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Journal

Journal of the Law Society of Scotland

Volume 67 Number 7 – July 2022

Justice unbalanced

The pressures that tipped the scales against one lawyer's dream career in criminal defence

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Editor

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Rights at stake

It can be difficult to write at a moment when the Government of our country is in imminent danger of collapse. It seems inevitable that the man who is currently Prime Minister will no longer be so by the time you read this. The more important question, however, is what effect, if any, that will have on the current legislative programme, as there have been few criticisms of that from his own side amidst all the tumult.

From a lawyer's point of view, a particular focus is the Bill of Rights Bill. It has been called out for cutting across the UK's obligations under international law, and shamefully it is not the only measure now before Parliament that does so.

Even on a domestic level, however, it should cause alarm. It purports to discriminate between those who should and those who should not be able to exercise their rights in full, the latter aspects targeting claimants serving a custodial sentence – the European Convention already takes due account of the limitations on rights that go with such a status – and those threatened with deportation. With human rights, the clue is in the name. They apply to all of humanity.

Even for the rest of us, obstacles are erected that could bar the upholding of their rights. There is a threshold of "significant disadvantage" before proceedings can be brought against a public authority. If that bar is cleared, the courts no longer have the power to read down legislation to make it comply with the Convention, but can only make a declaration; a minister decides what, if any, action to take. Courts are further limited in how their decisions can impact on authorities exercising statutory powers. Authorities are given a shield if acting under legislation incompatible with the Convention. So it goes on.

Lurking beneath the bill is the Government's belief, maintained despite having been debunked as wholly unsound in law, that enacting domestic legislation incompatible with Treaty or Convention obligations involves no breach of international law. It may become harder for claimants to take a case all the way to a ruling in Strasbourg, but the circumstances in which that might happen are set to multiply and it will be only a matter of time before that fallacy is exposed.

As has also been pointed out in analysis of the bill, its provisions are characteristic of a Government resistant to scrutiny and accountability and, more fundamentally, to the checks and balances that still underpin our constitution though now coming under increasing threat from an unprincipled executive.

For all these reasons, each of which reflects an aspect of the rule of law, lawyers should use every avenue to challenge, or at the very least seek to mitigate, the bill and its dangerous effects. The country which gave birth to the European Convention must not be allowed to disown it.

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
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In practice

ONLINE INSIGHT

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From beer to bones

Joanna Fulton reviews the recent Scottish product liability case before the UK Supreme Court, concerning a prosthetic hip – a decision that leaves some interesting questions unanswered while providing a useful survey of the law.

Court opportunities in a post-pandemic world

A Scottish Courts & Tribunals Service interview with Sheriff Principal Derek Pyle on the future of the justice system in a new era of technology following the COVID-19 pandemic.

Subsidy control: the new UK regime

A new, post-Brexit subsidy control regime has passed into law, seeking to balance existing international obligations with a more efficient domestic process. Jill Fryer provides an overview.

Strikes and infections: the employment implications

With rail strikes disrupting travel, and new phases of infectious disease on the rise, where do employers and workers stand in relation to employment obligations? Robin Turnbull offers an overview.

Are you resilient to a ransomware attack?

From Society partner Mitigo Cybersecurity, the top 10 areas that law firms need to address to stop ransomware.

OPINION

Elaine Farquharson-Black

Scotland's major cities need radical action, including their own special powers, to respond to recent shocks to the system, reverse their decline and promote necessary changes for the future

The recent *Scotland's Urban AGE 2022* ("SUA2") report – a major academic study on the future of Aberdeen, Glasgow and Edinburgh ("AGE") and their respective city regions – has highlighted the need for innovation, investment and informed leadership to address the shocks which Scotland's urban system faces in light of the combined challenges of climate emergency, COVID-19, Brexit, the war in Ukraine and the financial crisis.

Commissioned by the Aberdeen, Glasgow and Edinburgh Chambers of Commerce and supported by Brodies and AAB, the report found that the centripetal position of the AGE cities means that they have been hit hardest by the pandemic, which hollowed out shared spaces, devastated high streets and accelerated societal change.

Given their concentrations of population, wealth and knowledge, SUA2 stresses that the success of the three cities is a litmus test of Scotland's future. As such, the report makes several recommendations based on the key themes of developing our human capital, climate leadership, city centre regeneration, flexibility within planning frameworks and the reshaping of business rates.

The overriding message from the authors is that our cities need to be dynamic to avoid decline. They need to be empowered to respond to local needs and opportunities. Funding will be key in that regard, and the report recommends that devolving meaningful tax raising and other fiscal powers to our cities would allow for the delivery of programmes that reflect those local needs. That, of course, is a matter for policymakers, but it is clear that change needs to happen, and happen fast.

The report advocates not only a design-led approach to regenerating the AGE cities but also a systems and service design approach based on the quality of people's lives and their places. It suggests various scenarios for the potential futures of the business sector, the retail industry, cultural venues, the transportation system, and office property market (all of which are changing at the same time), to help understand the threats and opportunities which we face in finding new, more creative ways to make our cities safe, just and sustainable spaces.

SUA2 highlights that the cities face greater challenges than previously, due to the flux in all market sectors in terms of societal need, location, use and design. It calls for a more flexible, agile and responsive planning function, to support greater and faster change. Policy, economic development and design must work together to decarbonise the built environment and create a new vibrancy within each of the AGE cities. This will require retrofitting on an unprecedented scale.

One way of doing that lies in reimagining the office. At Brodies, we are already seeing demand for quality buildings that satisfy the requirements of larger occupiers. That includes more flexible space, more collaboration space and strong ESG credentials – all designed to encourage people back into the office and into the office community – something that simply can't be replicated at home.

With office space, it will be a case of evolution, not revolution. For example, Glasgow simply doesn't have enough available grade A office supply for even one year's worth of takeup. As a result, the city is going to see a raft of refurbishments coming down the line.

But this has to be matched with the decarbonisation and deep retrofit of the older office buildings within Glasgow city to meet these occupational needs – for which, as SUA2 highlights, political will and fiscal impetus are required to facilitate that repurposing and redevelopment.

And in retail, the recently opened St James Quarter in Edinburgh has got off to an encouraging start, attracting new entrants to the Scottish retail market, as well as relocating occupiers from other parts of the city centre.

With vision and collaboration, Edinburgh's previous retail showcase, Princes Street, has huge development potential. A move to a more experiential economy, with flagship stores interspersed with hotel, leisure and residential offerings, could see it reinvigorated to be on a par with the likes of the Champs Élysées in Paris or Regent Street in London.

Aberdeen presents its own opportunities, and is identified in SUA2 as a unique case by dint of its role as Scotland and the UK's oil capital and, going forward, as a carbon-neutral pioneer. While the loss of major office buildings and national retailers has had a palpable effect on the city centre, this can also provide added impetus for investment and diversification, including enhanced opportunities to increase city centre living, with new models such as build to rent.

Cities excel at bringing people together, and SUA2 provides a framework for how we can, and indeed must, work in partnership to ensure the economic recovery and ongoing success of the AGE cities.

Change is often difficult, but it is easier if we are all working toward a common goal of making our cities better. Working together: now, wouldn't that be a shock to the system?

Elaine Farquharson-Black is a partner and planning law specialist at Brodies LLP

VIEWPOINT

Gender question

With Twitter alive over the issue, and declarations that there are up to 72 genders, the Supreme Court last December came down firmly on one side of the argument over gender identity. In *R (Elan Cane) v Home Secretary* [2021] UKSC 56, at para 52, the court unanimously agreed that "legislation across the statute book assumes that all individuals can be categorised as belonging to one of two sexes or genders".

Opposition to this view comes from an unlikely source. In 1850, Parliament declared that in all statutes the masculine includes the feminine; s 1 of the Interpretation Act 1889 applied this to all legal documents unless the contrary intention appears; and s 6 of the Interpretation Act 1978 belatedly makes it apply vice versa. Conveyancers frequently (unnecessarily) repeat this mantra in documents, but the Canal & River Trust, which controls most publicly owned navigable waterways in England & Wales, has other ideas. Its draft documents declare that "a reference to one gender shall include a reference to the other genders [*sic*]".

Conveyancers in England & Wales have *en masse* accepted this doctrine of multiple genders, as evidenced in completed easements and other agreements with the Trust in this form. I would be interested to hear from your readers if Scottish conveyancers generally are at one with their counterparts in England & Wales, or if they instead follow the ruling of the Supreme Court.

David Pedley, retired English solicitor

The UK's (new) Bill of Rights

While we have our regular Blog of the Month choice below, we thought it worth drawing attention also to Professor Mark Elliot's post on his publiclawforeveryone.com site, on the Bill of Rights Bill.

We cover the bill in our feature on p 16, but Elliot's longer read is worth a lawyer's time also. As well as analysing what will and will not change if the bill is enacted, he takes a wider look at its overall impact, and what it tells us about the UK constitution today.

He argues that the similarities between the bill and the Human Rights Act are "largely superficial", because the bill undermines *both* the European Court of Human Rights *and* our domestic courts – the latter through a diminishing of their powers along with controls on the way they handle Convention cases.

While the bill might make sense in political terms, he continues, the legal problem is that it rests on a false premise — "namely, that it is possible to legislate domestically in order somehow to manipulate or magic away treaty obligations that are binding upon the UK as a matter of international law... If, as is likely, [it] results in more applications to (and UK losses in) the Strasbourg Court, the Government will then face a stark choice between accepting the court's judgments — thereby exploding the myth that the bill magically enabled the UK to loosen its international obligations via domestic legislation — or defying them and finding itself in breach of international law".

The Government's true objective, he concludes, is "the entrenchment of a form of executive hegemony — one that smacks of authoritarian resistance to scrutiny and is antithetical to the best traditions of the British constitution".

Whatever one's views, the blog is worth studying. – *Editor*

BOOK REVIEWS

A Practical Guide to Extradition Law Post Brexit

EDITED BY MILES GRANDISON
PUBLISHER: LAW BRIEF PUBLISHING
ISBN 978-1913715359; £34.99

This book is written by a stellar cast of barristers who regularly appear before the English courts in extradition cases. They draw on their wide experience and have produced a valuable addition to the canon. This is more so due to the implications highlighted by the UK's withdrawal from the European arrest warrant scheme consequent on Brexit.

The UK is now regarded as a third state, albeit, in the area of security and cooperation, one with a unique bilateral agreement with the EU. The authors posit whether the route to incorporating the Trade and Cooperation Agreement into UK domestic law gives it primacy over domestic law. They also highlight its requirement that the principle of proportionality is established, introducing a ground of refusal otherwise not as readily available. The significant introduction of the nationality bar as a ground of refusal by EU states is also referenced: 24 states have indicated they will refuse to extradite their own nationals or may surrender them on a conditional basis.

The book provides a clear, considered and helpful analysis of extradition with non-EU states. Extradition law is reserved under the Scotland Act 1998. However, it is encouraging to see reference to some of the more significant Scottish cases. This is a worthwhile and easily accessible book.

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

The Escape Artist

JONATHAN FREEDLAND
JOHN MURRAY: £20 (E-BOOK £10.99)

"Freedland has brought to life a story which was largely unknown but which needs retelling. In his hands, it is a masterpiece."

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

BLOG OF THE MONTH

constitution-unit.com

"While the legality of such legislation might have been an open question in 2012, a decade later there are few constitutional scholars who believe it would pass muster in the Supreme Court".

So writes constitutional specialist Dr David Torrance, considering the legislative competence of a Scottish Parliament bill providing for an independence referendum without UK Government support. Ahead of the Supreme Court reference, his blog helpfully traces the strands of judicial and other opinion from the time of the Scotland Bill to the present day.

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

70 years and crowing

Her Majesty the Queen as a scarecrow? It happened – many times over – last month in at least three English villages which dedicated scarecrow competitions to the Jubilee (what else).

The Queen could be seen portrayed in her familiar outdoor garb, or as more of a Queen Victoria lookalike (even if smiling), or even in one case with a Union Jack parachute caught on a roof, in a parody of her 007 appearance at the opening ceremony of the 2012 Olympics. But the royalty theme was taken as embracing not just other members of her family, or their guards – naturally, figures such as Princess Leia, Freddie Mercury, and the singer for this purpose still known as Prince, were also favourites.

We can be glad that lèse-majesté isn't a thing, in this country anyway. Long may our head of state be willing to be seen taking tea with Paddington Bear.

Jubilee parodies could also be seen in Edinburgh

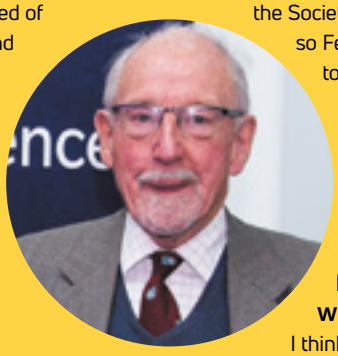
PROFILE

Brian Wood

Brian Wood is a retired solicitor, honorary sheriff and a Fellow of the Law Society of Scotland

1 Tell us about your career?

I've had quite a varied and haphazard career, spanning huge sociological changes. I was working in Edinburgh when I got a phone call asking me to take a trial in Kirkcaldy for my father, who had taken ill. I stayed on in his practice, and the pattern developed of prosecuting in the police court and defending in the sheriff court. I was a chair of the first industrial tribunals, then moved into conveyancing, corporate and agricultural work. I was appointed an honorary sheriff and still am.



2 What have been the most significant changes affecting the profession since you started?

Abolition of the feudal system had a huge impact. I don't think we really understood its complexities until it began to be dismantled. Also, nobody could have anticipated the explosion of crime. There used to be a criminal summary court once a fortnight in Kirkcaldy, whereas now two or three courts sit all day every day.

3 What motivated you to become a Fellow of the Law Society of Scotland?

When I retired I wanted to find a way of maintaining my interest in the law and the profession. I don't have the time to commit to the Society's Council and committees now, so Fellow membership is a good way to keep up to date, keep receiving the Journal and attending the annual conference, and keep in touch.

4 If you could ensure one change for the future of the profession, what would that be?

I think the biggest and most important change would be to get legal aid properly established. Justice really does depend on having properly established legal aid representation. If you don't have that, society is at risk.

Go to bit.ly/3jjqYxr for the full interview. Find out about Fellow membership at www.lawscot.org.uk/fellow

WORLD WIDE WEIRD

1 Recycling day

A wheelie bin from Hampshire has mysteriously turned up 1,200 miles away in Ukraine. It was spotted – at the roadside – by a British journalist reporting on the war with Russia.
bit.ly/3NREwRH

2 Wedding gator

A Mexican mayor has married an alligator dressed in a white wedding gown – and with snout firmly tied shut – in an ancient ritual carried out to secure nature's abundance for the local people.
bit.ly/3R7mpds

3 Barking orders

A woman who wanted a dog sitter who had to follow 11 strict rules and sign an indemnity agreement before being allowed to look after her pooch, has been pilloried on social media.
bit.ly/3yKtN7k

TECH OF THE MONTH

PicsArt Animator

Google Play and Apple Store: free and subscription versions

If you're feeling arty and creative in your spare time, then PicsArt Animator is worth downloading. It's a fun app that lets you make short videos, animations and GIFs on your phone. And it's free.

PRESIDENT

Murray Etherington

My first month in office has required regular public comment, standing up for the profession and the rule of law, but has also brought positive experiences celebrating the best of what the profession has to offer

It has been an interesting start to my tenure as President, with a few in-person meetings but still lots of online engagement. It was during one of the host of online meetings that it was remarked I had been "very vocal" in my initial few weeks. On reflection I probably have been but, in my defence, for very good reasons: the Scottish Government announcements on the justice budget and the proposed second independence referendum; and the UK Government's continued verbal attacks on the legal profession.

So, yes, I have been vocal in my first few weeks, but there was one voice that really hit home last month, and it wasn't mine. It was Lyndsey Barber, the young criminal defence lawyer, and her 11-minute YouTube video on why she was leaving the profession she loved. It was a powerful, emotional and impactful piece. It laid bare the issues the criminal defence bar are facing and the impact that a generation of underfunding of legal aid is having on practitioners. I encourage all of you to watch it and I applaud Lyndsey's courage in putting it out there.

Lyndsey's video also highlighted the need for all of us to consider our own mental health and wellbeing. We have all been under increased pressure over the past few years, and it is incredibly important that we make sure we are finding mechanisms to help us cope. The Society has a fantastic resource in our LawScot Wellbeing initiative and I recommend you all visit the website. It has some very useful material and highlights our work with LawCare. The simplest thing we can do is talk: try and vocalise your feelings. Don't suffer in silence; and remember it is OK to not be OK.

Positive vibes

Despite the month's challenges, there have been some amazingly positive events in which I have been able to play a small part. I opened our Virtual Summer School, attended by bright and enthusiastic young people interested in joining the profession. This was an online event and it was extremely well attended. I was also absolutely delighted to give the opening address to the In-house Lawyers Conference. I was incredibly impressed by the diverse range of organisations represented by the delegates. I also had the great pleasure of presenting the In-house Rising Star Award for 2022 to Mariel Kaney. Reading some of the comments about Mariel's work, both in the Lord President's Office and on the football pitch as captain of Hearts FC women's team, was very impressive.

I would also like to thank the Edinburgh Bar Association for inviting me to their annual dinner. It was nice to see people letting their hair down and enjoying themselves! And talking of enjoyment, I attended the Law Society of Scotland, Addleshaw Goddard's Open AG committee and the Glass Network's Edinburgh Pride brunch. It was great to see so many people in attendance, and a great time both at the brunch and on the march was had by all. For more information on the Glass Network and how to get involved, see their website theglassnetworksco.squarespace.com

Another inspirational pair of young people are Aimee Ross and Orla McMichael, the pupils from Fortrose Academy who were the winning team in the Society's annual Donald Dewar Debate. Vice President Sheila Webster attended the event at the Scottish Parliament and was delighted to present the award to the winners. She was very impressed by the level of debating by both the winning Fortrose Academy team and the runners-up, The High School of Glasgow.

Inspirations

From the inspirational young to the inspirational notquitesoyoung! Ken Dalling donned his Past President medal this month to represent the Society at the 50th European Presidents' Conference in Vienna. At the conference, the Law Society of Scotland joined its legal peers across Europe in signing the Vienna Declaration in Support of the Rule of Law. The statement includes 41 clauses covering relevant risks to the rule of law, including further condemnation of Russia's attack on Ukraine and the resulting humanitarian crisis.

And finally, July will bring the first in-person Admissions Ceremony for three years. This is such an important event for all of our new members, and I know our CEO, Diane McGiffen and I are very excited to meet our latest members in person.

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

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People on the move

ABERDEIN CONSIDINE, Aberdeen and elsewhere, has announced 11 senior promotions. **Elaine Elder** (Dispute Resolution, Aberdeen) has been promoted to senior associate. Nine who become associate are Aberdeen-based **Tom Main** (Family Law), **Danny Anderson** (Corporate & Commercial), **Shaju Noor** (Banking Litigation), and **Katie Hutchinson** (Residential Property & Conveyancing), along with Residential Property & Conveyancing colleagues **Stevie Kelman** (Banchory and Stonehaven), **Mairi Innes** (Perth), **Jordan Watt** (Peterhead and Ellon), and **Kerry Temple** (Edinburgh), and **Megan Hannah** (Family Law, Glasgow). **Ellen Masters** (Banking Litigation, Glasgow) becomes a senior solicitor.


Aberdein Considine has announced 11 senior promotions

ANDERSON STRATHERN, Edinburgh, Glasgow and Haddington, has appointed **Tom McEntegart**, solicitor advocate and Royal Institution of Chartered Surveyors-accredited evaluative mediator, as a partner in the Dispute Resolution team, based in Glasgow. He joins from TLT, where he was a partner and formerly head of its Scotland operation. **Mark Templeton** has been appointed a director and head of Immigration. He joins from QUINN, MARTIN & LANGAN.

BALFOUR+MANSON, Edinburgh and Aberdeen has promoted **James Hyams** (Private Client), **Carolyn Jackson** (Clinical Negligence), and **Peter Littlefair** (Personal Injury) to senior associate.


Balfour+Manson has promoted Carolyn Jackson, Peter Littlefair and James Hyams to senior associate

BELLWETHER GREEN, Glasgow, has appointed accredited employment law specialist **Marianne McJannett** as head of Employment. She joins from TC YOUNG.

BRODIES, Edinburgh, Glasgow, Aberdeen and Dingwall, has appointed **Jacqueline Stroud** as a partner in Family Law, based in the Edinburgh office. Formerly a partner in MACROBERTS, she is an accredited specialist in family law and an accredited family law mediator.

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Alan Cassels**, who joins from PINSENT MASONS, as a partner in its Banking & Finance team.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Alison Weatherhead** as practice group leader for the UK People, Reward and Mobility ("PRM") team. She replaces **Virginia Allen** who will be leaving the firm. An Employment partner based in Glasgow, she previously led Dentons' PRM practice in Scotland.

DIGBY BROWN, Edinburgh and elsewhere, has announced a round of 21 solicitor promotions. **Sarah Douglas, Diane Cooper** and **Kirsty O'Donnell** in Glasgow, and **Sam Cowie** in Inverness, all become partners. Promoted to associate are **Euan Robertson** (Dundee), **Louise McCulloch**, **Joy Bell** and **Stephen Duff** (Glasgow), **Isla McKnight** (Ayr), and **Izabela Wosiak** (Edinburgh). Eleven who advance to senior solicitor are **Chris Ritchie** (Dundee), **Fiona Bissett** (Kirkcaldy), **James Stephen** (Glasgow), **Sarah Newman** (Inverness), **Paul Thomson** and **Kimberley McLennan** (Aberdeen), and **Magdalena Wlochal**, **Donald Mackay**, **Simon Dempsey**, **Sarah Hobkirk** and **Louise Moffatt** (all Edinburgh).


Gibson Kerr has announced a number of new appointments and promotions

FRASER & MULLIGAN, Aberdeen and Ballater, has merged with MACKINNONS SOLICITORS, Aberdeen, Cults and Aboyne, with effect from 1 June 2022. Fraser & Mulligan's office at 1 Carden Place, Aberdeen has closed, with most of the partners and staff transferring to Mackinnons' office at 14 Carden Place. Fraser & Mulligan's office in Ballater remains open for business.

GIBSON KERR, Edinburgh and Glasgow, has promoted **Nadine Martin**, accredited specialist in family law and child law, accredited family law mediator and certified specialist in trauma informed practice, to partner; and **Stuart Millar** and **Katie Marshall**, both members of the Society of Trust & Estate Practitioners, to senior associate and senior solicitor respectively, and **Rhian Mackay** to paralegal, in the Personal Law unit. Property solicitor **Donald Towsey** has joined the practice from McDOUGALL McQUEEN, and **Nikki Lemon** has joined as a property paralegal.

GILLESPIE MACANDREW, Edinburgh, Glasgow and Perth, has appointed construction lawyer **Ross Taylor** to the partnership with effect from 5 July 2022. He joins from WRIGHT JOHNSTON & MACKENZIE and is a Fellow of the Chartered Institute of Arbitrators and an accredited mediator.

GILSON GRAY, Glasgow, Edinburgh, Dundee and North Berwick, has promoted **Shona Young** to senior associate in the Family Law team.

HARPER MACLEOD, Glasgow, Edinburgh, Inverness, Elgin and Lerwick, has promoted **Laura McLean** to partner in the Family Law team; **Angus Brown** to associate in the Dispute Resolution team; and **Natalie Bruce** and **Leanne Maitland** to senior solicitors in the Family Law and Private Client teams respectively. All are based in the Elgin and Inverness offices.

