"New pathway": how to reform surrogacy
P.16

Charities Bill: what's in and what's not
P.20

Difficult relations: how to assess damages?
P.24

Journal

Journal of the Law Society of Scotland

Volume 68 Number 4 – April 2023

Teeth for the underdog

We interview Jolyon Maugham KC on the challenges of the Good Law Project, and his hopes to operate in Scotland

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With the crowd

Crowdfunding is one of the features of our age. From sponsorship challenges to specialist medical treatment, the internet has made possible what in former times would have taken someone promoting a cause great persistence, publicity and probably luck to bring about.

What works for others is making its presence felt in the justice field, too. Crowdfunded litigation is growing in popularity, and online platforms now exist to help individuals and groups raise funds for actions that would otherwise be well beyond their means.

Such schemes could be open to abuse, but platforms have reputations to protect and should set out clearly what happens to money donated, depending on the outcome. With a cause that attracts sympathy, that could mean a lot of work. I know of at least one litigant who kept meticulous records, contacted each supporter from time to time with a progress update, and when partial recovery was finally achieved, offered the choice of a part refund or a donation to one of selected causes.

Whether or not everyone in that position takes such trouble, mass movement litigation must on balance be a good thing, particularly if it is the only means of effectively holding to account the Government or other large organisation, public or private.

No doubt, especially in the public law sphere, it comes as an unwelcome development for those who find themselves defending such actions; and quite possibly it leads to the courts having to rule on novel and contentious matters. Neither factor is a legitimate reason for putting obstacles in the way of otherwise arguable cases brought in the public interest.

It is therefore concerning to hear, as you can read in our lead feature, that the Good Law Project, which among a range of cases has enjoyed some success in bringing to light matters of doubtful legality that the UK Government had sought to keep from scrutiny, has recently found the courts unwilling to entertain fresh actions in its name. That after hints by the now Prime Minister that the law on standing would be changed unless the courts clamped down on it.

Why should citizens not be able to challenge the Government where the legality of its actions is in issue? Apart from the question whether politicians are putting improper pressure on our independent judiciary, as is pointed out it is usually not difficult anyway to find another party with sufficient interest to support as a litigant in the cause.

In a less unequal society it might be easier to hold public bodies to account without having to rely on the collective efforts of private individuals making small donations. As it is, we should be grateful that there exists some means of applying the rule of law to all, great or small – as there must if the term is to mean anything. J

Contributors

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

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Alex Lamley of MBM Commercial's US team, is qualified in Scotland and New York

Mark Nicholson is an advocate with Compass Chambers

Preslava Todorova is assistant legal officer at the Environmental Rights Centre for Scotland

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.68 NO.4 – APRIL 2023

Perspectives

Regulars

Features

Briefings

What to beware of when seeking US investor money: Page 22

In practice

ONLINE INSIGHT

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

Sentence discounting: a risk to the vulnerable
Tony Bowman of the SOLD Network explains why he believes some people with communication and understanding difficulties can be vulnerable to wrongful conviction in relation to sentence discounting.

Stormy seas for the defence of automatism
Automatism as the cause of a road accident should not allow a driver's insurers to avoid liability to an innocent third party, Jo Clancy argues.

Construction and competition: CMA takes a hard line
Charles Livingstone highlights action by the Competition & Markets Authority against bid rigging in the construction sector, the heavy penalties that have resulted and the lessons that should be drawn.

UK data protection: the relaunched reforms
The UK Government has restarted its data protection reform proposals after a six-month pause. Joanna Boag-Thomson and Alison White summarise key points and concerns with the proposals.

OPINION

Andrew Ormiston

Of the Scottish Government's proposed bail reforms, some are to be welcomed, some may have limited impact in practice, but one in particular could place huge demands on already stretched resources

The Bail and Release from Custody (Scotland) Bill was introduced to the Scottish Parliament in June 2022, following a consultation process, and has just entered stage 2. Part 1 relates to bail, while part 2 deals with release from custody. This article considers whether the changes proposed in part 1 will have a significant impact on the myriad bail decisions made daily across Scotland.

In reviewing the current legal framework, the stated purpose of the Scottish Government was to ensure that remand in custody is a last resort. Part 1 would (1) require the court to allow criminal justice social work an opportunity to provide information relevant to the question of bail; (2) change the test the court must apply; (3) remove the restriction under s 23D of the Criminal Procedure (Scotland) Act 1995, so that bail in all solemn cases is subject to the same test; (4) limit consideration of previous failures to appear in summary proceedings to failures directly connected to the case; (5) require that grounds for refusing bail be formally minuted; (6) require a sentencing court to consider whether time spent on electronically monitored bail should be regarded as a period in custody.

Proposed changes (3) to (6) above are all to be welcomed. Repeal of s 23D may at first blush suggest a less restrictive bail regime, and no doubt that was part of the Government's intention, but it is likely that accused who fall within s 23D would be considered generally to present a greater risk of harm because of the triggering conviction in any event. Often courts may accept that, due for example to the passage of time, s 23D is not engaged, but refuse bail on the merits. Arguably, therefore, repeal may not result in many more accused being granted bail, but would simplify the procedure, which was another stated aim. It is unlikely that any other reforms in this group will significantly affect determination of bail.

The second most significant change is the test to be applied. Currently the court requires to grant bail unless, having regard to the public interest and a number of factors in s 23C(1) of the Act, there is good reason to refuse. The new test requires the court to be satisfied that one of the s 23C(1) grounds applies and that it is necessary to refuse bail in the interests of public safety, including the complainer's safety, or to prevent a significant risk of prejudice to the interests of justice. There is certainly some overlap between the s 23C criteria and these new elements. For example, an accused who poses a substantial risk of failing to appear, or of interfering with witnesses, is almost always going to pose a significant risk of prejudice to the interests of justice. It is perhaps hard to see what impact the new test would have. Maybe having a good reason to refuse bail is a lower test than only refusing bail where it is necessary to do so for safety or prejudice to justice reasons? Time will tell.

Perhaps the most significant change is the requirement that the court must grant a local authority officer an opportunity to provide information relevant to bail. The potential impact could probably be the subject of its own article. The impact of this reform will depend on the manner in which it is implemented and the resources made available. It is fair to say that our criminal justice social work departments are already stretched. If the proposed bail reports are to be similar to post-conviction court reports or parole reports, it will place a huge burden on those drafting them: these reports are prepared over a number of weeks with the assistance of digital risk assessment tools. Even then the authors occasionally question the results. Bail risk assessment reports would have to be prepared on a staggeringly shorter timescale (time bars relating to determination of bail are not being amended). How is that going to be achieved, and to what level of detail and accuracy?

Government has already accepted that adequate funding will have to be made available. Rapid risk assessment may require specialist resources and training. With budgets already stretched, it does raise the question whether this reform, if implemented, will be a help to the court or a hindrance due to inadequate resourcing leading to unnecessary delay. Further delay is something all with an interest in the criminal justice process are keen to avoid.

In closing, it seems likely that most of the proposed changes will have a limited impact on the determination of bail. Granting local authority officers an opportunity to provide information is the reform that is most likely to have a significant impact, but whether that is a beneficial or detrimental one remains to be seen.

Andrew Ormiston is a partner with Murray Ormiston, Aberdeen, and a former member of the Law Society of Scotland's Criminal Justice Committee

Professional witnesses: a reply

The February Journal carried a Viewpoint about professional witnesses and the vital role they play in the administration of justice. That is without question. However, doubt was cast on whether professional witnesses are highly valued and respected. In response it is helpful to highlight the work being done by Scottish Courts & Tribunals Service ("SCTS"), in collaboration with our justice partners, to make it easier for professional witnesses to give evidence.

Since 2020 a cross-sector Remote Professional Witnesses Working Group, chaired by Lord Matthews, has been in place. Part of its work has been to reflect on the innovations and lessons learned from the pandemic and, going forwards, to encourage more evidence to be given remotely.

One such innovation is the introduction, from January 2022, of an agreed default position that professional witnesses in the High Court are to give evidence remotely. Exceptions can be applied for in the usual way. This means that professional witnesses, such as doctors, scientists and police officers, are no longer required to attend court in person.

This enables police officers to give evidence from their police station rather than having to wait in court for their case to be called. It also benefits other professional witnesses who often have to travel significant distances and/or give up a day's work to attend court. Since January 2022 over 170 professional witnesses, who are not police officers, have given evidence remotely in the High Court.

In Aberdeen Sheriff Court, an initial virtual summary trials pilot focusing on domestic abuse cases has been running since June 2021. In addition to supporting vulnerable witnesses to give their evidence remotely, an essential part and continued focus of the pilot is that it enables evidence from police and medical professionals to be given remotely from different locations across the sheriffdom. This ensures that high quality evidence continues to be provided by such witnesses, while freeing up considerable time to allow them to continue with their essential duties as opposed to travelling to, and waiting in, court with associated costs.

There may be delays and postponements to cases, which are outwith the court's control. SCTS is acutely aware of the impact any delay has on all those involved, and works with justice partners to minimise these. As part of this work, as reported by the Journal (online news, 5 September 2022), a new initiative to manage summary criminal cases is being piloted in Dundee, Hamilton and Paisley Sheriff Courts. It seeks to reduce the number of unnecessary hearings, which contributed to over 400,000 witness citations last year, through facilitating early disclosure of evidence and early judicial case management.

Should a delay or postponement occur, witnesses will be notified by those who have cited them to attend court.

A further step taken by the cross-sector working group to support more evidence to be given remotely has been its agreement to a witness behaviour protocol. This has been approved by the Faculty of Advocates and COPFS, and is currently being considered by the Law Society of Scotland. The protocol is provided to witnesses who are giving evidence remotely.

The work mentioned above is a mere snapshot of the steps that have been taken to maximise digital innovations and reduce the impact court proceedings can have on professional witnesses. It is an excellent example of collaborative working within the justice system, including with the legal profession.

David Fraser, executive director, Court Operations, Scottish Courts & Tribunals Service

BLOG OF THE MONTH

lawyerwatch.wordpress.com

We return to Richard Moorhead, Professor of Law and Professional Ethics, for his take on the cab rank rule controversy that has erupted round the declaration declining to act for fossil fuel interests/ against protesters, signed by a growing number of barristers and others.

Strong feelings have been expressed on both sides. Moorhead does not share these, not being convinced either that the rule of law demands the withdrawal of services, but also arguing that the signatories' rights "are stronger arguments than the cab rank rule as it currently stands".

BOOK REVIEWS

Delict – A comprehensive guide to the law in Scotland

3RD EDITION

FRANCIS McMAHON, RONALD E CONWAY AND ELEANOR RUSSELL WITH JOSEPHINE BISACRE AND RANALD MACPHERSON

PUBLISHER: EDINBURGH UNIVERSITY PRESS
ISBN: 978-1474462440; £55

This comprehensive guide will be most welcome. The legal traveller, whatever their existing knowledge, will benefit from its contents, updated from the second edition published 11 years ago.

The principal author was assisted by contributors who wrote individual chapters on matters within their expertise. The book states the law at October 2020 and explains many recent decisions in important areas. The case summaries are excellent, particularly those in the sections on vicarious liability and breach of statutory duty.

The scope of this book means that it will always be difficult for any reader coming to the subject new to navigate easily. There is a good "Summary of Key Concepts", but this comes rather curiously at the very end rather than the beginning. Clearer headings and subheadings would also have made it easier to follow the text in some chapters. These are minor reservations, however. The analysis and discussion are clear and concise and will greatly assist anyone new to this topic or wanting to refresh their memory.

Charles Hennessy
For a fuller review see bit.ly/4Aprw6F

The Landlord's Hypothec

ANDREW SWEENEY

PUBLISHER: EDINBURGH LEGAL EDUCATION TRUST
ISBN: 978-1999611880; £30

"This book... is Volume 10 in the Studies in Scots Law... I commend them to you."
Read the review by Professor Stewart Brymer at bit.ly/4Aprw6F

The Bookseller of Inverness

S G MACLEAN (QUERCUS: £16.99; E-BOOK £5.49)

Anyone familiar with Church Street in Inverness will immediately be drawn into this book... a terrific story, well crafted and utterly compelling.
This month's leisure selection is at bit.ly/4Aprw6F
The book review editor is David J Dickson

Piste of the action

We have our celebrity court cases, but isn't it all just so much, well, *glitzier* over in the States.

But then we don't get suits like retired optometrist Terry Sanderson's action against A-list actress Gwyneth Paltrow blaming her for injuries in a collision at a luxury ski resort.

One side issue arose when Team Paltrow wanted to "bring in treats for the bailiffs for how helpful they've been", seemingly in keeping press photographers at bay at the doors. It may be fine on a film set, but it was a "Thank you, but no thank you" from Judge Holmberg.

Taking the stand, Sanderson had to deny he was "into celebrity worship", having sent an email headed "I'm famous" to his family soon after the accident. The question might well have been asked of his lawyer Kristin VanOrman, who in cross examining Paltrow put it that she probably had the best ski outfit on the slopes, and envied her height, also observing: "You're small but mighty. Actually you're not that small."

Question of the trial however must be "Did you or did you not compare my client to King Kong coming out of the jungle?" – which Sanderson admitted to saying at a 2019 press conference. But he, er, really meant to say she screamed like a woman being chased by King Kong.

Whatever, he lost his case.

PROFILE

Laura McBain

Laura McBain is the Society's member services coordinator, and secretary to the Accredited Paralegal Committee

1 Tell us about your career so far?

I started in financial services, working as a client services executive for over 10 years. After having my daughter, I needed a change of direction and joined the Society in 2019, first as a team administrator then quickly moving to my present post. This is when my involvement with the Accredited Paralegal status began. I was delighted to become secretary to the Accredited Paralegal Committee in April 2022.

2 As secretary, how do you support paralegals?

I am lucky to engage with paralegals all over Scotland on a daily basis. Whether by providing information to potential new members, supporting accredited paralegal trainees, or helping existing members maintain their membership, I am involved every step of the way.

3 Do you think any aspect of the scheme may come as a surprise to people?

It's important to highlight that the application process is very straightforward. A common misconception is that applicants need to complete an exam, or some form of coursework to gain accreditation. Paralegals are simply asked to demonstrate that they meet the competencies and standards set by the Society through our online application. Most applicants really surprise themselves when they get their experience down on paper!

4 Immigration law was recently added to the list of areas for accreditation. What do such additions mean to the profession?

It's essential that we continue to develop and maintain a diverse range of practice areas for accreditation so we can support as many paralegals as possible and cater for growing areas of law. We were delighted to launch immigration law as our 14th area. We're aware there are highly specialised paralegals working in areas of law that we have yet to develop an accreditation for, so we want to hear from you with your suggestions!

Go to bit.ly/4Aprw6F for the full interview

WORLD WIDE WEIRD

① Baaaad behaviour

A gang of feral sheep, owner unknown, has been terrorising residents of a Welsh village for weeks by taking over gardens, breaking walls and munching through hedges.

bit.ly/3m36WAG

② Uber confident

A suspected cocaine smuggler was caught by police after he ordered an Uber Eats delivery under his own name from a hideout while on the run in Western Australia.

bit.ly/3zxZOPS

③ Transmission to jail

Two teenage carjackers in the US were caught after the motor they tried to steal at a filling station in Maryland was a manual car – and they could only drive automatics.

bit.ly/438b6b6

TECH OF THE MONTH

North Coast 500

Apple and Google Play: free

If you fancy discovering one of Scotland's main tourist routes during the summer, this app is a must. Packed with fun facts, it helps you find the most interesting sights and places to visit on your journey of discovery through the North Highlands, and features lots of stories, songs and music.

Murray Etherington

Is the profession feeling positive at present? The record recent admissions ceremony suggests it is; feedback from constituency visits suggests less so. What will the *Profile of the Profession* survey tell us? Make sure you take part

One of the most rewarding aspects of the President's role is welcoming new solicitors to our profession at our admissions ceremonies. It was a real honour and pleasure at the end of last month to attend the biggest admission ceremony the Society has held in its 74-year history, sharing a special day with 80 new solicitors. It's likely we'll have even larger ceremonies in the near future, as the record number of trainees taken on in the past two years begin to feed through to the ranks of newly qualified solicitors.

New members are quite literally the future of our profession, and marking their achievement is important, as is providing the right support in the earliest stages in their careers. Ensuring the health of the profession also means preparing for the changes coming, whether that's in regulation, technology, business practices or wider society, to help ensure the most recent cohort of new solicitors are well placed to deal with challenges and capitalise on opportunities.

Feedback from your localities

Unfortunately, not all of us are feeling quite so positive about the present, let alone the future, which is why the constituency visits I've been making across the country are so important. Feedback from members at these events has confirmed issues for some firms and in-house teams, regardless of where they are located or their size. The struggle for employers to recruit newly qualified solicitors, or to retain their trainees on qualification, is something that's playing out across the country, and it is not just finding and keeping suitable candidates for junior positions that's proving difficult: the filling of senior solicitor posts is also posing challenges.

From my discussions I know that members in more rural areas such as the Highlands are finding it extremely difficult to recruit, and some firms and in-house legal teams are considering that a new approach is needed, such as outsourcing certain areas of work. However, it is not exclusive to those in rural areas, with those working in towns and cities also raising these difficulties.

The changing shape of the profession and provision of legal services across Scotland is something we are monitoring closely. This is also an issue for other jurisdictions, professions and sectors, so we are not alone in this. While solicitors have proven themselves to be resilient over decades of change, we need to ensure the profession remains in good health to serve businesses and communities for the years to come. We'll continue to engage with our members on this.

Profile of the Profession

Our five-yearly census of members – *Profile of the Profession*, or POP – is now underway and you should have received an email from the independent researchers Taylor McKenzie. This is a key piece of research for us and provides us with a crucial insight into our members' experiences and how the profession is changing and progressing. All voices and views are important, as the research directly impacts the work of the Society.

The results of our previous POP survey in 2018, which generated over 2,700 responses, led to a host of major initiatives, such as launching Lawscot Wellbeing; embedding diversity training in the practice management course; the creation of a gender equality action plan; establishing the Racial Inclusion Group; and hosting events promoting LGBTQ+ inclusion.

It's important for us to hear about your views and experiences, so if you have not yet completed the survey, please do take the time to do so before it closes on 10 May. The more of our members who take part, the better it will reflect the solicitor population and the better we will be able to support you, having robust evidence for our future policy work and negotiations with bodies such as the Scottish Government.

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

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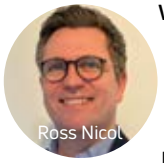
SCOTTISH LEGAL AWARDS 2022 WINNER Legal Technology Award

The Society of Law Accountants in Scotland

People on the move

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has appointed IP and IT specialist **Ross Nicol** as a partner in its Commercial team in Scotland. He joins from DENTONS.


Ross Nicol

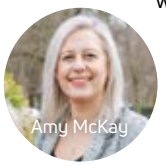
LESLEY ANDERSON LAW, Falkirk, has moved to new premises at 25 Vicar Street, Tudor House, Falkirk, FK1 1LL.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed accredited specialist **Simon Mayberry** (previously at SHOOSMITHS) as partner and head of its Employment team, and **Kenzie Howard** (previously at WORKNEST) as a solicitor in the same team. **Greg Lawson**, previously at PETERKINS, has joined the Private Client team in Aberdeen as a senior associate, while **Amy McKay** has been promoted to senior associate in the same team.


Simon Mayberry

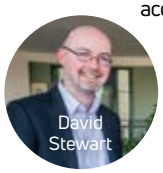

Kenzie Howard


Greg Lawson


Amy McKay

BLACKADDERS LLP, Dundee and elsewhere, has announced the following promotions. **Dario Demarco** (Glasgow) becomes a legal director in the Corporate team. Promoted to associate are **Robyn Lee** (Private Client, Dundee), **Richard Wilson** (Corporate, Dundee) and **Susan Currie** (Dispute Resolution, Glasgow and Edinburgh); while **Blair Duncan** (Employment, Edinburgh and Dundee) and **Stefan Docherty** (Residential Property, Glasgow) become senior solicitors. Blackadders has also appointed partner **Neil Robb** as head of its Commercial Property team, succeeding **Emma Gray**, now joint managing partner.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **David Stewart**, who joins from MORTON FRASER, as a partner in its Commercial Real Estate division, based in Edinburgh; and media, entertainment and sports specialist **Fraser MacKinven**, who joins from Abu Dhabi-based FLASH ENTERTAINMENT, as a partner in its Technology & Commercial division.


David Stewart


Fraser MacKinven

CAESAR & HOWIE, Bathgate and elsewhere announces the retiral of partner, **Lesley Susan Cunningham** on 31 March 2023 after 23 successful years with the firm. The partners and staff of Caesar & Howie wish Lesley a long, happy and healthy retirement. **Joanna Izabela Thomson** has been promoted to associate from 1 April 2023.

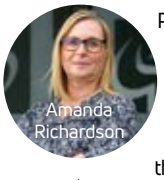
CLAN CHILDLAW, Edinburgh, has promoted **Katy Nisbet** to head of legal policy.

GARDEN STIRLING BURNET, Dunbar, Haddington, North Berwick and Tranent, has announced four appointments as it sets up a Family Law division. Leading the team is legal director **Claire Christie**, an accredited specialist in family law, who joins from SKO FAMILY LAW SPECIALISTS. Joining in consultancy roles are **Kathryn Wilson**, formerly of Melrose & Porteous, and **Angela Craig**, who used to head the Family team at Garden Stirling Burnet. Family law paralegal **Amanda Richardson** has also joined the team.


