PROFESSIONAL NEGLIGENCE AND LIABILITY UPDATE

SCOTLAND - ONLINE CONFERENCE

"Navigation"

June 2022

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION

SCOTLAND "ONLINE" CONFERENCE

"Navigation"

June 2022

10 mins — *"Joint Chairs Introduction"*

Tim Edward – Partner – MBM Commercial LLP

Karen Cornwell – Legal Director – Thorntons Law LLP

https://mbmcommercial.co.uk/team/tim-edward.html

https://www.linkedin.com/in/karen-cornwell-337946193/?originalSubdomain=uk

27 mins — *Keynote Address – "Remote Hearings – What have we learnt?"*

The Hon Lord Clark QC

Senator of the College of Justice

Judge of the Court of Session

23 Mins — *"Remote Proofs and Affidavit Evidence Post Covid 19"*

Sheriff GK Murray

Dundee Sheriff Court

20 mins — *"Apportionment in Medical Negligence"*

Simon Bowie QC

Ampersand Advocates

https://ampersandadvocates.com/people/simon-bowie-qc/

25 mins — *"The Scope of the Convicted Mind"*

Vinit Khurana QC

Ampersand Advocates & Whitestone Chambers

https://ampersandadvocates.com/people/vinit-khurana/

26 mins — *"The Defender Perspective"*

Alison Grant – Partner & Andrew McConnell – Director

DWF LLP

https://dwfgroup.com/en/people/a/alison-grant

https://dwfgroup.com/en/people/a/andrew-mcconnell

23 mins — *"The Pursuer Perspective"*

Cat MacLean – Partner

MBM Commercial LLP

https://mbmcommercial.co.uk/team/cat-maclean.html

54 mins — *"Contractual interpretation: where are we now?"*

Murray Steel

Axiom Advocates

https://www.axiomadvocates.com/advocates/profile/murray-steel

35 mins — *"Causation – pitfalls for Pursuers and wrinkles for Defenders"*

Michael Upton

Themis Advocates

https://www.themis-advocates.co.uk/advocates/junior/Michael+Upton

23 mins *"The USA Perspective"*
Christopher Carroll – Partner
Kennedys
https://kennedyslaw.com/our-people/profiles/basking-ridge/christopher-carroll/

30 mins *"Lender Claims"*
Andrew McWhirter
Axiom Advocates
https://www.axiomadvocates.com/advocates/profile/andrew-mcwhirter

2 mins *"Closing Remarks"*
Katy Manley
PNLA President

Monday 26th September - "Live" *questions and discussion with speakers @ The Signet Rooms - 2:30pm to5pm*

5 hr – Total talk time
1 hr - Conference Pack Review
3 hr – Questions & Networking @ The Signet Rooms
Total CPD – 8 hours

Tim Edward
Partner
MBM Commercial LLP
&
Karen Cornwell
Legal Director
Thorntons Law LLP

"Joint Chair's Introduction"

10 mins

MBM ENTREPRENEURIAL BUSINESS LAWYERS

Tim Edward

Partner

Dispute Resolution
Email: tim.edward@mbmcommercial.co.uk
Tel 0131 226 8200

Tim joined MBM Commercial as a Partner in January 2021. He has over three decades of experience in litigation and dispute resolution and is listed as a leading lawyer in both Chambers and Legal 500 for Commercial Litigation and Professional Negligence (Scotland). He is Co-Chair of the Professional Negligence Lawyers Association Conference – Scotland (www.pnla.org.uk). Tim is also a Law Society of Scotland Accredited Specialist in Professional Negligence.

Tim is ranked as Band 2 in Chambers for Professional Negligence – Scotland and Band 3 for Litigation – Scotland and is described as "A consistently good and reliable lawyer." He is listed in Legal 500's Hall of Fame for both commercial litigation and professional negligence. Tim is an active Solicitor-Advocate with experience of presenting cases in the Court of Session.

Prior to joining MBM, Tim spent 30 years at Dentons (previously Maclay Murray & Spens) where he was a partner and a member of their Litigation and Dispute Resolution practice, focusing on insolvency and company litigation.

He is a currently a member of the Law Society of Scotland's Pursuer's Advisory Panel pursuing negligence claims against solicitors. He served on the Law Society of Scotland's Diploma Materials Committee in the 1990's and ran the Maclay Murray & Spens PCC Elective on Civil Litigation from 2003 to 2012. He carries out regular CPD training for the profession in the field of dispute resolution.

Memberships:
Member, Pursuers' Advisory Panel of the Law Society of Scotland
for pursuing negligence claims against solicitors
Member, Society of Solicitor Advocates (Scotland)
Member, Society of Writers to Her Majesty's Signet
Regular presenter of training seminars for CPD training
Co-chair Professional Negligence Lawyers Association Conference - Scotland

Thorntons
We do what's right

Karen Cornwell

Legal Director

Whitehall House
33 Yeaman Shore
Dundee - DD1 4BJ
01382 767022
kcornwell@thorntons-law.co.uk

Karen Cornwell is a solicitor having qualified in Scotland in 1999 and England & Wales in 2010. She is a Notary Public. Karen's background has almost been exclusively in civil and commercial litigation including (but not limited to) contract disputes, property litigation, professional negligence, financial services, actions of interdict, Sheriff Court, Court of Session and UK Supreme Court. Karen is an Accredited Specialist in Professional Negligence Law by the Law Society of Scotland having initially been accredited in 2014.

She acts as the Scottish representative of the Professional Negligence Lawyers Association.

Karen is also currently a member of the Law Society of Scotland's Pursuer's Advisory Panel pursuing negligence claims against solicitors.

Outside of work Karen enjoys, mono (water) skiing, snow skiing, hill walking, climbing, sea swimming and horse riding. She is Legal Director for Water-ski and Wakeboard Scotland and Committee Member of Loch Lomond Water Ski Club.

The Hon Lord Clark QC
Senator of the College of Justice
Judge of the Court of Session

Keynote Address
"Remote Hearings – What have we learnt?"

27 mins

The Hon Lord Clark QC

Senator of the College of Justice
Judge of the Court of Session.

Lord Clark was appointed as a judge of the Supreme Courts in May 2016.

He is a graduate of Glasgow and Strathclyde universities and has been a university lecturer.

He became an advocate in 1994 and was appointed as a Queen's Counsel in 2007. He has conducted cases in the sheriff court, High Court, Lands Tribunal, Court of Session, House of Lords and the Supreme Court.

He was convenor of the International Committee of the Faculty of Advocates, and is the author of the book ‘Product Liability’. He has also contributed to the Stair Memorial Encyclopaedia of Scots Law, and a number of articles in legal journals.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Sheriff GK Murray
Dundee Sheriff Court

"Remote Proofs and Affidavit Evidence Post Covid 19"

23 mins

Sheriff GK Murray

Dundee Sheriff Court

Admitted as a solicitor in 1987, a partner at what are now Blackadders and Lindsays from 1990, an Accredited Specialist in Insolvency Law, a member of the Rules Council and the Law Society Civil Justice Committee, Course Leader and Lecturer in Civil Procedure at the University of Dundee; appointed as a Sheriff in 2011, in Aberdeen then Peterhead 2011 – 13, Arbroath and Forfar from 2013 to 2021 and Dundee since.

I mainly practised in commercial litigation and have been a Commercial Sheriff in Tayside Central and Fife since the court was established

Sources

Coronavirus (Scotland) Act 2020, Schedule 4

Suspension of requirements for physical attendance

2 (1) Any requirement (however expressed) that a person physically attend a court or tribunal does not apply, unless the court or tribunal directs the person to attend physically….

(3) In the case of such a diet, the court may disapply any requirement (however expressed) that a person physically attend the court by directing that the person need not do so.

(4) A court or tribunal may issue a direction under sub-paragraph (1) only if it considers that allowing the person to attend by electronic means in accordance with paragraph 3 would—

(a) prejudice the fairness of proceedings, or
(b) otherwise be contrary to the interests of justice.

(5) A court may issue a direction under sub-paragraph (3) only if it considers that allowing the person to attend by electronic means in accordance with paragraph 3 would not—

(a) prejudice the fairness of proceedings, or
(b) otherwise be contrary to the interests of justice.

(6)A court or tribunal may issue or revoke a direction under sub-paragraph (1) or (3) on the motion of a party or of its own accord.

(7) In considering whether to issue or revoke a direction under sub-paragraph (1) or (3), the court or tribunal must—

(a) give all parties an opportunity to make representations, and
have regard to any guidance issued by—
(i) the Lord President of the Court of Session…

(8) References in this paragraph to physically attending a court or tribunal are to—

(a) being in a particular place, or
(b) being in the same place as another person,

for the purpose of any proceedings before a court or tribunal or an office holder of a court or tribunal.

Attendance by electronic means

3 (1) A person excused from a requirement to physically attend a court or tribunal by virtue of paragraph 2(1) or (3) must instead appear before the court, tribunal or office holder (as the case may be) by electronic means in accordance with a direction issued by the court or tribunal.

(2) A person who fails to do so is to be regarded as having failed to comply with the requirement to physically attend from which the person is excused.

(3) The power under sub-paragraph (1) to issue a direction includes the power to vary or revoke an earlier direction under that sub-paragraph.

(4) A direction under sub-paragraph (1)—

(a) is to set out how the person is to appear by electronic means before the court, tribunal or office holder, and
(b) may include any other provision the court or tribunal considers appropriate.

(5) A court or tribunal may issue a direction under sub-paragraph (1) on the motion of a party or of its own accord.

(6) Before issuing a direction under sub-paragraph (1), the court or tribunal must—

(a) give all parties an opportunity to make representations, and
(b) have regard to any guidance issued by—
(i) the Lord President of the Court of Session…

(7) A direction under sub-paragraph (1) that—

(a) sets out how a party to proceedings is to attend, by electronic means, a trial diet must provide for the party to use means that enable the party to both see and hear all of the other parties, the judge and (where applicable) the jury and any witness who is giving evidence,
(b) sets out how a witness who is to give evidence at a trial diet is to attend by electronic means, must provide for the witness to use means that enable all of the parties, the judge and (where applicable) the jury to both see and hear the witness.

(8) Nothing in sub-paragraph (7) is to be taken to mean that a person is to be enabled to see or hear a witness in a way that measures taken in accordance with an order of the court or tribunal would otherwise prevent.

Current National Guidance

https://www.scotcourts.gov.uk/docs/default-source/default-document-library/coronavirus-docs/guidance-for-sheriff-and-justice-of-the-peace-court-users---april-2022.pdf?sfvrsn=aa4848d0_2

NB:-

6. CIVIL BUSINESS AND FAIS

6.1 Proofs and other substantive hearings will be conducted using WebEx, unless otherwise directed by the court. Where a party considers that a hearing cannot proceed remotely using WebEx technology, or cannot entirely be conducted in this manner, that party should advise the court of the reason.

6.2 All procedural business, debates and Fatal Accident Inquiries will be conducted by WebEx unless otherwise directed by the court.

Current Local Guidance

See e.g. https://www.scotcourts.gov.uk/the-courts/court-locations/dundee-sheriff-court-and-justice-of-the-peace-court

Likely to change in the near future, but in TC&F as at 19 April:-

Procedural Courts – all held by WebEx

Proofs/Evidential Hearings – mode of evidence to be discussed and agreed with parties at the pre-proof/procedural hearing. Virtual or hybrid preferred to ensure witness accommodation space for witnesses in criminal cases

WebEx

SCTS Guidance for Court Users - https://www.scotcourts.gov.uk/coming-to-court/virtual-courts

Contains:-

Guidance for Civil Solicitors
Video Sharing Guide
General Witness Guide
Civil Virtual Certification
General Party Guide

Luminar Lava Ignite Ltd v Mama Group plc (2010) SC 310

Lord Hodge:-

Use of affidavits and signed witness statements

70. The Lord Ordinary in a postscript to his opinion discussed the proper approach for the court which has authorised parties to present evidence in the form of affidavits in a commercial action under Rules 47.11 . This court invited counsel to address it on the issues raised. Counsel agreed with the Lord Ordinary's approach but suggested that the court and parties had to exercise some care in selecting the cases in which affidavits or signed witness statements would be appropriate. Where there were sharp issues of credibility and reliability in relation to the evidence of particular witnesses, that evidence should be taken orally. There was always a danger that the text of the written

statement would be far removed from the words which the witness would use unprompted. Counsel recognised that the use of such statements saved considerable court time. They expressed the view that it was very important that a witness should have signed off his affidavit or statement before he saw the affidavits or statements which the other party had tendered or which other witnesses of the party calling them had given.

71. It is the practice of the commercial judges in an appropriate case to order parties to lodge affidavits or signed witness statements in advance of a proof with the intention that they will form the bulk of each witness's evidence in chief. Once the witness appears in court counsel asks him to identify and (if the witness statement is not an affidavit) confirm the truthfulness of the statement. The witness is given the opportunity to correct anything said in the statement or to amplify matters in the light of the other evidence and may also be asked supplementary questions. When counsel use the first witness to introduce the case to the court it is common for counsel to show the witness, and thereby the court, the relevant documentary evidence. In each case the witness may be cross-examined and re-examined in the ordinary way.
*327

72. If parties produce such affidavits or witness statements at different times in advance of the proof there is a risk that, if a later witness is shown the statements of other witnesses, his evidence might be altered from what it would otherwise have been. In Watson v Student Loans Co Ltd , Lord Hardie criticised the briefing of an oral witness when a solicitor had shown the witness the evidence of another witness which had been taken on commission. I agree with the Lord Ordinary in his endorsement of Lord Hardie's view that in our legal system it is not permitted to brief or coach a witness with a view to his altering his evidence.

73. When parties are ordered to exchange affidavits or witness statements on the same day there is no risk of one party having seen the other party's statements in advance. When taking a witness statement or preparing an affidavit, a party's solicitor can precognosce the witness in the normal manner, which includes asking questions in the light of what the solicitor knows from other statements which he has obtained. But it would not in my view be appropriate for the solicitor to show the witness the statements or draft statements of other witnesses at this stage. Once the parties had exchanged statements it would be perfectly acceptable for a witness, whose statement had been exchanged, to be shown the other statements which were relevant to his evidence and for him to be given an opportunity to modify his evidence in the light of

that evidence. Where a witness wished to modify his evidence, this could be done by lodging a supplementary affidavit or statement explaining the change and the reason for it. Alternatively, he could do the same in oral evidence at the proof. The change would thus be made openly. It is sometimes the practice of the commercial judges when fixing a timetable for the exchange of witness statements to specify also a later date by which parties may produce supplementary affidavits or statements to make transparent any change of position and to narrow down the issues in dispute.

74. As the Lord Ordinary has stated, the use of such written statements is a move away from 'trial by ambush' and allows a witness to give a considered response to points which may be made against him and the evidence given by others. I have no difficulty with this approach. But I consider that where a party proffers an initial affidavit or witness statement of a witness after the exchange of the statements of other witnesses, the solicitor tendering the statement should certify by letter to the court that the witness has not seen or been informed of the evidence of others or, if he has, specify the statements which the witness has seen or been told about and the circumstances in which that has occurred.

75. In my opinion this approach would be consistent with our traditions in relation to the giving of evidence in court.

Court of Session Commercial Court - Guidance on Use of Signed Witnes Statements or Affidavits

https://www.scotcourts.gov.uk/home/commercial-court/guidance-on-use-signed-witness-statements-or-affidavits

In this note we use the term "statements" to cover both affidavits and signed witness statements which are adopted as part of a witness's evidence; also "he" includes "she".

The purpose of signed witness statements or affidavits

The purpose of the statements is to assist the court to hear cases expeditiously. It is our experience that the use of statements has helped parties to complete hearings within the times allocated to them, which are often shorter than would be the case without

statements being used. If the diet fixed for a case is shorter, this in turn has a beneficial effect on the ability of the court to fix cases without undue delay. While we acknowledge the work that has to go into the preparation of statements, it is hoped that there will be a net financial saving to the parties from shortening the length of the court hearing.

There is also, we think, a benefit in parties knowing sooner rather than later the evidence likely to be adduced by the other side, since it enables them more confidently to assess the likelihood of success or failure and thereby facilitates settlement.

We are of the view that it is generally desirable that a witness, who is speaking to events which occurred some time previously, should give his evidence after he has had an opportunity to consider documents which he had seen at the relevant time. He should also have had the opportunity to re-read his statement shortly before he gives oral evidence. We consider that it is consistent with justice that a witness is placed in a position to give truthful evidence to the best of his ability.

Supplementing statements by oral evidence in chief

We recognise that controversial issues within a witness's evidence, where issues of credibility and reliability arise, will usually have to be addressed in oral evidence in chief as well as in the statement. This assists the judge to form a view of the witness in the more relaxed circumstance of evidence in chief and also when under the stress of cross-examination.

We do not intend to have all evidence in chief presented solely in written form.

In some cases, where significant cross-examination is foreseen, it may not be appropriate to have a witness adopt his statement and be subjected immediately to cross-examination. Counsel leading a witness can, for example, clarify matters in his statement which appear to be in controversy or, where it is relevant and appropriate to do so, ask him to comment on points raised in the statements of other witnesses.