HOLMES MACKILLOP, Glasgow, Milngavie, Johnstone and Giffnock, has appointed **Ross Brown** as a director, **Emma Donaldson** as senior associate, and paralegals **Elaine Clark** and **Shona Currie** as senior executry assistant and tax assistant respectively, all in its Wills, Trusts & Executries practice. All join from BTO SOLICITORS.

LINDSAYS LLP, Edinburgh, Dundee and Glasgow, wishes to announce that, with effect from 6 June 2022, **Duncan MacKinnon** has resigned from the partnership.

MACDONALD HENDERSON, Glasgow advises the appointment of **Michael Strain** as a solicitor in the firm's Dispute Resolution team. He joins from KEOGHS.

MACDONALD LYNCH, Glasgow has promoted **Robert Telfer**, who joined the firm on its formation a year ago, to partner from 4 July 2022.

McEWAN FRASER LEGAL, Edinburgh, Aberdeen, Airdrie and Inverness, has appointed **Caroline MacBeath** as a solicitor in its Family Law team. She joins from GIBSON KERR.

MACNABS, Perth, Blairgowrie, Pitlochry and Bridge of Allan, has appointed **Duncan Mackinnon**, an accredited specialist in child law, as a consultant, and accredited paralegal **Lynne Kelly**, to its Family Law team. They join from LINDSAYS in Dundee.

MORTON FRASER, Edinburgh and Glasgow, has announced a total of 22 promotions. **Emma Kiel** and **Suzanne Sutherland** (both Real Estate), and **Ewan McGillivray** and **Nicola Edgar** (both Litigation), become legal directors. **Stewart Moy** (Corporate Growth), **Fiona Byron** (Private Client), **Andrew Gibson**, **Debbie Brogan** and **Hayley Johnson** (all Litigation), and **Emma Carmichael-Stewart** (Real Estate) advance to senior associate. There are six new associates: **Trudy Burns**, **Ellen Crofts**, **Katie Mahony** and **Anna Maitles** (all Private Client), and **Nadia Watson** and **Robin Keay** (both Litigation). Four new senior solicitors are **Kiril Pehlivanov** (Corporate Growth), **Stephanie Tinney** and **Stephen Wyper** (both Real Estate), and **Judith Baxter** (Litigation). **Charmaine Gomez** becomes a paralegal, Real Estate, and **Luke McNaughtan** a paralegal, Litigation.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Banchory, Ellon, Inverurie and Stonehaven intimate the appointment of **Carolyn Richards** as a partner on 13 June 2022. She was previously a senior associate with BURNESS PAULL.

SCULLION LAW, Hamilton and Glasgow, has appointed **Ailidh Ballantyne** as an associate director in the Wills, Trusts & Future Planning team. She joins from THOMPSONS where she was head of Private Client.

STRONACHS, Aberdeen and Inverness, has assumed **Deborah Law** of its Dispute Resolution team as a partner of the firm. **Lucy Cran** and **Callum Armstrong** have been promoted to senior associate in the Commercial Property and Corporate teams respectively, and **Hazel MacGregor** (Dispute Resolution), **Morven White** (Private Client) and **Sarah Adams** (Residential Property) have been promoted to senior solicitor.

STIRLING & GILMOUR LLP, Alexandria, Helensburgh and Clydebank intimate that with effect from 31 March 2022 **Graeme D Yeoman** has retired from the firm. The firm wish him a long and happy retirement.

TLT, Edinburgh, Glasgow and UK-wide, has moved its Glasgow office to the top floor of Cadworks, the first net zero office building in the city. Its address is 9th floor, 41 West Campbell Street, Glasgow G2 6SE (t: 0333 006 0400).

WORKNEST, Glasgow, Edinburgh, Aberdeen and UK-wide (incorporating the former LAW AT WORK), has promoted **Daniel Gorry** to legal director to manage its legal advisory teams in its Scottish offices.

The WS SOCIETY, Edinburgh, has appointed charity law specialist **Sophie Mills** to its executive as a solicitor. She joins from BTO SOLICITORS.

Dreams to dust

Nine years ago a young woman toured Scotland in pursuit of her dream career in criminal defence. Now, exhausted and broken, she is abandoning it. Lyndsey Barber tells the Journal what has driven her out, like many of her colleagues

> "Criminal defence is all I ever wanted to do... But my mental health now is the lowest it's ever been... I genuinely feel exhausted."

The speaker is Lyndsey Barber, who just nine years ago undertook an epic tour of Scotland to seek the criminal defence traineeship that would open the door to her dream job. Now, worn down by low pay on legal aid and a malfunctioning court system, she is packing it in for something different. She told the Journal the story of how the dream turned sour.

Readers may have heard some of it, through a (latterly tearful) video she posted to LinkedIn, and available on YouTube, to announce her departure. In it, she describes life at the defence bar today as "soul-destroying... It takes all my energy every day to open a courtroom door".

How then have we come to this point, for the determined young woman who from the time she started high school wanted to be a defence lawyer, who drove 1,800 miles crisscrossing the country from Wick to Wigtown visiting 85 different firms hoping to be offered a traineeship, and who after different qualified posts, claims she has "really enjoyed" in particular the combination of defence and children's hearings work that her present position provides?

Beyond breaking point

The doubts as to whether she could carry on, Barber tells me, began when she was newly married and applying for a mortgage and other finance, which she found a difficult experience on her earnings. Since then, she has discovered, "When I speak to people who aren't lawyers about what we get paid, every single one of them is surprised that it's not representative of the work we do."

The work began to lose its shine. "When you factor in everything else that goes with the job, you'll be on call, the callouts, the constant client messages on various platforms at all times of day or night, it was draining. I enjoyed the job but it was constantly overshadowed by worrying about bills and waiting for expenses to be paid and everything else. It just wasn't a pattern I could see the profession coming out of, and financially and emotionally it was taking its toll."

Then came the pandemic, which added to the pressures on mental health. "Very few defence lawyers were furloughed or took time off, and it was apparent that everybody was vulnerable, everybody was in an unknown situation, and there isn't the support that defence practitioners need. It was making me feel more vulnerable when I was already not feeling great about things. There's a lot more support, a lot more staff at the other side of the table and that's not a luxury that the defence have."

Post-COVID, with the pressure on the courts to reduce the case backlog, there is no longer the same allowance for the problems facing defence agents. "The courts are trying to get business as normal; if we're asking for adjournments because we physically don't have the capacity to do the cases, the frustrations from the sheriffs are aimed at the defence."

Some sheriffs in particular, Barber claims, know the pressures on the defence but tend to disregard them.

"The majority of criminal lawyers are never happier than when they're in court doing a trial, but at the moment more often than not cases are having to go off because someone is in a jury trial and the trainee can't appear in court or any number of reasons, and even sheriffs that know our firm well – and it has a good reputation – are not entirely sympathetic to the pressures of the defence and how it is at the moment."

If the system worked better, would she still be coping, with or without fee increases? "No. Absolutely not. The money is absolutely scandalous for what we do. I've seen somebody work out recently that it's just about minimum wage for a summary fixed fee, and that's whether the case is resolved immediately or at the end of matters. There's literally no money left in it. It's just beyond broken."

"People would walk"

What about the effects on her personally? "My mental health is the lowest it's ever been, because I find that the sheriff's attitude can have a massive impact on our day. If you know you're going to be at court with somebody who's going to give you a hard time for something that's unavoidable, it makes it so much harder when we've got constant pressure from clients as well.

"I'm not aware of having had mental health problems before. But now I genuinely feel exhausted, and the sad thing is I know there is an endemic problem in the profession now, of mental health and exhaustion and people who would walk away if they had another option. A lot of people."

It affects her family life, "because you can't switch off. It's not a 9 to 5 job and I don't think anybody entered the profession thinking it would be, but we don't have a support network and you can be on call or you get messages from clients in the middle of the night. You can put your phone on silent but you're constantly on edge just waiting for the ball to be dropped".

Likewise for her colleagues. "Everybody is just exhausted. People are worn down; you can see a physical difference in people when there's a certain sheriff on the bench. And that's horrible. Everybody is wanting to do their job so they can pay their bills or go on holiday or whatever, and when you consider how thankless it is to do this job you have to wonder how the profession survives."

Clients losing out

The video claims that the defence bar no longer has the capacity to service the workload. What does that mean in practical terms for clients or people seeking help?

"They're not getting the level of service they should be or that perhaps they would have got previously, because there are a number of additional procedures now for both summary and solemn cases that require extra work and preparation and an expectation that that will be done, but no extra money for it to bring in more trainees, more admin staff, more support staff. There shouldn't be any disparity or difference in how people approach a private case or a legal aid case; they should all be treated with the same merit and the same attention to detail, but we are not getting the time to look at cases for the next day or to prep things. I feel that a lot of us are just flying by the seat of our pants because we're just not getting the time to look at things."

Are would-be clients actually being turned away? "Yes, a lot of the time they are now. And that's unheard of."

A world away

Barber is off to do something completely different. Had she considered following many of her peers into the prosecution service, or focusing on her other love, child law? Maybe if she was starting her career now. "It is literally a no-brainer to me that if I was starting out again, as much as I've never ever wanted to prosecute, if I was at the trainee or NQ stage and I was going to get 15 or 20 grand extra for doing the same job with more support, and more perks across the table, that wouldn't even be a decision for me – I literally couldn't get the application form done quickly enough."

But it doesn't interest her now. "I know myself as a person as well – it just wouldn't be a good fit for me, though the money would be a massive temptation. Children, I could have done that full time, but even that is financially very punitive, and I think as well it's good for me as a lawyer to have the two disciplines – it gives you a break and a different focus as opposed to just doing children, especially as some of the subject matter is quite harrowing. I would struggle with doing that full time."

Instead, she is returning to a commercial firm in Geneva, where she spent some time pre-traineeship, but now working remotely. Strikingly different, it's the world of high net worth investors and hedge fund managers, of IPOs and due diligence on companies that are going public. Does it hold an appeal? "It's very different; it's very gruelling; it obviously has its own pressures, but it's a completely different world from what I'm doing now. It was very glossy and fancy, but it's still law and I'm very grateful to have the opportunity."

Not that she will be confined to a desk in her spare room. "No, I would struggle after being out and about so much! And I like people, I like interacting, and I have a lot of freedom to manage that. I can travel if I want. There's an office in Geneva and one in Wall Street, so I'm hoping to get a bit of travel in."

None of her colleagues grudges her the move. "I've been quite overwhelmed by the support. Everybody at various levels has been so approachable and quite emotional, particularly some older male lawyers with whom I've only really ever had maybe a cursory conversation, coming out of their way to say that they're grateful for the video, and sad at the same time." Absolutely no one has told her things will get better, or begged her to stay and rethink.

Of course, she is sad to be leaving her chosen career. "I am quite emotional about it, but for me, it's not manageable any more."

Will Barber's high profile departure have an impact? Her video concludes: "I'm being outspoken because I don't want anybody else to feel this way. What I hope comes out of this is at least that the people who can amend this, who can change it and make it better, do so. Because we deserve so much better."

"They're not getting the level of service they should be or that perhaps they would have got previously, because there are a number of additional procedures now for both summary and solemn cases that require extra work and preparation and an expectation that that will be done, but no extra money for it"

Legal aid: a gap still to bridge

Ministers have put a new legal aid offer package on the table, one that leaves a number of questions open. This is the position as the Journal goes to press

What next for legal aid? For a week or so after Lyndsey Barber's video, Scottish ministers were either silent on the subject in the face of growing pressure to engage with the profession, or deflected questions regarding a crisis by referring to progress in tackling the court backlog.

Then on Friday 1 July Communities Minister Ash Regan released a letter to Society President Murray Etherington setting out a revised package, said in effect to be a final offer, but leaving it open how the £11 million total cost should be actually shared out. In view of the continuing questions, it is worth attempting a summary of where it leaves us.

The letter first records that in May the Society set out proposals agreed jointly with the Scottish Solicitors' Bar Association, consisting of (a) an across the board 15% fee increase for criminal and civil legal aid, subject to (b) the summary criminal fee rising from £550 to £750 (36%), and (c) a s 76 fee of £1,135.58 (sheriff court) or £1,149.48 (High Court) – £43.16 is paid at present; and (d) commitment to a regular review, on a basis to be agreed. Ministers have costed this at £27 million per annum, a 22% rise in spending.

Capped proposals

After stressing the current pressures on public finances recently set out by the Finance Secretary, the letter states that ministers "cannot agree to increases in fees at the scale proposed by the profession". However, they offer the following:

- increases to the s 76 fee as they have previously proposed, not detailed but costing £1.98 million;
- an 8.8% increase to summary criminal fees, that calculation including (it appears) reversal of the proposal that the fee should cover additional deferred sentence hearings, and reinstatement of the mileage costs provision;
- a possible further general uplift, but subject to the capped total cost; and
- an evidence based mechanism for ongoing review, to be developed in line with recommendations of the Payment Panel.

In addition (and outside the cap) the traineeship scheme would be extended for a further two years.

The potentially tricky point for the Society/the profession is that variations could be agreed to put more money on to the summary criminal fee – or to a general uplift – but always within a total cost of £11 million, so that any additional money for one type of work comes at the expense of others.

"This is a substantial and credible offer," the minister declares. "I must emphasise that there is no scope for further immediate increases beyond this offer."

It is also conditional on the two representative bodies seeking a cessation of disruptive action by members, such as the boycott of domestic abuse cases; on active support for evidence gathering to support research into the appropriate level of fees; and on cooperation in continuing modernisation of the courts and the wider COVID recovery programme.

Reactions

Neither the Society nor the SSBA reacted positively, however. Highlighting that a generation of underfunding had left the legal aid system in crisis, Murray Etherington said: "This latest announcement from the Scottish Government may recognise a serious problem to be solved. However, it falls far short of the investment we have argued for and which we believe is necessary to retain solicitors in the legal aid system to ensure access to justice for all."

SSBA President Julia McPartlin told the Journal: "The latest offer from the Scottish Government is not enough to redress the imbalance [in pay and conditions with publicly funded bodies], so we will continue to lose solicitors and struggle to attract new talent.

"We have asked the Scottish Government to provide a full breakdown of their figures and the proposed new table of fees so that we can consider the latest offer properly. Unfortunately, there remains a great deal of mistrust of the Scottish Government and we need to scrutinise the proposal carefully.

"It is also crucial to the future of the profession that an appropriate fee review mechanism is put in place. The Scottish Government has yet to make a detailed proposal for review.

"The SSBA will canvass our members' views when we have this information. The boycott of Domestic Abuse (Scotland) Act 2018, s 1 cases will continue meantime."

The Society is considering the proposals in detail, taking soundings from members and will issue a further response in due course.

The power of emotion in law

Traditionally, lawyers have been schooled to mask their emotions but, Musab Hemsi argues, the law deals with emotional concepts, and clients (and colleagues) respond to those who show human responses

As lawyers, it is my experience that we often conform to standards of perceived normative professionalism. Personality is parked; it is seen as mutually exclusive with the traits of a "traditional lawyer" – whatever one of those is.

As Emeritus Professor Susan A Bandes of DePaul University College of Law put it in 2016: "The legal system has long been inhospitable terrain for the study of emotion. The standard model of legal education treats law as a science, legal reasoning as a purely deductive process (Langdell 1871), and emotion as the enemy of reason. In this model, emotions are individual, arbitrary, unanalyzable, and ultimately a threat to the proper functioning of the legal system. They are, in the words of one prominent legal scholar, 'inconsistent with the very norms that govern and legitimate the judicial power' (Fiss 1990). This attitude is still pervasive in law."

Let me elaborate. My hypothesis is that positivity, enthusiasm and happiness are underrated by law firms. Scottish law firms choosing an antiquated attitude towards emotion are at odds with many of the laws we interpret.

We deal regularly with concepts of trust, confidence, reasonableness, injury to feelings, suffering – all intangibles which register on an emotional scale. When law firms hire or reward based on unsupported or mistaken notions of how in control of emotions a person might appear, they are missing a trick.

Take a moment to think about how emotion translates into some of the key areas where lawyers seek to excel.

Studying law

The belief that emotion plays no good role in reasoning has also had a powerful, and often pernicious, effect on the education of law students. Speaking to law students through the Law Society of Scotland Racial Inclusion Group, through events with the Scottish Discrimination Law Association and SYLA and other firm/university gatherings, I could not help but feel their real personalities had to be unveiled over time. Individuals harboured a genuine reluctance to draw attention to themselves with any overt display of emotion, no matter how positive.

Musab Hemsi is a director with Anderson Strathern

Winning new clients

The traditional assumption that those trained in the law should not traffic in emotion has led to large gaps in our knowledge about those who engage us. Our clients are increasingly our audience. They scan our content, our videos, our websites and our demeanours, not to award prizes for brilliant legal rationale and understanding, but for our more human traits. The ability to know, like and trust has long been seen as the triumvirate for securing new client relationships across different sectors. As those relationships are cultivated over time, through shared experiences and social (as well as legal) interactions, liking and trust increase in the minds of both lawyers and those we proudly serve.

Building strong client relationships

Lawyering in general raises a host of other emotional issues. For example, client relationships may raise issues of loyalty, empathy, anger, frustration and sadness. Lawyers must address their clients' hopes and fears and establish trust under difficult circumstances. They must also deal with their own emotions – but that does not mean hiding them.

Being yourself

During lockdown, a colleague and I attended a virtual funeral for a wonderful lady we had worked with as a client for many years. I cried hard that day and still miss her. I have also celebrated births, birthdays, nights out, charity events and weddings with clients. The ability to embrace empathy, sorrow or happiness is human. I encourage any reader – please do not feel you have to hide yourself or your human responses: they have truly awesome power.

The talented future of the Scottish legal profession would do well to be reassured that those holding the torch love to see them happy, positive and thriving. Those emotions enrich our offices and firm cultures. Increasingly, we seek out these individuals – people who will showcase their range of emotions and bring their true selves to work. Our clients love them, and so should we.

"The talented future of the Scottish legal profession would do well to be reassured that those holding the torch love to see them happy, positive and thriving. Those emotions enrich our offices and firm cultures"

Rights without remedies?

The Bill of Rights Bill purports to retain the human rights contained in the European Convention, but contains practical limitations and makes it harder for those claiming infringement of their rights to obtain redress, as Lauren Smith explains

The UK Government proposes to repeal the Human Rights Act 1998 ("HRA") and replace it with a Bill of Rights. On 22 June 2022, the Government introduced the Bill of Rights Bill into Parliament.

On the surface, the bill seeks to protect the same European Convention on Human Rights ("ECHR") rights as are currently defined as Convention rights under s 1 of the HRA. However, the explanatory notes to the bill list a plethora of proposed policy changes to the approach to human rights protection in the UK, which are reflected in its drafting.

This article explores three of the key proposed changes to human rights protection under the bill and the potential impact of these changes in practice. It will focus on the changes to remedying Convention-incompatible domestic legislation, the proposal to make the UK Supreme Court the "ultimate judicial authority" on Convention rights, and the proposed weight to be given to freedom of expression over other Convention rights.

Remedial action for domestic legislation

The HRA provides courts with two ways to remedy Convention-incompatible domestic legislation. First, legislation can be read and given effect by the courts in a way that is compatible with the Convention rights, so far as this is possible (HRA, s 3). Alternatively, the court can make a declaration of incompatibility, i.e. a formal notice that the legislation is incompatible with a Convention right (HRA, s 4). In practice, under the HRA, declarations of incapability are far less frequently relied on by the courts compared with the s 3 remedy.

The bill proposes to remove the courts' power to read and give effect to legislation in a way that is compatible with Convention rights. Instead, the courts will be required to rely on declarations of incompatibility to seek to remedy legislation regarded as incompatible with a Convention right.

Under the bill, where a declaration of incompatibility is made by a court, a UK Government minister, if they consider "that there are compelling reasons for proceeding" to take remedial action, "may by regulations make such amendments to the legislation as the minister considers necessary to remove the incompatibility" (clause 26). Although this mirrors the HRA power following a declaration of incompatibility (s 10), it is likely to be starker in practice. As the s 3 compatibility remedy is removed, there is reliance solely on declarations of incompatibility to ensure domestic legislation is ECHR compliant in a case before the court.

The s 3 remedy has the immediacy of interpreting legislation in a Convention-compliant way in order to protect an individual's Convention rights. An example of its use is the decision of the then House of Lords in *Ghaidan v Godin-*

Mendoza [2004] UKHL 30, in which the court read the Rent Act 1977 so as to comply with articles 8 and 14 of the ECHR, to include the same protection to a partner in a same-sex relationship to succeed to a statutory tenancy as was afforded to heterosexual couples.

With reliance on declarations of incompatibility, the recognition of an individual's right in terms of legislation is a far more protracted process. It puts control of remedial action in the hands of the relevant minister to consider whether "there are compelling reasons" to proceed with remedial steps. Of particular concern where a government is opposed to, or at least interested in limiting, protection of fundamental rights, is the control over this route for remedying incompatible legislation. In this instance, a declaration of incompatibility may be viewed as a badge of honour rather than scope for improvement.

Ultimately, where legislation is declared incompatible, it may be possible for an individual to pursue the protection of their Convention rights to the European Court of Human Rights ("ECtHR"). Although the bill declares the UK Supreme Court as the "ultimate judicial authority on questions arising under domestic law in connection with the Convention rights" (clause 3), the UK, as a party to the ECHR, remains subject to the supervisory jurisdiction of the ECtHR.

However, an individual requires to exhaust their domestic remedies before proceeding to the ECtHR, which is likely to be a lengthy process. This is in stark contrast to the possibility of the offending legislation being read and given effect to as though compliant, possibly at first instance, in terms of HRA s 3.

The removal of an equivalent to s 3 of the HRA shifts the day-to-day remedial work of Convention incompatible legislation from the hands of the courts, who can effect remedial work swiftly in cases presented before them, to UK Government ministers who may be, in effect, marking their own party's homework.

By this removal, an individual's ability to protect their Convention rights against offending legislation is weakened, as they have to rely on a minister deciding to take remedial action. One of the UK Government's policy aims of the bill is to increase democratic oversight of human rights issues. However, the revised approach is likely to increase the executive's oversight.

Limits on judicial interpretation

Under s 2 of the HRA, a court is required to take into account the jurisprudence of the ECtHR when such jurisprudence is relevant to the legal question before the court. There is no equivalent provision in the bill. Instead, as noted above, under clause 3 the UK Supreme Court is marked as "the ultimate judicial authority" on questions arising in connection with Convention rights.

This appears to be in pursuit of the UK Government's policy objective to "strengthen domestic institutions and the primacy of UK law". The presumption appears to be that domestic courts will interpret the Convention more narrowly than the ECtHR. However, despite what is declared under clause 3, in terms of international law the ECtHR remains the ultimate judicial authority on interpretation of the Convention.

The bill as currently drafted may place the courts in a difficult position. As currently drafted, the courts may not adopt an interpretation of a Convention right that expands the protection afforded by the right "unless the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it" (clause 3). The explanatory notes state that "this does not require a court to predict the exact judgment that the ECtHR would make". However, it would seem that a level of judicial guesswork would be required.