Claire Christie


Kathryn Wilson


Angela Craig


Amanda Richardson

GIBSON KERR, Edinburgh and Glasgow, has expanded its Personal Law team with the hire of **Sara Albizzati** (who joins from BTO SOLICITORS) as an associate and **Susie Alexander** as a senior solicitor.

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has announced the promotion to partner of **Andrew Leslie** of the Housebuilder team, **Ross MacRae** in Banking & Finance, and **Sharon Murray**, who leads the Family Law team. Also promoted are **Lindsay Bryce Mackay**, **Victoria Curren** and **Rae Gilchrist**, to legal director; **Gillian Hyams** to associate; and **Ross Baron**, **Katie Brown** and **Jamie Seath** to senior solicitor.

GUNNERCOOKE, Glasgow and Edinburgh, has hired two more partners to its Scottish presence: employment specialist **Katy Wedderburn**, who joins from MACROBERTS LLP, and **Alex Innes**, a dual qualified lawyer with experience latterly as a business consultant, who joins in Banking & Finance.


Katy Wedderburn


Alex Innes

JAMESON + MACKAY LLP, Perth and Auchterarder, announce that **Alison Ramsay** retired as their senior partner on 31 March 2023 after more than 40 years' service to the firm. Alison will continue with the firm as a consultant.

KERSLANDS SOLICITORS LTD, Milngavie, are pleased to announce that with effect from 1 April 2023 they have merged with RALSTONS SOLICITORS. The practice continues under the name of KERSLANDS SOLICITORS at their current address of 4 Station Road, Milngavie. The principals are **Alison Keith**, **Lesley McDermid** and **Elspeth Talbot**.


Blackadders' joint managing partners Ryan McKay and Emma Gray with promoted colleagues (l-r) Wilson, Docherty, Lee, Demarco, Duncan, Currie


Gillespie Macandrew: MacRae, Murray, CEO Graham-Campbell, Leslie


Promoted staff at Turcan Connell

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, has announced its merger with MILLER HENDRY, Perth, Dundee and Crieff with effect from 30 May 2023. The enlarged firm will be branded as LINDSAYS. Miller Hendry's seven partners and about 50 staff will transfer to Lindsays. Staff currently based in Dundee will join those at Lindsays' offices at Seabraes. Others will remain at their current locations. Miller Hendry (Asset Management) Ltd will continue to operate as a separate standalone business.
LINDSAYS is delighted to announce the promotion of **Alison McKay** as partner with effect from 1 April 2023, in the firm's Private Client department based in Glasgow. In other promotions, **Sharon Drysdale** becomes a director, and **Eilidh Robertson** an associate, in the Rural team; **Kathleen Gaughan** becomes an associate in the Personal Injury team, based in Glasgow; and in Dundee, **Lindsay Carr** in Residential Conveyancing, and **Katherine McAlpine** in Dispute Resolution & Litigation, both advance to associate.
Lindsays has also appointed **Leanne Gordon** as a director in its Rural Services department. Having previously spent six years at Lindsays, latterly as senior associate, she returns to the firm after working for SCOTTISH LAND & ESTATES and then BLACKADDERS.

ALLAN McDOUGALL SOLICITORS, Edinburgh, has announced the promotion of employment law specialist **Alice Bowman** to associate.


Alice Bowman

Thomas Murdock WS is moving from JAMF SOFTWARE LLC to take up the role of Corporate Vice President and deputy general counsel at US software company BLUE YONDER.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Ellon, Inverurie, Banchory and Stonehaven, has appointed **Kirsty Dunning** as a private client associate in Aberdeen. She joins from STEWART & WATSON, Huntly.

STRONACHS LLP, Aberdeen and Inverness, has welcomed **Amy Fordyce** as a senior solicitor to its Commercial Property team. She joins the Aberdeen office from PINSENT MASONS.

TENEU LEGAL, Glasgow, immigration law specialists, have announced the appointment of South Africa qualified **Sahar Davachi** to support clients on immigration issues.

THORNTONS LAW, Dundee and elsewhere, has announced a number of new appointments across its Dundee, Forfar, St Andrews and Glasgow offices. In its Dundee headquarters, **Millie Griffiths** has joined as a solicitor in the Wills, Trusts & Succession team, and **Zeenat Reid** as a solicitor in the Commercial Real Estate team. Both were previously with BLACKADDERS. **Aimee Young** joins the Wills, Trusts & Succession team as a solicitor in the Forfar office from MACNABS LLP. In the St Andrews office, **Lauren McIntosh**, also previously with MACNABS, joins as a solicitor in the same team, and **James Martin** joins the Residential Property team from BLACKADDERS as an associate. Newly qualified **Claudine Tumangan** has joined the Glasgow office as a solicitor in the Intellectual Property team.
Thorntons has also announced the appointment of seven newly qualified solicitors to its Dundee and Edinburgh offices on completion of their traineeships with the firm: **Sophie Kirk**, **Iain Buchan**, **Baktosch Gillan**, **Rory Mellis**, **Emma Alderson**, **Eve McBride** and **Ollie Hofford**.

TURCAN CONNELL, Edinburgh, Glasgow and London, has announced the promotion of 23 professionals. They include two legal directors, **Mark McKeown** (Charities) and **Heather Bruce**, accredited specialist in agricultural law, and tax director **Iain Alexander**, a fellow of the Association of Tax Technicians. There are five senior associates: **Heather Burnett**, **Jillian Bynoth**, **Sarah Macleod**, **Andrew Ross** and **Alice Warne**; six associates: **Kirsty Bell**, **Alexandra Graham**, **David McBurnie**, **Christopher Reid**, **Joseph Slane** and **Catherine Sloan**; six senior solicitors: **Duncan Bauchop**, **Fraser McDonald**, **Andrew Robertson**, **Sophie Walker**, **Ciara Wilson** and **Emma McWhirter**; two tax managers: **Scott Webster** (to senior) and **Scott Reid**; and paralegal **Audrey Vass**.


Thorntons, clockwise from left: Tumangan, Young, McIntosh, Martin, Griffiths, chair Colin Graham

When hard cases make Good Law

It has succeeded in holding the UK Government and others to account on a range of issues; now the Good Law Project hopes to open in Scotland to counter increasing obstacles down south. The Journal spoke to founder Jolyon Maugham KC to discover more

Words: Peter Nicholson

How did a specialist tax lawyer end up heading an organisation dedicated to fighting for the underdog – one that has become a thorn in the flesh of the Government and other powerful interests?

The answer is the story of the Good Law Project ("GLP"), whose successes, it appears, have led the UK Government to resort to various tactics to try and stall further litigation by a body that has successfully challenged it on matters ranging from Covid-19 contracts to its net zero target.

With the English courts turning hostile to new GLP actions – on grounds founder Jolyon Maugham KC has yet to fathom, but against a background of political threats – Maugham has ambitions to add a Scottish presence to GLP's armoury, and its profile north of the border may be in line for a sharp rise. But how did it all start?

Tax gain and political pain

About 10 years ago Maugham was appearing in tax avoidance cases (and not on the side of HMRC). The subject was making the political agenda. "I made the choice to engage in an educated but also a political way with that very political debate. I very quickly became quite influential in this space; I was advising the Labour Party, I had a very good relationship too with the then Financial Secretary to the Treasury David Gauke. So I was wearing a number of different and sometimes conflicting hats. And I suppose that political strand of work just reminded me of who I wanted to be" – on the side of the underdog, that is.

After advising the Avaaz campaign group over a tax amnesty it wanted to challenge, he began to consider "this question of whether strategic litigation might provide some answers where politics couldn't". He brought the first GLP case in his own name; it ended with the Uber company being liable to account for VAT. "That was a very GLP type of case, a fairly narrow technical tax point and a fairly vigorous public facing campaign, and those two elements are pretty central to the way the GLP works now."

Without a higher law such as a written constitution, Maugham observes, litigation "may not be that effective in its own terms": a successful judicial review of central government often results in no more than a declaration that it has breached the law. Nevertheless, "Litigation can shine a light on abuses of power, can speak a language that politicians do understand – the language of political pain." And it can give journalists new angles on vital subjects such as global warming, on which they might otherwise have difficulty writing in ways that lead to people reading and responding to their articles.

That ability to engage with the public about the law has been crucial to GLP's growth. With more than 90% of its income coming from the now more than 30,000 people making small monthly direct debits – averaging maybe £9 – "you have to spend a lot of time thinking about how to speak about the law in ways that resonate broadly". Twitter, Instagram and an email list now more than 300,000 strong are key, "because very often the causes that we take up are not liked by the cultural power elite and so go underreported in the outlets they own".

Lawyers' concerns

How does GLP identify the cases to bring? Broadly it has three thematic areas: good governance, or in plain language holding power to account; the environment, particularly climate change; and what GLP tags "No one left behind", which is fighting for communities it thinks are being neglected or victimised. "That third strand I think is probably the most difficult – sadly it's a big bite to swallow; 'leaving fewer behind' would be a better description of our achievements as opposed to our ambition."

Much the largest proportion of its work concerns the first of these. "Although I'm sometimes styled by my detractors as radical, in truth I have a very boring, recondite, traditional

lawyer's concerns for the processes by which state power arrives at decisions", Maugham maintains. "About as core a lawyer's belief as it's possible to find."

GLP's campaigning activity is as important as its legal cases, however, and a desired outcome, if achieved, may ultimately be due to either or both. "Sometimes we build up a campaign in a space before we bring litigation; sometimes after we bring litigation we use the voice that we've then created to carry on campaigning. Usually one of those two dynamics is present, but there are some issues about which either the GLP or I feel very strongly and on which we speak even though litigation is unlikely to result."

GLP's track record is notable. Practising what it preaches about transparency, its website (goodlawproject.org/) carries a table, updated quarterly, of every case it has brought, with an assessment of its level of success in both the legal outcome and the campaigning outcome. Of matters concluded, the wins clearly outweigh the defeats. "We massively outperform any benchmark you could possibly choose", Maugham declares. "Something like one in 40 or one in 50 judicial review cases that is commenced succeeds in court; our record is a high multiple of that. But I certainly wouldn't pretend that we are immune to the forces shaping the conduct of justice in the High Courts and the appellate courts in England & Wales."

Pushback

Increasingly it is facing headwinds, particularly now over standing to sue, on which Maugham has some pointed observations. "It's undoubtedly true that the courts have become enormously hostile to the idea of the GLP bringing litigation, I think in a way that lacks principle. Since Rishi Sunak issued a statement last August that unless judges clamped down on litigation brought by the GLP, he would change the laws on standing, there hasn't been a single case I can recall where a court has accepted that we have standing.

"I think that response of the judiciary is understandable, but I don't think it is principled. I also don't think it's helpful, because it's not that difficult for GLP to do what it has done, which is respond by litigating through third party claimants. The issues that we litigate on are necessarily issues of public concern – we can usually find a small not-for-profit or an individual that is directly touched by the issues, and we can meet their legal costs and litigate the same points through them."

He adds: "I do want to make this point: there is something to me deeply unattractive about the pushback in the English & Welsh judiciary against crowdfunded litigation. There's a sense that normal people who fund our cases in their tens of thousands somehow don't have a proper interest in the litigation they are willing to fund. And I can't but contrast it with the attitude the courts have adopted in the past to establishment figures like William Rees-Mogg and the approach that the judiciary has had to their standing. It doesn't feel to me very principled, and it seems to me difficult to explain otherwise than by reference to a kind of institutional preference for establishment power."

When that hurdle has been overcome, the Government has attempted to put costs estimates in the way, at levels that "have shocked even the most hardened and cynical public law specialists in England, and I have personally little doubt that those bills are intended to dissuade GLP from bringing litigation. As you can gather, I'm not very happy about how public law operates in England at the moment. I can be and am sympathetic to the political pressures that judges face from a bullying executive; but the outcome isn't one that feels to me conspicuously like justice".

Scotland: a different landscape?

All this helps to explain why, last November, GLP announced plans to open a Scottish office, not least because Maugham believes the Court of Session, protected by the Act and Treaty of Union, is more insulated from threats by the state – or, as he puts it, "beyond the comfortable reach of the Conservative Party". This base would

"It's undoubtedly true that the courts have become enormously hostile to the idea of the GLP bringing litigation, I think in a way that lacks principle"

support litigation on UK as well as Scottish causes in appropriate cases. Not that Scotland's judges have a reputation for radical action, but "at a time of social retrenchment you might be quite happy to have conservative institutions which react more slowly to external pressures, and that's how I feel in broad terms about the Inner and Outer House".

He also hopes the Scottish courts would be more likely than the English to look at the substance rather than the form of an action when considering caps on expenses. "The cost capping rules in England & Wales are statutory and so quite inflexible, and don't seem to contemplate that public law actions can be brought in a private law sphere and so benefit from cost protection." Thus he failed to obtain costs protection when suing Uber, in form a private law action in his own name over the princely sum of £1.06, but which ultimately led to recovery of about £600 million for the public purse. Would the Scottish courts have taken a similar line on capped expenses?

Scotland has already been the springboard for the case of which Maugham says he is proudest – the *Wightman* litigation during the pre-Brexit turmoil. "That was extraordinary", he recalls. "It went from the Outer House to the Inner House on permission, then back to the Outer House on substance, then was appealed on substance, and the Inner House referred the question to Luxembourg." The Westminster Government instructed five QCs to try and persuade the Supreme Court to hear an appeal, and failed; the reference was heard by a unique full bench in the EU Court of Justice with a judge from every member state; the case was opposed by the EU Council and Commission as well as the British Government, but the court nevertheless ruled that the Westminster Parliament could unilaterally revoke the notice to leave given under article 50 of the EU Treaty. "And I think that was a pretty extraordinary achievement. Nobody gave us a chance."

Finding a Scottish qualified public law solicitor of the right calibre for the proposed office has not been easy, though discussions continue. "I think exactly what form the Scottish office takes will depend on whether we are able successfully to recruit the right lawyer to head that office. This is very difficult work that we do, and it's not really a surprise that recruiting for it is challenging."

Indeed, even success in court does not always translate into results in the world outside: Brexit has happened despite what was achieved in *Wightman*. But Maugham is philosophical. "You can only do what you can do. I try to bear that in mind. I try to play my part, and I understand that there are many things beyond my control. When it comes to what compels and motivates me, that is good enough actually: I've done what I can do to progress something I care about. To me that's enough."

"You can only do what you can do. I try to bear that in mind, and I understand that there are many things beyond my control"

Personal and public

Not someone who keeps a low profile on an issue he feels strongly about, Jo Maugham's latest brush with controversy is his aligning himself with (currently) nearly 300 lawyers who have signed a declaration that they would refuse instructions to work on new fossil fuel projects or prosecute climate change protesters opposing new projects. Taking a stand on refusing to "support laws that defend those who destroy the planet, and criminalise those who try to protect it", the signatories have stirred up strong views around the cab rank rule, which barristers (and advocates) found on as a principle to detach themselves from the causes they plead.

Maugham recognises that he might come to be seen as some sort of moral policeman, but denies that it might impact negatively on GLP's work. "I can tell you for sure that the anger of the *Daily Mail* and fury on Twitter do not correlate to a falling off in financial support for GLP", he asserts. "I've had lots of very supportive messages from people who I know are GLP supporters and funders, and I do think that climate change is the existential issue of our time."

Supporters would have to vote with their wallets, as GLP has no plans to adopt a governance arrangement like that of Liberty, for example, under which a council is elected that has oversight over the organisation. "I think those models have advantages; they also have disadvantages, and for the moment we don't plan to replicate that model."

Readers interested in finding out more about what makes Maugham tick might like to look out for his book *Bringing Down Goliath*, published on 27 April by Penguin Random House. It isn't just the Good Law Project story: "It's also forward looking and a considerable part of the book is taken up with a discussion of how the law is not working as it should, is failing to hold power to account and in fact has a sort of hegemonic quality, a quality of conserving things as they are rather than delivering justice for those who question the exercise of that power."

A speaking and signing tour will include events in Edinburgh and Glasgow over the summer – details to be announced.

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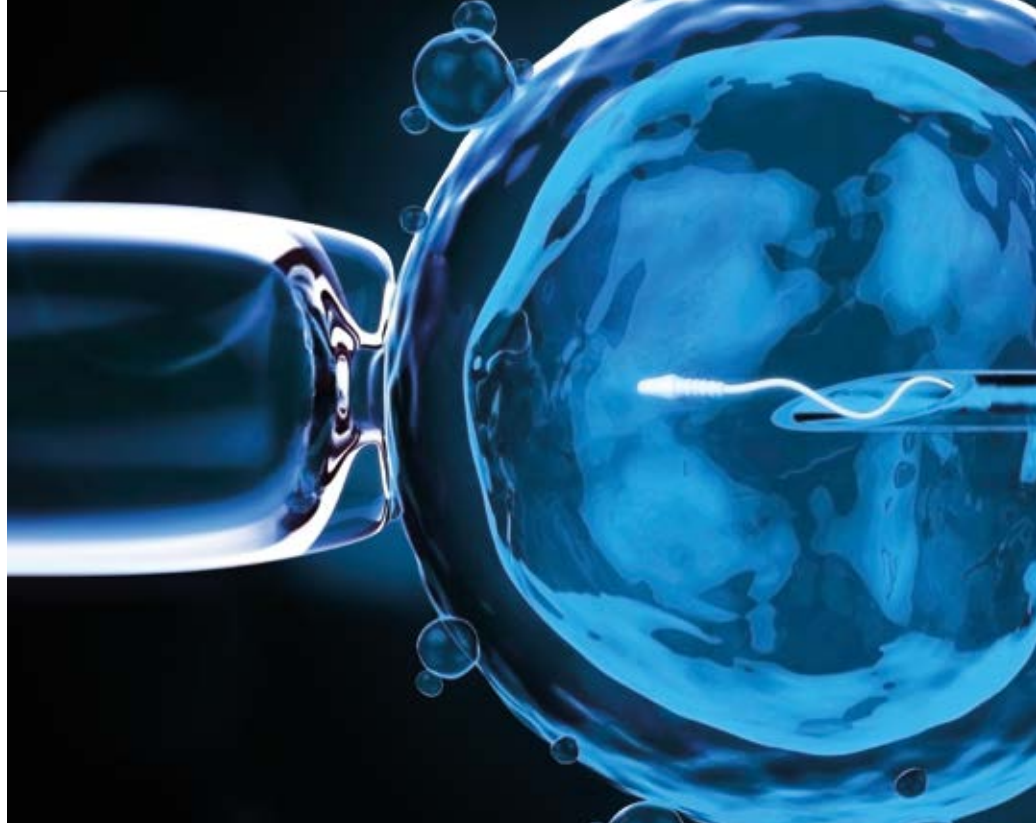


Building families through surrogacy

Jointly authored from the Scottish Law Commission and the Law Commission of England & Wales, this article explains the main recommendations for surrogacy law reform proposed by the two Commissions in their newly published report

On 29 March, the Scottish Law Commission and the Law Commission of England & Wales published their joint report, *Building families through surrogacy: a new law* (available at www.scotlawcom.gov.uk). The report and draft bill outline a new regulatory regime for surrogacy that offers more clarity, safeguards and support.

By placing the best interests of the child at the heart of reforms and introducing pre-conception screening and safeguarding measures for the surrogate and the intended parents, we can respect the shared intentions of the parties to the surrogacy arrangement by recognising the intended parents as the legal parents at birth. Our recommendations also have the effect that surrogacy will remain non-commercial, by prohibiting payments to the surrogate for carrying or delivering the child, ensuring that surrogacy agreements remain unenforceable, and requiring surrogacy organisations to operate on a non-profit-making basis. This article sets out the key recommendations in the report, which will now be considered by the UK Government.

The Commissions' project

The Commissions' joint review of the law of surrogacy was announced in 2018. In June 2019, we published our joint consultation paper, *Building families through surrogacy – a new law* (2019) Law Commission Consultation Paper No 244; Scottish Law Commission Discussion Paper No 167, setting out a range of provisional proposals. The consultation period ran for four months; we received 681 responses. We also held a series of public consultation events across the UK for people to discuss their views on our provisional proposals, and across the project there was a high level of engagement from consultees, whose responses have helped inform the recommended reforms.

What is surrogacy?

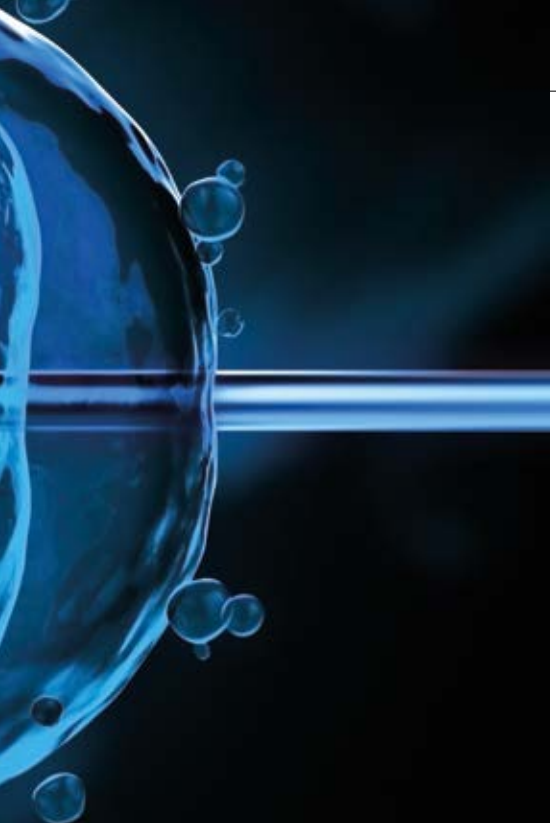
Surrogacy is when a woman (who we refer to as the surrogate) becomes pregnant with a child who may, or may not, be genetically related to her, and gives birth to the child with the intention that another couple or individual (the intended parents) will be the child's legal parents.

