to have a chat with a bunch of passionate Scots about helping you make your business even better, call us on 0141 331 5290. If you prefer to write to us our email is info@denovobi.com

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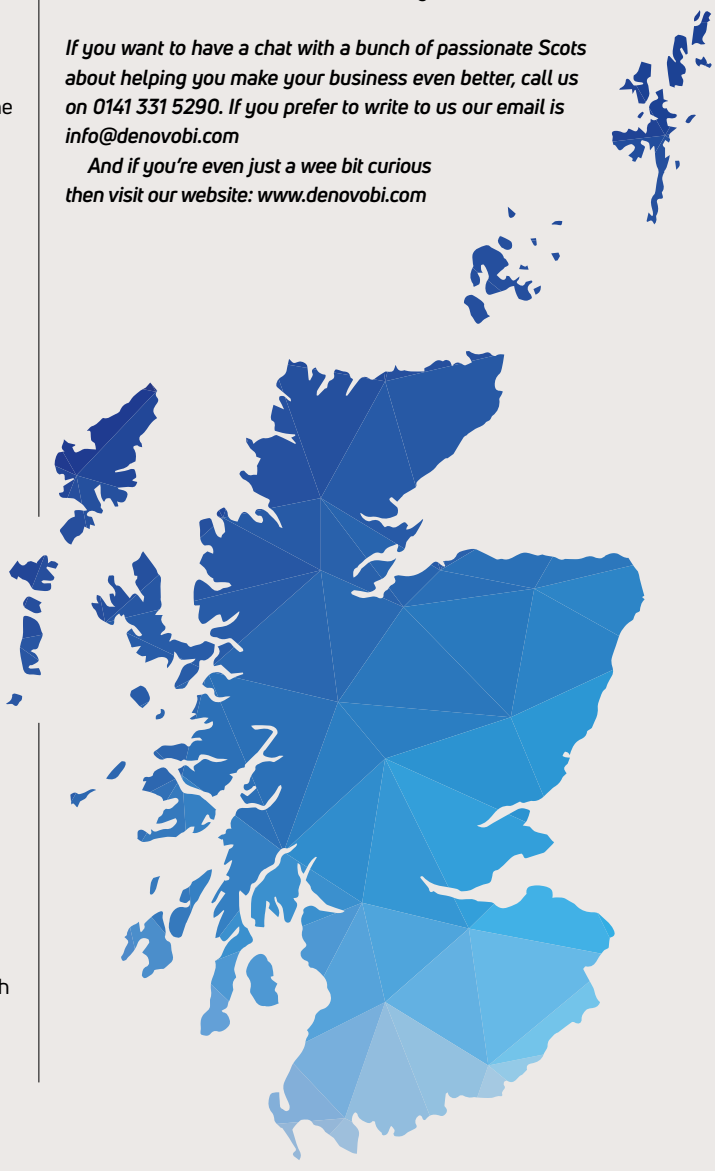

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Youthful excess: what price?

Coming into force this month, the new guideline on sentencing young people provoked conflicting views during consultation. Krista Johnston, who took part in its development, explains the thinking and attempts to answer the critics

The Scottish Sentencing Council's new guideline on sentencing young people, its highest profile guideline to date, comes into effect on 26 January. Following extensive research and engagement, the guideline was submitted to the High Court and was approved on 9 November 2021. This marked what Lady Dorrian, Lord Justice Clerk and chair of the Council, called a "significant milestone which will help to increase understanding and awareness of this complex and challenging area".

There certainly appears to be a need for this. An independent analysis of responses to a public consultation on the draft guideline revealed overwhelming support from organisations with experience of the criminal justice system; but it also showed that many individuals disagreed with aspects of the guideline and appeared to lack understanding of the law surrounding young offenders and the factors relevant when sentencing them.

This may not come as any great surprise to those who work within the system. Criminal justice has always provoked a great deal of interest from those outwith the profession, many of whom hold strong opinions on how we should be tackling crime and improving the protection of the public. Defence solicitors will have had to defend their vocation a hundred times. Now there is a new matter to justify: "Why should the criminal justice system treat under 25s differently?"

As a defence lawyer for more than 25 years, I joined the Council as its solicitor member in 2018 and was appointed to the committee leading on the guideline's development shortly thereafter. Naturally, I have an interest in how the guideline has been received and I am keen to address any misunderstandings around it. The Council's consultation report does this in depth, so I will focus here only on a few of the key objections that surfaced.

Why 25?

Let's start with the decision to define a young person for the purposes of the guideline as someone under 25. While organisations overwhelmingly agreed with this proposal, a significant majority of the individuals responding to the consultation did not.

As any experienced defence lawyer will tell you, and studies have shown, many young people begin to desist from offending by their mid-20s. A comprehensive review of the latest neurological, neuropsychological, and psychological evidence on cognitive maturity – which provided the evidential basis for the guideline's definition of a young person – explains why.

It found that the brain does not fully develop until at least 25, and that cognitive development can be delayed or hindered by experiences of trauma and adversity in childhood. In particular, the areas of the brain governing emotion develop before those which assist with self-control. This imbalance explains the risk-taking, emotionally-driven behaviour commonly attributed to young people. We might even recognise that as eloquent of the behaviour of young adults dear to us, or dare I say, of our younger self! Research also explains why this behaviour, which can contribute to criminality, tails off in the mid-20s.

All of this is, of course, directly relevant to sentencing. It means a young person lacking maturity will generally have a lower level of culpability than an older person for a similar offence.

Not children

Without citing any research calling into question the evidence drawn on by the Council, some who disagreed with this did so on the basis of assumptions such as that the Council was suggesting under 25s should be treated as children, or that they do not know right from wrong.

It is important in this specific context to emphasise that neither the research nor the guideline states that all under 25s necessarily have immature brains. That is why the guideline requires an assessment of the individual's maturity when under 25, taking into account, among other things, the impact of any trauma or adverse childhood experiences.

It also needs to be stressed that the research does not suggest that under 25s do not know right from wrong, but rather that they may have more difficulty acting appropriately or controlling their emotions and impulses despite knowing that what they are doing may be wrong or have negative consequences.

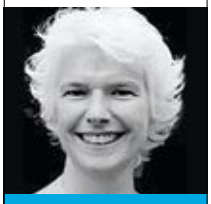
Another common dissenting argument was that young people can vote, marry, join the armed forces or learn to drive at earlier ages so the guideline should align with these. But reaching full maturity is a process, not an event, and it does not arrive on a particular birthday.

The decision on the age threshold aligns with developments elsewhere. For example: the new youth justice vision and priorities prepared by the Scottish Government and the Youth Justice Improvement Board proposes to extend the Whole System Approach to those up to age 26 where possible and appropriate; the Probation Service in England & Wales assesses the maturity of offenders up to age 25 in pre-sentence reports; and the Irish Government has announced that it will look at increasing the age limit for its youth diversion scheme from 18 to 24.

Selecting the disposal

Two further themes emerged during consultation: first, how the guideline should address victims' issues; and secondly, the role of community-based options as opposed to custody.

"In recognition that a young person might be in need of a more interventionist approach [the guideline] allows for a more challenging community sentence for a young person"



Krista Johnston is a solicitor advocate, a director of Martin Johnston & Socha, and a member of the Scottish Sentencing Council

In respect of the first issue, the Council takes the impact of crime on victims very seriously and carried out direct engagement with victims' and survivors' organisations during the consultation. Based on these discussions, and its consideration of consultation responses, the Council amended the guideline. This was to make it clearer that the assessment of seriousness – which requires the evaluation of the level of culpability and harm – includes the impact on any victim or victims; and, critically, that the guideline does not affect the assessment of harm. That is to say, although lack of maturity affects culpability, it does not have any bearing on the consideration of the impact on the victim.

With regard to community sentences, the Council recognises that these can provide an effective – and challenging – sentencing option. Indeed, research suggests community-based sentences are more successful in reducing reoffending than short custodial sentences.

As the Council has noted elsewhere, community payback orders can impose severe restrictions on offenders, and can last months or years. They can include elements of punishment, such as deprivation of liberty or unpaid work, and rehabilitation, such as programmes to help stop further offending behaviour. And confronting and moving away from the causes of one's offending behaviour can sometimes be one of the hardest things for any offender to do.

Practitioners know that community sentences can be anything but a "soft option". It is also worth bearing in mind that while the guideline states that a period of custody should usually be shorter for a younger person than an older person, in recognition that a young person might be in need of a more interventionist approach it allows for a more challenging community sentence for a young person than might otherwise be selected.

It can be a hard sell to the public, but in terms of their longer term protection, a community sentence must surely be more effective than a short period of custody, especially when such an order can effect lasting change and successful rehabilitation of a young person.

And in respect of one of the guideline's key themes – rehabilitation, which it states should be a primary consideration – the consultation results were similar to the findings of a nationally representative study carried out on the Council's behalf by Ipsos MORI. This revealed that a majority of the public believe that rehabilitation is the single most important thing Scottish courts should be trying to achieve when sentencing young people.

Further work

As well as the final guideline receiving the High Court's approval in November last year, it has been gratifying to note it has met with a largely positive reaction.

The work does not end there, however. The complexities involved in sentencing young people are not, generally speaking, well understood by those outwith the criminal justice system. The guideline will play a part in addressing this, but it will not be enough in and of itself, and the Council will be undertaking specific educational activity in the days and weeks ahead in furtherance of its statutory duty to increase public awareness and understanding of sentencing. The profession can help spread the word, too.

We all have an interest in increasing public confidence in sentencing, and this is especially important as the Council enters a new phase of its work, where its focus will be on offence guidelines involving a number of matters of significant public concern. These include guidelines on death by driving, rape, sexual assault, indecent images of children, and domestic abuse offences. These are also offences in which children or young people can, sadly, be involved: either as perpetrator or victim or as witnesses. It is therefore imperative that the development of these guidelines is informed by research and engagement involving children and young people and those who work with and represent them.

I look forward to hearing practitioners regularly refer to the guideline in court. Those of us already familiar with it will note that the guideline refers to young people having a greater capacity for change and rehabilitation than older people. So too is there a capacity for change in people's attitudes to sentencing and to how we treat young people who offend. The efficacy of the guideline depends upon us all helping to achieve that goal.

A trauma-informed guideline

Trauma specialist psychotherapist Kirsty Giles, introduced by criminal defence lawyer Iain Smith, writes on how the new sentencing guideline should support trauma-informed practice, which both are campaigning to promote

Iain Smith (of Keegan Smith) writes:

I have had the pleasure of knowing Kirsty Giles, an integrated psychotherapist who specialises in trauma, for a few years now. Over the past 12 months, she has joined forces with some lawyers including myself, Melissa Rutherford, Tony Bone and Nadine Martin, as well as colleagues James Docherty, project lead at the Violence Reduction Unit, BAFTA winning filmmaker Stephen Bennett, and educator Douglas Clark to form the Trauma Aware Law Group.

Together we decided to ensure that trauma-informed practice was embedded with law students to promote an early understanding and create a more compassionate and understanding legal system in the future. To that end we spoke to every law school in Scotland, with a huge turnout and a positive response. Some universities have now added trauma awareness to their curriculum. The group have also delivered the Law Society of Scotland's inaugural Trauma Accredited Law course, with plans to expand the course in 2022.

The highlight of 2021 took place in November, when the High Court approved the Scottish Sentencing Council Guidelines on Young People, which the Trauma Aware Law Group hope will create a system change and a smarter approach to understanding and addressing traumatised folk who float into the justice system. The group, in association with the Law Society of Scotland, are providing a free talk on 20 January 2022 (see the Society's CPD page) on why all lawyers and judges need to gain knowledge of trauma and, more importantly, how we all respond. The new guidelines oblige lawyers and judges to see properly who is before the court, and prioritise repair and rehabilitation ahead of retribution and punishment.

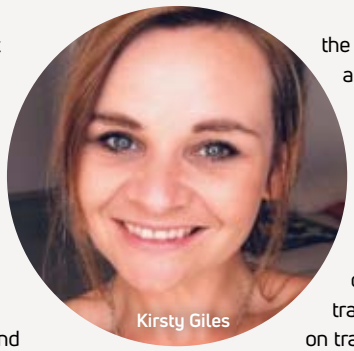
Traumatised folk can't be punished out of their pain or addiction, but they can be helped and healed.

Kirsty Giles writes:

The science is clear and the evidence is unavoidable. Adverse childhood experiences (ACEs) are the strongest predictor for an individual to become involved in crime, as a victim, as a perpetrator, or often both. What have ACEs got to do with justice? Read the paper at this link: bit.ly/3Jijj2j to find out that the answer is, *everything*.

Now that we know about the incredibly detrimental impact adverse childhood experiences can have on a young person's life trajectory, what do we do with this knowledge?

We turn it into practice.


Kirsty Giles

Understanding the biology and science of toxic stress and how it affects the developing brain is an excellent start, but what does this mean in a courtroom? What does it mean for the criminal justice system? How do we use it to influence and guide us when our job is to make Scotland safer?

We've heard of "presiding with kindness", but what does that actually mean? Kindness and criminal justice in the same sentence is a fairly new concept. As a children and young person psychotherapist, these words are easy to say, and the science is relatively easy to understand, but putting it into practice is where the work truly begins.

We all have a responsibility to become curious about trauma-informed practice. Please seek out this new knowledge and way of working in order to make Scotland safer by reducing reoffending rates, stopping the revolving door of prison, and supporting people with substance misuse difficulties which are only exacerbated in the prison setting.

Our small but mighty group, Trauma Aware Law, seek to help you in your curiosity. We can provide training and awareness sessions on trauma-responsive practice: the "how to" of learning.

We are all on the same page here; we want safer streets and a safer country for our children and families and we also want to help people to heal.

If we have learned anything from the ACEs study and the incredible movement across Scotland to understand this information and how it impacts on people's lives, I'd like us to remember this:

Hurt people hurt people, but healed people heal people. For every individual we keep out of prison and help to rehabilitate and recover, we know that healed person can go on to heal other people. We call it "lived experience", but what we really mean is "hope".

If judges and lawyers understand the importance of trauma, the new guideline is sure to be a success.

Spoofing & hacking - how secure is your email account?

These days we are all aware of the potential dangers of fraud when it comes to our emails. So, what are the main issues that you might face when dealing with malicious email?

IN ASSOCIATION WITH LAWWARE

For the purposes of this article, I will be focusing specifically on email through Microsoft Office 365 as this is the mail platform we resell to clients, and which is fast becoming the most popular email service for businesses. Let's define a couple of terms and then look at what can be done to mitigate some of the risks to your firm.

Spoofing.

Spoofing occurs when you, or a third party, receives an email that at first glance looks to have come from your account. In fact, it has not. Your account has not been hacked or compromised.

The sender has made it appear that the email was sent by you. Closer examination reveals that the sending address was something completely different. Typically, a Gmail or other free account that scammers use.

While a message like this will not pass detailed inspection, it may be enough to trick people into thinking that it came from yourself or someone else at your firm.

While not as serious as a full email breach, this is a common method employed by scammers which most of us have encountered at some point.

Solution: DKIM Technology.

This is where a technology called DKIM (Domain Keys Identified Mail) can come in. With this feature enabled on your Office 365 account, all outgoing messages will be digitally signed with an invisible key unique to your firm. When a mail server receives a message, it will check this key and verify that it really came from your firm.

If this check fails, the message is not delivered to the recipient.

Hacking.

This kind of attack worries people the most and is potentially the most damaging to your firm. It means that someone has illegally gained access to your email account and can access your contacts list, and emails you have both sent and received. Scammers may monitor your account for some time, reading messages and gathering useful information such as bank details and details of transactions you are conducting for clients.

They may then contact the client asking for funds to be transferred. The client, seeing that the email came from their solicitor, could then make payment to the bank account that the scammer provided to them.

Prevention.

Fortunately, there is a solution available to all Office 365 customers that can help prevent this situation – Multi Factor Authentication.

Multi Factor Authentication (MFA) provides an additional layer of security for your Office 365 account by requiring not only your email address and password but also a second authentication step.

This can be either a code sent via text message or through an app installed on your mobile device.

When you sign into Office 365, you will be prompted for this second stage verification.

While a hacker may have access to your email address and password, unless they also have your mobile phone, they will not be able to gain access to your account.

The good news.

If you have Office 365 email administered by LawWare, then both DKIM and Multi Factor Authentication are available to you. Please contact me to find out more.

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

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software for the legal profession

Thriving in a pandemic

A new start in 2013; Law Firm of the Year in 2021. Peter Nicholson met the founders of Jones Whyte to find out what lies behind the firm's growth and success

Eight years old, and the winner in the same year of "best firm" trophies from both the main legal awards for the Scottish profession. Jones Whyte must be doing something right, even if its founding partners play down having had any great vision when they set out.

Certainly neither Ross Jones nor Greg Whyte would have predicted even just a few years ago that they would now be heading a firm of more than 200 staff – a figure reached when in April 2021 they were selected to take on the client files of Glasgow practice W W & J McClure, then in administration.

But their story has been one of seizing opportunities that have arisen. It transpires that they didn't even know each other all that well before they teamed up. As Jones relates it, they met playing five-a-side football, lost touch for a year or so while Whyte did a scholarship, then bumped into each other at the gym, discovered in a two-minute conversation that both were thinking of working for themselves, had coffee together, "and within about five minutes we'd agreed we would pack our jobs in and go it alone".

So any initial mission statement was just a back of the envelope job? "I don't think it was even as good as that," Jones admits.

"I think we were both kind of at a natural crossroads, a situation that a lot of lawyers a few years qualified will relate to," Whyte joins in. "Both of us had an idea that we would like to have a go at doing things ourselves. Around 2013 it wasn't quite the usual path; I think having mutual support and someone to bounce ideas and suggestions off, and tell you when you were being daft, was very useful."

With commercial lawyer Jones launching with civil litigator Whyte, "there was a synergy in being able to do more than one thing. And it worked quite well for us. You can have the best plans in the world but ultimately it comes down to what business is coming through the door. Fortunately, that aspect went relatively smoothly".

Growth curve

Within a year, two people had become four, and the growth has continued exponentially. As Jones puts it, "We're probably the biggest wee firm in Scotland just now." That is, still "a law firm for the person in the street. We don't have any aspirations to practise corporate law or anything like that – what your ordinary person wants legally, we want to do every piece of that, whether it's injury claims, power of attorney, buying a house, leasing a shop, anything. That's our customer".

Whyte comments: "I think we are for all intents and purposes still a high street firm, albeit one with over 200 people. We now cover most areas of law, and if we don't we have close partners that we can refer business reciprocally to and from. We don't spend much time trying to define ourselves but we're quite happy just now trying to consolidate our position and improve our client offering after what has been a very hectic year."

Rapidly expanding businesses sometimes overreach themselves financially. How has Jones Whyte kept a proper handle on this? "We recruited an extremely skilful operations and performance director a couple of years ago," Whyte replies. "He's an MBA graduate and actually an engineer by trade; he previously worked at Rolls-Royce and in the Middle East. Prior to this our own financial insight was fairly novice. We're now far more sophisticated in that regard."