As demonstrated in clauses 5 and 6, the bill seeks to restrict judicial power to enforce positive obligations on public authorities, and to reduce the protection of rights to UK citizens who are subject to a custodial sentence. This appears to be in fulfilment of the UK Government policy aim to "recognise that responsibilities exist alongside rights". It is striking that these provisions appear beside one another in the bill. In pursuit of this policy, the bill appears to be seeking to reduce the responsibility owed by public authorities, while limiting applicability of Convention rights to a defined group of individuals. This appears to be at odds with article 1 of the ECHR, which requires the UK, as a party to the ECHR, to secure "to everyone" their Convention rights under articles 2-12 and 14 of the Convention.

Regardless of the restrictions on judicial interpretation, as the UK remains a party to the ECHR it will remain possible for an individual to pursue the protection of their Convention rights to the ECtHR, which will follow its own jurisprudence. However, the ultimate control as to whether legislative change will be effected by the decision of the ECtHR will lie with Parliament, whose legislative agenda is largely influenced by a majority government.

Hierarchy of Convention rights?

Under the bill, article 10 protection of freedom of expression is rebranded to "freedom of speech". In terms of the bill, it is proposed that "a court must give great weight to the importance of protecting the right". This is fleshed out in the accompanying explanatory note, which suggests that freedom of speech is to be afforded primacy over, for example, the article 8 right to private and family life. However, it is proposed that freedom of expression is not absolute and remains subject to the qualifications detailed under article 10(2) of the Convention.

The reference to the primacy of article 10 over article 8 appears particularly stark in light of the recent US Supreme Court decision to overturn *Roe v Wade*, and comments of the First Minister in regard to establishing buffer zones around abortion clinics. At present, protection of competing article 8 and article 10 rights would be on an equal footing. However, in terms of the bill, "great weight" would require to be given to the importance of protecting freedom of speech, which could tilt the judicial balance in its favour, albeit there may be limits in light of article 10(2) in terms of, for example, "public safety" and "prevention of disorder or crime".

If this clause remains following the legislative process, there will no doubt be litigation regarding how to define the proposed "great weight" to be afforded to freedom of speech. In effect, the proposed increased protection of freedom of speech will likely be at the expense of protecting other competing Convention rights.

Protection curtailed

On review of three of the proposed changes to Convention rights protection in the UK, it is evident that the bill, as currently drafted, will curtail the protection of an individual's fundamental rights. The lack of an equivalent to s 3 of the HRA will push control of remedial action for incompatible domestic legislation to the executive. The proposal of the UK Supreme Court as the ultimate judicial authority, albeit incompatible with international law, suggests a focus on narrowing the courts' interpretation of Convention rights. The treatment of freedom of speech as paramount to other Convention rights will likely lead to the weakening of protection of other competing rights. As the bill generates much public attention, it will be interesting to see what survives of its current drafting as it progresses through the Houses of Parliament.

Lauren Smith is an associate in Public Law Litigation with Balfour+Manson

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Not proven and back again: an academics' tale

As debate continues over the future of Scotland's three jury verdicts, a psychologist team from The Open University report on their research comparing results under different systems, and what might counteract juror misconceptions

Scotland's jury system differs in a number of ways from jury systems used elsewhere in the world, primarily the number of jurors who sit on a jury, the verdicts available, and verdicts being reached by a simple majority. These important differences have been at the heart of this team's research for a number of years. As psychologists who are interested in decision making, we have been studying how Scotland's unique system can influence the way jurors view the accused and the verdicts they reach.

"Legal professionals ranked a proven and not proven system as significantly preferable to either the Scottish three-verdict system or the Anglo-American guilty and not guilty system"

Two studies

Two of our most recent studies were (i) a survey of Scottish legal professionals' opinions of the Scottish jury system, and (ii) an experimental study investigating the effects of different verdict systems on jurors and the verdicts they return. In the former, legal professionals ranked a proven and not proven system as significantly preferable to either the current Scottish three-verdict system or the Anglo-American guilty and not guilty verdict system. One reason for this may be that such a verdict system might direct jurors to their true role of focusing on the "proof" provided by the prosecution, rather than their perception of "guilt" towards the defendant.

In the second study, we compared the effects of a potential proven and not proven verdict system with the existing Scottish and Anglo-American verdict systems. We showed jury-eligible volunteers a video of a staged murder trial, filmed in a real courtroom as part of a joint venture between the Faculty of Advocates, Bloody Scotland and the Modern Studies Association of Scotland. There were a number of interesting findings from the study:

1. jurors were significantly more likely to convict in the Anglo-American guilty and not guilty verdict system when compared with the other two systems;
2. there were no significant differences in conviction rate when comparing the current Scottish verdict system with the proven and not proven verdict system;
3. the majority of the volunteer "jurors" had misunderstandings about the Scottish legal system, such as thinking that a jury consisted of 12 members and not knowing which verdicts existed in the Scottish jury system.

The first two findings suggest that the labels used for the verdicts may be more important than the number of verdicts that are available. We hypothesise that the words "proven" and "not proven" (in both our novel system of proven and not proven and the current Scottish

system) helped jurors to focus on the prosecution's evidence and evaluate whether it met the required standard of proof beyond reasonable doubt. This caused them to acquit more frequently than jurors only provided with the options of guilty and not guilty. In other words, consistent with the first study, the word choice of "proven" in a verdict system may prime jurors to think about how much proof the prosecution really has. As the burden of proof is on the prosecution, we do not think this is a negative and we would recommend a proven and not proven verdict system as a potential replacement to the current system.

Adoption of the Anglo-American verdict system may increase convictions, relative to the current Scottish verdict system, in certain trial types (e.g. murder). However, we do not know whether the increase in convictions would be entirely appropriate. An increase in *wrongful* convictions would represent a failure of natural justice, as well as potentially costing the taxpayer in compensation payments and retrial costs. Adopting a proven and not proven system, on the other hand, would remove not proven as the "second class" acquittal verdict in the current Scottish system and might keep the conviction rate constant across the change. The latter point might be a positive overall, as a wrongful conviction typically leads to two injustices, as the guilty person escapes justice and an innocent person is punished, whereas the acquittal of a guilty party only involves one injustice.

Sexual offences: why the differences?

However, keeping the conviction rate consistent would not necessarily be an unqualified good. It may not be desirable in offence types which may already lead to a disproportionate number of acquittals of *potentially* guilty parties, which currently may be the case in sexual offences. For example, in Scottish courts the conviction rate for rape and attempted rape was 47% in 2018-19, lower than any other crime type and much lower than the average conviction rate in Scotland of 87%.

It is very unlikely that rape cases are being brought to court on a substantially different basis than all other crimes (e.g. with much weaker evidence). Therefore, the Scottish Government has a duty to try to improve the conviction rates for rape and other sexual offences, as long as wrongful convictions are avoided, and psychological researchers can help to inform the action they take through investigating potential factors, such as the not proven verdict, that might influence conviction rates.

Some have argued that the abolition of the not proven verdict may help to increase the conviction rates in rape trials. However, the evidence, from experiments, that a change from a three-verdict to a two-verdict system will increase convictions specifically in rape and sexual assault trials is currently weak. Ormston et al (2019) found that the Scottish verdict system led to significantly fewer convictions than the Anglo-American system in physical assault trials, but not in rape trials. Similar findings were made by Hope et al (2008). This does not mean that the availability of the not proven verdict does not influence conviction rates in rape trials; rather it means that experimental data have not captured this if it is the case.

Archival data show more clearly that England & Wales has a higher conviction rate than Scotland for rape trials (70.7% versus 47%). However, it is difficult to make causal conclusions with this type of data, as the conviction rate differences might be influenced by additional factors, such as the simple majority verdict system. We cannot, therefore, be sure how much the availability of the not proven verdict influences conviction rates when comparing archival data in Scotland with England & Wales.

Conviction rates for sexual offences are also substantially below the average conviction rate in other jurisdictions, including south of the border (the average conviction rate is 81% for all crime types in England & Wales, which is higher than the 70.7% conviction rate for rape in that jurisdiction). This suggests that it is not just an issue created by the Scottish jury system; but it may be exacerbated by it, if wavering jurors choose not proven as a "fence-sitting" option.

Countering juror bias

One factor that may affect sexual offence trials, in any jurisdiction, is the existence of prejudicial and false beliefs about sexual assault and its perpetrators, victims and survivors. These beliefs, often referred to as "rape myths", are widely held by the general public, from which juries are summoned, and can be intentionally or unintentionally invoked by legal actors to manipulate jurors' interpretations of the evidence. The solution to the issue of low conviction rates for sexual offences might not be found in the abolition of the not proven verdict, then, but may instead reside in providing more education in relation to the law, consent and rape myths to the general public.

"The majority of our sample of members of the Scottish public did not know how many jurors sat on a jury in Scotland"

Lee Curley (above) is a lecturer in psychology, **Lara Frumkin** (above) a senior lecturer in psychology, **James Munro** a psychology technical lead (teaching and research), and **Jim Turner** a senior lecturer in forensic psychology, all at The Open University

Indeed, as noted above, another key finding from our study was that our sample of jury-eligible members of the Scottish public were not knowledgeable about important aspects of the jury system in Scotland. For instance, the majority of jurors did not know how many jurors sat on a jury in Scotland (the most common answer, incorrectly, being 12). They also did not know which verdicts were available to jurors. We suggest that American and English film and television representations of trials lead to a Scottish-specific "law and order" effect on jurors, where their limited knowledge of the courtroom is supplied by television shows set in other jurisdictions. If the masters of the facts do not understand their role, how can they perform it effectively? This is not just an issue in Scotland, however; research from other jurisdictions shows that jurors have difficulty understanding legal concepts such as beyond reasonable doubt.

To rectify both the low conviction rates in sexual offence trials and the lack of knowledge that prospective jurors have about the Scottish legal system, we suggest that better education, informed by psychological research, be provided. An online, short training course could be provided to jurors selected to attend jury duty. The course could educate jurors on potential verdicts, different legal concepts (e.g. beyond reasonable doubt), potential biases that might influence them (e.g. rape myths), decision making strategies, notetaking advice, and a basic understanding of legal evidence. We believe that such training would help attenuate the role that error/bias play in the courtroom and ensure that jurors better understand the legal process.

Psychology has a substantial body of knowledge on jury decision-making, including specifically in the Scottish context. There are, of course, limitations to the research (e.g. jury decisions in experimental studies do not have real-world consequences). However, researchers have addressed this issue through the triangulation of data, by researching different samples and using various methods and trial materials. An important next step for researchers in Scotland is to investigate the effect that education has on the decision-making of jurors.

Interim aliment: barred by agreement?

Should a motion for interim aliment be heard if it relies on a pre-nuptial agreement under challenge as not fair and reasonable? A sheriff has agreed that it should, Ashley McCann reports

R v K (EDI-F205-21), unreported, concerned a motion for interim aliment prior to determination of whether a pre-nuptial agreement bearing to exclude all claims under the Family Law (Scotland) Act 1985 (including aliment) should be set aside or varied on the basis that it was not fair and reasonable at the time it was entered into. Raised as a standalone action for divorce by the husband, the case was defended by the wife who sought financial provision and interim aliment.

The latter was opposed on quantum and on the basis that the court should not consider a motion for aliment until it had determined whether the exclusion clause was fair and reasonable. It was argued that this could only be done after proof, and that to allow provisions of a binding contract to be cast aside on an interim basis would set a dangerous precedent having regard to our culture of entering into separation agreements that routinely exclude alimentary claims.

The defender's submission to the contrary was that:

1. Section 6 of the 1985 Act provides a self-standing right to apply for interim aliment at any time, based on the applicant's needs.
2. Further, s 7(1) provides that "Any provision in an agreement which purports to exclude future liability for aliment... *shall have no effect*" unless the provision was fair and reasonable at the time the agreement was entered into, thus placing the onus on the pursuer in that respect.

In the absence of case law, para 2.131 of the Scottish Law Commission's *Report on Aliment and Financial Provision* (1981), which sets out the policy underpinning the 1985 Act, was cited. It states: "The fundamental difficulty in relation to interim aliment *pendente lite* is that awards have to be made before the facts have been properly established. For this reason, the normal rules on entitlement, defences, quantification and the powers of the courts cannot apply without qualification... It is clear that in relation to aliment *pendente lite*, the court must have a wide discretion. It must be able to award aliment to someone who may at the end of the day turn out not to be entitled to aliment. It must be able to order aliment to be paid on an interim basis by someone who may at the end of the day turn out to have a good defence. It must be able to quantify an interim award in a rough and ready way on the basis of incomplete information: any other solution would result in delay which would frustrate the whole purpose of an interim award."

Ashley McCann is an associate with Gillespie Macandrew. The firm acted for the defender in this case.

"Courts will make an award of interim aliment without the full facts. The fact that an order may be at variance with the ultimate outcome of a claim for aliment is not persuasive or determinative"

The pursuer submitted that this was not on point: the fact that there may be occasions on which the strength of a defence cannot be properly assessed at interim stage does not mean that the court should disregard a pre-nuptial agreement that specifically excludes such a claim.

Freestanding right

Sheriff Kenneth Campbell QC agreed with the defender's interpretation. It would be "fundamentally wrong" if the court was precluded from awarding interim aliment prior to ruling on the disputed fairness and reasonableness of an agreement purporting to exclude it, which would have to be determined on another occasion. That, he said, would "load the dice against the party applying for interim aliment (in this case, the defender), since the question under s 7 will almost inevitably require proof. That would be surprising since s 7 plainly places the onus on the party relying on the agreement..., who will, *ex hypothesi*, be the paying party in an interim aliment application. Since ss 6 and 7 form part of the same statutory scheme, where s 6 is a freestanding right, separate from all questions of final financial provision, in my opinion, it cannot have been intended that s 6 is excluded by a pre-nuptial agreement of the kind in this case".

The sheriff was careful to emphasise that his decision was made against the background of a pre-nuptial agreement, not a separation agreement, and that he expressed no view about the parties' arguments in the context of a separation agreement. In the writer's view, the decision provides some useful takeaways for family practitioners that apply to all forms of agreement that purport to regulate aliment:

1. Interim aliment has deliberately been cast as a self-standing right. It is competent to make a claim where there is an agreement bearing to exclude alimentary claims. To require proof first would be inconsistent with the policy intention of s 6.
2. Section 7 places the onus on the party relying on an agreement bearing to exclude alimentary claims. This could be relevant in the context of separation agreements where the parties have not yet divorced.
3. Courts will make an award of interim aliment without the full facts. The fact that an order may be at variance with the ultimate outcome of a claim for aliment is not persuasive or determinative.
4. More broadly, the decision endorses the ethos of the 1985 Act as being one of meeting need.

New Ways – less conflict?

Shared Parenting Scotland is piloting a new training programme for separating parents, designed to reduce conflict

Over 12 years of casework, Shared Parenting Scotland has supported hundreds of parents who are struggling to make sense of their own emotions around separation and their palpable distress at the disruption of their relationship with their children.

At the same time, they discover that the Scottish legal system's adversarial approach to resolving childcare disputes can trap them in hostility. The shorthand term is "high conflict", when one or both parents have lost their sense of direction in pursuing what they will each vehemently insist is best for their children.

New Ways for Families® is an approach developed by the High Conflict Institute, created by Bill Eddy, previously a family lawyer, mediator and family therapist in the USA. It focuses on four big behavioural skills that actively help separating parents control at least their own part in the conflict: identifying difficult emotions; managing them; developing flexible thinking; and strategic parenting. It also concentrates on the impact high-conflict environments have on our children's development and future opportunities.

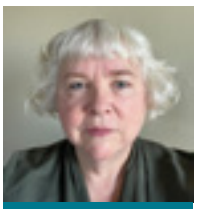
Shared Parenting Scotland is exclusively licensed to offer the training in Scotland. It has recruited a number of coaches including experienced solicitors, family therapists and other professionals who have all trained with the High Conflict Institute. Their one-to-one interaction with each learner at three separate points over the learner's course gives the programme its distinctiveness.

For the learners, the flexible training comprises 12 online modules which take about 12-15 hours to complete, at their own pace. The course features information, videos and role play, as well as a personal journal in which learners document their journey.

New Ways for Families® isn't mediation. If both parents sign up they will be allocated different coaches. Nor is it legal advice. It empowers parents with the skills and insight to find their own way to put their children ahead of their urge to discredit each other.

A recent independent study from Orange County (USA) on the New Ways approach recorded 37% of parents noting an improved relationship with their co-parent, and 61% an improved relationship with their children.

Although only at the midpoint of our pilot, the feedback from parents undertaking the course has been extremely positive, not only in the context of their contact and residence issues but quickly transferring into other areas of their life.



Claire Ross, training manager, Shared Parenting Scotland

A solicitor/trainer's view:
Fiona Mundy writes

I began work as a civil litigator in 1983 and handled my first proof in a custody and access (as it then was) case in 1984. I persuaded a sheriff to award joint residence in a divorce action in 1989, and have worked in family and general civil litigation ever since. I became a solicitor advocate in 2001.

I am acutely aware our current adversarial system in family cases frequently polarises positions, despite the introduction of child welfare hearings and attempts to bring cases involving childcare to conclusion faster. The system in my view allows parties to "win", and this in some cases damages relationships between parties and their children. I was very interested to hear about the New Ways for Families (NWFF) programme, as I felt it might provide separated parents with the tools to avoid, or defuse, some of the conflicts which can arise, potentially allowing them to stay out of court.

After investigating the programme, I decided to train as a coach. This involved online sessions with the High Conflict Institute, followed by three remote training sessions lasting nine hours. They were very informative, discussing, among other things, the behavioural patterns of high conflict individuals and how to recognise and deal with these.

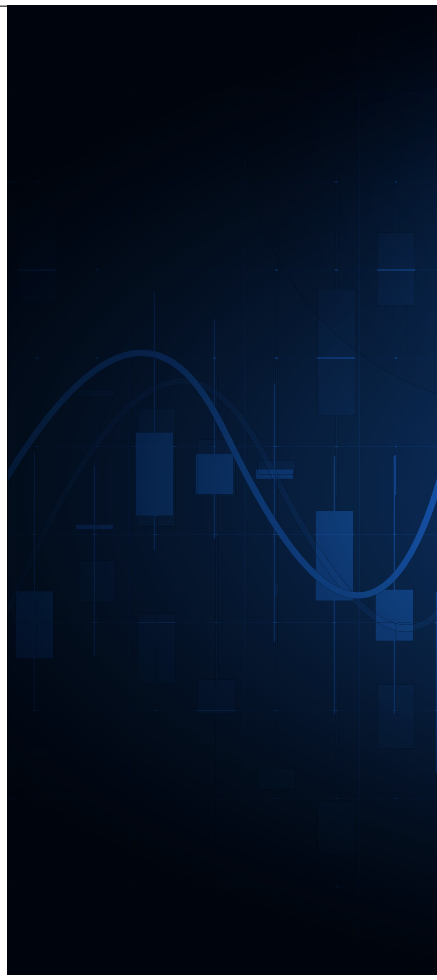
Having completed the programme, I am now working with my first learner. I have found this a daunting, but very interesting, experience. The challenge is not to be dragged into the learner's personal circumstances but to keep them focused on learning the NWFF core skills in the three sessions coaches have with their learners. Time is the great limiter, and the need to coach the skills while establishing a rapport with the learners.

They naturally will want to discuss their circumstances – they are looking for help. As a family lawyer, the temptation is to try and guide them, but the programme needs learners to practise the skills their online sessions are teaching them and to identify situations where they can profitably use these. Unfortunately, it doesn't currently provide for follow-up sessions, but this may come in time.

As a lawyer, I hope that the skills the online programme and coaches are teaching may become generally recognised by the profession and used in our day-to-day practice. I hope family practitioners will refer separated parents to the programme even before conflict has arisen, to teach them the skills to avoid it. I hope sheriffs will refer litigants to the programme as soon as it becomes clear that agreement in relation to their children's care is not possible.

This programme should not just be used for difficult cases. It should become routinely available for separated parents. The skills taught are also relevant to the workplace, where conflict can arise all too easily, and indeed our day-to-day lives. They have universal applicability.

Fiona Mundy is a consultant at Johnson Legal and a solicitor advocate



Tradecraft tips

Ashley Swanson compiles some further practical advice based on his years of experience at the coalface of client service

Guiding your clients

On occasion I have considered including in the narrative of a fee note: "To making your mind up for you", where the client has been dithering about some matter much to my annoyance. On the other hand, a solicitor has to take their client's instructions and cannot really dictate to them.

A client had a business that he was looking to wind up. The bank overdraft was secured not only against the business premises but also against the client's house. The client was determined that the free proceeds of sale of the premises would be sufficient to clear the overdraft so that he would not have two securities on his house. The premises stuck on the market, and every time overdraft interest was applied the client was looking to receive a higher price. He did not appreciate that the open market value of the premises was not in any way linked to the size of his overdraft.

What I found incredible about the situation was that the mortgage on his house was less than £1,000, so why he could not have left say £10,000 of the business overdraft secured on the house and paid it off over a number of years as some sort of term loan was beyond my comprehension.

I was not directly involved in the matter, but if I had been acting I would have emailed the client summarising my view of the situation, making the appropriate suggestion, and asking in the most courteous and polite way: "Do you really know what you are doing here?" Doing this at a face-to-face meeting or on the telephone would not be the correct way, as there would be a danger of getting a response on an emotional rather than a rational level. Clients need to be left to ponder on such matters without feeling obliged to give an immediate response.

Part of the solicitor's job is to be sure that the client knows all the options that are open to them. Some solicitors may be hesitant about suggesting alternative courses of action to clients that are contrary to their initial instructions, just in case something goes wrong and they have to take the blame, but you are doing your clients a disservice if you do not make them aware that there may be different ways of approaching the same situation.

Put it in writing

I was involved in a difficult case and the other solicitor phoned me to discuss the matter. I was worried about losing my temper with him so I asked the receptionist to tell him that I would only communicate in writing. I did not realise at the time how valuable this decision actually was.

The matter was later the subject of a third-party complaint, but when reviewing my file at least the SLCC knew that it told the whole story and there was nothing that did not appear in the file. The SLCC must often wonder if the file they are given to look at tells the whole story. In this case, it clearly did. The complaint was not upheld.

If you have an inkling that the matter in hand might have consequences in the future or be the subject of scrutiny by the authorities, it is worth considering having everything in writing either by letter or email. The added advantage is that in composing an outgoing email or responding to an incoming one you have time to think about what you are saying, and also time to ask someone else in your firm for their view. Not every solicitor is at their best on the phone or in a face-to-face meeting.

Holding on to the client

A client was selling her house and it was sticking on the market when other similar properties seemed to be selling quite readily. Month after month was going by and I was greatly concerned that the client would get the impression that we were doing nothing to assist with the sale, and end up asking another firm to take over the marketing. There was nothing wrong with the house; it was one of those cases where it was very difficult to work out why it would not sell.

Just to show that we were doing something, on three separate occasions I prepared a chart with information from the Aberdeen Solicitors Property Centre giving details of all similar houses sold in the recent past or currently for sale, with details of how the selling price or asking price related to the survey value in the home report and how long each property had taken to sell or had been on the market. This did nothing at all to secure an eventual sale, but at least I was engaging both with

the client and with the market and the client could not gain the impression that I was indifferent to the situation.

Sometimes in a long drawn-out matter you simply have to get some "joined-up writing" out there, even if it is only to confirm to your client that nothing is happening and that you are trying to make something happen.

Does size really matter?

For many years, I worked for a sole practitioner, but if I was wrangling with a much larger firm about something I was never particularly fazed by this. If the other firm had 15 partners, I thought that if you took away the court partners, the executry partners and the corporate partners you might be left with only four or five conveyancing partners, and the ones not involved in the matter at hand might take the view that they already had enough work and they did not need to spend hours on another partner's work. More often than not it was me on one side and only one solicitor on the other.