A new pathway to legal parenthood

Under the current law, the surrogate is the child's legal mother at birth, and the intended parents must apply for a parental order after the birth to become the legal parents. The current system produces several problems.

As a starting point, it does not reflect the intention of the parties involved in a surrogacy arrangement and does not serve the best interests of any of those involved. The surrogate, who does not intend to raise the child, is legally responsible for the child until the parental order is granted. During this time, the intended parents are not the legal parents and may not have parental responsibilities and rights, although they are usually the ones caring for the child and are best placed to take decisions about the child. The parental order process can take several months to complete and brings with it a degree of uncertainty and stress for the parties, which is not in the best interests of the child.

In response to these issues, we recommend



the introduction of a "new pathway", that will enable the intended parents to be the legal parents of the child from birth and remove the need to apply for a parental order. This new pathway will introduce essential screening and safeguards for the surrogate and intended parents prior to conception, so that state regulation comes before, not after, the birth of the child. These screening and safeguarding checks include health checks, a requirement to undertake implications counselling, independent legal advice, criminal records checks, and a pre-conception assessment of the welfare of the child.

We also recommend eligibility criteria, so that there must be a genetic link between at least one of the intended parents and the child, the parties must be domiciled or habitually resident in the UK, and the surrogate must be at least 21 years old. As at present, the intended parents must be at least 18 years old.

If these safeguards and eligibility conditions are met, the intended parents and surrogate will be eligible for admission to the new pathway. Importantly, the automatic attribution of legal parental status in favour of the intended parents will not affect the surrogate's autonomy during the pregnancy: all decisions concerning the pregnancy and birth will remain with her. She will also have a right to withdraw consent during the pregnancy and for six weeks post-birth.

Non-profit oversight

To be admitted onto the new pathway, a surrogacy arrangement will need to be approved by a non-profit-making surrogacy organisation, which will be licensed and regulated by the Human Fertilisation & Embryology Authority ("HFEA"). We refer to these organisations as regulated surrogacy organisations ("RSOs"). RSOs will be the only bodies able to approve surrogacy teams to enter the new pathway and, in doing so, confirm that the required screening and safeguarding have been completed.

New rules on payments

The issue of payments is currently addressed in the context of parental orders. For a court to make a parental order, it must be satisfied that no money or benefit has been paid by the intended parents to the surrogate, other than "expenses reasonably incurred": Human Fertilisation and Embryology Act 2008, ss 54(8) and 54A(7). Yet this current test is unclear and has been interpreted broadly by the courts. Our recommendations are designed to provide clearer guidance, while guarding against exploitation and preventing the introduction of commercial surrogacy.

They take as their overriding principle that a woman should be no better or worse off financially from being a surrogate. We recommend that the law should not permit intended parents to pay the surrogate for carrying the child, compensation for pain and inconvenience, or general living expenses. Instead, the intended parents should be able to cover the costs of the surrogate pregnancy which fall in specific categories; and any payments which are not expressly permitted are prohibited. Permitted payments include:

1. costs of meeting up in the period leading up to the surrogacy agreement, during the pregnancy and following the birth;
2. medical and wellbeing costs;
3. costs of pregnancy-related items, such as clothing or comfort aids;
4. costs of additional food required as a result of being pregnant;
5. costs of paying for assistance with household tasks, such as childcare or cleaning; and
6. loss of earnings (whether someone is salaried or self-employed).

In addition to these permitted payments, which are entirely optional, there are some costs under the new pathway which the intended parents must pay, or offer to pay. These are the costs to the surrogate of medical assessment, counselling about the implications of the surrogacy agreement, and independent legal advice as to the effect of the new pathway, together with the costs of life and critical injury insurance.

Although surrogacy agreements should remain unenforceable, we recommend that the surrogate should be able to recover from the intended parents any costs which she has incurred that fall within the permitted categories and which they had agreed to pay her.

A new Surrogacy Register

At present, people born through surrogacy can find out about their gestational and genetic origins in several ways, such as from their birth certificate, court files from a parental order application, or the existing HFEA Register of donor conception. (The HFEA register was set up in 1991. A separate voluntary Donor Conceived Register helps to connect donor-conceived people who were conceived before 1 August 1991 with their donor and siblings.) However, there are gaps in the current framework because it was not developed with surrogate-born people in mind.

To address these gaps, we recommend creating a Surrogacy Register, to be maintained by the HFEA, alongside the existing HFEA Register of donor conception. The Surrogacy Register will record information for all surrogacy agreements entered into after the new law comes into force, whether in or outside the new pathway, and domestic or international. This will make it more straightforward for surrogate-born people to access information about their origins.

Reforms to parental orders

A parental order application will be needed where the surrogate has withdrawn her consent to the agreement proceeding on the new pathway. It will also be possible to apply for a parental order where the new pathway is not used, or for cases where the new pathway does not apply, such as international surrogacy arrangements. We therefore recommend a number of reforms to the parental order process, including that a late application for a parental order (beyond the statutory six-month period) should be permitted where this is in the best interests of the child. We also recommend that where the welfare of the child demands it, the court should be able to dispense with the requirement that the surrogate consent to the making of an order. This would bring parental orders into line with other family law where the welfare of the child throughout the child's life is the paramount consideration.

(Top to Bottom): **Professor Gillian Black**, commissioner, Scottish Law Commission; **Professor Nick Hopkins**, commissioner, Law Commission of England & Wales; **Nic Vetta**, legal assistant, Scottish Law Commission

What's next?

Our draft bill applies in Scotland and in England & Wales. Our recommendations apply equally in both jurisdictions, subject to specific provisions in relation to matters such as parental responsibilities and rights, and succession, where we recommend surrogacy fitting into the existing Scottish provisions.

As surrogacy is a reserved matter, it is now for the UK Government to decide whether to introduce the bill, published with our report, giving effect to our recommendations. The Commissions' view is that the reforms, if implemented, will improve outcomes for all parties involved in surrogacy and provide long overdue clarification and certainty to the surrogacy process as a whole.

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Five steps to success

The five most important aspects of leading legal professionals in times of legal software change

Successful law firm leaders understand how to earn their employees' trust.

Change is unavoidable, whether it results from organisational initiatives, market conditions, or an uncontrollable external force. Solid and effective change leadership is essential for organisations to survive, grow, and prosper in the face of change.

Here are five crucial steps the best leaders take to guarantee success, regardless of the kind or size of the change you lead.

#1. Encourage others and impart your vision

Effective legal department leaders foresee, comprehend, and respond to staff members' worries to motivate them to embrace legal technology change rather than fear or reject it. They gain buy-in and support for change by adopting a responsible approach.

To start, leaders communicate an inspiring vision that outlines the desired future state, explains why the new practice management software will be better than the present, and highlights its advantages. A clear vision makes it easier to ensure everyone involved not only knows the benefits of changing, but feels part of it and accepts the necessary adjustments. According to *Harvard Business Review* research, executives are more successful at gaining support for change when they express a clear vision of what will change and what won't. People are less likely to feel anxious or resist change when they can visualise what the outcome will imply for them.

#2. Establish the strategic plan

Leaders need to establish a strategic plan to bring the transformation vision to life once their legal team clearly understand its goals. The plan has to define expectations, so that people can understand who will be responsible for what, the timeframe that will guide the change, and the critical processes that will be affected along the way. Individuals can then start to understand the overall effects of change and what it will mean for them and their teams.

#3. Clear communication

Communication must be two-way. Your legal professionals must feel they can express their worries and ask questions about the change. Not all team members are comfortable providing feedback in all situations, therefore as the person leading the change, look for different and varied opportunities to gather feedback. Establishing secure environments is essential to getting insightful and relevant input.

Various methods should be used, including emails, team meetings, and one-on-one consultations. Only then will you get a feel for how the change is really going to affect each individual.

#4. Offer continuous assistance

Leaders must be present and ready to support their team during organisational change. People will need coaching and guidance to navigate daily implications and difficulties. Introducing a new legal case management system brings new strategies and practices that will emerge as tasks are added and others' scopes are altered. By working with team members frequently to address concerns and ideas linked to the process as well as workflow enhancements to optimise the plan for implementing the strategy, leaders may optimise the impact of change.

#5. Continually maintain the momentum

Successful change leadership requires sustaining passion and drive throughout the project, since lasting change takes time. To do this, leaders can acknowledge accomplishments and frequently reaffirm the reason for the change to ensure it stays at the top of people's minds. Show progress through statistics or metrics. Seeing their efforts paying off in this way might encourage people. Some businesses could even discover that conducting regular surveys to assess workers' attitudes and dedication to continuing their current efforts will assist them to make necessary adjustments so that everyone can maintain their effort. You can't afford to risk your investment in a change campaign fading away before reaching the goal.

Strong leadership is required for change

There is never a doubt that change will occur in a business; the only issues are when and how to do so effectively. Strong leadership is necessary to handle change consistently and successfully because, in the end, your team will carry out the new strategy in their day-to-day work. Leaders must find ways to motivate with a compelling vision, establish a strategy, communicate clearly, assist staff members, and keep up the momentum and dedication necessary to see change through to its successful conclusion.

Strong law firm leaders encourage their team members to believe that they can and should learn something new, in addition to ensuring that new procedures and tools are implemented seamlessly into daily operations.

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Charities: a partial way forward

The reforms to charity law before the Scottish Parliament make some significant changes, without going as far as many would wish. Lianne Lodge considers what is in the bill, and what has been left out

The Charities and Trustee Investment (Scotland) Act 2005 is approaching its 20th anniversary. The legislation transformed the charity sector in Scotland; however the time has come for it to be reviewed.

Following a series of consultations, punctuated by Covid, the Charities (Regulation and Administration) (Scotland) Bill is currently at stage 1 with the Scottish Parliament and calls for views were heard in March. As the name suggests, this is mainly an administrative bill which seeks to tinker around the edges of charity law rather than trigger a more significant evolution. That said, some of the proposed amendments will require further consideration.

The bill

The main intention of the bill is to enhance public faith in charities. Transparency is, of course, key to that.

It is proposed that all accounts and annual returns are published on the Office of the Scottish Charity Regulator (OSCR) website, together with the names of all trustees. While this information may be accessible for many charities on their websites or elsewhere already (depending on their structure), other charities have opted not to publish this information. In addition to a general concern around privacy, there is a concern that this may expose charity trustees to direct communication from service users or grant applicants, which would ordinarily be best directed to another appointed person within the charity. There may be a further administrative burden for charities, as it is anticipated that there will be a requirement to update OSCR with the charity trustees' details, as and when these change. At present, charity trustee names are only updated with OSCR in the annual return.

The bill contains provisions on the disqualification of trustees and senior managers of organisations. This is broadly welcomed in the sector and brings the current provisions in line with those in England & Wales. The disqualification criteria set out in the bill relate to convictions of serious criminal offences, for example offences of terrorism, money laundering or perverting the course of justice. To provide greater transparency and protection for charities, there will be a search function on OSCR's website allowing an organisation to check whether a trustee has been disqualified.

Another aspect of the bill is the requirement for charities to have a connection to Scotland, in order to be entered onto the Scottish Charity Register. There were concerns at the initial consultation stage that this was intended to limit charities who operate in other jurisdictions. It has become clear that these provisions are to ensure that any charity seeking entry onto the register has an interest in doing so: for example, it may be registered in Scotland, operational in Scotland, or have trustees, beneficiaries or assets or fundraise in Scotland. If a charity has none of these ties, then it would seem odd for it to wish to be registered in Scotland. Furthermore, if the charity is not compliant with the rules and regulations, there would be no jurisdiction for any action to be taken against it.

A new register of mergers

The legislation provides clarity in relation to legacies left to a particular charity, in circumstances where that charity is no longer operating, due to a windup or merger. Historically this has created issues, albeit avoidable with good will

drafting. The legislation will allow OSCR to maintain a register of mergers which can be reviewed by the executry practitioner, to provide transparency around the evolution of the charity. Ultimately, in doing so, the legacy should not fail. Again, a sensible approach.

New powers for OSCR

In addition to the above, the bill provides OSCR with new powers which warrant further consideration.

- **Appointment of interim trustees:** On the face of it this should be welcomed, as it allows charities to apply to OSCR where there is no trustee in place or if the board is inquorate, and for OSCR to appoint a specific individual(s) to that board. The appointment would be temporary but would make the charity quorate, at which point it can assume further trustees (including the interim appointment if desired) and the issue is therefore resolved. One point that needs further consideration, however, is that OSCR will have the ability to appoint interim trustees where there are no trustees acting. The question to be posed is, who OSCR will appoint in such cases and what conflict issues may arise as a result?
- **Issuing of positive directions:** The legislation is relatively broad on this point and essentially will allow OSCR to issue positive directions which it "considers to be expedient in the interests of the charity" (s 15(3)), in line with the charitable purposes. This is an incredibly wide remit. While OSCR has advised that it would see this being used for specific targeted actions, for example for annual accounts to be submitted, the legislation does not currently restrict it to such, and it will be interesting to see how this evolves.
- **Investigation of former charities (and trustees):** Currently if an organisation has wound up, OSCR has no power to investigate the charity or the trustees themselves. The extension of powers to allow investigations post winding-up should help to protect the sector and has been broadly welcomed.
- **Removal of charities from the register:** There are a number of dormant charities on the register that have not engaged with OSCR. The regulator currently has no ability to remove them, therefore again this seems like a sensible approach.

Missed opportunities?

While helpful, the bill does not go as far as many in the sector had hoped. The Scottish Government has acknowledged this in the accompanying narrative since the bill was published, and has undertaken to allow for a second phase of review after this bill has been enacted. While there are a number of areas that could be considered, there are certain changes in particular that could be made to current legislation which would have a positive effect on the sector.

The first of these is the extension of powers for the reorganisation of royal charters. Currently royal charters do not generally fall within the OSCR reorganisation remit; extending the reorganisation provisions already in place would allow far greater flexibility. Another issue that it would be helpful to address relates to Scottish charitable incorporated organisations ("SCIOs"), and while there is work afoot with regard to some of the technical aspects of SCIOs, which will hopefully be passed by statutory instrument, a larger review would be welcomed. At present the only type of organisation that can convert into a SCIO is a company limited by guarantee, which already benefits from limited liability for the charity trustees. It would be incredibly beneficial to the sector if unincorporated organisations and trusts could also convert into a SCIO, since at present they must set up a new SCIO and wind up the existing charity. Not only does this have cost implications, it also means that contracts, land and/or property, staff etc all need to be transferred to the new organisation, which is far from ideal.

The Scottish Government has advised that under the next review it will not be bound by the principles of the current Act and that it will be a wider review, which is to be welcomed.

"Setting aside the current bill, there are some more pressing concerns that those advising charities should be aware of"

Other legal developments

Setting aside the current bill, there are some other more pressing concerns that those advising charities should be aware of. One is the Register of Controlled Interests in Land. As there is no charity exemption, it will have an effect on many unincorporated organisations where the trustees change regularly, for example churches, community halls and others. Unless these organisations are constituted as a SCIO or a company limited by guarantee, each time a charity trustee changes, the charity will have to update the register, which will be cumbersome. Thankfully the period before this comes into force has been extended to 1 April 2024; however care should be taken to speak as soon as possible with clients for whom this is relevant, to ascertain what, if anything, can and should be prepared or set in motion before then.

While not mentioned by Jeremy Hunt in his Budget speech in March 2023, the written report included plans to restrict UK charity tax reliefs to UK registered charities only. There is a one-year grace period for some charities previously recognised for tax purposes, until March 2024. Other than the obvious effect on charities, it is also an important consideration for private client practitioners whose clients are giving legacies or bequests to European charities, in particular which may have qualified pre-Brexit, as they may no longer benefit from inheritance tax relief in the future.

The Trusts and Succession (Scotland) Bill also has a part to play in the charity sector. At the time of writing, s 41 of the bill abolishes the 21-year limit on accumulation of income, but s 41(5) means the change will not apply to public or charitable trusts. We await to see how this particular point evolves as the bill makes its way through the Scottish Parliament.

It is without doubt an interesting time for the sector. It remains to be seen what is eventually passed in terms of this much-anticipated legislation and how it is implemented by the regulator.

Lianne Lodge is a partner, and head of Charities, at Gillespie Macandrew

The perils of fundraising: tales from the US

Scottish startup companies may attract interest from United States based investors. If so, Alex Lamley advises, they need to be aware of the requirements of US securities law, including rules on accreditation of investors

As the Scottish startup ecosystem continues to grow and strengthen its international recognition as a centre of innovation, it is not surprising to find more and more international investment directed into Scottish companies. Scottish technology companies are drawn to the likes of Silicon Valley and the venture capital firms investing in technology there, and medical and life sciences companies see the United States as a key market supported by investors that understand the industry well. In addition, increasingly we see successful Scottish ex-pat entrepreneurs looking to invest back into the ecosystem in which they began their careers.

The result is more and more Scottish companies issuing shares to US persons, and not always with an awareness of the need to observe US securities laws. Legal firms should be aware of the application of US regulation where their client might be issuing shares to a US person.

Requirement to register shares

Section 5 of the Securities Act of 1933 sets out that all securities sold in the US must be registered with the Securities & Exchange Commission ("SEC") or be exempt from registration. To avoid the burden and associated costs of registering securities with the SEC for a public offering, companies raising investment will often seek to carry out a private offering of shares under one of the many exemptions provided in the Securities Act.

The most commonly used exemptions for offerings of securities by early stage companies fall under Regulation D of the Securities Act, which, for example, allows for private placements under rule 506(b). Among other things, Regulation D has historically prohibited general advertising and solicitation in the offering of securities. However, the Jumpstart Our Business Startups Act 2012 ("JOBS Act") introduced a new rule 506(c) allowing companies to engage in general advertising and solicitation for the purposes of fundraising.

In order to qualify for the Regulation D exemptions, companies must comply with certain limitations and requirements related to the persons to whom an offering is made (such as whether those persons are "accredited investors"), and the amount of investment being raised.

A company undertaking a private offering typically uses investor questionnaires to help collect and verify information about potential investors' suitability to participate in a rule 506(b) or rule 506(c) offering and whether or not any such investor is "accredited". It is the company making the offering that carries the burden of determining the status of potential investors. If a company sells unregistered securities to an unqualified investor, such company may not be able to rely on the private placement exemption in question.

Selling securities without a registration statement or valid registration exemption gives each investor (not just the unqualified investor) the right to rescind or cancel its investment and recover the investment (plus interest) from the company for up to one year following the investment. To avoid this liability, companies are recommended to require investors to complete questionnaires so that the investee company may be reasonably certain of the investor's status.

Compliance for early stage companies: accredited investors

Individual angel investors are the most likely sources of venture funding for most early stage companies. In the UK, founders and companies may already be familiar with the concept of the high net worth individual to whom shares may be sold in compliance with the UK financial promotion regulations, provided certain criteria are met. In the US, in accordance with the Regulation D exemption, investors can participate in an offering provided they meet the criteria for being "accredited".

Under rule 506(b) of Regulation D, securities can be offered to an unlimited number of accredited investors and up to 35 non-accredited investors (more on those below). Rule 506(c) allows for general solicitation, but only accredited investors may participate and there is an

increased level of scrutiny of whether investors meet "accredited" criteria. Accredited investors are a limited group, and include (among others) the officers of the company offering the shares, individuals with a net worth of $1 million (excluding the value of their primary residence), and individuals with income in excess of $200,000 in each of the last two calendar years.

What about family companies or trusts?

Individuals and families with wealth in the US tend to make more use of family trusts and investment companies than their UK counterparts. It is not unusual to find that an investor wishes to invest through their family trust or investment company. Such investment companies will often be a limited liability company ("LLC").

An LLC or trust is not automatically recognised as an accredited investor. The principal way to qualify a trust or LLC as an accredited investor is to meet an assets test of $5 million. Certain other enumerated entities with over $5 million in assets qualify as accredited investors, while others, including regulated entities such as banks and registered investment companies, are not subject to the assets test. The result is that the LLC or trust will need to have $5 million in assets or confirm that all of its members are individual accredited investors, to be able to qualify as an accredited investor.

Non-accredited investors

Recognising that many startups seek investment from friends and family who may not meet the accredited investor test, companies may offer securities to non-accredited investors, but only if such investors, either on their own or relying on a purchaser representative, have sufficient knowledge and experience in financial and business matters that they are capable of evaluating the merits and risks of the proposed investment; and the company must satisfy an additional information requirement. This requirement is to provide disclosure documents that are generally the same as those used in registered offerings, which is a very high standard. The cost of such work and the advice needed may put some startups off seeking investment from those friends and family that are not accredited investors.

Documentation

Whether an investee company is signing up to an investment by way of a simple subscription letter or an investment agreement, companies selling shares to US persons should obtain certain representations and warranties from the investor to comply with the securities laws, confirming, among other things, that the investor is aware that the shares are not registered shares, that the investor is buying them for its own account and that certain restrictions apply to the resale of such shares. Additionally, US investors, particularly funds and family trusts, will seek certain confirmations from investee companies relating to information to be provided to the investor in order for it to comply with passive foreign investment company regulation in the United States.

