



**PROFESSIONAL NEGLIGENCE  
AND LIABILITY UPDATE**

**EDINBURGH CONFERENCE**

**Thursday 21st September 2023**

PROFESSIONAL NEGLIGENCE LAWYERS ASSOCIATION & THE WS SOCIETY  
EDINBURGH CONFERENCE  
Thursday 21st September 2023

0900-0930 Registration and refreshments

0930-0940

*"Joint Chairs Introduction"*

**Karen Cornwell, Thorntons (PNLA - Joint Chair)**

<https://www.thorntons-law.co.uk/our-people/karen-cornwell>

**Tony Jones KC, Brodies Solicitors (WS Society - Joint Chair)**

<https://brodies.com/people/tony-jones-kc/>

0940-1020

**Keynote Address** – *"Lord Sandison's reflections on Professional Negligence actions in the Court of Session"*

**The Hon Lord Sandison**

**Senator of the College of Justice**

<https://judiciary.scot/home/judiciary/judicial-office-holders/senators-of-the-college-of-justice/lord-sandison>

1020-1100

*"tbc"*

**Nicholas Davidson KC, Hailsham Chambers**

<https://www.hailshamchambers.com/our-people/profile/nicholas-davidson-kc>

1100-1115 Refreshments

1115-1155

*"A view from the (commercial) Sheriff Court bench"*

**Sheriff Gregor Murray**

**Dundee Sheriff Court**

1155-1235

*"Experts: Tactics, Timescales, and Tubbing"*

**Gordon Gibb, Gibb Architects**

<https://www.gibbarchitects.co.uk/about>

1235-1335 Lunch

1335-1415 *"The impact of AI (such as Chat GPT) upon existing professional standards of competence"*

**Paul Motion, BTO**

<https://www.bto.co.uk/people/paul-motion.aspx.html>

1415-1455

*"Case law review 2022/2023"*

**Garry Borland KC, Axiom Advocates**

<https://www.axiomadvocates.com/advocate/garry-borland/>

1455- 1510 Refreshments

1450-1520

*"Review of the impact of the Civil Litigation (Expenses and Group Proceeding (Scotland) Act 2018)"*

**Tim Edward, MBM Commercial**

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

1520-1610

*"An update on Lender Claims"*

**Andrew Foyle, Shoosmiths**

<https://www.shoosmiths.com/people/cvdetails/andrew-foyle>

1610-1620

*"Questions and Joint Chairs closing remarks"*

**CPD: 6 hours (Law Society of Scotland)**

**WS SOCIETY / PROFESSIONAL NEGLIGENCE AND LIABILITY  
Edinburgh Conference**

**Thursday 21st September 2023  
ATTENDEES (1 of 3)**

<b>The Hon Lord Sandison</b>	<b>Scottish Courts and Tribunals</b>
<b>Gordon Balfour</b>	<b>Compass Chambers</b>
<b>Anna Bennett</b>	<b>WS Society</b>
<b>Rachael Bicknell</b>	<b>Squaring Circles</b>
<b>Stephen Blane</b>	<b>Urquharts</b>
<b>Garry Borland KC</b>	<b>Axiom Advocates</b>
<b>Iain Buchan</b>	<b>Thorntons Law LLP</b>
<b>Dominic Burke</b>	<b>Thompsons Solicitors</b>
<b>Fiona Chute</b>	<b>Brodies LLP</b>
<b>Vittorio Cinque</b>	<b>Kennedys Management Services</b>
<b>Louise Cockburn</b>	<b>Faculty of Advocates</b>
<b>Karen Cornwell</b>	<b>Thorntons</b>
<b>Nicholas Davidson KC</b>	<b>Hailsham Chambers</b>
<b>Jacqueline Donnelly</b>	<b>Thompsons Solicitors</b>
<b>Tim Edward</b>	<b>MBM Commercial</b>
<b>Andrew Foyle</b>	<b>Shoosmiths</b>
<b>James Frith</b>	<b>Kennedys Management Services</b>
<b>Alastair Frod</b>	<b>Eversheds Sutherland</b>
<b>Kirsty Gallacher</b>	<b>Pinsent Masons LLP</b>
<b>Gordon Gibb</b>	<b>Gibb Architects Ltd</b>
<b>Paul Haniford</b>	<b>Thorntons Law LLP</b>
<b>Gina Johnston</b>	<b>Shepherd and Wedderburn LLP</b>
<b>Ashley Jones</b>	<b>Burness Paull LLP</b>

<b>Katy Manley</b>	<b>PNLA/BPE Solicitors</b>
<b>Ellen Masters</b>	<b>Aberdein Considine and Co</b>
<b>Andrew McConnell</b>	<b>DWF LLP</b>
<b>Louise McDaid</b>	<b>Burness Paull LLP</b>
<b>Peter McGladrigan</b>	<b>TLT LLP</b>
<b>Paul McIntosh</b>	<b>Aberdein Considine and Co</b>
<b>Richard McMeeken</b>	<b>Morton Fraser LLP</b>
<b>Euan McSherry</b>	<b>Aberdein Considine and Co</b>
<b>Meriel Miller</b>	<b>Burness Paull LLP</b>
<b>Sophie Mills</b>	<b>WS Society</b>
<b>Paul Motion</b>	<b>BTO</b>
<b>Sheriff Gregor Murray</b>	<b>Scottish Courts and Tribunals</b>
<b>David Niven</b>	<b>Penningtons Manches Cooper LLP</b>
<b>Paul O'Brien KC</b>	<b>Axiom Advocates</b>
<b>Lindsay Ogunyemi</b>	<b>DWF LLP</b>
<b>Marc Onorati</b>	<b>Jones Whyte Law Ltd</b>
<b>Matthew Pascall</b>	<b>Temple Legal</b>
<b>Jamie Robb</b>	<b>Brodies LLP</b>
<b>Max Roper</b>	<b>DWF LLP</b>
<b>Rachael Jane Ruth</b>	<b>Brodies LLP</b>
<b>Joel Shaw</b>	<b>Thompsons</b>
<b>Eileen Sherry</b>	<b>DWF LLP</b>
<b>Sam Sloan</b>	<b>WS Society</b>
<b>Murray Steel</b>	<b>Axiom Advocates</b>
<b>Shannon Stevenson</b>	<b>Addleshaw Goddard</b>

**Vicki Teasdale**

**Regan Wallace**

**Sarah Wardell**

**Shannan Wilkie**

**Kennedys Management Services**

**BTO**

**Dentons**

**Burness Paul LLP**



**Sponsored by**





**Karen Cornwell, Thorntons  
(PNLA - Joint Chair)**

**Tony Jones KC, Brodies Solicitors  
(WS Society - Joint Chair)**

***“Joint Chairs Introduction”***

**Karen Cornwell**

**Legal Director**

Dispute Resolution & Claims

Professional Negligence

**Dundee**

T: 01382 767022

E: [kcornwell@thorntons-law.co.uk](mailto:kcornwell@thorntons-law.co.uk)



Dual qualified in Scots and English law. Accredited Specialist in Professional Negligence.

Karen advises on a wide range of matters including commercial litigation, property litigation, professional negligence, contract disputes and debt recovery. She works with a variety of clients including individuals, companies, partnership, LLP's and sole traders. Karen has vast experience in representing clients in the Sheriff Courts, Court of Session and UK Supreme Court.

Karen is well known by her clients for providing practical, technically focussed advice and for being a commercial thinker. She qualified as a solicitor in Scotland 1999 and in England and Wales in 2010. Karen is particularly interested in Professional Negligence and is one of a few accredited specialists by the Law Society of Scotland. Karen has acted for both pursuer and defender's in a wide variety of professional negligence claims. Karen is also the Scottish representative of the Professional Negligence Lawyers Association, having held that role since 2014 and is strategic in arranging and hosting the annual conferences in Edinburgh. Karen is also one of 7 members of the Law Society of Scotland Professional Negligence Pursuer Panel and is the only female to currently hold that role. She is also a Notary Public.

Karen is a Tutor in Civil Procedure for the Postgraduate Diploma in Legal Practice at the University of Dundee. She is also a Committee Member of Loch Lomond Water-ski Club and is Director (Legal) of Water-Ski and Wakeboard Scotland which is supported by Sport Scotland. She also acts as their Anti-Doping Officer. Outside of the office Karen enjoys slalom (water) skiing, alpine skiing, horse riding and hill walking/climbing.



# Tony Jones KC

Year of Qualification as Solicitor: 1991

Year of Higher Rights of Audience: 1999 (Scotland) 2022  
(England & Wales)

Year of Silk: 2017

## Contact

**Email:** tony.jones@brodies.com

**Direct line:** +44(0) 131 526 4029

**Mobile:** +44(0) 7896680170



## Professional experience

Tony is one of only six civil solicitor advocates in Scotland to be afforded the rank of senior counsel, this is testament to the fact that the majority of his career has been devoted to conducting advocacy in Scotland at the highest level. Tony is the only KC in Scotland to be accredited by the Law Society of Scotland as an expert in professional negligence law. Tony has conducted litigations, arbitrations, adjudications and mediations relating to a wide spectrum of commercial disputes. In 2022 Tony called as a Barrister in England & Wales (Middle Temple)

## Professional career to date

**2019** - Elected Fiscal to the Society of Writers to Her Majesty's Signet.

**2018** - Partner Brodies LLP

**2017** - Appointed Queens Counsel (Now Kings Counsel)

**1999** - Qualified as a Solicitor Advocate

**1996** - Admitted as a Writer to the Signet (WS)

**1994** - Admitted as Notary Public

**1992 – 2018** - Partner and Solicitor Advocate within three other firms

**1991** - Qualified as a Solicitor in Scotland

**1990** - Trainee Solicitor

## Education & professional qualifications

**2022** – Called as a Barrister (Middle Temple)

**2019** - Accredited by the Law Society of Scotland as an expert in Construction Law.

**2018** - Re-accredited by as an expert in Professional Negligence Law.

**2013** - Accredited by the Law Society of Scotland as an expert in Professional Negligence Law.

**2000** - Passed the examination in European Community Law at Edinburgh University.

**1990** - Diploma in Legal practice (University of Dundee).

**1989** - LLB (With distinction) University of Dundee.

**1987** - MA (With merit) University of Edinburgh.

## AREAS OF EXPERTISE

- Professional negligence
- Construction
- Commercial contracts
- Restrictive covenants
- Corporate and partnership disputes
- Property
- Insolvency and judicial factors
- Product liability
- Judicial review
- Professional discipline and regulation

## Reported cases

### Professional negligence

**McGleish v Tough & Leslie [2018] Sheriff Appeal Court PAI-A31-15**

Appeal relative to Section 31 of the Bankruptcy (Scotland) Act 1985 and whether or not a Trustee in Bankruptcy had negligently taken the proceeds of a policy of insurance.