In many cases it may be necessary to take an early witness through his evidence in some detail to introduce the court to the relevant documentary evidence. Later witnesses may have to introduce further documents or be asked about points which have arisen in the evidence of earlier witnesses. Otherwise, it is intended that the substance of a witness's evidence be contained in the witness statement or affidavit and extensive and prolonged evidence in chief be avoided.[1] Counsel should use their professional judgement in deciding how much oral evidence in chief is needed in the particular case,

though the judge must be free to intervene if he feels that this is tending to subvert the purpose behind the use of statements.

The content of the affidavit or witness statement

The following principle must be respected: the statement should be the evidence of the witness and should cover only those matters to which he can properly speak.

The role of legal advisers or other parties in the preparation of the statements
The purpose of a statement is to record the evidence of a witness. The court does not expect to receive a document which is in large measure framed by lawyers and which uses language which the witness would not use. Words should not be put into a witness's mouth. If a party produces such a document as the evidence of the witness, it is likely that it will receive little weight from the court and it may in some circumstances significantly damage a party's case. Equally, if it appears that a witness has been improperly tutored in his evidence, the court is likely to discount his evidence. In preparing such statements, legal advisers should bear in mind that a witness may have to justify on cross-examination things contained in his statement.

What the court is looking for is the actual evidence of the witness in written form. It seems that the best approach is for the witness to give a precognition in the normal way. As the statement has a different role from a precognition, it is likely that the legal advisers will want to consider the draft statement carefully.

The legal advisers, including - where appropriate - counsel, can consider the draft statement to ensure that the witness has covered the relevant matters to which he can speak. They can also seek to clarify ambiguous statements within his evidence when his statement is in draft, and seek his comments on documents and other materials which might appear to raise questions about the accuracy of his recollection. Where there are matters, which the legal advisers think he might be able to address, they can properly ask him whether he can give evidence on those subjects. They can show him documents which he might have seen at the time, and if he had seen them, ask for his comments on them. Where the witness comments on documents which he had not seen at the relevant time, the fact that he had not seen them then should be made clear in his statement.

We recognise that the process of taking a precognition means that the product involves input from the precognoscer. We expect that care will be taken to ensure that the witness's testimony is accurately represented. He is also to be given the opportunity to

consider carefully what the draft statement says and to confirm its terms or instruct its amendment before he is asked to sign the statement. The legal advisers should also inform him that he may be cross-examined on his statement in court.

When the statements should be prepared and exchanged

We will normally order parties to exchange the documents on which they wish to found at proof at a date not less than two weeks before they are appointed to lodge and exchange statements. Often, if time permits, we will allow four weeks. This is to give the legal advisers an opportunity to peruse the documents and identify any matters which they need to raise with a witness before he finalises the statement.

Legal advisers or other people involved in taking evidence from a witness to prepare his statement should finalise the statement without showing the witness the other statements which are being obtained for their client. By fixing a date on which the parties are to exchange their statements, the court seeks to prevent a witness's initial statement from being influenced by the evidence of the witnesses put forward by another party.

Where, exceptionally, a witness finalises a statement (other than a supplementary statement) after the exchange of statements of other witnesses, the solicitor tendering the statement should write a letter to the court either (i) certifying that the witness has not seen or been informed of the evidence of others, or (ii) if he has, specifying the statements which the witness has seen or been told about and the circumstances in which that occurred.

The statements of a party's other witnesses or of another party's witnesses may be disclosed to a witness after the exchange of statements between the parties. If in the light of that information a witness needs to expand or qualify the evidence which he has already given in written form, a supplementary statement may be lodged. The court will normally allow for this in the timetable which it fixes. The purpose of the supplementary statement is to correct or qualify what the witness has already stated. It is not intended that the witness should lodge a supplementary statement to comment on or rebut the evidence of other witnesses.

A court order which fixes a proof diet may therefore set out a four-stage timetable. First, it will fix a date for the exchange of the documents which parties intend to rely on at the proof. Secondly, it will specify a date for the parties to exchange and lodge in process their statements. The date for that exchange should be fixed to allow parties' advisers time to analyse the documents exchanged under the first stage before they

have to finalise the statements. Thirdly, it will specify a date for the exchange and lodging of supplementary statements. Finally, it will fix a By Order hearing at which parties can give notice of any issues of the admissibility of the written evidence or other pertinent matters.

Signature and adoption of statements

A witness is to swear an affidavit in normal way. At the start of his evidence from the witness box, he should identify the affidavit as his.

A witness statement which is not an affidavit should include a declaration that the evidence is true to the best of the witness's knowledge and belief and the witness should sign the statement. The witness should confirm in witness box (i) that the statement is his, (ii) that after giving a statement, he has considered the terms of the written statement and signed it, and (iii) that he adopts it as his evidence. Thus the statement will become part of his sworn testimony.

Whether statements are evidence if the witness is not called to give oral evidence
As is well known, the Civil Evidence (Scotland) Act 1988, section 2(1)(b) allows a person's statement, including a written statement, to be admitted as evidence of any matter of which direct oral evidence by that person would be admissible.[8] But when the court orders the preparation of a statement as a witness's evidence in chief in a case on the Commercial Roll, it will normally not admit the statement in evidence if the witness is not made available for cross-examination. In such circumstances the court will admit the statement only if (i) parties agree the evidence, or agree to its admission as the evidence of the witness, or (ii) a party makes an application by motion for the evidence to be admitted and the court assents to that motion.

Where a witness does not co-operate in giving a witness statement
If a witness whom a party wishes to call does not co-operate with solicitors in producing a signed witness statement or affidavit, the solicitors should explain the problem at a by order hearing and produce the correspondence to vouch the request and the witness's non-co-operation.

Expert witnesses

The court does not expect an expert witness to produce a signed witness statement if he has set out his evidence in a report.

Simon Bowie QC
Ampersand Advocates

"Apportionment in Medical Negligence"

20 mins

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

Simon Bowie QC

Advocate
Year of Call: 1995
Silk: 2009

email Simon.bowie@advocates.org.uk
tel 07739 638 945

Practice Areas

Clinical Liability
Commercial Dispute Resolution
Company
Crime and Regulatory Law
Family and Child Law
Personal Injury
Product Liability
Professional Liability
Real Estate Litigation

Court and Tribunal Experience

Court of Session (Inner/Outer House)
Sheriff Court
High Court
Criminal Appeal Court
Arbitrations
Employment Tribunals
FAIs
Public Inquiry
Commercial Court

Qualifications/Education

Devil Masters: Lord Bracadale; G.Moynihan QC; G. Hanretty QC

Traineeship: Bar Trainee, Brodies WS (under David Willamson QC

Qualifications: LLM Cambridge University; LLB (Hones) Aberdeen University; Dip LP University of Edinburgh

"Regularly retained to defend institutions and individuals implicated in alleged medical negligence.....very responsive" (Chambers 2021)

"A highly regarded silk....an excellent advocate..." (Chambers 2020)

***"A highly experienced and astute senior counsel who hides considerable steel under an air of unflappable congeniality" "A highly regarded silk"* (Chambers 2019)**

***"Very good in court... very knowledgeable... always very well prepared" "His attention to detail is second to none." "Extremely user friendly. Very good with clients"* (Chambers 2018)**

***"Has the ear of the court... excellent at defending cases"* (Chambers 2017)**

***"Very intellectually able... measured, unflappable and very dedicated"* (Chambers 2016)**

***"Always ensures that the client's best interests are kept centre stage"* (Chambers 2015)**

***"Widely recognised for his work on behalf of both clinical institutions and health professions"* (Chambers 2014)**

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

Memberships/Appointments

2011: Appointed Part Time Sheriff
2008 to 2010: Trial Advocate Depute
2007 to 2008: Standing Junior to the Home Department
2005 to 2008: Standing Junior to the Department for Work and Pensions
2003 to 2008: Ad Hoc Advocate Depute (continuing)
Member Faculty of Advocates' Professional Standards Committee

Publications/Articles

Vinit has given presentations to legal (and medical) audiences on a wide variety of medico-legal topics during his career. He has also delivered in house medico-legal talks to solicitors. He also gives lectures to sheriffs for the Judicial Institute.

Simon Bowie QC undertakes a wide range of civil litigation. He has "an impressive and broad ranging practice which covers a wide range of civil and commercial work." (Chambers 2014). He has over 19 years' experience; he has appeared at most levels of the Scottish criminal and civil court systems.

He has extensive experience of oral advocacy. **"He is very clam, self-assured, reasonable and a very smooth advocate". "He has excellent attention to detail". His "ability to swiftly grasp vast amounts of information is superb". (Chambers 2015).** He has appeared in proofs and reclaiming motion in the Court of Session, and prosecuted serious crime in the High Court and the Appeal Court. He has acted in high profile cases involving complex and novel points of law: shipping/oil and gas law (The "Braer" Oil tanker litigations), construction law (Costain Engineering v Scottish Rugby Union arbitration), negligence/scope of duty of care of police (Gibson v Chief Constable of Strathclyde); corporate insolvency (Geddes Petitioner). Between 2005 and 2008 he was appointed standing junior to the Department for Work and pensions (social security) and the Home Department (immigration).

Recent high profile instructions/cases:

Retained to act for the Scottish Football Association – 2018 onwards; UK Infected Blood Inquiry – 2018 onwards – acting for Scottish National Blood Transfusion Service and Health Boards; Mesh litigation "class action" – principal senior counsel acting for NHYS Scotland – defending around five hundred cases – largest medical litigation in Scottish legal history.

Recent and selected cases

AH v Greater Glasgow Health Board [2018] CSOH 57 - Lord Boyd's decision in Mesh debate. Principal senior counsel acting for NHS Scotland in the mesh litigation 'class action', the largest medical litigation in Scottish Legal History involving 500 cases.

Stewart v Acorn Finance Ltd [2018] CSOH 31 - Action of reduction by a crofter against a lender involving allegation of fraudulent misrepresentation. Acting for the finance company.

Jim Clark Rally FAI 2017 - First ever joint Fatal Accident Inquiry in Scotland into two separate fatal accidents. Acting on behalf of the Clerk of Course.

Huntaven Properties Ltd v Hunter Construction (Aberdeen) Ltd [2017] CSOH 57 - Prescription case arising out of multi million pound professional negligence claim against consulting and specialist engineers. Acting for pursuer.

The Vale of Leven Hospital Inquiry 2014 - Public Inquiry into outbreak of c. difficile leading to fatalities. Acting for Health Protection Scotland

The title of my paper is Apportionment in Medical Negligence

A Paper by Simon Bowie QC

Principles

I am going to talk today about the situation where a pursuer sues two or more joint wrongdoers, each of whom is found to be jointly and severally liable to the pursuer. How does the court determine what portion of the liability to the pursuer each wrongdoer has to bear? The answer lies in the well-known provision, section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940

By way of background, in cases where the question of apportionment arises which involve medical negligence, commonly the acts of negligence are committed by different parties, occurring successively or consecutively, being separated in time. The pursuer normally sues all the wrongdoers in one action seeking joint and several decree against each of them on the basis that each has caused or contributed to the pursuer's whole loss.

Sometimes in such actions the negligence is entirely medical in character, but often what is involved is a non-medical, negligently caused accident, resulting in

injury, which then leads to medical treatment which is also negligent causing a worsening of the pursuer's condition.

Turning to the statutory provision, section 3(1) paraphrased provides

> "*where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are… found jointly and severally liable in damages, [they] shall be liable inter se to contribute to such damages or expenses in such proportions as the court may deem just*"

The correct approach to this section is well known amongst lawyers: the extent of a parties' share of the liability depends on an assessment of first, the seriousness of the respective parties' fault (i.e., blameworthiness) and secondly, the degree to which the fault contributed to the loss in question (i.e., causal potency). (*Widdowson's Executrix v Liberty Insurance Ltd* 2021 SLT, 539)

The assessment of blameworthiness and causal potency is essentially one of fact, direct or inferred (*Widdowson* supra) involving a consideration of the whole

circumstances of the individual case (*Nicol v Advocate General For Scotland* 2003 G.W.D 11-329).

Frequently parties will cite examples of decisions on apportionment found in previous case law to support their argument. However, because each case turns on its own facts, it might be thought that such authority can only assist up to a point, and that what is arguably more important is the correctness of the analysis of the particular facts against recognised principle.

The assessment itself is not simply an arithmetical exercise albeit that fractional or percentages will be the result (*Widdowson supra, 558C).*

It's been said that in relation to the application of the equivalent English provision that the assessment involves the exercise of a "semi structured discretion" and that greater weight should be accorded to the defendant's causal responsibility (*Brian Warwicker Partnership PLC v Hok International Ltd* [2006] P.N.L.R. 5 at [42] and [45].

It is important to note that the assessment is a relative one involving a comparison between the wrongs in question in terms of causation and

blameworthiness. Accordingly, a more serious or blameworthy fault or wrong having less causative effect, may nevertheless be viewed as being the same in terms of share of liability as a less serious fault or wrong which has greater causative impact (*Downs v Chappell* [1997] 1 W.L.R. 426)).

It is also worth noting that at the stage of the assessment, the threshold question of the liability of each wrongdoer is no longer in issue - a pre-condition of the application of the section is the joint and several liability of the parties as "wrongdoers". (Section 3(1))

What then of the logically prior question of joint and several liability? It may be worth making just a few observations on that. As in all cases of negligence, there must be causation (both factual and legal).

In consecutive or successive wrong cases, the determination of factual causation normally involves the straightforward application of the "but for" test.

Legal causation can be more complicated and involve arguments about whether a later negligence is a *novus actus* - thereby breaking the chain of causation from the earlier wrong. In medical negligence this is a difficult argument to make out.

That is partly because in circumstances where an initial injury is exacerbated by medical treatment any medical negligence involved in the treatment will normally be regarded as a foreseeable consequence for which the original wrongdoer is liable. (*Widdowson, 553C* citing *Webb v Barclays Bank Plc* [2001] EWCA Civ 1141*).* Only inappropriate treatment so grossly negligent as to be a completely inappropriate response to the injury might break the chain of causation *(Widdowson, 553C* citing *Webb v Barclays Bank Plc* [2001] EWCA Civ 1141*).* For that reason, in medical negligence cases where negligence by each of the defenders is accepted, the issue is often about apportionment, rather than liability.

With these introductory remarks I want to turn to look briefly at two recent cases.

Widdowson Executrix v Liberty Insurance Ltd (OH) 2021 SLT 539

-This first case, *Widdowson Executrix v Liberty Insurance Ltd* (OH) 2021 SLT 539, involved an action of damages brought by the family of a deceased against three defenders. The first defender was the motor insurer of the driver of a car who negligently caused an accident in which the deceased was involved. The deceased was badly injured and following the accident he received treatment at

two hospitals for which two health boards (the second and third defenders) were responsible. Although the deceased suffered very serious injuries in the accident, he could have been saved with appropriate medical treatment. However, the treatment he received at the two hospitals was negligent and he subsequently died.

It was accepted that the accident, combined with failings in the care of the deceased, all contributed to his death. The case went to proof on apportionment.

The following points are perhaps noteworthy.

No doubt with a view to seeking to try to persuade the court of the greater blameworthiness [53] of the treating doctors, the insurer of the negligent car driver sought to lead direct evidence from his experts of their view as to the seriousness of the departure from normal and usual practice by the doctors. This evidence was opposed with the second and third defenders arguing that blameworthiness being one of the principal matters for the court was not an issue for expert evidence.

The court upheld the objection on the basis that it offended against the rule that expert evidence cannot be used to usurp the function of the court [53]. Furthermore, against the background of admissions of fault by the health boards, the court held there was no basis upon which the expert witnesses could properly be asked about the extent of the doctors' fault [53]. The court also considered there to be force in the argument that there was, in any event insufficient, primary evidence upon which the expert could be asked to express an opinion [53].

-More fundamentally, however, the court observed that, had such evidence been competent and relevant, it would have been of little assistance in relation to the issue of comparing how the doctor's blameworthiness compared to that of the driver [53]. This makes the point that the court was not comparing like with like. It seems to me to beg the question how far such evidence could ever benefit the insurer driver of the car had it been allowed and whether in such cases having expensive proof for the purpose of ventilating such evidence, is worth it.

In the end, the court decided the issue on a broad, common sense view which appears self-evident: no matter the number or seriousness of the failures on the

part of the hospital staff in treating the deceased, the medical staff were uniformly well intentioned, at all times trying to save the life of the deceased. This could not have contrasted more markedly with the driver whose actions were patently highly reckless and dangerous.

On the question of causation, the driver's insurer argued that the causal potency of the negligent driving was "almost nil" [553B] having been "very considerably diluted" by the subsequent failings in treatment. [553D] He argued his liability should be no more than 10% [553E}. The medical failures had the greatest causal connection with the death of the deceased.

The court roundly rejected that and observed that it was the driver's initial recklessness that put the deceased in the position where, absent surgical intervention he was going to die, albeit not immediately. [557E] The deceased's serious injuries were attributable solely to the driver's actions, and the driver's negligence was the trigger for everything that followed

The court determined the issue by apportioning 70% of the liability to the driver's insurer with 15% to each health board.

Almond-Roots v Eljamel and NHS Tayside [2021] CSOH 130

The second case I want to look at is that of *Almond Roots v Eljamel & NHS Tayside*. This case also involved successive or consecutive acts of fault, but in this case the negligence was entirely medical in character.

The pursuer sued two parties in connection with her treatment of a neurological condition called *cauda equina syndrome* which involved compression of the nerves at the base of her spine. The first defender was a surgeon, Professor Eljamel, and the second defender, NHS Tayside.