Filings

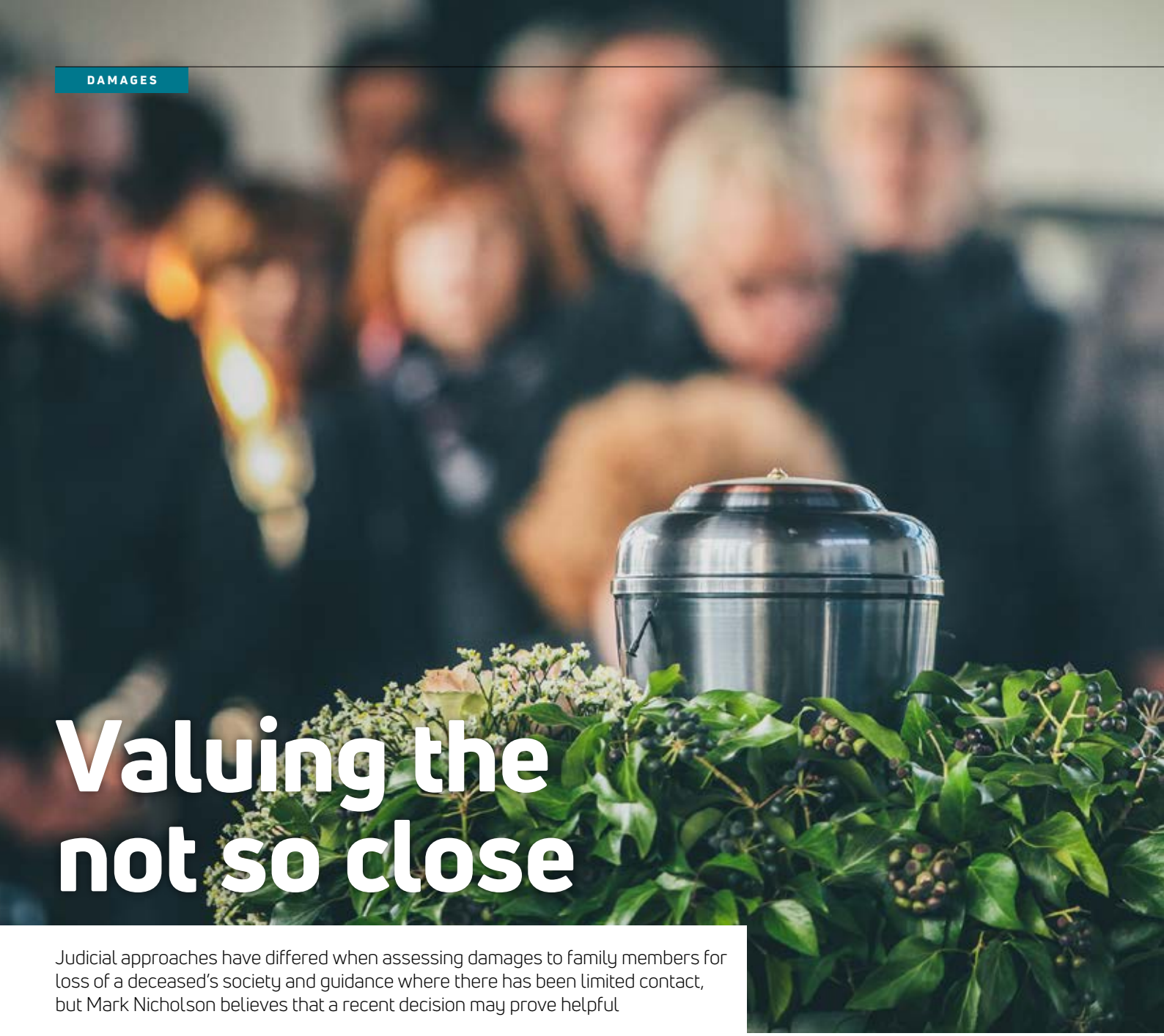
The Securities Act is a federal statute, but most states have enacted what are known as "blue sky" laws that deal with the offer of securities in that state and offer exemptions to certain registration requirements. The federal law pre-empts the state law in addressing registration of securities, but companies will have to comply with any requirement to notify a state of having completed an offering into that state and having done so by way of an exemption under the Securities Act. As such, companies selling securities into the US should comply with both federal and local state securities laws (and their respective filing requirements), as discussed below.

A Form D must be filed with the SEC within 15 days after the first sale of securities in the offering (which will usually be the completion date). With the excitement of closing out the funding round, the investee company (and its counsel) should not forget to make the appropriate filings. A company may add to its defence against an accredited investor seeking a refund by evidencing that it has confirmed the accredited status of the investor and filed a Form D with the SEC to comply with federal law. The investee company should then file the Form D in each state in which the company has sold shares (i.e. where the investors are located). Filing requirements differ from state to state, and online filings, while making things easier in some regards, often require layers of identity validation and can take time to set up, so getting on top of the filing requirements early is a great recipe for an easier life.

Firms working in this space

Firms should continue to ensure that they have in place adequate terms of engagement that clearly set out the jurisdictional limit of advice. The Securities Act applies to companies outside of the United States if such companies are selling securities into the United States. As noted, fundraising in the US by Scottish companies is becoming increasingly commonplace. Where firms are assisting companies with raising funding and US investors are participating, appropriate US advice should be sought by the investee company.

Alex Lamley is a New York qualified attorney as well as a Scottish qualified corporate solicitor. He is a member of MBM Commercial's US team, which is involved in advising clients who are expanding into US markets , receiving investment from US investors and otherwise transacting with US businesses.



Valuing the not so close

Judicial approaches have differed when assessing damages to family members for loss of a deceased's society and guidance where there has been limited contact, but Mark Nicholson believes that a recent decision may prove helpful

The right of the relatives of a person killed as a result of another's negligence to seek damages has long been part of Scots law. The current law is found in the Damages (Scotland) Act 2011. This allows certain relatives to make claims for patrimonial and non-patrimonial losses. The scope of this comment is restricted to considering awards for non-patrimonial losses, commonly referred to as "loss of society" awards, made under s 4(3) of the Act.

The categories of relatives able to make such claims are set out in s 14. These are limited to the deceased's immediate family, including spouse, civil partner or cohabitee, parents, grandparents, children and grandchildren. The Act makes no distinction from relationships that arise from consanguinity, adoption or stepfamilies, and it extends to persons who were accepted by the deceased as being such a relative. Anyone who falls within those categories has a right to bring a claim.

While there is a rough hierarchy that arises from the ranges of common awards, certain relatives tend to get higher awards than others. For example, a bereaved civil partner is likely to be awarded more than a sibling. These lines have become rather blurred, particularly when a court has considered awards to children and grandchildren. While there are general factors, such as the age of the deceased and their life expectancy, that will affect any awards made, recent case law has made it clear that the significant factor the court will consider is the closeness of the relationship. This has seen grandchildren whose evidence was that a deceased grandparent filled a parental role receive awards on a similar level to those made to children in other cases. In general, a closer relationship will result in a higher award from the court. In some older cases brought under the Damages (Scotland) Act 1976, distinctions were drawn between children living at home and those that had moved out: *Morrison v Forsyth* 1995 SLT 539; *Sargent v Secretary of State for Scotland* 2000 GWD 28-1089, although no such distinction was drawn in *McManus v Babcock Energy Ltd* 1999 SC 569.

Judicial approaches

Practitioners familiar with fatal claims are likely to have seen families ranging from those whose relationships are very close through to families who have had little or no recent contact, or on some occasions, ongoing conflict between family members. In cases like these, approaching s 4(3) claims can be very difficult, both in terms of dealing with the various family members and providing advice regarding their claims.

Some of the concerns arise from very low awards made to very young grandchildren. By a jury in *Kelly v Upper Clyde Shipbuilders (in liquidation)* 2012 Rep B 107-6, grandchildren aged 14 were awarded £8,000, while younger grandchildren aged seven and two were awarded £4,000 and £1,500 respectively. A similar distinction was drawn in *Gallagher v SC Cheadle Hume Ltd* 2015 Rep LR 33, where two elder grandchildren were awarded £25,000, and three others £12,000. The youngest grandchildren,

respectively aged two years and less than three months, were only awarded £2,500.

Lord Uist in making his decision relied on *McGee v RJK Building Services Ltd* 2013 SLT 428, albeit the specific question of very young grandchildren did not arise in that case. A rough inference that could be drawn is that the courts put significant weight on an existing relationship, and the possibility of closeness in the future is of less import when assessing an award – though this is very different from the approach taken in the slightly earlier case of *Stuart v Reid* 2014 Rep LR 107, where Lord Woolman made an award of £14,000 to a grandchild (age not given) and apportioned it wholly to the future, accepting that he had been deprived of the deceased's guidance for 15 years (the agreed life expectancy).

This created a difficulty in providing advice regarding the value of their case to pursuers who had had a limited relationship with the deceased. Broadly speaking, the extent of the relationship would be a determining factor in making any award. The question is, how would a court approach a difficult or non-existent relationship? Would pursuers who had fallen out and not spoken to a deceased for years still have a statable claim? To what extent would a historic good relationship between a child and a parent, severed by a falling out and the loss of any possibility of future reconciliation, sway a court? *Stuart* would suggest that a future closer relationship could be a significant factor, albeit in a case with a difficult relationship this might only amount to the loss of a chance of a close relationship, while the awards in *Gallagher*, read along with *Morrison*, could be taken to support a court placing greater reliance on past and current relationships.

Recent guidance

The recent decision from Lord Arthurson in *Paterson v Lanarkshire Health Board* [2023] CSOH 1, insofar as it relates to the second and third pursuers (the deceased's brother, and stepsister respectively), gives some guidance as to how a court may approach more difficult family relationships.

It was a very tragic clinical negligence case centring around treatment for the deceased's psychiatric condition and her subsequent suicide aged 35. The question of liability takes up much of the written decision. An award of £100,000 under s 4(3) of the 2011 Act was made to the deceased's mother, the first pursuer. The fourth and fifth pursuers, the deceased's children, aged 20 and 22 at the date of decision (13 and 15 at the time of the death), were each awarded £70,000. The opinion does not set out the evidence of the family relationships for the first, fourth and fifth pursuers in any great detail, but Lord Arthurson refers to these pursuers as "beloved" in para 1.

Turning to the treatment of the second and third pursuers, their evidence is not set out in detail, but it is recorded in para 1 that the deceased and her brother and stepsister were "in large part estranged due to a family rift". In para 61, Lord Arthurson describes the relationship as "very distant", and refers to medical notes that recorded that the deceased had been ostracised by members of her family. His Lordship was of the view that this included the second and third pursuers. Lord Arthurson specifically notes that the second pursuer did not return to court to finish his evidence, and that he had struggled to recall the time of year that the deceased had died. In respect of the third pursuer, he noted she had only lived with the deceased for a very short period and there was a sizable age gap of 16 years. The awards made to these pursuers were £5,000 each inclusive of interest. The deceased's death occurred on 10 October 2016, so given the passage of time and assuming usual interest at 4% the net award before interest was in the region of £4,000. This is a very reduced award compared to other recent cases dealing with bereaved siblings. In *McCulloch v Forth Valley Health Board* [2020] CSOH 40 the agreed quantum for the sister of a deceased aged 39 was £25,000. In *McArthur v Timberbush Tours* [2021] CSOH 75 the judicial award made to a half-sister who had a very close relationship with the deceased aged 26 at death was £45,000. In *Currie v Esure Services Ltd* 2014 SLT 631 (OH), a brother was awarded £22,500. This reinforces the approach that the courts take by putting significant reliance on the nature and closeness of the relationship.

While the opinion in *Paterson* does not explore the relationships in detail, there is enough there to infer that these were not close. The court accepted that both the second and third pursuers were estranged from the deceased.

This decision is helpful to both pursuers and defenders, as it does give some assistance in respect of claims for difficult family relations. For pursuers it shows that even where a relationship is one of estrangement, the courts will make an award that is significantly more than a token. For defenders, it shows that such awards are likely to be much reduced compared to awards for closer family relationships. The important thing for both sides is to be aware and investigate the family relationships as far as possible when presenting or defending such claims.

Questions remain about how the courts may approach similar situations, for example a feuding family, but it appears likely that where there has at some point been some sort of relationship, an award will be made.

Mark Nicholson is an advocate with Compass Chambers

Dispensing with service

A broader issue that arises for practitioners from the *Paterson* case is the terms of RCS, rules 43.14 and 43.16 in the Court of Session, and OCR, rules 36.2 and 36.4 in the sheriff court. These govern the need to plead the existence of connected persons and the obligation to intimate the proceedings on any persons who may have an interest in the action.

A pursuer needs to set it out where the names and whereabouts of such persons are not known and cannot be reasonably ascertained, or where the likely claim would be under £200. The pursuer can then apply to the court to ask that intimation be dispensed with. The concern in this respect raised by *Paterson* is that given the level of awards made, whether to the second pursuer who was estranged and had a distant relationship with the deceased, or the third pursuer who was estranged and who could be read as having a limited relationship, were still significantly more than the £200 set out in the court rules. Practitioners should be very cautious when making applications to dispense with service on the basis of RCS, rule 43.14(2)(c)(ii) or OCR, rule 36.2(c)(ii), as even awards for very limited relationships are likely to exceed that limit.

A Scottish Environment Court: breaking new ground?

Preslava Todorova argues that the forthcoming consultation on environmental governance is an opportunity to introduce a dedicated Scottish Environment Court to improve access to justice on the environment

The question of the establishment of an environmental court or tribunal ("ECT") in Scotland has persisted for many years. The time has come round again for the Scottish Government to review and address the growing gaps in environmental governance. The current system is fragmented and this article argues that a dedicated Scottish Environment Court would improve access to justice, provide better remedies, and bring judicial certainty.

Forthcoming consultation

In the aftermath of Brexit, Environmental Standards Scotland ("ESS") was established under the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021. However, the powers of ESS are very limited compared to the powers of the European Commission pre-Brexit. The publication of the ESS strategic plan in November 2022 triggers the duty under s 41 of the 2021 Act to consult on "whether the law in Scotland on access to justice on environmental matters is effective and sufficient, and whether and, if so, how the establishment of an environmental court could enhance the governance arrangements". This consultation must commence no later than the end of May 2023. It will be key to any decision on whether an ECT will be incorporated into the Scottish legal system and, if so, how the court will be structured.

ERCS and its work

The Environmental Rights Centre for Scotland ("ERCS") was established in 2020 to assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment. It has four areas of work: awareness raising of legal rights and remedies; advocacy in policy and law reform; strategic public interest litigation; and in 2021, ERCS launched Scotland's only free legal advice service on environmental and related planning law, with the aim of increasing access to justice and holding public authorities and polluters to account on the environment. In its first 18 months the service received over 150 enquiries.

A key objective for ERCS's advocacy is to establish a dedicated Scottish Environment Court. The case for an ECT in Scotland is clearly outlined in *Why Scotland needs an environmental court or tribunal* (ERCS/Christman, 2021), and most recently by Professor Campbell Gemmell in *The clear and urgent case for a Scottish Environment Court*, both published on ercs.scot.

Access to justice

The many barriers to access to justice are the most compelling argument in favour of the creation of an ECT. Scotland is in breach of article 9(4) (access to justice) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), and is required to produce an action plan to achieve compliance by October 2024. A court with a comprehensive jurisdiction would enable appropriate, fair, equitable, timely and not prohibitively expensive access to justice and go some way to achieve full compliance with the Aarhus Convention.

Lessons from other jurisdictions

The consultation on the effectiveness of environmental governance is an opportunity to consider what an effective ECT in Scotland would look like. Given the growing number of ECTs around the world, there could not be a better time to learn from the experiences of other jurisdictions.

Some excellent examples are the Land & Environment Court of New South Wales ("LECNSW"), and the Environmental Court of New Zealand ("ECNZ"), as well as the Swedish Land and Environment Courts. The aspects which determine their success are their jurisdiction, their remedies, how they place the burden of proof, the expertise of judges and members of the court, and the use of alternative dispute resolution processes.

Jurisdiction

Broad jurisdiction means a court can hear disputes at different levels – an ECT can have civil, administrative and criminal jurisdiction, and/or original and appellate jurisdiction. The LECNSW has one of the broadest defined jurisdictions,

"A Scottish Environment Court with a comprehensive jurisdiction would act as a one-stop shop, with permanent expertly trained judges, far-reaching remedies, enforcement powers, and a flexible, tailor-made approach to dispute resolution."

which includes merits review, judicial review, civil enforcement, criminal prosecution, and civil claims about planning, land, and other legislation. The Environment & Land Court of Kenya is another example of a specialised court which has original and appellate jurisdiction to hear disputes related to land and the environment. The ECNZ is an appellate court, therefore much of its workload comes from appeals brought against decisions of local authorities. A Scottish Environment Court with broad jurisdiction could effectively respond to the multi-faceted nature of environmental disputes.

Burden of proof

Environmental courts have displaced traditional burdens of proof. Case law from the LECNSW establishes that it is not necessary for serious or irreversible environmental damage to have occurred – simply the threat of such damage may be enough, coupled with the condition that the damage passes the threshold of serious or irreversible: *Telstra Corporation Ltd v Hornsby Shire Council* [2006] NSWLEC 133. A similar approach was taken by a Chinese regional environmental court in the case of *Guiyang* (discussed in Wang and Gao, Journal of Court Innovation, vol 3 (2010), 37), where the plaintiff was only required to demonstrate that pollution of a local drinking water source had occurred, not that a duty of care existed on the part of the defendant. A Scottish Environment Court could introduce new standards of burden of proof which ensure equity.

Preslava Todorova is assistant legal officer at the Environmental Rights Centre for Scotland

Remedies

Access to justice can be measured by an assessment of the remedies available. Remedies can vary, depending on the type of dispute, and an environmental dispute can often encompass many issues which require separate remedies, such as environmental damage, damage to human health or economic loss. Equally, the lack of adequate remedies can act as a deterrent to persons who wish to bring a case to court.

ECTs are known to develop innovative remedies and holistic solutions to environmental disputes. The ECTs of India utilise innovative remedies such as "continuing mandamus", which is the power to continue having oversight of a case after it has concluded, to ensure full compliance with the decision. Access to justice in Scotland would be improved by an ECT which could provide far-reaching remedies, with long-term effects, tailored to the often multi-faceted issues in environmental disputes (cf D Smith, "Environmental courts and tribunals: changing environmental and natural resources law around the globe", *Journal of Energy and Natural Resources Law*, vol 36 (2018), issue 2).

Environmental law expertise

Countries which have not established ECTs face problems arising from the lack of expertise of generalist judges who preside over environmental disputes. Some ECTs have multidisciplinary teams sitting during trials; others provide specialist training to judges; and there are ECTs which employ full time, law-trained justices and part time, technical experts with scientific background.

In Sweden, an ECT has a panel of one law-trained judge, one environmental technical adviser, and two lay expert members (Anker and Nilsson, "The Role of Courts in Environmental Law – Nordic Perspectives", *Journal of Court Innovation*, vol 3 (2010), 111). The judge and the technical adviser are employed by the court on a permanent basis, while the lay members are nominated by the industry and central public authorities. The use of technically-trained judges has improved the quality of environmental judgments – the collective approach has led to a better understanding of expert evidence, and the panel is equipped to ask the right questions during hearings: see Domenico Amirante's "Preliminary Reflections on the National Green Tribunal of India", *Pace Environmental Law Review,* vol 29 (2012), 441). A Scottish Environment Court could benefit from employing a similar approach to improve environmental law expertise in the judiciary.

Alternative dispute resolution

Some of the most successful and effective ECTs in the world have recognised that the complex nature of environmental disputes may be served well by the flexibility of alternative dispute resolution. In Australia, ECTs have adopted less adversarial and more informal alternatives to trials, such as mediation, conciliation, and neutral evaluation. The LECNSW, which hosts several ADR processes, has been described as operating a "multi-door courthouse": B Preston, "Characteristics of successful environmental courts and tribunals", *Journal of Environmental Law*, vol 26 (2014), 365.

The Planning & Environment Court of Queensland is unique in its appointment of an ADR Registrar – an environmental law practitioner who assists the parties to find a resolution in a collaborative manner. The ADR processes are undertaken early in the case, even from the very outset, and approximately 60-70% of all cases are settled with the help of the ADR Registrar (Preston, cited above). A Scottish Environment Court could adopt a similar process for more effective, timely and affordable remedies.

Conclusion

The forthcoming review and consultation on environmental governance has the potential to introduce transformational change in reducing the barriers to access to justice and improving judicial processes. A Scottish Environment Court with a comprehensive jurisdiction would act as a one-stop shop, with permanent expertly trained judges, far-reaching remedies, enforcement powers, and a flexible, tailor-made approach to dispute resolution.

The two main texts drawn on by this article for information on courts in other jurisdictions are the Preston article, cited above, and George and Catherine Pring,* Environmental Courts and Tribunals – 2021: A Guide for Policy Makers, *UNEP

Towards proper control

Strictures over the proper conduct of first diets, and a departure from the cases of *Swift* and *Early* in considering extensions of time, feature in the two leading cases discussed in this month's criminal court roundup

Criminal Court

ADRIAN FRASER, SUMMARY SHERIFF AT EDINBURGH

Management of cases by the court, coupled with ownership so that cases are properly progressed to conclusion within a reasonable time, and consistency of approach – these have been the trends over the mid to recent past. This also heralds the future.

The desire for consistency throughout the country underpins the marking hubs and national specialist units brought in by the Crown.

The procedure for pre-intermediate diet meetings and cases then proceeding to that diet, with guidance applying in all sheriffdoms, and a streamlined system designed to avoid churn and achieve consistency of approach, signposts the route towards a more efficient criminal justice system.