"Pat on the back to Greg for hiring him," Jones adds. "Lawyers are not always good at that kind of stuff and if that's not your strength, get someone in to do it."

Even so, taking on McClure's work, doubling the firm in size once more, was a pretty massive step. How did it come about? "We were advised of the opportunity by another lawyer we are friendly with," Whyte explains, "and we had previously referred some work to McClure, so it was a relatively warm introduction. Ultimately it was down to the former directors and the administrator to pick who they thought would be the best fit to hold these files and offer services to the clients. We made a presentation, as did other firms, and they chose us. No more sophisticated than that."

For Jones Whyte it brought in new practice areas, including a huge step-up of its private client interest. "We did a small amount before, and now it has become one of our major practice areas. That was obviously a huge challenge, especially in the period immediately post-acquisition, but we're happy to say that we have restructured; we are now able to give any former client of McClure who calls us a clear path as to what we can do for them, and hopefully an assurance that their file is in safe hands."

The takeover did create a client relations issue, in that many McClure clients had signed up and paid for a trust administration service, and found it hard to understand that Jones Whyte had taken over the client files but not the business itself. Hence a lot of "firefighting" dealing with complaints – some of which made it to the press – when clients were advised that they would be charged for further work. In fact the sheer number of cases meant that the firm was initially advising some clients to consult other solicitors – as all were free to anyway – though following the restructure it is now able to deal with all queries directly. "Understandably, some clients were confused and couldn't understand that the law firm they had previously instructed didn't now exist. Some had paid that firm for legal services that now couldn't be fulfilled. It was difficult to convey the message that while what had happened was unfortunate, it wasn't anything to do with us and that we are here to offer to help pick up the pieces," Whyte observes.

Standing out

Autumn 2021 saw Jones Whyte named Law Firm of the Year at the Scottish Legal Awards; and Law Firm of the Year, Scottish Independents, at The Herald Law Awards of Scotland. What

From left: Greg Whyte and Ross Jones

made the firm stand out? Feedback indicated its significant growth, rather than battening down the hatches, during the pandemic. That was happening before the McClure work.

"We aggressively recruited in 2020 because as a young firm, against a background where nobody else was recruiting, we were able to find high quality candidates that we might not otherwise have had the opportunity to recruit," says Whyte. "Obviously that could have left us with egg on our face, but we've been fortunate in that there has been a recovery and the legal sector doesn't appear to have been hit as hard as some. You didn't get other firms that had significantly increased revenue, added new practice areas, increased their headcount during the pandemic. Then last April's acquisition was significant. We weren't a player in private client, and overnight we became one, so we were adding that significant offering also during the pandemic."

He adds: "We were brave, and we were lucky. It's nice to be recognised, but it's more pleasing to feel that we are going somewhere, that we've got a strong team, people are happy to be here, that we're looking forward into the future and with excitement."

Awards apart, it is a feature of the interview that neither Jones nor Whyte claim any special status for their firm – on the perfectly fair basis that they don't really know how they compare with others, for example on having an IT focus (though being a new firm was an advantage here), or a framework for staff wellbeing. They were however among the leaders with homeworking: even pre-pandemic, it was "one of the foundations on which we built the firm" that people were trusted to do their work as and where they wanted to. "We had two simple rules for working from home," Whyte explains. "One, don't leave a colleague in the lurch [such as by leaving them to deal with your clients visiting the office]. Two, you make your work from home day as productive as you possibly can.

"We've heard lots of people say they became more productive during the pandemic. We had already experienced that, because we think people enjoyed having the freedom to work where they wanted to."

He continues: "Wellbeing for me is a bit trite, but like everyone else in the 21st century you have to be supportive; you have to give your team the best possible working atmosphere and support – if you don't they'll be elsewhere. We put it quite high on the list of priorities that people enjoy themselves as part of their work."

When opportunity knocks

And next? Whyte again: "It's fair to say that in 2022 we want to consolidate. We don't have any massive growth plans. We simply couldn't do that again in such a short time. I think just now we need to focus on ensuring that the client gets the best possible experience."

Both however take a "never say never" attitude. Jones affirms: "We have organically grown and developed other practice areas, not by chance but when opportunities have come up we've said, we're not going to knock back that type of work. So we've got to this size, not by accident but not by any great grand plans either."

Whyte adds: "I think we're lucky in that we both enjoy our work; we enjoy the challenges, the ups and downs; we've got a genuinely brilliant young team who are great fun to work with as well as being excellent lawyers and paralegals. I'm sure everyone will say this to you, but our own team surely are. We feel lucky to be here."

He admits to one factor that has worked for them: "One of the things we've found remarkably helpful over the years is to ask advice of senior lawyers at other firms. We got a group who we lean on and take advice from, who have been there and done it, and it's been amazing for us. These guys are never too busy to answer the phone. We hope to be able to do that for other lawyers in the future because it's a competitive profession, but actually it's a profession where we find your colleagues and your peers are delighted to help you, and we hope to kind of repay that to others as we go."

Seeking remedies for the abused

Laura Connor, solicitor for the pursuer in *A v Glasgow City Council*, reflects on what her firm has learned about clients pursuing such cases and asks how the profession can offer better support

My client, A, wrote at Journal, December 2021, 16 about his experience as the pursuer in the recent case of *A v Glasgow City Council*. I was his solicitor and main contact, but his wider legal team included senior and junior counsel, junior solicitors and support staff at Thompsons.

The point we have reached at the conclusion of this case, coupled with the welcomed comments from our client, have created a point of reflection: are we really doing enough as lawyers, as a profession, to support those who have suffered such trauma in their lives? This is not only relevant to survivors of historical abuse but to any pursuer who has suffered life changing injury.

We dedicated a team of solicitors to this new area of work as we have tried to navigate new legislation and learn more about our clients, all of whom are survivors of historical abuse, to allow us to form better working relationships with them but also ensure that we can pursue their cases in the best way possible. Our experiences thus far have very much been a rollercoaster of emotions. While we have felt this on personal and professional levels, we have very much worked as team, shared losses and successes and have plenty of support available, from counsellors to colleagues and fellow professionals. These points are, of course, all about us. What though for our clients? I do continually ask myself whether we are doing enough to support them, and can we do more.

Re-traumatisation

At the outset of embarking on this work, we attempted to make decisions about processes which we thought were in our clients' best interests. At that point, though, we could not have understood what those interests were, and of course they will vary from case to case. Our understanding has come from experience. At the outset, we listened to advice from professionals, those medically qualified and working with survivors. One of the key points made was the dangers to their health from continual re-traumatisation, often caused by recounting their story time and time again.

One focused effort was our attempt to instruct experts jointly, at least in the first instance, to reduce the need for recounting stories as well as the stressful nature of these situations. This was met with resistance, and we soon realised that in most cases this was just not going to be possible within our fairly rigid system. We sought out and instructed "fresh" experts not traditionally involved in litigations but with extensive experiences of working with survivors of historical abuse, but this was not sufficiently attractive to engage defenders. It was rather frustrating that at the point of the joint pre-proof meeting of the experts in *A v Glasgow City Council*, much agreement was then actually reached. I appreciate though that defenders' agents are bound by the views of those instructing them, and there are parts of process which will likely just need to be followed unless either party insists on court intervention.

Laura Connor
is a partner
with Thompsons

Need for protection

One effort which we made and have not deviated on is ensuring that our clients' anonymity is protected from the outset of a case. Some will choose to waive this right as part of their journey, but whilst in our hands, we will seek to ensure this at every stage. Our anonymous letters of claim caused confusion initially, and appear still to irritate some insurers, but we are grateful to defenders' agents for their understanding of this position and for developing their systems accordingly. Our insistence on that issue is probably one of the unique points in handling these cases that we have been most consistent about, and the more we have understood and experienced the cases, the more important this has become.

In pursuing a claim for damages, many survivors have to share details about their history, and often their ongoing lives, which they have never done before. In order to achieve the justice they deserve, they require to recount horrors and personal information, often the most intimate of secrets, which no one should have to share unwillingly. I have tried and so far failed to find any other way to pursue their claims, though, so what we must do is ensure that both they and their information, stories, and secrets are handled as sensitively as possible, because they have trusted us to do that.

No celebration

The success in *A v Glasgow City Council* was a relief for many of us, but we have learned that success is not a point for any form of celebration. One of the many lessons I have learned from working on this type of case is that there are rarely moments of celebration in the way I would once have done when dealing with accident cases. Raising court proceedings, receiving an admission of liability, even settlement, are not cause to celebrate, no matter how much is awarded. All instead serve as a reminder of what the case is all about.

We have adapted the way in which we deliver advice and news. What many survivors tell us they want more than

anything, is to be acknowledged and hear a meaningful apology. As A suggests, much of that recognition can be through the conduct of litigation.

The redress scheme, also referred to by A, has opened since his article was written. I agree with A's points about that, and could speak all day about the importance of obtaining legal advice before "settling" for this scheme. But one main point I would make now is that it too seems to fail to achieve what it set out to. The well documented intention was that it was a non-adversarial system, with indications that survivors would not be required to prove their abuse. As a litigation lawyer, I could not really understand how that could be possible, or even fair, but it was an ideal that I certainly wasn't going to argue with. Instead, though, what we have is the reality – a scheme demanding evidence that I would suggest is akin to a civil case for the individually assessed awards, with few organisations seeming to be accepting of responsibility given the scant list of contributors. We will have much discussion and debate to come around this scheme as we now navigate through that with many of our clients.

In A's case, the focus came to be on money. Liability was admitted and arguments were focused on the extent to which severe sexual abuse could impact on a person's life. A case focused on causation and quantum instead of liability should surely be one of the most straightforward, and so I worry about the impact on pursuers where the entire case remains in dispute.

How can we do more?

We have solicitors who are specifically trained to support survivors with complex mental health injuries, we can seek advice and guidance from counsellors, and we have good relations with charities to ensure that our clients are also supported throughout their case when they wish. I will also take on board A's comments about going further than this around the time of proof. This all leaves me to wonder, what more can we do?

"We learn from daily experiences in our team and continually assess and discuss our practices. But beyond that, I think our clients need the support of the wider profession"

I was surprised to hear that this process was more difficult to go through than a criminal case. I had thought that the very fact that a lawyer or assistant is available to a client to provide updates, advice and guidance would be a positive point, but for some reason it either isn't, or isn't enough. I wonder therefore if this is another point that we will have to accept will not be satisfactory to clients, or is there more that can be done? I am eager to find this out and discuss alternative approaches, should any reader wish to contact me to discuss.

We learn from daily experiences in our team and continually assess and discuss our practices. But beyond that, I think our clients need the support of the wider profession. Not in settling or pursuing their cases, but just in understanding them and treating them more respectfully with a general understanding at least of their situation.

A pursuer could be any one of us at any point in our lives. A survivor could also be any one of our clients; their cause to carry that term just may not be the reason they seek legal advice. My views on the matter are now formed by ongoing trauma training and case experience. It is unrealistic to think that every lawyer could achieve this in addition to the demands of their own practice, even if willing. If there is agreement from the profession that it would be helpful, perhaps the best way to introduce this is specific TCPD as standard. Pursuers' agents are just one piece of a jigsaw and if we focus on trainee training, one day we may have a more understanding profession.

A chequered race

Ryan Macready believes the legal aftermath of the controversial climax to the recent Formula 1 season has parallels in other recent sporting cases

"No Mikey! That was so not right!" At the end of a tumultuous Formula 1 season, the words of Mercedes team principal Toto Wolff to race director Michael Masi during the last lap of the final Grand Prix will echo for years, one suspects.

The Abu Dhabi Grand Prix was to be a winner-takes-all clash between seven-time champion Lewis Hamilton (Mercedes) and Dutch *Wunderkind* Max Verstappen (Red Bull).

After a year of crashes and controversy, the two were level on points going into the race. With six laps to go, and Hamilton leading by 11 seconds, Canadian driver Nicolas Latifi crashed and the safety car was brought out to clear the track. With one lap remaining, Masi allowed some (but, crucially, not all) of the lapped cars in the race to pass the safety car prior to a restart, in order to set up a one lap shootout between Verstappen and Hamilton. This eliminated Hamilton's hard-earned lead and enabled Verstappen, on newer and sharper tyres, to pass Hamilton and win the race, and with it the championship.

Mercedes launched two protests under the Fédération Internationale de l'Automobile (FIA) articles (the Formula 1 rulebook). The principal one related to article 48.12, which states: "any cars that have been lapped by the leader will be required to pass the cars on the lead lap and the safety car". Rejecting both protests, the FIA argued that "any" in article 48.12 does not mean "all" lapped cars (i.e., they were not strictly required to let all cars pass). Further, Masi had "overriding authority" in relation to the safety car and his decision was accordingly valid.

It was widely reported that Mercedes intended to challenge the FIA's decision, first in the FIA Court of Appeal and, if unsuccessful, at the Court of Arbitration for Sport (CAS). However, it was later announced that Mercedes would not pursue the appeal but had instead entered into "constructive dialogue" with the FIA with a view to creating "clarity for the future".

While it is difficult to provide a definitive view as to the likelihood of success had Mercedes pursued their appeal, any challenge would form part of a wider discussion on the decision-making processes of governing bodies.

Impartial tribunal?

Under the FIA articles, the FIA Court of Appeal is the sole arbiter for settling disputes. It is important to note that the arbiters on this court are appointed by the FIA itself. One can easily see an argument that the arbiters would not wish to find against their appointers, for fear of tarnishing the governing body's reputation.

For a comparison, one only needs to look back to 2020, and Manchester City's challenge of their financial fair play sanctions on being banned from UEFA competition for two years. Manchester City appealed initially to a decision making body of UEFA itself. When this failed, they further appealed to CAS, claiming (among other grounds) that UEFA's process was prejudicial as the decision-making body had an interest in upholding UEFA's decision.

While CAS ultimately found in City's favour on time-barring and evidential issues, City's ability to appeal to CAS arose due to the (perceived) prejudicial nature of UEFA's decision-making process.

Also in 2020, the International Skating Union ("ISU") case saw ISU sanctions against certain skaters (for competing in unauthorised competition) overturned by, first, the European Commission ("EC") and latterly the EU General Court ("GCEU"). Under ISU rules, the skaters were required to raise their challenge initially through the ISU arbitration process and accept the exclusive jurisdiction of CAS.

When the arbitration found in favour of the ISU, the skaters appealed to the EC, claiming (among other grounds) that CAS's exclusive jurisdiction was a restriction of commercial freedom.

This exclusive jurisdiction was found to be a foreclosure of the ISU's potential competitors under the eligibility rules. The ISU appealed to the GCEU, which upheld the EC's decision. While this case was ultimately decided on breaches of competition law, an important consideration for the EC and GCEU was the ISU decision-making and appeals process.

Serious questions

Accordingly, there is precedent for courts taking a dim view of sporting bodies marking their own homework, so to speak. While the circumstances of each case are very different, it is certainly food for thought in the context of the Formula 1 controversy. Although we will not see this dispute carry through the courts, it is interesting to consider Mercedes' prospects of success in convincing the FIA's own arbiters to find against the FIA, as well as whether they would have had success appealing any unfavourable finding to CAS. These are matters to consider independently of the dispute itself.

Regardless of Mercedes' decision not to appeal, many will still ask the question: did Masi truly have overriding authority in relation to the safety car? Or were the FIA articles misapplied? Racing fans will also have to consider what impact this will have on the perception of Verstappen's championship in years to come.

The race and its aftermath have raised serious questions about the FIA's decision-making process, and it will be interesting to see the impacts of the "constructive dialogue". Sports lawyers will be closely monitoring any developments.

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COVID vaccine: in the child's interests?

How will the courts rule if there is a clash of views between parents or others over whether a child should receive the COVID-19 vaccine? Natalie Bruce considers the first such case in England

On 12 September 2021, the COVID-19 vaccination programme was extended to children aged between 12 and 15.

As anticipated, it wasn't long before the issue of vaccinating a child against COVID-19 came before the courts. We now have what is believed to be the first case of its kind in England: *C (Looked After Child) (Covid-19 Vaccination)* [2021] EWHC 2993 (Fam).

C, a 12 year old boy, the subject of a local authority care order, was living in a local authority placement. His mother and father retained parental rights and responsibilities. Due to the care order, the local authority also held parental rights and responsibilities.

C wished to have the COVID-19 and also the winter flu vaccines. The local authority was supportive, as was C's father. His mother however was opposed to C receiving either vaccine. The local authority applied for a declaration that it could override the mother's wishes.

Material before the court

The mother had a strong but generalised concern about the vaccines. She did not consider the COVID-19 vaccine to be tried and tested. She considered the flu vaccine to be unsafe. She accepted that there were no medical issues specific to C that raised concerns about the vaccines, though she said C might have an unknown condition that would put him at risk. She sought more time to look into the safety and efficacy of the flu vaccine, and she did not wish C to receive the COVID-19 vaccine until there was what she would regard as "compelling evidence that it is safe and effective". She did not accept that decisions made about the national vaccination programmes were based on sound evidence.

In addition, the mother sought clarification as to who would be responsible for any adverse reaction C might suffer following vaccination, stating that she would hold the court responsible.

She produced items which the court described as "anti-COVID-19 vaccination propaganda". The court found the material devoid of evidence and rational argument, lacking citation of any

peer reviewed research that would raise any significant concern about the safety and efficacy of either vaccine.

The authority relied on advice published by the UK Health Security Agency ("UKHSA"), citing the view of the Chief Medical Officers that one dose of COVID-19 vaccine would provide good protection for young people against severe illness and hospitalisation, and help reduce the risk of COVID-19 spreading within schools and the need for time off school, thereby keeping young people emotionally well and happier – an important consideration. Similar guidance was referred to in respect of the winter flu vaccination.

C, whose views were taken by a guardian appointed, expressed that he was frustrated by his mother's position. He had weighed up the evidence about the vaccines and reflected on his own circumstances. In particular, he had concerns about the risk of infecting a disabled child in his current placement. He considered his mother's views not "smart". He was clear that he wished to receive both vaccines.

Decision

Absent any specific evidence-based concerns about C receiving these vaccines, or any new peer-reviewed research calling into question their efficacy and/or safety, the court did not consider it necessary or appropriate to delve into an assessment of the vaccines themselves, or seek expert evidence. It was satisfied that the national programmes were based on a wealth of scrutinised evidence and, as the vaccines had been approved and recommended by UKHSA, that they were in the best interests of children at the specified ages.

The court acknowledged that vaccines are not free from risk of harm to a child; but also that not giving a vaccine gives rise to a risk of harm. Before a national programme of vaccination is rolled out, such risks require to be carefully considered and balanced against the benefits from vaccination.

The case was simplified to some extent as C himself wished to have the vaccines. The court was satisfied that the local authority, with a care order in place, could override the mother's wishes in this case and proceed to vaccination.

Commentary

While this is the first case relating to COVID-19 vaccination, there have been a number of similar disputes before the English courts surrounding the administration of a vaccine to a child.