A client of the firm died. He had operated a one-man accountancy business, and a small two-partner accountancy firm wanted to take over the client base. One of the partners said to me: "These huge international accountancy firms can solve any accountancy problem anywhere in the world. They have the resources to do these things, but the man running the corner shop does not need this. All he needs is someone to prepare his accounts and check his income tax assessments. We can do this and we are not carrying enormous overheads in the process."

Do not feel intimidated if the other firm is much larger than yours. This does not make their client's case any better than it would otherwise be, and it does not mean they are any better at dealing with the matter than you are. In many cases, the larger firm has no more ability or resources than you have.

Festina lente (Hasten slowly)

Twice in the recent past, other solicitors seemed to be trying to hustle me into fixing what I considered to be an impossibly short settlement date. What perplexed me about this was that both transactions had been dragging on for months, and in neither case would the clients be moving into the properties on settlement day. While I do not want to be inconveniencing other solicitors or their clients, there is seldom any reason for making a rod for your own back. Often if you try to give one transaction top priority you are throwing two or three others out of joint in the process. The only time when you should be flooring the accelerator pedal is when there is a genuine reason why the transaction needs priority or there has been some want of attention on your part which needs to be compensated for.

The golden hour

Everyone has their own way of working. Some people need coffee poured into them first thing in the morning before they are up to speed. Unless there is some urgent matter requiring immediate attention, I start most days with what I call the golden hour and deal with such incoming emails as require only a few minutes' work or do whatever else I feel like doing (provided it is chargeable work), before settling down after 10am to matters requiring longer periods of attention.

Entering the dragon's den

In a firm I worked for after qualifying, one of the partners managed somehow to operate the client account without going through the cashroom. The cashier came up to his room and literally threw him out through the window, partner or no partner.

Never, repeat never, fall out with the cashroom or take liberties with them. Make sure that you are fully conversant with the Law Society of Scotland rules about holding funds for clients, and never break them no matter how much pressure you may be under to settle a transaction or to do anything which requires money to be paid out of the client account.

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

Issues on appeal

A collection of issues arising in relation to appeals, expenses, personal injury actions and the leading of evidence forms the bulk of this month's civil court roundup

Civil Court

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

There have been some interesting procedural and substantive issues relating to appeals in the last two months. The Courts Reform (Scotland) Act 2014 made significant alterations to the appeals structure, with a view to restricting appeals generally and excluding unmeritorious appeals which took up disproportionate judicial time. It is difficult to assess whether those aims have been achieved, but there are still many appeals that simply do not get off the ground.

On an entirely different point, there have only been a handful of published decisions from the sheriff courts in the last three months, and only four published decisions from ASSPIC since the beginning of this year. Does anyone know why that should be?

Appeals

O'Neill and Lauchlan v Scottish Ministers [2022] CSIH 13 (9 March 2022), was an application seeking leave to appeal to the Supreme Court against the dismissal of the applicants' petition for judicial review. Section 117 of the 2014 Act introduced a new s 40A of the Court of Session Act, providing a test for leave that "the appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time".

The inner House refused leave, saying: "The primary issue which arose in this case was a simple question of statutory interpretation. The main arguments... were not only not advanced previously, they contradict the clear position... previously advanced, and are not in any event arguable. It is not appropriate to grant leave to appeal to the UKSC on such a basis... Otherwise the matters raised simply disagree with the outcome of the case."

In *Warner v Scapa Flow Charters* [2022] CSIH 25 (10 May 2022), the Inner House overturned a decision of the Lord Ordinary after proof before answer. The court found that the Lord Ordinary had erred in law and therefore it could intervene as an appellate court. The action concerned a "technical" diver who injured himself when crossing the deck of the dive boat to make his dive. The skipper was blamed for failing to take reasonable care.

"Defining the standard of reasonable care requires the judge, as the hypothetical reasonable person in the position of the defenders, to weigh various elements", Lord Carloway said. "The equation notably, but not exclusively, involves evaluating the risk of any accident occurring, the seriousness of any potential injury, the practicality of any specific precaution, and the effect of any prohibition on the activity in question. It is in carrying out this exercise that the court considers that the Lord Ordinary has erred...

"The fundamental question remains one of whether the standard of care extended to prescribing, monitoring and controlling the manner in which each member of a group of highly skilled and experienced technical divers put on their diving gear and moved to the exit point."

On the other hand, in *McDonald v Indigo Sun Retail* [2022] SAC (Civ) 15 (21 April 2022), the Sheriff Appeal Court declined to overturn the sheriff's decision after proof before answer to award the pursuer substantial damages for hearing loss. The pursuer had been subjected to a lengthy exposure to a fire alarm on a single occasion. One of the main arguments was whether the sheriff had been entitled to conclude that this incident had actually caused her symptoms.

The SAC said that causation was a matter of *fact*. The pursuer's evidence about the symptoms arising immediately after the exposure raised "a *prima facie* presumption that the hearing loss was caused by the noise of the alarm". Her evidence, taken along with the evidence of an acoustic expert was "sufficient to allow the sheriff to draw the inference that [her] hearing loss and tinnitus were more likely than not to have been caused by her exposure to noise".

I thought there might have been some discussion of *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548 (a case of mine) in relation to causation, but it was not referred to. In that case, the judge at first instance had been satisfied that a particular trauma had caused multiple sclerosis, but that finding was overturned on appeal, a decision upheld by the House of Lords.

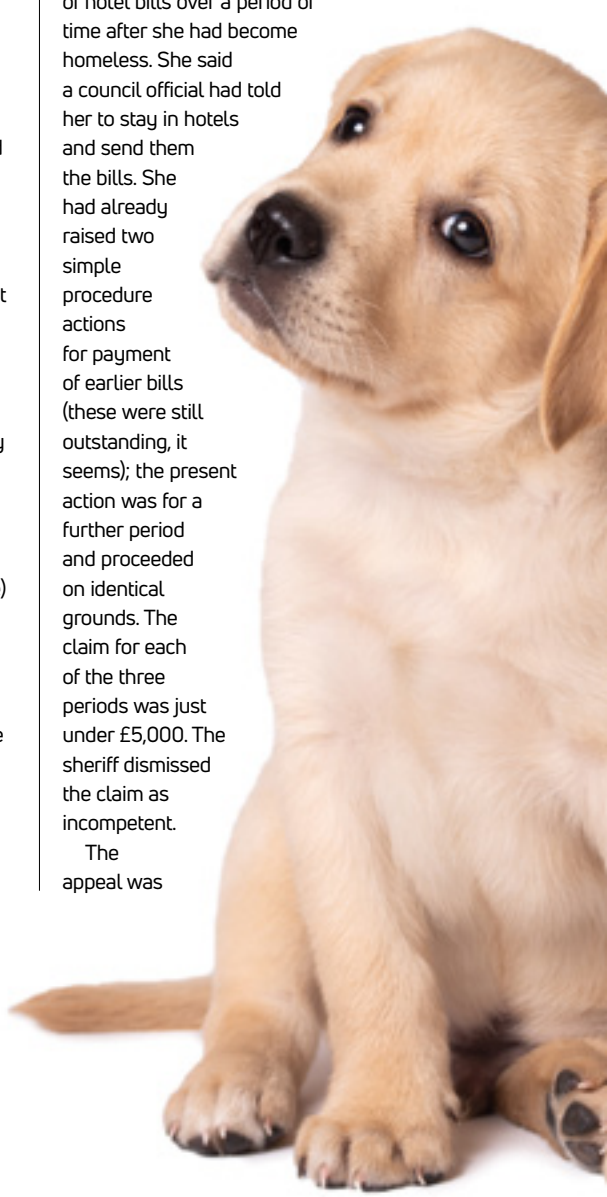
Smith v Duncan [2022] SAC (Civ) 16 (2 May 2022) was an appeal under s 82(1) of the 2014 Act in a simple procedure action. It raised an important point of principle and practice about the content of the sheriff's appeal report in terms of rule 16.3 of the Simple Procedure Rules. In short, the sheriff must prepare a draft report setting out the factual and legal basis for the decision reached, and legal questions for the SAC to answer. The case concerned a dispute about the ownership of a dog(!). The details are in the judgment, which is brief and to the point.

The SAC considered that the principles which applied to stated cases in summary cause actions, and to judgments in ordinary actions, should apply equally to simple procedure appeal reports, "no matter the informality required". The sheriff must establish (and state) the facts, summarise the accepted evidence, explain how conflicting evidence was resolved, discuss the submissions of the parties on the law, reach a reasoned conclusion on the law and apply the law to the facts. "To do otherwise is to leave the appeal court in the dark as to the basis for the decision."

Afandi v Edinburgh City Council [2022] SAC (Civ) 10 (4 March 2022) was another appeal in a simple procedure action, but one which raised a novel point. It did not focus on the merits of the party litigant's claim as such, but the rule that damages arising from the same cause of action must all be assessed and recovered in one action. Did that principle apply to simple procedure?

Briefly, the party was claiming payment of hotel bills over a period of time after she had become homeless. She said a council official had told her to stay in hotels and send them the bills. She had already raised two simple procedure actions for payment of earlier bills (these were still outstanding, it seems); the present action was for a further period and proceeded on identical grounds. The claim for each of the three periods was just under £5,000. The sheriff dismissed the claim as incompetent.

The appeal was



unsuccessful. The SAC said that it was "*pars judicis*" to consider the competency of the proceedings at that stage, and the existing law and practice was clear. The court acknowledged that simple procedure was designed "with unrepresented litigants in mind and the sheriff is encouraged to adopt an interventionist approach", but that did not help the party in this case.

I once suggested that sheriffs in simple procedure actions should be regarded as "dispute resolution officers" as much as judges. I do wonder if an interventionist sheriff applying the principles of simple procedure and taking into account the nature and complexity of the dispute, the parties involved, and the responsibility to encourage parties to settle their disputes by negotiation or alternative dispute resolution, might have found a way to address the merits of this particular action within the spirit of the principles, rather than dismiss it on what can be regarded as a technicality.

Expenses

There have been two decisions on expenses that are certainly worth looking at. *Motherwell v Covea Insurance plc* [2022] SAC (Civ) 17 (29 April 2022) was an ordinary personal injury action which settled by tender and acceptance for the sum of £3,500. The pursuer's statement of valuation of claim pre-litigation had been £5,651. The sheriff found the defender liable in expenses to the date of tender but on the summary cause as opposed to the ordinary scale. The pursuer appealed, relying *inter alia* on a passage in Macphail (3rd edition) which suggested that in "marginal cases" the question of the appropriate scale should not be weighed in "too fine scales". Appeals against decisions on expenses are discouraged, of course, and since the decision was a discretionary one, the pursuer was always going to have his work cut out in the appeal. He was not helped by the fact that by the time the appeal was heard, the fourth edition of Macphail had been published, and the relevant passage was in markedly different terms.

In *McCallion v McCallion* [2022] CSOH 36 (6 May 2022), a divorce action, the concluding interlocutor *inter alia* found the pursuer liable to the defender "in respect of 50% of the expenses of and occasioned by the preparation and conduct of the proof". The auditor took the view that preparation for a proof can only truly commence after parties have finalised their pleadings, ingathered and lodged all their evidence, and attended to all incidental procedural matters required in advance of a proof. The court considered that the auditor had misdirected himself and referred the account back to him to reconsider.

Lord Menzies said: "Once a proof has been allowed, it is likely that many (or most) of the expenses will fall to be categorised as being of and occasioned by the preparation and conduct of the proof. It does not follow that all items of expenditure incurred after the allowance of a proof will necessarily fall to be so categorised – there may be charges which (as in this case) relate to late changes to the pleadings by way of minute of amendment which may not fall properly within this categorisation... It is necessary for the auditor to consider each individual charge, and decide whether the work charged for is properly to be categorised as relating to the pleadings, or is of and occasioned by preparation and conduct of the proof – and to justify that decision."

Personal injury actions

It is well accepted that claims of damages for personal injury should only be dismissed at debate in rare and exceptional cases. One such case was *A v B Ltd* [2022] CSOH 34 (27 April 2022). The first defenders operated a residential care home. The second defenders, a local authority, placed a 16 year old resident in the home. The first defenders allowed the resident unsupervised leave, during which he raped and sexually assaulted a child. The leading Scottish authorities include *Mitchell v Glasgow City Council* 2009 SC (HL) 21 and *Thomson v Scottish Ministers* 2013 SC 628. Lord Ericht had little difficulty in dismissing the action on relevancy.

Clinical negligence actions are often challenged on relevancy too, especially when the pursuer is a party litigant. The advent of case management has introduced what might be regarded as an additional – or alternative – basis for having such actions dismissed, namely a failure to obey a case management order to produce a supportive expert report. In *Chisholm v Grampian Health Board* [2022] CSOH 39 (18 May 2022), the pursuer had originally had the benefit of lawyers, but was latterly unrepresented. The procedural history was complex. The pursuer did not produce an expert report relating to causation, though was aware that it was required. Her claim was dismissed at procedure roll as irrelevant and failing to give fair notice, in the absence of a report, of why the alleged negligence was said to have caused the pursuer loss.

Relying on *JD v Lothian Health Board* 2018 SCLR 1, the court observed that in a clinical negligence case of this kind, expert evidence must be provided to support causation. Where the court is satisfied that a pursuer's pleadings are not properly founded on expert evidence, the court has the power to dismiss the action. There is support for the view that the consequences of there being no expert report on causation may be determined at a by order hearing (rather than a debate). At a debate, the court does not normally look beyond the pleadings, but where the absence of an expert report is raised, there is no difficulty in the court dealing with the point. In this case, the debate encompassed both matters of relevancy *and* the issue of whether there was support in expert evidence for the pursuer's case. As I read it, however, the action was dismissed on the grounds of relevancy.

> *"The court observed that in a clinical negligence case of this kind, expert evidence must be provided to support causation"*

In that connection, *McGowan v Ayrshire & Arran Health Board* [2021] SAC (Civ) 20 can be seen as a good example of a party litigant being able to pursue such a claim to a proof – and appeal – neither of which would appear to have had any realistic prospect of success.

Evidence

A recurrent theme in recent articles has been the changing nature of evidence being led in civil cases and the increasingly variable approach to the conduct of proofs. Some developments have been welcome and helpful, but others much less so.

For example, in *T v W* [2022] CSOH 44 (27 May 2022), Lord Summers observed: "Although witness statements were supplied it would not appear to me that this led to a more efficient use of court time. The witness statements were not used in substitution for evidence in chief. The witnesses were for the most part examined extensively about matters covered in the witness statements as well as other matters. In consequence the oral evidence represents the substance of the case. I have consulted the written statements where the oral evidence was unclear, but for the most part I have proceeded on the basis of the oral evidence."

This brings me to *Chief Constable v SAI* [2022] SC ABE 11 (18 March 2022), in which the court was asked to make a risk of sexual harm order against an individual. The sheriff must be "satisfied" that there had been relevant conduct on at least two occasions. The sheriff narrated the evidence led in order to persuade him to make such an order: "Several witnesses gave evidence in person. All of them had previously sworn affidavits or, in the case of police officers, had prepared operational statements. Each witness adopted his or her affidavit or statement as their evidence in chief.

"Only one of the four girls gave evidence in person... There was hearsay evidence given by the parents of one of [the] other girls and in the form of transcripts of joint investigative interviews of these other girls spoken to by other witnesses... The issue is that the evidence... in respect of these other girls was not the best evidence that could have been led... The reasons for that... were not explored in evidence...

"Transcripts are a poor substitute for the visual and audio recordings of the interviews. It is impossible for me, or anyone, to form a judgment as to the credibility and reliability of a witness from the printed page. Had I been able to see and hear the actual interviews and the reactions, demeanour and body language of the girls and their verbal delivery as they spoke in those interviews I would have been able to assess their credibility and reliability...

"On the whole matter, I am not satisfied that the applicant has proved any of the allegations against the respondent."

Another example can be seen in the admittedly special circumstances of an international family dispute, in *ZA and MN v B* [2022] CSOH 38 (12 May 2022). Lady Carmichael described the proof in this way: "Five witnesses... gave evidence in person. Each of them had provided evidence in chief by way of affidavit, gave additional oral evidence in chief, and was cross examined. The remainder of the witnesses who gave oral evidence did so using WebEx... The proceedings were live streamed... Counsel who were in court were given time to communicate electronically with counsel and solicitors who were not, or adjournments when required.

"There was no order that the reports of professional witnesses should constitute their evidence, or their evidence in chief. In the absence of specific agreement that a report should be treated as evidence, I disregarded reports from persons who did not give oral evidence."

Summary decree

Finally, a good example of a successful motion for summary decree can be found in *Promontoria (Chestnut) v Ballantyne Property Services* [2022] CSIH 17 (18 February 2022), a commercial action where the defenders appealed against the grant of summary decree by the commercial judge. The court briefly set out the accepted approach to such motions: "Rule of Court 21.2 introduced the concept of a summary decree. This permits a pursuer to seek such a decree 'on the ground that there is no defence to the action... disclosed in the defences'. The wide scope of the rule is circumscribed by *Henderson v 3052775 Nova Scotia* 2006 SC (HL) 85, which confines it to cases in which the defender is, after a hypothetical proof, 'bound to fail'. On this approach, the highly implausible defence may well survive until proof."

In this case, the defence did not survive to proof and the court took into account the shortcomings in the defenders' pleadings. "It is no doubt correct to say, as a generality, that a broad view should be taken to pleadings in a commercial action even if, as in this case, the pleading method used is expansive rather than abbreviated (cf Practice Note No 6 of 2004, Commercial Actions, paras 3(1) and 6(1)). It remains necessary for each party to give the other fair notice of the case to be advanced."

Licensing

AUDREY JUNNER, PARTNER, MILLER SAMUEL HILL BROWN

"Minimum unit price is not changing alcoholics' habits", and "Minimum unit price causes poorest to cut back on food", were just two examples of headlines last month following the publication of a new Public Health Scotland report from a study by the University of Sheffield, the University of Newcastle in Australia and Figure 8 Consultancy Services.

Although the Scottish Government's minimum unit pricing ("MUP") policy sought to address alcohol consumption at harmful levels, the report concluded that there was no clear evidence of a change in consumption or severity of dependence following the introduction of the controversial measure. In addition, the increased expenditure on alcohol required some economically vulnerable groups to cut back on essentials like food and utilities to support their addictions.

For those critical of the policy this came as little surprise: opponents had predicted that higher pricing would hit those who most need support and who were unlikely to respond with a reduction in alcohol consumption. However, despite the report's findings, Alcohol Focus Scotland, a leading proponent of MUP, claimed that there were positives to be drawn. The charity has already urged the Scottish Government to increase the minimum unit price from 50p to 65p.

In terms of a sunset clause in the Alcohol (Minimum Pricing) (Scotland) Act 2012, its provisions will terminate on 30 April 2024 unless the Scottish Parliament votes in favour of their continuation. A detailed evaluation of the policy – due to be completed by 30 April 2023 – will be central to that decision. In the meantime we can expect to see MUP and its impact in tackling alcohol abuse attract many more headlines.

Price and overprovision

Two months ago, MUP grabbed headlines for a different and wholly unexpected reason as the deciding factor in a licensing appeal. Aldi Stores Ltd applied to the Dundee City Licensing Board for a provisional premises licence for a new store in Broughty Ferry. The application was refused on the basis of the board's overprovision policy, which seeks to halt the growth of off-sales outlets in the city. In the ensuing appeal before Sheriff Lindsay Foulis, Aldi sought to assail the board's approach on a number of grounds; but only one argument secured its victory. The exclusion of price from the board's consideration was fatal to the board's approach.

The policy sought to address alcohol-related harms in the board's area having regard to two principal considerations flagged in a report by the local Alcohol & Drugs Partnership: availability and price. Nevertheless, although at the time of the refusal of Aldi's application (14 January 2021), MUP had been in operation for some 30 months, the matter of price had not been taken into account. In the result, Sheriff Foulis found in favour of Aldi, remitting the case to the licensing board for reconsideration in the light of his judgment.

A question arises as to whether the decision will oblige other licensing boards to revisit their policy statements and consider price as a factor when formulating new policies. Sheriff Foulis considered that "The production of a Scottish Government report in due course" did not preclude a local exercise. MUP was a national measure but it nevertheless operated locally. However, one might think that conducting local research leading to robust and unassailable conclusions would amount to a lengthy and complex process, particularly in the shadow of the statutory evaluation. In any case, the Aldi judgment turns very much on the policy

background and the prominence of price as a material consideration.

Leaving the matter of price to one side, there is one passage in the sheriff's judgment that appears to disclose a palpable error. He considered that, when the board revisited the application, it might take "demand" into account, noting the existence of a local Sainsbury's superstore as well as the possibility of drawing custom from the Angus Council area. Such an approach would depart from the statutory guidance issued to licensing boards by Scottish ministers. Paragraph 49 of the guidance enjoins boards not to take into account a number of matters, including "the need or demand for licensed premises in the locality".

Footnote: Aldi's application came before the board again on 30 June and was granted. Senior counsel for Aldi submitted that, for the moment, there was no overprovision policy, a view which the board felt obliged to accept.

Insolvency

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

Adjudication of a creditor's claim in a sequestration is very important. It determines the sum which the creditor is entitled to be paid in the event that a dividend is available, and voting rights at creditors' meetings. In *Akhter v Accountant in Bankruptcy* [2022] SC GLW 13 an appeal was taken by creditors against a review by the Accountant in Bankruptcy ("AiB") of an adjudication, after the AiB determined that the trustee's adjudications had been incompetent and revoked them.

The sheriff's judgment is a useful summary of how adjudication should be approached where loans are advanced jointly by more than one creditor. It also approves the approach of the sheriff in *Reid v Accountant in Bankruptcy* [2019] SC ABE 52. This was the subject of a previous briefing (Journal, July 2019, 34) concerning the difference between a "review" (where the AiB can consider the whole matter *ab initio*) and a more restrictive "appeal".

Background

The debtor was sequestrated in March 2018. In October 2020 the trustee adjudicated on submitted creditor claims. These included loans advanced by the three sets of appellants in this case. Their debts were admitted in full.

In the case of the second and third appellants, loans had been advanced by two creditors jointly. The trustee allowed each of the joint creditors to submit claims for the full amount of the loan. The trustee recognised that this meant each loan was admitted twice, stating that any dividend ultimately paid would not exceed the value of the loan.

The petitioning creditor requested a review by the AiB, arguing that the loans were by parties closely connected to the debtor and were fictitious.

On review, the AiB revoked the adjudications in respect of the three loans. For the first loan, the AiB was satisfied that a loan of £55,000 had been advanced. They noted there was no evidence regarding the current balance of any of the loans. Significantly, they also held that in respect of the second and third

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Law reform ideas

The Scottish Law Commission is open to suggestions of areas of law in need of reform as it prepares its Eleventh Programme of Law Reform, due to start in 2023. See www.scotlawcom.gov.uk/news/consultation-on-our-eleventh-programme-of-law-reform/
Respond by 29 July.

Violence against women and girls

The independent Strategic Review of Funding and Commissioning of Violence Against Women and Girls Services is tasked with developing a new funding model to ensure quality, accessible specialist services across Scotland. See consult.gov.scot/violence-against-women-team/violence-against-women-and-girls-services/
Respond by 1 August.