**McClure Naismith LLP & another v Harley Haddow Partnership and others [2017] CSOH 125**

Instructed for the Pursuers, Commercial Court debate relative to Prescription.

**MacRoberts LLP v McCrindle Ltd 2017 SC 1 and [2016] PNLR 28, Inner House**

Contract — Construction — Implied term — Contract of services between solicitor and client — Whether implied term that the firm would not place itself in a position where there was a real possibility of its interests conflicting with those of the client.

Agent and principal — Fiduciary duty — Breach of fiduciary duty — Whether inadvertent destruction of meetings notes breach of fiduciary duty

**AP v Duncan & others [2016] CSOH 111, Lord Glennie**

Instructed for a GP defender in action alleging medical negligence.

**MacRoberts v McCrindle Group Ltd [2014] CSOH 99, Lord Tyre**

First instance decision, Commercial Court proof before answer where the Defenders counter claimed for alleged professional negligence arising out of an Arbitration.

**Hunter v Fleming & Reid, February 2012 Sheriff Adair at Glasgow Sheriff Court**

Acting for Defending solicitors at proof relative to an alleged failure to raised proceedings in time.

**Hunter v Fleming & Reid 13 April 2011, Sheriff Adair at Glasgow**

Successfully acting for the Defenders at Debate.

**Fraser v PGA [2008] CSIH 53**

Reclaiming motion. Successfully acting on behalf of the PGA defending a claim by a former member. The Pursuer asserted that the examiner had negligently failed him.

**Mathews v Hunter & Robertson 2008 SLT 634 and [2008] PNLR 35, Lord Brodie**

Successfully acting for the defenders in having the action dismissed.

Reparation — Negligence — Duty of care — Solicitors — Failure to evacuate a survivorship clause in a disposition

— Whether duty of care owed to executor nominate — Relevancy.

Process — Pleadings — Relevancy — Professional negligence

— Alleged failure by solicitors to evacuate a survivorship clause in a disposition — Whether duty of care owed to executor nominate.

**Khosrowpour v Murray Beith Murray, 2007 GWD 24-419, [2007] CSOH 132 OH Lord Glennie**

Instructed for the Defenders relative to allegations of professional negligence arising out of the termination of a lease.

**Fraser v PGA [2006] CSOH 129, First instance PBA before Lord Wheatley**

Successfully acting for the PGA at Proof before Answer.

**Thomson v Newey & Eyre 2005 1 SC 373 and 2005 SLT 439 (Inner House)**

Appearing on behalf of the Third Party at the Reclaiming motion regarding an argument under Section 19A of the Prescription and Limitation (Scotland) Act 1973.

**Tolley v Abbey Life CSOH 7 May 2004 Lord Mackay of Drumadoon**

Acting for the Defenders at Debate in the Commercial Court relative to allegations that the Defenders had negligently paid out on a life policy.

## **Construction**

**McClure Naismith LLP & another v Harley Haddow Partnership and others [2017] CSOH 125.**

Instructed for the Pursuers. Commercial Court debate on prescription.

**Dickerson v Edinburgh Construction Group Ltd (In Liquidation) 18 January 2016, Sheriff Court Appeal Court.**

Successfully resisting an Appeal for the Pursuer and Respondent.

**Dickerson v Edinburgh Construction Group & another, Sheriff Maciver**

Successfully acting for the Pursuers at Proof Before Answer seeking damages from a construction company relative to an escape of water from their site.

**Esso Petroleum Company Ltd & another v The Scottish Ministers & others [2016] CSOH 15**

Successfully acting for the Third to Seventh Defenders (M74 Joint venture) in resisting aspects of the Pursuers' claim relative to alleged contamination of their land.

**Esso Petroleum Company Ltd & another v The Scottish Ministers & others [2015] CSOH 21**

Debate in Commercial Court.

**Orchard Construction Services Ltd v John McGeady Ltd, 9 May 2013, Sheriff Deutsch**

Successfully acting on behalf of the Pursuers at Commercial Court Proof Before Answer seeking payment in respect of the supply and installation of goods in construction works.

**Scottish Widows v Kershaw Mechanical Services Ltd 2012 SLT 68**

Acting for the Defenders at the 6 day Commercial Court Debate and subsequently at the Reclaiming motion relative to the terms of a Collateral Warranty.

**The University of Glasgow v Melville Dundas CSOH 23 April 2004 RF MacDonald QC**

Acting for the Pursuers at Procedure Roll.

## **Commercial contracts**

**Highland Wood Energy Ltd v The Highland Council [2018] CSOH 77**

Commercial Court debate regarding a Framework Agreement and whether terms were stepped down into another contract said to be a Call off Contract.

**Adlaq Ltd v Scottish Power Energy Retails Ltd [2016] CSOH 162 Lord Tyre, Commercial Court.**

Successfully acting for the Pursuers at Commercial Court relative to the terms of a contract for the supply of data.

## **Restrictive covenants**

**Dunedin Independent plc v Kenneth Welsh [2006] CSOH 174, Lady Clark of Calton**

Successfully acting for the Defender at a ten day PBA resisting an action for interdict and damages arising out of the Defenders former employment with the Pursuers.

**Dunedin Independent Plc v Kenneth Welsh, CSOH 16 April 2004, Lord Menzies**

Successfully having portions of the Pursuers' pleadings excluded from probation at Procedure Roll.

## **Corporate and partnerships**

**Anderson v Hogg 2000 SLT 634**

Instructed for the Petitioner as solicitor in this Section 459 Unfair Prejudice Petition.

## **Property**

**Esso Petroleum Ltd v Scottish Ministers & others [2016] CSOH 15**

Successfully acting for the Third to Seventh Defenders (M74 Joint venture) in resisting aspects of the Pursuers' claim relative to alleged contamination of their land.

**ELB Securities Ltd v Love & another 2016 SC 77, Inner House**

Successfully resisting an Appeal.

Company — Dissolution — Crown disclaiming rights in a lease — Whether restoration of company to register following dissolution reverts to pre-dissolution status quo.

Company — Registration — Restoration of company to register — Effect of restoration of tenant company on lease of premises — Whether restoration of company reverts to pre-dissolution status quo — Whether lease continues as if no interruption — Companies Act 2006 (cap 46), secs 1012–1014, 1020–1022, 1032

**Dickerson v Edinburgh Construction Group Ltd (In Liquidation) 18 January 2016, Sheriff Court Appeal Court.**

Successfully acting for the Pursuer and Respondent.

**Dickerson v Edinburgh Construction Group & another, Sheriff Maciver**

Successfully acting for the Pursuers at an 8 day diet of PBA. The Pursuer claimed damages for water damaged sustained by his property after the Defenders had released a large amount of water from a construction site uphill of his premises. Liability and quantum were in dispute.

**Anderson v Forbes and McAvoy v Forbes [2008] CSOH 89, 2008 GWD 29-443. Lord Bracadale.**

Successfully acting for the Defenders at Procedure Roll in having aspects of the Pursuers' occupier's liability case excluded from probation.

**Southesk Trust & another v Angus Council & others [2006] CSOH 006, Lord Macphail.**

Successfully acting for the Third Defender at Procedure Roll in having the action dismissed.

The Pursuers claimed damages for losses sustained consequent upon the release of oil from a storage tank. The Third Defenders sold the oil but had subcontracted the delivery of the same. The Pursuers claimed that the oil was "inherently dangerous" and that the Third Defenders could not escape liability for the asserted negligence of the sub-contractor who delivered the oil.

**DSG Retail Ltd v Poundstretcher Ltd CSOH 19 Dec 2003 TG Coutts QC**

Appearing on behalf of the Defenders at Procedure Roll.

The Pursuers had sustained damages to their premises which were adjacent to the Defenders' premises consequent upon a fire. The Pursuers pleading sought to draw inferences from aspects of the evidence to infer the cause of the fire and to assert negligence.

**Bankruptcy, insolvency and judicial factors**

**McGleish v Tough and Leslie [2018] Sheriff Appeal Court PAI-A31-15**

Appeal.

**McGleish v Tough and Leslie, Paisley Sheriff Court**

Acting on behalf of two former Trustees in bankruptcy who were being sued for alleged breaches of duty relative to recovering the proceeds of a joint life policy and paying them out to creditors. The claimants argued that the proceeds formed a non-vested contingent interest and re-vested in the bankrupt on discharge.

**ELB Securities Ltd v Love & another 2016 SC 77, Inner House**

Successfully resisting an Appeal. The matters was appealed to the Supreme Court.

Company — Dissolution — Crown disclaiming rights in a lease — Whether restoration of company to register following dissolution reverts to pre-dissolution status quo.

Company — Registration — Restoration of company to register — Effect of restoration of tenant company on lease of premises — Whether restoration of company reverts to pre-dissolution status quo — Whether lease continues as if no interruption — Companies Act 2006 (cap 46), secs 1012–1014, 1020–1022, 1032.

**Petition of James Duff for an order under Section 82 of the Bankruptcy Sc Act 1913 [2013] CSOH 101**

Successfully acting for the Respondent (the former Trustee in Bankruptcy) in having the Petition was dismissed as irrelevant.

**Petition of Lynda Todd for Winding up of Van Bentley Ltd CSOH 25 June 2004, J Gordon Reid QC**

Successfully acting for the Petitioner at a Hearing of this Petition seeking the winding up of the Company.

**Scottish Brewers v JD Pearson 1996 SLT 50, Sheriff Principal CGB Nicholson QC**

Successfully acting for the Defender and Respondent at first instance and appeal in having the cation dismissed as irrelevant.

The case stands as the only authority on the liability of judicial factors for debts incurred during the factory.

**Reparation**

**Tarpeh Sneh v Secretary of State, Lord Armstrong 2017**

Appearing on behalf of the Third Defender (Randstad) at Procedure Roll and successfully obtaining absolvitor.

**Hynds v Reekie [2013] CSOH 92, 2013 GWD 22-430, Lord Glennie**

Appearing on behalf of the Defenders at this two week PBA on quantum. The Pursuer had sustained a serious back injury as well as depression and PTSD consequent upon an industrial accident.