By agreement of the parties the court granted joint and several decree against both defenders for payment of £2.8M in damages to the pursuer. Thereafter the court was asked to decide the issue of apportionment between the two defenders based upon an agreed set of facts.

In brief, the essential facts were that in early February of 2013 the pursuer attended at Ninewells hospital where she received negligent treatment from medical professionals for whom NHS Tayside was responsible. The pursuer should have been referred for an urgent MRI. Importantly, it was agreed that, but for NHS Tayside's negligence the pursuer would have undergone spinal decompression surgery no later than the end of the first week in February. Had that happened she would have avoided the bulk of the neurological problems she developed subsequently, assuming the surgery had been carried out by a neurosurgeon exercising ordinary skill and care [8].

Instead of undergoing surgery in early February as she should have done, the pursuer underwent a routine MRI on 20th February and ended up having surgery in the April carried out by Professor Eljamel privately – hence the reason for his being convened as a separate defender.

Between the February and the April, the pursuer's neurological condition fortunately did not deteriorate, and it would still have been possible for the pursuer to achieve a good outcome similar to that which she would have achieved had she had the surgery in early February. Unfortunately, both the surgery, and the pursuer's post operative treatment in the April, were carried

out negligently by Professor Eljamel. The pursuer was left with permanent neurological harm.

Professor Eljamel argued for a 50/50 apportionment (citing similarities with the *Widdowson* case) whereas NHS Tayside argued for 100% of the liability to be apportioned to Professor Eljamel. The court accepted the argument of NHS Tayside.

Critically, the court's decision was based significantly on NHS Tayside's argument that its failings in early February did not cause the neurological deterioration, being the loss for which the pursuer was claiming damages in her action (page 28, para, ii). Complete c*auda Equina syndrome* developed only after (and as a result) of Dr Eljamel's negligence, not as a direct consequence of the failure to arrange an MRI scan urgently (page 28, para ii). The argument was accepted by the court.

In its Opinion, the court expressed the view that although NHS Tayside's failings did form part of the sequence of events leading to Professor Eljamel's negligence during surgery and afterwards, it was Professor Eljamel's negligence which was the cause in law *(the causa causans*) of the neurological damage [42]. The

causative potency of NHS Tayside's prior negligence in early February, in relation to the harm suffered by the pursuer, was nil. [45].

The view that the negligence of NHS Tayside was not causative of the neurological damage seems to me to be problematical.

Firstly, the conclusion is arguably at odds with the joint and several decree granted, by agreement, against both defenders for the whole of the agreed damages (£2.8M). If the correct analysis is that NHS Tayside's negligence did not contribute to the pursuer's neurological damage, it seems difficult to understand why NHS Tayside agreed to decree passing against it in the first place, or how one reconciles the decree with the view that NHS Tayside's negligence had nil causal potency.

NHS Tayside was arguably responsible for creating the situation in which the negligent surgery took place [42]. Furthermore, it was agreed between parties that but for NHS Tayside's negligence the pursuer would have had earlier surgery [8]. Had that happened, it would have been successful, and the pursuer avoided the bulk of the neurological damage, assuming, that is, the surgery had been carried out with ordinary skill and care [8]. In law that is a sufficient basis

to found causation. (*Bolitho v City and Hackney Health Authority* [1998] AC 232, 240C-F, and *Wright v Cambridge Medical Group (a partnership)* [2013] QB 312 at [75])

The fact that the negligence of Dr Eljamel intervened between the earlier negligence of NHS Tayside and the pursuer's loss, and was proximate in time to the loss, does not in law negate the causative effect of the earlier acts of negligence on the part of NHS Tayside, at least in the absence of Dr Eljamel's negligence being a *novus actus* which was not an argument advanced. A case which illustrates the point is the Court of Appeal's decision in *Webb v Barclays Bank and Portsmouth Hospitals NHS Trus* referred to already in this paper and mentioned in *Widdowson* at 553C. The claimant tripped over a protruding stone in the forecourt of her employer, Barclays bank, causing her injury. She was subsequently treated by a doctor, Mr Jeffrey, who unfortunately wrongly advised the claimant to have her leg amputated which she did. Understandably, and in circumstances perhaps not dissimilar to those pertaining to Dr Eljamel, the court held Mr Jeffrey, the doctor, to be "*much more responsible for the amputation*" and apportioned 75% of the amputation damages to him. However, importantly the court also said that the bank should remain responsible for its share of the amputation damages to the extent of 25%

because: "*[the bank's negligent maintenance of the forecourt was responsible for getting the vulnerable Mrs Webb before the doctors employed by the Trust*" [57] and [59]. One might think that is not so very different from the position of NHS Tayside in the *Almond-Roots* case. (The *Webb* case is discussed in Jones, Medical Negligence, 6th Edition at 5-147. See also *Wright (A Child) v Cambridge Medical Group* [2011] EWCA Civ 669 at [32])

Fundamentally the arguments put forward by NHS Tayside on this issue in the apportionment proof were the same arguments that would have considered by the health board at the stage of liability when deciding whether it could argue that Dr Eljamel's negligence was a *novus actus* breaking the chain of causation from its negligence. NHS Tayside chose not to make the argument. It <u>might</u> be said, therefore, that the position adopted by NHS Tayside at proof was, for all intents and purposes, a *novus actus* argument by the back door: the effect of the court's decision was the same as a finding that Dr Eljamel's negligence was a *novus actus* but without the need to satisfy the high legal test normally required to set that up. If correct, it is difficult to see how an apportionment based on that can be "just" in terms of section 3(1) of the 1940 Act.

For these reasons it would seem to me that the conclusion that the negligence of NHS Tayside had nil causative potency in relation to the pursuer's harm, with the result that NHS Tayside bore none of the £2.8M liability to the pursuer, is at the very least open to some doubt.

The action is being reclaimed by Dr Eljamel so we will see what the Inner House makes of the issues.

22 April 2022

Vinit Khurana QC
Ampersand Advocates
&
Whitestone Chambers

"The Scope of the Convicted Mind"

25 mins

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

Vinit Khurana QC

Advocate
Year of Call: 1999
Silk: 2018

email vinit.khurana@advocates.org.uk
tel 07920 230502
twitter Click Here

Practice Areas

Administrative & Public Law
Alternative Dispute Resolution
Civil Liberties, Human Rights and EU Law
Clinical Liability
Crime and Regulatory Law
Personal Injury
Public Inquiries, FAI's and Tribunals

Court and Tribunal Experience

Vinit appears regularly in court, often in complex, high profile and urgent matters. He has experience of appearing in the Court of Session (Inner and Outer House), the Criminal Appeal Court, the High Court of Justiciary and Sheriff courts around the country. He has also appeared before various Tribunals.

Qualifications/Education

- 1970 - 77 Hurst Grange, Stirling
- 1977 - 83 Falkirk High School
- 1983 - 88 Edinburgh Medical School
- 1993 - 96 Edinburgh Law School
- LLB July 1995
- Dip LP July 1996
- MB ChB July 1988
- DRCOG May 1991
- JCCC 1991
- MRCGP July 1992
- DCCH Sept 1993

Practice Profile

Vinit is the only practising member of the Scottish Bar dually qualified in law and medicine. He has the unique distinction of having practised as a medical General Practitioner for over a decade as well as being an Advocate since 1999. He took silk in 2018.

Vinit has a wide ranging practice involving both appearance and advisory work. He has experience of acting for and against private individuals and corporations. He also has experience of acing for and against public bodies. He regularly acts for and against health boards in professional negligence and personal injury cases.

Vinit specialises in all aspects of Medical Law including clinical negligence, judicial review, professional disciplinary matters, regulatory work and mental health. He is one of the most experienced practitioners at the Scottish Bar in relation to Fatal Accident Inquiries having appeared at over 20 such Inquiries since 2000. Since calling in 1999 his medical knowledge has proven to be a valuable asset in a wide variety of cases. His instructions have encompassed both civil and criminal work. Examples of the breadth of his instructions include: fraud cases brought by Health Boards against Optometrists before the NHS Tribunal; the chairing of the NHS Classification Appeal Committee in respect of disciplinary matters; appearances on behalf of the National Appeal Panel in judicial review petitions for entry to the pharmaceutical list; and advisory work in connection with many other matters related to the provision of healthcare including competition law issues in the provision of dispensing services by pharmacists and GPs, optometric and pharmaceutical services regulation, contractual arrangements between Health Boards and GP primary care providers, mental health matters and ECHR issues in the areas of organ donation and treatment refusal.

Vinit was the Chair of the Faculty of Advocates Sub-Committee

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

Memberships/Appointments

Appointments

- 2019 – Called to Bar of England & Wales
- 2019 – Equality and Human Rights Commission Panel of Counsel
- 2018 – Queen's Counsel
- 2015 – Shrieval chair to the Mental Health Tribunal for Scotland
- 2013 - Police Appeals Tribunal panel member
- 2012 - Classification Appeal Committee legal chair
- 2005 to 2012 - Standing Junior to the Scottish Government
- 2011 - Part time Sheriff
- 2006 to 2009 - full time Advocate Depute
- 1999 - called at the Scottish Bar (after devilling to Sheriff Principal C A L Scott QC and Derek Ogg QC)
- 1996 to 1998 – trainee solicitor with Messrs Dundas & Wilson CS, Edinburgh and Glasgow, with experience in private client, construction, banking, commercial litigation and civil litigation (clinical negligence and personal injury)

Medical posts

- 1992 to 2004 - worked periodically as a locum medical General Practitioner as well as doing hospital locum work in medicine, accident and emergency, ENT, ophthalmology, care of the elderly, dermatology, surgery and psychiatry
- July 1993 to October 1993 - worked as a locum medical General Practitioner in Brisbane, Australia
- 1989 to 1992 – Fife General Practice Vocational Training Scheme. Qualified as a GP following two years in various hospital posts and a year with a general practice in Kirkcaldy
- February 1989 to July 1989 – Junior House Officer in Surgery, Falkirk and District Royal Infirmary
- August 1988 to January 1989 – Junior House Officer in Medicine, Stirling Royal Infirmary

Publications/Articles

Vinit has given presentations to legal (and medical) audiences on a wide variety of medico-legal topics during his career. He has also delivered in house medico-legal talks to solicitors. He also gives lectures to sheriffs for the Judicial Institute.

which responded to the Scottish Government's consultation on the reform of mental health legislation. He has also responded on behalf of the Faculty of Advocates to Scottish Government consultations on organ donation and transplant. He is currently a member of the Faculty Committee that oversees all of the Faculty's responses to Scottish Government consultations.

Throughout his career Vinit has been prepared to work in new areas. He enjoys new challenges. He is a conscientious and hard worker. This has allowed him to gain an understanding of the particular circumstances of and the legal background to the cases in which he has been instructed. As well as appearing in court in complex, high profile and urgent matters, he regularly provides written advice on a wide variety of matters.

Vinit was called to the Bar of England & Wales in 2019 and joined 2 Temple Gardens in November. He can accept instructions in England and Wales via his clerks at 2TG.

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

> He approaches every case meticulously and gives sound and helpful advice at all times.
>
> Chambers UK Bar

Medical/Clinical Negligence Law

Melissa Malone v Greater Glasgow Health Board (2016)
Acted for the defenders in this clinical negligence proof where an alleged delay in diagnosis resulted in a stroke for the young pursuer. Lord Brailsford issued a judgement in favour of the defenders in early 2017. This case also involved an attempted extension of the Montgomery decision in relation to informed consent.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=34852ba7-8980-69d2-b500-ff0000d74aa7

Scottish Mesh Litigation (2014 to date)
Instructed for the NHS defenders in one of the largest group actions in Scotland. There are currently over 400 cases in this group.

Leadbetter v Tayside Health Board (2016)
Acted for the defenders in this action of surgical negligence involving a laparoscopic cholecystectomy

Deborah Young v Borders General Hospital (2015 to 2016)
Instructed for defenders in this preliminary proof on timebar in a medical negligence case.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=45d101a7-8980-69d2-b500-ff0000d74aa7

Honisz v Lothian Health Board (2008 SC 235)
Acted for the defenders in this leading medical negligence case in respect of loss sustained as a result of infection following arthroscopy of the knee.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=734b86a6-8980-69d2-b500-ff0000d74aa7

Selected Others

2016 to 2017
Instructed by NHSLA in England in relation to an appeal by a GP to the Upper Tier Tribunal.

2017
Instructed by a health board in the defence of a health and safety prosecution following the death of a patient.

2017
Instructed for appellant in an appeal to the Senatus Academicus in

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

relation to a University Exclusion Appeal.

2015 to 2016
Instructed by a health board in relation to a high profile employment matter before an appointed panel under the NHS Annex C procedure

Personal Injury Law

Jack v Borders Health Board (2017)
For the defenders in an alleged acceleration of back pain case following injury

O'Neil v Greater Glasgow Health Board (2014)
For the defenders in this personal injury action involving a head injury caused by a fall in the course of employment.

Stewart v Greater Glasgow Health Board
Instructed for the defenders in this action concerning the acquisition of hospital acquired infections (MRSA and C-diff).

Brown v Tayside Health Board (2012)
Acted for the defenders in this latex allergy case.

McCuish v Highland Health Board (2011)
Acted for the defenders in an action involving injuries sustained by a nurse as a result of an assault by a violent patient.

Public inquiries & Fatal Accident Inquiries

FAI into the death of Andrew Logan (2015)
Instructed for Scottish Ambulance Service in this 5 week high profile FAI. It concerned the alleged delay in retrieving an elderly man who was ultimately found to have a ruptured abdominal aortic aneurysm. Leading experts in vascular surgery and also expert paramedics gave evidence.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=d013f5a6-8980-69d2-b500-ff0000d74aa7

FAI into the death of Kathryn Beattie (2012-2014)
Instructed for the Health Board in this high profile FAI which ran over the course of about two years ending in January 2014. It concerned the circumstances surrounding the death of a 13 year old girl with acute leukaemia. Leading experts in leukaemia research, haematology, neuroradiology and neurosurgery all gave

Ampersand Advocates
Advocates' Library
Parliament House
Edinburgh, EH1 1RF

web ampersandadvocates.com
phone +44 (0)131 260 5674
fax +44 (0)131 225 3642

evidence.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=328b9aa6-8980-69d2-b500-ff0000d74aa7

FAI into the death of David Tweedie (2012)
Instructed by the Health Board in relation to a death following elective surgery where concerns about the availability of medical information in paper form and on computer was an issue.

FAI into the death of Mary MacAuley (2011)
Instructed by the Scottish Ambulance Service in relation to the death of a lady in her home in unusual circumstances.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=057f86a6-8980-69d2-b500-ff0000d74aa7

FAI into the death of Irene Hogg (2009)
Instructed by Scottish Borders Council in relation to the suicide of a primary school head teacher following a school assessment.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=8a4487a6-8980-69d2-b500-ff0000d74aa7

FAI into the death of Gordon Ewing (2009-2010)
Instructed by the Health Board in relation to the death of young man during anaesthesia for elective surgery.
https://www.scotcourts.gov.uk/search-judgments/judgment?id=328e86a6-8980-69d2-b500-ff0000d74aa7

The scope of the convicted mind

Vinit Khurana QC

Presentation for PNLA

April 2022

1. South Australia Asset Management Corpn v York Montague Ltd [1997] AC 191
2. Gray v Thames Trains [2009] 1 AC 1339
3. Patel v Mirza [2017] AC 467
4. Stoffel & Co v Grondona [2020] UKSC 42
5. Meadows v Khan [2021] UKSC 21
6. Henderson v Dorset Healthcare [2021] AC 563
7. RO v Gray and Motor Insurers' Bureau [2022] 1 WLR 1484

Alison Grant
Partner
&
Andrew McConnell
Director
DWF LLP

"The Defender Perspective"

26 mins

Alison Grant

Partner, Edinburgh

T: +44 (0) 141 228 8127
M: +44 (0) 7748776894
E: alison.grant@dwf.law

Alison is a Band 1 ranked lawyer with Chambers and Partners and a Leading Individual with Legal 500.

She heads up the Professional Negligence team in Glasgow assisted by Director Lindsay Ogunyemi and Senior Associate Andrew McConnell. For over 20 years, Alison has been one of a select panel of solicitors appointed by Insurers for the Law Society of Scotland Master Policy to handle professional negligence claims often of high value and a complex nature against solicitors. Alison has been described as 'one of the best and most experienced lawyers in the field of professional negligence in Scotland'. Following the expansion of DWF into global markets the team's caseload has expanded significantly and with regular instructions from London Market Insurers. These include a wide variety of claims involving not only solicitors but also accountants, surveyors, architects, IFA's and construction professionals.

Her clients have commented as follows:

- *'Alison Grant and her team display a highly professional yet practical approach to getting matters resolved while protecting the client's best interests.'*
- *'Highly professional and pragmatic team; good early understanding of the issues.'*

'Alison Grant is excellent and leads an experienced and helpful team giving expert and pragmatic advice in a helpful, user friendly manner.'

- *'A leading team in this market.'*
- *'Alison Grant is a top class lawyer who delivers expert advice in a helpful manner based on her long years of experience in this field.'*
- *'Alison Grant has unrivalled knowledge of the nature and number of claims which arise against solicitors in Scotland. She is wholly pragmatic in her approach.'*

Alison is an accredited mediator and has experience representing clients at high value mediations.

She is very much involved in promoting Diversity across DWF and actively participates in the Diversity steering group.