Disability commissioner

Conservative MSP Jeremy Balfour seeks views on his proposed bill to establish a Disability Commissioner for Scotland. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-disability-for-scotland-commissioner-bill
Respond by 3 August.

Permitted development rights

As part of its review of planning regulations, the Government seeks views on permitted development rights in relation to electric vehicle charging infrastructure; changes of use in city, town and local centres; and port development. See consult.gov.scot/planning-architecture/permitted-development-rights-review/
Respond by 3 August.

Victims yet again

Regarding the Scottish Government's *Vision for Justice in Scotland* (February 2022), views are sought on more empowerment of complainers (aka "victims") by way of "person-centred and trauma-informed practice". See consult.gov.scot/justice/victimsconsultation/
Respond by 5 August.

Health care safety zones

Gillian Mackay, Green Party MSP for Central Region, seeks views on a proposed Abortion Services Safe Access Zones (Scotland) Bill. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-abortion-services-safe-access-zones-scotland-bill
Respond by 11 August.

Police complaints and misconduct

In light of Dame Elish Angiolini's independent review, the Scottish Government seeks views on improving fairness, transparency, accountability and proportionality in the regime governing police complaints and misconduct. See consult.gov.scot/safer-communities/police-legislative-reforms/
Respond by 16 August.

Tackling drugs deaths

Labour MSP Paul Sweeney seeks views on a proposed bill to enable the establishment of overdose prevention centres in order to tackle drug related deaths, and to create a new body to oversee drug policy development and implementation. See www.parliament.scot/bills-and-laws/proposals-for-bills/proposed-drugs-death-prevention-scotland-bill
Respond by 17 August.

Budget priorities

The Parliament's Finance & Public Administration Committee seeks views to inform its pre-budget scrutiny of the Scottish Government's plans for the 2023-24 budget. The specific issue of the cost of living crisis looms large. See www.parliament.scot/about/news/news-listing/cost-of-living-and-the-scottish-budget
Respond by 19 August.

loans the trustee's approach to joint creditors was incompetent. Where two or more creditors advanced a loan jointly, either a single claim required to be made, or if the creditors preferred individual claims, the total value of individual claims could not exceed the loan amount.

The creditors appealed.

Basis of appeal

The appellants challenged on a number of grounds:

1. The application for review ought not to have been accepted, as it was not advanced on statable grounds.
2. The revocation was made on grounds not argued for by the petitioning creditor.
3. The AiB was not entitled to revoke decisions based on their own interpretation of facts already determined by the trustee.
4. Basing revocation on the non-production of evidence inverted the burden of proof in relation to creditors' claims.
5. The AiB had misinterpreted their powers: amendment of the adjudication was the appropriate course, not revocation.

The judgment

Regarding the first three grounds, the sheriff identified that the Act did not prescribe any form of application for review. In fact, the application need not state any grounds at all. Given that a review allowed the AiB to consider the matter *ab initio*, it was clear that the AiB could base their decision on any grounds they saw fit arising from the facts and circumstances. These elements of the appeal accordingly failed.

In relation to the fourth ground, the sheriff held that the AiB was entitled to consider all material provided and make a decision about acceptance of the claim. It was apparent that the AiB had considered the limited evidence that the full debt remained outstanding, but considered it insufficient. Notably, had they failed to consider a matter of relevance, the sheriff could have interfered.

On the fifth element, if the AiB was entitled to revoke rather than amend the adjudication, the court held that the AiB took the correct course. The sheriff agreed with the conclusion that the adjudication of the joint creditors' claims was incompetent. The effect of the adjudication was that loans were being claimed twice, inflating the claims in the estate, which might disadvantage other creditors in relation to voting rights. It was not cured by the trustee agreeing not to pay out more than the loan. The correct course was either to have a joint claim by the creditors, or if the debt was divisible, to lodge two claims in the relevant proportions not exceeding the loan amount.

In those circumstances amendment could not cure the incompetency and the AiB was right to revoke.

Tax

ZITA DEMPSEY, SOLICITOR AND ROSS MACKENZIE, TRAINEE SOLICITOR, PINSENT MASONS LLP

The importance of sustainability and tackling climate change is at the forefront of world leaders' policies. Solutions and ideas are needed in every aspect of our lives, and that includes tax. The Chancellor has introduced two new taxes, a windfall tax and a plastic packaging tax, that are sustainability related. It is hoped that both taxes will make a positive impact on climate change and that the windfall tax will help ease the current cost of living crisis.

Windfall tax

The windfall tax, termed the "energy profits levy", is a temporary, 25% tax on North Sea oil and gas company profits arising on or after 26 May 2022. It is currently in force until 31 December 2025. The key rationale for this tax is to attempt to raise £5 billion to mitigate the effects of increased household energy bills and the rising energy price cap on consumers.

With the average household energy bill going up by £2,000 a year and the cost of fuel being higher than ever, the introduction of a windfall tax on the profits of North Sea oil and gas companies would be welcomed to help ease the burden. However, although the tax could result in significant money initially, the long-term impact may not be what the Chancellor is aiming for. North Sea oil and gas companies may reduce the amount they spend on research into renewable solutions, as the money they had earmarked for that may need to go towards paying the windfall tax. This is the opposite of the Government's hope that the windfall tax may result in the oil and gas sector looking towards renewable energy as an alternative solution. There is also the possibility that these companies may increase their prices to deal with the windfall tax, meaning that customers will ultimately be the ones who pay – the very people that the windfall tax was brought in to help. This will hit consumers particularly hard given that the energy price cap is being increased.

"The joint and several liability requirements... mean that businesses will need to conduct significant due diligence on their supply chain"

Companies in other parts of the energy sector are now waiting nervously to see whether the Chancellor will extend the reach of the windfall tax. RWE, the German energy company that is one of the biggest power plant owners in Britain, has suggested it may reconsider its significant investment plans in the UK if they become subject to a windfall tax.

Plastic packaging tax (PPT)

The PPT was brought into force on 1 April 2022. This new tax is imposed on plastic packaging manufactured in, or imported into the UK, that does not contain at least 30% recycled plastic. It is hoped that the imposition of this tax will encourage high levels of recycling in plastic products and innovative solutions in relation to plastic.

The PPT can play a big part in tax assisting the UK achieve its net zero goals and sustainability targets. By incentivising businesses to use as much recycled plastic as possible in plastic packaging, the intention is that this will create a greater demand for recycled plastic, resulting in the number of suppliers and consumers of recycled plastic greatly increasing. This would result in less plastic waste ending up in landfill sites and be a key factor in the push to achieving sustainability goals.

Regulations for this new tax have had to be strict, to ensure that the minimum 30% level of recycled plastic is upheld across all types of plastic packaging. This has included the methods for weighing plastic packaging components and the requirement for maintaining, procuring evidence of and calculating the recycled material.

There are four types of packaging components that are exempt from the tax, regardless of how much recycled plastic they contain. These are:

- plastic packaging manufactured or imported for use in the immediate packaging of a medicinal product;
- transport packaging used on imported goods;
- packaging used as aircraft, ship and rail stores; and
- components that are permanently designated or set aside for use other than a packaging use.

The tax is expected to impact an estimated 20,000 manufacturers and importers of plastic packaging. The joint and several liability requirements of the new tax mean that businesses will need to conduct significant due diligence on their supply chain to ensure that the

packaging they use is above the minimum 30%.

The introduction of new taxes is not without its challenges and, while the scope of the windfall tax appears still to require ironing out, it is hoped that both taxes will achieve their aims of mitigating the impact of the cost of living crisis on individuals while helping to achieve climate change targets.

Immigration

MEGAN ANDERSON,
TRAINEE SOLICITOR,
LATTA & CO

On 28 June 2022, the Statement of Changes to the Immigration Rules dated 11 May 2022 came into effect. The modifications reflect the changes required now that the Nationality and Borders Act 2022 has been passed. The Government's "New Plan for Immigration" has been described as the "biggest overhaul of our asylum system in decades", and as such, it is important to consider the impact that it will have on those who seek protection in the UK.

There will essentially now be two categories of refugees in the UK, otherwise known as Group 1 and Group 2 refugees. Generally, those in Group 1 will have arrived in the UK directly from the country where they fear persecution and claimed asylum without delay. However, those who will be categorised into Group 2 will not be able to meet these requirements. If an individual has entered the UK illegally, or is in the UK illegally, they will be required to show good reason for their unlawful presence. There will be a number of stark differences between those in Group 1 and Group 2, and there has been some debate as to whether those in the latter group will be regarded as "second class" refugees due to the limitations that will be placed on them.

Group 1

This group will encapsulate those who arrive in the UK directly from the state in which they fear persecution, without passing through a third country. Group 1 refugees will be granted five years' leave to remain and it will be possible for them to apply for settlement after those five years. Group 1 refugees will also be eligible to apply for family reunion, meaning their spouse and children can apply to join them in the UK. The family reunion rules are extended to permit adult children also to apply to come to the UK, if there are exceptional circumstances. Many of the Group 1 rules mirror the system in place prior to 28 June.

Group 2

If an individual is granted leave to remain as a Group 2 refugee, they will be permitted to stay in the UK for 30 months. The same will apply for those who are granted humanitarian protection. It will then be possible for people on those routes to renew their leave for a further 30 months. They will not be eligible for settlement until they have had leave to remain for a total of 10 years, effectively doubling the time that certain persons will be required to be in the UK before they can apply for indefinite leave to remain. The reason for this shorter period of leave is to ensure that those granted leave under the Group 2 rules will be regularly assessed for removal from the UK.

Group 2 refugees will also not be permitted to apply for family reunion, unless there are insurmountable obstacles to their family life continuing outside the UK. This means that those who are granted leave through this route will not in most cases be able to apply for their family to join them. In addition, those with leave under this section of the Immigration Rules will have a "no recourse to public funds" condition attached. This condition has been found to be unlawful on a number of occasions, most recently in June of this year.

Implications of the changes

The new rules explicitly treat different groups of asylum seekers differently, and concerns have been expressed about this by the UNHCR as well as other organisations. The stark difference between the two categories of refugees does seem somewhat unfair. There are many reasons why an individual may pass through a safe third country en route to the UK. However, these are unlikely to be considered by decision makers under the new rules.

Nevertheless, the Government is keen to press on and ensure that the asylum system is overhauled. The delays at present are extremely concerning, with there being just under 110,735 individuals awaiting a decision on their initial asylum claim. There is also an approximately 20 week wait for an initial interview. On the surface, this remodelling of the asylum system seems as though it may exacerbate issues that are already in place. However, it remains to be seen how the rules will work now that they are in force.

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Desmond William Donoghue

A complaint was made by the Council of the Law Society of Scotland against Desmond William Donoghue, solicitor, Edinburgh. The Tribunal found the respondent guilty of professional misconduct in that he (a) as designated cashroom manager, failed to disburse a client's balances when there was no longer any reason to retain them; and (b) failed to respond to correspondence and statutory notices received from the Council, impeding the Council in its statutory obligation to investigate complaints. The Tribunal censured the respondent.

Following conclusion of a transaction, the respondent held funds for the secondary complainer. A sum was due to Revenue Scotland for LBTT. The respondent failed to pay this. The secondary complainer incurred a penalty. The respondent failed to disburse the client's balance when there was no longer reason to retain the money. He was both the designated cashroom manager and the person who dealt with the transaction. Adherence to proper cashroom procedures would have alerted the respondent to the position. The secondary complainer repeatedly attempted to have the respondent act. Following a complaint, he failed to cooperate and respond about the investigation. This impeded the Council in its statutory obligation. The Society cannot properly exercise its function to protect the public without solicitors' cooperation. These failures undermine the public's trust in the profession, and therefore its reputation. In the circumstances, the Tribunal was satisfied that the respondent was guilty of professional misconduct.

Douglas Kilpatrick

A complaint was made by the Council of the Law Society of Scotland against Douglas Kilpatrick, PRP Legal Ltd, Glasgow. The Tribunal found the respondent guilty of professional misconduct *in cumulo* in respect that he failed to return loan funds to a lender within the timescale specified in an undertaking, failed to communicate with the lender, and breached rules B1.4.1, B1.5.1, B6.2.3(b) and B6.11.1 of the Law Society of Scotland Practice Rules 2011. The Tribunal censured the respondent and fined him £4,000.

The respondent was instructed by a purchaser and lender in a conveyancing transaction. He signed a certificate of title which contained an undertaking to return the loan funds to the lender within five working days if settlement did not take place. His firm received £434,960 on 25 May 2018 from the lender. This money was not returned to the lender until 21 September 2018. In the interim, the respondent received monthly cashroom printouts which contained this balance, and two reminder letters from the lender. He had several conversations with the cashier about it.

Solicitors must protect the interests of the lender with the same care and responsibility as they give to the purchaser. They must not prefer the interests of one client over another. They must act in the best interests of their clients (rule B1.4.1). They must have the authority of their clients for their actions (rule B1.5.1). They must return money promptly as soon as there is no longer any reason to retain it (rule B1.6.11.1). They must not cause or knowingly permit their firms to fail to comply with the rules (rule B6.2.3). The respondent did not comply with these obligations. If a further settlement was anticipated, the funds could have been ordered again.

In with the stonework

An accredited specialist in IP tells of her move to sole in-house solicitor at the body responsible for Scotland's built heritage – and of the positives she sees in today's profession

In-house

SUSAN FERGUSON-SNEDDEN,
HEAD OF LEGAL,
HISTORIC ENVIRONMENT SCOTLAND

Tell us about your career path to date?

Having discovered a love of intellectual property at Glasgow University, I secured a traineeship at Maclay Murray & Spens ("MMS") (now Dentons), well known for its IP expertise. I returned to MMS's IP team in 2005 and worked my way up to become a director and head of the IP & IT Litigation team in 2012, specialising in IP, IT and data protection matters, as well as commercial contract disputes.

In 2018, I was lured away from private practice to become head of Legal at Historic Environment Scotland ("HES"). I was attracted by the focus of the role on IP matters.

What are your main responsibilities?

I am responsible to our senior management team and chief executive for all legal matters (except property) within HES.

HES is an interesting organisation with an extensive range of activities. We look after 336 of Scotland's historic sites, including iconic properties such as Edinburgh Castle, Arthur's Seat and the Calanais Standing Stones, and operate them as visitor attractions. We also look after a broad range of archives and collections, many of which are made available digitally.

We carry out lots of R&D work and regularly collaborate with universities on research projects. We do a lot of partnership working with other heritage bodies. In addition, we have a regulatory role in respect of listed buildings and scheduled monuments.

This broad remit gives rise to a wide range of legal issues and challenges and makes HES a fascinating place to work as a solicitor. My team advises on anything from commercial matters relating to our visitor attraction business, to health and safety issues, IP issues arising from our research work and our archives, and everything in between. HES is a non-departmental public body, so there are a lot of public law issues also, such as interpreting legislation that applies only to HES.

Susan Ferguson-Snedden: specialist IP skills proved transferable (photo copyright: Historic Environment Scotland)

You were the first in-house solicitor HES had. What was it like going into that role? With the benefit of hindsight, is there anything you would have done differently?

I was indeed, and working at HES was also my first in-house role, apart from a couple of secondments. It was quite overwhelming at first, particularly as so many matters required attention. My line manager encouraged me to focus on small wins and not to try to do everything at once, which really helped.

A couple of high-profile issues requiring significant legal support arose within my first three months. While that was challenging, it accelerated the process of me becoming a trusted adviser to the senior management team.

With hindsight, I would have been more relaxed about not being familiar with every area of law. Although my private practice skills were quite specialist, they proved to be fairly transferable and I could call on external lawyers too. Working in-house, you have to be comfortable dealing with the unexpected.

You've now grown the legal team. How did you approach that process and were there any particular hurdles with securing the go-ahead from senior management?

I have felt very supported by the senior management team within HES from day one, and received support to recruit an additional solicitor when I had been in post for less than a year. We have since grown the team to add another solicitor. Having a solicitor from our external law firm on secondment helped make the case for additional in-house resource, as we could demonstrate that an extra pair of hands in-house helped us get through work a lot quicker.

A site visit to Iona was a highlight

When, like me, you don't have connections or a family background in law, it can feel like a very intimidating and inaccessible profession. To help open up the profession to everyone, it is really important to share knowledge and experiences

In-house solicitors are sometimes badged as generalists, but you're an accredited specialist in intellectual property. Is it important to you to maintain a level of specialism in a particular field? Does that impact the type of legal function you are?

I've always been really interested in IP and was only willing to move in-house to a role with that focus. However, the breadth of HES's activities means that I've learned a fair amount about many other specialisms and I have really enjoyed that. I've discovered a particular interest in health and safety law as it applies to historic buildings and the natural environment – something I would never have considered if it hadn't been for my HES role.

COVID-19 has created significant challenges for your sector. How has the organisation generally and the legal function in particular had to adapt?

COVID was very challenging for all areas of our business, but particularly the visitor attraction side. We had to close and reopen all of our staffed sites many times. The legislation was constantly changing. We had to get comfortable with giving advice on legislation/guidance which was made public at 4pm one day and took effect the next.

Thankfully, my team all worked from home at least some of the time even before the pandemic, so we were well set up from a technology perspective from the outset.

You were recently part of a panel of in-house solicitors for the Society's "Conversations on Progression" series. Why do you think it important to share your experience as a senior female in the profession?

When, like me, you don't have connections or a family background in law, it can feel like a very intimidating and inaccessible profession. To help open up the profession to everyone, it is really important to share knowledge and experiences. I'm still learning, and I certainly don't have all the answers, but I'm always happy to share what I do know.

I benefited from some really useful help early in my career and I feel a responsibility to pay that forward. I worked at Turcan Connell as a summer student, and one of the partners put me in touch with his wife, who was a recruiter. She spent an afternoon helping me put a CV together for my traineeship applications. Her advice was incredibly useful and I follow some of it to this day! I believe her generously given advice was instrumental in helping me obtain a traineeship at my first choice firm.

Other advice that has helped me was a chance remark at an in-house lawyers networking event. One of the speakers said his mantra was "progress not perfection". Of course, sometimes perfection is required, but often it isn't, and hearing that from another senior in-house lawyer gave me permission to look at things in a more realistic way.

Do you think attitudes and working practices in the legal profession have changed since you started out? If so, for better or worse?

I do think things are improving, but in my view, the profession is still many years behind other sectors and cannot afford to be complacent.

Positive changes I have seen include more focus on diversity and inclusion. This has been very important for me as a gay woman who was advised early in my career (by some colleagues) to hide this. It took many years to break the habit of using non-gender-specific pronouns when making small talk with senior colleagues and clients. Attempting to hide a part of yourself while trying to build relationships is really challenging, and it made networking a real ordeal at times. It's so important to allow people to be themselves.

I'm also glad that the profession has finally started to acknowledge mental health issues. We work in a demanding profession, and I think it's important that things like stress and burnout are talked about, and that we take meaningful action to look after ourselves and our staff.

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

It's a great time to be an in-house lawyer in Scotland. There are so many interesting in-house roles these days. There is a great opportunity to embed ourselves as trusted advisers and senior decision-makers in our organisations.

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

I would recommend gaining some experience in private practice before going in-house. At the right firm, you will get great exposure to a wide range of sectors and matters, which will really help in-house as it teaches you to consider many different perspectives. I would also recommend joining a network of in-house lawyers, as this will be an invaluable support.

In my view, to be a good in-house lawyer you need to be pragmatic, calm in a crisis, good with people, able to explain legal issues in plain English – and not sit on the fence!

What is your most unusual/amusing work experience?

I've had many comedy moments both in private practice and at HES!

In private practice, there was much amusement when we had a mannequin as a production in a patent infringement action. Our trainee christened him "Plastic Pete"!

And an amusing moment at HES involved a historically inaccurate bath duck...

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

I love the variety of my role at HES and the occasional opportunity to go on-site visits. The highlight of my career to date is a three-day trip to Mull and Iona!

Outside work, I sing in Forth Valley Chorus (current UK women's barbershop champions), and I enjoy outdoor swimming.

Living with the Register of Overseas Entities

Advice from the Property Standardisation Group on how the coming of the Register of Overseas Entities will impact on property transactions involving such entities

Property

PROPERTY STANDARDISATION GROUP

It seems that 2022 is becoming the year of the registers. The Register of Overseas Entities ("ROE") is likely to be introduced imminently, and, unlike the Register of Persons holding a Controlled Interest in Land, this latest register will have a big impact on conveyancing transactions when overseas entities are involved.

The definition of "overseas entity" is wide, encompassing any legal entity (a body corporate, partnership or other entity that is a legal person under the law by which it is governed) that is governed by the law of a country or territory outside the UK.

The ROE will be a UK-wide register, introduced by the Economic Crime (Transparency and Enforcement) Act 2022, and is being fast-tracked for commencement due to the continuing crisis in Ukraine.

Although the ROE will seek to capture details of beneficial owners of affected overseas entities, its principal purpose is to capture details of land located anywhere in the UK held by those entities.

Any overseas entity that either owns or leases land (under a registrable lease) or wants to buy land (or take a registrable lease) in Scotland will need to register in the ROE.

Registration in the ROE

The ROE will be operated by the Registrar of Companies for England & Wales.

There are, in effect, two phases for registration. The **first phase** – the transitional period – will run for six months from the date of commencement of this part of the 2022 Act.

During that period, any overseas entity that owns or leases land in the UK must register in the ROE. (At the time of writing, the requirement only applies if the land or tenant's right in the land (i.e. a "relevant interest in land") has been registered in the Land Register on or after 8 December 2014. There are different cutoff dates for England & Wales, and Northern Ireland.) The overseas entity does not need to be involved in any transaction with that land. Failure to have done so by the end of the transitional period will constitute an offence liable to imprisonment (for every officer of the entity), a fine, or both. The Secretary of State has power to serve notice on an overseas entity at any time, requiring it to register in the ROE.

In addition, any overseas entity that grants a disposition, standard security, lease or assignation of a lease between 28 February 2022 and the date of its registration must provide details of the deed. Even if an overseas entity does not require to register because it has ceased to own land by the end of the transitional period, it must still submit details of deeds granted by it from 28 February.

In theory, therefore, every overseas entity that *currently* owns or is the registered tenant of land in Scotland any time from 8 December 2014 should be registered in the ROE by the end of the transitional period.

There will, however, be a moratorium on rejection of deeds granted by an unregistered overseas entity (but not on those in favour of one) during the transitional period. There is also an exception for registration of deeds that are in implement of a contract entered into before the later of the date on which the overseas entity's title was registered and the commencement date.

The **second phase** applies to overseas entities that acquire or become the registered tenant of land on or after the commencement date. Although the 2022 Act does not impose any express duty on such an overseas entity to register, the effect of its provisions is that, without registration in the ROE, registration in the Land Register is not possible.

A registered overseas entity has a continuing duty to keep its entries in the ROE up to date at least once in every 12-month period, even if there have been no changes to the information previously provided.

Effect of failure to register

If an overseas entity has not registered in the ROE (and is not an exempt entity; regulations have still to be made defining these), the Keeper must:

- reject an application by an overseas entity to register a disposition, lease or assignation (each a "qualifying registrable deed"), and
- reject an application by a person acquiring from an overseas entity to register a qualifying registrable deed or a standard security.

Accordingly, it is going to become an essential component of the conveyancing process, when transacting with an overseas entity, to ensure that (if the overseas entity is not exempt) it is registered in the ROE.

What should the missives say?

If a transaction with an overseas entity to which a contract relates will result in a qualifying registrable deed or a registrable deed that is a standard security, that contract needs to make provision about registration of the overseas entity in the ROE.