F v F [2013] EWHC 2683 (Fam) saw the High Court order that two children, aged 11 and 15, be administered the MMR vaccine, despite their mother's and their own opposition. Their father was in favour of vaccination. While the court was bound to take the children's views into account, it found they lacked a mature and appropriate understanding of the issues. The court acknowledged its statutory duty to treat their welfare as its paramount consideration; in the circumstances the children's views could not override that duty. The children were therefore ordered to receive the vaccination.

We are yet to see a case come before a Scottish court regarding COVID-19 vaccination. However, this English case law supports the approach we would expect a Scottish court to take: to follow the UK Government guidance in favour of vaccination in the absence of any specific contraindication relating to the child concerned.

Natalie Bruce
is a solicitor with Harper Macleod

Open government for lawyers

Can self-regulation be carried out with sufficient independent oversight? Jim Gallagher proposes a model that he believes would resolve the issues debated since the Roberton review, and in the recent consultation

Every decade or so, I find myself grappling with how best to regulate the Scottish legal profession.

First, in 1990, the Government I was working for introduced solicitor advocates and gave the system its first shakeup in a long time. In 2004, as head of the then Justice Department, I struggled to think what to do in the wake of the Clementi review for England, and so bear some of the responsibility for the present arrangements. It was partly in expiation for their flaws that I've spent much of the last 10 years on the Law Society of Scotland's Council, and then its Regulatory Committee, as a lay member.

Now that the Government is looking at this again, in the wake of the Roberton review, it's time to get it right.

Does the present system work?

Most of the present system of regulation works quite well in practice, and the profession is, in my view, in general properly regulated. Much good work is done by the Society in relation to admissions, advice and guidance, standard setting and so on. The (non-statutory) work which the Society does on the financial stability of firms identifies problems and occasional instances of misconduct which otherwise might well not come to light. Moreover the Society, as both a representative and regulatory organisation, makes a particularly strong contribution to legislation and legal policy and so to Scottish democracy.

Two problems however need fixing. The first is glaring. The legal complaints system is not working well. Having a separate Legal Complaints Commission for service complaints against solicitors has proved slow, expensive and ineffective. It was clearly a strategic error to split complaints into those concerning service and those potentially involving professional conduct. The unhelpful Court of Session ruling which said – against all experience – that complaints could be only one or the other added to the difficulties.

At the minimum, a single complaints gateway is needed, in the interests of consumers, but there should also in substance be a single process for dealing with complaints. It is absurd, as well as slow and expensive, to have two bodies dealing with the same issue and potentially reaching contradictory conclusions. I return below to what that body ought to be.

The second problem is presentational as much as real: how can self-regulation be, and be seen to be, not self-interested? The present system tries to address this by including an independent element in the regulatory process, but that is not yet sufficiently powerful, or evident.

External regulation v self-regulation

Ministers commissioned the Roberton review, but its analysis was weak. It started from the conclusion that self-regulation was intrinsically wrong, rather than from evidence of problems in the working of the system. Clearly self-regulation carries risks both of substance and perception, discussed below, but wholly external regulation carries risks too. Instead of a profession or businesses taking ownership of the principles and objectives of the regulatory system, there may develop a culture of compliance with rules, and an ever deepening thicket of rules, as loopholes exploited are closed off.

It is striking to compare the regulation of legal services with that of financial services (where I also work). There, regulators are increasingly shifting from a rules based culture to a principles based one, which involves personal responsibility for individuals with a particular status. Sounds a bit like professional regulation...

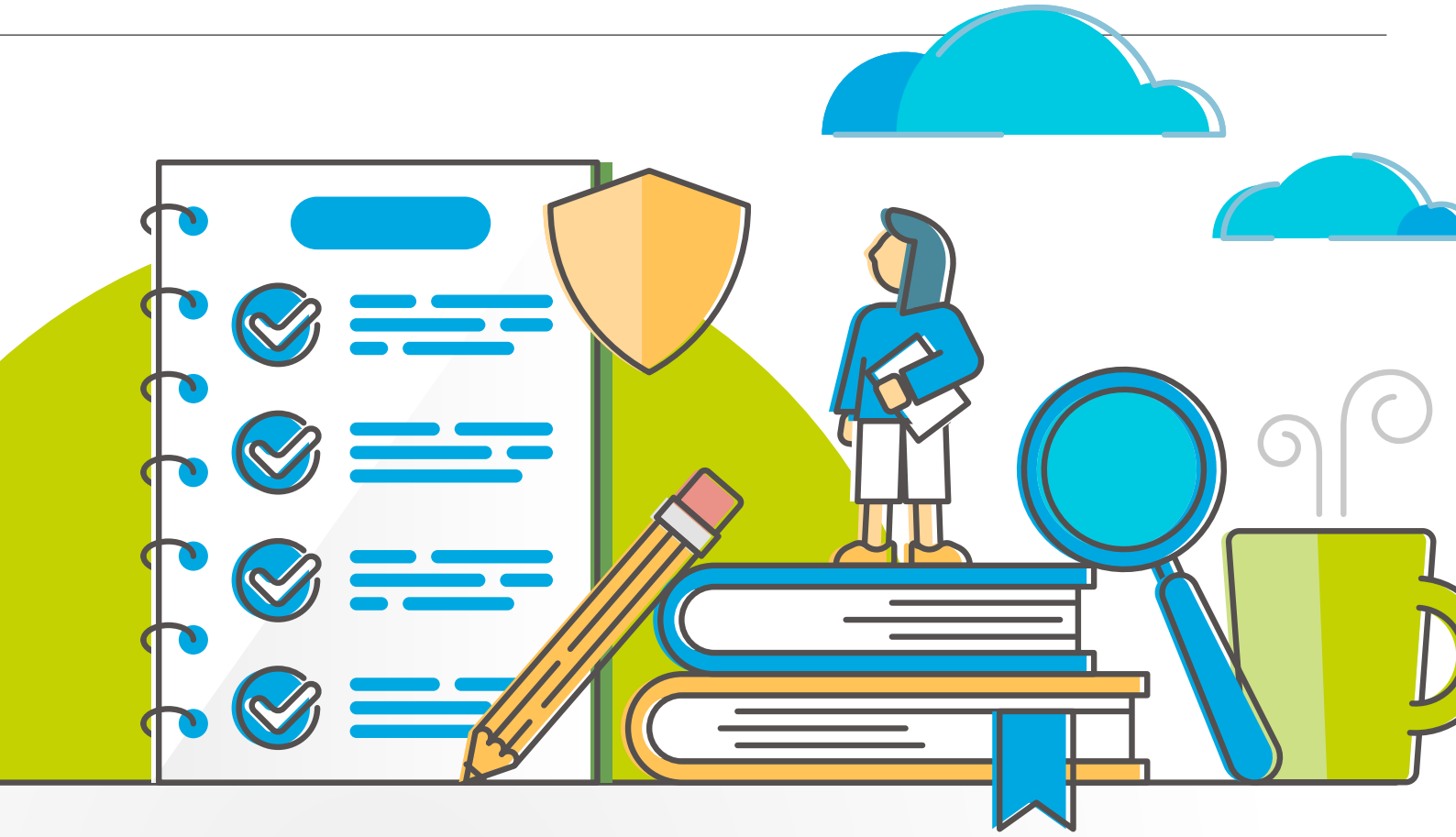
Self-regulation has potential strengths: notably bringing to bear the knowledge of professionals in daily practice to the issues of regulation that arise. First of all, they are likely to understand the nature and detail of legal services and the legal issues which come up in individual cases, and also to have an understanding of good practice and propriety from their own experience, rather than simply a reading of the rules.

Additionally, the system operated by the Law Society of Scotland mobilises substantial quantities of voluntary effort into regulation, bringing this expertise and these insights to bear without charge. This is not a trivial point: a wholly external regulator would have to employ or contract individuals to do this, and in a small jurisdiction like Scotland that would be potentially a substantial overhead which ultimately the users of legal services would bear. The cost of the SLCC would seem to bear this out.

But self-regulation does carry risks. Consciously or unconsciously, professionals do not always find it easy to distinguish properly the profession's interests and those of clients, e.g. in setting out good practice in complex issues where interests could conflict. At least as important is perception: any system of regulation must be seen to be fair, and there is an understandable reluctance to let any profession just "mark its own homework".

The key question

This is the issue: is it possible to retain the strengths of self-regulation while managing its risks? Clementi struggled with this; the present



Scottish arrangements try to address it. Roberton simply ignored it.

In my view, after rather too long looking at the question, the answer is yes, provided there is effective independent oversight of the work of regulation, and assurance that it is properly conducted.

The present system achieves some of this. There are independent, lay, members on the Society's Regulatory Committee and its subcommittees, and the Regulatory Committee operates with a degree of independence. So regulatory decisions all have independent lay input (whether in relation to individual cases, complaints etc, or policy development). This is an important way of ensuring that the public interest, not just the profession's interest, is taken into account in regulatory matters, and gives independent oversight at a very detailed level.

The system is however deficient in a number of respects:

- The Regulatory Committee is a committee of the Society's Council and therefore perceived to be subordinate to it, including by the Council itself and the Society staff. It has no budget, no staff of its own and in my experience insufficient authority within the Society: less than the SRA in England appears to have. This is not oversight, nor is it independent enough.
- The committee is also appointed by the Society: this does not demonstrate its independence.
- The committee and its subcommittees work diligently to regulate in the public interest, but there is no process to give assurance to the public, the courts or to the Parliament that the Society's regulatory work achieves that result.

Get it right this time?

We may now have a chance to get this right. Third time lucky. Here is how it should be done.

Regulation of solicitors should remain the responsibility of the Law Society of Scotland. The Society should appoint, as now, a regulatory body and subcommittees, with a mix of lay and professional members.

Its regulatory work should be overseen, however, by an independent oversight regulator whose task would be to give assurance that the regulatory responsibilities of the Society were exercised in the public interest:

- This oversight body would be creature of statute, with members appointed by the Lord President of the Court of Session.
- The Society would be required to produce evidence to this body demonstrating the propriety of the regulatory processes.
- The new oversight regulator would have complete visibility of all regulatory processes and decisions inside the Society (able to view papers, records and sit in on meetings).
- It would be able to seek other sources of information also (e.g. surveys or research).
- It would be expected to give the Society a periodic opinion on the quality and effectiveness of regulation, and the scope for improvement, to be submitted to the Lord President and laid before the Parliament.
- If, however, it was unable to give the necessary assurance, or able to give only limited assurance, it would have power to direct the Society to make improvements.

This institutional architecture would also allow for the unification of complaint handling, again subject to the oversight regulator:

- The Society should once again be made responsible for dealing with *all* complaints, whether raising issues of misconduct or service.
- The oversight regulator should have the same powers in relation to complaints as in other regulatory matters, but should in addition be able to select and deal with any complaint itself.

This article looks at these issues through the lens of regulating the solicitor branch of the profession, but the new oversight regulator could discharge essentially the same functions in relation to the Faculty of Advocates.

These proposals represent the right balance between getting the strength of self-regulation and the assurance of independent oversight, so that the public interest is and can be seen to be secured without creating a potentially expensive and ineffective wholly external regulator. Indeed, since they imply abolition of the Scottish Legal Complaints Commission, the number of public bodies will not be increased.

We should have seen this more clearly in 2004, and Roberton should have recommended it. The Scottish Government now has the opportunity to implement a structure like this, offering effective but relatively light touch external regulation, ensuring that the Law of Scotland can serve, and be seen to serve, both the interests of the profession and the interests of the public – as it is obliged by law to do.

I do hope I don't have to come back to this again in another 15 or 20 years to get it right.

Professor Jim Gallagher CB, FRSE, Institute of Constitutional & Legal Studies, University of St Andrews. This article is based on his submission in response to the Scottish Government consultation on legal services regulation.

COVID and the claimant: reworking future loss

Keith Carter considers the changing job market given the effects of COVID and wider economic uncertainties such as Brexit, and how this could impact on possible loss of earnings calculations

The current world of employment is shrouded in uncertainty and concerns over instability. As just two examples, ONS data from November 2021 projected hospitality vacancies to reach a "record high" over the Christmas period, while youth unemployment had recovered to pre-pandemic levels.

Less than four weeks later, in December 2021, the Scottish Hospitality Group warned of an "immediate threat" to jobs in the sector due to the spread of the Omicron variant, whereby Government support would be needed to protect jobs and keep businesses afloat.

While COVID is foremost in people's minds and how this will affect future employment, it is important not to forget recent events which would also have affected the market.

COVID and the employment market

The effect of COVID on earnings is evident in the 2021 edition of the Annual Survey of Hours and Earnings (ASHE), a database that virtually all personal injury lawyers will be familiar with from loss of earnings schedules. ASHE 2021 is an anomaly insofar as the mean and median earnings for full-time Scottish employees declined compared to the previous year – even in the aftermath of the 2008 financial crisis, earnings grew overall. When looking at specific occupations, however, the implications become even more notable.

The average earnings for scaffolders, stagers and riggers in Scotland declined by some 31.5% between 2020 and 2021. This can be explained by construction work being halted during lockdowns, as well as reduced activity in the oil and gas sector, which employs a significant number of riggers in Scotland. However, with significant planned infrastructural investments on the horizon, and the Government placing the construction industry at the centre of the COVID recovery, Scotland is projected by the Construction Industry Training Board (CITB) to need an additional 26,250 construction workers by 2025.

This suggests that this decline in earnings is very likely to be an anomaly; indeed, ONS data indicate that earnings in construction have already seen significant growth, rising by 15% in May 2021 alone, the month after ASHE 2021 was conducted. Using the 2021 ASHE figure would therefore be misleading in this case if assumed for a projection of career loss of earnings.

Conversely, due to lockdowns and travel restrictions, the pandemic sharply accelerated rising trends in online shopping and e-commerce. With that, demand for postal workers, mail sorters, messengers and couriers has risen, and so too have their salaries, on average by some 28.6% in Scotland. While online shopping is unlikely to fall to pre-pandemic levels as consumer habits change, the reasons for this significant rise in earnings are unprecedented, and unlikely to apply permanently. As such, using 2021 ASHE data to project career earnings for couriers is likely to overestimate any potential loss dramatically.

With the national living wage set to increase by some 6.6% in April 2022 in response to rising living costs, the traditional categorising of earnings by job title may no longer apply.

Some business groups, including the British Chambers of Commerce and the British Retail Consortium, have expressed concerns that the sharp increase will exacerbate inflationary pressures. Some smaller businesses, already facing financial difficulties because of the pandemic, may struggle to cope, and regarding employment, rising business costs could see fewer staff being engaged.

Whether there will be a further increase in zero-hour contracts remains to be seen, as employers worry about sector or market instability. Zero-hour contracts have increased by 13% since the start of 2021 and the indicators suggest they are likely to continue to rise.

Wider economic uncertainties

On top of COVID, other wider processes such as Brexit and the energy transition are leaving employment, and therefore possible future earnings, across different sectors in a state of flux. Starting with Brexit, while its immediate aftermath is currently difficult to assess, both due to how recently it passed and the effects of COVID quickly overshadowing it, some impacts on employment and earnings are already emerging.

A fall in EU workers removed many from Scotland's service sector which, as the major COVID restrictions were lifted in April 2021, created a vacuum and a skill shortage.

In December 2021, UK Hospitality Scotland reported a shortage of up to 48,000 hospitality staff due to COVID and post-Brexit immigration rules which have "unfairly" classified many hospitality roles as below the minimum required skill and salary levels. Last year some Highland hotels were forced to close early, and they have expressed concerns over shortages increasing this coming summer if Brexit regulations are not adjusted.

In terms of earnings, competition between businesses for staff is pushing up wages, with the Scottish Hospitality Group reporting that some businesses are facing a 20% increase in wage costs.

Another prominent example is Brexit's impact on the supply of HGV drivers. With an outflow of thousands of EU citizens who had previously lived in the UK and worked in freight, the Road Haulage Association estimates a UK shortage of up to 100,000 lorry drivers, while the Scottish Wholesale Association suggests the shortage is resulting in a 30% reduction in goods reaching northern Scotland.

Wages have inflated as a result, with many lorry drivers currently receiving premium "signing-on" payments, and reports of salaries up to 40% above typical rates. In response to the shortages, the UK issued temporary visas for 5,000 HGV drivers and established a free

Scotland ASHE 2021 losers		Scotland ASHE 2021 winners	
Scaffolders, stagers and riggers	-31.5%	Elementary administration occupations	+29.3%
Chief executives and senior officials	-27.5%	Postal workers, mail sorters, messengers and couriers	+28.6%

Average weekly earnings vs. unemployment rate, Great Britain

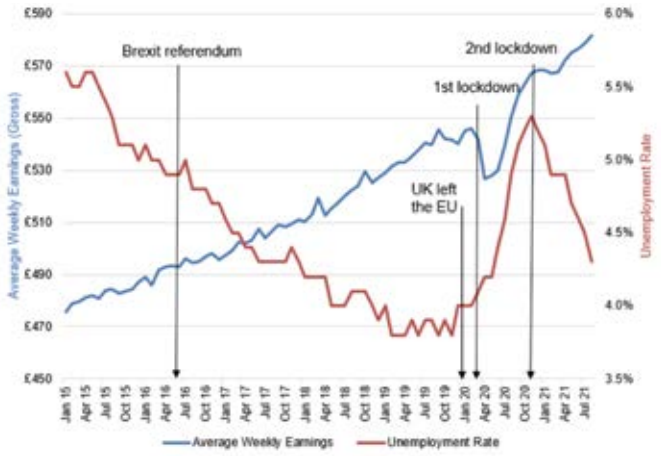


Figure 1

Migrant worker levels and earnings

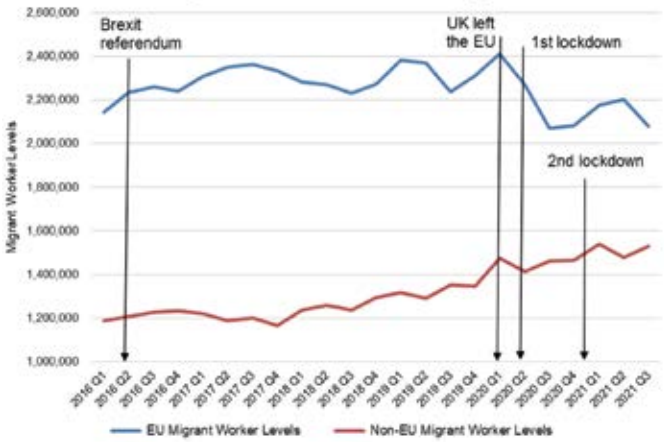


Figure 2

Earnings in Aberdeen and Scotland vs. Brent oil price

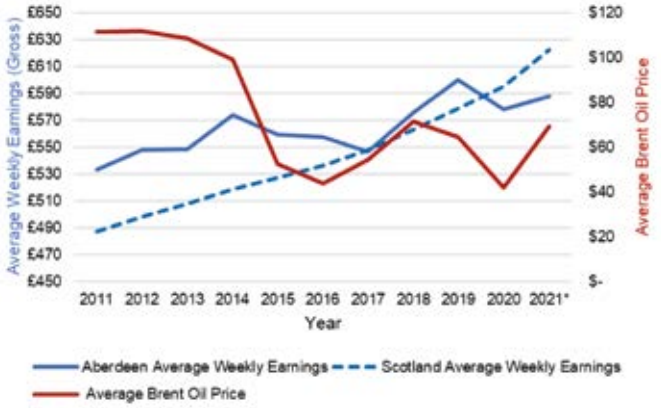


Figure 3

Disabled and long-term unemployment

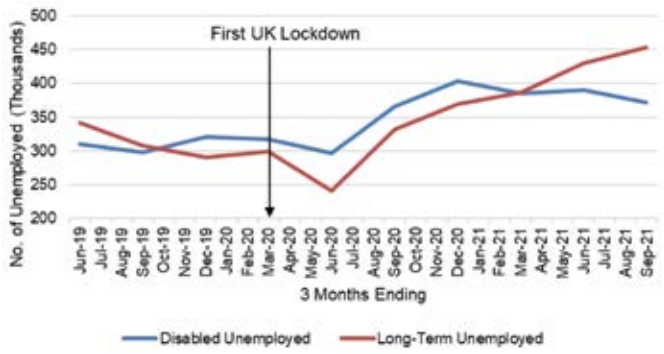


Figure 4

16-week "skills bootcamp" programme to train HGV drivers. As the supply of HGV drivers increases and returns to the point of equilibrium, it is highly likely that wages will return to pre-shortage levels. Thus, in a vocational assessment as to earnings calculation, using current market rates to calculate a medium to long-term projection may be misleading.