Andrew McConnell

Director, Glasgow

Professional Indemnity & Commercial Insurance team

T: 0141 228 8034
M: +44 (0) 7712355967
E: andrew.mcconnell@dwf.law

Andrew is recognised as a "Rising Star" in the Legal 500 in the field of professional negligence.

Andrew acts exclusively for professional indemnity insurance clients and regularly handles high value, complex claims giving succinct advice on all matters concerning liability, causation and quantum.

Andrew now specialises in the PI construction field and has acted in a significant number of construction claims representing various construction professionals such as architects, structural engineers, M&E engineers and D&B contractors. Clients have remarked that Andrew is the "go-to" solicitor in Scotland for all professional indemnity construction matters.

Andrew continues to significantly expand his knowledge of the PI construction market as he works regularly from our London office, assisting the PI Construction team with highly complex claims including multi-jurisdictional cases together with high value coverage declinature claims.

Clients commend Andrew's "personal touch" in handling highly complex cases and have praised Andrew's "comprehensive presentations" which he regularly delivers to construction professionals throughout Scotland and Insurers on a variety of construction topics.

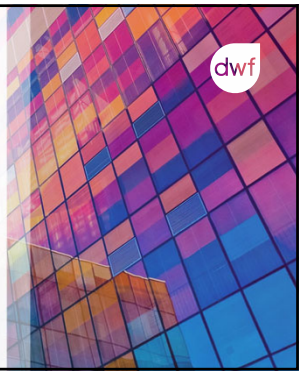
"I love working with DWF Glasgow. Your team are excellent when it comes to support, knowledge and service. I would like to mention Andrew McConnell individually as can always pick up the phone to him and he is always happy to help with queries!" - Client, Broker

Andrew is a Member of the Law Society of Scotland & Notary Public

The Defenders' Perspective

Alison Grant, Partner
Andrew McConnell, Director

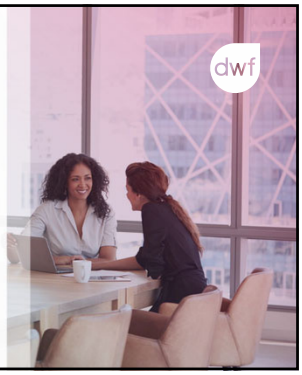
dwfgroup.com



Solicitors

Horizon Scanning....

dwfgroup.com



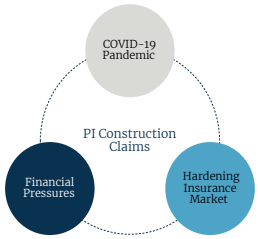
Solicitors - Claims

1.	Consequences of Remote Working	4.	Under-settled or Mismanaged Litigation
2.	Conveyancing Claims	5.	Virtual Mediations
3.	Will drafting	6.	Cyber

Construction Sector

Impact of Covid-19

Horizon Scanning



PI Construction Claims – Horizon Scanning

1. Cladding

Cladding claims are still coming through.

Claims are now relating to more unusual systems and products.

Issues with impact of cladding further into the building.

2. Delay

As a result of lockdowns due to COVID-19 pandemic.

Increased claims for extension of time for projects.

Delay in Start-Up Claims (DSU)

3. Building Safety Bill

The Bill cannot be discounted in Scotland as a limited range of changes will apply there too:

- The power to make regulations for the marketing and supply of construction products;
- Increased competency requirements for architects;
- And amendments to the Health & Safety at Work Act 1974.

4. Shortage in labour and materials

Notable feature in 2021 as a result of COVID-19 and will continue into 2022.

Sharp costs rise for imported products – rise and fall clauses.

Problems from skilled labour shortages.

Any Questions? Contact us...

Alison Grant
Partner

E: alison.grant@dwf.law
D: 0141 228 8127

Andrew McConnell
Director

E: andrew.mcconnell@dwf.law
D: 0141 228 8034

Specialisms include:

Solicitors
Advocates
Accountants
Tax Advisors
Independent Financial Advisors
Brokers
Chartered Surveyors
Architects
Structural Engineers
Design & Build Contractors
Quantity Surveyors
Educational Institutions
Charities & Third Sector
Organisations
Professional Disciplinary
Proceedings

DWF is a leading global provider of integrated legal and business services.

Our Integrated Legal Management approach delivers greater efficiency, price certainty and transparency for our clients.

We deliver integrated legal and business services on a global scale through our three offerings; Legal Advisory, Mindcrest and Connected Services, across our eight key sectors. We seamlessly combine any number of our services to deliver bespoke solutions for our diverse clients.

dwfgroup.com

Cat MacLean
Partner
MBM Commercial LLP

"The Pursuer Perspective"

23 mins

MBM ENTREPRENEURIAL BUSINESS LAWYERS

Cat MacLean

Partner
Dispute Resolution

Email cat.maclean@mbmcommercial.co.uk
Tel 0131 226 8218

Cat is the only solicitor to have won the prestigious title of “Solicitor of the Year” twice, at the Law Awards of Scotland in 2015 and 2012, having previously been short-listed for the award in 2010, and in 2016 led her team to victory in the Scott & Co Legal Awards, winning “Litigation Team of the Year”.

Prior to joining MBM in 2008, she spent several years in a large litigation practice in Edinburgh, before becoming an Advocate at the Scottish Bar in 1998. She spent 10 years in busy practice as an advocate before joining MBM, and having undertaken cases in the Sheriff Court, the Court of Session and the Appeal Court, she has been able to apply her extensive litigation and courtroom experience to the work she now undertakes for her clients. She sits on the Lord President’s Consultative Committee on Commercial Actions, chaired by Lord Doherty, and has also been appointed to the Law Society of Scotland’s Professional Conduct Committee, which sits every month. Additionally, she is also a Writer to the Signet (WS) and has been appointed to the Council of the WS Society.

Her clients include individuals, technology companies, property developers and entrepreneurs. She specialises in both financial claims, against banks and other financial institutions, and in professional negligence. She is a member of the Professional Negligence Lawyers Association, and the sole Scottish representative of the International Banking Litigation Network, an association of law firms across Europe who are willing to handle complex claims against banks and who have the required level of knowledge and experience to do so. She is also Acting Deputy Chair of the Independent Monitoring Panel of the Chartered Bankers Professional Standards Board, is a member of the Westminster All Party Parliamentary Group on Fair Business Banking's Professional Advisory Panel, was a Committee member of the House of Commons Parliamentary Inquiry into Financial Disputes, and in the summer of 2018 was asked to provide expert testimony to the Treasury Select Committee on financial disputes. In 2021, Cat was appointed to the Business Banking Resolution Service SME Liaison Panel.

PNLA Talk

Pursuing professional negligence claims: the Pursuer's perspective. In the talk I am about to give, I have focused on solicitor's negligence, although much of what have to say will be true for claims of prof neg in other areas.

There are a number of issues to consider when acting for Pursuers, and I'm going to cover these under 6 main chapters.

1. Valuing the claim
2. The need for an expert report
3. File Recovery
4. SLCC claims
5. Dealing with insurers and the Law Society's Pursuer's Panel
6. Funding litigation.

1. Valuing the claim

Alongside the issue of obtaining an expert report, which I will come to, a crucial step in assessing any prof neg claim is working out the value of the claim, and identifying whether and to what extent any potential breach of duty has caused the loss claimed by the client. It may also be important to distinguish whether your claim relates to the loss of a chance and if so, how to approach quantifying that loss.

There are a wide variety of situations which may give rise to a loss of chance. As a result of an oversight by a solicitor a client may be unable to proceed with the purchase of heritable property. Erroneous advice may be given by a solicitor to his client and a property purchase may prove to be less valuable than was assumed at the date of purchase. Most commonly, courts have been required to evaluate the loss of a chance where, through solicitors' negligence, the client has lost the chance to either bring or defend proceedings.

Loss of a chance is a whole separate and distinct topic in itself and not something easily distilled into a couple of sentences – so I will simply flag that it is something to think about carefully in terms of how you approach valuing your claim, alongside establishing the extent to which any breach of duty on the part of the professional has clearly caused the loss identified by the client.

The question of the true value of the claim will feed into a number of decisions you make thereafter, including whether to proceed with a SLCC complaint, or whether to raise proceedings, bearing in mind that as much as 50% of the litigation costs incurred will be irrecoverable.

2. Need for expert report

In Scotland it is long established that it is regarded as an abuse of process (and therefore misconduct) to proceed to raise an action in negligence against a solicitor without an expert report.

This was illustrated in the 2014 decision of McKay v McNabb a decision of Sheriff Principal Stephen sitting in Edinburgh Sheriff Court. The pursuers and respondents were a firm of solicitors who sued the defender and reclaimer for payment of £8,738.08 arising from work in connection with divorce proceedings.

At first instance the sheriff found for the pursuers. A key aspect of the defender's defence was, despite the absence of pleadings, that the pursuers had provided an inadequate professional service which amounted to professional negligence. The Sheriff Principal said in her judgment:

"At the risk of stating the obvious allegations are serious when directed towards professional conduct and integrity. If allegations of professional negligence are to be made they require to have a proper foundation in fact and law otherwise the reputation and integrity of the professional is impugned in an unwarranted fashion and they are bound to fail. A solicitor is entitled to exercise a measure of judgment and discretion in fulfilling his or her duties and if the solicitor is criticised in the exercise of these professional duties any allegations of professional negligence must be underpinned by a report from a suitable witness which states that the course taken was one that no solicitor exercising ordinary skill and care would have taken. This is a matter of significant importance. To continue to make allegations and assertions about the solicitor's professional conduct and probity, as happened in this case, without any proper foundation whether deliberately or even in a mistaken belief, could amount to an abuse of process."

The Sheriff Principal went on to say that while the Mckay & Norwell case involved a counterclaim made by a litigant in person as a result of being sued for unpaid fees, that did not water down the need for a supporting report to support allegations of professional negligence. And, given the requirement on litigants in person to have an expert report, the requirement was all the more onerous on solicitors when raising actions. Turning to the question of remedy, she commented that *"Given that, outside of the commercial court procedure, there is no requirement to lodge an expert report until late on in the procedure the obvious answer appears to be to ask those acting for the other side, and to put calls in the pleadings seeking confirmation that there is indeed a report. If the answer is unsatisfactory, or not forthcoming, then one remedy available is to seek decree of default on the basis of an abuse of process".*

3. File Recovery

It will be essential in any litigation to recover the professional's file, and highly desirable for any SLCC complaint.

To do this you will need to:

(i) Ensure you have a signed Mandate completed by your clients authorising transfer of the file to you and

(ii) You will need to ensure your clients' fees owed to the firm in question are paid up to date to avoid lien being exercised over file and the file being withheld

In case of delay or refusal to hand over file, this will probably qualify as a conduct issue resulting in referral to the Law Soc's PCC Committee – but the complaint needs to be fed through SLCC first.

Clients can sometimes baulk at recovering the file, through a combination of wanting to avoid paying overdue fees, wanting to avoid alerting their former solicitors to the fact that a claim is likely to be issued, or wanting to avoid you spending time going through the file with a fine toothcomb.

This is however essential. Clients will sometimes argue that the file can be recreated if they simply send you every email sent to them by, or received from, the solicitors. However, in many cases, this may not be the full story – either because they have not kept every email, or because they have not recorded advice which was given in a meeting, consultation or telephone call. If, for example, the clients position was that a disadvantageous contract had been entered into and the solicitors had not properly protected their interests when the contract was negotiated, that position could be fatally undermined if a file note existed documenting the fact that detailed advice on the contract terms was given to the clients, including advice that certain terms should not be accepted, but the clients instructed the solicitors to conclude the contract as it was.

In essence, until you are able to see the whole file, you don't know what you don't know.

4. SLCC

The SLCC was set up by the Legal Profession and Legal Aid (Scotland) Act 2007.

Before then, complaints about lawyers were dealt with by different professional bodies - the Law Society of Scotland and the Faculty of Advocates.

Complaints could be made to the Scottish Legal Services Ombudsman (SLSO). However, the Ombudsman could only look at how complaints had been handled by those professional bodies.

The SLSO was abolished in 2007, and the SLCC was set up as the single 'gateway' for all legal complaints in Scotland. The SLCC can award up to a capped maximum of £20k compensation for "actual loss", so is definitely a route worth considering if you are looking at a lower value claim.

The SLCC receives over 1000 complaints every year. Just under half these will be accepted for investigation. They categorise claims into those considered to be relating to service, which are less likely to amount to professional negligence, and those which relate to conduct.

Of accepted complaints, 30% were deemed to be "service" complaints, 10% deemed to be conduct, and 8% hybrid.

In 2020-2021 the SLCC awarded:

£218,826.28 compensation for inconvenience and distress;

£98,111.14 compensation for financial loss;

£36,860.78 in fee refunds and reductions and ;

£49,168.22 in other settlements.

SLCC publish a wide range of stats, but what is not clear is the % of complaints made with solicitor input and help versus those made by complainants by themselves, and the success of those made with solicitor input.

Nevertheless, there's some anecdotal evidence to suggest that the success rate is higher where there has been solicitor input.

Submitted claims will first be checked for eligibility. If they pass the eligibility checks they are then accepted for investigation. These checks relate to time limits and the "frivolous, vexatious or totally without merit" test.

The SLCC operates strict time limits for accepting complaints. This means complaints must be made by a certain time after the service ending or the conduct occurring. The time limit now is:

- If the date from which you were first provided with a service in connection with that specific piece of legal work is on or after 1st April 2017, within 3 years after the date on which you were last provided with a service in connection with the specific piece of legal work you are complaining about
- Otherwise the deadline is 1 year from the date on which the service was last provided

However, the SLCC will disregard any time it considers that the complainer was excusably unaware of their concerns. If you make a complaint after the deadline has passed, and unless it can be established that the complainer was excusably unaware, it is unlikely that the SLCC will be able to consider the complaint unless there are exceptional circumstances.

If the eligibility checks are passed, the SLCC will attempt to reach an agreement acceptable to both the complainer and the lawyer or law firm. They will often offer free mediation to help do this, and 75% of SLCC mediations in 2021 were successful.

If an agreement can't be reached, the SLCC will investigate further. Once the investigation is concluded, a report from the investigator will be issued, setting out recommendations.

If either the complainer or the lawyer do not agree with the report, the Determination Committee will make a final decision.

The SLCC is certainly worth considering as an avenue if

- The value of the claim is lower and harder to justify the cost of litigation
- The client does not necessarily have the funds to meet litigation costs
- The client has a number of issues or grievances, not all of which would necessarily qualify as negligence. In these circumstances, some of their grievances may well quality as services issues and a positive determination from the SLCC on these issues might help in achieving closure.

5. Dealing with insurers and the Pursuer's Panel

If you are considering litigation, you will need to intimate a claim on the Law Society's Master Policy, under which in Scotland all solicitors are insured. The lead insurer is and has for many years been RSA. RSA reported in 2020 that in their view often claims were being brought by "dabblers" – solicitors who have no expertise in professional negligence claims, who are consulted by a longstanding client and decide to act for them. In RSA's view the claims can be protracted and not well presented as a result.

The Law Society maintains a panel of specialists, known as the Pursuer's Panel, whose particular role it is to act in such cases, providing the approach that is often needed to restore the client's faith in the solicitors' profession. Yet according to RSA, only about 2-3% of claims intimated to them are handled by panel members. It may be that the existence of the panel is not as widely known as it should be, even to solicitors. This is something the Law Society are currently looking at, with a view to publicising the panel more widely.

RSA have a major advantage over their English counterparts because as lead insurer they deal with the vast majority of claims against solicitors, only involving other insurers when the claim and settlement value exceeds £2m. This gives them a "whole market" view, with a much greater spread of knowledge and an ability to co-ordinate their approach to similar types of claims. However, in claims of substance, supported by a solid expert report, RSA will often take a pragmatic approach. They are not the type of claims handler who will drag things out needlessly or litigate for the sake of litigating, and are often amenable to having that discussion to get things resolved at a comparatively early stage. They are also favourably disposed to mediation.

A Voluntary Protocol was prepared a few years ago in 2016 as a collaborative project between the Pursuer's Panel and RSA, and applies where a claimant wishes to claim against a professional as a result of that professional's alleged negligence or equivalent breach of contract or breach of fiduciary duty.

Unlike in England and Wales, there is no statutory basis for a Pre-Action Protocol. The Protocol therefore will require to be entered into voluntarily on an individual case by case basis by mutual agreement.

The aims of the Voluntary Protocol are:

- to establish a framework in which there is an early exchange of information so that the claim can be fully investigated and meaningful discussions entered into regarding liability and quantum, so that, if possible, the claim can be resolved without the need for litigation;
- To enable appropriate offers to be made either before or after litigation commences;
- To set out good practice making it easier for the parties to obtain and rely upon information required.

The Voluntary Protocol is intended to apply to all professional negligence claims where the value of the claim is up to £20,000. The parties may by mutual agreement use the Voluntary Protocol for claims of higher value.

It hasn't received a great deal of publicity and is not used regularly but still remains in place and certainly worth looking at using for lower value claims you might be looking at advancing.