Where the overseas entity is the seller, the landlord, or the assignor, or is granting a standard security, the other contracting party requires to be sure that the overseas entity is registered in the ROE, as otherwise the resulting deed will not be capable of being registered, because the Keeper must reject it (unless the overseas entity is exempt). This would mean the purchaser, tenant, assignee or lender, as the case may be, will not get a real right.

Where the overseas entity is the purchaser, the tenant or the assignee, the other contracting party requires to be sure that the overseas entity is registered in the ROE, otherwise the resulting deed will not be capable of being registered, meaning that the seller will not be divested of the title, the landlord will not have an enforceable lease, or the assignor will remain liable as tenant.

Where any party to the missives is an overseas entity, the contract should contain

"Failure to have registered by the end of the transitional period will constitute an offence liable to imprisonment (for every officer of the entity), a fine, or both. The Secretary of State has power to serve notice on an overseas entity at any time, requiring it to register in the ROE"

confirmations from them:

- that they are a registered overseas entity;
- that they have complied with the duty (in s 7 of the 2022 Act) to update the ROE; and
- that the information held in the ROE for them is correct, complete and up to date.

Some additional definitions will be required. The PSG offers are being updated to include suitable wording and definitions and will be available on the PSG website (www.psglegal.co.uk) as close to commencement as possible, along with a guidance note on conveyancing implications of the ROE.

It is not necessary, in the PSG's opinion, to require any undertaking from the overseas entity (where it is the seller, landlord or assignor) that it will not remove itself from the ROE until completion of registration of the deed. While an overseas entity can apply to be removed from the ROE, s 10 of the 2022 Act requires the Registrar, on receipt of such an application, to check whether the overseas entity is registered as proprietor, and if it is, the Registrar must refuse to remove it from the ROE.

Neither should it be necessary to require any undertaking from the overseas entity (where it is the purchaser, tenant, or assignee) that it will not withdraw its application for registration in the ROE; or that it will not remove itself from the ROE. Quite apart from the fact that it must be registered in the ROE to be able to register the deed in the Land Register, once registered the overseas entity cannot be removed from the ROE while it is the proprietor or registered tenant of land registered in any of the UK land registers.

Searches

It will be necessary to obtain a search in the ROE. The firms of professional searchers will provide such a search report. The report should disclose that the overseas entity is registered in the ROE; and that the entries in the ROE are up to date.

It is recommended that a search report is obtained at an early stage of the transaction so that if any action is required (such as registration or updating), there will be time to do so before completion. An overseas entity will be able to register in the ROE before it owns or tenants any land, and since the procedures for confirming information and obtaining verification before registration can be effected can take some time, it is recommended that the overseas entity takes steps to register in the ROE at the earliest opportunity. J

Notifications

ENTRANCE CERTIFICATES ISSUED 29 APRIL-30 JUNE 2022

ALEXANDER, Craig
ALHAJJAJ, Jude
ARCHIBALD, Jordan Theresa
BARNES, Gabriella Christina
BATEY, Colleen
BAXTER, Jenna Louise
BELL, Ashley Jane
BENNETT, Ainslie Marie
BODZAK, Karolina Magdalena
BÖRJESSON GROTMAAK, Sol Signe Elly
BOWN, Milo Philip
BRECHANY, Nicola Mary
BRIGGS, Harry Robert
BROCKLEBANK, Ana Elizabeth
BROOKS, Scott Michael
BROWN, Olivia
BUCHAN, Alanna Caitlyn
BURGESS, Gary
BURGESS, Julita
BUTT, Zainab Shahzad
BYRNE, Emily Elizabeth
CAMERON, Jordan Alice
CAMPBELL, Iain
CAREY, Rebecca Elizabeth
CHEAITOU, Samer Philip
CHOWDHURY, Raiyan Saadullah
CHRISTIE, Shona Lindsay
CLARK, Alanna Mairi
CLARK, Fiona Wyatt
CLARK, Iona Beth
CLAY, Angela Leanne
CLEMENT, Martin Alan
COLQUHOUN, Ross
CONNOR, Erin Maria
COOPER, Eve Louise
CORMACK, Daniel
CRUICKSHANK, Sophie
DAHL, Amos Frithiof
DEMPSTER, Chloe
DICKSON, Cameron Harris
DOUGLAS, Abigail Catherine
DRANSFIELD, Evalina Beatrice
DUTHIE, Veronica Mae
DYER, Rebecca Gillian
EDMOND, Steven Alexander
FAGAN, Catherine Jane
FERGUSON, Lyndsay
FERRY, Stephen
FINDLAY, Erin
FISHER, Mark John
FORREST, Tsepiso
FOSTER, Chiara
FRAME, Murray Joseph
FREW, Catherine Anne
GARCIA MORENATE, Amanda
GARDNER, Katie Rachel
GOMEZ-LLORENS, Victorie-Anne Carole Stéphanie
GORDON, Campbell
GRANT, Rose Elizabeth
GRAY, Katie Louise
GREEN, Gideon Edwin
HAMLETT, Jordan Cowen
HARLEY, Amy
HARPER, Hannah Catherine
HENDERSON, Allana
HENDERSON, Ashleigh Octavia
HENDERSON, Rosie Morag
HENDRIKSON, Alexander Eduard
HERRIOT, Lois Jane
HOLBURN, Kenneth David
HORNSBY, Vaila Jeanne Carruthers
HOROWITZ, Michael Dean
HORTON, Rebecca Simpson
HUNTER, Rachel Lynn
HUSSAIN, Humna Noor
HUTCHEON, Adrian Alexander
INGLETON, Sam Richard
IRVINE, Kaytlin
JAMAL, Humairaa Shaheed
JANUS, Daria Magdalena
JOHNSTON, Casey Caroline
JONES, Eleanor Elizabeth
JUDGE, Sarah June
KAUFHOLD, Lisa
KEDDIE, Sian
KEIR, Sarah H
KELLY, Stephanie Rose
KIRK, Stephen
KOONER, Simren Kaur
LALLEY, Roisin
LANG, Gordon Douglas
LANIGAN, Leanne
LEGGE, Lois Christie
LITTLE, Molly Ellis
LOGAN, Jake Travers
LOOSE, Rachel Sarah
McAULAY, Mhairi Jane
McAVOY, Stephen
McCAFFERTY, Liam John
McCORMACK, Cameron
McCOSH, Lindsay Killin
McCREADIE, Ennis M D
McCULLOCH, Gillian
McDONALD, Emily Rose
MACDONALD, Katie
McEWAN, Perry Violet
MACFARLANE, Andrew
McFARLANE, Emma Jane
McGRANE, Kerren Marion
MACGREGOR, Ashley Charlie
MACGREGOR, Grant Hamilton
McGREGOR, Louise
McINTOSH, Ellie Stewart
McINTYRE, Lauren Elizabeth
McIVER, Dhana Katherine Anne
MACKAY, Fraser Gordon Hugh
McKAY, Kirsty
MACKENZIE, Andrew Iain
McLACHLAN-HUNT, Bronagh
McLAUGHLIN, Cameron Scott
McMILLAN, Ruth Sarah
McPHERSON, Leigh
McPHIE, Donald Andrew
MADDOX, Theodore Peter
MAIN, Alice Rosemary
MANFREDINI, Megan Danielle
MELDRUM, Frazer Ross
MILLAR, David Ramsay
MILLAR, Laura
MOLLO, Marina Borges
MORRISON, Erin Lesley
MUNRO, Nina Ishbel
MURDOCH, Cameron Matthew
MURIE, Kaela
MURTAZA, Aleena
O'HARA, Alannah Sarah
O'HARA, Chloe Maria
ORR, Cameron Gavin
OWEN, Alexander Calder Clark
PACITTI, Adele
PAGE, Gregor William
PATERSON, Morven Kathleen
PAUL, Kirsty Melville
PEARSON, Bobbie
PETO, Vanessa Kinga
PHILLIPS, Paige
PIERRONNET, Olivia Louise
POLLAK, Mateusz Albert
POZZO, Francesca Natalia
PROSSER, Hannah
PURDIE, Natalie Lynne
QUINN, Erin
RAE, Alexander
RAMSAY, Holly Elizabeth
REID, Euan Beaton
REUBENS, David John
RICHARDSON, Kay Lindsay
ROBERTSON, Emma Louise
ROBERTSON, Keith George
ROBERTSON, Nina Caroline
ROBERTSON, Olivia Anne
RODGER, Megan Louise
SARWAR, Daud Ahmed
SCOTT, Rachel Elizabeth
SINGH, Gulshan Lakhan
SMITH, Chloe
SMITH, Eilidh Anderson
SMITH, Hannah Logue
SPEAR, Rhiannon Valentine
STEWART, Ella Morag
STODDART, Charlotte-Ann
STONE, Rhona Victoria
SULLIVAN, Natalie Mary
SUNDE, Annike Charlotte
SYMANIAK MOTA, Jessica
THOMSON, Aaron James
TIMMINS, Katie
UPPAL, Rajeev Singh
WALKER, Angela Louise
WARD, Ross Luke MacBrien
WATSON, Jennifer Kate
WATSON, Sarah Colette
WATTS, Euan Alistair
WHITE, Kyanna
WHITE, Lynsey
WHYTE, Leona
WILKIE, Eva Margaret
WILLIAMSON, Michelle Linda
WILSON, Clara Elisabeth
WOOD, Laura Louise
WOODS, Christie
WOODWARD, Niamh Hanna
WRIGHT, Eilidh
WRIGHT, Katie Louise
WYLIE, Shiona MacMillan
ZAHID, Aminah

APPLICATIONS FOR ADMISSION 22 APRIL-14 JUNE 2022

ARMOUR, Calum Iain
ASGHAR, Safina
ASLAM, Amina Aslam
BAIG, Anzal Faran
BASI, Elizabeth Anne
BELL, Nicola
BINNIE, Marei Fiona
BOYES, Rachael Georgina
BROOKS, Rachael
CAPALDI, Caterina Giulia
CARRUTHERS, India Amanda
CLAXTON, Rowena Lucy
COCKBURN, Michael
COLVILLE, Caitlin Mary
COOPER, Rachel Margaret
CURRAN, Kirsty Lauren
DOBSON, Robert William
DOHERTY, James
DONALDSON, Robyn
DUFF, Anna Jennifer
FERGUSON, Stuart Graeme
FERGUSSON, Andie Spiers
FLEMING, Ashley-Jayne
FORSYTH, Ewan Anderson
FOWLER, Claire
GOODALL, Eilidh Urquhart
GOWAN, Fraser James
GRANDISON, Suzanne
GRANT, Debbie Louise
GRAY, Christopher
GRIMLEY, Ross Kieran
HAMILTON, Iulia-Alexandra
HARKNESS, Ciaran Andrew
HARLEY, Amy Shannon
HENDRIE, Emma
HOOD, Ruairidh Stuart
HOWARD, Kenzie Isabella
KERR, Brogan Joan
KIDD, Jenna Sutherland
KORNEJEVA, Anastasija
LIVINGSTONE, Lauren
McBRIDE, Eve Catherine
McGOVERN, Thomas
McGRATH, Caroline
McMURCHIE, Lauren
MAHOOD, Derek Duncan
MERTON, Alexander James
MONCUR, Erin Mary Jane
NEIL, Jenna Marie Craigen
RASUL, Sohaib
RICE, Lucy Katy
ROUDH, Simon Dildarjeet Singh
SCOTT, Susannah Louise
SHARP, Julie Barbara
SHEERINS, Niall Molloy
SOMMERVILLE, Chloe Jemima
STEVENSON, Shannon Margaret
STEWART, Claire Anne
STEWART, Katie
THOMSON, Ashley Jayne
TOWNSEND, Jack
WALKER, Bryony
WILSON, Kathryn Frances
WILSON, Ross
YORDANOVA, Ameli Rumenova

Kaney named In-house Rising Star

Mariel Kaney, Deputy Legal Secretary to the Lord President's Private Office (below), has won the Society's In-house Rising Star Award 2022. Marion Sweetland from the Commercial team at Aegon was runner-up.

In what the judges described as a very close-run competition, both finalists were said to have excelled in their organisations, working on pivotal projects that have been greatly valued by their employers, showing fantastic client service skills, and working on an array of different matters to a high degree, while being dependable team members. They have also worked extensively in their communities.

Mariel Kaney has successfully managed her commitments as captain of Hearts FC women's team and as a trustee of the Big Hearts charity, alongside a demanding role; Marion Sweetland has championed the in-house legal sector in both her work at Aegon and in her mentoring of law students.

Presenting the award, Society President Murray Etherington, said: "We should all recognise that the challenges for those early in their careers have been more acute as a result of the pandemic. The recent circumstances make these layers of essential on-the-job development very difficult, which in turn makes the achievements of all our Rising Star Award nominees all the more impressive.

New Council members named

Iain Jane, principal at Iain Jane & Co in Peterhead, has been appointed Law Society of Scotland Council member for Aberdeen, Banff, Peterhead & Stonehaven. A criminal defence lawyer, he joins Debbie Wilson-McCuish in representing the area.

Lesley Watt has joined Council as its newest lay member. She qualified as a solicitor before retraining as a chartered accountant in 1988. She is an independent non-executive director with Tatton Asset Management plc and sits on their Audit & Risk Management and Remuneration Committees.

Ruaraidh Macniven, director of the Scottish Government Legal Directorate, a member of Council since May 2019, has been reappointed.

Rugby players wanted

After an almost three-year hiatus, the Law Society of Scotland's rugby club has arranged a fixture, hosting the Italian Law Society XV in Edinburgh on Saturday 19 November, and is looking for players to join the team.

Winners of the Lawyers World Cups in 2007 and 2009 and the bronze medal in 2015, the club is looking for new members in advance of the return of the Law World Cup in Paris in 2023. All current and former players of any ability are welcome to join, if you are keen to play some sociable rugby and network with other legal colleagues.

Please contact club captain Alistair Wood (alistair.wood@pinsentmasons.com) or vice captain Matthew Henson (matthew.henson@burnesspaull.com).

OPG update

Fees increase

The majority of fees payable to the Public Guardian increased from 1 July 2022. Under the Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2022, fee levels will increase at planned intervals.

Fees from 1 July 2022 until 31 March 2023 are shown in sched 1. Submitting a power of attorney document or deed of amendment costs £83; registration fees for intervention or guardianship orders increase to £93; all fees associated with supervising guardians increase.

Fees from 1 April 2023 until 31 March 2024 are shown in sched 2; fees from 1 April 2024 onwards are shown in sched 3.

Change to waiting time

From 18 July 2022, registered powers of attorney that require to be amended, and new PoAs revoking a

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas from the last few weeks are highlighted below. For more information see the Society's research and policy web pages.

Seafarers' pay

The Society's Marine Law and Employment Law Committees responded to a consultation from the UK Government proposing new legislation on wage protection for seafarers working on ships that regularly visit UK ports.

The response noted that this is a complex matter and suggested that careful consideration of the details as well as consultation with industry was needed, to minimise the risk of unintended consequences. The potential for conflict between the proposed approach and existing legislation controlling the responsibilities for flag states to control seafarer remuneration was highlighted, particularly responsibilities under the UN Convention on the Law of the Sea and Maritime Labour Convention 2006. It was also noted that the proposed ability to prevent vessels from accessing UK ports would need to be considered in light of the open port duty and any existing contractual arrangements which ports might have made with vessels and/or employers.

It was suggested that vessel type should not be the sole criterion for determining the vessels to be within scope of the provisions; the importance of clarity in the definition as to which vessels are included and excluded was highlighted.

The response further suggested that the Maritime & Coastguard Agency ("MCA") would be best placed to enforce the proposed new regulations rather than statutory harbour authorities, though noted that it would be crucial for the MCA to be given the necessary resources and personnel.

National Care Service

The Public Policy Committee has established a working group to lead the Society's engagement with the proposals for a National Care Service for Scotland. The group's membership is drawn from across the membership of existing committees with an interest in the proposed reforms, reflecting the wideranging scope of the proposals. Its remit includes responding to relevant policy and legislative proposals, working with other committees as appropriate, and engaging with Scottish Government and other stakeholders. The group is currently considering the National Care Service Bill, which was introduced in the Scottish Parliament on 20 June.

Find out more about the Society's Policy team's work with its network of volunteers to influence the law and policy.

Society pension trustee vacancy

The trustees of the Law Society of Scotland Staff Retirement Benefit Scheme are looking to appoint a Scottish solicitor as one of the two independent trustees to the scheme. The candidate must hold a current full and unrestricted practising certificate and have at least five years' experience in pensions law. Previous trustee experience would be desirable but not essential.

The scheme is a closed final salary pension scheme both to new members and future accrual. There are at least two trustees' meetings per annum (hybrid meetings with video options). Interested applicants should send an up-to-date CV to David Cullen, chair of the trustees at cullendavid46@yahoo.co.uk by 31 August 2022. Interviews will be held in September.

registered PoA, will be queued and processed in date order along with all new PoA submissions.

This measure will enable OPG to focus resources on pre-registration submissions, resulting in reduced overall waiting time. Where there are circumstances requiring expedited submission, please email opg@scotcourts.gov.uk with the details. Some amendments can be complicated to apply, and it is often easier and costs the same for the old PoA to be revoked and a new PoA registered.

Bond of caution forms

Marsh Ltd has contacted OPG to advise that some solicitors are using an old version of its application form (SCOT18).

Using the older version may lead to a delay in the bond being accepted and set up, as it contains a previous postal address. The application form with reference SCOT21 should be used as it has all the up-to-date details.

ACCREDITED SPECIALISTS

Commercial mediation
Re-accredited: JANE ELIZABETH FENDER-ALLISON, CMS Cameron McKenna Nabarro Olswang LLP (accredited 16 December 2015).

Debt and asset recovery
JOEL MARTIN CONN, Mitchells Roberton Ltd (accredited 14 June 2022).

Employment law
KEVIN JOHN DUFFY, Scottish Engineering (accredited 30 June 2022).

Family mediation
Re-accredited: HELEN HUGHES, Helen Hughes Family Law (accredited 19 February 2004); KAREN GIBBONS, Harper Macleod LLP (accredited 10 March 2016); ALEXIS HUNTER, Alexis Hunter Family Law (accredited 6 March 2019).

Personal injury law
RICHARD DORIAN PITTS, Digby Brown LLP (accredited 22 June 2022).
Re-accredited: ANNA MHAIRI WATT, Ledingham Chalmers LLP (accredited 26 April 2017).

Planning law
CHRISTOPHER DEVLIN, Anderson Strathern LLP (accredited 7 June 2022).

Public procurement law
Re-accredited: DAVID THOMAS McGOWAN, Dentons UK & Middle East LLP (accredited 19 January 2012).

Professional negligence law
Re-accredited: ALISDAIR STUART MATHESON, Brodies LLP (accredited 19 June 2012).

Trust law
SARAH-JANE MACDONALD, Gillespie Macandrew LLP (accredited 30 June 2022).

ACCREDITED PARALEGALS

Company secretarial
JANE McTAVISH, Dana Petroleum Ltd.

Residential conveyancing
JENNIFER RUTHERFORD, Lindsays LLP.

Wills and executries
ANNA RUTH MACLEOD-ADAMS, Wright, Johnston & Mackenzie LLP; ANNE SCOTT, C & D Mactaggart.

OBITUARIES

JANE (JEAN) HANNA HAMILL, Helensburgh
On 28 May 2022, Jane (Jean) Hanna Hamill, formerly a longstanding partner of the firm of Stirling & Gilmour, Alexandria.
AGE: 92
ADMITTED: 1967

COLIN EDWARD FORBES, Glasgow
On 2 June 2022, Colin Edward Forbes, formerly of TUV SUD Services (UK) Ltd, East Kilbride.
AGE: 57
ADMITTED: 1987

An appreciation of Ian Balfour is on p 48

Gear up for the Scottish Legal Walks

Graeme McWilliams invites your support for this year's fun events in support of local legal advice charities

Access to Justice Foundation Scotland is pleased to confirm that the Scottish Legal Walks, in aid of free local legal advice charities, are back this autumn.

The Glasgow Legal Walk is on Tuesday 27 September, with the closing reception at the Royal Faculty of Procurators. The Edinburgh Legal Walk is on Wednesday 5 October, with the closing reception in the Upper Signet Library. The Foundation is keen to encourage judges, advocates, solicitors, paralegals, trainees and law students, and their colleagues, friends, and family (and dogs) to walk with us at one of these events. They are great fun, offer super networking opportunities, and support very worthwhile causes, so why not organise and register a team, or sponsor some local walkers?

Funds raised in Scotland

Around £42,500 has been raised to date in Scotland by the Foundation through event fundraising, all distributed to Scottish advice charities, so what is raised in Scotland stays in Scotland.

The impact of COVID-19 on social welfare advice organisations led to a group of independent funders partnering with representative bodies to form an alliance for social justice, the Community Justice Fund ("CJF"). The Foundation, as one of the funders, was tasked with hosting and distributing this vital funding, which provided substantial sums in two waves to several Scottish charities affected by the pandemic.

To date the Foundation has distributed a total of £772,193 to legal advice charities including JustRight Scotland, Ethnic Minorities Law Centre, Clan Childlaw, Castlemilk Law & Money Advice Centre, Legal Services Agency, Shelter Scotland, Govan Law Centre, and Govan Community Project.

Walkers at the 2021 Glasgow Legal Walk

More information on the CJF is at atjf.org.uk/communityjusticefund

The work carried out and the continued support shown by the UK Law Societies has been welcomed by the Access to Justice Foundation Scotland, and by its UK parent.

The Foundation

Access to Justice Foundation Scotland is registered as a charity in Scotland. Its committee has been appointed from a broad section of Scottish organisations and interests, all committed to ensuring access to justice for all. The Foundation is seeking designation as a Scottish prescribed charity eligible for pro bono costs orders in terms of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. Although no charity has yet been designated by the Lord President for this purpose, the Foundation is a strong candidate and hopes to achieve designated status in due course.

Other Foundation events

Foundation events raise funds that support legal advice charities. If you are unable to join or support a Scottish Legal Walk, please consider one of the other events this year, including Go the Extra Mile for Justice, the Great Legal Bake, and the Great Legal Quiz: see atjf.org.uk/events

Pro Bono Week 2022

The 21st annual pro bono week will take place from 7 to 11 November. This event will offer an opportunity to recognise and support the voluntary contribution made by the legal profession across the UK in giving free legal help to those in need: probonoweek.org.uk/

Recruitment and review

The Foundation is looking for more committee and working group members to support its work in Scotland. The central belt has the Glasgow and Edinburgh Legal Walks, but what about the rest of Scotland? Is there any local appetite to extend the Scottish Legal Walks further north in future?

Email me if you are interested in joining our committee or working group, would like more details of what would be involved in setting up a new Scottish Legal Walk, or are interested in helping with the existing walks. If you would like to sponsor an event, or donate to the Foundation, please contact enquiries@atjf.org.uk

Follow us on Twitter (@ScotlandLegal), Instagram, and LinkedIn. Graeme McWilliams is a Fellow of the Law Society of Scotland, retired in-house lawyer, and committee member of the Access to Justice Foundation Scotland and chair of its working group. e: gmmcw@aol.com

Disabled solicitor support group proposed

A trainee solicitor is looking for interest in forming a group to support disabled solicitors and disabled students wishing to practise law in Scotland.