Another process likely to reshape the interregional dynamics of employment and earnings in Scotland is the transition from oil and gas to renewable energy sources such as wind. For example, home to thousands of high-paying oil and gas jobs, Aberdeen has historically recorded earnings above the Scottish average. However, employment in oil and gas is closely tied to investment, and therefore also to the market value of Brent (North Sea) oil. This means, as illustrated in figure 3, that earnings in Aberdeen are also closely tied to the price of oil, raising questions as to the effects of the energy transition on local earnings in the long term. Meanwhile, regions with high concentrations of planned offshore wind infrastructure, such as the Moray Firth and Firth of Forth, may in turn see average earnings rise as a result.

Projecting for the future

With the uncertainty of COVID intertwined with the processes of Brexit and the energy transition, formulating future earnings calculations presents numerous complex challenges.

Following the financial crisis of 2008, it took some nine years for unemployment in Scotland to return to pre-crisis levels. After rising dramatically in the 1980s, the UK unemployment rate would not recover to the 1979 level until 2000. While unemployment levels have, since COVID, remained below the levels seen following the financial crisis, they are contained to an extent by the furlough scheme, a surge in part-time workers and a high number of workers engaged on zero-hour contracts.

Employers, concerned about further lockdowns and redundancies, may also prefer to adopt a flexible approach in their hiring, preferring a transient workforce to a full-time permanent one. As such, we may see insecure working further exacerbated as a result.

What can be predicted in an uncertain future is that those with a work-related disability or who are marginalised, for example the long-term unemployed, will face the greatest challenges. The number of unemployed disabled people in the UK was 25% higher in Q3 2021 than in Q3 2019, while the number of long-term unemployed increased by 47% over the same period. To put this into perspective, the number of unemployed people not qualified as disabled under the Equality Act increased by only 3% in this time.

What then, does all the above mean for future loss of earnings calculations? COVID has had a clearly uneven impact on earnings across different occupations, raising important questions over how we calculate future loss. A case-by-case model is therefore most appropriate going forward; however, this also raises questions over consistency and fairness. This means that projections must be supported with in-depth evidence and expertise, where shortsightedness is avoided, and the sector specific nuances and medium to long-term trends carefully considered.

Keith Carter is principal of Keith Carter & Associates, employment consultants

Tradecraft tips

Ashley Swanson contributes some practical advice for trainees and the newly qualified, based on his years of experience in private practice

Speculative conveyancing

A number of years ago in connection with a property sale I offered to forward the titles for examination in advance of conclusion of missives. I was rudely rebuked for my trouble. The purchasing solicitors said they did not indulge in speculative conveyancing.

When I am acting in a purchase I always specify that the missives shall not be deemed to be concluded until I have had sight of the titles. If I pick up a title fault the fact that the missives are still open gives the client the option to abandon the purchase without obligation. If missives are closed and the seller does not accept that the purchaser has a valid reason for resiling, matters could end up in court and this would create anxiety both for me and the client. I would rather risk wasting an hour or two looking at titles in a case where for some reason the transaction did not go ahead than try to withdraw from concluded missives, particularly where the seller had concluded missives to purchase another property on the strength of a concluded bargain for their existing property.

Continuity

On two occasions in the recent past I have arrived at work to find a sale file on my desk with a note saying, please attend to the settlement of this transaction today. I had not previously seen the files in question. As a precaution I have to read through the file just to be sure that everything needed for settlement has either been produced to the purchasing solicitor or is on order. This takes up valuable time, but it avoids the situation where the purchasing solicitor requests exhibition of something as a prerequisite to settlement and only then do you find that it has not been ordered.

In all my sale files there is a checklist which is constantly updated to show what has been ordered and exhibited to date, and by the same token what remains to be ordered and exhibited. Anyone picking up the file for the first time can see in a matter of seconds exactly what stage the transaction has reached without having to read through the file.

Ungrateful clients

A client phoned one day to say that he was seriously in arrears with his mortgage payments. I spent about 20 minutes with him discussing the position and in the process I made a suggestion which might have allowed him to avoid having to sell the house.

The client phoned again a little while later. I spent another 15 minutes with him and it was agreed that he would put his house on the market. Draft sale particulars were duly prepared and sent out for approval. In response the client phoned and said "Can you put matters on hold?" I was puzzled by this, and three or four weeks later my suspicions were confirmed when I saw the house on the market for sale through another firm. I never discovered what I had done wrong, if anything at all. You have to be prepared for this sort of thing and not let it bother you. As long as you are clear in your own mind that you have done your best for the client, that is sufficient.

Securing the transaction

I had a case once where clients were selling agricultural ground but retaining the farmhouse and an area of ground. One of the purchasers had definite "issues"; the purchasing solicitor made the mistake of trying to accommodate this and went through the most awful contortions in the process. Our clients were expected to fence off the retained ground to an accuracy of less than an inch and the purchasers were expecting the road verges to be included in the disposition, no doubt so that they could graze animals or plant crops right next to passing traffic! On my part I just had to accommodate the purchasing solicitor's way of dealing with the transaction because my clients knew they were being offered a very good price for their ground and at all costs the deal had to be secured.

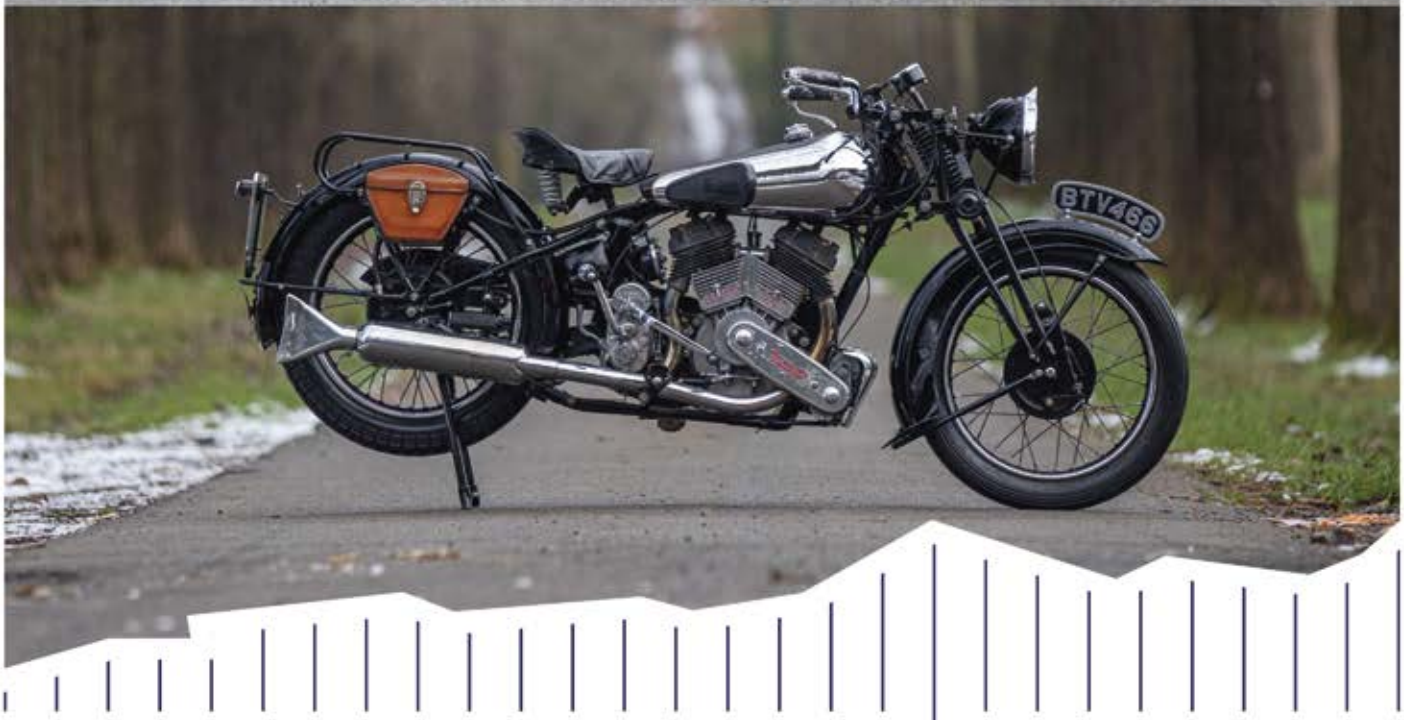
Other solicitors

A former employer of mine, who started his own practice from scratch, once told me that the people who had caused him the most trouble during his career were not the clients but other solicitors. Jean Paul Sartre said "Hell is other people". I sometimes wonder if Hell is other solicitors.

If you are in an adversarial situation such as a divorce or an acrimonious dispute between neighbours, do not allow yourself to become a mouthpiece for your client. I had a case once where neighbours were wrangling over the precise location of a boundary, and the other solicitor sent me the most unpleasant letter I have ever received from another solicitor. He was simply venting his clients' spleen. I did not reply. The letter contributed nothing at all to the eventual resolution of the dispute. If the other solicitor wanted to behave like that he was on his own. I was not going to engage in the process at that level in any shape or form.

Ashley Swanson is a solicitor in Aberdeen and winner of the 2021 Innovation Cup (see p 41)

SILVERSTONE
AUCTIONS



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Market for traditional craft and fine art is alive and well

Roseberys has more than 30 years of experience providing a range of valuations for private institutional and professional clients in the UK and overseas, striving for the highest possible level of service with the strictest policy of confidentiality for our clients. We tailor each valuation to the client and the collection, working with single items through to large multi-category collections. We recognise the importance of carrying out valuations at a sensitive time, where speed is often of the essence.

The lifetime collection of artist, collector and all-around art patron, Berthe Wallis, was a recent highlight starting with a probate valuation. Like many other creatives, she chose to live in the Barbican estate in the heart of London. The Barbican served as a home not only for Wallis, but also her large collection of art, which would later be auctioned at Roseberys – 228 lots in total. Names such as Patrick Hughes, Barbara Hepworth, Maggie Hambling, David Bomberg and Frank Auerbach, were included. Her wide-reaching collection required not only Modern & Contemporary British Art specialists to appraise, but also valuers from Roseberys' Jewellery, Furniture, Ceramics and Glass departments.

Noteworthy works from the collection included an oil by Walter Sickert which sold for £8,125, a work on paper by Leon Kossoff which made £7,750 and a bronze by Dora Gordine which realised £6,250.

Another remarkable sale came from the late Herbert Kennard. Mr Kennard still lived in the apartment in which he was born, almost 100 years earlier. Kennard had a passion for late 18th century English furniture, satinwood in particular. As well as furniture, he also collected all manner of associated works of art including a variety of different boxes, tea caddies and trays. The high level of interest proved that the market for traditional furniture and works of art is very much alive for pieces of fine quality and provenance. A rare George III inlaid satinwood three-division tea caddy, early 19th century was the highlight of the auction, realising £13,750.

Other recent highlights from esteemed estates include important works of Chinese art, from magnificent archaic bronzes to Tang ceramics, from the Van Daalen collection; a cabinet of curiosities from Oliver Hoare, an English art dealer, described as arguably the most influential dealer in the Islamic art world, ranging in sold prices from £100 up to £17,500; and a white glove sale of a private collection of silver and Judaica, with Sefer Torah scrolls doing particularly well.

As illustrated in the examples above, Roseberys' Valuations team possess a wealth of experience, working with single items through to large multi-category collections including furniture, ceramics, silver, pictures, jewellery and Asian and Islamic art. At Roseberys in 2021, the nine specialist departments' auctions, 46 in total, have yielded many outstanding results. Many of the highlight sales have come from probate valuations. The top three highlights include a rare xizun, Yuan/Ming dynasty Chinese bronze tapir-form ritual vessel selling for £137,000, a 7.50-carat diamond realising the price of £175,000, and *Three Punchinelli,* a work on paper by Italian artist Giovanni Battista Tiepolo making £100,000 at auction.

Dora Gordine, Estonian/British 1895-1991 – Sea Rose; bronze with marble base

A rare George III inlaid satinwood three-division tea caddy

Contact our team who can guide you through the process of the type of valuation you require. Our fees are tailored depending on the type of service that you require and generally based on the length of time taken to conduct the valuation. Please contact us and we would be happy to discuss your requirements with you with no obligation.

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English School, circa 1760-1780- Portrait of Sir John and Lady Hopkins with their children, and Doctor Boutflower; oil on canvas
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IN ASSOCIATION WITH

LYON & TURNBULL
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Restrictions and records: an auctioneer's year of discovery

Although 2021 started as a challenging year for many, with another lockdown and ever-changing restrictions, the requirement for valuations to be carried out remained. Lyon & Turnbull, one of the UK's premier fine art and antiques auctioneers, adapted its practices to allow for the provision of both virtual and socially distanced valuations, thus providing a constant service to clients throughout 2021.

The year, as it turned out, was to reveal some of the most surprising finds for the firm's specialist team on relatively routine valuations.

In January, in the midst of yet another lockdown, a valuation in rural Aberdeenshire turned up a rare and valuable French gothic ivory box, tucked away in a cupboard. Lyon & Turnbull's valuer was able to explain to their client that changes in the laws on the sale of ivory were due to be enforced in 2022, which could make open market valuations of the box problematic in future. They decided that it would be better to sell and so, after extensive research confirming the box's rarity, it was offered for sale in May 2021 when it made a world record price of £1.45 million.

To coincide with US Independence Day at the start of July, the team offered their second record-breaking historical rarity of the year: a "signer's copy" engraving of the US Declaration of Independence. Printed in 1823 by William J Stone, it turned out to be one of the last six copies known still to be in private hands. It was discovered by Lyon & Turnbull's Books & Manuscript specialist in a pile of pamphlets during a valuation of books and papers brought down from an attic during a house contents valuation in a Scottish country house. Working in partnership with Lyon & Turnbull's sister company, Freeman's of Philadelphia, it was sold in the US for a world record price of $4.5 million (£3.23 million).

The third major world record of the year came in October, when the contents of Lowood House, Melrose, were offered as a single-owner "house sale". The process started with a current market valuation being carried out, during which one of Lyon & Turnbull's team of specialist valuers discovered a rare maoilica dish, in pieces, in a drawer. They knew it was more than just a broken plate, and subsequent research attributed it to Nicola da Urbino, the "Raphael of maiolica painting". A museum quality restoration was instructed before the dish was offered at auction, where it established a new world record for maiolica of £1.26 million.

The provision of professional valuation services is a core element of the specialist auctioneer's business and one which Lyon & Turnbull are pleased to have been able to maintain. They continue to offer valuations in a variety of formats in order to assist with tax planning, the management of estates, market valuations and insurance during these continuing challenging times.

Lyon & Turnbull have been in the business of valuing fine art and antiques since 1826 and rank as one of the UK's oldest and largest firms of valuers & auctioneers. They have more specialist valuers than any other auction house in Scotland, and their locations in Edinburgh, Glasgow and London enable provision of a nationwide service to clients. International business is supported through their partnership with Freeman's of Philadelphia, America's oldest auction house, and their Hong Kong subsidiary company.

Lyon & Turnbull European Ceramics specialist with rare maiolica dish

Lyon & Turnbull Manuscripts specialist with rare signer's copy of the US Declaration of Independence

The team, led by Gavin Strang, regularly review their services, taking into account legal and regulatory changes and other circumstances which might affect the form and content of valuations. The firm is represented on HMRC's Chattels Valuation Fiscal Forum, the committee of the Society of Fine Art Auctioneers and Valuers (SOFAA) and other professional bodies. Participation in the international art market provides an extensive knowledge of current market trends and prices which inform all valuations.

Valuations remain at the heart of what Lyon & Turnbull do, and they look forward to providing you and your clients with a seamless service in 2022; and perhaps discovering more forgotten rarities along the way!

Led by Gavin Strang, Managing Director & Head of Valuations: gavin.strang@lyonandturnbull.com

A RECORD-BREAKING SERVICE

Left:
RARE AND IMPORTANT FRENCH GOTHIC IVORY COMPOSITE CASKET
CIRCA 1330
Sold for £1.45m May 2021
WORLD AUCTION RECORD

Above:
SIGNER CHARLES CARROLL'S COPY OF THE DECLARATION OF INDEPENDENCE
1823
Sold for £3.2m
July 2021 WORLD AUCTION RECORD

Right:
AN UNRECORDED ITALIAN [URBINO] ISTORIATO MAIOLICA DISH, ATTRIBUTED TO NICOLA DA URBINO
CIRCA 1520-23
Sold for £1.26m October 2021
WORLD AUCTION RECORD

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RAMSAY CORNISH
AUCTIONEERS AND VALUERS
EDINBURGH

The importance of research and expertise in adding value at auction

The contribution of auction houses to research and knowledge has grown exponentially since World War 2.

During the late 19th and first half of the 20th century, expertise resided with important dealers who formed strong personal relationships with their clients and guided them in what to buy and how much to pay for it. Dealer connoisseurs such as Joseph Duveen in England and Bernard Berenson in USA advised collectors such as Isabella Stewart Gardiner in Boston, the Fricks in New York, and the Guinness family in London. The role of the auction house was limited to selling objects quickly and efficiently with generally minimal descriptions and little attempt at research.

As the pool of buyers and collectors increased in the inter-war period, the size of the auction market grew as a consequence and the role that those houses played became more important. Gradually during the 1950s and 1960s, the major and provincial auction rooms hired experts in order to provide reassurance to buyers and sellers alike and, thereby, to increase auction prices.