Guidelines by the Scottish Sentencing Council increasingly guide the judiciary with a view to consistency at the point of sentencing.

Use of court time

In my article at Journal, February 2023, 28, I discussed the opinion of the Sheriff Appeal Court in *PF Glasgow v Cooper* [2022] SAC (Crim) 8. Part of the focus was on making proper use of court time, and the management of cases so that there is an efficient throughput of business to prevent or, at least, minimise churn. To that end, in both summary and solemn cases, the expectation is that the court will exercise a management function.

For that to happen, the Crown and defence have to play their part. Repeated continuations of intermediate and first diets are to be avoided, all the more so during the recovery programmes for summary and solemn business post-pandemic.

There should be timeous (1) disclosure of evidence which requires to be disclosed, (2) citation of witnesses, and (3) negotiation of joint minutes agreeing non-contentious evidence so that issues can be focused.

Those marking cases for the Crown and preparing guidance for solemn case preparers routinely ensure that instructions are given at an early stage for police statements to be submitted, forensic enquiries carried out and any follow-up matters dealt with. There is no doubt that front-loading contributes to the efficient disposal of business.

Having talked primarily about summary cases, it seems sensible that I draw attention to some recent solemn cases as well.

Conducting first diets

The importance of management/ownership of cases was highlighted by the High Court in *S(B) v HM Advocate* [2023] HCJAC 5; 2023 SLT 339.

An appellant charged with wilful fireraising at an educational centre appeared on petition on 16 June 2020 and was indicted to a first diet on 15 January 2021. That diet was continued administratively until 1 March and then 25 May because of Covid-19 restrictions. On 25 May, the diet was adjourned on joint motion for further preparation. It was adjourned on six further occasions, *inter alia* "for further investigations", "for discussions to be made" and "for disclosure to be obtained".

On 16 September 2021, at a first diet, a trial diet was fixed for 7 February 2022. When that diet called, it was adjourned until 6 June due to lack of court time. The 12 month time limit was extended to 10 June, in terms of s 65(3) of the Criminal Procedure (Scotland) Act 1995.

On 6 June, the appellant's agent was told it was likely that the trial would require to be adjourned because another trial had overrun. On 9 June, the case was called in a court different to the anticipated trial court for the purposes of adjournment. The appellant had previously been excused attendance. His agent, who was probably in the building, was not told of the change of court. There was no appearance by or on behalf of the appellant.

The sheriff granted the motion to adjourn in respect that there was "no court room available". A new trial diet was set for 20 September 2022, with the time bar extended to 23 September. An appeal was marked against the decision to extend the time limit in absence.

The High Court pointed out (para 3) that at the seven first diets, seven different depute fiscals and five different sheriffs had been present. That reflected a lack of ownership of the case by either the prosecution or the court, particularly disturbing given that the appellant was a child.

Since the sheriff court solemn procedure reforms introduced by part 3 of the Criminal Justice (Scotland) Act 2016, a first diet, like a High Court preliminary hearing, was intended to mark the end of the preparation stage. Continuations or adjournments should be the exception rather than the rule. In terms of s 71B of the 1995 Act, having disposed of any preliminary pleas and issues, the court had to fix a trial diet (para 4).

The procedure followed flew "in the face of the statutory scheme"; the various applications for adjournments should neither have been made nor granted (paras 4 to 10). Routine continuations of first diets for reasons such as those recorded should be refused in favour of fixing a trial diet for a time which allowed any additional preparatory work to be completed and/or granting a time limited order for provision of whatever relevant information was required (para 11).

If sheriffs did not take firm control of the management of first diet cases, repeated and unnecessary churn resulted and an overloading of first diet courts with multiple continued cases. Sheriffs are given time to prepare cases; the number calling ought to allow them to manage cases appropriately, but to do so, they require the assistance of Crown and defence in carrying out the necessary preparation in advance (para 12).

Only in exceptional circumstances should a trial which has already been adjourned due to lack of court time be adjourned again for the same reason, especially where the accused is a child (para 14).

When deliberating an extension of time under s 65(3), there is a statutory requirement for the court to give parties an opportunity to be heard; when the appellant's agent could not be located immediately, consideration should have been postponed until later in the day. It should have been possible for the Crown or court to have communicated effectively with the agent; failure to do so was a substantial irregularity (paras 17-20).

Notwithstanding the seriousness of the failure, the court required to be satisfied that, had the agent been present, a different decision might have been reached, namely one that would have ended the prosecution of a serious charge. Having regard to the procedural history, with at least some delay attributable to the appellant's belated amendment to the defence statement and consequent application for an excessive degree of disclosure, that would not have been in the interests of justice. The appeal was refused.

Extensions of time

As can be seen, one of the court's management functions is to adjudicate on applications for extensions of time and adjournments.

In *Barr v HM Advocate* [2023] HCJAC 9; 2023 SLT 324, an appellant charged with an abusive course of conduct towards his partner contrary to s 1 of the Domestic Abuse (Scotland) Act 2018 appealed against a decision to extend the 12 month time limit under s 65(3)(b) of the 1995 Act.

The sheriff and parties relied on what had hitherto been thought the approach – a two stage test based on dicta in *HM Advocate v Swift* 1984 JC 83 and *Early v HM Advocate* 2007 JC 50. At stage one, the question was whether the Crown had shown a sufficient reason to justify an extension; at stage two, whether, if it had, the court should grant an extension in all the circumstances.

In this case the reason for the application, as with a previous application, was the complainer's absence. On the previous occasion the Crown had obtained a witness warrant, but had not enforced it as it had not been passed to the Crown by the court. The case had been timeously indicted, and so was within the period wherein the court could be expected to exercise a management function.

The ultimate position of the Crown was that had the witness warrant been received, it would have been enforced. However, the High Court provided a different perspective (para 21): "It is quite inappropriate in sexual and domestic abuse cases for complainers, who may be regarded as vulnerable, to be arrested and thus kept in custody pending liberation at a court appearance, or perhaps even until the trial diet, thus adding to any trauma which they might have already sustained. The appropriate course is, at least initially, to persuade the complainer to attend the trial, no doubt by, amongst other things, putting in place vulnerable witness measures. Better still... steps should be taken to have the complainer's testimony taken on commission."

At a first diet on 30 May 2022, the sheriff, applying the two stage test, extended the time limit. The trial had previously been adjourned to 8 August.

The High Court distinguished *Swift* and *Early* as being of their time and different in their facts. However, these authorities were not overruled. A larger bench would, of course, have been required for that.

The position is neatly set out in the opinion delivered by the Lord Justice General (para 16): "The introduction of the 12 month limit, with its provision for an extension on cause shown, must now be viewed in light of the incorporation of the reasonable time requirement in article 6(1) of the European Convention into domestic law. Having regard to the jurisprudence on the interaction between the reasonable time requirement and the general right to a fair trial (*Spiers v Ruddy* 2009 SC (PC) 1), it may often be difficult to resist an application for an extension of the 12 month time bar when the trial remains due to start within what would be regarded as a reasonable time under the Convention, where a reason for an extension has been proffered and no additional prejudice to the accused is demonstrated."

Where does that leave us? Well, in the words of the Lord Justice General: "It may still be valuable to pose the two questions... desiderated in *Swift*, but the single true question for the court, when it is being asked effectively to stop a prosecution in a solemn case because of the non-appearance of a crucial witness at a trial diet, is: where do the interests of justice lie? This will involve a balancing of the interests of the accused in being brought to trial within the statutory time limit with those of the complainer and the public in general in allowing the system of justice to determine the charges libelled on their substantive merits as opposed to on grounds that are essentially procedural in nature."

Course of abusive behaviour

I made a passing reference earlier to the Domestic Abuse (Scotland) Act 2018: a cue to discuss some appeal cases on aspects of charges under s 1. These are now very common in the courts, though parties are often unaware of the cases I refer to below.

Section 1 makes it an offence to engage in a course of behaviour which is abusive of a partner or ex-partner, in circumstances where a reasonable person would consider that course of behaviour to be likely to cause physical or psychological harm, and the offender either intended the behaviour to cause such harm or was reckless as to whether it did so. References to psychological harm include fear, alarm and distress.

By s 2, abusive behaviour includes behaviour which is violent, threatening or intimidating, and has as a purpose, or would be considered by a reasonable person to be likely to have, a range of effects amounting to controlling behaviour towards a complainer. References to violent behaviour include sexual violence. For completeness, s 10 stipulates that behaviour means "behaviour of any kind", including communication as well as intentionally failing to do or communicate something. A course of behaviour involves behaviour on at least two occasions.

In *A(C) v HM Advocate* 2022 SCCR 267, the appellant was convicted of a charge under s 1 narrating a series of different types of abusive behaviour. There was corroboration of at least four types of behaviour alleged.

The opinion delivered by the Lord Justice Clerk made it clear that the Act created a new offence constituting a separate crime known as a course of conduct. That had been stated by the Lord Justice General previously at para 37 of *Wilson v HM Advocate* 2019 SCCR 273.

At para 10 of *A(C)*, the Lord Justice Clerk said: "It is the course of behaviour which is the core of the offence, and it is thus the course of behaviour – in other words proof of behaviour 'on at least' two occasions – which must be established by corroborated evidence. Once there is corroborative evidence of this kind it is open to the jury to determine that other incidents equally form part of the course of conduct, even though spoken to by only one

witness... it is the proof of a course of conduct which constitutes the relevant essential element of the offence."

This is the evidential position which applies in relation to a single charge of assault in a "single episode of assault". Every element does not require to be corroborated.

That is, of course, different to the position in *Wilson*, where an omnibus charge of assault included several incidents over a period of a month, each of which had to be viewed as separate crimes requiring corroboration rather than elements "in a single episode of assault".

In *A(C)*, the correct directions had been given by the sheriff and the appeal was refused.

Behaviour likely to harm

A different aspect of s 1 was considered in *Walker v PF Dunoon* [2022] SAC (Crim) 9. The charge libelled that between 20 August and 10 September 2021 the appellant engaged in a course of behaviour abusive of his ex-partner by repeatedly loitering at a primary school while she was collecting his child.

To establish the *actus reus* of the offence in terms of s 2 of the Act, the court required to find that the appellant's behaviour was (1) directed at the complainer, and either (2) that by simply being at the locus (where the complainer objected to his presence), his behaviour could be regarded as violent, threatening or intimidating, or (3) that a reasonable person would consider his behaviour likely to have one or more of the relevant effects in subs (3), such as frightening the complainer.

The *mens rea* requires a finding that either the appellant intended to cause the complainer psychological harm or he was reckless as to whether his behaviour had that result.

The locus was close to the school. The appellant was attempting to observe his five year old daughter leave school. He had recently been awarded contact every Friday. She was to be collected at 3.45pm from a contact centre a few minutes' walk from the school.

On 20 August the appellant sat on a public bench and waved to his daughter. She waved back. The complainer objected to the appellant's presence after this incident. The findings in fact made no reference to her being distressed. A solicitor's letter was sent to the appellant, but there was no evidence of this stating that the complainer was threatened, intimidated, fearful, alarmed or distressed. The appellant's solicitor advised him that there was no legal restriction on attending to observe his daughter leaving school. On 27 August, he remained in his vehicle at the locus, and was observed by the daughter. The complainer was not present. On 10 September, he went to the locus and again remained in his vehicle.

The SAC made it clear that these cases are fact sensitive, and mere presence at a locus had the capacity to fall within s 10 of the Act. However, it was difficult to see how the sheriff could have concluded that the appellant was reckless as to whether his behaviour was likely to cause the complainer psychological harm, given that he took legal advice and remained in his vehicle on the second and third occasions.

There was no finding to support an inference that the appellant's behaviour was violent, threatening or intimidating, or had as one of its purposes frightening the complainer, in terms of s 2(2). Likewise there was no finding that the appellant was aware that the complainer was fearful, alarmed or distressed simply by his presence. The findings did not support an inference that his behaviour was directed towards the complainer. When considering a no case to answer submission, the sheriff had focused purely on the second part of s 2(2)(b)(ii), namely whether the behaviour would be considered by a reasonable person to be likely to have one or more of the relevant effects.

The opinion in this case emphasises the importance of addressing the finer points of the legislation and, from a sheriff's perspective, the care needed in drafting findings in fact, particularly where the legal matrix is a complicated one.

Drug treatment orders

Finally, a postscript to a previous article by Sheriff Crowe in which he lamented the temporary unavailability of drug treatment and testing orders in Edinburgh. This necessitated the less than ideal workaround of community payback orders with conduct requirements, plus reliance on voluntary agencies to supervise treatment.

I am pleased to report that these orders are now making a gradual but very welcome comeback as staffing issues are resolved.

Planning

ALASTAIR McKIE, PARTNER, ANDERSON STRATHERN LLP

My last article (Journal, January 2023, 29) anticipated that National Planning Framework 4 would be approved by the Scottish Parliament and then adopted by ministers and published as part of the development plan for all planning decisions across Scotland. That approval occurred on 11 January 2023 with ministerial adoption and publication taking place on 13 February.

Landmark policy

NPF4 is a truly landmark planning policy document, containing 33 "national policies" and heralding some major changes in direction that will affect all new development. At its heart are key policies designed to tackle the global climate and nature crisis.

Planning law requires that applications for planning permission be decided in accordance with the "development plan". For the first time, NPF4 forms part of the development plan. The big point here is that when we refer to the "development plan" this will mean both (1) NPF4 and (2) the relevant local development plan ("LDP").

NPF4 will supersede NPF3 and Scottish Planning Policy 2014 ("SPP"), which are treated as withdrawn. The Scottish Government has brought into force changes to the Town and Country Planning (Scotland) Act 1997 to give effect to NPF4; through these, strategic development plans and associated supplementary guidance cease to have effect.

Since 13 February, all planning assessments, whether for applications before planning authorities or at appeal, must address this important requirement as matter of law and policy – even applications at "minded to grant" status and subject to completion of a planning obligation (s 75 or s 69 agreement), which means that as matter of planning law they will need to be reassessed against NPF4.

National development

NPF4 identifies 18 types of "national development", including renewable energy projects over 50MW, high speed rail, and developments at Edinburgh and Dundee waterfronts. For these, the "needs" case is considered to be established but detailed assessments will still be required along with permission or consent.

Incompatibility with LDPs

In the event of incompatibility between a provision of NPF4 and an LDP, whichever is the later in date is to prevail. How NPF4 and the LDP are to fit together for confident and rational decision making will remain an issue. Planning assessments for proposals are likely to become more complex, with a potential need for further expert reports to address increased policy requirements.

The Chief Planner has published guidance on transitional arrangements in a letter dated 8 February 2023. This indicates that in applying NPF4, it must be read as a whole (it is 160 pages), and that in interpreting NPF4 and LDPs conflicts are to be expected. "Incompatible" policies are considered to be ones that "contradict" or "conflict".

NPF 4 policies

Given its sustainability theme, NPF4 should provide significant opportunities for the renewables sector under **Policy 11 – Energy**.

Industry bodies have described the new regime as one of the most supportive planning regimes for renewables in Europe.

Policy 3 – Biodiversity applies to all new development and requires "enhancement" of biodiversity. This is a potentially watershed moment for the assessment of projects; it may cause compliance difficulties for urban projects where the scope for enhancement may be very limited.

Policy 16 – Quality Homes is a pivotal policy, representing potentially one of the biggest changes in approach. Pre-NPF4, LDPs provided for a five year supply of effective housing land. Housing shortfalls indicated that an LDP was out of date, which frequently allowed developers at appeal to obtain planning permission through the "presumption" in favour of sustainability and the application of what became known as the "tilted balance" in favour of development. This "relief valve" allowing non-allocated housing sites to be supported has been removed.

The practical implication has been causing significant concern in the housing industry, with debate focused on the true meaning of Policy 16(f), which only allows non-allocated housing sites to be supported through a restricted exceptions sub-policy. Essentially that is where:

- the delivery of sites is happening earlier than identified in the deliverable housing pipeline; or
- the proposal is for rural homes; or
- it is small scale within an existing settlement; or
- it is for less than 50 affordable homes and part of a local authority supported affordable housing plan.

The net effect of this may mean that it will be very difficult for housing sites not allocated in an LDP to be consented, as on any incompatibility NPF4 (as the later expression of policy) will prevail. This follows a strict "plan-led" approach for new housing. That is what the Chief Planner's letter sets out. The current legal debate questions that approach and centres on whether the "LDP" referred to in Policy 16(f) is not the current LDPs of planning authorities but the new style LDPs to be promoted after the adoption of NPF4. If the correct interpretation is that Policy 16(f) only applies to post-NPF4 LDPs, this may in certain circumstances disapply its exceptions policy, although a difficulty arises because the "tilted balance" that might otherwise apply owes its existence to the SPP, which was withdrawn on 13 February. The outcome of this complex debate may well have to be settled in the Court of Session.

Insolvency

ANDREW FOYLE, SOLICITOR ADVOCATE AND JOINT HEAD OF LITIGATION, SHOOSMITHS IN SCOTLAND

While the law of England is reasonably well developed, there is a dearth of authority in Scotland concerning the circumstances in which the Scottish courts may wind up an overseas company. This was the question that the First Division required to address in *Kingston Park House v Granton Commercial Industrial Properties* [2022] CSIH 59.

Background

The reclaimers were a company registered in Jersey which owed a substantial amount in loans to the petitioners. The petitioners had security over plots of land at Granton harbour, Edinburgh, which had been purchased for the purpose of development. The development did not take place and the loans defaulted. The petitioners sought to wind up the reclaimers. The Lord Ordinary granted the petition at first instance. The reclaimers appealed.

Although the reclaimers were registered in Jersey, from where their management and control was exercised, the plots at Granton were the sole asset owned by the company. They had an agent in Edinburgh, but no office or place of business there.

The applicable law

It was common ground that, because the reclaimers were not registered under the Companies Act 2006, they were an unregistered company for the purpose of the Insolvency Act 1986. This meant that the court had a degree of discretion in relation to the winding up of such a company.

The court considered the position in England & Wales in relation to the exercise of the court's discretion and identified that there were "three core requirements". Those were:

1. There must be sufficient connection with England, which may but does not necessarily have to consist of assets within the jurisdiction.

2. There must be a reasonable possibility of benefit to the party seeking the winding-up order if it is granted.

3. One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise jurisdiction.

While there was no binding authority in Scotland as to the application of the three core requirements, the court noted that Lord Hodge, as Lord Ordinary in *HSBC, Petitioner* 2010 SLT 281 had cited the requirements with approval. It also noted the desirability of applying the provisions of the 1986 Act consistently across the UK.

The court's judgment

The first question was whether the three core requirements were "hard-edged rules of law", or factors to be considered in the exercise of the court's discretion. The court held, following English authority, that they were the latter.

The court then considered the three requirements in turn.

It was admitted that the first requirement – a sufficient connection to Scotland – was satisfied. In this case the reclaimers' only known assets were in Scotland, and Scottish liquidators were best placed to deal with them.

In relation to the second requirement, it was argued that this was not satisfied because the court required to weigh up the advantages and disadvantages of proceeding with a winding-up petition as opposed to other options for recovery, such as calling up securities. The court rejected this argument. It held that this requirement was "not a difficult test to satisfy". The petitioners did not require to look to their securities. There was also clearly a benefit of having an independent, Scottish-based liquidator under the supervision and control of the court to take steps to realise the company's assets.

It was further argued that the third requirement could not be satisfied as the petitioners were not based in Scotland and had no place of business here, and therefore were

not subject to the jurisdiction of the Scottish courts. The court referred to s 426 of the 1986 Act, which provides that any order of a court in the UK in relation to an insolvency matter may be enforced in any other part of the UK as though it had been pronounced there. The court considered that this "direct effect" of insolvency law into the rest of the UK meant that the court did have the power to exercise jurisdiction over the petitioners. Moreover, any action taken by the petitioners in calling up their securities would require to be raised in the Scottish courts. Taken as a whole, this requirement was also satisfied.

Conclusion

It's rare that a creditor attempts to wind up an overseas entity in Scotland. Therefore. it is beneficial to have clarity that the Scottish courts intend to adopt a similar line to the rest of the UK when approaching this question.

Tax

ZITA DEMPSEY, ASSOCIATE

AND HAYLEY STEVENSON, SOLICITOR, PINSENT MASONS LLP

Chancellor Jeremy Hunt's new Spring Budget has brought with it the latest in a long string of reforms to the UK's research and development ("R&D") tax credits system – a new enhanced tax credit for R&D intensive small and medium sized enterprises ("SMEs"). The ongoing uncertainty has made planning ahead difficult for businesses, but the newest changes have been largely welcomed by the industries they are targeting. The upcoming changes that R&D intensive businesses should be aware of are highlighted below.

Enhanced tax credit

In the aftermath of the Chancellor's Autumn Statement in 2022, in which he announced a cut to the R&D tax credit for loss-making SMEs from 14.5% to 10% and a cut to the SME additional deduction for R&D costs from 130% to 86%, many SMEs had been looking to the introduction of those cuts in April 2023 with considerable apprehension. In particular, loss-making SMEs – which are particularly reliant on the cash repayment as a source of financing – were expecting to see a significant reduction in their effective rate of subsidy by the R&D tax credit.

The Chancellor's new announcement that a tax credit "worth £27 for every £100 they spend" will soon be available to loss-making R&D intensive SMEs has come as something of a relief to those it affects. Companies will only be able to qualify for the credit if they spend 40% of their total expenditure on R&D. For these "R&D intensive" companies, the payable credit rate will be 14.5%, reflecting the original rate of the R&D tax credit for all loss-making SMEs.