Fraser Mackay, who has dyspraxia, has overcome his disability to achieve a philosophy and English degree and then his LLB, but has found no equivalent in Scotland to the England based Aspiring Solicitors, which provides support in order to increase diversity in the profession, or the Diversity Access Scheme, a scholarship programme.

Anyone interested, or who has had a similar experience, has information to share, or would like to volunteer support in any form, should contact frasermackaylaw@gmail.com

The only strategy that is guaranteed to fail is not taking risks.

Mark Zuckerberg, Facebook

Graeme McKinstry

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RISK MANAGEMENT

Cybercrime: the hybrid worker prey

Solicitors and their clients are still falling victims to frauds perpetrated by cybercriminals. Lynne Cardow discusses some of the reasons why

In 2020-21, Police Scotland recorded an estimated 14,130 cybercrimes, almost double the figure recorded the previous year. The risk of falling victim remains a constant threat to solicitor firms and their clients. As a panel solicitor for the Law Society of Scotland's Master Policy insurers, I am still seeing cases of fraud perpetrated against solicitor firms and their clients all too regularly. The fraudsters are as sophisticated as ever, and the impact of these fraud incidents is devastating for the firms and their clients.

The volume of cyberattacks grew as a result of the COVID lockdown and the dramatic increase in the number of people working from home. As we come out of the pandemic, the shift to hybrid working continues to provide opportunities for criminals to exploit some of the vulnerabilities that flexible working brings.

Location, location, location

Hybrid working tends to mean more employees are working part of the week at home and part in the office, possibly using different devices for work, and working from different locations, not just one or two physical office locations. There are many benefits to hybrid working, but it means that there is more reliance on technology and so a higher risk of cybercrime. Businesses have to manage the risks hybrid working brings.

As soon as IT equipment leaves the office, data are at risk. Whether that is by accessing data on unsecure public wi-fi, viewing client data on public transport, or even having devices lost or stolen, the movement of employees between different locations means businesses are relying on their employees having a good awareness of cybersecurity issues and how their actions can expose them and the business to risk. Businesses are having to trust that employees' home wi-fi networks are secure, their passwords are strong and changed regularly, their mobile devices are secure and that they have appropriate antivirus software, among many other security measures. There is more need now than ever for everyone working in a business to think about their own cybersecurity.

The human element

Human error is still the main cause of cybersecurity breaches. It is not enough for just the IT department or the firm's IT consultants to think about cybersecurity. Everyone in a business needs to be thinking about it.

Phishing emails are still one of the most common tactics by cybercriminals to gain access to a business's systems. Working from home may mean an employee is more susceptible to falling victim to a phishing email, perhaps for one of the reasons already mentioned, such as poor wi-fi passwords or outdated hardware. If an employee's computer contains malware as a result of a successful phishing attack, the malware could be transmitted to the company, resulting in system disruption.

Payment instruction fraud, or email modification fraud, is still, in my experience, the most common form of fraud I am seeing perpetrated against solicitor firms and their clients. It is not, of course, the only form. This fraud is often able to be perpetrated after a successful phishing attack where the fraudsters place malware into the computer system, which can lie dormant until the right transaction comes along, usually a property or private client transaction involving payment of funds from one party to another. The email correspondence between the solicitor and the client is intercepted and altered, often with bank details changed to direct payment of

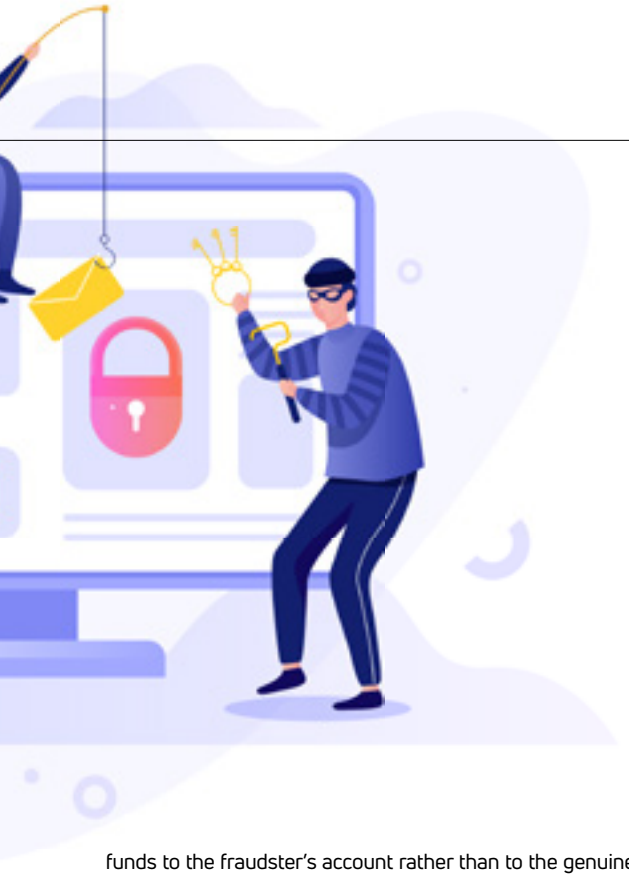
FROM THE ARCHIVES

50 years ago

From "The Lawyer's Duty to the Law" (address by Lord Goodman to the Society's AGM), July 1972: "I have rarely attended a conference or presentation with some member of the Bar when at some stage the gentleman has not tilted back his chair, looked at the air, kept his spectacles on the end of his nose by some remarkable feat of balancing – only a seal can do it as well as a leading barrister – and conveyed or intimated or stated what a loathsome creature my client was or how foolish she was, or – if she happens to be a pretty woman – how ill-advised and how in need she is of his paternal protection. Now I don't think this is good; I think that people have reached a stage where they no longer want this."

25 years ago

From "Reducing the Risks of Aggression and Violence at Work", July 1997: "It is also commonly recognised that the professions are not immune. This has perhaps taken an even bigger leap of understanding. My father was in the legal profession... I would never have considered that such a respectable profession could have a problem with personal safety. These past years have forced me to think differently. With hindsight I realise how shaken my father was when faced with a shotgun when visiting a client in his country home. I now remember the time my father refused to prosecute the man who had deliberately scratched both sides of his car. 'The poor lad felt I let him down in his drink-driving case', he said."



funds to the fraudster's account rather than to the genuine bank account of the firm or the client.

Absent appropriate measures, employees working from home can easily fall victim to these cyberattacks, giving the criminals access to the firm's systems, and their clients' data. While to err is human, it is not of itself an adequate line of defence to a claim from a client for a breach of GDPR or for loss from fraud.

Managing the risks: knowledge is everything

Hybrid working is here to stay, and training and educating all employees on cybersecurity issues is vital not only to prevent fraud but also in defending claims against firms for failing to protect clients' interests.

Only when employees know what to look for will they be able to avoid the traps set by the cybercriminals. As a first step, employees need the training to understand which aspects of cybersecurity are their responsibility and what steps they need to take to manage that responsibility. Appropriate cybersecurity is essential, regardless of the employee's location or the device they are using. The training and education of employees need to be regular and up to date. Cyberattacks continue to evolve, and our awareness must evolve with them.

Today, everyone in a business needs to understand the cybersecurity risks they may come across in their day-to-day work, and they need to know and understand how to act if they think their system or device has become compromised. Firms need to ensure they, or their IT specialists, provide regular training to their employees on all aspects of cybersecurity. In addition, firms will need to ensure they have robust policies in place to enable secure working from home, and critically also on fraud response to ensure employees have a good awareness of what to do if they do fall victim to a cyberattack. As with so many things in life, timing is everything and reacting quickly is essential in the worst-case scenario where there's a successful attack.

Everyone wants to enjoy the many benefits of hybrid working, but homeworking needs to be safe and secure to minimise the risk of a cyberattack.

Lynne Cardow is a partner and accredited specialist in professional negligence law with BTO Solicitors

ASK ASH

Piling it on

My boss just keeps turning the screw

Dear Ash,

I have been working non-stop lately and feel like I'm on burnout, but my manager keeps piling on the work. She claims I need to prove myself after the pandemic as she feels people have been slacking. I need my job and don't agree that I have been lazy; if anything it was really hard trying to juggle home life with working from home. My manager just seems to become increasingly unreasonable and has now made clear that parents should not be working from home unless their children are at nursery or school.

Ash replies:

It seems your manager is acting somewhat irrationally as perhaps she too is under pressure after the pandemic. However, you need to stand up for yourself and your own wellbeing.

In my younger days, I too experienced times when a team leader found it difficult to address their own stresses, and essentially filtered down such pressures onto their staff. This is not only unfair but creates a tense and eventually unmanageable working environment.

I appreciate you need your job, but if you carry on like this you risk potential burnout in any case.

In regard to the childcare issues, employers are offering increasing flexibility for parents. Therefore I suggest you speak to your manager and confirm you are willing to provide regular updates on your work to provide assurance about your progress and level of commitment. Such assurance is sometimes all that is required to help put your manager's mind at ease.

However, if your manager is not willing to compromise, you may have to look at alternative opportunities. The pandemic has in many ways been a force for positive change in terms of work-life balance and your manager needs to understand that the horse has now bolted in this regard and she needs to adapt to this. Adding unreasonable restrictions and discriminating against parents will just push away good employees in the long run.

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).

TRS: time for a trusts trawl

From 1 September the anti-money laundering controls of the Trust Registration Service extend to many trusts not previously required to register. Ian Macdonald sets out the background, and the action needed now

A huge number of additional trusts will have to register with HMRC's Trust Registration Service (TRS) before 1 September 2022. This article, which follows the article at Journal, February 2021, 42, includes a reminder of the background to TRS and explains which trusts do and do not now need to register.

Background

The Fourth Anti-Money Laundering Directive (4AMLD) required the then EU member countries to establish a register of "beneficial owners" of structures such as trusts, companies etc. The TRS is administered by HMRC and has been in place since 2017, so it should be familiar to most trust practitioners. TRS was established to provide information and transparency on trusts to help in the fight against money laundering and terrorist financing.

In this context, the expression "beneficial owners" does not really mean "beneficial" or "owners" at all. Under TRS, "beneficial owner" is essentially the term used for any of the parties involved in a trust, even though a Scottish interpretation would not ascribe any ownership, beneficial or otherwise, to most of them. This includes a settlor, trustee, protector, beneficiary, class of beneficiaries and any other individual who has control over the trust. Where beneficiaries are identified as a class (for example, the issue of a particular person) and the class is not yet fully identifiable, it is sufficient to provide a description of the class. That changes if any individual beneficiary receives any payment or asset from the trust – their personal information must then be added.

TRS phase 1, 2017

In the first stage of TRS, only trusts which incur a UK tax liability needed to register. These are now known as **registrable taxable trusts**. Liability can be to any of:

1. income tax;
2. capital gains tax;
3. inheritance tax – periodic and exit charges and/or a liability on the death of a beneficiary;
4. land and buildings transaction tax (LBTT) when the trust buys property.

All existing registrable taxable trusts should already be registered unless the tax liability is a one-off (for example an IHT 10-year charge, or LBTT), in which case the trust need only be registered when the liability arises.

Any changes to the information submitted to TRS must now be reported within 90 days of the change occurring. For trusts which submit an annual self-assessment tax return, there is a box to tick to confirm that all changes have been reported or none have arisen. For other trusts, there is no need to make any annual or other declaration that no changes have occurred.

TRS phase 2, 2021

More trusts must now register

Under the Fifth Anti-Money Laundering Directive (5AMLD), all "express trusts" must now register in TRS unless they are within one of the exclusions set out in sched 3A to the revised regulations (SI 2017/692 as amended). These trusts are called **registrable express trusts**. *Such trusts must register even if they do not have a tax liability.*

Timetable

Registrable express trusts in existence on 6 October 2020 or created before 1 June 2022, must be registered by 1 September 2022. Non-taxable trusts created after 1 June 2022 must be registered within 90 days of being set up.

Bare trusts

Before I look at a number of these exclusions in a bit more detail, I first need to cover the situation of bare trusts. These are not always considered as being trusts at all because they are merely a structure that allows the trustees to hold property in their name on behalf of the beneficial (in its proper sense) owner of the assets.

Bare trusts are not, however, excluded from registration unless they come within one of the other exclusions. HMRC has, however, recently amended the regulations to say that bank accounts held by a parent or other individual for a child under 18 will not be required to register under TRS. This new exclusion is also being treated by HMRC (per the guidance/manual) as covering all Junior ISAs.

Exclusions – trusts on death

There are essentially three categories of trusts which arise on death and do not require to register under TRS2. As with all these exclusions, however, if the trust incurs a UK tax liability it still will need to register under the original TRS rules even though it is within one of the exemptions which apply to non-taxable trusts.

1. ***Legislative trusts.*** This expression is used to apply mainly to bare trusts and life interest trusts which arise on intestacy, which will generally arise only in England.
2. ***Will or life policy trusts within two years of death.*** A will trust or a trust which held only a life policy that paid out on the death does not need to register until the second anniversary after the death. If, however, the trust continues after that date, it must register even if no tax liability has arisen or is likely to arise.
3. Under para 16, ***bereaved minor's trusts*** and ***18 to 25 trusts*** do not need to register, even if they run for more than two years after death.

Pilot trusts and co-ownership

Under para 6, pilot trusts are excluded provided the value does not exceed £100 and the trust was created before the regulations came into force on 6 October 2020. This is a very limited exclusion and if a new pilot trust, however small, is created it must register. Similarly, if additional property is added to a pre-6 October 2020 pilot trust, taking the value over £100, it must then register.

Under para 9, a trust of jointly-held property where the trustees and the beneficiaries are the same persons (described under the heading "co-ownership") need not register. The most likely examples of such trusts are joint bank accounts (which we would not normally think of as being trusts at all), and jointly owned land and buildings in England where the property is being held in trust.

Trusts of insurance policies

The exclusion in para 7 as originally described in the TRS guidance was very limited indeed. Trusts of insurance policies that do not need to register are restricted to those paying out only on the death, critical illness or permanent disablement of the person assured or to pay care costs.

However, the guidance has now been changed to say that a trust holding a whole of life policy that could acquire a surrender value (rather than just a term policy) does not need to register. This change recognises the many problems which would have arisen for trustees and advisers because many life policy trusts tend to be forgotten about, so many clients are unlikely to know or remember that they have a trust, far less who the trustees and beneficiaries might be.

So trusts holding only conventional life policies will not need to register until the policy pays out. Trusts holding investment bonds *will* have to register.

Access to information

The Government recognises that the vast majority of trusts are established for legitimate reasons and, particularly because trusts are so widely used in the UK, has sought what it calls a proportionate solution to 5AMLD's information-sharing obligations. There is no public access to the register, and access to TRS information is restricted to law enforcement agencies and third parties with a "legitimate interest" as interpreted by HMRC.

Action required now

As well as making sure that all your registrable taxable trusts have been registered on TRS and that the information on the register is complete and up to date, you will now have to trawl through your firm's records to identify the registrable express trusts which have not so far had to register because they have not incurred a tax liability, but are not covered by the exclusions. The main such trusts are likely to be the following (although this list is not exhaustive):

- trusts holding land and buildings which do not incur a tax liability, such as those occupied by a beneficiary;
- trusts holding only insurance company investment bonds;
- trusts holding private company shares which do not normally pay a dividend;
- bare trusts other than those specifically excluded.

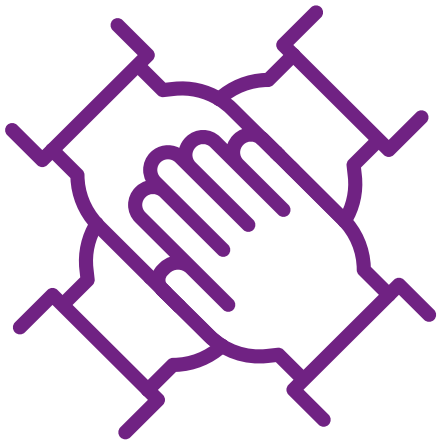
A key consideration is who is going to do the work, which is quite extensive and time-consuming, and who is going to pay for it, particularly where you do not currently have an engagement with the trustees, and in many cases the trust has no money available to pay fees.

Many trustees will be unaware that they are now required to register under TRS, and it is likely that some who do know that they are a trustee will decide to do nothing about it. This option is not, however, open to us as advisers, because we should know all the trusts in which we or our colleagues have been appointed as trustees and the other trusts established by our clients.

More positively perhaps, this will be an opportunity to review trusts to make sure that their trustees, beneficiaries and provisions are up to date – indeed that there *are* current trustees and beneficiaries.

Ian Macdonald, TEP, is head of Private Client at Wright Johnston & Mackenzie LLP

Know people, know business



People professionals have a key role in focusing a business on ESG targets, Rupa Mooker argues, given the issues they deal with that relate to employee wellbeing and motivation

At the CIPD Festival of Work conference last month, its president, Baroness Ruby McGregor-Smith, said that people professionals need to be the driver of ESG targets in business. I agree. Businesses want to be more sustainable, socially responsible, and environmentally friendly. So, just as we stepped up during the pandemic, people professionals must now play a pivotal role in designing how workplaces will evolve due to ESG and continuous cultural change.

What is ESG?

ESG can be broadly broken down as follows:

- **Environmental** – focuses on a business's impact on things such as climate change, carbon emissions, pollution levels and responsible waste management.
- **Social** – focuses on a business's impact on its people, issues such as gender, diversity and inclusion ("D & I"), mental health, employee rights and working conditions, and its corporate social responsibility ("CSR") programmes.
- **Governance** – focuses on the running of, and trust and transparency across, the business.

Why is ESG relevant to the legal profession?

ESG considerations are slowly, but surely, working their way into the legal profession. First, ESG is an area where lawyers are advising on things such as environmental law, responsible investment funds and sustainability-linked loans. Secondly, clients consider ESG a key priority for their own business *and* want to ensure their legal providers are operating under trustworthy ESG credentials. Finally, not only are staff increasingly interrogating their employer's ESG focus to help decide whether they want to continue to work there, it is equally important to prospective hires when deciding where they want to work.

Essentially, a legal organisation's ESG performance can assist with attracting clients, talent, and investment, which can ultimately affect its financial performance.

Where do "people professionals" fit in?

Since the pandemic, the focus on ESG matters in workplaces has moved from the environmental impact to social issues which are naturally linked to matters that HR professionals, like me, deal with daily. It is no longer enough for firms simply to deliver a bit of pro bono legal advice and carry out some charitable endeavours.

What matters as regards "social" ESG targets?

- **Pay and working conditions** – these are key when looking at the social strand of ESG, particularly in the current climate. Organisations are increasingly investing time and money into recruitment, fair wages and enhancing terms and conditions to ensure their people are looked after. Job applicants assess pay, benefits and career progression to help gauge what value is placed on the workforce. This forces employers to be more transparent and accountable in these areas.
- **Policies and procedures** – implementation of disciplinary and grievance, whistleblowing and equal opportunities policies sits firmly within HR teams. Such policies assist in preventing and tackling issues of discrimination, bullying and harassment, ultimately leading to a fairer workplace.
- **D & I** – a diverse workforce, with a range of different perspectives, results in a wide mix of skills and experience and, in my experience, leads to greater employee engagement and retention. Legal organisations that have D & I prominent on the business agenda are more likely to see a positive influence on their reputation as well as success with clients, which positively impacts on fees.
- **Mental health and wellbeing** – for many, extended lockdowns and isolation during the pandemic created, or exacerbated, mental health issues. As a result, much of the Scottish legal profession is now more focused than ever on creating collaborative working environments promoting health and wellbeing. By doing so, employees are more likely to be productive and engaged, leading to better performance, reduced staff turnover and less sickness absence. At MacRoberts, the appointment and training of designated mental health first aiders (MHFAs), who can be the first point of contact for any employees who are struggling with their mental health, has proven incredibly useful.
- **Learning and development** – it is vital for employees, particularly managers, to get effective training providing them with skills that enable them to identify and deal with issues such as stress, anxiety and discrimination at an early stage, and in an open manner – before matters escalate to the stage where team members simply leave.
- **CSR programmes** – in addition to the above, it remains vital to maintain strong community links and to "give back" wherever possible – whether that is via pro bono legal advice or setting aside staff volunteer days for causes that are close to their hearts. Employees feel extremely motivated when they view the corporate brand as one with a social conscience.

The future

Competition is helping to incentivise those within the Scottish legal profession to do better when it comes to ESG, particularly when they realise it gains rewards from employees, attracts talent and clients, and hits the profitability angle too. The role of "people professionals" in aligning corporate culture and human values to create safe, fair and more sustainable workplaces is invaluable. As British-American author and inspirational speaker, Simon Sinek says: "If you don't know people, you don't know business."

Rupa Mooker is Director of People & Development with MacRoberts

Clio®

How to go paperless in your law firm

1. Onboard clients digitally

The simplest way to reduce your paper use is to stop creating new paper files and documentation. One way to achieve that is to move from a paper-based client system to a digital one.

With technology, you can reduce a lot of paper from the intake and onboarding process: client details can be stored in a spreadsheet or in an online folder. Documents can be emailed and sent for e-signature. Moving to a client relationship management (CRM) platform for lawyers, such as Clio Grow, can offer even more paperless benefits. CRMs and practice management software allow you to set up paperless agreements, intake forms, billing, and e-signatures, for example.

2. Convert your existing files

Unless you are a brand new law firm, the chances are that you have at least some (or many) paper files and documents stored in your office or in use now. This is where a quality digital scanner will come in handy. Start with the documents you need immediately and work backwards when digitising.

A cloud-based storage system, such as Dropbox or OneDrive, can be used for storage. Alternatively, consider a practice management software (such as Clio's which has in-built cloud storage) to store all client details where they can be accessed in just a few clicks.

Be sure to shred documents that are no longer required, and take your time to clear the backlog – it should be a marathon and not a sprint.

"Unless you are a brand new law firm, the chances are that you have at least some (or many) paper files and documents stored in your office or in use now. This is where a quality digital scanner will come in handy"

3. Adopt clear processes

If you want a paperless system to stick, it is imperative that you outline that system in writing. This should answer questions such as:

- What should be done with paper files dropped off by clients?
- How are files named and organised on your cloud storage server?
- Who is responsible for making sure this all gets done?

Going paperless can help your law firm to lower overheads, collaborate more easily with colleagues and clients, and positively impact the environment. For more details on how your firm can go paperless – including detailed steps for organising your digital files, dealing with your existing paper files, and staff training – check out Clio's free guide.

Download "The Green Law Firm: A Lawyer's Guide to a Paperless Office" at clio.com/uk/gogreen

High street and hybrid

One high street practice has taken on board the lessons of the pandemic, and merged four branch offices into one while at the same time broadening its geographic client base

Four branch offices combined into one, with too few seats for everyone at once – but a new outreach to clients across Scotland. Welcome to one high street firm's restyled version of practice in the 2020s.

The firm is McSherry Halliday, which has just relocated its 35 strong team, previously dispersed in four offices across Ayrshire, to newly renovated premises at Elliott House, Irvine.

Except it isn't quite that simple. The new office is fitted out with desks for just 15 staff, though the building can accommodate the firm's expansion plans if necessary. It sends a clear signal that a practice which until the pandemic had stuck to the 9 to 5 office working day model, has fully embraced hybrid working, with staff spending maybe two days a week in the office and three at home.

COVID-19 catalyst

While planning began about a year before COVID-19 emerged, once the initial shock of lockdown had passed the enforced change began to be seen as an impetus towards the new office and as making the transition a lot easier.