Auction rooms can now help identify pieces of value and then do whatever research might be necessary in order to market those pieces in the most effective way.

Careful researching not only places the item in the correct context for sale and ensures accurate cataloguing, but also evidences to prospective buyers that they can buy with confidence.

The valuation team at Ramsay Cornish includes Martin Cornish, formerly of Lyon & Turnbull, Bruce Addison, formerly of Bonhams, and Richard Edwards, formerly of Sothebys New York. Richard heads up the research department, contributing his own specialist area, sculpture, together with a raft of specialist knowledge acquired over the years. Bruce adds expertise in furniture, including mid-century, and Martin contributes specialism particularly in silver and jewellery along with his considerable experience across the board. Additional expert advice is available via our various consultants including areas such as militaria, stamps, coins and books.

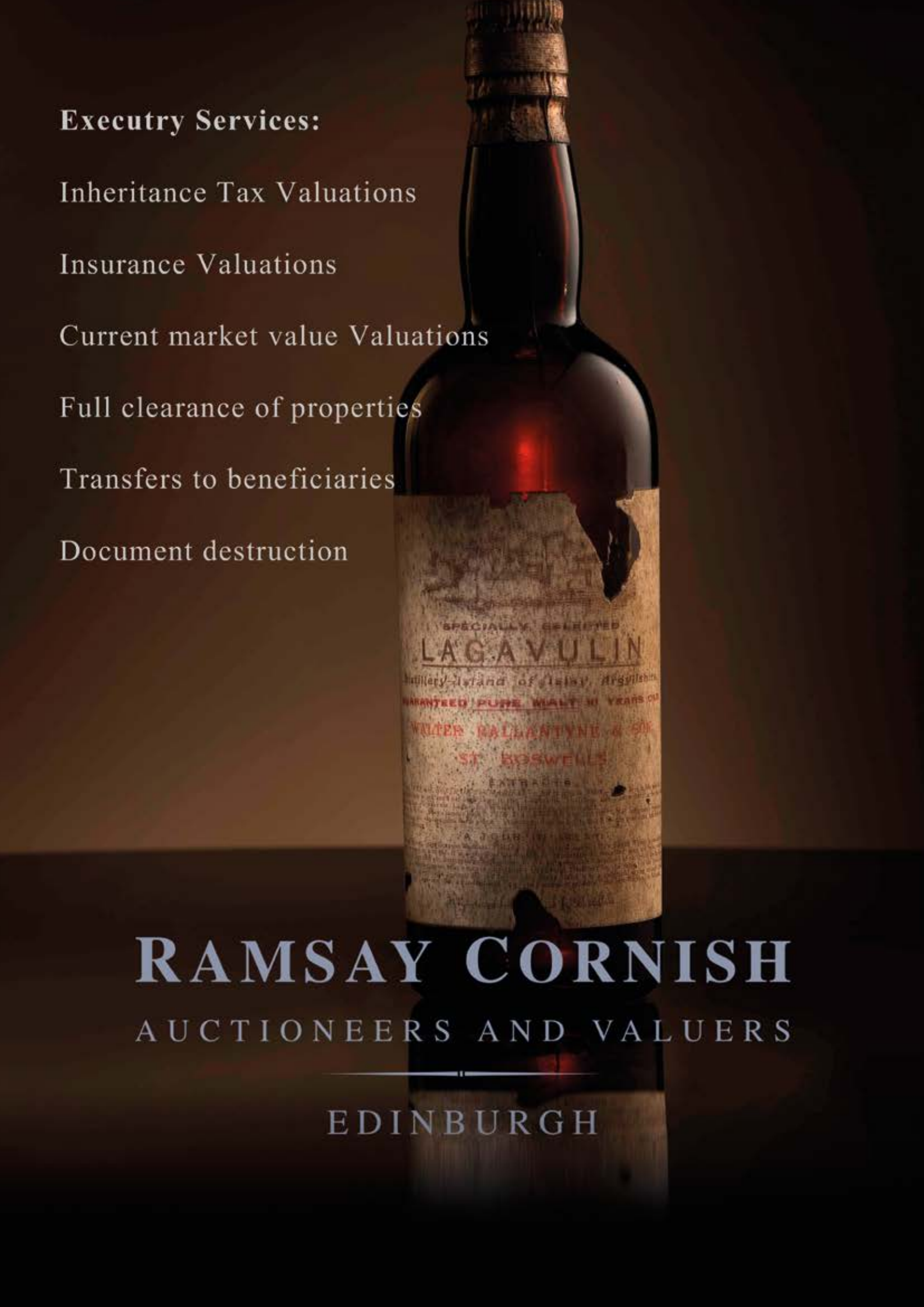
Making research count

Recent examples where research and knowledge have secured substantial sale prices include the sale of two important early American maps. The maps had sat unnoticed and unregarded in a cupboard for several decades and were spotted by our auction team.

The first was John Mitchell's (1711-68) *Map of the British and French Dominions in North America*, which has been called "the most important map in American history". Research conducted by our in-house experts established it was a 3rd state example c1760 – particularly rare. This led to it achieving (despite fragile condition) a hammer price of £105,000 on a pre-sale estimate of £50,000-70,000.

The second was a *Map of the Inhabited Part of Virginia Containing the whole Province of Maryland with Part of Pennsilvania, New Jersey and North Carolina* (London, 1753). This map is regarded as the definitive 18th century map of Virginia. The cartouche, showing a tobacco warehouse and wharf, is one of the earliest printed images of the Virginia tobacco trade. This map is believed to have been published in eight editions, but this example, after investigation, proved to be an almost unobtainable first edition, and achieved £66,000 on a pre-sale estimate of £30,000-50,000.

On occasion scientific assurances can prove a vital part of the auction process, particularly with regard to the sale of whisky, increasingly a market where fraud is not uncommon. A bottle of Lagavulin whisky, 1920 with an unusual label, "Specially Selected Lagavulin Distillery – Island of Islay, Argyllshire. Guaranteed Pure Malt – 10 Years Old. Walter Ballantyne & Son. St Boswells" was sold by Ramsay Cornish, achieving a hammer price of £11,500. A combination of research and the use of science to establish authenticity and value was applied in this case and the bottle was sent to the Scottish Universities Environmental Research Centre for radiocarbon dating. After testing, the bottle, with cork stopper and bar-top type closure, was professionally resealed with black wax.



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RAMSAY CORNISH

AUCTIONEERS AND VALUERS

EDINBURGH

Hearing cases in a new way

The last couple of months have seen a bumper crop of decisions on a variety of rare and unusual civil procedure points, but first we look at the big issue for practitioners regarding proposals for remote hearings

Civil Court

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

Remote hearings

The SCJC consultation concluded on 15 November and many of the responses have been published on its website. The overall feeling seems to be that the proposals go too far too fast. Remote hearings for some procedural and administrative business would be perfectly acceptable, if not preferable, in future, but a vast majority of responses share concerns about evidential hearings and detailed legal submissions being conducted by electronic means unless parties and the court agree that it would be appropriate in a specific case. Our system has responded well to the pandemic with significant temporary changes in procedure and practice, and considerable flexibility and cooperation from all concerned. While it is not desirable for this to continue indefinitely, it may be preferable to making permanent rule changes at this stage without careful consideration of the long term consequences.

Proof by electronic means

An interesting example of how evidence was heard in one case can be seen in *Boyle v Greater Glasgow & Clyde Health Board* [2021] SC GLW 62 (4 June 2021).

"Of consent, the proof was conducted remotely via WebEx, with all parties participating simultaneously, by electronic means, from various remote locations under the control of the court... In advance of the proof, signed written statements of all witnesses had been exchanged and lodged, the contents of which were deemed by prior interlocutor to constitute the evidence-in-chief of the signatories thereto, subject to supplementary examination-in-chief, cross-examination and re-examination, and under reservation of all issues of competency, relevancy and admissibility.

"At proof, I then heard oral testimony via videoconference from the pursuer himself (from office accommodation kindly made available to him by staff at Leverndale Hospital) and from his expert witness,... a retired consultant psychiatrist based in London. For the defender I heard testimony in like manner from three [medical] witnesses... A joint minute of admissions was also lodged."

While that approach to taking evidence is becoming more and more familiar, one immediate thought is that the detailed preparation for the proof must have been much more complex and time consuming (and possibly much more expensive) than formerly.

Nobile officium

The *nobile officium* is the exceptional and rarely exercised equitable power of the Court of Session to prevent an injustice or to provide a remedy where none exists. *Mayor and Burgesses of the London Borough of Lambeth and Medway Council, Petrs* [2021] CSIH 59 (21 September 2021) was one of a number of petitions to the *nobile officium* by English local authorities who place vulnerable children in residential care, and sometimes have to place them in Scotland. This involves depriving them of their liberty, and such measures must be authorised by the courts. There is no legislation about recognising High Court orders in Scotland, albeit that is apparently under urgent consideration. Although the court discouraged the notion that petitions to the *nobile officium* should be considered routine, it issued guidance to practitioners as to the procedure to follow in similar cases meantime.

Another very recent example is *SU, Petr* [2021] CSIH 65 (7 December 2021), an application in a complex family matter. The court decided that the petition was not competent since, in the particular circumstances, the petitioner was not devoid of another remedy.

Approbate and reprobate

Under the doctrine of approbate and reprobate a party may not both accept and reject a contract. The test for approbation is high. As Erskine puts it, "the approbatory acts must be so strong and express, that no reasonable construction can be put on them, other than that they were performed by the party from his approbation of the deed homologated". It could be regarded as a type of personal bar, but its application to specific circumstances is not entirely clear.

In *Integri Consultants Ltd v Midlothian Council* [2021] CSOH 105 (20 October 2021), the pursuer had initially raised an action in the sheriff court for sums due under contracts for services. The defenders contested jurisdiction and the pursuers raised a subsequent action in the Court of Session. The question was whether, by lodging defences and a rule 22.1 note in the sheriff court action, the defenders had approbated the contracts, so that they were barred from contesting their validity in the Court of Session action. The court decided that there was no inconsistency between the defenders' position in the two actions. All that the defenders were doing in the sheriff court was attempting to ensure that the dispute as to validity was held in the correct forum.

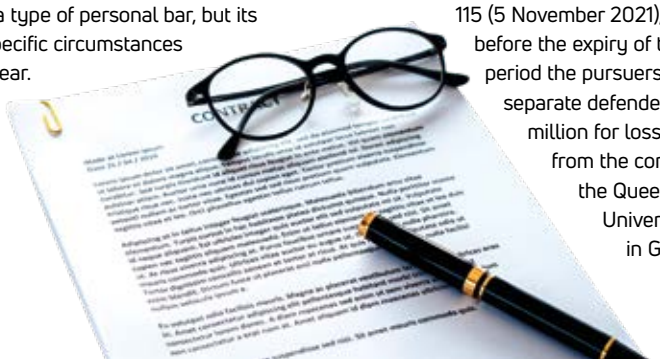
Count, reckoning and payment

In Journal, July 2021, 28 at 29, Lindsay Foulis included the case of *Herberstein v TDR Capital General Partnership* [2021] CSOH 64 in which Lord Ericht outlined the procedural structure of actions of count, reckoning and payment. In *Gray v John Cape t/a Briggate Investments* [2021] SAC (Civ) 32 (18 October 2021) the Sheriff Appeal Court gave an even more detailed and comprehensive tutorial on the appropriate procedure and practice in such actions, observing that much confusion still exists about them in the sheriff court. This decision should be essential reading for all practitioners thinking of raising such an action or feeling their way through the procedural maze which can sometimes derail the process.

Two matters in this case are worthy of additional comment. First, the action was raised in 2011 and by my "count and reckoning", there had been eight different diets of proof fixed over the years (not to mention umpteen procedural callings) before it eventually proceeded. Secondly, when the sheriff issued his judgment he referred to an authority which had not been cited to him but which he had located himself. The SAC said that in such circumstances, before the sheriff reached his decision, the case should have been put out by order to give parties the opportunity to address the sheriff on that authority. Something to bear in mind for the future.

Prescription

The law about prescription continues to cause worries for parties and their advisers. In *GGHB v Multiplex Construction Europe Ltd* [2021] CSOH 115 (5 November 2021), shortly before the expiry of the five year period the pursuers sued four separate defenders for £72.8 million for losses arising from the construction of the Queen Elizabeth University Hospital in Glasgow.



Putting it very simply, the contract provided for adjudication of contractual claims. Among other craves, the pursuers sought a declarator that the raising of the court action was a "relevant claim" for prescription purposes. The defenders argued that the action was incompetent because of the adjudication provisions and should be dismissed on the grounds of contractual bar. Lord Tyre considered that the action was not incompetent, but that the adjudication process had to be followed first. The action should be sisted pending that process. That being so, the declarator that the action was a "relevant claim" was unnecessary. The raising of the action was sufficient to interrupt the prescriptive period and so it had served its purpose in that sense.

Several defenders

When a party has a claim against several defenders, does settlement with one of them preclude any further action against the rest? Two recent cases – very different in their facts and circumstances – produced different results, and the possibility of an appeal to the Supreme Court may be lurking. This is not the place for a detailed exposition of the material circumstances in each case, although that is essential for a proper understanding of the ratio.

In *Ward v Wm Morrison Supermarkets plc* [2021] SC EDIN 53 (3 September 2021), a personal injury claim in ASSPIC, the pursuer settled with the first defender at a pre-trial meeting. The issue for consideration was whether the settlement was of the entirety of the action or only insofar as directed against the first defender. After hearing a proof about the circumstances of the settlement and identifying numerous significant factors, the sheriff concluded that the pursuer had received (full) satisfaction of his claim and could not proceed against the second defender.

In *Kidd v Lime Rock Management LLP* [2021] CSIH 62 (12 November 2021), a commercial action for substantial damages, the pursuer had received a settlement of his claim against B pre-litigation. He raised proceedings against the defenders named, who argued that the settlement with B precluded any further claim for the loss. The relevant parts of the settlement agreement are reproduced in the judgment, which is worth reading for this alone.

The court analysed House of Lords authorities on the general point and said that the question turned on the proper construction of the settlement agreement in its context. Is it enough that the settlement is in full and final settlement of the claim made against B for the whole loss, or must the agreement indicate that the amount payable was or is to be taken as full compensation for the loss, injury or damage sustained by the pursuer? On the facts, the pursuer was entitled to proceed against the named defenders.

Pleadings

I do not apologise for highlighting once again the topic of written pleadings. Cases keep cropping up in which pleadings cause problems for parties and the courts. The benefit of simple, clear and coherent expression of the essence of a case and defence in writing helps everyone. This could not be illustrated more forcefully than in *Donnelly v South Lanarkshire Council* [2021] SAC (Civ) 30 (7 September 2021), in which the Sheriff Appeal Court identified a veritable tsunami of failures in the written pleadings.

The criticisms are lengthy and trenchant. One can tell that things are going to go badly when the relevant part of the judgment starts: "In this action, the record consists of 62 pages of averments, many of which are typed in small font size with minimal line spacing. There has been little attempt over these 62 pages to present the pleadings in any recognisable order; much evidence is pled, there is no consistent chronological sequence to the averments and no discernible attempt to lay out the averments in a manner which might focus the issues upon which the court is asked to adjudicate."

I am afraid that the failings do not stop there. With some degree of inevitability, the submissions do not pass muster either. "A notable feature of the submissions for both parties has been to provide the court with cross references to a vast quantity of material, which the sheriff had aptly described as 'bewildering' in its scale. The appellant's note of argument is particularly lengthy, diffuse and repetitive... Many words appear mid-sentence in capital letters, presumably by way of emphasis. Pages 5 and 6 are almost entirely in capital letters".

And with a final, despairing, observation, Sheriff Principal Anwar noted: "I invited the parties to produce a one page summary of their salient arguments. The margins on the appellant's summary had been extended so far that the words had fallen off the right hand side of the page."

Nuff said!!

Appeal to Sheriff Appeal Court

There was a timely reminder of what can and cannot be appealed to the Sheriff Appeal Court in *McMaster v McMaster* [2021] SAC (Civ) 31 (11 October 2021), a family action with multiple craves. The sheriff made a decision on various matters at a procedural hearing and the pursuer purported to appeal. Referring to s 110 of the Courts Reform (Scotland) Act 2014, the appellant argued that the decision (1) fitted into the category of a "final judgment"; (2) amounted to an order *ad factum praestandum*; and (3) amounted to a sist of the cause. Sheriff Principal Turnbull dealt with each argument succinctly and ruled the appeal not competent on any of these grounds. Of course, if the pursuer had been granted leave to appeal, the arguments would have been academic.

Judicial expenses

A significant matter regarding judicial expenses was authoritatively decided by the Inner House in *Cabot Financial (UK) v Weir* [2021] CSIH 64 (30 November 2021), an appeal from the Sheriff Appeal Court. The question was whether a "success fee" could be recovered from an opponent as judicial expenses in a judicial account charged on an agent/client, client paying basis.

There are very clear statements by the Lord President about the basic principles on which judicial expenses are charged and taxed. He concluded: "The 'success fee' in this case is not an expense which is part of, or directly related to, the process. It is a private arrangement between solicitor and client which is outwith the boundaries of the process; it is an extrajudicial item. It is a form of incentive to the agent to represent the client in the litigation. It is not related to the work which the solicitor does in carrying out that task... The fee is an extrajudicial cost to the client. As such it is not an allowable item in the taxation of an account following upon an award of expenses, on whatever scale."

One would normally expect such a point to arise in a case where a pursuer seeks to recover a success fee but, in this case, it was the defender who was attempting to do so. A subsidiary point discussed in the appeal was what the success fee should have been if allowed. The speculative fee agreement, quoted in the opinion, put a cap on the success fee as "not... more than 25% of the... settlement you win". The court considered that this

term must be given some meaning where a claim for £7,277.52 was successfully resisted in its entirety. It interpreted the agreement by taking that figure (the sum sued for) as the defender's "win".

Boundary disputes

Finally, in this time of peace on earth and goodwill to all, it may be appropriate to conclude with a reminder of the joys of boundary disputes as illustrated in *Dougherty v Taylor* [2021] SC INV 61 (19 August 2021). The dispute had been ongoing since 2007 and came to proof 13 years later. The sheriff set the scene memorably in his introduction, which tells you all you need to know: "The disputed boundary... at the widest... point represents less than one metre of differing opinion. So far as resolution of the dispute is concerned, the parties remain miles apart".

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE AND PARTNER, SHOOSMITHS

Paragraph 75 of sched B1 to the Insolvency Act 1986 allows the court, on the application of a stakeholder, to examine the conduct of a company's administrator. If the court considers that breaches of duty occurred, it may order the administrator, among other things, to contribute a sum by way of compensation.

It is rarely invoked in Scotland and there is limited Scottish authority. Insolvency professionals therefore awaited with interest the Lord Ordinary's judgment in *Joint Liquidators of RFC 2012 plc, Noters* (6 October 2021).