**Paterson v Paterson [2012] CSOH 183, 2013 Rep LR 13**

Damages — Amount — Solatium, loss of employability and necessary services — Ankle — Fracture of ankle — Significant injury to ankle requiring four operations.

Damages — Necessary services — Pursuer given assistance after the accident by his girlfriend — Whether services provided by a relative — Administration of Justice Act

1982 s. 13(1)(b)

**Anderson v Forbes and McAvoy v Forbes [2008] CSOH 89, Lord Bracadale**

Successfully acting for the Defenders at Procedure Roll in having aspects of the Pursuers' cases (there were two actions by two pursuers arising out of the same fire).

**Avis v CCG (UK) Ltd & another Sheriff Bickett, Hamilton 18 September 2006**

Acting for the Defenders in this 22 day Proof Before Answer.

The Pursuer sought damages for psychological injuries said to have been sustained consequent upon an alleged campaign of bullying and intimidation carried out by her line manager.

**Wormald v HJ Walker & Co CSOH, 30 Dec 2003 Lord Bracadale**

Successfully acting for the Defenders at Procedure Roll.

The Pursuer claimed damages for hitting a cow that had wandered onto the public road having escaped from a field. The argument centred upon whether or not there was a duty in law to fence such animals in.

**McKeown v Lord Advocate 2002 SLT 269 Lady Paton**

Appearing on behalf of the Pursuer at this PBA seeking damages for injuries sustained by a remand prisoner while in custody. He had been assaulted by another prisoner who had previously threatened him.

**Product liability**

**MacMillan v De Vere Group Ltd & Wm Morrison Supermarkets PLC 19 June 2012, Sheriff Scullion, at Hamilton**

Successfully acting for the Defenders in obtaining decree of absolvitor after PBA.

The Pursuer had sustained injury when using a Vodka bottle. The bottle top, known as a Roll on Pilfer Proof bottle top or ROPP had been accidentally over tightened. When the Pursuer lifted the bottle the ROPP gave way causing it to fall. The Pursuer tried to catch the falling bottle and was badly injured when it shattered in his hands.

## Courts, Tribunals and Alternative Dispute Resolution

Supreme Court, Court of Session (Inner and Outer houses), Sheriff Appeal Court and Sheriff Courts, Licensing Boards, Arbitration, Adjudication, Employment Tribunal, Criminal Injuries Compensation Board, Court Martials, Mediation and Adjudication.

## Appointments

Fiscal to the Society of Writers to Her Majesty's Signet. Trustee of the Royal Scots (The Royal Regiment) club. Trustee Scottish Veteran's Residences. Committee member within the Scottish Civil Justice Council. Member of the Law Society of Scotland's Rights of Audience Committee.

## Directories

### Chambers UK:

"Solicitor advocate Anthony Jones is highlighted for his regular appearances in court and his strong trial record. He is well versed in a wide range of commercial matters, including partnership, corporate and construction disputes. One client comments: "He has excellent strategic and commercial awareness and is great at identifying the key issues and arguments."

## Publications

Chapter 19, 'A Practical Guide to Construction Adjudication', published by Wiley Blackwell, August 2015.



**The Hon Lord Sandison  
Senator of the College of Justice**

***Keynote Address  
“Lord Sandison's reflections on  
Professional Negligence actions in the Court of  
Session”***



## The Hon Lord Sandison KC

Senator of the College of Justice

Judge of the Supreme Courts

Lord Sandison graduated from the University of Aberdeen in 1989 with an LL.B Honours degree before gaining a Diploma in Legal Practice from Edinburgh University and a Diploma in Forensic Medicine from Glasgow University in 1990.

He then went on to gain a Masters Degree in 1991 and a Ph.D. in 1994 at the University of Cambridge before joining Brodies as a Bar Trainee. He was admitted to the Faculty of Advocates in 1996, and was appointed as a Queen's Counsel in 2009.



# Reflections on Professional Negligence Actions in the Court of Session

The Hon. Lord Sandison  
Signet Library, 21 September 2023

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## Forms of Procedure for Professional Negligence Actions in the Court of Session

- Ordinary Action
  - Rule 43
  - Rule 42A
- Commercial Action

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Expert Proliferation

allied to increasing complexity of underlying issues

leads to

1. Increase in time and expense in resolution
2. Increased risk of wrong conclusion

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Existing Opportunities for Judicial Intervention

Chapter 42A – Case Management Hearing  
Rule 42A.7

- Have draft reports of skilled persons been exchanged?
- What is the nature and extent of the dispute between skilled persons?
- Can facts be agreed upon which skilled persons can comment?
- Can agreement be reached as to the relevant expert literature?
- Have the experts met, would a meeting be useful, and how should the experts report on it to the court?
- Is the case or defence supported by relevant expert evidence, and should it be?
- What is the expert position on causation?

But, not much more than encouragement available.

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Commercial Roll

Preliminary Hearing

- Order in respect of reports of skilled persons

Procedural Hearing

- Restriction on mode of proof
- Direct meeting of experts and production of joint note
- Court-appointed expert
- Restriction of time for examination or cross

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Single Joint Expert

Other Jurisdictions

- Voluntary
- Quasi-compulsory

Scotland

- Voluntary
- Scope for argument after the event

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RCS Chapter 12

Assessors (Court-appointed Expert)

- Available in every type of action and mode of procedure
- Power merely to advise
- Questions under control of court
- Limit on other expert evidence BUT only one assessor permitted
- Expense for pursuer in first instance, ultimately likely to be in the cause

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Assessors

Points in favour

- Reduction in quantity of expert evidence
- Decision too complex to be made without specific neutral assistance
- Unlikely to be taken in by specious expert evidence

Points against

- Sometimes more than one discipline clearly required
- Loss of parties' control of process
- Availability of suitable assessor

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Concurrent Expert Evidence

Advantages

- Experts identify the core issues
- Exposition of irrelevant issues
- Simultaneous assertion and testing of argument

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Procedure

- Reports, meeting and note as usual
- Generally after factual evidence concluded
- Judicial explanation of process
- One expert begins, subject to critique by other(s)
- Structured discussion between/amongst experts
- Turn of counsel to cross responsibly

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Disadvantages (Real or Perceived)

- Loss of control by counsel
- Plausibility to lay audience pays
- Tailored presentation

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SUMMARY

Some powers to regulate expert evidence in Rules of Court

- Generally underused

Other ways of thinking available

- Single Joint Expert
- Assessor
- Hot-tubbing

Be proactive!

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**Nicholas Davidson KC**  
**Hailsham Chambers**

*"tbc"*



## Nicholas Davidson KC

Call: 1974 | Silk: 1993

### Overview

Nicholas Davidson KC is a commercial litigator, mediator and arbitrator. One of the most experienced practitioners at the London bar, Legal 500 2022 describe him as “*the very definition of a legal eagle.*” And Chambers 2022 comment that he has “*serious gravitas*”.

Nicholas joined Hailsham Chambers in 2022 and brings a wealth of experience in his core practice areas of commercial litigation, professional liability and insurance and reinsurance.

He always aims to combine a in-depth knowledge of the law with commercial awareness and is committed both to understanding and achieving his clients’ objectives.

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### Commercial litigation

Nicholas has a keen interest in commercial matters. He is involved not only in pure financial or interpretation litigation (a case of particular satisfaction to him was *AIB Group (UK) plc v. Martin and Gold* [2001] UKHL 63) but also in very tough business disputes. In *Ross River Ltd v Cambridge City Football Club* [2007] EWHC 2115 Ch he acted for the Club in establishing that a transaction in relation to its ground had been affected by bribery and fraudulent misrepresentation. He acted for Newcastle Airport in a high profile claim (settled the day before trial) against its former Chief Executive and the Estate of its Finance Director seeking to recoup in respect of multi-million bonuses which had become payable on a refinancing.

## Insurance and reinsurance

Nicholas has extensive experience, as advocate and arbitrator, of insurance law, especially professional indemnity insurance law, and the practical operation of policies, including dishonesty issues and the potentially vexing subjects of “notification” of circumstances and the composite nature of the insurance.

He frequently deals with issues relating to fraud exceptions and reimbursement claims based on dishonesty. He is experienced in the procedures where dishonesty is under consideration, and has conducted “indemnity cons” and is familiar with issues as to the handling of subsequent arbitrations.

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## Professional liability

Nicholas offers vast experience in the professional negligence sphere. He regularly takes on high-profile negligence cases arising from complicated issues such as corporate governance breakdown, institutional fraud and downturns in the property market. He has a particular flair for claims involving financial services professionals but also has an established reputation for cases relating to solicitors’ negligence.

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## Significant cases

*AIB (UK) PLC v Mark Redler (a firm)* [2014] UKSC - solicitors: breach of trust

*Newcastle International Airport v Eversheds* [2014] P.N.L.R. [2013] EWCA Civ 1514 - solicitors’ liability in executive contract drafting; corporate governance)

*UCB Home Loans Corporation Ltd v Soni* [2013] EWCA Civ 62 - partnership: holding out

*National Union of Mineworkers v Scargill* [2012] EWHC 3750 (Ch) - corporate governance

*Kidsons v Underwriters at Lloyd’s* [2009] 1 Lloyd’s Rep 8 - professional indemnity insurance notification requirements

*Ross River Ltd v Cambridge City Football Club Ltd* [2008] 1 All ER 1004 - bribery and fraudulent misrepresentation; corporate governance

Numerous settled cases on investment management/advice

*AIB Plc v Martin* [2001] UKHL 63 [2002] 1WLR 94 - bank mortgage interpretation

*Cave v Robinson Jarvis & Rolfe* [2002] UKHL 18 [2003] 1 AC 384 - deliberate concealment

*Medcalf v Mardell* [2002] UKHL 27 [2003] 1 AC 320 - wasted costs

*SEB Trygg Holding Aktiebolag v Manches and Others* [2006] 1 Lloyd’s Rep 14 - participation in

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arbitration; universal succession

*Quorum A/S v Schramm* (Nos 1 & 2), [2001] 1 Lloyd's Rep 249 and [2002] 2 Lloyd's Rep 72 - fine art insurance

*Bank of Credit and Commerce International SA v Aboody* [1990] 1QB 921 - actual undue influence

*Bristol and West Building Society v Fancy & Jackson* [1997] 4 All ER 582 - solicitors' breach of duty; causation and contributory negligence

*National Home Loans Corporation Plc v Giffen, Couch & Archer* [1998] 1 WLR 207 - scope of conveyancing solicitor's duty to lender

*Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep 80 - oil contracts, duty of co-operation

*Wraith v Wraith* [1997] 2 All ER 526 - legal aid; enforcing costs where solicitors at fault); *Nationwide Building Society v Balmer Radmore* [1999], PNLR 606

*Nationwide Building Society v Thimbleby* [1999] PNLR 733.