"We pride ourselves in always thinking ahead of the game to develop, an example being our decision over 10 years ago to trial the remote storage of information and case management on the cloud," partner Caroline Nisbet explains. "We have been working with this technology since then, gradually becoming paperless, to such an extent that when the pandemic forced everyone to work remotely, we were well equipped from the beginning to move our entire practice smoothly from office to homeworking. This meant that throughout the lockdown we were available to fully service all of our clients' needs."

Clients have equally discovered the benefits of remote working, finding it more convenient to join a video call than take a half day's leave for an in-person appointment.

Though a traditional high street practice, taking on most types of work apart from criminal law, McSherry Halliday was already finding ahead of COVID-19 that the digital side could be a good way to grow the business. Even so, the pandemic proved a catalyst to realising just how effective it could be – which helped reinforce the intention to move everything under one roof.

New business recently has been coming primarily through its website and other digital means. As a result, clients are coming from a wider area. And associate Louisa Doole, who now lives in Edinburgh, is able to manage a caseload that covers not only Ayrshire clients but the whole of Scotland. "This has shown that hybrid working has enabled us to expand and thrive. I don't think anyone realised how progressive we could become within such a short time," she comments.

Team ethos

Another lesson has been the breaking down of barriers between teams in different offices. For example, if someone in one branch was on holiday, others would have to cover from within that branch, putting staff under pressure. With a new structure of departments or teams across the firm all working together, whether from home or in the office, there is much more collective cover for staff on holiday or unwell.

That greater team ethos is also reflected in the firm's branding, which has been given a unified theme.

While people in the office do have an allocation to particular desks, the breakout spaces, dining and kitchen area and general ambience are designed, following the pattern now being adopted by many larger firms, to enable those working there to find the best setting for the particular task in hand, and to relax and take time out when they need to.

Partner Catherine Morrow, who joined the firm five years ago, soon realised that what seemed a traditional practice on the surface was poised for change – change that has helped counter the negative impact of the pandemic on mental health. "We recognised that this was also true for our whole team at McSherry Halliday, and this is partly why we are adopting a hybrid working system and introducing a holistic approach to our team," she relates. "We are currently planning a programme of resources for our team to use, which will allow them to take time out during their working day to focus on their wellbeing. Hybrid working allows for a better work-life balance, which can be severely lacking in the legal profession. Embracing the change in our newly adopted way of working is proving to be one of the best and most exciting decisions we at McSherry Halliday have made!"

#TeamMcSherryHalliday

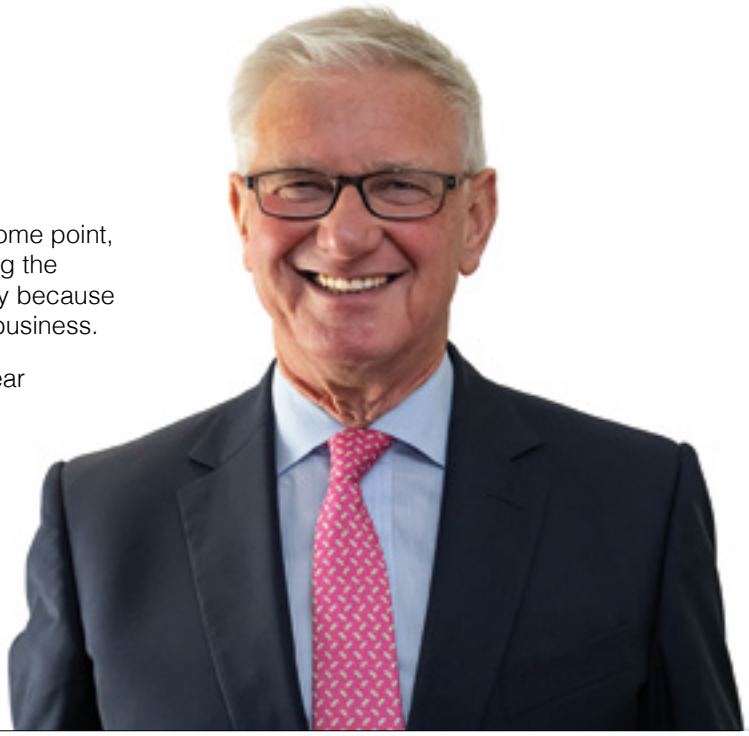
Other smaller firms with new or changed working practices are welcome to share their experiences.

Getting out of business is harder than getting into it.

You must have a plan!

Graeme McKinstry

Exit Strategy Consultancy



Every business owner needs to exit their business at some point, whether it is succession to the next generation or selling the business. However, many of them overlook exit strategy because they are so involved in the day-to-day running of their business.

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Ian Leslie Shaw Balfour

16 June 1932-11 June 2022

While it has fallen to me to pen this, I do so on behalf of the huge number of people who have passed through the doors of Balfour+Manson and received the support and guidance from or worked with Ian Balfour (or "Mr Ian" as he was known by so many).

On looking back, it is simply quite extraordinary to see the list of eminent lawyers who were trained and guided by him. They range from solicitors in private practice across the country to academics and members of the Faculty of Advocates, as well as sheriffs and senators.

Of those, I pause to wonder what the result would be if a straw poll were carried out to see how many enthusiastically embraced the styles books created by Mr Ian (green and yellow, I am told). They covered various areas of litigation. I understand that those books contained some small grammatical or typographical errors, and it was not unusual to see the same errors being repeated in court documents lodged by other firms in the Court of Session over the following years!

One point that comes through loud and clear is that Mr Ian was a quiet but confident scholarly lawyer. He placed immense trust in his apprentices/trainees. When he would depart on holiday, those individuals would be advised not simply to acknowledge letters, indicating that Mr Ian would deal with them on his return, but to respond to the issues raised in them. If the response was correct, then all fine and good, but if wrong he advised he would sort it out on his return.

As a result, his self-contained confidence was gently instilled in those he trained. I can recall that when he was heading to retirement, he handed over a significant client to me. There were few words, but absolutely no doubts expressed if the approach I took was perhaps different from his. He was there when needed but did not interfere. I wonder how many of us can truly say we have that skill.

His frequent kindness to others was carried out in the same quiet way, whether to help a former apprentice with a house purchase or problem (with no charge of course) or to support a member of staff. He never seemed to be a man after praise or the limelight, but was quite content in being a true professional, looking after many.

Another retired colleague told me Ian frequently worked in the office late into the evening. As a result, when he announced that his wife was expecting their third or fourth child he was asked, by a lady in the firm at the time,

"How do you find time, Mr Ian?" Apparently, he took it in good humour – given that would be over 45 years ago, it was quite a bawdy remark! It shows his sense of humour.

On at least one occasion, in the middle of a full discipline hearing, with a witness in the witness box, Ian was seen to stand up and, without a by your leave, leave the room, returning a few minutes later to resume his questioning. No break, no apology or fuss – he just carried on. Nothing was said by anyone, either because he was held in such high regard or the others in the room were so surprised. I wonder who would dare to try that now.

It has already been said that he was ahead of his time with technology, but I had not appreciated how early that enthusiasm started. Apparently, in 1958 he installed the very first telex machine for a legal firm, and in the 1980s was encouraging the firm to be as computer literate as he was. He was truly innovative in this area.

In his later years, he would visit the office regularly to carry out his sheriff court auditing role and I was always touched when he would pop in to have a quick word about something that was on his mind.

When I last saw him to chat late last year, he simply advised he was retiring as an auditor (at 89!), as he wasn't keeping that well. In many ways, that speaks of the man himself.

However, for me, and for I suspect many others, the real legacy that Ian continued to instil in the firm is that of its culture and ethos. It has held strong despite the extraordinary changes in our profession. It has resulted, throughout his years and since, in immense loyalty across past and present members of the firm.

For that, and many other things, Ian Balfour, Mr Ian, will be long remembered with great fondness and affection. RIP.

Elaine Motion

Law Society of Scotland

Expert Witness Directory

2022

Law Society of Scotland

Expert Witness Directory 2022

I am very pleased to introduce the 2022 published *Expert Witness Directory*.

I hope you will find it useful for finding experienced experts that will provide essential technical analysis and opinion evidence in court and reports.

All our listed individuals and companies have demonstrated experience and ability in providing expert witness services through an application process and professional references and have agreed to our code of practice. Many also have specific training in report writing and giving evidence in court.

If you need more in-depth information about any of the experts, you will be able to find their full profile detailing qualifications and experience in our recently improved online directory www.lawscot.org.uk/members/expert-witness-directory.

We welcome any suggestions you may have for areas of expertise that you would like to see represented in the directory, or indeed recommendations of experts that you have worked with who may benefit from joining it. My contact details are listed below.

Through our CPD programme, we will continue to provide training for solicitors when instructing expert witnesses, most notably at our annual Personal Injury Conference. If you want to know more about the training, please email CPD@lawscot.org.uk.

Angus Maclauchlan
Head of Marketing
Law Society of Scotland

If you are an expert witness and would like to find out more about how to be listed in the Law Society of Scotland Expert Witness Directory, please email **angusmaclauchlan@lawscot.org.uk**

WHO RATES OUR EXPERTS

Reference system underpins entries for all those listed in this index

The directory is comprised of expert witnesses who live and work in Scotland, and expert witnesses who are based in other areas but are willing to travel to Scotland to work. New experts applying to be listed are required to demonstrate experience and ability in providing expert witness services, normally by providing references from two solicitors holding practising certificates who have instructed them within the last three years.

The reference form asks the referee to rate from "very good" to "very poor" several aspects of the expert witness's report: accuracy; understanding and analysis of the expert subject area; presentation; and adherence to timescale. Where the expert has presented evidence in court, referees are asked to rate their understanding of the court's requirements, and the preparation, content and delivery of the expert's evidence.

Referees are asked whether they have received any adverse comment from the judge or others which gives them cause to doubt the expert's expertise and whether the referee would use the expert again or recommend the expert to other solicitors.

Where any of the ratings fall below "good", the references are carefully scrutinised. Other than in very exceptional cases, low ratings lead to the expert's exclusion from the listing of checked experts. It is always the responsibility of the instructing practitioner to ensure any expert witness possesses the knowledge and experience required for each individual case.

Individual expert witnesses and corporate expert firms

All experts listed in a corporate entry must provide satisfactory references for their individual work as expert witnesses. In addition, all firms must supply the name of a main contact person.

Other referees

One reference must be from a solicitor from the same jurisdiction as the expert witness, who has instructed him/her within the last three years. The other reference, also pertaining to instruction as an expert within the last three years, may be given by:

- practising solicitors/lawyers from Scotland, England or Wales
- a lawyer from another jurisdiction
- an advocate in Scotland or barrister in England, Wales, Ireland or Northern Ireland
- a judge, sheriff or holder of other judicial office.

Cases where references have not been required

There are certain cases where our reference requirements have been superfluous because the expert has already passed through a rigorous accreditation process, which has included proven experience and understanding of expert witness work. In these cases, the Law Society of Scotland may accept experts who have worked for or been vetted by other organisations. The Law Society of Scotland will verify the procedures employed by other organisations to ensure that their procedures meet or exceed our requirements and will verify membership/employment where appropriate.

CODE OF PRACTICE IS EXPERT SUPPORT

Law Society of Scotland Code published to assist expert witnesses engaged by solicitors

The Law Society of Scotland has published a Code of Practice to assist expert witnesses engaged by solicitors in effectively meeting their needs, so those solicitors can better serve their clients and the interests of justice.

The Code applies generally, but there may be additional requirements relating to cases in specialised areas of law. Experts must also comply with the code of conduct of any professional body to which they belong.

At the outset, experts should ensure they receive clear instructions, in writing. In addition to basic information such as names, contact details, dates of incidents, etc, these should cover the type of expertise called for, the questions to be addressed, history of the matter and details of any relevant documents. Experts should also be advised if proceedings have been commenced or if they may be required to give evidence.

When medical reports are involved, it must be highlighted whether the consent of the client or patient has been given, and in cases concerning children, that the paramountcy of the child's welfare may override the legal professional privilege attached to the report and that disclosure might be required.

Instructions should only be accepted when the expert is fully qualified to speak on the matter and has the resources to complete the matter within an agreed timeframe.

Experts should provide terms of business for agreement prior to accepting instructions, including rates of payment or the agreed project fee, and travelling expenses, etc.

Solicitors must be notified, and their agreement obtained, if any part of the assignment will be undertaken by anyone other than the individual instructed.

Client confidentiality must be observed.

Guidance is also given as to the content of the report prepared, which should be in plain English with any technical terms explained.

Independence and complaints

Once they have accepted instructions from a solicitor, experts are under a duty to provide an objective and independent opinion relating to the case.

The key to being an expert is maintaining independence. When giving evidence at court, the role is to assist the court. Any and all personal or professional relationships, business dealings and competing interests that might influence the expert's work must be fully advised to the solicitors at the start of each project. Experts should immediately withdraw if a conflict of interest arises.

Site visits or client meetings should first be discussed with the solicitor.

Experts should also provide a procedure for resolving any complaints, and respond quickly and appropriately if any complaint arises.

The Law Society of Scotland reserves the right to exclude any expert who has failed to adhere to the Code of Practice from any future edition of the Directory of Expert Witnesses.

This article provides only an overview of the Code of Practice. For a complete and comprehensive guide, please visit: **www.lawscot.org.uk/members/business-support/expert-witness**

EXPERT WITNESS: CASE LAW UPDATE

Meera Shah highlights some recent Scottish cases on the expert's role and duties in court, which practitioners should be aware of

While Part 35 of the English Civil Procedure Rules contains mandatory rules on duty and procedure that expert witnesses and their instructing parties in England & Wales must adhere to, there are currently no equivalent rules under Scottish law, and few rules of court that directly affect experts. Nevertheless, the compliance and conduct of an expert witness during a case held in Scotland can be critical to the outcome and/or the reliance placed on their evidence. Instructing parties are therefore advised to keep abreast of common law developments in this area, as well as ensuring that any experts they instruct have received up-to-date and relevant training on their role and conduct.

There have been several recent cases commenting on the role and conduct of expert witnesses. Below are a handful of the most relevant.

Expert's overriding duty

The position relating to an expert's duty was historically unclear until *Ury Estate Ltd* [2019] CSOH 36, which confirmed that it is the expert's duty to help the court on matters within their expertise, and this duty overrides any obligation to the person who instructed them, or the paying party. As such, expert opinion must be objective, unbiased and uninfluenced by the pressures of litigation; experts must not assume the role of an advocate and their evidence must be confined to their expertise.

Set out basis factors

T v W [2022] CSOH 44 is a personal injury case where a primary school teacher sought damages from her former employer for psychiatric injuries suffered during her employment. The pursuer objected to the evidence of the defender's expert witness, claiming that he had not followed *Kennedy v Cordia (Services)* [2016] SC (UKSC) 59 in stating "the facts or assumption on which his opinion is based", and "the relevant factual evidence so provided". The motion was refused by Lord


Meera Shah

Summers, who found that the witness had complied with his duty under *Kennedy v Cordia*, as he had acknowledged that he had been supplied with precognitions, and the facts disclosed in his report were based on these precognitions.

Relevant expertise

Gemmell v Scottish Ministers [2022] SC GLW 16 is a common law negligence case where the pursuer alleged that specific duties were owed to him by the defenders in the exercise of reasonable care. While Sheriff Reid found the pursuer's expert witness to be "a thoroughly engaging and impressive witness", he felt that large sections of her report were entirely irrelevant, and he attached little weight to her evidence as he felt that "she did not have the relevant expertise to offer reliable opinion evidence on the key issues in this case".

Admissible and reliable?

Martin v Hughes [2021] CSOH 109 concerns a claim for unfair prejudice under the Companies Act 2006 by a minority shareholder in a limited company that provides accountancy services. The respondents claimed that the petitioner's expert failed to act as an independent expert witness to the standards set out in *Kennedy v Cordia*, on the basis that "His evidence as to the choice of valuation methodology… was, in essence and as he himself accepted, merely his say-so", and "Moreover, he had no contemporary, real world valuation experience." This was rejected by Lord Clark on the basis that the expert ''obviously offered opinion evidence, but it was not, as suggested, 'merely his say-so'. Rather than being unsubstantiated *ipse dixit*, it was based upon quite standard features of the EBITDA approach". The judge went on to say that the expert "did have… appropriate experience", and that he explained, "with reasons, why the EBITDA approach for valuation… was to be preferred".

Disclosure of prior connections

Joint Liquidators of RFC 2012 plc, Noters [2021] CSOH 99 concerned an application by the joint liquidators of a football company under the Insolvency Act 1986. Lord Tyre addressed certain issues regarding the respondents' expert, stating that although he did not hold the expert's evidence as inadmissible (on the basis of *Kennedy v Cordia*), it must be treated with caution owing to the fact that his connections with one of the owners of the football company were not disclosed in his expert report. The explanation given by senior counsel failed "to have proper regard to the duty incumbent upon [the expert] himself to disclose prior connections".

Summary

Expert witnesses are assumed to be aware of and understand the terms of their appointment, including their duty to the court and the extent and limits of their role. As expert witness skills and disciplines are different to those of an expert's day job, the above cases emphasise the value of regular and up-to-date professional training to an expert witness to ensure they are kept abreast of all the key developments in common law regarding the scope of their duty and its application. Instructing solicitors are advised to bear this in mind when appointing and working with expert witnesses.

Meera Shah, content manager and non-practising lawyer

Bond Solon is the UK's leading provider of expert witness training and information. In conjunction with the University of Aberdeen, they offer the first university certified expert witness training programme for experts practising in Scotland.

Expert Witness Directory 2022

Accountants

Adamson Forensic Accounting Ltd
Forensic Accountants
Edinburgh
Email: info@adamsonforensics.co.uk
Tel: 07914 070 741
Web: www.adamsonforensicaccounting.com
Specialisms: accounting services, forensic accounting

Christie Griffith Corporate Ltd
Chartered Accountants
Glasgow
Email: robin@christiegriffith.co.uk
Tel: 0141 225 8066
Web: www.christiegriffith.co.uk
Specialisms: accountancy disputes, business valuation, forensic accounting

Mr Jeffrey Meek
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Cupar
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Mr Peter Drummond
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Web: www.pdarch.co.uk
Specialisms: architectural design, building and construction problems, town and country planning

The Hurd Rolland Partnership
Architects
Dunfermline
Email: kennethwilliamson@hurdrolland.co.uk
Tel: 01592 873 535
Web: www.hurdrolland.co.uk
Specialisms: architectural design, building and construction problems

Banking and Insurance

Expert Evidence International Ltd
Bankers, Property Financing Advisers, Investment Advisers, Regulators and Tax Advisers
London
Email: thomas.walford@expert-evidence.com
Tel: 020 7884 1000
Web: www.expert-evidence.com
Specialisms: banking, fraud and money laundering, insider trading, taxation

GBRW Expert Witness Ltd
Financial Sector Expert Witnesses
London
Email: experts@gbrwexpertwitness.com
Tel: 020 7562 8390
Web: www.gbrwexpertwitness.com
Specialisms: employment, accounting services, banking, business valuation, insurance

Building and Construction

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Mr David Roberts
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Web: www.hartfordsterlingassociates.com
Specialisms: building and construction problems, surveying and valuation, civil engineering, offshore oil and gas

Corporate Investigation

Matrix Intelligence Ltd
Corporate Intelligence and Investigations
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Email: stuart@matrix-intelligence.com
Tel: 0131 473 2315
Web: www.matrix-intelligence.com
Specialisms: forensic accounting, fraud and money laundering, asset tracing, matrimonial disputes, people tracing and surveillance

Dentistry and Odontology

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Digital Forensics

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Disability

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Drugs and Toxicology

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Employment

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Keith Careers Ltd
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Specialisms: employment, career guidance and development, schools and education, disability

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Meteorology

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Web: www.weathernet.co.uk
Specialisms: meteorology, event reconstruction

Occupational Therapy

Julie Jennings & Associates Ltd
Occupational Therapist/Rehabilitation Cost Consultant
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Psychiatry

Independent Psychiatry
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Web: www.independentpsychiatry.com
Specialisms: psychiatry, disability, employment, family issues

Insight Psychiatric Services
Psychiatric Consultants
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Specialisms: psychiatry, family and child issues

Dr Douglas Patience
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Tel: 0141 582 1233
Specialisms: psychiatry

Expert Witness Directory 2022

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IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF **ENGLAND AND WALES** COMPANIES COURT (ChD)

CR-2021-002370

IN THE MATTER OF ZURICH INSURANCE PUBLIC LIMITED COMPANY
-and-
IN THE MATTER OF ZURICH INSURANCE COMPANY LTD
-and-
IN THE MATTER OF PART VII THE FINANCIAL SERVICES AND MARKETS ACT 2000

IS HEREBY GIVEN that on 18 May 2022 Zurich Insurance Public Limited Company (the "**Transferor**") and Zurich Insurance Company Ltd (the "**Transferee**") (together, "**Zurich**") applied to the High Court of Justice of England and Wales for an Order under section 111(1) of the Financial Services and Markets Act 2000 (the "**Act**") sanctioning an insurance business NOTICE transfer scheme (the "**Scheme**") providing for the transfer to the Transferee of certain business of the Transferor's UK branch, comprising a mix of direct and reinsurance-assumed business (the "**Business**"), and for the making of ancillary provisions in connection with the Scheme under sections 112 and 112A of the Act.

This is an internal reorganisation between two companies within the Zurich Group and is in response to the UK's exit from the European Union on 31 January 2020 (Brexit). The proposed transfer will result in the Business, which is currently being carried on by Zurich Insurance Public Limited Company, being carried on by Zurich Insurance Company Ltd. If the Scheme is sanctioned, it is expected to come into effect on 1 January 2023. Further information about the Scheme including:

- a copy of the report on the terms of the Scheme prepared by an Independent Expert in accordance with section 109(1) of the Act;
- a copy of the full Scheme document; and a summary of the Independent Expert's report
- and a summary of the terms of the Scheme,

are available free of charge and copies can be downloaded from **Zurich.co.uk/brexit- transfer** or requested by calling or writing to us at the address below, from the date of publication of this notice until the date on which the application is heard by the Court.

We are here to help you. To speak to a representative of Zurich about the proposals please call us on 08009 179507 (freephone in the UK) +44 203 467 4611 (international). The information line will be open from 8.30am to 5.30pm UK time on Monday to Friday (excluding bank holidays) until the Scheme takes effect on 1 January 2023. Alternatively, you can write to us at transfer.queries@ uk.zurich.com or Zurich Insurance Transfer Query, Unity Place, 1 Carfax Close, Swindon SN1 1AP, United Kingdom.

The application is expected to be heard at the High Court of Justice, 7 Rolls Buildings, Fetter Lane, London EC4A INL on 20 October 2022 (the "**Hearing**"). Any person who thinks that they may be adversely affected by the carrying out of the Scheme may attend the Hearing and express their views either in person or through legal Counsel. Anyone who intends to appear at the Hearing is requested to notify their objections to Zurich by 13 October 2022, setting out why they believe they would be adversely affected. Anyone who does not intend to attend the Court hearing but wishes to make representations about the Scheme or considers that they may be adversely affected should communicate their views to Zurich by calling or writing using the above contact details, preferably before 13 October 2022.

Zurich's appointed solicitors: Slaughter and May (Ref: ACC/EZZS)

Classifieds

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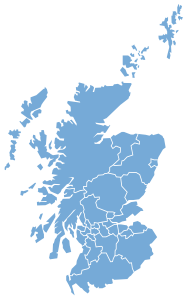

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