6. Funding litigation

If you have decided that litigation is the best way forward for your client, and are looking for funding for your claim, there are a few "top tips" to consider:

1. <u>Clarity and Detail</u>
   Be clear and concise about your case and what cover you're asking for (eg always ensure that the funder agrees to pay outlays, such as counsel and expert fees – otherwise the client or the firm may end up bearing that expense)
   Distil the case down so you can present it simply and effectively, but make sure you know your case inside out and back to front – prepare thoroughly.
   Play devil's advocate and consider what counter arguments the other side will make.
   Along with an expert report, you will need an Opinion from Counsel giving you 60% prospects of success.
   Be aware Funders' knowledge of the law will vary - you may be presenting to legally trained reviewers – but they may not be

2. Cost Budget

   For years I used to quote what I thought was Winston Churchill: "let him who desires peace prepare for war" – and was disappointed to learn when I finally looked it up that it was actually uttered by an obscure Roman writer from the 4th century AD. However, it's very true when it comes to litigating – prepare as if you are going to be running the case all the way through to Proof, and be meticulous and thorough when estimating litigation costs
   Always prepare a generous cost budget
   Add a % on top for contingency
   Identify the best and worst case scenarios with reference to recovery and expenses
   Be realistic about the % of cost you expect to recover in expenses if successful
   ensure the funder is fully informed of the costs (and any changes) in each stage of the case

3. Manage your client's expectations

   Client may have unrealistic expectations on a number of aspects of funding: on recovery, a typical offer of funding can be repayment of funds utilised plus up to eg 3 times that sum in success fee. One of the better results I achieved for a prof neg client in mediation was payment of 90% of the full value of the claim – yet the client was very unhappy not to recover 100%. A lesson for me to make sure that I have fully explained to clients how mediation is likely to work and that some compromise is inevitable.
   Clients may also be unrealistically optimistic on whether or not funding will be available, so you need to make sure your clients also understand that funding is never a given: funders may reject for a variety of reasons including:

   - Value of claim too low
   - Projected costs disproportionately high cf value of claim
   - Difficult subject matter (eg tax litigation)
   - Recoverability on success.

   You should also manage your clients' expectations on how long it can take to get funding over the line. Funders' due diligence processes can be very protracted – many promise a quick answer but in practice none deliver this. Be clear with your client on who is meeting the cost of completing the due diligence process, especially where – as is common - the funder asks a range of follow up questions.

4. Sign up issues

   Be aware of the potential conflict between solicitor and client on the terms of the proposed Litigant Agreement – if necessary secure independent advice for your client on terms.
   Review clauses on withdrawal of funding carefully. Know what happens if you withdraw.
   Is there scope for any uplift and where will you be placed in the "waterfall" of funds distribution?

It's been a bit of a whistle stop tour through some of the issues for those thinking about pursuing a claim for professional negligence, but I hope that's been useful!

Murray Steel
Axiom Advocates

"Contractual interpretation: where are we now?"

54 mins

Murray Steel

Year of Call: 2019
murray.steel@axiomadvocates.com
07789204763

Murray called to the Bar in 2019 after 10 years as a solicitor in private practice. He was the 2018 – 2019 Faculty Scholar. He has a background in accountancy and an LLM in Construction Law.

Murray's principal area of practice is in commercial law. He has a particular interest in construction disputes. He also acts for clients in relation to contractual actions, clinical and professional liability cases, and insurance matters.

Murray appears regularly in the Court of Session (including the Commercial Court) and in the Sheriff Court. He represents clients in adjudications, arbitrations, and mediations.

Professional Career to date

- Devilmasters: Gordon Balfour, Miranda Hamilton, Edith Forres
- June 2019: Admitted to Faculty of Advocates
- September 2018 – June 2019: Devil
- December 2014 – September 2018: Associate, BLM
- October 2008 – December 2014: Solicitor then Associate, Harper Macleod LLP
- October 2006 – October 2008: Trainee Solicitor, Harper Macleod LLP

Qualifications

- Member of Faculty of Advocates
- Faculty Scholar (2018 – 2019)
- LLM Construction Law (Distinction), University of Strathclyde (2017)
- Diploma in Legal Practice, Glasgow Graduate School of Law (2006)
- LLB, University of Strathclyde (2005)
- B.Acc, University of Glasgow (2002)

Areas of Expertise

- Alternative Dispute Resolution
- Clinical Liability
- Commercial Contracts
- Construction and Engineering
- Product Liability
- Professional Liability

Contractual interpretation: where are we now?

Murray Steel, Axiom Advocates

Introduction

"In point of fact, if not the meat and drink, then at least staple diet, of the Commercial Court can be summed up in one word "Construction". Commercial lawyers – Solicitors, Barristers and Judges – spend a very substantial part of their time interpreting contracts"

Lord Goff, Commercial Contract and the Commercial Court (1984) LMCLQ 382

Interpretation/construction v implication

"construing the words used and implying additional words are different processes governed by different rules"

Marks & Spencer pc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 per Lord Neuberger at [26].

Interpretation: an objective exercise (1)

"It is true the objective of the construction of a contract is to give effect to the intention of the parties. But our law of construction is based on an **objective** theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language." (emphasis added)

Deutsche Genossenschaftsbank v Burnhope [1995] 4 All ER 717, per Lord Steyn

Interpretation: an objective exercise (2)

"When, therefore, lawyers say that they are concerned, **not with subjective meaning of the language which the speaker has used,** what they mean is they that they are **concerned with what he would objectively have been understood to mean**. This **involves examining not only the words and the grammar but the background as well."**

Mannai Investment Co Ltd v Eagle Star Life Assurance Society Ltd 1997 AC 749 , per Lord Hoffmann at 775.

Interpretation: an objective exercise (3)

"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which there were at the time of the contract."

Investors Compensation Scheme Limited v West Bromwich Building Society [1998] PNLR 541, per Lord Hoffmann at 559

Interpretation: an objective exercise (4)

"there is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in [*ICS v West Bromwich Building Society]…* the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the **language** in the contract to mean." (emphasis added)

Chartbrook Ltd v Persimmon Homes Ltd 2009 1 AC 1101, per Lord Hoffmann at para 14.

Controversy (1) – unlimited background?

"I was merely saying that there is no conceptual limit to what can be regarded as background"

BCCI v Ali [2002] 1 AC 251, per Lord Hoffmann at para 39.

Controversy (2) – business common sense?

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a consultation that flouts business common sense, it must be made to yield to business common sense"

Antaios Compania Naviera SA v Salen Rederierna AB [1985] 1 AC 191, per Lord Diplock at 201. (Cited with approval by Lord Hoffman in *ICS* at p560)

Attempts at clarification (1) – Rainy Sky

"exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person… would have understood the parties to have meant… the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other"

Rainy Sky v Kookmin Bank [2011] UKSC 50, per Lord Clarke at [21].

Attempts at clarification (2) – Rainy Sky

"Where the parties have used unambiguous language, the court must apply it."

Rainy Sky v Kookmin Bank, supra , per Lord Clarke at [22].

Attempts at clarification (3) - *Arnold*

"[the meaning of a clause] has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement] (iii) the overall purpose of the clause and the [agreement] (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Arnold v Britton [2015] AC 1619, per Lord Neuberger at [15].

Attempts at clarification (4) - *Wood*

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning".

Wood v Capita Insurance Services Ltd [2017] UKSC 24, per Lord Hodge at para 10.

Attempts at clarification (4) – *Wood* (2)

"where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense."

Wood v Capita, supra, per Lord Hodge at para 11.

Attempts at clarification (5) – *Wood* (3)

"business common sense is useful to ascertain the purpose of the provision and how it might operate in practice. But in the tug o'war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o'war rope lay, when the negotiations ended"

Wood v Capita, supra, per Lord Hodge at para 28.

Where does that leave us?

- ICS not overruled.
- Remains good law.
- Construction still an objective exercise.
- Battle between text and context.
- After the shift towards context (culminating in *Rainy Sky*), *Arnold* and *Wood* try to redress the balance.
- Primacy attaches to the language.

Scotland?

- *Arnold* followed.
- See:
  - *@Sipp Pension Trustees v Insight Travel Services* 2016 SC 243
  - *HOE International Limited v Andersen* 2017 SC 313 at para 19
  - *Midlothian Council v Bracewell Stirling Architects* 2018 CSIH 21 at para 19
  - *Scanmudring AS v James Fisher MFE Ltd* 2019 295 at para 63

But is the focus switching back to context?

"a contract must **invariably** be construed contextually"

Ashtead Plant Hire Limited v Granton Central Developments Limited [2020] CSIH 2, per Lord Drummond Young at para 10.

"inherently ambiguous, and in serious intellectual field is it possible to reach a sensible view on the meaning of a passage of text without placing that passage in context".

Ardmair Bay v Craig [2020] CSIH 21, per Lord Drummond Young at para 48.

Michael Upton
Themis Advocates

"Causation – pitfalls for Pursuers and wrinkles for Defenders"

35 mins

Michael Geoffrey Johnson Upton

Personal information

Address	Advocates' Library, Parliament House, Edinburgh, EH1 1RF
Telephone (work)	0131 226 5071
Date of Birth	12 March 1964
Nationality	British

Clerking information

Clerk	Kiera Johnston
Address	Themis Advocates, Parliament House, Edinburgh, EH1 1RF
Telephone	0131 260 5654
E-mail	kiera.johnston@themis-advocates.co.uk

EDUCATION

School

Glencorse Primary School, Glencorse, Midlothian, 1969-1972.

George Heriot's School, Edinburgh, 1972-1982.

University

Oxford University; St. Edmund Hall, 1982-1985;

B.A. (Hons.) (2/1), Philosophy & Politics, 1985.

Edinburgh University, 1986-1989;

LL.B., magna cum laude, 1988;

Dip.L.P., 1989.

European University Institute, Florence, 1994-1995;

LL.M., European Law, 1996.

Master's thesis: 'Private Enforcement of E.C. Competition Law'.

PRACTICE

Apprenticeship

Boyd Jameson, W.S., Solicitors, Edinburgh; 1989-1990.

Pupillage

Pupil & Lord Reid Scholar, Faculty of Advocates; 1990-1991.

Devilmasters: H.W. Currie, Q.C.; N.D Murray, Q.C.

Qualification

Admitted to the Faculty of Advocates, 12th July 1991.

Post-qualification

Practising member of the Faculty of Advocates since 1991.

APPOINTMENTS

Tutor, Constitutional & Administrative Law, Dept. of Public Law, Edinburgh University, 1989-1995.

Tutor, Commercial Law, Dept. of Private Law, Edinburgh University, 1990-1993.

Tutor, Property Law, Dept. of Private Law, Edinburgh University, 1991-1994.

Clerk, Law Reform & Legislation Committee, Faculty of Advocates, 1991-1994;

Committee member, 1994-1999.

Examiner for the annual Civil Rights of Audience Examinations for solicitors seeking to qualify as Solicitor-Advocates, Law Society of Scotland 2018-

PUBLICATIONS

The War Crimes Act 1991 (with Mark Poustie) in "Justice & Crime", ed. R.F. Hunter, 1993.

Marriage Vows of the Elephant: the Constitution of 1707, (1989) 105 L.Q.R. 70.

The Diploma in Legal Practice: a critical review (with Peter McCormack) (1989) 34 J.L.S. 290.

Alternative Dispute Resolution in Perspective, 1993 S.L.T. (News) 75.

A Constitution for the European Union, in "A Proposal for a European Constitution", The European Constitutional Group, London, 1993.

European Harmonisation of Court Procedure, (1995) 40 J.L.S 153.

European Unfair Contract Terms Law, 1995 S.L.T. (News) 295.

The Crown Seals, Stair Memorial Encyclopaedia, vol.7 (1995), pp.489-615.

The Cullen Review: Reform of Procedure in the Court of Session, (1996) 41 J.L.S. 111.

Crown Liability in Damages in Community Law, 1996 S.L.T. (News) 175 & 211.

The Platitude of Parliament Square, 1997 S.L.T. (News) 273.

Who would be a Scottish taxpayer?, Scottish Legal News, 2nd April 2013

SOCIETIES

Fellow, Society of Antiquaries of Scotland.

LANGUAGES

Conversational German.

DECIDED CASES

Agriculture

E. P. Brand (Farmers) Ltd. *v.* A. M. McEwan; Peacock *v.* same; **2015**, Arbroath Sheriff Court: Commercial contracts; Seed potatoes; Glyphosate contamination; Sale; Proof of contract.

Crewpace Ltd. *v.* French [2011] C.S.O.H. 133, Outer House, Court of Session: Agriculture; Tenancy; Joint landlords; Right of joint landlord to prevent resumption by other landlord; Unjustified enrichment.

Sinclair *v.* Scottish Ministers, 2 February 2011, Scottish Land Court: Agriculture; E.U. subsidies; Whether error in I.A.C.S. form excusable under dispensing power in E.U. regulations.

Loudon *v.* Hamilton, 2010 S.L.T. 984, Inner House, Court of Session: Agriculture: Whether land subject to secure agricultural lease or limited grazing lease.

Stephen *v.* Scottish Ministers, 2008 S.L.C.R. 107, Scottish Land Court: Agriculture; E.U. subsidies; N.F.U.-backed appeal; Notification requirements for Suckler-Cow Premium.

Wallets Marts Castle Douglas Ltd. *v*. Scottish Ministers, 2004, Kirkcudbright Sheriff Court: Agriculture; Test case; Measure of payments for livestock valuers during the 2001 outbreak of foot-&-mouth disease.

Ali *v*. Khosla, 2001 S.C.L.R. 1072, Inner House, Court of Session: Agriculture; Whether consensus to conclude an agricultural tenancy.

Knapdale (Nominees) Ltd. *v*. Donald, 2001 S.L.T. 617, Outer House, Court of Session: Agriculture; Agricultural holdings; Partnership property; Renunciation of lease.

Morris *v*. Sutherland, 10 August 2000, Selkirk Sheriff Court: Lease of livestock; Unjustified enrichment; Measure of compensation.

Procurator Fiscal, Selkirk *v*. Sutherland, 1998 S.C.C.R. 474, Selkirk Sheriff Court & Criminal Appeal Court: Agriculture; Criminal prosecution; Animal products; Food safety; Statutory instruments.

Clubs & associations

Morrison *v*. Showman's Guild of Great Britain, 19 August 1992, Inner House, Court of Session: Judicial review; Unincorporated association; Disciplinary proceedings; Ultra-vires rule; Exhaustion of alternative remedies.

Commercial law

Arbitration

Sim Group Ltd. *v*. Jack, 2002 S.L.T. 847, Commercial Court, Court of Session; Arbitration; Arbiter; Awards; Building contract; Jurisdiction.

Hanover (Scotland) Housing Association Ltd. *v*. Sandford, 2002 S.C.L.R. 144, Outer House, Court of Session: Judicial review; Arbitration; Sheltered housing .

Building contracts

Muirheads *v*. David Wilson Homes, 28 January 2015, Paisley Sheriff Court: Building contract; Structural adequacy; Engineering evidence; Quantification; Quantity-surveying evidence.

Robertson Construction Co. (Denny) Ltd. *v*. Bone Steel Ltd., 29 October 2003, Commercial Court, Court of Session: Building contract; incorporation of standard terms.

Blyth & Blyth Ltd. *v*. Carillion Construction Ltd., 2002 S.L.T. 961, Outer House, Court of Session: Building contract; Damages; Novation; Engineer assuming employer's liabilities; Claim for pre-novation breaches; Contractual construction.

Cumming v. Mayen Holdings Ltd., 11 November 1999, Perth Sheriff Court: Building contract; Payment; Whether works disconform to contract.

Commercial contracts

Hamilton Tarmac *v*. Carney Contracts Ltd., 14 November 2012, Kilmarnock Sheriff Court: Contracts; Retention; Whether retention based on mutuality or security; Summary decree.

Blacha *v*. Bank of Scotland, [2008] C.S.O.H. 173, Outer House, Court of Session: Banking; Construction of loan instrument.

Delphis Group Ltd. v. J. B. Ventures Ltd., 5 December 2007, Sheriff Principal, Glasgow & Strathkelvin: Intellectual property; Software; Alleged breach of contract; Damages.

Taylor *v*. Fraser, 20 June 2007, Elgin Sheriff Court: Partnership; Dissolution; Grounds for dissolution; Partner convicted of the murder of his wife.

Companies

Maguire *v*. 5 PM Ltd., 31 July 2014, Commercial Court, Glasgow Sheriff Court: Shares; Valuation; Valuer; Material departure from instructions; Valuer seeking to have final report treated as draft; Rescission.

York Place (381) Ltd. *v*. Murray, 20 June 2011, Commercial Court, Glasgow Sheriff Court: Sale of shares; Breach of warranties; Measure of damages.

Downie *v.* DS Beteiligungs G.m.b.H. [2010] C.S.O.H. 167, Outer House, Court of Session: Company; Sale of shares; Interim order to enforce share-purchase agreement.

Thomson Pettie Tube Products Ltd. *v.* Hogg, 2000 G.W.D. 27-1036, Commercial Court, Court of Session: Company; Sale of shares; Warranties; Construction.

Conti *v.* Ueberseebank A.G., 1999 S.L.T. 580; on appeal, sub nom. Conti *v.* AIP Private Bank Ltd., 2000 S.C. 24, Inner House, Court of Session: Companies; Registers; Striking off; Restoration.

L.A.W. Construction Co. Ltd. *v.* L.A.W. Holdings Ltd., 25 August 1997, Commercial Court, Court of Session: Companies; Pension scheme for corporate group; Construction of deed of trust; Potential amendment of deed; Interim interdict.