The background is well publicised and stems from the demise of Rangers Football Club. Here, it is possible only to consider selected facets of the case.

Alleged failures

The liquidators of the club applied to the court under para 75, claiming almost £48 million of losses. Their allegations fell into two chapters: (1) that the administrators acted in breach of their duties by failing to manage costs properly during the administration; and (2) that the administrators failed to take reasonable care to obtain the best price for the company's assets, or at least its heritable property.

It was claimed the administrators had failed to manage overheads by actioning their original strategy of playing and non-playing staff redundancies, and that the possibility of selling players for value was not examined. In particular, there was a breach of duty for failing to accept an offer of £1.7 million for (player) Steven Naismith.

On best price, the liquidators contended that the administrators failed to take advice on the value of the Rangers brand, and on the heritable assets, for example by exploring a sale and leaseback arrangement of Ibrox Stadium and Murray Park.

Further, they failed to address deficiencies in their original exit strategy of a CVA. This included the opposition of HMRC to a CVA and the inability to force a transfer of the shares in the company to any preferred bidder.

The tests

The court identified that an administrator owes a duty to the company to carry out their duties with the standard of care to be expected of "an ordinarily skilled and careful insolvency practitioner". However, that standard is a spectrum. It ranges from mere "reasonable care" for functions not needing specialist skills from the administrator, to the *Hunter v Hanley* test at the other end of the scale.

Significantly, the court underlined that an administrator has a duty to take specialist advice on matters outwith their own expertise. Where an administrator seeks and follows advice from apparently competent advisers, they will have complied with their duty, even where that advice was incorrect.

> *"Significantly, the court underlined that an administrator has a duty to take specialist advice on matters outwith their own expertise."*

The court further recognised that passions within the fanbase may present challenges for the administrators and staff in carrying out their duties. However, the court underlined that an administrator must not allow such distractions to deflect from fulfilment of their statutory duties.

Summary

The Lord Ordinary levelled significant criticism at the actings of the administrators. Their failings included an overreliance on advice from (manager) Ally McCoist, rather than from more dispassionate voices when considering redundancies, and a failure to inform themselves of options within the player transfer market.

However, the court did find that the decision to proceed by way of wage reduction rather than redundancies was reasonable, because this course did not produce a demonstrable difference in savings.

The court found that administrators should have considered a strategy for the sale of players. While not all of the eligible players could have been sold, the failure to pursue a sale strategy resulted in loss.

Regarding a failure to obtain the best possible price, the court did not accept that the failure to consider the value of the Rangers brand was a breach of duty. The inextricable link of brand to club meant it would not have been practical to sell the brand separately.

However, the administrators did breach their duties in relation to the heritable property. A valuation of Ibrox and Murray Park was obtained, but advice was not sought on the options available for realisation of the value of the property separately from the rest of the business. As offers for the whole business realised little more than the value of the property alone, it was incumbent on the administrators to explore alternative means of realising the value of the property.

Overall the case is a valuable examination of the approach a court will take in examining the conduct of a former administrator, and the award of £3.4 million a salutary lesson that breaches of duty can have financial consequences for the practitioner.

Licensing

AUDREY JUNNER, PARTNER, MILLER SAMUEL HILL BROWN

This time last year we reflected on what was widely accepted as the most challenging year to date for those operating within the licensing arena, as the country struggled to cope with an unprecedented health crisis, and the impacts were felt in terms of restrictions on trading and resources. Like many, I was cautiously optimistic for 2021, but that naive optimism was soon shattered with new variants, further lockdowns, vaccine passports and more restrictions.

The original 10 sets of regulations became 17, more guidance followed, legal challenges were rejected and temporary legislation will become permanent. For many years licensing solicitors have called for a consolidated Licensing Act to no avail; no doubt a consolidated version of the COVID-19 regulations was also on many Christmas lists. As we reflect on 2021 and look forward to 2022, many commentators report that the hospitality landscape has never looked bleaker, and for solicitors the challenge of grappling with the ever changing legal position is clearly set to continue into the new year.

Permanent changes?

Over the past 20 months the lifeline for many within the hospitality industry has been the ability to utilise an outside area/beer garden. These spaces were the first to be given the green light to reopen and, in July 2020, everything from a bin storage space to a car park was repurposed as an alfresco drinking area by way of occasional licences. This was a direct result of licensing boards being encouraged via a formal update to guidance to look creatively at applications for occasional licences in an effort to support outdoor hospitality. At the same time the Chief Planner and the then Housing Minister announced temporary relaxations of planning and building standards controls in respect of temporary structures and the use of land.

This was embraced wholeheartedly, but as we prepare for the lifting of these relaxations at the end of March this year the inconsistencies across different licensing authorities are becoming apparent. In some areas no more occasional licences will be approved, while others will revert to a pre-pandemic position where rolling occasionals are acceptable for outside spaces. Operators are being encouraged to review their positions and many major variation applications to make arrangements permanent are already being considered. These are often attracting neighbour objections as public sympathy for the industry wanes and licensing boards are asked to consider wider public nuisance ramifications as things return to "normal". This is bound to be a very difficult balance to strike.

In the off-trade sector, what were initially temporary arrangements during the first lockdown have become established facilities as the demand for deliveries continues to grow and shopping habits change. Many national operators have already sought to include a permanent delivery service within their operating plans over the past year where licensing board policies call for this. This has been an opportunity for the board to attach conditions which would otherwise not apply. Agents are already encouraging other operators looking to continue offering this facility to make it permanent where necessary to ensure they are not left behind.

After the elections

While COVID-19 continues to dominate the headlines and events are cancelled, there is one significant event which is still expected to take place this year. On 5 May, the Scottish local elections are due to happen, following which new licensing boards will be formed. Historically this has often marked a shakeup in approach and policy. These newly appointed licensing boards will have the somewhat unenviable task of reviewing their predecessors' policies later in the year for introduction in 2023.

To what extent will the pandemic shape their development? We know that outside areas are now seen as vital. One licensing board took the unusual, but welcome, decision in December to permit all premises operating outside areas to play background music during the festive period. Could this be made permanent? Deliveries are now the norm. Will more boards choose to address this in their policy and provide for specific local conditions? How will the health data used to shape overprovision policies have been impacted by the pandemic, and will boards reassess their views on licensed hours, particularly hybrid premises, given the way in which premises had to adapt in recent times?

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Offensive weapons

The Scottish Government seeks views on draft statutory guidance on provisions of the Offensive Weapons Act 2019 extending only to, or applying differently in Scotland, covering inter alia corrosive substances, knives and firearms. See consult.gov.scot/justice/offensive-weapons-act-2019-scot-statutory-guidance/
Respond by 25 January.

Tacit relocation

The Scottish Law Commission is consulting on its draft bill to codify and reform the law of tacit relocation of leases and other termination-related matters. See www.scotlawcom.gov.uk/news/consultation-on-draft-leases-automatic-continuation-etc-scotland-bill/
Respond by 28 January.

Land rights statement

Under the Land Reform (Scotland) Act 2016, Scottish Ministers are carrying out the first five-yearly review of their Scottish Land Rights and Responsibilities Statement. See consult.gov.scot/agriculture-and-rural-economy/review-of-the-land-rights-and-resp-statement/
Respond by 28 January.

Child wellbeing

The Government seeks views on draft, refreshed guidance under s 96(3) of the Children and Young People (Scotland) Act 2014 on how the eight "wellbeing indicators" are to be used in relation to children and young people. See www.gov.scot/publications/draft-statutory-guidance-assessment-wellbeing/pages/2/
Respond by 4 February.

Building standards

Views are sought on a national plan to provide greater assurance that compliance with building regulations is achieved in high risk buildings, with proposed definition. See consult.gov.scot/building-standards/highriskbuildingcompliance/
Respond by 4 February.

Remand and release

What part could reform of remand and progressive arrangements regarding release from custody play in developing a modern penal system? See consult.gov.scot/justice/bailandreleasefromcustody/
Respond by 7 February.

Environment guidance

Draft statutory guidance on the five guiding principles in the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 has been issued. See consult.gov.scot/environment-forestry/guiding-principles-statutory-guidance/
Respond by 8 February.

Right to food

Rhoda Grant MSP seeks views on her proposed Right to Food (Scotland) Bill to address issues such as food insecurity and lack of access to quality fresh food. See www.parliament.scot/bills-and-laws/bills/proposals-for-bills/session-6-right-to-food-scotland-bill
Respond by 16 February.

Court fees increase

The Government proposes an increase in court fees of 2% per year for the three years from April 2022, based on (unrealistically low?) UK inflation targets, and certain other changes. See www.gov.scot/publications/scottish-court-fees-2022-2025-consultation/
Respond by 4 March.

Victims again, and FAIs

Jamie Greene MSP seeks views on his proposed Victims, Criminal Justice and Fatal Accident Inquiries (Scotland) Bill, providing for yet more focus on the complainer, abolition of "not proven" and mandatory time limits for completion of FAIs. See www.parliament.scot/bills-and-laws/bills/proposals-for-bills/proposed-victims-scotland-bill
Respond by 9 March.

The new licensing board members will also receive updated training which is set to be finalised and approved later this year. It is hoped this will better equip them to make the difficult decisions they will inevitably be faced with as licensing continues in the shadow of the pandemic.

Planning

ALASTAIR McKIE, PARTNER, ANDERSON STRATHERN LLP

The Scottish Government published the long-awaited consultation draft of its Fourth National Planning Framework ("NPF4") on 10 November 2021 (see bit.ly/3mPkf4X).

NPF4 is a spatial plan, essentially a blueprint for land use, development and investment in Scotland. It sets out a plan of action for where and how Scotland should grow and develop to 2045, and provides the key policy direction to assist in achieving net zero sustainable development by that date.

When it is ultimately approved by the Scottish Parliament, NPF4 will form part of the legal "development plan", meaning that planning decisions should be taken in line with it. It will therefore exert a very significant influence on what is built (or not built, for that matter) and where. It will also exert a profound impact on future local development plans to be produced by all 32 planning authorities.

Structure

NPF4 is an extensive policy document made up of four parts:

- Part 1 sets out the overarching strategy including priorities, spatial principles and action areas.
- Part 2 sets out the proposed "national developments".
- Part 3 sets out policies for the development and use of land which are intended to be applied in the preparation of local development plans, local place plans, masterplans and briefs, and for deciding a large range of applications.
- Part 4 sets out how the Scottish Government will deliver this strategy.

Principles

Six overarching principles are identified to aid delivery of the national spatial strategy, including "compact growth" to limit urban expansion where brownfield, vacant and derelict land can be used more effectively; "local living" to create networks of 20 minute neighbourhoods; "balanced development" across all of Scotland, enabling more people to live in rural and island areas; "conserving and recycling"; "urban and rural synergy", bringing together the contributions of cities, towns, villages and countryside areas to achieve shared objectives; and "just transition" to ensure that the transition away from fossil fuels is fair, creating a better future for all.

Action areas

NPF4 splits the country into five "action areas", each with its own priorities: North and West Coastal Innovation; Northern Revitalisation; North East Transition; Central Urban Transformation; and Southern Sustainability.

National developments

Eighteen national developments that support the spatial strategy are identified, including electricity generation and storage, from renewables of or exceeding 50 megawatts capacity; urban mass/rapid transit networks (in Aberdeen, Edinburgh and Glasgow); and "waterfronts" in Dundee and Edinburgh. Although consent or permission will be needed for these national developments, the "needs case" for them is made out in NPF4.

Housing

With NPF4 being part of the development plan, delivery of housing takes a central role as a matter of national importance. The housing policies stated in NPF4 will play a key role in meeting the targets for new homes coming forward over the next several years, not to mention the tenure of those homes and the quality of build.

Planning policies

NPF4 contains 35 national planning policies against which future planning applications will be assessed. There should be no need for these policies to be repeated in future local development plans, and the expectation is that this should allow for greater consistency and predictability of decision making.

Conflict

While the expectation is that there will be no conflict between NPF4 and future local development plans under s 13 (which is yet to come into force) of the Planning (Scotland) Act 2019, in the event of any incompatibility between a provision of the National Planning Framework and a provision of a local development plan, whichever of them is the later in date is to prevail.

Closing date

The closing date for responses to NPF4 is 31 March 2022.

Immigration

MEGAN ANDERSON, TRAINEE SOLICITOR, LATTA & CO

Immigration and immigration law has become a hot topic in the media. In recent years there has been an astounding amount of press coverage surrounding people crossing the Channel to seek asylum in the UK. The dangers were brought home following the deaths of at least 27 individuals who tried to make the journey on 24 November 2021. With the rising number of people hoping to find safety in the UK via this route, the Government is promoting new legislation in an attempt to deter entry.

Nationality and Borders Bill

The Nationality and Borders Bill is further promoting the hostile environment in regard to immigration in the UK. The bill has passed the Commons and is now before the House of Lords. It is said to introduce the most significant overhaul of UK immigration law in over 20 years. It has been criticised by MPs, charities, and even the UN High Commissioner for Refugees, who found that it will

undermine refugee protection rules and break international law.

One key issue within the bill is that it seeks to criminalise those who attempt to reach the UK by boat and those who "facilitate" such journeys. This includes those who assist people struggling in the water, in order to prevent loss of life. This sparked anger and in response the RNLI published a video online showing the work it regularly does saving people from the sea. As a result the bill has grasped public attention.

However, it must be noted that much in the bill is not new as such. It is already possible for someone who facilitates unlawful immigration to be charged with an offence. Under s 25 of the Immigration Act 1971, if a person knowingly facilitates a breach of immigration law, they have committed an offence. Attention has been brought to this legislation in recent weeks following *Bani v The Crown* [2021] EWCA Crim 1958.

Bani v The Crown

On 21 December, the Court of Appeal overturned the convictions of four asylum seekers who had been imprisoned for facilitating a breach of immigration law, having steered small boats across the Channel.

Lord Justice Edis found that the reason for the wrongful convictions was due to "heresy about the law". The earlier case of *R v Kakaei* [2021] EWCA Crim 503 likewise considered s 25, and Lord Justice Edis also found the conviction to be unsafe.

It was said that it is not illegal to approach the UK by boat in order to claim asylum. Essentially, the Court of Appeal has found that simply guiding a boat to the UK is not entering or attempting to enter the UK unlawfully. The outcome in *Bani* is largely regarded as a victory for those who practise asylum law. The court will consider seven similar cases in January.

What will change?

Unfortunately, this precedent may not stand if and when the Nationality and Borders Bill is enacted. In its current form, clause 39 will amend s 24 of the 1971 Act and require anyone who seeks to enter the UK to have entry clearance before doing so, otherwise they will be committing an offence. The issue here is that there is no visa option for asylum seekers. They cannot apply for entry clearance to seek asylum.

Further, clause 37 will amend s 25 of the 1971 Act. The explanatory note highlights that the bill will address those who "arrive in" the UK illegally. Therefore, the bill will broaden the criminal offence not only to entering but also to arriving in the UK illegally. This is important as most boats are intercepted before they arrive in the UK and are in fact assisted by Border Force or the RNLI to reach the safety of the UK. Again, the explanatory note states that currently those who are "intercepted" are not always deemed to have entered the UK illegally. The amendment will mean that all people who enter or arrive in the UK without entry clearance will be criminalised. It also means that anyone who assists the unlawful or illegal entry will be committing an offence.

Criminalising those who come to the UK to seek refuge, as well as those who rescue them at sea, is undoubtedly going to endanger more lives. Although the Government has stated that its aim is to prevent smugglers profiting from facilitating entry to the UK, what is more likely to happen is that already vulnerable people will be driven further into the hands of smugglers as they become more desperate to seek asylum in the UK. No safe alternative routes have been proposed, and if the bill passes in its current form, the UK will become an increasingly hostile place for refugees. Therefore, although *Bani* may be regarded as a step in the right direction, we may soon be taking two steps back. J

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

John Harris Muir

A complaint was made by the Council of the Law Society of Scotland against John Harris Muir, c/o his agent William Macreath, Levy & MacRae Solicitors, Glasgow. The Tribunal found the respondent guilty of professional misconduct *in cumulo* in respect of his breaches of rules B6.4.1, B6.7.1, B6.8.1, B6.11.1, B6.13 and B6.23 of the Law Society of Scotland Practice Rules 2011.

The Tribunal censured the respondent and fined him £1,500.

The admitted conduct covered a number of significant breaches of the accounts rules, in particular in relation to the Money Laundering Regulations 2007. The Tribunal has emphasised on a number of occasions the importance of compliance with money laundering prevention provisions. It is extremely important that the public can have confidence in the profession and that its reputation is maintained. Problems were drawn to the attention of the respondent in 2012. These problems continued to exist in 2017. The respondent agreed that he had provided an undertaking to the Society in 2012 to rectify matters. He agreed that he had stated to the inspectors that the task of carrying out risk assessments had proved too time consuming. The Tribunal had no hesitation in concluding that the respondent's conduct fell below the standard of conduct to be expected of a competent and reputable solicitor to such a degree that it could only be considered as serious and reprehensible.

Tasmina Ahmed-Sheikh

A complaint was made by the Council of the Law Society of Scotland against Tasmina Ahmed-Sheikh, solicitor, Glasgow. The Tribunal found the respondent guilty of professional misconduct *in cumulo* in respect of her contraventions of rules B6.2.3, B6.3.1, B6.4.1, B6.5.1(d), B6.7.1, B6.11.1 and B6.12.1 of the Law Society of Scotland Practice Rules 2011.

The Tribunal censured the respondent and directed that for an aggregate period of two years, any practising certificate held or issued to her shall be subject to such restriction as will limit her to acting as a qualified assistant to such employer as may be approved by the Council of the Society or its Practising Certificate Committee.

The respondent was a partner and then director of Hamilton Burns. Between 1 October 2009 and 8 May 2015, she was the designated cashroom partner/manager of the firm. She was made aware by a cashier's email of 16 June 2014 that sums due to SLAB as recovered judicial expenses had been improperly taken to fees. She failed to take action to remit the judicial expenses to SLAB. She failed to cooperate and communicate with SLAB to resolve matters. She failed to correct matters. Money was therefore retained by the firm which was lawfully due to SLAB. This money was clients' money. In failing to remit the sums to SLAB and taking money to fees, a deficit was created on the client account.

The Tribunal was satisfied that the respondent's conduct regarding the admitted rules breaches was a serious and reprehensible departure from the standards of competent and reputable solicitors. The respondent was designated cashroom manager of the firm. This is an important and highly responsible position which should not be undertaken lightly. It is essential that designated cashroom managers ensure compliance with the accounts rules. In holding funds for clients, a solicitor is in a privileged position of trust. The public must have confidence that the profession will comply with the accounts rules and that solicitors can be trusted. Failure to comply with the accounts rules demeans the trust the public places in the profession. Designated cashroom managers have a particularly important role in protecting the public. They must protect client money and keep the client account sacrosanct. The admitted breaches demonstrated that the respondent had failed in her duties as the designated cashroom manager. Her omission was also reckless in terms of rule B6.12.1. Action was necessary, either to replace the money or report the situation to the Society. Professional misconduct was therefore made out. J

A message from new CEO Diane McGiffen

First, let me wish you a happy new year. Despite all the ongoing challenges, I hope 2022 will bring everything that you hope for professionally and personally, for you and all your loved ones.