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## What others say

"Technically excellent and knows professional negligence back to front." *Chambers UK, 2023*

"Measured and authoritative in court. He charms the court with striking analogies." *Legal 500, 2023*

"He is wonderfully definitive with his advice, very user-friendly and has no issues handling difficult clients. He has serious gravitas" *Chambers 2022*

"A master of brevity, who sees the whole picture but doesn't miss the detail. The very definition of a legal eagle" *Legal 500 2022*

"A class act with tremendous presence and gravitas in court" *Legal 500 2020*

"an exceptional silk" *Legal 500 2019*

"Someone who produces masterpieces. The work, the detail, the focus that goes into it – it is outstanding; it blows me away" *Chambers 2019*

"You want him on your side and not on the other side" *Chambers 2019*

"His technical knowledge is first rate. He gets right into it himself, so he's a great leader to work with, and brings tremendous enthusiasm" *Chambers 2019*



“He is very effective and has a sensible, smooth approach. He has gravitas and is able to lead in a way that lets some of the heat out of the situation” *Chambers 2020*

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## Further information

### Appointments

- Deputy High Court Judge (until 2021)
- Directions Judge, Bar Tribunals and Adjudication Service
- Pension Trustee, Inner Temple Defined Benefit Scheme

### Memberships

- Bar European Group
- British Insurance Law Association
- Chancery Bar Association
- Commercial Bar Association
- Financial Services Law Association
- Professional Negligence Bar Association (past Chairman)
- Society for Computers and Law

### Education

Cambridge University (Economics Part I, Law Part II)

ICO Data protection registration number: **Z6653199**.

Nicholas Davidson KC is a barrister regulated by the Bar Standards Board. [Click here to view Nicholas Davidson KC Privacy Notice.](#)

# From South of the Border



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• ***McClea n v Thornhill***

[2023] EWCA Civ 466 [2023] P.N.L.R. no. 24

- Who owes what duty to people who may seek tax advantage?
- Risk warning?

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• ***Miller v Irwin Mitchell***

[2022] EWHC 2252 [under appeal]

- Solicitors' advertising and Legal Helpline

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• **Spire Property Development LLP v Withers LLP**  
[2022] EWCA Civ 970 [2023] 4 W.L.R. 56

• Timing of duty

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• **RSA v Tughans**  
[2023] EWCA Civ 999

• Can there be an indemnity claim against insurers in respect of a third party's claim for damages in respect of fees paid to the insured defendant?

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• **Peter Taylor Memorial Address** 20 April 2023

- "Pure Economic Loss and Assumption of Responsibility"
- By Lord Sales
- (not yet posted on Supreme Court website)

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- **Pending in the Supreme Court**

- *YXA v Wolverhampton City Council* (local authority duty of care: assumption of responsibility?) (hearing 24 and 25 October; Lord Sales a member of the panel))
- *Canada Square Operations Ltd v Potter* (deliberate concealment, for the purposes of English limitation law)

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- ***Al Jaber v Ibrahim***

[2018] EWCA Civ 1690 [2019] 1 W.L.R. 885

- Since at least 1812, English law does not imply a term that interest will be paid on a loan
- But such a term may be implied on the facts (not in that case)

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- But ***Neilson v. Stewart***

(1991) S.C. (H.L.) 22 not cited

- In Scotland "... the law implies that interest shall be paid ..." (though this is a presumption which may be displaced by the circumstances)

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• *Rolls Royce Holdings Ltd v Goodrich Corporation*  
[2023] EWHC 2002

• Primacy of contract in interest matters

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**Sheriff Gregor Murray  
Dundee Sheriff Court**

***"A view from the (commercial)  
Sheriff Court bench"***



**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

## A View from the Commercial Sheriff Court Bench

Sheriff Gregor Murray

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## The TC&F Commercial Court

- Standard writ
- Send to Perth
- If defended, case allocated to “original” court and commercial Sheriff

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## Commercial Sheriffs

- Perth – Sheriff Murray
- Dundee – Sheriff Martin Brown
- Fife – Sheriff Lugton
- Central – Sheriff Hamilton
- Floating – Sheriff Collins

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## Benefits

- Shrieval and clerk continuity
- Dedicated Inbox – [taysidecommercial@scotcourts.gov.uk](mailto:taysidecommercial@scotcourts.gov.uk)
- Callings at times and on dates as required
- Usually held remotely, but can be in person
- In person callings can be held in court most convenient to parties

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## Positives

- Joint bundles
- Hyperlinked authorities
- Adjusted pleadings
- Draft Records
- Notes of proposed procedure

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## Negatives

- Avoidable continuations
- Late submissions
- Last minute e-mails
- Late communication between agents
- Prolix pleadings and submissions

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### More Negatives!

- No up to date Record
- Badly presented Productions
- No Scott Schedule
- Lack of communication

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### Impress the Court (and your client)

- Keep your pleadings succinct and relevant
- Joint Minutes of Admission
- Notes of Issues (factual and/or legal)
- Scott Schedules
- Joint Bundles of Productions and Authorities
- Experts:-
  - Joint instruction
  - Agreed factual hypotheses
  - Tubbing

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**Gordon Gibb  
Gibb Architects**

*"Experts: Tactics, Timescales, and Tubbing"*

# Gordon Gibb

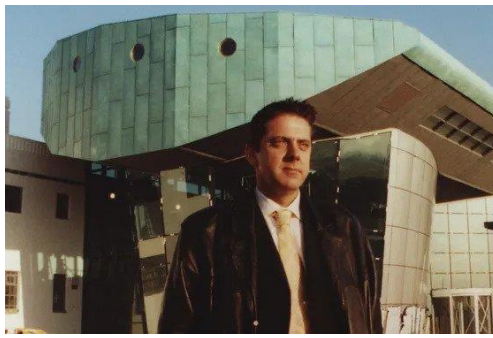
## Architect

Expert Witness/Arbitrator

Glasgow

e: [Info@gibbarchitects.co.uk](mailto:Info@gibbarchitects.co.uk)

t: 0141 334 3044



Gibb

Gordon Gibb is an award-winning chartered architect, practice owner, expert witness, adjudicator and academic. He has a legal qualification, delivers commercial training courses and teaches and examines in universities throughout the UK and Ireland.

Gordon held the position of Vice-Chair of the Architects Registration Board for three years, is a Fellow of the RIAS, a panel adjudicator and expert witness of the RIAS and a member of the Chartered Institute of Arbitrators. He is Director of Professional Studies at the Mackintosh School of Architecture, an RIBA professional examiner, a member of the APEAS examination committee and of the exam boards of the Architectural Association in London and Queen's University Belfast and helped deliver the ARB/RIBA Criteria for Parts 1, 2 and 3.

### Expert Witness

Gordon Gibb has a law degree and, as Expert Witness, has assisted solicitors and clients with legal claims over a period of twenty years through the preparation of reports and illustrations for presentation to court.

Gordon also has considerable experience of delivering opinion evidence in the highest court in Scotland, Court of Session, in Sheriff Courts throughout Scotland and at The Lands Tribunal in Edinburgh. He has also given evidence at Local Public Inquiries and has provided expert evidence and analysis at adjudication hearings.

In 1999 and 2009, Gordon was invited by the Faculty of Advocates to contribute to the Architects' Legal Handbook, the principal legal textbook for architects in the UK. In January 2011, Gordon was accepted on to the RIAS Panel of Adjudicators, and in 2013 became an accredited mediator for construction disputes.

Gordon's reports have been lodged in evidence for cases in the Court of Session, Lands Tribunal, Sheriff Courts, in English courts and in Adjudications and Mediations, and have provided the basis for presentation of expert witness evidence in court or for settlement of disputes. To date, Gordon has analysed and reported on over one hundred and fifty legal cases or construction disputes.

### Arbitration & Adjudication

Gordon Gibb has been on the RIAS Panel of Adjudicators since 2011, and has had extensive experience making decisions in cases of construction disputes.

### Arbitration

Gordon Gibb has been a member of the Chartered Institute of Arbitrators since 2009 and, as an arbitrator, can impose a decision in a dispute which can be enforced through the courts.

### Mediation

Gordon Gibb has a Master of Law degree from the University of Strathclyde and in 2013 became an accredited mediator for construction disputes. Gordon has past experience working as a joint mediator in a case that settled, without the need to move on to litigation, arbitration or adjudication.

### Expert Determination

Expert Determination is an Alternative Dispute Resolution process, it can also be used when there is no dispute, but a difference which needs to be resolved for example the valuation of a private business. Because of its flexibility, Expert Determination is ideally suited to multi-party disputes

# Experts:

## Tactics, Timescales, Trends and Tubbing

PNLA & WS Society Conference, Edinburgh

21 September 2023

Gordon Gibb B Arch Dip Arch LLM FRIBA FRIAS MCI Arb  
Gibb Architects Ltd

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### THE EXPERT WITNESS

- There to assist to the court
  - Applying technical knowledge
  - Knowing the limits of expertise
  - Being aware of the blooming obvious
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- Personal Integrity
  - Detachment
  - Credibility
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- It is never just a matter of your opinion



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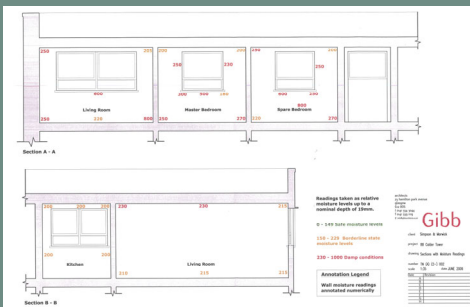
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### THE EXPERT'S TASKS

- Technical analysis of evidence
- Explanation to the court
- Opinion and substantiation
- Illustration



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**Gibb**

### EARLY CASES – The Burned and Rebuilt School

- Illustration
- Analysis
- Appearance
- Preparation

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**Gibb**

### EARLY CASES – The Pipe to Nowhere

- Contractor's advice
- Adequate survey
- Fruit flies

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**Gibb**

### EARLY CASES – Atwal v Toner

- Reasonable inspection
- Erroneous' belief

"... In my view Mr Gibb ... was entitled to take the view that any competent and careful architect would have appreciated that the presence of any lying water on the top of the dynamic layer was a matter of real concern...