Consumer contracts

Powell *v.* Lloyds Bowmaker Ltd., 1996 S.L.T. (Sh. Ct.) 117, Edinburgh Sheriff Court: Supply of goods; Hire purchase; Agency; Consumer credit.

Damages

Jamieson *v.* British Gas, 13 November 1992, Outer House, Court of Session: Damages; Explosion destroying commercial premises; Whether caused by ignition of gas; Gas Safety Regulations.

Insolvency

Britannia Building Society *v.* Gray, Sheriff Principal, Lothian & Borders, and Edinburgh Sheriff Court, 20 November 2012 (Sheriff Principal) and 22 November 2012 (Sheriff): Sequestration; Concurrent applications; Priority; Grounds for opposing award.

Cruickshank *v.* Gordon & Innes, [2007] C.S.O.H. 113, Outer House, Court of Session: Ranking; Insolvent agricultural-produce agents; whether funds held in trust for farmers.

McMahon's Tr. *v*. McMahon, 1997 S.L.T. 1090, Inner House, Court of Session: Sequestration; Family home; Trustee's power of sale; Power of court to impose conditions.

First Tokyo Index Trust Ltd. *v*. Morgan Stanley Trust Co. 30 September 1993, Outer House, Court of Session (reported as First Tokyo Index Trust Ltd. *v*. Gould [1996] B.P.I.R. 406): Investment trust controlled by Robert Maxwell; Liquidator's recovery of information under statutory powers; Leave to disclose information to third party.

Insurance

Gammie *v*. Abbey Legal Protection, 14 December 2011, Banff Sheriff Court: Insurance; Obligations of coverholder under contract to administer policy; Whether liable to insured.

Green Island Organics Ltd. *v*. Q.B.E. Insurance (Europe) Ltd. 2011 C.S.O.H. 15, Commercial Court, Court of Session: Insurance: Aquaculture; First litigated claim in Britain for loss of salmon through sea lice.

Ward *v*. Norwich Union Insurance Ltd. [2009] C.S.O.H. 27, Outer House, Court of Session: Insurance; Fatal harbour accident; relevance of deceased's conduct to life-insurer's liability.

Cuthbertson *v*. Friends Provident Life Office, 2006 S.L.T. 567, Outer House, Court of Session: Insurance; Income protection insurance; Alleged non-disclosure; Multiple sclerosis.

Aitken *v*. Financial Services Compensation Scheme Ltd., 2003 S.L.T. 878, Outer House, Court of Session: Insurance; Compulsory insurance; Employers liability; Expenses.

Partnership

Henderson Loggie *v*. Middlebrook, 13 January 2015; Commercial Court, Court of Session: Partnership; Breach of contract; Partner establishing competing business; Interim interdict.

Buchanan *v*. Nolan, [2012] C.S.O.H. 132, Commercial Court, Court of Session: Partnership assets; Count, reckoning & payment; Construction of partnership deed.

Rights in security

Thomson *v.* Royal Bank of Scotland, 22 May 2002 & 28 October 2003, Commercial Court, Court of Session: Rights in security; Whether wife unduly influenced by husband; Relevance to secured lenders' rights.

Clydesdale Bank *v.* Black, 2002 S.C. 555, Inner House, Court of Session: Rights in security; Creditor's powers and duties; Enforcement; Knowledge; Undue influence.

Royal Bank of Scotland *v.* Clark, 2000 S.L.T. (Sh. Ct.) 101, Dumfries Sheriff Court: Rights in security; Husband & wife; Alleged misrepresentation by husband to wife; Relevance to secured lender's rights.

Unjustified enrichment

Chartered Brands Ltd. *v.* Elmwood Design Ltd., 15 May 2009, Edinburgh Sheriff Court; Unjustified enrichment; Claim for recompense for preparatory work for abortive joint enterprisee.

Fife Scottish Omnibuses Ltd. *v.* Tay Road Bridge Joint Board, 1997 G.W.D. 23-1180, Outer House & Inner House, Court of Session: Judicial review; Unjustified enrichment; Road traffic; Toll bridge; Over-payment of tolls; Statutory interpretation; Equitable defences.

Employment

Malcolm *v.* Dundee City Council, 31 May 2013, Employment Tribunal; 5 September 2014, Employment Appeal Tribunal; 12 January 2015, Employment Tribunal: Sex discrimination; Compensation; Injury to feelings; Psychiatric injury; Loss of earnings; Loss of pension rights; Thaine apportionment; Reasons.

McCormack *v.* Hamilton Academical Football Club Ltd., [2010] C.S.O.H. 124, Outer House, Court of Session: [2011] C.S.I.H. 68, Inner House, Court of Session: Football manager; Wrongful dismissal; Alleged gross misconduct.

Maxwell *v.* Greenock Morton Football Club, [2007] C.S.O.H. 207, Outer House & Inner House, Court of Session: Football coach's claim for payment following club's insolvency.

Hughes *v.* State Hospitals Board for Scotland, 8 February 2007, Employment Appeal Tribunal; Unfair dismissal ; Fairness.

First Scotrail Ltd. *v.* Griffen 7 March 2006, Employment Appeal Tribunal: Disciplinary procedures; Employment tribunals; Investigations; Misconduct; Unfair dismissal .

Kirik *v.* Oktay Ltd., 20 November 2002, Employment Appeal Tribunal: Dismissal; Reasonableness; Re-organisation; Unfair dismissal .

Mitchell *v.* Strathclyde Fire Brigade, 23 April 2002, Outer House, Court of Session: Judicial review; Pension; Medical retirement.

International Computers Ltd. *v.* Eccleson, 31 August 2000, Outer House, Court of Session: Restrictive Covenant; Interdict

Secretary of State for Social Security *v.* M, 1999 S.C. 235, Inner House, Court of Session: Pensions; Medical pension for military service; Serviceman contracting H.I.V. infection; Right to pension.

Munro *v.* Raith Rovers, 1998, Kirkcaldy Sheriff Court: Football manager; Wrongful dismissal; Damages.

Hay *v.* George Hanson (Building Contractors) Ltd. [1996] I.R.L.R. 427, Employment Appeal Tribunal: Transfer of undertakings ; Unfair dismissal.

Personal injuries

Gray *v.* Westlake-Tritton, 11 October 2012, Aberdeen Sheriff Court: Provisional damages; Uninsured driver; Whether action for provisional damages competent.

Countess of Lindsay *v.* Fife Scottish Omnibuses Ltd., 30 May 2002, Outer House, Court of Session: Personal injuries; Road-traffic accident to horse-drawn carriage; Psychological injury to horses.

Rawlinson *v.* Initial Property Maintenance Ltd., 1998 S.L.T. (Sh. Ct.) 54, Glasgow Sheriff Court: Personal injuries; Procedure; Expert evidence; Medical examinations; Personal injury.

Mitchell *v.* Laing, 1998 S.C. 342, Inner House, Court of Session; Personal injuries; Recovery of benefits.

Percy *v.* Glenburnie Securities Services Ltd., 1993 S.L.T. (Sh. Ct.) 78, Glasgow Sheriff Court: Personal injuries; Time limit; Equitable discretion.

Professional negligence & discipline

Wylie *v.* Jeffrey Aitken, 12 December 2002, Outer House, Court of Session: Damages; Professional negligence; Solicitors; Commercial conveyancing; Licensed premises.

Ross Harper & Murphy *v.* Banks 2000 S.C. 500, Commercial Court, Court of Session: Partnership; Partner's liabilities; Professional negligence; Solicitors; Standard of care .

Quantum Claims Compensation Specialists Ltd. *v.* Powell, 1998 S.C. 316, Inner House, Court of Session: Contract; Allegedly unlawful contract; Legal services.

Property

Conveyancing

Scotia Homes (South) Ltd. *v.* McLean, 11 January 2012 (Sheriff) and 30 November 2012 (Sheriff Principal), Kirkcaldy Sheriff Court & Sheriff Principal, Tayside, Central & Fife: Residential conveyancing; Description of subjects; Use of extrinsic evidence; Whether contract void from uncertainty.

Mitchell *v.* Caversham Management Ltd., [2009] C.S.O.H. 26, Outer House, Court of Session: Commercial conveyancing; Informal agreement for sale of land; Whether made binding by conduct.

Henderson v. Marasa, 1 December 2005, Sheriff Principal, Glasgow & Strathkelvin: Commercial conveyancing; Warranty; Damages; Contractual time limit.

Smith *v.* Lindsay & Kirk (No.1), 2000 S.C. 200, Inner House, Court of Session; Smith *v.* Lindsay & Kirk (No.2) 2002 S.L.T. 335, Outer House, Court of Session: Conveyancing; Contractual time limits ; (No.2) Professional negligence; Reparation; Solicitors .

Palmer *v.* Forsyth, 1999 S.L.T. (Sh. Ct.) 93, Perth Sheriff Court: Conveyancing; Implied terms; Whether implied obligation of reasonableness.

Landlord & tenant

Cole *v.* Lonie, 2001 S.C. 610, Inner House, Court of Session: Landlord & tenant; Commercial conveyancing; Landlord's obligations; Time limits .

Esson Properties Ltd. *v.* Dresser U.K. Ltd., 1997 S.C. 304, Commercial Court, Court of Session; Landlord & tenant; Commercial property; Break option; Calculation of time limit for exercise of option.

Land-ownership

Campbell-Gray *v.* Keeper of the Registers, 28 January 2015, Lands Tribunal for Scotland: Land-ownership; Rectification of boundaries on Land Register; Interpretation of titles; Status of plans; Possession as explanatory of titles.

Burton *v.* Keeper of the Registers, 30 January 2014, Lands Tribunal for Scotland: Land-ownership; Rectification of boundaries on Land Register; Possession; Competing possessory acts.

Welsh *v.* Keeper of the Registers, 22 April 2010, Lands Tribunal for Scotland: Land-ownership; Rectification of boundaries on Land Register in the light of historic maps and aerial photography.

Harbinson *v.* MacTaggart, 2006 S.L.T. (Lands Tr.) 42; on appeal, sub nom. Allen *v.* MacTaggart, 2007 S.C. 482, Lands Tribunal for Scotland & Inner House, Court of Session: Land-ownership; Criteria for the existence of historic tenancies-at-will.

Jones *v.* Wood, 2005 S.L.T. 655, Inner House, Court of Session: Land-ownership; Disposition of property; Rectification of deed.

Dimitrijevic *v.* Classical House, 2003, Lands Tribunal for Scotland: Land-ownership; Title conditions; Discharge.

Mason's Exrs. *v.* Smith, 2002 S.L.T. 1169, Outer House, Court of Session; Land-ownership; Right to complete title to land; Negative prescription.

Hamilton *v.* Mundell, 2002 Dumfries Sheriff Court: Land-ownership; Roads; Stopping-up order; rights of land-owner to solum; Prescriptive acquisition of adverse rights.

Bowers *v.* Kennedy, 2000 S.C. 555, Inner House, Court of Session: Land-ownership; Rights of way; Extinction; Prescription.

Rafique *v.* Amin, 1997 S.L.T. 1385, Inner House, Court of Session: Land-ownership; Tenements; Common property; Common interest.

Public law

Constitutional law

Lord Gray's Motion [2002] 1 A.C. 124; 2000 S.C. (H.L.) 46, Committee for Privileges, House of Lords: Constitutional law; Request by the House of Lords for advice from the Committee for Privileges on the constitutional position of the Scots hereditary peerage under the Treaty & Acts of Union.

Monckton *v.* Lord Advocate, 1995 S.L.T. 1201, Outer House, Court of Session: Constitutional law; E.U.; Crown payments to E.U. for costs of Agreement on Social Policy; Whether made with Parliamentary authority.

Education

King *v.* East Ayrshire Council, 6 March 1997, Outer House, Court of Session: Judicial review; Education: School closure; Procedural requirements; Statutory interpretation & discretion.

Regan *v.* City of Dundee Council, 1997 S.L.T. 139, Outer House, Court of Session: Judicial review; Education; School closures; Consultation.

Firearms

Gillan *v.* Police Scotland, 23 August 2013, Lanark Sheriff Court; Firearms licence; Revocation; Appeal; Fitness & public safety.

Housing

South Lanarkshire Council *v.* McKenna (No.1), 2010 Hous. L.R. 36; South Lanarkshire Council *v.* McKenna (No.2), 2010 Hous. L.R. 82; [2012] C.S.I.H 78; 2014 S.L.T. (Sh. Ct.) 51, Glasgow Sheriff Court; Inner House, Court of Session; Sheriff Principal of Glasgow & Strathkelvin: Housing; Eviction; Human rights; Whether provisions of Housing (Scotland) Act 2001 compatible with tenant's Convention rights.

Grampian Housing Association *v.* Emslie, February 2010, Sheriff Principal, Grampian, Highland & Islands: Procedure; Housing; Eviction; Appeal against default judgment.

Morgan v. Stirling Council, 2006 S.L.T. 962, Outer House, Court of Session: Judicial review; Housing; Homelessness; Priority needs; Vulnerable adults.

Stirling Council *v.* Neil, 2006 S.L.T. (Sh. Ct.) 51, Stirling Sheriff Court: Housing ; Eviction; Procedure.

Graham *v.* Northern Joint Police Board, 2000 S.L.T. (Land Ct.) 7; Scottish Land Court: Housing; Right to buy; Police housing; Waiver.

Glancy *v.* City of Edinburgh Council, 27 May 1994, Outer House, Court of Session: Judicial review; Housing; Allocation of tenancies; Delay in seeking judicial review.

Planning

Rascarrel Bay, Kirkcudbrightshire, Holiday Chalets: Public Local Inquiry 2009; for private developer.

Whiting Bay, Isle of Arran, Wastewater Treatment Works Compulsory Purchase Order Public Local Inquiry 2009; for Scottish Water.

Dunoon Wastewater Treatment Works: Public Local Inquiry 2007; for Scottish Water.

Thurso Retail Superstores: Public Local Inquiry 2007; for the planning authority.

Edgar Road Property Co. v. Moray Council, 29 May 2007, Outer House, Court of Session: Judicial review; Planning; Retail park; Variation of conditions; Third-party challenge.

Gairloch, Argyllshire, Wastewater Treatment Works: Public Local Inquiry 2006; for Scottish Water

Wester Lairgs Quarry, Strathnairn, Inverness-shire: Public Local Inquiry 2002; for the planning authority.

Altens/Peterseat, Aberdeen; Industrial developments: Public Local Inquiry, 2000; for the planning authority.

W.W.F. U.K. Ltd. *v.* Secretary of State for Scotland, [1999] 1 C.M.L.R. 1021, Outer House, Court of Session: Judicial review; Planning; Environment; Conservation areas; Habitats; E.U. law; Cairngorm Funicular Railway.

Edinburgh City Council *v*. Secretary of State for Scotland, 1998 S.C. (H.L.) 33, House of Lords: Planning; Development plans; Listed buildings; Planning permission.

Panmurefield Wastewater Treatment Works, Dundee: Public Local Inquiry 1996; for the sewerage authority.

Taxation

Spring Salmon & Seafood Ltd. *v*. H.M.R.C., 11 September 2014, First-Tier Tax Tribunal: Income Tax; P.A.Y.E.; National Insurance; Directors' remuneration; Time bar; Taxpayer's conduct; Effect of agreements and undertakings by H.M.R.C.

Spring Salmon & Seafood Ltd. *v*. H.M.R.C., 29 October 2014, Upper Tribunal: Corporation Tax; Loss relief; Effect of closure notice for one tax year on claim for another year; Definition of 'tax return'.

Transport

David Runciman & Sons *v*. Scottish Borders Council, 2003 S.L.T. 1405, Outer House, Court of Session: Judicial review; Transport; Roads; Definition of boundary of road.

Close Asset Finance Ltd. *v*. Secretary of State for Transport, 28 February 2003, Transport Tribunal: Transport; H.G.V. operators' licence; Revocation; Appeal.

McDonald *v*. D.V.L.A., 16 January 2003, Inner House, Court of Session: Transport; Excise; Vehicle Excise Duty; Seizure of vehicles.

Elmford Ltd. *v*. Glasgow City Council, 2001 S.C. 267, Outer House, Court of Session: Judicial review; Transport; Roads; Access; Ransom strip;

Robbie the Pict v. Miller Civil Engineering Ltd., 1999 S.C.L.R. 749, Outer House, Court of Session: Transport; Roads; Toll bridge; Authority of agent to collect tolls; Interdict.

Hingston *v*. McGugan, 1997 S.C.C.R. 625, Dingwall Sheriff Court; Transport; Criminal law; Road traffic; Toll bridge; Offences.

Broughty Ferry Level-Crossing Private Legislation Procedure: Parliamentary Commissioners' Inquiry, 1993

Tayside Regional Council *v*. British Railways Board, The Times, December 30, 1993, Outer House, Court of Session: Transport; Railways; Level crossing; Closure; Order for performance of statutory duty to re-open the crossing.

Procedure

Tor na Coille Hotel Ltd. *v*. Instant Catering Maintenance Ltd.; Anderson *v*. same, 10 March 2015, Inner House, Court of Session: Remit from Sheriff to Court of Session; Grounds for and against remit.

Donnelly *v*. Royal Bank of Scotland, 4 February 2015, Commercial Court, Glasgow Sheriff Court: Remit from Sheriff to Court of Session; Grounds for and against remit.

Aviva Insurance Ltd. *v*. West Lothian Insurance Services, [2015] C.S.O.H. 1, Commercial Court, Court of Session: Summary decree; Principal & agent; Insurance broker; Accounting.