Unfortunately, R&D intensive SMEs which have begun to make a profit will not have access to the new tax credit. Loss-making SMEs that do not meet the 40% R&D expenditure threshold will also not qualify and will only have access to the 10% payable credit rate announced last autumn.

Overseas costs

The territoriality restriction, due to be introduced for accounting periods beginning on or after April this year for both the SME and RDEC (which provides R&D relief for larger companies) regimes, and aiming to prevent companies from claiming R&D relief in the UK for work undertaken overseas, has been pushed back until April 2024. This should be particularly well received by businesses in the life sciences sector, which must often undertake research abroad for regulatory reasons. However, as this postponement has come so late and will only last for one year, many businesses will have made their decisions on the basis that relief would not be available for overseas work and will not be able to take full advantage of it.

Increased scope of tax relief

The new Finance Bill will allow tax relief under both the SME scheme and the RDEC scheme for two more types of expenditure: expenditure on data licences and cloud computing costs. This is particularly important, as for many companies the computation, processing and analysis of their data are an integral part of their R&D process.

Additionally, the definition of R&D in the Government's guidance has been expanded to include pure mathematics. Depending on how this term is defined in the legislation, this change could be helpful for industries such as finance or insurance. These industries use complex risk modelling exercises which could substantially benefit from advances in mathematics and may therefore be inclined to invest more in mathematical research once a tax credit is available for it.

Future of the system

While some of the newly announced changes will be welcomed by businesses, the benefit of each change is arguably lessened by its presumed impermanence. The Government is currently considering proposals to scrap the current R&D tax relief system and replace it with a new single scheme based on the RDEC scheme from April 2024. It is proposed that – once the scheme has been introduced – relief will be simpler to apply for and there will be additional certainty as to whether it is available, which will encourage investment in R&D.

However, in the meantime, businesses are left with considerable uncertainty, particularly those falling within the SME R&D scheme.

The Government consultation on the matter has now closed, and new draft legislation is not expected until the summer, which some fear will leave businesses without enough time to prepare for the introduction of the new scheme. A new, simpler system would be welcomed by most, but the details of that system, and the ease of the transition to it, will be crucial for R&D heavy sectors.

Immigration

MEGAN ANDERSON, SOLICITOR

On 9 March 2023, the latest Statement of Changes in Immigration Rules was published and some significant amendments were announced. Such amendments include changes to salary thresholds, the Innovator route, continuous residence and the EU Settlement Scheme, to name a few. However, one of the most significant changes is the introduction of a new appendix relating to family reunion applications.

Family Reunion (Protection)

From 12 April 2023, applications for family reunion will be considered under Appendix Family Reunion (Protection). Refugee family reunion applications can be made by a spouse or the children of an individual who has been granted refugee status in the UK, to allow them to reunite as a family unit in the UK, subject to a number of conditions. We saw amendments made to the policy and the rules in June 2022, when the introduction of group 1 and group 2 refugee status under the Nationality and Borders Act 2022 was announced. However, there will now be a dedicated appendix relevant to such applications. The Statement of Changes sets out the new appendix from p 165 onwards and is meant to simplify the rules, following the recommendations made by the Law Commission for England & Wales in its report dated January 2020.

What are the rules?

A spouse or partner applying for family reunion must have been in a relationship with the person who has protection status (sponsor) before that person left their country of habitual residence. That relationship must be genuine and subsisting, and they cannot be within a prohibited degree of relationship as defined in Appendix Relationship with Partner.

A child applying to join their parent who has protection status in the UK must be under the age of 18 at the time of application, have formed

part of the family unit before the sponsor left the country of habitual residence and not have formed their own independent family unit. If the child applicant is over the age of 18, there must be exceptional circumstances that demonstrate the applicant should be permitted to reside in the UK with their sponsor. FRP 6.2 of Appendix Family Reunion (Protection) outlines specific considerations; however it notes that all relevant factors must be taken into account.

Applicants who do not fall under spouse, partner or child but who were part of the family unit before the sponsor left their country of habitual residence, can still apply, outside of the rules.

The appendix also contains a provision stating that where an applicant does not meet the requirements, the application can succeed if exceptional circumstances would render a refusal contrary to article 8 of the European Convention on Human Rights.

If an application is granted, the applicant will be granted permission to stay for a period equal to that of their sponsor. Outside of the rules, applications also must raise exceptional circumstances to improve their chances of success, especially as the Home Office continues to restrict those eligible.

Not everyone who is granted refugee status or humanitarian protection will be eligible for family reunion. If a sponsor was granted status before 28 June 2022, they are eligible sponsors, subject to them meeting all of the requirements. If the sponsor is categorised as a group 1 refugee, they are eligible to apply similarly to those granted before the relevant date. Anyone categorised under group 2 refugee status, or granted humanitarian protection, will have to demonstrate that there are insurmountable obstacles to their family life continuing outside the UK and that a refusal would result in a breach of article 8 ECHR.

What next?

Although there is no real policy change within the appendix, and indeed it does appear to have simplified the rules, there is concern that applications outside of the rules may now prove even more difficult. Further, there is the firm statement that biometrics now must be provided to validate an application. This has, on occasion, been waived for applicants who are unable to attend a visa application centre. Whether this will continue is yet to be seen. However, refugee family reunion was already restricted by the 2022 Act. There continue to be fewer legal routes for those seeking protection and their families. As ever, immigration practitioners will await to discover how the new rules will work in practice.

Megan Anderson is moving to a new job on qualifying and this is her last briefing. We thank her for her contributions over the past couple of years. – Editor

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Private health care

With increasing uptake of a range of private healthcare treatments, the Scottish Government seeks views on better regulation of this industry. See consult.gov.scot/safety-openness-and-learning/amendments-regulation-independent-healthcare/ **Respond by 26 April.**

Services during strikes

The UK Government's Strikes (Minimum Service Levels) bill will allow ministers to require the provision of certain services. The Department of Health & Social Care seeks views on how such regulations would work in relation to ambulance services. See gov.uk/government/consultations/minimum-service-levels-in-event-of-strike-action-ambulance-services **Respond by 9 May.**

The Department of Transport seeks views on how such regulations would work in relation to rail services. See gov.uk/government/consultations/minimum-service-levels-for-passenger-rail-during-strike-action **Respond by 15 May.**

Green freeports and tax

The UK Government's "green freeports" initiative includes, in Scotland, the Inverness & Cromarty Firth Green Freeport and the Forth Green Freeport. An early implication is likely to be a demand for relief from land and buildings transaction tax. Views are sought on how to facilitate that. See consult.gov.scot/taxation-and-fiscal-sustainability/lbtt-proposed-relief-for-green-freeports/ **Respond by 12 May.**

Peat no more?

Given efforts to restore peatlands in order to sequester carbon, the Scottish Government asks if it is time to stop the sale of peat extracted from bogs in Scotland. See consult.gov.scot/environment-forestry/ending-the-sale-of-peat/ **Respond by 12 May.**

Addressing misogyny

Following the report of the working group chaired by Baroness Kennedy KC, the Scottish Government seeks views on the introduction of new criminal offences to address violence against women and girls, which would introduce a "gendered law" rather than a gender-neutral response such as stirring up hatred based on sex or gender. See consult.gov.scot/criminal-justice/reforming-the-criminal-law-to-address-misogyny/ **Respond by 2 June.**

... and finally

The deadlines for two consultations listed in last month's column have been extended to 9 May. These are Energy and Just Transitions (see consult.gov.scot/energy-and-climate-change-directorate/energy-strategy-and-just-transition-plan/), and Community Wealth Building (see consult.gov.scot/economic-development/community-wealth-building-consultation).

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

John Ross Boyle

A complaint was made by the Council of the Law Society of Scotland against John Ross Boyle, Boyles Solicitors, Dundee. The Tribunal found the respondent not guilty of professional misconduct and declined to remit the complaint to the Council under s 53ZA of the Solicitors (Scotland) Act 1980.

The complaint alleged that the respondent advised the secondary complainer by email on 17 May 2019 that he had lodged a recall of decree with court when he had not done so. He also advised the secondary complainer by email on 1 October 2019 that he would seek to have a court order recalled. He did not take this action. The complaint alleged that the respondent failed to take steps to protect the secondary complainer's position, which failing, to advise him of the importance of protecting his position.

Briefings

In a separate paragraph, the complainers alleged that the respondent's actions in failing to protect the secondary complainer's position adequately, which led to the sequestration of his estate, brought the profession into disrepute.

With regard to the email of 17 May 2019, the Tribunal accepted the respondent's explanation that, sending a message in haste from his mobile phone, he did not intend to mislead or deceive the secondary complainer. With regard to the email of 1 October 2019, the Tribunal accepted the respondent's explanation that he intended to have the court order recalled and overturned at the time he wrote the email, but was unable thereafter to obtain instructions. No issues of dishonesty or lack of integrity therefore arose. The Tribunal considered that the respondent had breached rule B1.4. However, in the context of the whole circumstances of the case, there was not a large degree of culpability to be attached to the respondent.

Considering all the circumstances in context, the Tribunal was not satisfied that the respondent's behaviour constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. Therefore, the respondent was not guilty of professional misconduct. Given his explanation which was accepted, the Tribunal considered that the circumstances did not impinge on his reputation. Carelessness, incompetence, or inadequate professional service alone was insufficient to satisfy the test. Therefore, the Tribunal declined to remit the complaint under s 53ZA.

Kenneth Whitton Gray

A complaint was made by the Council of the Law Society of Scotland against Kenneth Whitton Gray, Williams Gray Williams Ltd, Cupar.

The Tribunal accepted the respondent's explanation that the disposition which was the subject of the complaint had not gone for registration due to a human error caused by oversight. He had believed that the disposition had gone for registration. The relevant form for submission to Registers of Scotland had been completed but unfortunately was also punched and filed amongst the correspondence. While he could not explain precisely why he failed to notice the credit balance on the client ledger before 2015, he explained that the credit balance of £30 would not have been an alert to an unregistered deed. The Tribunal accepted that, when he noted the credit balance in 2015, he passed the information on to the relevant individual at the firm who retained possession of the file. In all the circumstances, the Tribunal found the respondent not guilty of professional misconduct. The Tribunal concluded that the conduct here did not meet the test for unsatisfactory professional conduct and therefore it was not appropriate to remit the complaint back to the Council.

Saaima Khalid

A complaint was made by the Council of the Law Society of Scotland against Saaima Khalid, JKR Law Ltd, Glasgow. The Tribunal found the respondent not guilty of professional misconduct.

On 6 June 2018, the respondent became the sole director and shareholder of a private company limited by shares. That company was an "incorporated practice" as defined by the Law Society of Scotland Practice Rules 2011. A confirmation statement dated 5 June 2019 was lodged with Companies House. It indicated that five shares were held by the respondent, and five by another person. That other person was not qualified to be a member of the company either in terms of the Practice Rules or the company's articles of association. The Practice Rules were breached. The complaint alleged that only the respondent, or someone authorised by her, could have permitted the transfer of shares, as she was the sole director and member at the time of the transfer. The respondent, although not present at the hearing, had lodged documents tending to show that she was not aware of the transfer, which had been undertaken by her accountant on instructions from a member of her staff.

The onus of proof in a professional misconduct case is always on the complainers. The standard of proof applied is that beyond reasonable doubt. The benefit of any reasonable doubt must be given to the respondent. The Tribunal had a reasonable doubt about whether the respondent had known about the transfer. In those circumstances, the Tribunal considered that the degree of culpability which ought properly to be attached to the respondent was low. She was not guilty of professional misconduct. The Tribunal declined to remit the complaint to the Society for consideration of unsatisfactory professional conduct.

Gordon William Tulloch Murphy

A complaint was made by the Council of the Law Society of Scotland against Gordon William Tulloch Murphy, solicitor, Stirling. The Tribunal found the respondent guilty of professional misconduct in respect of breach of rules B1.7.1, B1.9.1 and B2.1.7, all of the Law Society of Scotland Practice Rules 2011.

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

The respondent acted in a conflict of interest situation when he acted for both parties in relation to a minute of agreement and standard security. The secondary complainer and her son required very different advice. It was for the respondent to identify this and act. He did not explain his advice to the secondary complainer in writing. It would have been appropriate to do so in the circumstances of this case which involved an unusual transaction and a significant amount of money for the secondary complainer. The potential outcomes for the secondary complainer were

"The Tribunal accepted the respondent's explanation that he... was unable... to obtain instructions"

serious. The respondent presented the minute of agreement to the secondary complainer's son without informing him in writing that his signature would have legal consequences or that he should seek independent legal advice before signature.

Solicitors must not act for two or more clients in matters where there is a conflict of interest between the clients (rule B1.7.1). Solicitors must communicate effectively (rule B1.9.1). They must not present deeds to unrepresented parties without giving them certain information in writing (rule B2.1.7).

Having regard to all the circumstances of the case, the Tribunal was satisfied that *in cumulo*, acting when the clients' interests were in conflict, failing to communicate effectively with the secondary complainer in writing and failing to issue a letter to the secondary complainer's son under rule B2.1.7 constituted a serious and reprehensible departure from the standards of competent and reputable solicitors. The respondent was therefore guilty of professional misconduct.

Allan Richard Morison Steele

A complaint was made by the Council of the Law Society of Scotland against Allan Richard Morison Steele, solicitor, Giffnock. The Tribunal found the respondent not guilty of professional misconduct and remitted the complaint to the Council in terms of s 53ZA of the Solicitors (Scotland) Act 1980.

The respondent was convicted in 2016 of a contravention of s 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. He was found guilty of behaving in a threatening or abusive manner which was likely to cause a reasonable person fear or alarm. The criminal complaint alleged that he had behaved in an aggressive manner towards his wife and shouted abuse at her and swore at her.

The Tribunal considered that the respondent's conduct was undoubtedly capable of criticism and might be said to represent a departure from the standards of conduct to be expected of competent and reputable solicitors. However, it did not consider overall that such departure was serious and reprehensible. In particular, while not of itself determinative, the Tribunal did not consider that the conviction raised any question of lack of integrity.

Therefore, the Tribunal found the respondent not guilty of professional misconduct. The Tribunal considered that the respondent's behaviour might constitute unsatisfactory professional conduct. Accordingly, the Tribunal found the respondent not guilty of professional misconduct and remitted the case to the Society under s 53ZA.

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Mark Zuckerberg, Facebook

Graeme McKinstry

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Support to suit

With flexible legal services a growing area as a means of support for in-house teams, we asked three provider firms how they operate, and the difference from secondments or other solutions

In-house

HOPE CRAIG, IN-HOUSE LAWYERS' COMMITTEE

Have you ever wished for an extra pair of hands at work, as the volume of work seemingly multiplies before your eyes? Or for specialist input for a period of time, without having to call up your external lawyers almost daily? Or perhaps you have worried about who will cover your team's specialist while she is on maternity leave?

These are just some of the situations which can be addressed by the growing area of "flexible law services" or "legal outsourcing services". In short, these are freelance legal providers who can step in and plug the gap in an in-house team's repertoire. They offer consultants with different levels of experience, from paralegals, trainees, NQs, right through to FTSE100 general counsel and senior partner level.

Increasingly, such services are being used by in-house teams. There are also a growing number of lawyers who have transitioned into this new way of working, perhaps prompted by the post-Covid shift in working practices.

To find out more about how flexible law services could benefit the in-house community, I asked representatives of three such services – Roger Connon from Vario, Louisa Van Eeden-Smit from Obelisk Support, and James Lewindon from Konexo – to explain more.

What sort of work can your organisation assist an in-house legal team with?

RC: We cover all forms of commercial legal work. There are about 1,500 lawyers on the platform. We don't do any private client work like domestic conveyancing, criminal work or wills and trusts.

JL: Essentially, anything that the legal team faces which has grown significantly in the last 10 years, from legal strategy, legal technology support, large scale projects, remediation, to resourcing the skills needed in-house – which could include paralegals, lawyers, project managers, compliance specialists, HR consultants and legal technologists.

LVES: Obelisk Support can provide in-house legal teams with ongoing or ad hoc flexible legal support, including cover for holiday, parental or long-term illness; access to a named pool of lawyers, when you need them; large or small ad hoc project support; major transactions support; and document automation.

What is the benefit of using a flexible legal service like yours, rather than contacting a traditional law firm?

RC: The benefits of using Vario – which is part of Pinsent Masons LLP – are cost, flexibility, and skillsets. Typically flex lawyers cover a maternity leave or a project, or a particular period of time when the client has a need.

JL: Konexo is wholly owned and part of Eversheds Sutherland ("ES"), which is a "traditional law firm". Clients tell us the value they see in using Konexo is that we offer a variety of additional services. That combination is the main USP for Konexo. In relation to legal resourcing, a client knows that anyone we put forward has been stringently quality assured, has the support of a global law firm behind them when on placement, and has in-depth client knowledge from our existing relationship. Being global, clients know we can support them (and our consultants) with any challenge, regardless of where they are based.

LVES: Working with Obelisk helps clients deliver better results, manage their costs and be more productive. A key differentiator to contracting a traditional law firm is our speed and agility. Clients can access the spread of skills with us more affordably and flexibly; we are more solutions-oriented and can allow them to build a solution faster, unhindered by complex partnership decision-making. Our network comprises 2,000+ lawyers, covering 20+ sectors and 18 essential practice areas for corporate legal teams.

It is not unusual for in-house teams to seek secondees from law firms to plug gaps in their team. What is the appeal of using a flexible legal service instead?

RC: Good question. Many secondees might not have exactly the skillset required, and typically they will only be seconded by firms for certain periods of time, regardless of whether a maternity leave or project is completed.

JL: At Konexo we often supplement ES secondees to clients. As an example, in a number of instances we have some consultants sitting next to ES secondees at a client, while others sit next to ES employees at the law firm, all supporting the client on the same matter. We also provide consultants as an alternative to a secondee as we have a broad skills base in our talent pool that may match the client need more closely.

LVES: Our consultants bring a pragmatic, commercial approach from their experience in-house, alongside best practice from working with a variety of legal teams of different sizes and across different sectors. Leveraging flexible legal support, legal teams are not constrained by issues such as desk space or equipment. Plus, the service is easy to set up, helps them deliver on their goals for the business and is truly flexible. Costs are effectively managed, with a model of only pay for what you use. Lastly, legal teams can tap into a comprehensive network of lawyers and paralegals, whether to support on work overflow or as specialist support on a specific project.

What is the minimum/maximum length of time that your organisation can provide support for?

RC: We have all types of arrangements; some are ad hoc with no guaranteed minimum or maximum commitment. However, most tend to be a minimum of three months and the maximum in my experience would be about nine months – although often people prove so useful they are extended beyond this. These can be full time or only a certain number of days a week.

JL: We don't put time limits on engagements. From very short term support (a few weeks) to ongoing ad hoc support (e.g. 10-20 hours a week) with no end date, to full time placements that have continued longer than four years, the flexibility of contract length is what clients and consultants enjoy.

LVES: There is no minimum or maximum commitment. Obelisk can provide support across small ad hoc projects, or act as an extension of your legal team for an indefinite period of time.

What process is involved in accessing your organisation's services?

RC: We have a dedicated admin team who answer all queries and who agree work scopes,

Entries for the 2023 In-house Rising Star Award are now open: see p 38

prepare bios for the client to review and if they are interested in any, set up the interviews.

JL: For a client wanting to access this support, we can quickly onboard them to work with us. We have consultants who can be working in as little as a few days depending on the client requirement.

LVES: Clients simply provide an outline of their requirements online, by calling their dedicated account manager, or by phone – whatever their preference.

How is a consultant matched to a brief? How can an in-house team be sure that the consultant will have the necessary skills and expertise without lots of support and training?

RC: We always agree the work scope in detail, provide CVs and bios, and the clients always interview the candidates before any offer is made.

JL: We have in-depth scoping sessions with clients to ensure we understand the requirements of the role. This is then assessed by our team, linking with a subject matter expert and client relationship lead within ES. We then use a mix of software tools, knowledge of our consultants, and cross team engagement to shortlist potential options before approaching a consultant. A key aspect is assessing a consultant's ability to hit the ground running. However, we also know that ongoing support is key to a successful placement: we provide consultants with access to online learning tools (e.g. PLC), ES subject experts, briefings, training, and a dedicated consultant app to access support from their phone at any time.

LVES: We understand that relationship fit, and a solid cultural match, are as essential to our clients as speed and expertise. We use our proprietary matching technology and proven #HumanFirst methodology to ensure quality matches, fast. For larger projects and when using our virtual extended teams, clients can benefit from our project management services. Only lawyers and paralegals who have experience from both a top law firm and working in-house are eligible to join our community. Once vetted through a robust screening process, all our consultants and paralegals have access to support with our Talent team to ensure their skills remain competitive, with professional and personal development through tailored support and third party webinars.

Does the in-house team need to resource the consultant, for example, with a desk and laptop? What arrangements are in place in terms of professional liability cover, etc?

RC: Many work remotely but we can provide a computer. Often the client provides this, but it's flexible and depends on whether the client needs the lawyer in their office or not. The flex lawyers get the benefit of our PI cover, hence we are very careful about who we invite onto the Vario bench.

JL: The working arrangements are very specific to the client and the project/resource need. Most clients issue a laptop/IT for a consultant to access their systems and work. Some have a fully remote working policy, and some projects need fully onsite office support. This is all scoped with the client before we send consultant profiles. All Konexo placements are covered by the insurance and policies ES has with all its clients.