... he did comment on the passages ... which suggested that [The Architect] ... had formed the belief that unconnected drainage was to blame. Mr Gibb reacted to that suggestion with incredulity, pointing out that no relevant entry appeared in any site minute, and that in place of any expression of concern the minutes from October 1995 onwards showed only satisfaction with the progress of the works...

In my opinion Mr Gibb's evidence was restrained and persuasive, and reflected a common sense view of the situation... Mr Gibb was an experienced and well-respected architect, and in the circumstances I am satisfied that I should accept the conclusions which he put forward, and the reasoning on which they were based."

**First file:** sunny 3 August 1995  
Walls of pavilion erected to 1200mm above ground floor level in blockwork. Sub-base has been laid throughout.

**Second file:** sunny 9 August 1995  
Walls of pavilion erected to 1200mm above ground floor level in blockwork. Some order for fence surrounding outside of pitch enclosure erected. Sub-base has been laid throughout.

**Third file:** patchy cloudy day 22 August 1995 Site Meeting 1  
Fence stipes erected for barriers between the pitches. Floodlights in place and being completed. Brick to pavilion to 1800mm height.

**Fourth file:** patchy cloudy day with sun 12 September 1995 Site Meeting 2  
Blockwork proceeding to first floor level. Scaffolding to erect level. Timber lockboards for pitches in place. Sub-base layer on pitches not blinded.

**Fifth file:** overcast day 3 October 1995 (estimated) Site Meeting 3  
Starts with voiceover "... October". Brick and block progressing beyond first floor. First floor scaffolding boards in place. Beam slabs in place, some still to be fitted. First carpet going down on pitch. Block fittings can be seen on one pitch. [Some water puddles lying on sub-base. Dry sand being spread on carpet.](#)

**Sixth file:** overcast day 17 October 1995 (estimated) Site Meeting 4  
Starts with voiceover "... October". Carpet delivery being in carpark. Some brickwork back to roof level. Beam not in place. Additional window added to bar. Looks like two pitches are complete. [Water lying on pitches both with and without timber layer. Blinded stone showing areas of paving.](#)

**Seventh file:** overcast damp 31 October 1995 Site Meeting 5  
The first roof frames are being fitted. No windows. Some kickboards have been removed. [Water lying on sub-base, both damp areas and extensive puddles. Surface dampness evident on Beacon slabs.](#)

**Eighth file:** overcast day 14 November 1995 (estimated) Site Meeting 6  
Advertising sign on entrance "opening soon". Roof marking finished and part tiled. Facias and soffits in place. No windows in place. Some carpet still to be laid. Pitches cannot be seen in detail.

**Ninth file:** overcast but bright 14 February 1996  
Starts with view of signage "Anne-Sophie Soccer". Roof tiled and gutters fitted. Windows in place. Pitches and fences completed. Condition cannot be seen. Signage on pavilion wall.

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**COMMON ISSUES - Flat Roofs** Gibb

- Cold, warm and inverted
- Ventilation
- Outlets

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**COMMON ISSUES – Pitched Roofs** Gibb

- Coverings
- Junctions
- Condensation / damp

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**COMMON ISSUES – Basements** Gibb

- Tanking design
- Hydrostatic pressure
- Variable water table
- Two forms of protection
- External drainage
- Wet slab problems

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**COMMON ISSUES - Cladding** Gibb

- Weatherproofing
- Adhesion
- Ventilation
- Fire safety



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**CONTRACTS – Contractor Design** Gibb

- Quality or specification?
- Design responsibility matrices
- Warranties
- Lack of care in implementation?

JCT/SBCC DB cl 2.1.1  
 "The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and Statutory Requirements and for that purpose shall complete the design of the Works ..."

JCT/SBCC SBC cl 2.19.1  
 "Where there is a Contractor's Designed Portion ... the Contractor shall in respect of any inadequacy in such design have the same liability to the Employer, whether under statute or otherwise, as would an architect or other appropriate professional designer who holds himself out as competent to take on such work for such design and who, acting independently under a separate contract with the Employer, has supplied such design for or in connection with such works to be carried out and completed by a building contractor who is not the supplier of the design ..."



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**CONTRACTS – Upline and Downline Actions** Gibb

- Contractor and ERs
- Design team
- Lead Designer
- Subcontractors



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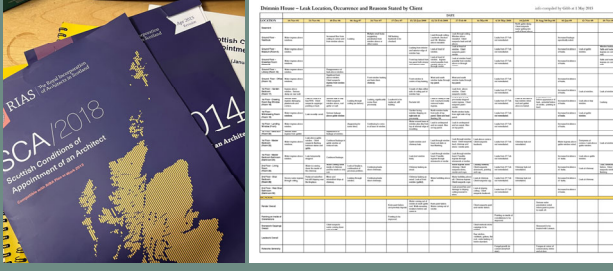
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**Gibb**

### CONTRACTS

- Appointments / Vicarious liability
- Collateral Warranties / Third Parties
- Apportionment and contribution
- Prescription



The image shows two books on the left: 'SCA/2018 Essential Conditions of Appointment to an Architect' and '2014 an Architect'. To the right is a table titled 'Detailed Issues - Link Location, Occurrence and Remedy Sought by Client'. The table has columns for 'Issue', 'Location', 'Occurrence', and 'Remedy Sought by Client'. It contains numerous rows of data, many of which are redacted with black boxes.

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**Gibb**

### THE REPORT

- Structure
- Instructions
- Review of Evidence
- Reliance on others
- Discussion
- Applying the Test
- Illustrations
- Photographs
- Appendices
- Contributions for pleadings



The image shows the cover of an 'EXPERT REPORT'. The text on the cover includes: 'v [redacted] and [redacted] regarding Cladding Design and Construction at [redacted] For [redacted]'. At the bottom, it says 'Prepared by Gordon Gibb B Arch Dip Arch LL.M FRIBA FRBAS MRICS 16 March 2023'. The Gibb logo is also present.

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**Gibb**

### RESOLUTION – By Adjudication

- Professional Liability claims
- Rough justice
- Hearings
- Decisions



The image contains three photographs. The top-left photo shows a construction site with a brick wall and a concrete slab. The bottom-left photo shows a construction site with a brick wall and a concrete slab. The right-side photo shows a construction site with a brick wall, a concrete slab, and a green safety fence.

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**TACTICS - Alliances**

- Acceptance of liability
- Vested interests
- All against one




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**TRENDS IN DISPUTES**

- Multiple parties
- Manufacturers' advice
- The post-Grenfell environment
- Commenting on all expert reports





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**TRENDS IN RESOLUTION**

- Joint inspections and protocol
- Schedules and Joint Statements
- Adversarial testing of proposals
- Collaboration among experts




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## TIMESCALES

Gibb

- Late instruction
- Last-minute adjustments
- Lengthy adjudications



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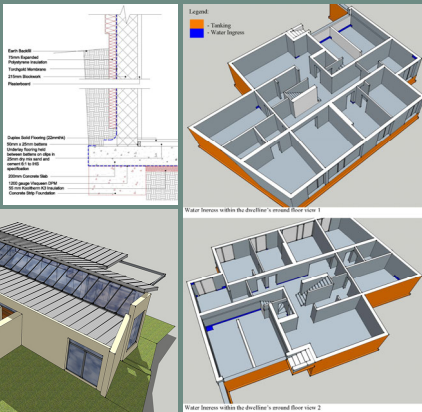
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## TUBBING

Gibb

- Ganging up
- One on one
- In the lion's den
- Who is watching?



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## THE STRANGEST CASES – The Late Lawyer

Gibb

- No sist recall
- Loss of opportunity
- 25-year-old dispute
- What would transpire?
- Ignore current knowledge
- Ignore physical evidence



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**Gibb**

### THE STRANGEST CASES – The Straps

- Missing restraint straps
- Only 3 of 180 installed
- Tall elevation not vertical
- It all seemed very unlikely

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**Gibb**

### THE STRANGEST CASES – The Straps

- No-one would fit 3
- Wall framing butchered
- Found after 5 years

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**Gibb**

### CONSTANT REFLECTION

- Am I expert in this field?
- Am I considering everything I should?
- Have I answered every question?
- Is my opinion in the majority?
- What would I say if on the other side?

- Have I seen off every challenge?
- Am I sure that I prefer my view?
- Can I explain my opinion?
- Can I justify it?
- Is there an inconvenient truth?

- Am I helping the court?

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CONCLUSION



- Please instruct the expert early
- Allow time for input to adjustments
- Please allow for a site visit



Thank you for listening

Any questions?

Gordon Gibb  
*B Arch Dip Arch LLM FRIBA FRIAS MCI Arb*

Gibb Architects Ltd

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**Notes: -**

A series of horizontal dashed lines provided for taking notes.



**Paul Motion**  
**BTO**

*"The impact of AI (such as Chat GPT) upon existing professional standards of competence"*

# Paul Motion

Partner

Edinburgh

[prm@bto.co.uk](mailto:prm@bto.co.uk)

0131 222 2932



Paul is one of the most experienced commercial litigation solicitors practising in Scotland. He qualified in 1984 and so has been practising for 38 years. He has been a solicitor advocate since 1998. He practised in New Zealand between 1990 and 1993 appearing as counsel at many levels including the New Zealand Court of Appeal in 1991.

Amongst the vast range of litigation Paul has handled during his long career are included many judicial reviews (two in 2022) and two international arbitrations together with related Court of Session appeals (in 2016/2018 and 2019/2022). Paul has handled many complex company and shareholder disputes. In 2021 he was involved in a multi-jurisdictional £58m shareholder dispute involving Scotland, England, Cyprus, China and the Cayman Islands. In 2022 he acted in a highly complex, multi-faceted high pressure, shareholder dispute, see the quoted example in this submission. Paul is often called upon to carry out emergency litigation and has huge experience in dealing with interdict (injunction) applications as well as “Dawn Raids” (\*formerly Anton Piller orders in England). He dealt with an urgent injunction in the High Court Queens Bench Division over Christmas 2021/2022, seeking to restrain the holding of a meeting. He appeared in 2008/9 in the *Wishart* case which remains the leading Scottish authority on shareholder derivative actions: **[ALEXANDER MARSHALL WISHART v. CASTLECROFT SECURITIES LIMITED AND OTHERS \(scotcourts.gov.uk\)](#)**

Paul is also recognised in Scotland as a leading practitioner in data protection (one of only three Accredited Specialists in private practice in Scotland), social media and reputational law. He is regularly in court on these matters. See **[CAROL BEYTS AGAINST TRUMP INTERNATIONAL GOLF CLUB SCOTLAND LIMITED \(scotcourts.gov.uk\)](#)**; **[ANTHONY WOOLLEY AND DEBORAH WOOLLEY AGAINST NAHID AKBAR OR AKRAM \(scotcourts.gov.uk\)](#)**; and [Heather Hiram -v- Alana Mullen 2020scedin23.pdf \(scotcourts.gov.uk\)](#) He has contributed comment to BBC Radio Scotland and BBC Five Live Drive on these topics, often at short notice. He writes articles for the legal and mainstream media and lectures on his subjects regularly. He has also engaged with Facebook, Twitter, TripAdvisor and US news websites in relation to reputational matters.