McKenna *v*. South Lanarkshire Council, 25 June 2014, Outer House, Court of Session: Judicial review; Leave to appeal; Review of Sheriff Principal's decision to refuse leave.

Graham *v*. Tristar Oilfield Services Ltd., 23 May & 4 June 2013, Outer House, Court of Session; Expenses; Correction of interlocutor; Abandonment; Consequences in expenses; Leave to appeal.

Fleming *v*. Hastie, 19 November 2012 & 22 May 2013, Outer House, Court of Session: Expenses; Final award before action concluded; Competency; Abandonment; Court's discretion anent expenses on abandonment.

J. & E. Shepherd *v*. Letley, 28 June 2012, Sheriff Principal, Tayside, Central & Fife: Interim interdict; Proceedings for breach; Relevancy. 14 April 2014, Dundee Sheriff Court: Interim interdict; Breach; Canvassing & solicitation of former customers: 10 December 2014, Sheriff Principal, Tayside, Central & Fife: Finding of breach of interdict; Appeal to Sheriff Principal; Competency.

Malcolm *v*. Dundee City Council, [2012] C.S.I.H. 13, Inner House, Court of Session: Employment; Unfair dismissal; Whether just & equitable for claim to proceed out of time; Leave to appeal; 9 August 2013; Employment Tribunal: Reconsideration of judgment; Grounds.

Battenberg *v*. Dunfallandy House, 2010 S.C. 507, Inner House, Court of Session: Procedure; appeal against default judgment; nature of appeal court's discretion.

McCormack *v*. Hamilton Academical Football Club Ltd., [2008] C.S.I.H. 164, Inner House, Court of Session: Arrestment; Definition of insolvency for purposes of interim protective measures.

Breitenbücher *v*. Wittke [2009] C.S.O.H. 87, Outer House, Court of Session: Procedure; Regulation of interim expenses pending resolution of issue of abuse of process.

Bennett v. Scottish Down's Syndrome Association, [2005] C.S.I.H. 44, Inner House, Court of Session: Procedure; Decree by default; Appeal.

Allseas U.K. Ltd. *v*. Greenpeace Ltd., 2001 S.C. 844, Outer House, Court of Session: Procedure; Interdict; General apprehension of civil disobedience affecting offshore drilling.

Modern Housing Ltd. *v*. Love, 1998 S.L.T. 1188, Outer House, Court of Session: Procedure; Interim protective measures; Inhibition; Formal requirements; Validity.

Lord Advocate *v*. Russo, 4 April 1996, Inner House, Court of Session: Procedure; Withdrawal of representation; defender's omission to intimate timeously whether maintaining defence.

Mullen *v*. Moweta, 7 November 1995, Inner House, Court of Session: Procedure; Appeal against decree by default; Reasonableness of explanation for default.

Succession

Moir *v*. Moir, 2013 C.S.O.H. 177, Outer House, Court of Session: Will; Interpretation; Commercial maritime salmon-fishing rights; Liferent.

PNLA
Professional Negligence
Lawyers Association

Notes: -

Christopher Carroll
Partner
Kennedys

"The USA Perspective"

23 mins

Kennedys

Christopher R Carroll

Partner
Basking Ridge, United States
T: +1 908 848 1250
E: Christopher.Carroll@kennedyslaw.com

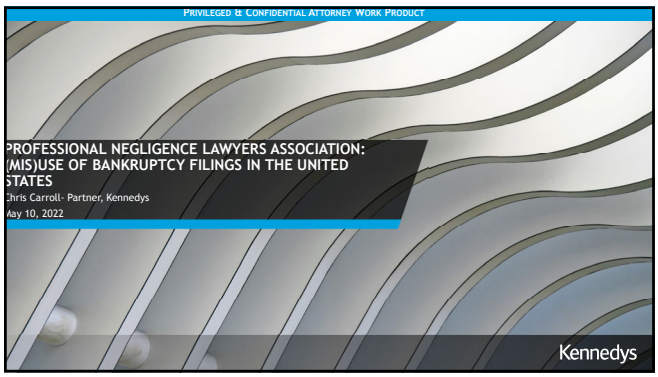
Chris is a Partner in the New York and Basking Ridge offices and is a member of Kennedys' Global Strategy Board. He has extensive experience in handling and resolving– through litigation and alternative dispute resolution mechanisms – insurance coverage disputes, including those involving environmental, toxic tort, asbestos, construction, advertising liability, products, cyber, technology, property, automobile, and employment issues.

Chris has represented clients in insurance coverage disputes in virtually every state in the United States, on both the state and federal level, as well as in Bermuda, Canada, Puerto Rico, and throughout Europe. He also is experienced in resolution of reinsurance disputes and the drafting of reinsurance contracts. Chris often provides counsel to corporate clients on general business matters, contract negotiation, environmental litigation and compliance, and all types of commercial disputes.

Chris is a frequent lecturer on a myriad of insurance and litigation topics, including mediation and negotiation, bad faith, construction defect, toxic tort, hazardous waste and advertising liability. He is on the the Advisory Board for The Center for the Study of Insurance Regulation at St. John's University in New York, as well as the Editorial Advisory Board of Insurance Law & Litigation Week. Chris also is a Fellow of the Litigation Counsel of America, a Fellow of the American College of Coverage Counsel (ACCC), and a Fellow of the American Bar Association, an honor only given to one percent of the lawyers admitted to practice in the US. Chris is Chairman of the Board of Trustees of St. Joseph's College in New York. He is also a board member of the Mayo Performing Arts Center in Morristown, New Jersey.

"Christopher Carroll is a distinguished practitioner who...is revered by clients for his experience and knowledge."
Chambers USA 2021

PRIVILEGED & CONFIDENTIAL ATTORNEY WORK PRODUCT



PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION: (MIS)USE OF BANKRUPTCY FILINGS IN THE UNITED STATES

Chris Carroll- Partner, Kennedys

May 10, 2022

Kennedys

Agenda

Kennedys

PRIVILEGED & CONFIDENTIAL ATTORNEY WORK PRODUCT

THE U.S. BANKRUPTCY SYSTEM

Kennedys

The US Bankruptcy System

- **The US Bankruptcy System is created by Congress.**
  - Article 1, Section 8, of the United States Constitution authorizes Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."
- The "Bankruptcy Code" was first enacted in 1978, which is supplemented by the Federal Rules of Bankruptcy Procedure and also by local rules.
- There is one bankruptcy court for each judicial district in the United States (total of 90 bankruptcy districts, plus one in Puerto Rico).

Two Main Purposes of the Bankruptcy System

1. A "breathing spell" codified as the "automatic stay" under Bankruptcy Code Section 362.

2. A "fresh start" from burdensome debts, accomplished by means of a discharge in bankruptcy.

Other Goals Achieved through Chapter 11

- Chapter 11 is utilized by commercial enterprises that desire to continue operating a business and repay creditors while operating via a court-approved plan of reorganization.
- It is through a confirmed plan of reorganization that a debtor may not only reduce debts and repay certain obligations, **but also**, it can serve to terminate burdensome contracts and leases, recover assets, re-scale operations, or obtain certain liability releases.

That is what bankruptcy is ***SUPPOSED*** to be used for and the debtor is the party a bankruptcy proceeding is ***SUPPOSED*** to benefit.

PURDUE PHARMA BANKRUPTCY & SETTLEMENT

Purdue Bankruptcy

- On September 15-16, 2019, Purdue filed for Chapter 11 under the Bankruptcy Code in the Southern District of New York.
- The purpose of the filing was to effectuate, through Chapter 11, a global resolution of the underlying lawsuits filed against it by governmental entities and individuals arising out of the opioid epidemic, to which Purdue is alleged to have been a major contributor through its manufacturing and false marketing of opioids, including OxyContin.
- Purdue has been sued in approximately 3,000 lawsuits by governmental entities and individuals, most of which were consolidated in the opioid multi-district litigation in the Northern District of Ohio.

Purdue Plea Agreement and Settlement with the U.S. Department of Justice (DOJ)

In November 2020, during the pendency of Purdue's Chapter 11 Bankruptcy Proceeding, Purdue entered into a plea agreement and settlement with the DOJ. The Settlement includes:

- Criminal fine in the amount of $3.544 billion.
- US receives unsecured claim in the amount of $2.8 billion arising from the DOJ's civil investigation.
- Federal government to receive "superpriority" lien of $2 billion, of which $225 million will be paid by Purdue directly. The remaining $1.775 billion is contingent on whether the Chapter 11 plan is confirmed.
- Settlement includes a plea agreement pertaining to Purdue's post-2010 conduct and knowledge of the risks of opioids and its misleading advertising efforts.
- Purdue is also required to create a public document repository showing its internal records and communications.
- The Bankruptcy Court approved Purdue's settlement with the DOJ.

Purdue Bankruptcy: Initial Plan Confirmation

- In August 2021, the Court held nearly a two-week hearing to confirm Purdue's Plan of Reorganization.
- **The Plan included a broad release of third-party claims against the Sackler family, in exchange for their agreement to contribute $4.325 billion to various opioid abatement trusts and a personal injury trust.**
- On September 1, 2021, the Plan was confirmed/approved by Judge Drain.

Purdue Bankruptcy: Appeal & Reversal

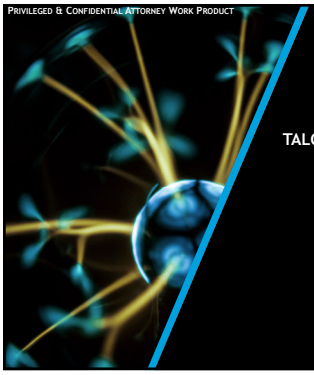
- In September 2021, the U.S. Trustee's Office and 9 state attorneys general filed appeals of the Order approving the Plan on the basis that liability releases for the Sacklers are unlawful.
- On December 16, 2021, the Southern District of N.Y. overturned the bankruptcy court's confirmation of the Plan.
  - Basis for Ruling: Bankruptcy Code does not authorize nonconsensual third-party releases against non-debtor parties, such as the releases for the Sacklers contemplated under the Plan.
- Purdue appealed to the Second Circuit.
  - Opposed by the U.S. Trustee's Office, arguing that the releases for the Sacklers, if permitted, would violate the Bankruptcy Code.
  - Appeal was heard on April 29, 2022.

Purdue Bankruptcy: Mediation & New Plan

- During the pendency of Purdue's appeal to the Second Circuit, Purdue, the Sacklers, and the 9 objecting states mediated a resolution of a new Plan.
- On March 3, 2022, Purdue and 9 objecting states reached a new deal, whereby the Sacklers agreed to increase their contributions from $4.325 billion to $5.5 billion for releases under the Plan.
  - This will come in the form of $1 billion in additional cash payable over the next 18 years to a newly created abatement fund; $175 million paid to the main master distribution trust; and up to $500 million in cash based on sales of non-Purdue assets (which could increase the Sacklers' contributions to $6 billion).
  - Institutions bearing the "Sackler" name will be permitted to change their name (i.e., buildings, programs, or scholarships).
  - Public statement of regret by the Sackler family will be included.
  - Additional funds will be split by the 9 states and territories that signed onto the new deal.
- On March 10, 2022, Judge Drain approved the settlement, but it will only be effective by an order of the SDNY or the Second Circuit. At that time, submission of a new, revised plan is anticipated.

Proper use or improper misuse of the bankruptcy system?

- **Query #1: From a legal perspective, *may* company owners and/or principals use the bankruptcy system to attempt to purchase nonconsensual third-party releases against non-debtors in order to avoid liability?**
  - Arguments have been made that the releases are permissible under bankruptcy law.
  - The issue is likely ripe for appeal to the U.S. Supreme Court.
- **Query #2: From a public policy perspective, *should* company owners and/or principals be permitted to obtain liability releases in this manner?**
  - Considerations:
    - It strips third-parties of their due process rights to pursue claims.
    - Owners are able to avoid any admission of wrongdoing.
    - The abatement plan is designed to benefit third-parties.
    - Preserves judicial resources by avoiding mass tort/class action-type claims.



TALC LITIGATION AND JOHNSON & JOHNSON'S TEXAS TWO-STEP

Kennedys

The Plaintiffs' Allegations Against J&J

- 2 different theories:
  - Talc contains asbestos
  - Talc is the same thing as asbestos
- Manufacturers of talcum powder products failed to warn users of talc of the increased risks of ovarian cancer and mesothelioma when using the products.
- Johnson & Johnson knew for more than 40 years ago that there is a link between using the products and ovarian cancer and mesothelioma.
- Despite knowing of this causal link, Johnson & Johnson intentionally made the decision not to warn that the powder could cause cancer by entering the body after being applied for personal hygiene.
- Despite knowing of the causal link, Johnson & Johnson refused to change its formula to use safer ingredients, such as cornstarch.

The Positions of Johnson & Johnson

- Talc is safe, as shown for years by the best tests available
- There is no asbestos contained in its products
- "The scientific consensus is that the talc used in talc-based body powders does not cause cancer, regardless of what is in that talc."- Peter Bicks, Esq., outside litigation counsel for J&J
- Expert geologist Matthew Sanchez testified at trial that "I have not found asbestos in any of the current or modern Johnson & Johnson talc products."
- In August 2019, expert epidemiologist Gregory Diette stated that there are no credible scientific studies supporting a link between talc and mesothelioma
  - Cited research showing that none of the miners/millers who worked in J&J's talc mines had developed mesothelioma

History of Talc Litigation in the United States

- The lawsuits are brought both in State and Federal courts. A large percentage of the State court cases are venued in Missouri, New Jersey and California.
- The Federal court cases have been consolidated for purposes of pre-trial discovery and motion practice in the multidistrict litigation ("MDL") venued in New Jersey Federal court. There are upwards of 30,000 lawsuits pending in the MDL against J&J and its supplier, Imerys Talc.
- In 2019, J&J attempted to remove all state court cases in which Imerys Talc America is a defendant to Federal court in Delaware on the grounds that all of these cases are related to Imerys Talc America's ongoing bankruptcy proceedings in Delaware Federal court. This effort was rejected by the courts.
- In July 2019, the U.S. Justice Department launched a criminal investigation to determine if J&J purposefully misled the public about the presence of asbestos in its talcum powder products.

Texas Two-Step

- A "divisive merger" procedure that allows a subsidiary to split into two new entities.
  - Used to separate valuable assets into a "GoodCo" and a "BadCo."
  - The "BadCo" files for Chapter 11 bankruptcy, allowing preservation of subsidiary assets in the "GoodCo" entity.

J&J's Use of the Texas Two-Step

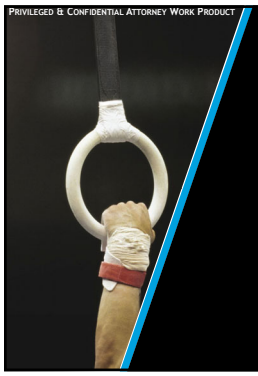
- On or about October 2021, J&J was facing more than 38,000 ovarian cancer and mesothelioma claims
  - At that time, J&J executed a Texas Two-Step strategy to limit its liability for asbestos related claims.
  - Specifically:
    - J&J's asbestos liabilities were split off from J&J's consumer products division.
    - Two entities were formed: LTL Management and New JJCI.
    - The newly formed subsidiary, LTL Management LLC, subsequently filed for bankruptcy in North Carolina (a favorable venue for pursuing bankruptcy relief).
- In most jurisdictions, this would technically be a fraudulent or bad faith transfer, but it is legal under Texas law.
- **NOTE:** J&J's Net Worth is approximately $435 billion, ranking 36 on the list of the top 50 Fortune 500 companies

Going Forward

- On November 11, 2021, LTL Management's chapter 11 bankruptcy was transferred from North Carolina to New Jersey after finding that LTL Management had used the "Texas Two-Step" to manufacture jurisdiction in North Carolina improperly.
- On February 25, 2022, the New Jersey court denied motions to dismiss by the claimants, finding that: (1) bankruptcy provides an optimal forum to resolve mass tort liability; and (2) the implementation of a "Texas Two-Step" divisional merger prior to the bankruptcy filing did not harm talc claimants.
- On March 18, 2022, a New Jersey bankruptcy judge appointed a pair of mediators to facilitate negotiations.
- In recent rulings, Chief Judge Michael B. Kaplan of the U.S. Bankruptcy Court for the District of New Jersey extended a stay pausing the 38,000 lawsuits against J&J until June 29, 2022.
- If J&J's divisive merger plan succeeds, J&J would be able to able to set up a multi-billion dollar trust fund to resolve talcum powder cancer cases filed against it.
- On March 30, 2022, the New Jersey bankruptcy judge granted an expedited appeal in the 3rd U.S. Circuit Court of Appeals on a February order ruling that J&J ***did not*** abuse the bankruptcy system.

Proper use or improper misuse of the bankruptcy system?

- There are divided opinions as to whether J&J's maneuver is a misuse of the bankruptcy system:
  - Judge Michael Kaplan (D.NJ. Bankruptcy Court): "The Court remains steadfast in its belief that justice will best be served by expeditiously providing critical compensation through a court-supervised, fair, and less costly settlement trust arrangement."
  - Senator Sheldon Whitehouse of Rhode Island has expressed his view that the Texas Two-Step is "a blot on our legal system," allowing wealthy companies to escape liability.
  - Bankruptcy expert David Skeel: "In an extreme case, a company that's facing a lot of litigation could stick all the litigation exposure — all of those liabilities — into one entity and stick everything else into the other entity, and the [Texas] statute doesn't do anything to stop that."
  - Illinois Senator Dick Durbin stated: "We need to close this loophole for good… Bankruptcy is supposed to be a good-faith way to accept responsibility, pay one's debts as best you can, and then receive a second chance, not a Texas two-step, get-out-of-jail-free card for some of the wealthiest corporations on earth like Johnson & Johnson."