I am thrilled to start my 2022 as the new chief executive of the Law Society of Scotland. And I can't start without saying thank you to Lorna Jack. Over the course of 13 years, Lorna made an outstanding contribution as chief executive, transforming the Society into a truly world leading professional body. She has been so kind and gracious in helping me get ready for my new role and has given me an insight into her passion and pride in the Society. I am excited to have the chance to build on her achievements, working with the Society's Council and colleagues in leading legal excellence.

From afar, I have seen a Law Society that is passionate about the rule of law and ensuring we have a thriving solicitor profession at the heart of a free and fair system of justice. These are proud goals – they matter now more than ever – and the chance to help achieve these goals is what made me want to come and work in your Society.

As your new chief executive, I want the

Society to continue to play a critical role in helping solicitors succeed, wherever you work and whatever area of law you practise.

One thing which has already struck me is the sheer diversity of today's Scottish solicitor profession and its work. Indeed, this is a core part of its strength. So, whether you're in a big firm, a smaller high street practice or working in-house; whether you're starting out on your career or a longstanding member; whether you work here in Scotland or work internationally, I am determined to ensure your Law Society is of help and relevance to you.

It is why I am looking forward to meeting and listening to you, our members, hearing your views and ideas. This will be particularly important as we embark on developing the Society's new strategy and deciding what kind of organisation we want to be in the years ahead.

That strategy will need to confront some big issues: the still fragile economic recovery; major changes to our courts and system of justice; maintaining wellbeing in the profession; improving equality and diversity; protecting access to justice through the proper resourcing of legal aid; the impact of the proposed changes to human rights legislation and much more.

This will also be the year when the Government decides the next steps in its plans to reform legal services regulation. As chief executive, I am determined to put forward a strong, confident and compelling case for the Society continuing to play a central role in the regulation of solicitors. In doing so, we can focus on reforming the areas which desperately need change, not least the current complex system of complaints.

There is much to be done and I look forward to representing your interests with energy and commitment. I will be so proud to work with you all and can't wait to get to know you.

Webster chosen as future President

Edinburgh commercial litigation solicitor Sheila Webster has been confirmed as the Law Society of Scotland's Vice President for 2022-23, and President elect for 2023-24.

In a ballot of Council members she was chosen ahead of Philip Lafferty and Susan Murray. She will assume the vice presidency at the end of May, when current Vice President Murray Etherington takes up office as President.

A partner and head of the Dispute Resolution team at Davidson Chalmers Stewart, Webster has been a Council member for Edinburgh since 2017 and currently sits on the Society's board.

Current President Ken Dalling commented: "Undoubtedly there is another challenging year ahead of us as we continue to recover from the impact of the coronavirus. I know that Sheila will rise to the challenges ahead, that she will apply her characteristic enthusiasm and expertise and continue to make a valuable contribution to the Society's work, the profession and the clients they serve."

Peter Walsh joins Council

Peter Walsh, of Jas Campbell & Co Ltd, Saltcoats, will fill the vacant seat for Greenock, Kilmarnock & Paisley on the Society's Council, having been the sole nominee. A practising solicitor for 14 years, his appointment will run until May 2024.

Title checklist wins Innovation Cup

A comprehensive and cost-free title checklist when buying a domestic property is the winner of this year's Innovation Cup.

Aberdeen solicitor Ashley Swanson won the £1,500 cash prize, provided by Master Policy insurers RSA, with his checklist, which particularly focuses on avoiding mistakes in the title.

The Innovation Cup is run jointly by the Law Society of Scotland, RSA and brokers Lockton, and aims to inspire new risk management solutions from within the profession.

Murray Etherington, convener of the Society's Insurance Committee, commented: "We were really impressed by the simplicity of a checklist that has been developed over decades of practice. This simple tool will focus practitioners' attention on risks that could give rise to a claim/complaint."

Edward Ambrose, UK head of Professional Indemnity for RSA, added: "Ashley was passionate about the checklist being made free of charge to practitioners, and also offered ideas on how it could be developed further to cover more than just the examination of title."

The checklist will now be formally developed by Lockton and be made available to members.

ABSs closer as Society appointed to regulate

Alternative business structures in the Scottish legal profession could finally become a reality in 2022, with the Law Society of Scotland having been authorised to regulate licensed legal services providers under the Legal Services (Scotland) Act 2010.

The move will enable Scottish solicitors to set up in partnership with other professionals such as surveyors, accountants or architects. Firms will also be able to assume existing senior, non-solicitor staff as partners, and seek external capital. All licensed providers will require at least one solicitor to be employed in the business, with a solicitor acting as head of legal services.

Under the Act, licensed providers will be required to be majority owned (at least 51%) by regulated professionals, as defined in the Licensed Legal Services (Specification of Regulated Professions) (Scotland) Regulations 2012. The Scottish Government's consultation on the future regulation of legal services, which closed in December, included a section on whether the 51% restriction should be removed.

The Society is currently building the policies and processes that will support the approved regulatory scheme, which is due to launch in 2022. As an approved regulator it will be subject to the oversight of the Scottish Legal Complaints Commission, which will handle any complaints about its exercise of its functions as such.

President Ken Dalling said: "This announcement marks a significant step towards opening up the legal services market in Scotland to permit these new types of businesses.

"It has taken significant effort to get to this stage and we are working on the policies and processes needed to support the new regulatory framework.

"It will ensure licensed providers operate to high professional standards and that there are robust consumer protections in place, as there are for clients of solicitor firms."

£31.8m hit to legal aid in 2020-21

The full impact of the COVID-19 court closures on the Scottish profession has been revealed in the 2020-21 annual report and accounts of the Scottish Legal Aid Board.

They show an overall reduction of £31.8 million in the cost of providing legal aid in the year to 31 March 2021, a year that began with the first court closures due to the pandemic taking hold. The total fell from £130.9 million in 2019-20 to £99.1 million in 2020-21, an unprecedented fall, with gross payments to legal firms down by 24%.

As well as delays to cases progressing, there was an overall 20% reduction the number of new cases. The number of firms receiving a legal aid payment during the year dropped by 7% from 733 to 679.

The biggest impact was in criminal legal assistance, where spending fell by 31% to £52 million compared to £75.9 million the previous year. The drop was particularly significant in solemn work, which fell by 41% from £33.1 million to £19.6 million, despite a substantial underlying increase in the number of new solemn cases. However, summary payments also fell by almost a third, from £24 million to £16.1 million. Criminal advice and assistance and ABWOR spending was down from £13.14 million to £11.46 million. PDSO costs rose from £2.28 million to £2.33 million.

Civil legal assistance expenditure fell 11% (£5.9 million) to £40.3 million, with new family cases down by 7% and non-family cases by 31%. The suspension of evictions had a particular impact on demand for help with housing issues, while a six-month deferral of guardianship renewals had a similar effect.

The cost of children's legal assistance fell from £5.3 million to £3.8 million; SLAB administration costs rose from £12.44 million to £12.92 million.

The Law Society of Scotland said the figures emphasised the urgent need for a long term funding plan for the sector. Ian Moir, co-convener of the Legal Aid Committee, commented: "While closure of the courts in the early days of lockdown has undoubtedly contributed to the reduction in legal aid spending over the year, the current crisis has been a generation in the making and the system is at breaking point. It is vital that the Government invests properly in legal aid to help those in need and ensure that solicitors are fairly paid for the work that they do."

In practice

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 the Society's research and policy web pages.

COVID isolation payments

The Society responded to the COVID-19 Recovery Committee's consultation on the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill. The bill makes temporary modifications to the Public Health etc (Scotland) Act 2008, to replace the duty on health boards to compensate people asked to quarantine voluntarily, with a discretion whether to do so, to prevent severe financial consequences for health boards. Overall, the Society welcomed the change because it is both more narrowly targeted and subject to better procedural control.

Director of Law Reform Michael Clancy, giving evidence to the committee, recommended that the whole vista of emergency legislation be revised in relation to any emergencies there might be in the future. There is a need to look at why we got into the position whereby the Coronavirus Act 2020 had to be enacted with only four days of parliamentary consideration in Westminster, and why it was necessary for the Coronavirus (Scotland) Act 2020 to be taken under the emergency procedure. That indicates that our previous laws for dealing with emergencies might not have been fit for purpose.

Not proven briefing

The Society issued a briefing ahead of the debate on 15 December in the Scottish Parliament on ending the not proven verdict.

Any changes to the Scottish criminal justice system must be carefully considered, and consistent with the principles of recognising the presumption of innocence, maintaining the rights of all those involved and minimising the risk of a miscarriage of justice. They must respect rights including the right to liberty under article 5 and the right to a fair trial under article 6 of the European Convention on Human Rights.

The briefing highlighted the Scottish Government study in relation to mock juries in October 2019, which noted that the presence or absence of the not proven verdict appeared to have little impact on the decision making aspects of the 32 mock juries even where a not proven verdict was returned. It also referenced the Society's own 2021 survey in which 72% of both non-criminal and criminal practitioners believed the verdict should be retained, the most frequently stated reason being that it provided an important safeguard against wrongful convictions.

Equality and asylum

In written evidence to the Women & Equalities Committee inquiry on equality and the UK asylum process, the Society stated that each of the protected characteristics can be related to one of the five grounds for asylum. There can be significant challenges with establishing that a "protected social group" exists. Disabled individuals can face significant barriers in accessing support; particular issues relate to learning disabilities. Claims based on sexual orientation can be particularly challenging to establish in evidence, and there is a lack of guidance on how decision makers should determine claims based on fear of persecution because of LGBTQI+ identity. The COVID pandemic and related restrictions have had the effect of isolating asylum seekers from their communities and related support (for example, assistance with substantiating a claim).

Human Rights Act

The Society issued a statement in response to the UK Government's publication of proposals to reform the Human Rights Act, saying that while it is reassuring that the proposed Bill of Rights will retain substantive rights protected under the European Convention, it will be vital to ensure that some existing rights are not diminished.

The President, Ken Dalling, noted that there will need to be very careful consideration given to those areas which the Government is seeking to strengthen. For example, there is no need to restate the primacy of the UK Supreme Court over decisions made in Strasbourg. The Society will examine the changes proposed to the right to respect for family life, and the permissions stage in UK human rights cases, for whether the protections provided by the Convention would be diminished.

Responses to the consultation are due by 8 March 2022.

Court fees to rise in April

Fees charged to litigants across the Scottish courts will rise by 2% from next April, under Scottish Government plans now out to consultation.

The previous review in October 2017 saw court fees being set for the period 2018-21. A fee review due in 2020 was postponed owing to the pandemic, and this new consultation proposes rises of 2% each year from 2022 through to 2024.

The paper notes the effect of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which came fully into force last year, as making the costs of civil litigation more predictable and increasing the funding options for pursuers, thereby improving access to justice.

Beyond that, the Government continues to believe that those who make use of the services of the courts should meet, or contribute towards, the associated cost to the public purse where they can afford to do so.

In addition to the fee rise, ministers are consulting on whether exemptions from fees should be extended, for example to party litigants with a disability, and environmental cases within the Aarhus Convention.

They also propose that fees for motions in the sheriff court should apply to any written motion lodged in any civil procedure; new court fees in specific types of proceedings including insolvency matters; reduction in fees for some family actions in the Court of Session; and various minor amendments to shorten court fee tables following anomalies identified by Scottish Courts & Tribunals Service.

Responses to the consultation are due by 4 March 2022.

ACCREDITED PARALEGALS

Commercial conveyancing
KELLY COOK, MacRoberts.

Liquor licensing
EMMA SUMMERS, Shepherd & Wedderburn LLP; KEELY TAYLOR, Burness Paull LLP.

Residential conveyancing
LAURA FRANCESCHI, Thorntons Law LLP; REBECCA MACKIE, Stewart & Watson; REBECCA REA, Munro & Noble; LUCY ROURKE, Thorntons Law LLP; MORAG TUMBER, Cullen Kilshaw.

Wills and executries
LENE KRUHOFFER, Allan McDougall McQueen LLP.

OBITUARY

ROBERT THORNTON McCORMACK (retired solicitor), Glasgow
On 23 October 2021, Robert Thornton McCormack, formerly partner of the firm R T McCormack, Glasgow.
AGE: 76
ADMITTED: 1967

Towards the equitable workplace

Employees are increasingly likely to consider moving on, and employers should consider "structured flexibility" in trying to make working arrangements as attractive as possible, says Rupa Mooker in her first quarterly column for the Journal

"The Great Resignation". A trend that describes record numbers of people leaving their jobs after the COVID-19 pandemic ends (whenever that may be) and life returns to "normal" (whatever that may be).

As we start off 2022, still in the middle of an unpredictable pandemic, there is disruption in businesses everywhere, not least the Scottish legal profession. Despite efforts to recruit and retain the best talent, anecdotal evidence from colleagues, peers and recruiters indicates that individuals continue to seek new opportunities. This ties in with research carried out by Microsoft in September 2021, that 41% of workers around the world are likely to consider leaving their current employer or changing their profession this year.

Although we are not yet at the stage of seeing what a post-pandemic workplace looks like, it is very clear things will never return to the way they were before. There will not be a grand reopening of office spaces – the hybrid workplace is here to stay. Most organisations have realised they must shed a "one size fits all" mindset, towards one of flexibility. Those businesses who haven't and insist on maintaining expectations of a full return to the office, will find themselves in a losing battle with employers who have announced their employees do not have to come back to the office regularly again. Talent will undoubtedly be lost, as new job or career opportunities are almost limitless and people grasp the chance to work with those who are forward-thinking and refuse to let location limit their candidate pool.

Managing the hybrid model

While a shift to a hybrid working model might not be for everyone, the opportunity to embrace blended ways of working should be carefully considered. Many businesses appear to be implementing two or three days in the office and two or three days remote. While the number of days is defined at the top level, decisions around which days employees come into the office are being made by individual managers who are in the best position to understand their teams' work and when they need to be together.

Offering "structured flexibility" and a degree of autonomy is advantageous to help people connect and collaborate with others they know are likely to be in the office at the same time.

The degree of remote work will also depend on how well firms manage the challenges that come with it. Traditionally, for example, career progression has been linked to spending time with managers and colleagues in person and networking face-to-face. Hybrid working could arguably make it more difficult for trainees, NQs and new employees, as well as women (who remain more likely to opt for greater flexibility) to grow in their careers. Presence bias will need to be eliminated by ensuring our "hybrid leaders" receive relevant training and support to address such biases. Also, not all jobs can be done remotely, which may unintentionally lead to inequalities between staff members.

The need to connect

Linked to this is the general need for connection with others. Individuals usually feel more engaged with their employers when motivated by others in a professional and social context. The power of catching up with someone while making a cup of coffee in the staff canteen or over some lunch shouldn't be underestimated in building trust, engagement and loyalty. It is important for our leaders to ensure that, going forward, offices are used as collaborative spaces where staff are encouraged to meet each other, clients are welcomed and interpersonal relationships can thrive. Work spaces might need to be redesigned to accommodate this. Employers will have to adapt, along with employees who will likely find themselves motivated to take on greater responsibility for their progression and transition in the workplace.

Experience also tells us that people usually share knowledge better and learn faster "in person". In order to prevent knowledge and communication silos, firms must focus on building collective knowledge for all, not only at senior levels, through use of digital technology wherever possible. Failing to do so will result in a loss of the diversity of thoughts and ideas which is essential to the success of any business. Investment in team and leadership development has never been more crucial.

The change within the legal profession over the last two years is vast. As we continue in a state of flux and uncertainty, it is difficult to predict where things will end up. However, continuous change within the legal sector is inevitable, particularly in the way individuals view their relationship with their career and profession.

Successful hybrid workplaces must be proactive, innovative and transparent about decisions made to address such ongoing matters. Wellbeing and equity need to remain high on the list of priorities. Equitable workplaces tend to attract – and keep – the best, most diverse talent. Those who feel valued and looked after naturally perform well and help maintain business continuity. Good management and a healthy workplace culture are fundamental for any organisation – hybrid working or not.

Rupa Mooker
is Director of People & Development with MacRoberts

RISK MANAGEMENT

Why take the risk?

Graeme McKinstry, recently retired from the practice he founded and now an adviser on practice management and risk issues, carries out risk audit visits under Lockton's Practice Improvement Programme. Here he explains how to avoid some of the issues he has found

Terms of engagement, checklists, file reviews and scope letters are hardly the things to make you sit up with excitement. Yet there is more here than meets the eye – the Master Policy excess means that the basic cost of a successful professional negligence claim is £4,500 per partner per claim, never mind the issue of double and even triple deductibles or the consequential rise in future premiums.

The phenomenon, however, is that data and experience both confirm that the overwhelming majority of claims for professional negligence (including the most expensive) do not arise by dint of giving wrong legal advice, but are invariably the result of poor practice and file management or system failure.

The profession predominantly comprises capable and competent lawyers, but many of those, even with years of experience, demonstrate carelessness, naivety or even a lack of awareness when it comes to applying the same level of care, attention to detail and professionalism in relation to managing risks as they apply when advising their clients.

This paradox is difficult to explain when the tools available both to identify the risk of claims and to reduce them are well known, tried, tested and straightforward to apply.

Perhaps the explanation is that busy solicitors feel overwhelmed by a combination of the exponential increase of invasive and time-consuming regulatory compliance, higher demands and expectations of a more mobile and selective clientele, pressures on fees and a widespread impression that the regulatory bodies and even the courts have shown a disproportionate tolerance and acceptance of the claimant against the position of the solicitor. So, what does your toolbag contain?

1. Terms of engagement

I used to call these letters "terms of endearment" because they set out (or should!) in clear language the terms and conditions which form the basis of your relationship with your client. More importantly, from a risk perspective, they often prove to be the first line of defence. Many lawyers consider both the need for and the drafting of terms of engagement to be burdensome. This is a cardinal misjudgment. Your terms of engagement letter can be a shield offering complete protection against a dissatisfied client steadfast in their pursuit to find someone to blame for an unfortunate outcome. The letter is vital and the benefits of a carefully and properly constructed letter cannot be overstated.

Your letter should contain fundamentals:

- Identify the work which has to be undertaken.
- Provide details of any area of work which will not be undertaken.
- Explain the basis upon which the fee will be charged, and any variations.
- Set out realistic timescales for completion, again explaining variables.
- Limitation of liability.
- How instructions will be taken from spouses, partnerships and limited companies etc.

A typical engagement letter will cover many more details such as complaints procedure, etc, and for a fuller analysis and consideration see the Letter of Engagement Guide on the Lockton website at www.locktonlaw.scot, as well as the following articles in the Journal:

- "Swimming, not sinking" (Journal, August 2018, 44)
- "Engagement letters: a practical approach" (Journal, September 2018, 44).