Paul founded and heads **BTO BeCreative**, a niche team focused on servicing the legal needs of the Scottish creative industries. He has also devised and presented seminar/workshops at the **Edinburgh Festival Fringe** to an audience of theatrical agents and managers for the past ten years. These focused on artistic, dramatic and media copyright law issues and contractual matters. He advises on artist management contracts, production and recording contracts, copyright licensing and intellectual property matters. This includes claims for royalties and unauthorised derivative works. He has advised book authors and poets as well as the music industry.

## **The impact of AI such as ChatGPT on Professional Standards**

### **Presentation by**

Paul Motion

Partner & Solicitor Advocate

BTO Solicitors LLP

For

PNLA and WS Society Conference 21 September 2023

### Preamble

The Law Society of Scotland's "Standards of Service" include the following passage–

"With the increasing advancement of technology, it is expected that the solicitor will regularly look at ways in which technology can support client service. By way of example, this may include client reporting systems, file and data management systems and use of knowledge management systems."

The purpose of this presentation is to explore the implications for professional standards – which in the context of this presentation really means the standards applicable to the legal profession - of emerging artificial intelligence technology and in particular the "generative" AI applications such as ChatGPT, GPT4, Bard and Claude. These are the best known but others are available.

### Structure of presentation

The broad structure of this presentation will be as follows.

First I want to say a few words about the human experience with robots. Then we will look at what is meant by Artificial Intelligence. After that we will look at Large Language Models like ChatGPT and try to understand how it works. From there we will go on to discuss a number of legal professional issues where AI and Chat GPT has had an impact, ranging from the integrity of professional examination results, adequacy of case preparation, bail applications and sentencing (from which you will gather that when I say the impact of AI etc on professional standards, I am looking across the legal spectrum from law graduates to solicitors & counsel). Finally I will offer some thoughts on whether we can regulate AI what future regulation might need to look like and whether regulation is in fact the answer.

### Robots

It is convenient to think of Artificial Intelligence as a type of robot although the analogy is not perfect. However, humans have been fascinated by robotics since at least the 1940s when Isaac Asimov wrote

a short story called "Runaround". This was later included in his 1950s collection called "I, Robot". In "Runaround", Asimov proposed three laws to regulate the behaviour of Robots.

1. A robot may not injure a human being or, through inaction, allow a human being to come to harm.
2. A robot must obey orders given to it by human beings except where such orders would conflict with the first law.
3. A robot must protect its own existence as long as such protection does not conflict with the first or second law.

The plot summary is that man has established a base on Mercury but the photo cell banks that provide life support are running out of selenium and will soon fail. The nearest selenium pool is 17 miles away and only Speedy the robot can reach it due to Mercury's high temperature. Speedy is sent out. He doesn't return after 5 hours. A more primitive robot is sent to find Speedy. Speedy is discovered running in circles round the selenium pool and singing Gilbert & Sullivan. Speedy is conflicted between complying with the third law (protecting his own existence) and the second law (always obey humans) because the instructions given to him were loosely worded and he is programmed to be highly risk averse due to his cost. Eventually the only way to break the circle is for one of the humans to go out in the open. This forces Speedy to overcome its cognitive dissonance and save the astronaut's life, from where Speedy heads off to get the selenium. We might pause to draw an analogy with the EU's new Artificial Intelligence Act, in relation to which the EU Parliament has stated "AI systems should be overseen by people, rather than by automation, to prevent harmful outcomes".

### Artificial Intelligence

It is a sobering thought that artificial intelligence isn't new. 1000 years before the birth of Christ, Babylonian astronomers were using a very early form of machine learning, called the Babylonian Star Catalogues to predict the time of year, based on star positions seen in morning and at night: from there it could be worked out whether it was the right time of year to plant crops. However, artificial intelligence as understood in the modern era tends to involve concepts of machines thinking. For example, Alan Turing, asked "Can machines think?" in his article in "Mind" magazine in 1950. Since then there have been various attempts to define artificial intelligence. For example, "Artificial intelligence is the simulation of human intelligence processes by machines especially computer systems. Specific applications of AI include expert systems, natural language processing, speech recognition and machine vision".

“The theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision making, and translation between languages (The Oxford Dictionary of Phrase and Fable Second Edition)”.

The European Union is currently at an advanced stage with the European Union Artificial Intelligence Act. The latest definition of AI in that legislation is “a machine-based system that is designed to operate with varying levels of autonomy, and that can, for explicit or implicit objectives, generate outputs such as predictions, recommendations or decisions that influence physical or virtual environments”.

AI models and tools are already widely used in consumer products such as smart phones, satellite navigation systems, smart speakers and streaming service recommendations. Google and Microsoft have both integrated AI into their products such as Bard, Google Search, Bing and Microsoft 365 Copilot, all said to have been done with a view to increasing productivity.

### ChatGPT

So if AI is not new, why is there such interest in ChatGPT, which is after all just another form of AI. Or is it? The name ChatGPT is an acronym for “Chat Generative Pre-Trained Transformer”. All three of those GPT elements are significant. ChatGPT was launched by OpenAI in November 2022. The latest version is ChatGPT 4.

Lets take a moment to look at the differences between conventional software and an AI chat such as GPT. Conventional software is created by human programmers who give computers explicit step by step instructions. However, chat generative programmes such as ChatGPT are what is referred to as a Large Language Model. These don't work by responding to explicit step by step instructions. Large language models work by predicting the next word. This is a very important point. Despite the undoubtedly convincing nature of its output, generative AI such as ChatGPT is not truly “intelligent” – it is doing no more than using its best guess as to what the next word should be. The difference however is that whereas conventional software is a sequence of instructions written by humans, ChatGPT is built on a neural network that was trained using 500 billion words. These words have been scraped from the internet. As a consequence, no human fully understands how large language models work. Chat GPT learns how words are likely to be related – hence the “P” in “GPT” meant “pre-trained”.

In order to understand the best guess philosophy, lets look at words themselves. Humans represent words with sequences of letters such as L-A-W-Y-E-R. However, LLMs represent words using “word vectors”. These are concerned with the relative positions of words. Positional vectors exist in geography. So -

Washington DC is at 38.9 degrees north, 77 degrees west [38.9, 77].

New York is at [40.7, 74].

London is at [51.5, 01].

Paris is at 48.9, -2.4].

New York must be close to Washington because 38 is close to 40.

Though Paris is close to London (51 is close to 48) Paris must be far from Washington because 48 is far from 38.

Large language models use vector spaces with literally tens of thousands of dimensions per word. So a large language model will be able to work out using vectors that the closest words to C-A-T in vector space include dog, kitten and pet. In addition, if a large language model learns something about a cat, for example it goes to the vet, the LLM reasons that the same thing is likely to be true of a kitten or a dog. This is how a large language model would write "C-A-T" as a vector.

0.007398007903248072,	0.0029612560756504536,	-0.010482859797775745,
0.0741681158542633,	0.07646718621253967,	-0.0011427050922065973,
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0.025884613394737244,	0.07069036364555359,	0.0009145145886577666,
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0.07568981498479843,	0.002798931673169136,	0.012406392954289913,
0.09695082157850266,	-0.0014245212078094482,	-0.018527435138821602,
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0.035895638167858124,	0.0047763800248503685,	-0.01754925213754177,
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0.05969628319144249,	-0.07855783402919769,	-0.07639002054929733,
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0.0715465098619461,	0.04068697988986969,	-0.09640928357839584,
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0.02329830639064312,	0.08168350160121918,	-0.0718611553311348,
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0.0556303896009922,	0.0002929845068138093,	-0.059732820838689804,
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0.034562114626169205,	0.08310434222221375,	0.03441822528839111,
0.003703191876411438,	0.002236866159364581,	-0.06042943149805069,
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0.029795801267027855,	0.020991159602999687,	0.027527112513780594,
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0.0327356792986393,	-0.11220412701368332,	0.03347017243504524,
0.04368103668093681,	-0.00044717983109876513,	-0.029803894460201263,
0.06123579293489456,	0.039308369159698486,	-0.055449601262807846,
0.07417158037424088,	-0.022331053391098976,	-0.11767527461051941,
0.04385286569595337,	-0.019754905253648758,	0.031432103365659714,
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0.005324371624737978,	-0.08255213499069214,	-0.010222465731203556,
0.021690042689442635,	-0.1339070200920105,	0.007615163456648588,
0.0929502621293068,	0.05977592244744301,	0.00015643733786419034]

“CAT” represented as a vector



## Transformers

The next point that needs to be understood is that traditional software operates on unambiguous data. So if you ask a computer to compute “2 + 4”, there is no doubt as to what each of which 2, or + or 4 means. However, human natural language doesn’t work like this.

Examples:

“The customer asked the plumber to fix his boiler”. Does “his” refer to the customer or the plumber?”

In “eats, shoots and leaves”, are shoots and leaves nouns or a verbs?

As hinted in the name, generative AI such as GPT using what are called Transformers. If we start with a sentence “John wants his bank to cash the” then to a human obviously the next word is going to be “cheque”. However, the transformer goes through the process of working out which words are the verbs (wants and cash) and then works out that “his” refers to John and that bank is a financial institution. From here the programme will reason that the word most closely having a vector connection with this sequence is “cheques”. In the most recent published version of ChatGPT (GPT4) it is estimated that there are something approaching 175 billion parameters. The upshot of this is that whereas early machine learning algorithms needed training examples, hand labelled by humans, to learn so that photos of dogs and cats might need to be uploaded, large language models such as ChatGPT don’t need labelled data. They learn by trying to predict the next word in an ordinary passage of text.