USA GYMNASTICS

USA Gymnastics & Larry Nassar Lawsuits

- USA Gymnastics was sued in hundreds of pending lawsuits arising out of claims of sexual abuse by Dr. Larry Nassar (including over 300 claimants) arising from his "treatment" of USA Gymnastics and Michigan State University athletes.
- Alleging that under the guise of medical treatment, Dr. Nassar sexually assaulted, abused, and/or molested the plaintiffs (many of whom were minors).
- **Other named defendants include:**
  - Michigan State University
  - Board of Trustees of Michigan State University
  - Lawrence Gerard Nassar
  - MSU athletic trainers, coaches, physicians, psychologists, etc.
  - United States Olympic Committee

USA GYMNASTICS
https://usagym.org/

USA Gymnastics Case Update

- On December 5, 2018, USA Gymnastics petitioned for Chapter 11 bankruptcy in the hopes of paving way to a settlement of the sexual abuse claims against it.
- On December 13, 2021, the U.S. Bankruptcy Court for the Southern District of Indiana confirmed USA Gymnastics' bankruptcy plan, which includes a $380 million settlement and significant non-monetary commitments focused on athlete safety and wellness.
  - Initially, the settlement fund was set for $425 million in order to pay the claims of over 500 survivors. However, upon further negotiations with insurers, the settlement fund amount was decreased. The case ultimately resulted in a $380 million financial settlement, which is being funded by the U.S. Olympic & Paralympic Committee (USOC), USA Gymnastics, and insurers.
  - As part of the plan, USA Gymnastics is required to strengthen its Safe Sport policies and inclusion of one survivor on the Board of Directors, Safe Sport Committee, and Athlete Health and Wellness Council.
  - Payments were in addition to the more than $500 million paid by Michigan State University.
  - **Key:** USOC received a release through the bankruptcy system, even though it was not a bankrupt entity.

Proper use or improper misuse of the bankruptcy system?

- **Proper Use of the Automatic Stay:** The "automatic stay" put in place as a result of USA Gymnastics' filing its Chapter 11 petition worked a significant, and potentially strategic, benefit to USA Gymnastics in that it paused all litigation, including discovery and depositions that may have allowed sexual abuse victims to uncover key information about USA Gymnastics' role in the alleged abuse.
- **Arguable Misuse of the System to Construct A Settlement:**
  - USOC obtained a release in the plan from nonconsenting third-parties, which release (unlike the one obtained by the Sacklers) was not appealed.
  - Notwithstanding the U.S. Trustee's opposition, it ***DID NOT*** appeal the plan's confirmation.

RELIGIOUS INSTITUTIONS

Religious Institutions

- Leaders of numerous religious institutions have been accused of sexual assault and abuse. In turn, the religious institutions/organizations themselves (e.g., Catholic Dioceses, religious universities, etc.) have been the subject of an increasing number of lawsuits.
- In particular, Catholic dioceses all around the country have been the subject of thousands of lawsuits, and counting.
- As a result, nearly 30 dioceses have filed for Chapter 11 relief with the goal of selling their assets (hundreds of millions in endowment and land and buildings) and reorganizing in order to fund their defense and settlement of lawsuits.

Dioceses

- 28 dioceses and 3 religious orders have sought relief through bankruptcy proceedings.
- Some of the Dioceses currently in bankruptcy proceedings include:
  - *Archdiocese of Portland OR, Diocese of Tucson AZ, Diocese of Spokane WA, Diocese of Davenport IA, Diocese of San Diego CA, Diocese of Fairbanks AK, Diocese of Wilmington DE & MD, Archdiocese of Milwaukee WI, Diocese of Gallup NM, Diocese of Stockton CA, Diocese of Helena MT, Archdiocese of St. Paul and Minneapolis MN, Diocese of Duluth MN, Diocese of New Ulm MN, Diocese of Great Falls-Billings MT, Diocese of St. Cloud MN, Archdiocese of Agana (Guam), Diocese of Winona-Rochester MN, Archdiocese of Santa Fe NM, Diocese of Rochester NY, Diocese of Harrisburg PA, Diocese of Buffalo NY, Archdiocese of New Orleans LA, Diocese of Syracuse NY, Diocese of Rockville Centre NY, Diocese of Camden NJ.*
- Certain Religious Orders that have also sought bankruptcy relief include:
  - *Christian Brothers Institute of New York, Crosier Fathers and Brothers Province, Society of Jesus, Oregon Province*

Dioceses Utilizing Chapter 11 To Achieve Settlements

- Of the dioceses that declared bankruptcy, the values of their settlements with sexual abuse victims have reached as high as 9-figures. Some examples include:
  - Diocese of Gallup (PA) settled the claims of approximately 55 victims for more than $20 million
  - Diocese of St. Paul and Minneapolis (MN) settled the claims of 450 victims for $210 million
  - Diocese of San Diego (CA) settled the claims of 144 victims for $108 million
  - Diocese of Fairbanks (Alaska) settled the claims of 300 victims for approximately $12 million

Taking Advantage of Chapter 11 To Shield Assets

- Dioceses have used the bankruptcy process to shield their assets in order to decrease the amount of funds available to pay towards potential settlement of claims.
- **Transferring Assets -** Prior to filing for bankruptcy, certain diocese transferred or shifted assets to other funds and parishes, then argued that it lacked sufficient funds to defend itself or settle underlying claims as a basis for declaring bankruptcy.
- **Undervaluing Assets** - As one example, the Diocese of Camden is alleged to have made a series of misstatements and omissions in order to undervalue its assets available for settlement.
  - The Creditor Committee in that bankruptcy proceeding argues that the undervaluation is an attempt to shield the Diocese of Camden from potential sex abuse victims. Creditors claim the Diocese failed to disclose $23 million in a "Deposit and Loan Fund" and an additional $9 million in a separate bank account.
  - Diocese of Camden has assets worth $1 billion, with up to $250 million in readily available assets. It paid $11 million to sex-abuse victims during the 1990s-2010s period and an additional several million in 2019 to settle 71 claims as part of a plan with five other dioceses. In February 2022, the Diocese announced a plan to distribute $90 million to approximately 300 sex abuse victims ($30 million of which is being funded by insurers).

Taking Advantage of Chapter 11 To Shield Assets (Cont.)

- **Limiting Available Assets from an Archdiocese's Estate** - Because dioceses are non-profit entities, they have sought to limit the scope of their estate.
  - In *Official Committee of Unsecured Creditors v. Archdiocese of St. Paul and Minneapolis*, 888 F.3d 944 (8th Cir. 2018), the Eighth Circuit affirmed lower court rulings that the assets of parishes and other entities associated with an archdiocese were not available to fund bankruptcy settlements with clergy abuse victims.
  - The Eighth Circuit held that a bankruptcy court's authority to issue "necessary or appropriate" orders does not permit it to order substantive consolidation of the assets and liabilities of a debtor archdiocese with the assets and liabilities of nondebtor entities (i.e., other parishes and parish schools) that also operated as nonprofits because doing so would violate the prohibition of involuntary bankruptcy filings against nonprofits.
  - Thus, an argument can be made that ***only the bishop's direct holdings***, as opposed to all properties held in trust for all parishes associated with the archdiocese/diocese, ***can be included in the archdiocese's bankruptcy estate***. *See In re Catholic Diocese of Wilmington, Inc.*, 432 B.R. 135 (Bankr. D. Del. 2010); *Comm. of Tort Litigants v. Catholic Diocese of Spokane*, 364 B.R. 81 (E.D. Wash. 2006); *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 842, 861 (Bankr. D. Or. 2005).
  - **Certainly, it invites the creative transfer of assets and serves to limit religious exposures, including of the ultimate parent religious entity, such as the Vatican in Rome.**

MOVING FORWARD

Impact Moving Forward

- Trial courts will be unlikely to interfere with the broad use of the bankruptcy system to obtain relief, such as the third-party liability releases obtained by the Sacklers and USA Gymnastics.
- Reform, if any, will need to come from Congress (through legislation) or the U.S. Supreme Court.
- Creating higher claim values through a non-litigated bankruptcy process typically dictated by the claimants.

Legislative Outlook

- Legislation is working its way through Congress on trying to limit the misuses of the bankruptcy system. Some examples include:
  - **Nondebtor Release Prohibition Act of 2021:** Aimed at prohibiting bankruptcy courts from approving nonconsensual releases of claim against non-debtors (e.g., the Sackler) under Chapter 11 plans or the Bankruptcy Code.
  - **Potential Legislation to Preclude the Texas Two Step Practice:** Hearings have been held in the Senate Judiciary Committee's Subcommittee on Federal Courts, Oversight, Agency Action and Federal rights on whether to eliminate the practice. This could be achieved through the proposed Nondebtor Release Prohibition Act of 2021 (discussed above) by requiring bankruptcy judges to dismiss cases filed by entities that have taken on liabilities in a divisional merger within 10 years before filing.
  - **Bankruptcy Venue Reform Act of 2021:** Aimed at limiting forum shopping by debtors regarding where they file for Chapter 11 relief. The bill would require debtors to file where its headquarters or principal assets are located.

Questions?

Please feel free to send me any questions at:
Christopher.Carroll@kennedyslaw.com

Andrew McWhirter
Axiom Advocates

"Lender Claims"

30 mins

Andrew McWhirter

Year of Call: 2021
andrew.mcwhirter@axiomadvocates.com
07957 431478

Andrew's practice focuses on commercial disputes including contractual, intellectual property, construction and professional negligence disputes. He is frequently involved in high value cases with complex legal, scientific and technical subject matter. He is particularly adept at handling large scale and document heavy litigations and arbitrations, including international arbitration.

Andrew has particular expertise in intellectual property, technology and media law. He has built up a substantial knowledge of the law in relation to intellectual property rights and has advised many well-known brands on infringement, validity and ownership of intellectual property. He lectures and tutors on the Intellectual Property in Business course at the University of Edinburgh and has written a number of articles on intellectual property law. Andrew called to the Bar in 2021 as Faculty Scholar. Prior to joining the Bar, Andrew gained over 6 years' experience as a commercial litigator. He was qualified as a solicitor in both Scotland and in England & Wales.

Professional Career to date

- Devilmasters: Usman Tariq, Jonathan Broome, Tony Lenehan
- June 2021: Admitted to the Faculty of Advocates
- 2020-2021: Devil, Faculty of Advocates
- 2018-2020: Associate, Brodies LLP
- 2014-2018: Solicitor, Shepherd and Wedderburn LLP
- 2012-2014: Trainee Solicitor, Shepherd and Wedderburn LLP

Qualifications

- 2020-2021: Faculty Scholar, Faculty of Advocates
- 2012: Diploma in Professional Legal Practice, University of Edinburgh
- 2011:LLB (Hons), First Class, University of Edinburgh

Areas of Expertise

- Alternative Dispute Resolution
- Commercial Contracts
- Intellectual Property Rights
- International Media Law
- Professional Liability

Appointments & Memberships

- 2019 - present: Lecturer and tutor on the Intellectual Property in Business course on the Diploma in Professional Legal Practice, University of Edinburgh
- 2019 - present: Member of editorial board for European Trade Mark Reports (Sweet and Maxwell)
- 2012: Researcher for Contemporary Intellectual Property Law and Policy (3rd Edition, Oxford 2013)
- 2011 – 2013: Tutor in Revenue Law, Commercial Law and Business Entities at the University of Edinburgh

Publications

- *Communication to the public online: protecting copyright or breaking the Internet?* 2020 Journal of Intellectual Property Law and Practice Vol. 15, No.5, 390-398
  Arbitration section in *Enforcement of judgments and arbitral awards in Scotland* Practical Law, Thomson Reuters
- Protecting your brand: *The Scottish Option* In-House Lawyer, 2019
- *Data breaches and the damages test* JLSS Dec 2018
- *Changing Sides* JLSS June 2017

Directories

- World Trade Mark Review 1000 (2021) for enforcement and litigation – ***"[He] has a flair for resolving spats both in and out of court for players in the food and drink, technology, oil and gas and luxury industries."***
- World Trade Mark Review 1000 (2020) for enforcement and litigation – ***"He has an excellent technical knowledge of trade mark law, which he is able to explain well to non-lawyers. Deadline-oriented and quick to grasp issues, he is also very personable."***
- IP Stars ***"Rising Star"*** 2020/2021

PNLA Scottish Conference 2022

Lender claims - scope of duty and the end of SAAMCO?

Andrew McWhirter, Advocate

May 2022

Content

- The approach to lender claims following Manchester Building Society v Grant Thornton 2021 UKSC
  - What has changed?
  - What has not changed?
  - What can be done?
- Two recent examples of the application of MBS

The old approach…

- SAAMCO – information or advice?
- "Information" case - then damages were confined to the direct consequences of the information being wrong.
- "advice" case - liability extends to all adverse consequences as a result of the course of action the claimant was negligently advised to follow.

Manchester Building Society v Grant Thornton

- GT advised MBS that:
  - MBS could prepare accounts on the basis of hedge accounting.
  - This would hide the volatility in the building society's capital position and hid a severe mismatch between swaps and the value of the mortgages which the swaps designed to hedge.
  - This was would not create regulatory difficulties
- Advice was negligent – MBS closed out the swaps at cost of £32 million
- Issue was what could MBS recover?

High Court and Court of Appeal

- This was an information case – could not recover the cost of closing out the swaps
- If MBS could, then damages should be reduced by 50% for contributory negligence

Supreme Court

- Could MBS recover the cost of closing out the swaps, being the £32 million?
- Appeal allowed unanimously
- the scope of the duty was governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice was given.
- Not bound by a rigid categorisation of "information" or "advice" case

AXIOM
ADVOCATES

6 Questions

1. **ACTIONABILITY** –is the harm that is the subject matter of the claim actionable in negligence?
2. **SCOPE OF DUTY** – what are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?
3. **BREACH** – did the defendant breach duty by act or omission?
4. **FACTUAL CAUSATION** – is the loss for which the claimant seeks damages the consequence of act or omission by the defendant?
5. **DUTY NEXUS** – is there a sufficient nexus between the particular element of the harm for which damages are sought and the subject matter of the duty of care analysed at stage 2?
6. **LEGAL RESPONSIBILITY** – are damages irrecoverable because too remote, failure to mitigate or avoid losses?

AXIOM
ADVOCATES

Conclusions on MBS

- ”Advice” and “information” not a rigid distinction
- Focus on the purpose of the duty
- SAAMCO counterfactual?
- Focus on express and implied terms of the engagement

AXIOM
ADVOCATES

Lawrence v Intercommercial Bank [2021] UKPC 30

- Loss recoverable by a lender as a result of negligent valuations
- Valuer valued land which was to be used as security for a guarantee
- Valued at $15 million based on commercial use. Incorrect, the land was only worth $2.3 million – negligent?
- Valuation report assumed good an marketable title BUT the guarantor did not have title to the land – security was worthless – also negligent?
- Scope of valuer’s duty?

"It is clear…that the purpose of Lawrence 's report was to value the property on the assumption that there was good legal title to the Land. It was not the purpose of…[the]… report to advise on, or give information about, the title to the Land. It is clear that the Bank was not looking to…[the]…report to advise on, or give information about, the title to the Land. That was a matter for a lawyer not a valuer. The Board is therefore seeking to exclude from the total loss factually caused to the Bank by…the…negligence that element of the loss that is outside the scope of…[the]… duty of care because it is attributable to the defect in title rather than to the overvaluation being based on commercial not residential use."

Knights v Townsend Harrison Ltd [2021] EHHC 2563

- Duty of care when accountants introduced clients to tax schemes or investment opportunities.
- The effect of disclaimers upon the question of whether there had been an assumption of responsibility by an accountant.
- In considering duty of care, it was appropriate to apply the "assumption of responsibility" test deriving from Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] A.C. 465, [1963] 5 WLUK 95.
- Disclaimer should be regarded as "one of the facts relevant to answering the question whether there had been an assumption of responsibility to the defendants for the relevant statement"

Closing thoughts

- Move away from “advice” and “information” distinction
- Counterfactual analysis of secondary importance
- Back to first principles but still much uncertainty
- Focus on the purpose of the instruction – what was the purpose of the advice sought from the professional?
- Frame terms of business and purpose of instruction - edit terms and conditions, to make clear the purpose of the advice and duty, and what the professional is retained to do.
- Appropriate carve-outs – i.e. tax work

Andrew McWhirter, Advocate
Axiom Advocates

e: andrew.mcwhirter@axiomadvocates.com
Tel: 07957 431 478
Clerks: 0131 226 2881

Web: www.axiomadvocates.com

Katy Manley
President – PNLA

Conference Closing Remarks
2 ***mins***

5 hr – Total talk time
1 hr - Conference Pack Review
3 hr – Questions & Networking @ The Signet Rooms
Total CPD – 8 hours

To complete your feedback form please go to

https://www.pnla.org.uk/event/navigation-scotland-2022-please-do-join-us-on-this-professional-negligence-liabilityroad-trip/