LVES: Consultants can work 100% remotely, but clients can choose for consultants to be onboarded to their IT setup or use our secure Obelisk infrastructure. Obelisk also provides PI cover.

Are fees fixed up front? Is it an agreed total price or will the consultant charge on an hourly basis?

RC: Some arrangements are hourly, but mostly it is based on day rates which are agreed with the client up front.

JL: In general, consultants work on a day or hourly rate. This is decided with the client during the scoping phase. However, we have worked on both monthly and annual fee arrangements. We are completely flexible to client requirements.

LVES: We offer a range of pricing options. These include fixed fee arrangements on defined projects, access to consultants and paralegals charged out by the hour or day, or ongoing retainers for access to virtual extended teams so that legal teams are in full control of managing their legal spend.

Once the consultant has started, what does the relationship look like in practice?

RC: We keep in close contact with both the client and the flex lawyer to ensure the arrangement is working.

JL: In practice, Konexo consultants are there to support and be a part of the client legal team. They often become integral to that team. Further, they are part of the Konexo community, with regular socials with other consultants. Konexo consultants also become part of the ES client service team for that client.

LVES: Both our clients and consultants are supported pre-, during and post-engagement with regular check-ins to ensure proactive management of issues that may come up. They are also able to highlight opportunities to ensure legal teams save time and effort, can effectively manage their legal spend, and remain agile and proactive. Consultants benefit from personalised support during interview preparation, onboarding and throughout their placement.

If you are interested in finding out more about how flexible law services might help your in-house team, check out the testimonials on each organisation's website, where various clients reflect on their experiences of using flexible law services.

Pinsent Masons VARIO

Obelisk

KONEXO

Record admissions ceremony welcomes 80

Eighty new solicitors were welcomed to the profession at the biggest admissions ceremony yet held by the Law Society of Scotland, which took place at Edinburgh's Royal College of Physicians.

Society President Murray Etherington told those gathered to be "proud of your hard work, focus and determination over the past few years; proud of your world-class legal education; and proud to wear the badge of Scottish solicitor – a badge that unites you all".

Guest speaker Stuart Munro, managing director at Livingstone Brown and convener of the Society's Criminal Law Committee, outlined the importance of the law in society, commenting: "Lawyers, of course, sometimes get a bad press. We're accused of being woke or lefty, but we should never apologise for standing up for the rule of law and the fundamental rights of citizens."

SLCC confirms proposed levy rise

Levies paid by practitioners to the Scottish Legal Complaints Commission in 2023-24 will rise by the previously proposed figure of 9%.

Laying its budget before the Scottish Parliament, the SLCC confirmed that rebounding complaint numbers and rising energy and other costs mean that, following two years of cuts, the levy will rise to just below pre-pandemic levels.

Principals and managers will pay £484, up from £444; employed solicitors £393, up from £361 (£166 during the first three years of practice), solicitors outwith Scotland £129, up from £118, and in-house lawyers £118, up from £108. Advocates will pay £186, up from £171.

In an effort to tackle the problem of firms delaying provision of client files for investigations, the full complaint levy will rise by £2,000 to £7,000, but this rate will, for the first four months, be charged only where a firm is judged to have failed to respond to a statutory request without appropriate explanation. The SLCC will work with the Society on further proposals for this levy, and has invited views from the profession.

The rise comes despite representations from the Society that the levy has increased in recent years by more than the percentage rise in complaints, or in the solicitors' practising certificate, and from the Faculty of Advocates that it was not proportionate to charge advocates more where their number of complaints had not increased.

Interim chair of the SLCC, Niki Maclean said: "We know that any rise in the levy is unwelcome. Like all businesses we are facing additional costs and we need to ensure we have sufficient budget to discharge our statutory duties."

The SLCC has also announced its intention to move from its present premises in central Edinburgh as a cost-saving measure.

Do you know an In-house Rising Star?

Nominations are now open for the Law Society of Scotland In-house Rising Star Award 2023. The award recognises the outstanding achievement of a newly qualified Scottish solicitor (with up to five years' post-qualification experience), or trainee, who is working in-house.

Nominations will be judged by members of the In-house Lawyers' Committee. The winner will be announced at the In-house Annual Conference in June.

ILC co-conveners Sheekha Saha and Vlad Valiente said: "As the name suggests, the aim of the award is to shine a light on rising stars who play an integral part in the in-house sector. Nominations over the years have been inspiring, and have presented many benefits to those being nominated and their organisation. Those include boosting motivation, showcasing the broad range of talent we have in the sector, and most notably, giving the individual due praise for their work."

For more information, and the closing date, see www.lawscot.org.uk/risingstaraward

Profile of the Profession running again

All members of the Law Society of Scotland are invited to take part in its 2023 *Profile of the Profession* survey, its major census of the Scottish legal profession.

Conducted roughly every five years, the survey offers an in-depth view of the makeup of the profession and the experiences of its members on a variety of important topics. This year these include mental health, post-pandemic working and violence against the profession. The results will enable the Society to tailor its future services and policies to best support the profession.

The survey will be conducted by independent researchers Taylor McKenzie, who are contacting all members directly by email. It will take around 15 to 30 minutes to complete and individualised links will enable members to save their progress.

All responses will remain anonymous. Completing the survey will count for up to one hour of verifiable CPD.

President Murray Etherington commented: "I would encourage everyone in the profession to take part and complete the survey. The more members who do, the better it will reflect the solicitor population as a whole and the better we as a Society will be able to support you, giving us a robust evidence base for our future policy work and negotiations with bodies such as the Scottish Government. Please take part and help shape the future of the profession."

The survey remains open for completion until 10 May 2023.

Spike in bogus lawyer fraudsters

A recent spike in online scams with fraudsters impersonating real law firms has led to the Law Society of Scotland renewing its warning to all solicitors to be on the front foot to protect themselves and their clients.

The Society has seen an influx of online scams trying to con solicitors' clients out of significant sums of money, using various sophisticated methods, including email interception, WhatsApp and fake websites.

Recent examples include:

- Scammers intercepting and controlling solicitor-client emails, targeting clients at the point where housing transactions were due to complete, mimicking the solicitor's emails exactly to give bogus payment details to multiple clients.
- WhatsApp messages bearing to be from legitimate law firms, using correct information such as office addresses and logos, and offering health and social care visas, in return for providing personal information such as copies of passports and paying fees of hundreds of pounds.
- Websites mimicking real law firms' sites and emails, but with slight spelling errors in the URLs that are easy to miss.

Information on how firms can protect themselves against the threats of cybercrime can be found in the Society's Guide to Cybersecurity.

AML guidance update

The Legal Sector Affinity Group has published the latest update to its Treasury-approved guidance on preventing money laundering in the legal sector, reflecting recent amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The changes include:

- guidance on the new requirement to carry out proliferation financing risk assessments, either as part of an existing practice-wide risk assessment or as a standalone document;
- changes to the duty to report discrepancies to company registries – from 1 April 2023, these will only need to be made in certain defined circumstances.

For AML legislation and guidance, see the Society's AML Toolkit page.

Breach reports

The Society's AML team has released an updated breach reporting form. This should be used by practices to report any serious breaches of the Money Laundering, Terrorist Financing and Transfer of Funds Regulations 2017.

Types of breaches can include:

- intentional or wilfully negligent breaches of legal requirements in relation to applicable AML legislation or regulation;
- repeated unintentional or repeated accidental breaches of legal requirements in relation to applicable AML legislation or regulation;

- systemic breaches associated with a failure of AML-related policies, controls, or procedures;
- facilitation of business activities that bear the hallmarks of money laundering activity (the legal requirement to file a suspicious activity report, where appropriate, remains).

Members must also report breaches of related legislation for which AML supervisors do not have direct regulatory responsibility, but which is still relevant to a member's ability to prevent financial crime, for example breaches of financial sanctions legislation.

One-off or non-systematic breaches of the regulations that are limited in scope and impact do not need to be reported.

More information is at the AML FAQs page.

Civil Online demos offered

Solicitors and legal staff are invited to attend a demonstration of Scottish Courts & Tribunals Service's new Civil Online platform.

The new portal will include the changes required for the Act of Sederunt (Simple Procedure Amendment) (Miscellaneous) 2022, which comes into force on 31 May 2023, as well as a new and improved login process in response to user feedback. Existing functionality will continue.

The dates to attend have been organised by sheriffdom. If you are unable to attend the session in your local sheriffdom, please feel free to attend another. The dates (all at 4pm) are:

- Glasgow & Strathkelvin: 18 April
- Grampian, Highland & Islands: 19 April
- Lothian & Borders: 25 April
- North Strathclyde: 26 April
- South Strathclyde, Dumfries & Galloway: 9 May
- Tayside, Central & Fife: 10 May

Please contact Gary White at civilonlinelab@scotcourts.gov.uk to sign up for a specific session.

Notifications

APPLICATIONS FOR ADMISSION 3-29 MARCH 2023

ADAIR, Jack James
ANDERSON, Bryon
ARNOTT, Joanna Louise
BELL-CAIRNS, Gareth
BRICE, Emma
BRUCE, Megan Nicola
CALLANDER, Robert
CONNELLY, Ryan James
DEANS, Katie Melville
DUNCAN, Gabriella Lois Marie
FREE, Jennifer Margaret
GARDNER, Lauren
GRANT, Ellen
GRIFFITH, Alun Thomas
HARPER, Kirsty Louise
KILDARE, Antonia Felicity
KIRIMBAI, Latasha Georgia
KOSER, Atiya
McCOLL, Cameron James William
MacCONNELL, Emily Catherine
McGEORGE, Ashleigh Mary
McGUIRE, Matthew Edward
MACKENZIE, Euphemia Jean
MACKINNON, Eve Aislinn
MARTIN, Stella Louise
MELVILLE, Andrew Peter
NISBET, Brooke Jane
O'DONNELL, Lisa Nicole
ONWENI, Stephanie Ngozi Uche
PETERSEN, Emma
RENWICK, Lauren Mhari
SILVER, Victoria Jane Blyth
VEAR, Gemma Louise
WEBB, Kirstie Anne
WOOLMAN, Sarah

ENTRANCE CERTIFICATES ISSUED 1-17 MARCH 2023

CLARK, Andrew Hugh Martin
DOLLIN, Ashley
HYND, Claire Erin

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.

Illegal Migration Bill

The Immigration & Asylum Committee issued a briefing on the bill in advance of the House of Commons second reading. It raised concerns that the UK Government is pressing ahead with legislation which may not be compatible with the European Convention on Human Rights, potentially contravening UK law and the 1951 UN Refugee Convention.

Introducing the bill, Home Secretary Suella Braverman said she was unable to state that its provisions were compatible with the Convention rights, but the UK Government still wished the bill to proceed.

The committee also expressed concern that very little time was allowed for the bill to be reviewed in its entirety and for the proper checks and balances which are an important part of the parliamentary process.

Read more at the Society's page on the bill.

Trusts and Succession Bill

The Society submitted written evidence on the Trusts and Succession (Scotland) Bill to the Scottish Parliament's Delegated Powers & Law Reform Committee. It welcomed the bill and the opportunity it presents to reform and consolidate trust law. It highlighted a number of areas where the Society considered the bill could be refined and improved. Specific comments related to duties to provide information, trustee's duty of care, expenses of litigation and certain definitions in part 3 of the bill.

It also highlighted that the bill raises considerations regarding the interaction between trust law and charity law in the context of public trusts, which may be registered charities. In particular, it called for clarification on whether certain provisions are intended to apply to public trusts, with amendment of the definition of "beneficiary" to remove uncertainty in relation to public trusts. It further called for the proposed abolition of restrictions on accumulation of income to be extended to charitable trusts.

On the proposals relating to succession, the written evidence pointed to the potential for inconsistency under both the current law and the bill, and called for change to be considered extremely carefully. Widespread public education should accompany any changes to the law in this area.

The Society expressed regret that the bill does not legislate for the nature and constitution of trusts: further consideration should be given to these matters at a future date.

Read more at the Society's page on the bill.

Moveable Transactions Bill

The Society issued several amendments to the Moveable Transactions (Scotland) Bill ahead of its stage 2. These seek to provide clarity on relevant sections and consistency with wider insolvency legislation.

The bill seeks to modernise and reform Scots law in relation to security over and assignation of moveable property, and to remove the need for intimation to the debtor when assigning a claim, assignations being registered in the Register of Assignations. It would also create a new form of security over moveable property called the statutory pledge, and a Register of Statutory Pledges, removing the need for physical delivery to the creditor.

Read more at the Society's page on the bill.

Economic Crime etc Bill

The Society issued a briefing on the Economic Crime and Corporate Transparency Bill ahead of the House of Lords committee stage. The bill seeks to complement the Economic Crime (Transparency and Enforcement) Act 2022, and to address the use of UK corporate structures for purposes of economic crime, by reforming Companies House, improving its functionalities and the accuracy of companies data, and the law on limited partnerships, amending the powers of the Registrar of Companies.

It would also provide law enforcement with new powers to seize cryptoassets, and enable businesses in the financial sector to share information for the prevention and detection of crime.

The briefing commented on the position of Scottish limited partnerships, noting that they are a popular vehicle in investment, such as operating funds or holding commercial property. The Society is keen to support the Government in ensuring that limited partnerships are not open to abuse by those engaged in criminal activity.

The Society also commented that there should be a consistent approach to anti-money laundering supervision in the UK.

Read more at the Society's page on the bill.

For more information see the research and policy section of the Society's website.

ACCREDITED SPECIALISTS

Agricultural law

Re-accredited: LINSEY BARCLAY-SMITH, Anderson Strathern LLP (accredited 19 April 2018).

Commercial mediation

Re-accredited: DAVID HOSSACK, Morton Fraser LLP (accredited 11 March 2005).

Discrimination law

LORNA DAVIS, Harper Macleod LLP (accredited 2 March 2023).

Employment law

JAMES DAVID CHALMERS, Stronachs LLP (accredited 13 March 2023).

Re-accredited: MUSAB HEMSI, Anderson Strathern LLP (accredited 8 May 2018).

Family law

ISABELLE DOUGLAS, Aberdein Considine & Co (accredited 21 March 2023).

Re-accredited: JOANNE ROMANIS, Inksters (accredited 14 February 2003).

Family mediation

ASHLEIGH MORTON, Morton Brody Law (accredited 1 March 2023).

Re-accredited: SUSAN OSWALD, SKO Family Law Specialists LLP (accredited 4 April 2011); JOANNE MURRAY, Blackadders LLP (accredited 28 March 2017).

Insolvency law

Re-accredited: CALUM JONES, Kepstorn Solicitors Ltd (accredited 16 October 1996); STEPHANIE CARR, Blackadders LLP (accredited 27 March 2013).

Medical negligence law (defender only)

ISLA BOWEN, National Health Service Scotland (accredited 8 March 2023).

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ACCREDITED PARALEGALS

Civil litigation – reparation law

LEANNE CHRISTIE, Digby Brown; VICTORIA HUMPHRIES, Digby Brown; CLAIRE THOMSON, Digby Brown.

Residential conveyancing

GILLIAN FASKIN, Andersonbain; LUCY MANSON, Ralph Sayer; KAREN STEWART, Stewart & Watson; PRIYANKA THAKUR, Gilson Gray LLP.

Wills and executries

ANGELA OGILVIE, James & George Collie LLP.

OBITUARIES

LINSEY JANE SOUTTER, Edinburgh

On 27 February 2023, Linsey Jane Soutter, employee of the firm Fiona McPhail Solicitors, Edinburgh.

AGE: 40

ADMITTED: 2008

ERIC DODSON MILLER, Glasgow

On 14 March 2023, Eric Dodson Miller, partner of the firm GWG Ltd, Glasgow.

AGE: 56

ADMITTED: 2004

Breaking up not so hard?

A new report suggests that women leaders are moving jobs more frequently than ever. Rupa Mooker looks into the reasons why

First came the "Great Resignation" – the trend describing record numbers of people leaving their jobs after the Covid-19 pandemic. Then came the "Great Reshuffle" – where workers didn't just leave, they reconstructed their careers to ones aligning more with their values. Now, it appears we're amid a "Great Breakup" between senior women leaders and businesses.

According to the latest "Women in the Workplace" report from McKinsey, "women leaders are switching jobs at the highest rates we've ever seen, and ambitious young women are prepared to do the same". The report also highlights that this is especially true for women of colour. This potentially has serious implications for businesses everywhere, including in the Scottish legal profession.

Despite feminisation of the profession continuing, with around two thirds of newly admitted members being female each year (according to the Law Society of Scotland's *Diversity Data from the 2020-21 Practising Certificate Renewal*), the latest available data, the 2018 *Profile of the Profession*, shows a significantly higher proportion of males who were equity partners in private practice (26%) than females (7%). It also showed a higher proportion of female than male respondents who spent longer as a senior associate or similar level below partnership before becoming a partner.

At the time of going to print, the Society has issued its latest *Profile of the Profession* survey. I await the results of that with hope that the 2023 senior leader/partner figures are more reflective of what our profession looks like. However, a quick look at websites of legal organisations and firms in Scotland shows that women tend to remain underrepresented in leadership/partner roles. It is vital that these women are retained as, otherwise, not only does our profession lose them, but it risks losing the next generation of women leaders too. Young women are watching senior women leave for other opportunities and they may well follow suit.

Undervalued

But why are women leaders across all sectors leaving at the highest rate we've ever seen? And at a much higher rate than men leaders? According to the McKinsey report, there are three primary factors:

1. Women leaders want to advance, but they face stronger headwinds than men. Women experience microaggressions undermining their authority, implying they aren't qualified enough, or face suggestions that it's more difficult to advance due to personal characteristics such as being a parent or their gender.

2. Women leaders are overworked and under-recognised. Compared with men at the same level, women leaders invest far more time and energy doing work which supports employee wellbeing and fosters diversity, equity and inclusion (DEI). While it's now widely accepted that this work is vital and considerably improves the employee experience, it's unfortunately still not considered important enough to merit actual reward and recognition in most businesses: 40% of women leaders say their valuable DEI work isn't acknowledged or formally recognised at all in performance reviews. Is it surprising then that more women in leadership than men end up experiencing burnout?

3. Women leaders are seeking a different culture of work. Women want more flexibility or to work somewhere really committed to employee wellbeing and DEI.

Equity before equality

This year's theme for International Women's Day is worth a mention here – #EmbraceEquity. A useful and timely reminder that organisations should be aiming for *equity* over equality. Equity recognises that women have different needs from men. So, although more women might be moving into leadership positions, societal expectations and lack of employer support continue to interfere with their careers. Therefore, resources and support should be allocated with equity in mind, particularly when it comes to inclusion, health, and wellbeing.

To truly support women in the workplace, employers must understand the health conditions some women may experience, and which can impact their careers. Providing health and wellbeing support for, for example, pregnancy, miscarriage, and menopause significantly improves a workplace's chances of retaining current staff and attracting new talent. Firms and businesses must recognise, and provide, what women need – a supportive workplace culture, effective mentoring and sponsorship, career advancement opportunities, flexibility, and investment in reskilling.

According to the World Economic Forum, it will take another 132 years to close the global gender pay gap, and women will continue to be underrepresented in leadership positions. With statistics like that, it's absolutely imperative that all employers sit up, take notice and do whatever they can to prevent senior women from walking away.

Rupa Mooker is Director of People & Development with MacRoberts

Tradecraft tips

Another collection of practice points from Ashley Swanson, drawn from his experience

Saying no

My late father once said to me that there are a dozen different ways of saying no.

Clients had bought a house which needed substantial refurbishment before they took up occupation and it would be lying empty for a considerable time. They thought we would be able to arrange insurance, but my boss simply wanted the clients to be told that this was not part of the service we offered. My own inclination however is that you should never cut your clients dead. I looked through my notes for the name of a specialist insurer prepared to provide cover for empty houses and then checked on the internet to make sure they were still in business. This information was then passed on to the clients with advice that when making their application they should stress to the insurers that the house was wind and water tight, fully lockable, and located in a residential area, just in case the insurers thought they were being asked to provide cover for a semi-derelict and insecure house out in the middle of nowhere which would be a target for vandals and arsonists.

All of this took time, but it avoided the clients simply being rebuffed.

Doorstepping

Clients had concluded missives to buy a farmhouse with a right of pre-emption on it in favour of neighbouring farmers who had bought the rest of the farm at an earlier date. The selling solicitor bungled the necessary procedures, with the result that the transaction could not settle on the due date. Our clients had to give entry to the purchasers of the house they were selling, thereby becoming homeless. The next day, which was a Saturday, I made a special trip to see the neighbouring farmers with no prior appointment and I was lucky enough to have a meeting with them at which valuable information about the overall situation was obtained.

I returned to Aberdeen and telephoned the clients to bring them up to date. They were impressed that I had put in this extra effort to help them in their predicament. The neighbouring farmers went ahead and took up their pre-emption right, which is the only time in 46 years that I have ever seen this done. The clients had to arrange short term accommodation and eventually purchased another house. I could have telephoned the farmers, but I just felt that in all the circumstances a visit, albeit unannounced, would give me the best chance of a positive result.

Ashley Swanson is a solicitor in Aberdeen. The views expressed are personal. We invite other solicitors to contribute from their experience.

Help required

One of the important things in life is recognising when you are up against something which is completely beyond you, and either disengaging from it or getting someone else's help to deal with it. In a farming executry HMRC were trying to deny agricultural relief on a farmhouse which was worth £350,000. An all-out effort was required, so after obtaining copies of all the relevant taxation cases, some sourced from the Signet Library, and studying these, I identified the expert we needed to consult and contacted him. To find someone who had already been round the very specialised learning curve in question I had to go south of the border.