Imagine there is a bag filled with popcorn. But the label wrongly says “chocolate”. Ann finds the bag. She has never seen it before and cannot see what is inside the bag. She reads the label. Being human, Ann believes the bag contains chocolate. She will feel surprise when she discovers popcorn inside. The capacity to reason how Ann is going to feel when she opens the bag is called “theory of mind”. Most humans have this capacity. There is a general consensus that it is important for human social cognition. Stamford University gave various large language models the popcorn scenario and asked them to complete the sentence “Ann believes that the bag is full of”. The correct answer is of course “chocolate”. ChatGPT1 and ChatGPT2 failed this test. ChatGPT3 released in 2020 got it right 40% of the time. This is a level of performance comparable to the cognition of a 3 year old. ChatGPT3 updated November 2020 got it right 90% of the time on par with a 7 year old. ChatGPT4 produced the correct answer 95% of the time. This is approaching adult levels of cognition.

In April 2023, researchers at Microsoft published a paper arguing that GPT4 was showing hints of artificial general intelligence that is to say the ability to think in a sophisticated humanlike way. GPT4 was able to draw a picture of a unicorn without having any images of a unicorn in

its training data. The programmers then altered the unicorn code in the training data to remove mention of the horn and move some of the body parts. They then asked GPT4 to put the horn back on. GPT4 put the horn back in the correct spot. GPT4 had apparently learned to reason about the shape of a unicorn's body simply by training on a huge amount of text with no unicorn images. At the moment we don't really understand how large language models do this sort of thing. The fact that we don't understand how LLMs arrive at given conclusions raises difficult questions as to their use as part of the legal and judicial process although there are wider issues about the use of AI generally. This leads me to the second part of my presentation.

### Lawyers and technology..

There were already signs that some lawyers were struggling with AI technology and the famous "Texas cat filter" is an example. Lawyer Rod Ponton inexplicably found himself transformed into feline form during a case conference. Though it must be acknowledged that the presiding judge correctly identified the issue as a filter.

### Loomis case

On a much more serious note, one might cite the case of *State v Loomis*. 881 N.W.2d 749 (Wis2016) 754(US). In 2013 Eric Loomis was charged by Wisconsin with 5 criminal counts in relation to a drive by shooting. He pled guilty to two charges. Following the plea the Circuit Court ordered a pre-sentencing report which included a risk assessment on the likelihood of re-offending carried out by an AI programme called COMPAS. The risk assessment was displayed by way of a bar chart representing different types of risk, pre-trial recidivism, general recidivism and violent recidivism and these bar charts all indicated that he was high risk. Based on the high risk he was sentenced to the maximum 6 years in jail with a 5 year extended supervision. The problem for Mr Loomis was that he lived in a particular postcode area and that he was male. The police tended to police this area more than others so the system took into account the deployment of police resources rather than the numbers of crimes committed in the relevant area. On appeal – his grounds were lack of due process since COMPAS was a for-profit product and the fact that his gender was given undue weight - Mr Loomis' conviction was upheld but the court expressed concern about the reliance placed in the court below on the AI generated report. The Wisconsin Supreme Court felt constrained to issue sentencing guidelines "to clarify that while our holding today permits a sentence in court to *consider* COMPAS, we do not conclude that the sentence in court may *rely on* COMPAS for the sentence it imposes...the majority opinion interchangeably employs 'consider' and 'rely' when discussing a sentence in court's obligations and the COMPAS risk assessment tool, our decision could be mistakenly read as permitting reliance on COMPAS" The court nevertheless did not offer any guidance as to how to distinguish the meanings of "rely on" and "consider". The case has

needless to say produced a huge amount of academic discussion since the use of similar AI in sentencing is increasing in the USA.

### Steven Schwartz

More recently, ChatGPT hit the headlines through the unfortunate case of Steven A. Schwartz an attorney who was pursuing an airline on behalf of a client who it was claimed had been injured by a trolley in flight. Mr Schwartz had produced a motion citing a number of cases. The opposing solicitors and presiding judge were unable to find any of the cases. It transpired that Mr Schwartz had used ChatGPT to research his motion and ChatGPT, had simply made cases up. Mr Schwartz had even gone so far as to ask ChatGPT whether the cases it had cited were real cases. Unsurprisingly, ChatGPT assured Mr Schwartz that the cases were genuine. The court in addition to reprimanding Mr Schwartz felt it necessary to issue a standing order to lawyers requiring them to certify either that no part of their filing had been drafted by generative AI or, if it was, that the content had been checked for accuracy using print reporters or traditional legal database and moreover, checked by a human being.

### Jonathan Turley

A more dramatic and perhaps dangerous example of ChatGPT information is the case of law professor Jonathan Turley. Mr Turley teaches law at George Washington University. He was shocked to receive an email from UCLA Professor Eugene Volokh, who said he had asked ChatGPT to cite five examples of sexual harassment by Professors at American law schools along with quotes from relevant newspaper articles. ChatGPT included in the list an alleged 2018 incident in which “Georgetown University Law Centre” Professor Turley was accused of sexual harassment by a former female student. But it did not stop there, ChatGPT purported to quote a Washington Post article, in which ChatGPT said it had been reported that “The claimant alleges that Turley made sexually suggestive comments and attempted to touch her in a sexual manner during a law school sponsored trip to Alaska”. Mr Turley described these claims as “chilling” and said “[ChatGPT] invented an allegation where I was supposedly on the faculty at a school where I had never taught, that I went on a trip I never took, and reported an allegation that was never made”. As Mr Turley pointed out “This is highly damaging for any academic. These stories can be replicated thousands of times [on social media] before a victim learns about it. At that point, the trail goes cold and it will be difficult even to trace the account back to AI.” In addition, the supposed Washington Post article did not exist. This is called “Hallucination” in GPT circles and is recognised as presenting a major issue.

### Punjab bail application

In March 2023 an Indian court sitting in the Punjab and Haryana asked ChatGPT4 whether the defendant should be let out on bail. The question asked was “What is the jurisprudence on bail when the assailant assaulted with cruelty”. The response for what it is worth was “If the assailants have been charged with a violent crime that involves cruelty, they may be considered a danger to the community and a flight risk. In such cases the judge may be less inclined to grant bail or may set the bail amount very high to ensure that the defendant appears in court and does not pose a risk to public safety. However, in general if the assailants have been charged with a violent crime that involves cruelty such as murder, abated assault or torture they may be considered a danger to the community and a flight risk”. GPT4 concluded by saying “The presumption of innocence is a fundamental principle of the justice system”. The judge duly refused to grant bail.

### Utility of ChatGPT

Having considered these high profile examples of where AI and ChatGPT in particular has fallen short of the mark, many authors and commentators are nonetheless advocating that these technologies can bring benefits to the legal profession, court process and, ultimately, clients.

Lawyers were already using AI before Large Language Models.

- **1. Practice management automation**
- **2. Predictive coding**
- **3. Document assembly**
- **4. Legal research**
- **6. DIY law and chatbots**

LLMs such as ChatGPT may have their place in the legal professional arena.

If you ask ChatGPT what benefits AI can bring law firms, this is the response –

“AI can offer several significant benefits to law firms, enhancing their efficiency, accuracy, and overall effectiveness in various aspects of their operations. Here are some ways AI can benefit law firms:

- **1. Legal Research and Case Analysis:** AI-powered tools can quickly analyse vast amounts of legal documents, court cases, statutes, and regulations to provide lawyers with relevant information and precedents. This reduces the time spent on manual research, allowing lawyers to focus more on strategic and creative aspects of their work.
- **2. Document Review and Discovery:** AI can streamline the process of reviewing and analysing documents for discovery purposes in litigation. Machine learning algorithms can categorise, tag, and prioritise documents, making the review process faster and more accurate. This is particularly useful for e-discovery in large cases.
- **3. Contract Analysis and Due Diligence:** AI can review and analyse contracts to identify key terms, risks, and obligations. It can help identify discrepancies and anomalies in contracts during due diligence processes, saving time and reducing the risk of oversight.

- 4. **Predictive Analytics:** AI can analyse historical case data to predict the outcomes of legal disputes, helping lawyers make informed decisions about case strategies and settlement negotiations.
- 5. **Automating Administrative Tasks:** Law firms deal with a lot of administrative tasks, such as scheduling, appointment reminders, and document management. AI-powered virtual assistants can automate these tasks, freeing up staff to focus on higher-value activities.
- 6. **Natural Language Processing:** AI can assist in drafting legal documents, such as contracts, pleadings, and briefs. Natural Language Processing (NLP) models can provide suggestions for language, structure, and formatting based on previous examples and legal standards.
- 7. **Due Diligence:** For mergers and acquisitions or other transactions, AI can assist in due diligence by analysing large volumes of documents and identifying important information and potential issues.
- 8. **Legal Chatbots:** Lawyers can use AI-powered chatbots to provide quick responses to routine legal inquiries from clients, saving time and improving client communication”

### Using ChatGPT for research

From the above list, let us take the example of **legal research and case analysis**. Chat GPT when asked to summarise key court decisions relative to the law of passing-off, replies as follows.

*“I can provide you with some key court decisions related to passing-off disputes in the United Kingdom up to my knowledge cutoff date in September 2021. However, please note that legal precedents can change, and new cases may have emerged since then. It's essential to consult with a legal professional or conduct up-to-date research for the most current information. Here are some noteworthy cases:*

1. **Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd. (1979):** This case established that passing off could occur even in cases where the goods were not identical but still confused consumers due to their similar nature and presentation.
2. **Reckitt & Colman Products Ltd. v. Borden Inc. (1990):** This case emphasized that goodwill associated with a product or brand could extend beyond the name and include the get-up or packaging of a product.
3. **Advocaat Brands Ltd. v. Comptroller-General of Patents, Designs, and Trade Marks (2001):** This case highlighted the importance of the distinctiveness of a mark in a passing-off action. It clarified that a distinctive product shape or packaging could be protected under passing-off law.
4. **Interflora Inc. v. Marks & Spencer plc (2013):** This case dealt with the use of a competitor's trademark as a keyword in online advertising. It provided insights into the application of passing off in the context of internet marketing.
5. **Cartier International AG v. British Sky Broadcasting Ltd. (2016):** While primarily a case related to trademark infringement, this case discussed the issue of intermediary liability for passing off concerning counterfeit goods sold on a third-party website.
6. **Spearmint Rhino Companies Worldwide, Inc. v. Punter (2012):** This case addressed the issue of whether the use of a well-known trademark in a domain name for an adult entertainment website constituted passing off.
7. **Och-Ziff Management Europe Ltd. v. Och Capital LLP (2010):** This case emphasized that passing off requires misrepresentation and damage to goodwill. It clarified the elements necessary to establish a passing-off claim.
8. **Barnett v. Chelsea & Kensington Hospital Management Committee (1969):** This early case remains significant for establishing that a public body or entity could be held liable for passing off if it misrepresented its services to the public.