Importantly, of course, your file should contain clear evidence that the terms of engagement letter has been issued, and ideally a signed copy.

2. Scope letters

Your scope letter should not be a carbon copy of the terms of engagement letter. Scope letters should be complementary to the more general terms of engagement letter, drafted in a bespoke fashion to the client and reflect the particular instruction. Your letter should communicate to the client the precise nature of the work to be undertaken, including extraordinary or unusual issues or items requiring special expertise and identifying particular elements of work not to be undertaken by you.

A good scope letter would identify where other skills, such as an accountant or planning consultant, would require to be engaged. A classic illustration arises in private client work where aspects of taxation can often cause untold difficulties, and it is good practice within the scope letter to be accurate and comprehensive in what is going to be done, what will not be included and where specialist advice may require to be sought.

Both the initial terms of engagement letter and tailor-made scope letter are enormously helpful to insurers in defending claims and put a much higher onus on the pursuer in establishing liability. A bonus of both letters is that they are also extremely useful in resolving complaints, as distinct from claims, in favour of the solicitor.

3. New matter form

The forms I have seen in most firms score maximum points for recording anti-money laundering enquiries and requirements. Many of those forms, however, contain a paucity or no disclosure about client or transaction risk.

Client risk

Your form should explicitly cover the following key points:

- What is the precise identity of these clients (individual, partnership, limited company, etc)?
- What do we know about these clients?
- What checks have been made to confirm what we have been told?
- Why are these clients (particularly new ones) instructing you?
- Who has authority to provide instructions?

We are all keen to secure new business, but enthusiasm should be tempered with caution, particularly when the client is new, or instructions are being received remotely or give vague information as to why you have been instructed, the purposes and the timing of the transaction or about the financing (in particular). Your forms should address each of those points.

Transaction risk

Often forms are bland and state that a transaction is a conveyance, divorce, etc. This first but often missed opportunity to identify transaction risk should be presented at the very outset of the transaction and, at that stage, a little time should be taken to record some fundamentals, because it is those omissions which often give rise to the claim:

- Does the firm retain the competencies to complete the transaction?
- Does the firm have the resources (e.g., is this extremely urgent)?
- What are the aspects of the transaction that are likely to be harbinger of risk, e.g. options agreements?
- Is there an unusual nature or type of work?
- Are different disciplines required?
- Is rural property involved?
- Are time limits identified and recorded?
- Are there access to land issues?
- Jurisdiction checks.
- Title checks.

Many large claims have arisen because of inadequate and sometimes careless recording of basic instructions. The classic example arises in the taking of title. Your form should confirm precisely:

- Who is your client?
- In whose name(s) is/are the title to be taken?
- Is there a survivorship destination?

These are illustrations of oversights at the outset of a transaction which have frequently been seen and which often lead to trouble and a claim arising even many years later.

4. File review

These are anathema to many practitioners, but a claim buster to even more! File review need no longer be cumbersome. Many readers will remember coming into offices at weekends and painstakingly physically going through cabinets and reviewing either their own or their colleagues' files. Today, with the advent of technology and advanced case management systems, file review is far less labour intensive and ought to be both more efficient and more frequent. One caveat to the electronic file, however, is to ensure that everything (I mean everything) is fully recorded on the file in the same way as the file note was written.

5. Peer review

While accepting that in smaller firms peer review may be impractical on a resource basis, the overarching principle nonetheless ought to be sacrosanct across the profession that, wherever possible, reviews should be done on a peer basis to avoid the obvious risks of subjectivity and a reluctance to address issues in the hope that the problem will simply dissolve. Experience shows that problems grow arms and legs if not resolved as quickly as possible. Often peer review will reveal more than simply the problem within the file itself, such as a personal or professional problem facing a colleague which may itself be a risk factor.

During, and beyond, the pandemic, the inexorable rise in a variety of working practices whether at home or remotely has the potential to spawn new claims. Changes in working practices bring new issues of both identifying and managing risk. Insufficient time has yet passed to know whether claims will arise as a result of new working methods; however, careful thought should be given by all practices to create satisfactory systems which identify and manage risks, especially where work has been delegated and there may be inadequate systems of supervising and reviewing work done at other locations. File review (ideally by peer) is even more important with the advent of remote working.

6. Checklist

To maximise the effectiveness of the file review, whether carried out by physical examination or remotely, a checklist is essential to guide the reviewer to the points (some of which may not be obvious) to be checked. This article does not extend to detailing the content of checklists, and to an extent these may be matters of preference; however, the key is to confirm the following:

- The identity of the client.
- Has a terms of engagement letter been sent?
- What are the terms of the scope letter?
- What transaction risks have been identified?
- What client risks have been identified?
- What key dates have been identified and communicated?
- Has the file been progressed?
- Has there been recent communication with the client?

7. File validation

The final element in dealing with files and completing the circle from opening through review to closure is validation. This is the last and critical opportunity for you to check that risks which you have identified at the outset of the transaction have been managed throughout, and confirm that there are no loose ends at conclusion. This is vitally important especially in cases where some of the work has been delegated to a colleague perhaps working remotely. Again, the extent and scope of the validation is not for this article; the purpose is to encourage its application. Typically, as with the file review, a file validation exercise relies heavily on a checklist or other aid to ensure that the key points referenced are identified.

Hopefully (at least some) readers will find this article helpful and stimulating, and encourage colleagues to revisit client and transaction risk. For more assistance and a wider analysis of risk topics, please visit the Lockton website: www.lockton.com.

Contact Graeme McKinstry
at graeme@mckinstrypm.co.uk
t: 01292 281711
07980 833160

ELECTRONIC SIGNATURES

QES: the who and how

The Society is revising its guidance on qualified electronic signatures, and has created a panel of providers to help solicitors choose the most suitable for their needs

Over recent years, the use of electronic signatures has become increasingly common in a range of commercial transactions and contracts, and the pandemic only served to speed up wider adoption.

As this trend is expected to continue, it is important to be aware of the different options available and the legal requirements for different types of documents.

The Society's Electronic Signatures Working Group published a guide to electronic signatures in 2020 which outlines the different types of signatures and their validity as well as the signing and verification process. The guide can be found in the business support section of the Society's website at www.lawscot.org.uk/electronicsignatures

In addition to this guide, the Society has recently been looking specifically at the use of qualified electronic signatures (QES).

A QES is the most secure type of signature as it involves the signatory's identity being verified by a qualified trust service provider before the signatory is issued with a QES. Under Scots law, a QES is the only type of electronic signature that is self-proving (probative). It is used for:

- missives and other documents dealing with the transfer of rights in land;
- certain types of guarantees; and
- where (under Scots law) you wish a document to have self-proving status.

Many in the profession will already be familiar with a QES as it is a fundamental benefit in your Law Society of Scotland smartcard. In some countries (including some in continental Europe with civil law systems), QESs are more widely available. For example, some countries have them built into national identity cards.

"As this trend is expected to continue, it is important to be aware of the different options available and the legal requirements for different types of documents"

Qualified electronic signatures are by their secure nature more complex than other types of signatures and, along with higher costs, this has been seen as a barrier to adoption for some firms. However, there are now many providers who offer affordable cloud-based QES solutions that integrate easily to existing legal processes. It can be challenging to decide which QES provider to choose, so the Society has created a panel of providers (see logos) to help solicitors find a suitable solution for their needs by comparing benefits and costs. This panel is expected to grow, as it only represents a small selection of the market at present, but it is important to be able to compare what is on offer.

More details of the panel can be found on the Society's website: www.lawscot.org.uk/members/member-benefits/qualified-electronic-signatures/

DIGIDENTITY Namirial INTESI GROUP DocuSign

Notifications

ENTRANCE CERTIFICATES ISSUED DURING NOVEMBER/ DECEMBER 2021

ANDERSON, Samantha
ASLAM, Amina
CARMICHAEL, David W A
FINNON, Peter Joseph
HIRAN, Jasmine Gilraj
HOURSTON, Thomas
LAL, Priya Javed
MACDONALD, Jonathan Magnus
McKEOWN, Tim Robert
McMILLAN, James David
MOHAMMED, Jena Karen
MORRISON, Samantha Ria
OPALA, Morgen
PANOL, Suzanne
QUINN, Gillian
RATHBONE, Hilary McPhail
SCOTT, Gillian Catherine Anne

APPLICATIONS FOR ADMISSION NOVEMBER/ DECEMBER 2021

BORTHWICK, Alison Elizabeth
CHANEVA, Lili Teodorova
DAVIDSON-RICHARDS, Oliver
DORMER, Deborah
DORRIAN, Robert Lindsay
DUFF, Megan Louise
FAULDS, Lewis David
HAIR, Charlotte Anna Marion
JOHNSTONE, Kate Anne
KEENAN, Julianna Frances
KOCELA, Anna Maria
LIGHT, Luke Evan
McALLISTER, Lindsay Regan
McALLISTER, Megan
McALONAN, Danielle Josephine
McALPINE, Anna Megan
MACDONALD, Andrew Lewis
MACDONALD, Sarah Louise
McFADYEN, Emily
McFARLANE, Lucie Maria
McGOWAN, Sarah Emily
McGRATH, Kieran Sean
McKITRICK, Michael Thomas
McNALLY, Sophie Marie
MACPHERSON, Katherine Rhona Morrison
MALLEY, Sophie
MALTMAN, Heather
MOUAT, Anna Lai-Ming
NOBLE, Jennifer Ann
PEOPLES, Ruari Daniel
PHILIP-DAVIDSON, Sophie
REYNOLDS, Caroline Elaine
ROBERTSON, Andrew Francis
SCOTT, Erin Atlanta
SHANNON, Nicholas Gregory
SHERIDAN, David Myles
SKINNER, Celine Page
SLOAN, April

ELECTRONIC SIGNATURES

Missives: when e-signature won't work

A note from the Society's Property Law Committee on when electronic signing of missives would be inappropriate, for the time being at least

Solicitors have been forced to rethink many of their usual processes and procedures because of COVID-19 lockdown restrictions. Working from home has led to many solicitors using electronic signatures in order to avoid the impracticalities of having to print out, wet ink sign, scan, and post hard copies. In particular, there has been an increase in the use of qualified electronic signatures to sign missives.

The Law Society of Scotland's Property Law Committee would like to remind solicitors that signing missives electronically will prohibit them from being registered in the Books of Council & Session since, at the time of writing, the Books of Council & Session do not accept electronically signed documents.

This is particularly important to remember for missives of let. A landlord will usually want the missives of let to be registered in the Books of Council & Session for preservation and execution, so that they can enforce the missives, using summary diligence, if the lease itself has not been completed. Whilst it *might perhaps* be possible to register electronically signed missives in the sheriff court books for preservation and execution, so allowing for summary diligence, this would be unusual and would require to be first checked with the relevant sheriff court.

Some real-life examples of clients being unable to effect summary diligence because of electronically signed missives have been brought to the attention of the committee. These show how important it is to consider (as early as possible in the transaction and certainly before issuing a formal missive letter) whether it is appropriate to sign missives electronically. If the missives are to be registered in the Books of Council & Session, electronic signing will not be appropriate. If electronic signing is not appropriate, solicitors may wish to include a provision in their offer which expressly prohibits signing the missives electronically or they may prefer to adopt a less formal approach and simply agree with their counterpart, before the offer is issued, that the missives will not be signed electronically.

Fortunately, from 1 October 2022 this issue will cease to exist. Under The Registers of Scotland (Digital Registration, etc) Regulations 2022 (which, at the time of writing, are subject to approval by the Scottish Parliament), it will become possible to register electronic documents (PDFs), signed with a qualified electronic signature, in the Books of Council & Session.

Fiona Alexander, senior practice development lawyer, Pinsent Masons LLP, and Ann Stewart, property and professional development adviser and senior professional support lawyer, Shepherd and Wedderburn LLP, are both members of the Property Law Committee

ASK ASH

Up against a bully

An opposing solicitor is trying to intimidate me

Dear Ash,

I have been working as a lawyer for a few years and have encountered some challenging cases and indeed lawyers acting for the other side. However, I have recently encountered a particularly nasty opposing lawyer. He has a tendency to shout loudly at me during phone calls or on Teams and has even tried to belittle and laugh at me when I've tried to make an important legal point. I've noted that he seems particularly rude to female lawyers.

He is, however, good at putting on the charm offensive in front of sheriffs or sheriff clerks, though he recently slipped up by showing his true colours when he began shouting at me after a virtual court hearing was delayed as he didn't realise the clerk was still online! I'm loth to even speak with this individual as he is a real bully, but I'm not sure how I can manage the situation effectively on behalf of my client.

Ash replies:

I am really sorry that you've had to put up with such an obnoxious and unprofessional person. He clearly has insecurities about his own abilities which is resulting in him behaving in this manner.

All solicitors, as you will know, need to abide by a specific professional code of conduct and I would say that he is falling well below the standards expected. Can I suggest that you contact the Law Society of Scotland in the first instance and speak to the Professional Practice team (details are available on the Society's website). You could initially speak to them on an anonymous basis to sound out your concerns, and to understand better what steps you can take moving forward.

It is unacceptable that you are being effectively intimidated, but no doubt this individual's charm offensive will continue to slip in the future and he will be called out for his behaviour by others too. In the meantime, you should make clear to him that unless he refrains from shouting, you will not be able to continue with any conversations. Also speak to your own management about his behaviour as you may be able to seek help in raising a complaint with his employer, as no reputable firm will want to be associated with such behaviour.

As with any bully, it is important that you stand your ground and call out the behaviour; but please do not allow him to get to you as he is clearly the one with issues. Good luck!

Send your queries to Ash

"Ash" is a solicitor who is willing to answer work-related queries from solicitors and other legal professionals, which can be put to her via the editor: **peter@connectmedia.cc**. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education, Training & Qualifications team. Email **legaleduc@lawscot.org.uk** or phone **0131 226 7411** (select option 3).

Classifieds

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Would anyone holding or having knowledge of a Will by Susan Hill McMillan, formerly of Brenfield Drive, Glasgow, and latterly of 8 Solway View, Dalbeattie, DG5 4PN please contact Vicky Evans at Gillespie Gifford & Brown LLP, Solicitors, 135 King Street, Castle Douglas, DG7 1NA on 01556 503744 or mail@ggblaw.co.uk

John Callaghan (deceased) – Would any solicitor having knowledge of a Will for the late John Callaghan (DOB 12 February 1938), latterly of Lornebank Nursing Home, Hamilton ML3 9AB and formerly of 140 Hillhouse Road, Hamilton ML3 9TU, please contact Leigh Beirne, Solicitor, Harper Macleod Tel: 0141 227 9414 or leigh.beirne@harpermacleod.co.uk

Gary Steven Paton - Deceased
Please call 0141 248 4957 to speak to Peter McEwan at Macdonald Henderson if you hold a Will for Gary Steven Paton who died 26 October 2021. Mr Paton lived and worked in Kuwait but frequented the Kinross area on trips back to the UK.

FROM THE ARCHIVES

50 years ago

From *"Art Competition", January 1972:* "The Society put the final touch to the celebration of the 21st Anniversary of its foundation by promoting a competition for a work of art for permanent display in [its] headquarters... The competition was open to all students in the Schools and Colleges of Art in Scotland. They were asked to submit works... appropriate to the identity of the Society or to the layout of the office... A painting, 'Oasis Light', by James McGlade of Edinburgh [won] the first prize and this painting has become the property of the Society and hangs in the Council Room at 26 Drumsheugh Gardens."

25 years ago

From "*Keep on Trucking: Remedies for European Lorry Drivers*", January 1997: "This is not a good time to be a trucker. As the French dispute drew to a close, barricades sprang up across major roads and rail links in Greece. More than 100 British trucks, many of which had been caught in the lorry blockades to the north, found themselves facing implacable lines of tractors and angry farmers demanding extra subsidies, cheaper fuel and VAT concessions... The Greek state is liable to make reparation to all economic operators who suffer loss as a consequence of the denial of their right to free movement."

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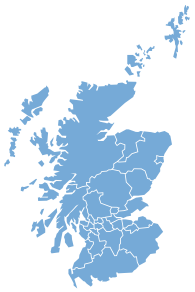

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From law to long-term investments

How barrister Brenesha Cox made the switch

Brenesha Cox joined Baillie Gifford's Client Manager Programme nearly two years ago after working as a barrister and legal adviser in London and Turks & Caicos. Specialising in commercial law, Brenesha became increasingly interested in how investing in companies that are solving the problems of today and tomorrow can affect social change. So, when she saw Baillie Gifford was looking for people from a broad range of backgrounds, it became an exciting opportunity to take her career in a new direction.

We asked Brenesha what she enjoys most about her new career: "My last role was in quite a traditional culture, so I love that I have a great deal of autonomy as a Client Manager at Baillie Gifford and can just be myself at work. This enables me to really show up and truly enjoy building long-term relationships with new and existing clients." She went on to say that the client management and advocacy

skills gained through her legal career have been useful in her new role, but there's also been a lot of support from the firm to make the transition.

"I started the programme as part of a group of six, all from different backgrounds, including oil and gas, retail and the special forces. We were given a comprehensive induction, that included an in-depth overview of the investment strategies, and have since received professional training to gain our industry qualifications."

As to the culture at Baillie Gifford, Brenesha describes it as forward thinking, a firm where people work hard but the opportunities for hybrid working and the equivalent of a nine to five day mean you can enjoy the fruits of your labour. She also enjoys the opportunity to continually develop her knowledge by getting involved in projects, attending conferences or completing a secondment in one of the investment management teams.

If you're interested in transferring your skills from law to investment management, find out more about the Client Manager Programme at: clientmanager.bailliegifford.com

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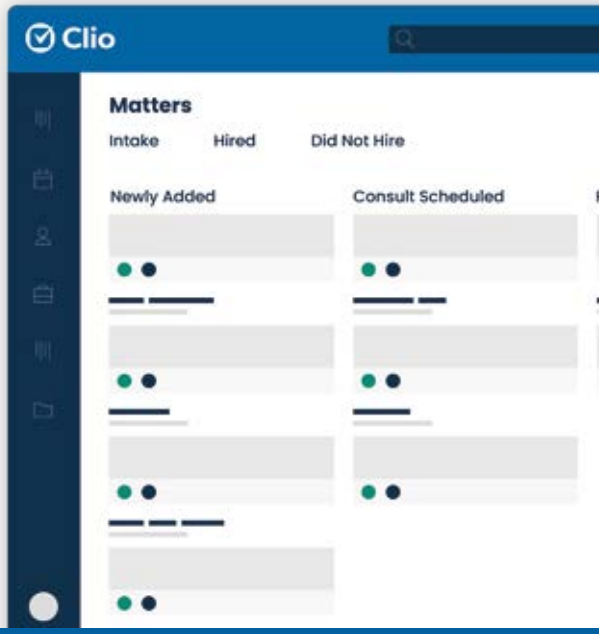

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*Statistics taken from Clio's *Legal Trends Report 2020*. 26% revenue increase observed in August 2020