The result at the end of the day was that HMRC conceded the relief, saving the executry £140,000 in inheritance tax. The expertise is out there to help you with just about any problem you encounter. Don't be hesitant about engaging with it, but just be sure that whoever you approach has the ability and experience required.

Running out the wicket

Some cricketers, the great Denis Compton in particular, had a style of playing when facing spin bowlers. Rather than waiting for the ball to come within reach of their bat they would leave the crease and run out the wicket towards it. This gave them a tactical advantage and made the bowler's job more difficult.

Clients were facing possible court action on an access issue. Normally I would have waited to see the terms of the initial writ before stating my defence, but I took the view that it was better to try to stop the action before it was raised, therefore I set out my entire defence in advance so that the other solicitor could take it into account when contemplating whether or not to go to court. As events turned out no action was raised.

There are occasions when being proactive can give you an edge over the other solicitor, and the skill lies in knowing when best to put certain things into play. Sometimes playing your cards right can bring success even when you have not been dealt the best hand.

Getting out of business is harder than getting into it.

You must have a plan!

Graeme McKinstry

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RISK MANAGEMENT

Client account fraud: an ongoing issue

The profession continues to be targeted by client account frauds. This article from Lockton provides tips on how to address the risk and implement essential safeguards

As solicitors are aware, the "client account" is the bank account of a law firm that is used for holding client funds. Any money received for clients, and any money coming from clients (unless in payment of a fee note which has been rendered) must be paid into the client account.

The role that solicitors play in client transactions, and the fact that solicitors often have control over substantial sums of client money, makes the profession an attractive target for fraudulent activities. Some of the fraudsters involved in these scams are opportunists, but many of them are well organised criminals, with very sophisticated hacking techniques. The capabilities of some of these fraudsters are considerable, enabling them to engage in "social engineering" and to commit tricks to overcome barriers and risk controls.

In this regard, there have been a number of client account frauds reported to Lockton in the last few months and we urge you to remind all your colleagues to treat any email containing bank account details with extreme caution.

It is important to note that law firms that fall victim to payment fraud range from sole practitioners to large multinational firms, so the whole profession needs to be vigilant. The consequences are serious for both firm and client; and for firms, there is the reputational damage to consider as well as the financial loss. Most of these types of claims can be very easily avoided through a simple check, yet we continue to see matters arising.

"Criminals can now mimic the language used by clients, which means that, in some cases, there is nothing unusual or inconsistent in the language that is used."

Regular readers of the Journal will recall that Lockton has written about this subject previously, and the advice that **the telephone is the best single weapon a solicitor can deploy in the war against the fraudsters** (Journal, January 2021, 44) is worth restating. The payment frauds that have been intimated as Master Policy circumstances over the last few months – and indeed in the years before – could all have been averted by judicious use of the telephone.

Steps to prevent client account fraud

Some tips:

- Have a firm-wide policy: any email correspondence containing bank details should be assumed to be fraudulent, unless verified by telephone.
- Any concerns regarding the veracity of an email need to be taken seriously and acted on.
- Checking is better than not checking. Always.
- But using email to check instructions received by email is worthless. If the instructions were fraudulent, the response might well be intercepted too, and no comfort can be taken from any confirmation received.
- A phone call to a client to check their instructions takes minutes and could save hundreds of thousands of pounds.
- When contacting a client to verify bank details, practitioners should use the phone

The typical scenario

In many of these cases, a fraudster will send an email to a law firm purporting to be one of their legitimate clients. The email will often include an instruction to change the client bank account details, to bank account details that will ultimately benefit the criminals. The fraudsters will usually time the email well, ensuring that it aligns with the run-up to the completion of a transaction. As transactions often complete on a Friday, these frauds are often referred to as "Friday afternoon frauds". But they can happen at any time.

The email instruction might refer to

number that was originally provided by the client (i.e. don't use a phone number that might have come from a potentially fraudulent email).
• Every member of your staff should be aware that bank account details provided in an email should never be relied on without further (non-email) verification.
• All staff should receive regular training regarding the risk of payment fraud, how it is perpetrated and how it can be avoided.
• Have strong procedures and protocols in place regarding the checking and authorisation of any payments to be made from the client account (or indeed the firm's own account). Dual signoff for larger amounts is always wise.
• Make sure that clients understand that the bank details provided to you are fixed and that email instructions regarding changes to the account details will not be acted on.
• Clients fall foul of fraudsters too. Make sure they know that you will not contact them by email to advise a change of your bank details.
• Ensure that any move to remote working does not result in any deviation from payment policies.

a payment due to the solicitor's client representing the free proceeds of sale, as these attacks are common in property transactions. However, any transaction might be targeted, including payments to beneficiaries from trusts or executries.

Sophisticated email hacking techniques

Increasingly these frauds are targeting individuals. We have seen cases where there is nothing about the fraudulent emails that would have caused the firm any concern. Criminals can now mimic the language used by clients, which means that, in some cases, there is nothing unusual or inconsistent in the language that is used. The emails themselves can also be sent directly from the hacked email account. As such, the email address is often correct, the instructions make sense, and the email is completely convincing. In other words, there might be no way to distinguish between a fraudulent email and a genuine email.

Therefore, in all cases where a bank account is provided over email, effective steps need to be taken to verify with the client, by means other than email, that the details are genuine. Face to face is obviously ideal but, at the very least, picking up the phone and verifying email instructions with a known individual is an essential safeguard.

Bank account details on file

We have also seen cases where the bank account details do not actually change and it is the initial email that provided the bank details that was fraudulent.

In these circumstances, there is the risk that law firm staff use the bank account details that are stored on the file, assuming that their colleagues will have already verified the details when they were obtained. However, unless the account verification has also been recorded on the file, these bank details should never be relied on.

As outlined above, where a party requests that they wish to change their bank account details, that is an obvious red flag. However, it is never safe to assume that any email containing bank details is genuine, regardless of when those bank details are received during a matter.

Where the client or third party initially provides their bank account details/instructions, it is always essential that these are verified either by telephone or in person. A contemporaneous note should be made of this verification and recorded on the file.

Telephone calls from "the bank"

As well as email fraud, criminals will sometimes telephone solicitors, masquerading as a member of the bank's fraud investigation team.

It is important that firms remind their staff never to give any security credentials over the phone. The banks will never ask them to disclose security credentials and any request should not be answered.

Please also note that fraudsters can remain on the line, even when the telephone has been put down. If staff are calling the bank back, they should do so from a different telephone and a different line and they should use the telephone number they usually use to call the bank (rather than any number that might have been provided by the fraudster).

"Unless the account verification has also been recorded on the file, these bank details should never be relied on."

Always report early

If you do fall victim to fraudsters, this should be reported under the Master Policy as a matter of urgency. RSA, the lead insurer, works closely with the banks and financial institutions in relation to these issues. Many transactions of this nature have been intercepted. In some cases, RSA can take immediate steps towards recovery – this can sometimes involve a disclosure order and an arrestment of funds. However, it can be extremely difficult to recover funds once they have been dissipated or have left the country, so prompt reporting is critical. The quicker Master Policy insurers are made aware of matters, the more likely that some of the funds might be recovered.

Matthew Thomson is a client executive in the Master Policy team at Lockton. He worked as a solicitor in private practice before joining the Law Society of Scotland in 2011, and then Lockton in September 2018 dealing with all aspects of client service and risk management.
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In practice

FUNDRAISING

The Scottish Legal Walks return

Graeme McWilliams unveils this year's Scottish Legal Walks, some other events in aid of the Access to Justice Foundation Scotland – and appeals for more volunteers

The Access to Justice Foundation Scotland committee organises the annual Scottish Legal Walks, which help to raise funds for local legal advice charities, and promote and protect wellbeing. All money raised in Scotland stays in Scotland, the walks help to ensure everyone has access to justice, and they're always great fun.

We are very pleased that the Law Society of Scotland is a supporter and sponsor.

Three Scottish Legal Walks are confirmed so far this year, and we hope to make this a record breaking year for walkers and sponsorship.

- The Glasgow Legal Walk will be on Tuesday 26 September, and we're keen to encourage local law students and lecturers to join the many legal professionals, plus colleagues, families, friends, and Legal Walk dogs who take part.
- The Edinburgh Legal Walk will be on Wednesday 4 October; all are equally welcome to join us here.
- The Dundee Legal Walk returns in October, with the final date to be confirmed shortly, will build on the success of its inauguration last year, and everyone is invited.

Hannah Moneagle, from Grampian Community Law Centre, part of Robert Gordon University's Law School, is organising an Aberdeen Legal Walk, and hopes to have a date confirmed soon. If you're interested in helping with this inaugural event, please email h.moneagle@rgu.ac.uk.

The Foundation's Legal Walks page is kept up to date and can be found at atjf.org.uk/legal-walks.

It's not just about the walks though, and this year's other events include The Great Legal Bake from 6-10 November and The Great Legal Quiz on Wednesday 29 November. Remember, you don't have to be a lawyer to join these events, and all legal professionals, co-workers, friends, and families are welcome.

The ATJFS committee oversees the Scottish events and liaises with local event organisers, while its working group deals with event specifics such as social media promotion and sponsorship etc. We are looking for new committee and working group members, as well as volunteers to help us with the walks and other events, so if you are at all interested, please contact me.

The related annual Pro Bono Week 2023 will also be from 6-10 November, and more local event information will follow.

We look forward to welcoming more current and new ATJFS event supporters in 2023.

Graeme McWilliams is a Fellow of the Law Society of Scotland, member of the ATJFS committee, and chairs its working group.
e: gmmcw@aol.com

What do you know about memory?

How does memory work? Are memories stored forever? Witness testimony reliant on long-term memory is a common feature in many justice settings, and personal views about memory play a pivotal role in professional practice. Now the help of practising lawyers is wanted for a study that aims to capture new information on UK lawyers' beliefs about memory.

The research is part of the first nationwide study to investigate legal, therapeutic and lay populations' memory beliefs. It will form part of a PhD dissertation, and has been approved by the University of Portsmouth's Science & Health Faculty Ethics Committee. The researcher, Pamela Radcliffe, is a former practising barrister and lead editor of *Witness Testimony in Sexual Cases*.

Barristers and solicitors in England, Wales and Northern Ireland are already taking part. Encouraging as many solicitors and advocates as possible to take part is important. A larger study size increases the scientific integrity and statistical validity of data findings.

All practising solicitors and advocates are eligible to take part. The survey is anonymous, confidential and quick (about 10 minutes). It is completed at the participant's private location on any e-device. It is accessed via an e-link to a secure, password-protected online survey platform.

For more information and to join the survey, go to: bit.ly/4KKE1jU

Or scan the QR code.

Clio

Everything you need to know about cloud-based legal software

Cloud-based legal technology is indispensable for law firms, but if you're not using it, you likely have a lot of questions. This article will examine the practicalities and benefits of cloud computing for law firms and will answer some of your most common questions.

Here's what you need to know.

Is cloud-based legal software secure?

Cloud-based software is generally regarded as more secure than traditional data centres.

This is because cloud software providers invest heavily in cybersecurity, continuously monitoring systems for potential vulnerabilities and ensuring that code is updated to maintain optimal security. Moreover, cloud-based software providers employ IT experts who continually enhance their platforms' security capabilities.

On-premise v cloud-based law firm software: which is better?

A clear winner emerges when you compare on-premise technology versus cloud-based alternatives. Major benefits include:

- **Uptime**

Physical servers are subject to inconsistent uptime and risk of damage due to floods, power outages, or fires. However, some cloud-based software providers (such as Clio) guarantee an uptime of over 99.9%.

- **Total cost of ownership**

Using on-premise technology racks up significant costs: servers, office space, electricity, IT support, maintenance, and so on. Customisations and upgrades incur additional spend.

Cloud-based software, on the other hand, eliminates these costs. Firms simply have to pay subscription fees (typically per user), while upgrades and new features are often free.

- **Support**

On-premise technology requires constant monitoring from in-house or outsourced IT professionals.

Not only does this eat into firms' profitability, but they might come unstuck if they can't access IT support when a problem arises (e.g. if their in-house IT staff is away on holiday, or their external experts are busy dealing with another client's project).

Conversely, cloud-based legal practice management software providers, such as Clio, have teams dedicated to customer support, meaning law firms usually rely on their providers for continual IT support.

Selecting a cloud-based law firm software: how to choose the right provider

When evaluating cloud services, there are six essential questions to ask any potential providers:

1. What are your terms of service/confidentiality policies?
2. What is your backup/business continuity plan?
3. What security measures are provided as standard?
4. What is your geo-location?
5. What happens if we cancel our subscription?
6. How is data migrated from one system to another?

Learn more about cloud-based software

Cloud computing offers major benefits to law firms. That's why Clio is proud to sponsor the Law Society of Scotland's *Guide to Cloud Computing*.
You can read it in full for free at clio.com/uk/cloud-scotland.

THE UNLOVED LAWYER

Why am I still in the law?

Why acceptance of certain things about working life can help your wellbeing

If you have read my previous blogs about the challenges of working as a lawyer, you might be wondering why I am still in the law if I found the hours and conditions so overwhelming and, at times, toxic.

The years of studying and student debt aside, I love the law and it's that simple.

I have now learned how to manage my stress from my experiences, so this time I will share with you some points of acceptance that I have come to so far.

1. Accept that you may have 10 things on your to do list for that day, but there is more chance of being struck by lightning at your desk than getting them done. Otherwise all you are doing is setting yourself up for failure before you have even logged on for the day.

2. Accept that you do need to take breaks from your desk during the day. You are not superhuman – unless for religious reasons, not only do we need to drink water and eat during the day to function and concentrate, but there is also nothing wrong with taking a few minutes to enjoy a cup of tea, a chocolate biscuit and drift into a quick daydream about a holiday you'd like, for example.

I no longer admire those lawyers who operate like robots. For a long time I worked with a lawyer who drank and ate nothing during the working day. Initially I thought they were a machine and wished I could do that – but why? Is it because they were perceived as having a greater work capacity and therefore were able to generate endless fees? However, dehydration just isn't cool. Being so hungry that you can't concentrate is also not cool.

Recharge!

3. Accept that taking holidays is necessary to recharge. We are literally beings that are made up of energy. We just aren't plugged into the wall to charge, unlike our phones or laptops. If you are out and your phone runs out of battery, you can wish it to come back to life all you like but that phone is off until such time as it's plugged in. We need to recharge too.

A doctor client of mine told me that the body really needs a break every 10 weeks. That's not unreasonable, is it? It's enough time to get your workload in order, prioritised and for client expectations to be managed.

"If you think about it, would you ever challenge your dentist, doctor or optician for taking a holiday?"

If you think about it, would you ever challenge your dentist, doctor or optician for taking a holiday? At worst, you'd find it inconvenient and think it in your head, perhaps, but you would never say "Really? You're taking a holiday?" Neither would clients or other professionals say that to you. And – before you say it – I don't want to hear the line "But I'm too busy to take holidays!" No, you're not. Your firm, your colleagues and the law in general will go on without you and that is the reality of it.

A very special former colleague once told me: "If you don't have your health, you don't have anything." This was at a time when I was in a very poor state of health, and they were right. Burnout is now frequent, but it too is not cool. No one wants a frazzled solicitor. Yes, the lead up to a holiday is frantic and so is the return, but it doesn't mean you shouldn't take your holidays. As others have said, you will never be on your deathbed and wish you had worked more.

Friends and colleagues

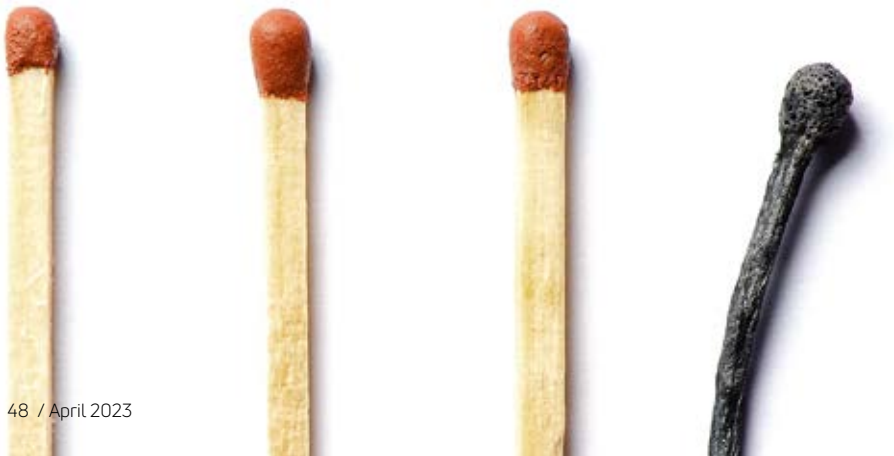
4. Accept that your work colleagues are, *generally speaking*, not your friends. Or, at least, not your true, genuine, "to the grave" friends that you can rely on no matter what. Of course, you can socialise with them outside of work time, and you can remain friends when you or they leave the firm, but your work colleagues are similar to your family – you didn't choose them and you have to spend a lot of time in their company whether you like them or not.

I would qualify this by saying I have met some truly wonderful people whom I would class as friends, but I have met some truly horrific people too. The typical law office will have at least one genuine person – more if you're lucky. But, generally speaking, it can be more like "Where's Wally?", where you aren't so much looking for a man in a red and white striped top as rather the office bully, the office narcissist, the office backstabber etc. Just be careful who you trust and with the personal information you give to your work colleagues, as not everyone's intentions are as pure as they seem.

Teach it?

Considering that some of the above situations are pretty endemic in the law, it would seem to me beneficial for this to be covered in some way in the Diploma, if for no other reason than to prepare would-be trainees for the shift they are going to experience on leaving the comfort blanket of university. Perhaps this is something for the Law Society to consider going forward.

The Unloved Lawyer is a practising solicitor



ASK ASH

The challenge of promotion

My colleague is challenging my position as a new manager

Dear Ash,

I have recently been promoted to a managerial position for the first time and although I'm happy about my promotion, I'm finding it a bit of a challenge managing a particular colleague who I've worked with across a number of years. He seems to not take any direction from me and assumes that he knows better than me how to manage particular clients. It started off with him making the odd comment to challenge my input during our regular catchups, but more recently he has began to raise issues with my direction in front of other colleagues in a way that is clearly looking to undermine me. I wanted to manage my team in a friendly and open manner but this particular person is seeing this as some sort of weakness and I'm not sure how to address it.

Ash replies:

One of the key challenges of management is understanding how to lead. This can be even more tricky when you have successfully moved up the ranks and require to manage colleagues you worked alongside over a number of years. There will be an inevitable need for a period of adjustment by both sides.

However, the issues you are outlining may be attributable to you not taking prompt action at an early stage to make your managerial boundaries clear. Churchill once aptly noted that: "When eagles are silent, parrots begin to chatter."

I therefore suggest you need to take action to exert your authority. This does not mean that you need necessarily to adopt an authoritarian style, but you do need to be clear and firm.

Gaining the respect of your team is like walking a tightrope, as you don't want to be too hard and to demotivate your staff, but you also do not want to be too soft, resulting in a lack of clear boundaries and lack of effective leadership.

I suggest you hold a team meeting and outline your key approach in terms of how you intend to manage the casework and your team. For example, make clear when you normally expect to be notified about key case milestones, perhaps for example when a particular case reaches a certain financial threshold, and what decisions you will expect to sign off. Be prepared for any inevitable questions about this, and where possible make clear how your approach aligns with the overall firm practice and procedures to give more credibility to your outline approach.

Take the opportunity also to highlight your own experiences at the firm; and provide assurance that you are open to always listening to any constructive feedback too.

Effective management is a key skill which takes inevitably takes time to develop; however, by providing your team with initial clarity about boundaries, you should at least be able to take back some control and make clear that you may be nice but that you are certainly no pushover! 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).

FROM THE ARCHIVES

50 years ago

From "Good communications", April 1973: "The letter, of course, has written authority but lacks the speed of the telephone which, though enabling discussion, does not provide a record of what has been said and, thus, can lead to misunderstanding and misinterpretation. But telex – the national and international teleprinter network operated in this country by the post office – is fast, documentary and accurate. Although the system has so far found only limited favour with Scottish law offices, there is a strong case for its wider introduction".

25 years ago

From "Editor's Introduction", April 1998 (the first issue produced by Connect Publications): "...central to the philosophy is the need for The Journal to be an effective working magazine, playing a positive role in assisting the diverse range of practitioners in Scotland... The magazine will now be called simply The Journal. It is, after all, how the profession refers to it in conversation... Out goes the old-fashioned layout. The Journal will be more effectively laid out to make it easier to access and read; it will be printed in full colour and, for the first time, carry colour photographs and graphics to support and enhance the articles."

Classifieds

William Cunningham Watt (Deceased) - would anyone holding or knowing of a Will for the above, latterly of 2/8, 29 Hutchesontown Court, Gorbals, Glasgow, G5 0SY, please contact Katie Brown, Gillespie Macandrew, 163 West George Street, Glasgow, G2 2JJ (0141 473 5568 or katie.brown @gillespiemacandrew.co.uk)

Mr Jan Aleksander Nowicki (Deceased)
Would anyone holding or having knowledge of a Will by the late Mr Jan Aleksander Nowicki, who resided at 73 Baronald Drive, Glasgow, G12 0HP and who died on 26th December, 2022, please contact Daniel Cowie at Paterson Holms, Solicitors, 4 Roman Road, Bearsden, Glasgow, G61 2SW. Telephone 0141-942 8825 or email daniel@patersonholms.co.uk.

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