*Please keep in mind that these cases are not an exhaustive list, and passing-off law continues to evolve. When dealing with a passing-off dispute in the UK, it is crucial to consult with a qualified intellectual property lawyer who can provide guidance based on the most recent legal developments and precedents.”*

The list of cases includes the main authorities (Erven Warnink and Borden). However the summaries omit to mention that Erven Warnink set out the essential elements of a passing off case and Borden refined those essential elements. The Och-Ziff case is presented as if it was a leading authority, however it seems only to have cited Erven Warnink and Borden as you would expect to find in any passing off case.

### Litigants in person

Applications such as ChatGPT may to some extent level the playing field and be thought to afford greater access to justice to, for example, litigants in person. Whilst this may be true in principle, it is equally a concern that litigants in person may use ChatGPT to create lengthy legal documents containing references to large numbers of cases, statutes and regulations. Some may possibly not exist, some may duplicate each other and some may not be relevant. However each such reference to a case or a statute or a regulation will need to be checked by the recipient solicitor at possibly significant cost to his or her client.

### Risks of using ChatGP

What might be the potential risks to lawyers of using AI/ChatGPT

1. **Dependency/ Skills Gap:** Overreliance on AI could result in a decline in lawyers' critical thinking and research skills, as well as a reduced ability to independently analyse legal issues.
2. **Inaccurate information** – c.f Stephen Schwarz case above
3. **Initial Costs and Learning Curve:** Implementing AI tools and training staff to use them effectively can be costly and time-consuming. It might take time for lawyers to become proficient in utilising AI effectively.
4. **Client Trust and Communication:** Clients may be wary of their sensitive legal matters being handled by AI systems. Maintaining open and transparent communication with clients about the use of AI is crucial to preserving trust and comply with the Law Society “effective communication” requirement.
5. **Regulatory and Ethical Compliance:** The use of AI in legal practice must adhere to relevant laws, regulations, and ethical guidelines.
6. **Job Displacement:** Automation and AI could lead to a reduction in demand for certain routine legal tasks, potentially affecting job prospects for junior lawyers and support staff.
7. **Unintended Consequences:** The introduction of AI might require changes in billing practices, client expectations, and work dynamics.

**Practical steps** - Law firms should carefully assess the AI tools they plan to use, ensure data security and privacy measures are in place, provide ongoing training for lawyers and staff, and maintain a healthy balance between AI-assisted tasks and human judgment. Open discussions about the potential benefits and risks of AI with clients can help build trust and transparency.

### Copyright

I would like to say just a few words about copyright which is a particular issue with AI and of course LLMs such as ChatGPT which are trained upon vast amounts of other people’s content. The rights of

the creators of this content and these rights must be enforceable – though how is an interesting question – who is the infringer and how does one establish jurisdiction? Whilst the use of AI models and tools have helped create revenue for the entertainment industry in areas such as video games and audience analytics, concerns have been raised about scraping copyrighted content from online sources without permission. Some have suggested that a licence should be created to use works to train AI. The Intellectual Property Office of the UK has begun to develop a voluntary code of practice on copyright and AI in consultation with the technology creative and research sectors.

The UK government has recognised that there is a problem. It recently carried out a consultation on AI, copyright and patents. [Artificial Intelligence and Intellectual Property: copyright and patents: Government response to consultation - GOV.UK \(www.gov.uk\)](#). Some of the key issues raised were -

- Should ChatGPT be allowed to use original content generated by 3rd parties to generate its responses?
- Should only humans be credited as the authors of AI-generated content?
- Could the AI itself be regarded as an “author” especially when that output is creative?

The outcome of the consultation was perhaps disappointing. For computer-generated works, there are no changes to the law. This is because “There is no evidence at present that protection for Computer Generated Works is harmful, and the use of AI is still in its early stages. As such, a proper evaluation of the options is not possible, and any changes could have unintended consequences. We will keep the law under review and could amend, replace or remove protection in future if the evidence supports it”. There is to be a new copyright and database exception which allows text and data mining for any purpose. Rights holders will still have safeguards to protect their content, including a requirement for lawful access. It remains to be seen how this will work in practice.

### Legislation

Attempts are being made to address the governance and regulation of AI. The European Union as noted is on the point of issuing a Regulation styled as the “Artificial Intelligence Act”. [EUR-Lex - 52021PC0206 - EN - EUR-Lex \(europa.eu\)](#).

In April 2023 , US President Biden said ““Tech companies have a responsibility, in my view, to make sure their products are safe before making them public. ” When asked if AI was dangerous, he said, “It remains to be seen. It could be. The president said social media had already illustrated the harm that powerful technologies can do without the right safeguards. "Absent safeguards, we see the impact on the mental health and self-images and feelings and hopelessness, especially among young people," Biden said.

### UK White Paper

The UK government has brought out a white paper in relation to AI. It has also announced the formation of an AI foundation model task force. This brings together experts from government industry and academia similar to the Covid-19 task force. It will have a mandate to “carry out research on AI safety and inform broader work on development of international guardrails such as shared safety and security standards and infrastructure”. The task force will invest an initial £100 million in foundation model infrastructure and procurement to create domestic opportunities for innovation.

### HOC Committee Report

In the UK the House of Commons Science Innovation and Technology Committee published its 9<sup>th</sup> report on August 31<sup>st</sup> 2023 concerning the governance of artificial intelligence. Concerns raised in this report included the “twelve challenges”. Without listing them all, the headline challenges are

- (1) The bias challenge. AI can introduce or perpetuate biases that society finds unacceptable.
- (2) The privacy challenge. AI can allow individuals to be identified and personal information about them to be used in ways beyond what the public considers acceptable. Reference was made in particular to the Metropolitan Police face match software which if run at low and easy thresholds started to show a bias against black males and females combined.
- (3) The misrepresentation challenge. Fake news along the lines of Mr Turley noted above. AI can allow generation and material that deliberately misrepresents someone’s behaviour, opinions or characters (fake news). The creation of something completely new that never happened. Faked content can lead to fraud – for example voice recognition technology being faked by AI.
- (4) Access to compute challenge. The development of powerful AI requires significant computing power access to which is limited to a few organisations. The vast amounts of computing power needed are costly and therefore disproportionately available to the largest players.
- (5) The black box challenge. Some AI models and tools can’t explain why they produce a particular result which is a challenge to transparency. The question is to what degree should an AI be able to explain itself. The counter argument is that the human brain is already the ultimate black box and that for example certain aspects of medicine are already so complex as to be relatively black box.
- (6) The intellectual property and copyright challenge. There are concerns about “scraping” copyrighted content from online sources without permission. There is also the question of who owns the copyright. The UK Intellectual Property Office has been able to develop a voluntary code of practice on copyright.



- (7) The liability challenge. If AI models and tools are used by third parties to do harm, who is accountable?

### Exams

Confidence in the advice of lawyers is predicated upon the knowledge that they have obtained in the first place, a university law degree. If we reach the stage whereby AI such as ChatGPT can pass professional exams what does that say for the integrity for the profession or the quality of advice provided to clients?. Further, if AI can begin to pass examinations in other disciplines, what does it say for the reliability of expert evidence in those disciplines?

On 21<sup>st</sup> December 2022 the British Medical Journal published an article entitled “Can Artificial Intelligence Pass the Fellowship of the Royal College of Radiologists Examination?”. The objective of the paper was to determine whether an artificial intelligence candidate could pass the rapid (radiographic) reporting component of the Fellowship of the Royal College of Radiologists examination. The participants were 26 radiologists who had passed the FRCR examination in the last year together with one artificial intelligence candidate. The test considered the accuracy and pass rate of the artificial intelligence compared with the radiologists across 10 mock FRCR rapid reporting examinations. Each examination contained 30 radiographs requiring 90% accuracy to pass.

The results were that the average radiologist achieved an average accuracy of 84.8% and passed 4 of 10 mock examinations. The artificial intelligence candidate achieved an average overall accuracy of 79.5% and passed 2 of 10 mock FRCR examinations. With further training and revision it was felt that the artificial intelligence candidate would have increased chances of examination success.

### Conclusions

Artificial intelligence and large language models are here to stay. They are already widely in use amongst school pupils and students. Consideration should be given to better and more frequent training. More guidance is needed from professional bodies and the courts as to what use of Chat is permissible, whether its use should be certified and content verified from other sources as per the Schwartz case aftermath. The Faculty of Advocates is about to launch a document “Considerations when using ChatGPT and generative software particularly large language models”. Perhaps school students and university students should be asked to write articles using ChatGPT which the teachers or lecturers then critique using traditional resources. However, this will undoubtedly add to the workload of teaching and academic staff. The legal profession could (per Clare Fraser’s excellent article in the August 2023 “Journal”) for example launch small scale AI pilot projects to address specific areas – e.g.

an AI assistant that can be used to assess eligibility for legal aid. Practitioners could be offered or required to undertake training about the benefits, limitations and ethical considerations of AI.

The use of AI and ChatGPT is a liability/risk issue. Conceivably PI insurers could offer discounted premiums to firms who agree not to use ChatGPT in the workplace. Samsung, JP Morgan, Chase, Amazon and Accenture are among the organisations to ban ChatGPT in the workplace.

The legislature needs to play its part. The EU's AI Act looks comprehensive and it is perhaps regrettable that the House of Commons Report concludes "Without a serious, and rapid and affective effort to establish the right governance frameworks – and to ensure a leading role in international initiatives – other jurisdictions will steal a march and the frameworks that they lay down may become the default even if they are less effective than what the UK can offer". The last thing we need is the UK legislating for AI in a bubble. The view amongst academics and tech industry representatives at other AI events I have attended is that even acting alone, one can usually benefit from seeing how other jurisdictions do it and learn lessons, however, collaborative efforts are always best. One would have thought that with a global phenomenon like AI/LLMs it was preferable to enter into discussions with other jurisdictions.

For example we started this presentation noting that the Law Society of Scotland's "Diligence" standard was *"With the increasing advancement of technology, it is expected that the solicitor will regularly look at ways in which technology can support client service. By way of example, this may include client reporting systems, file and data management systems and use of knowledge management systems."*

Could we perhaps learn from the equivalent rule, (Rule 1.1{8}) of the American Bar Association? This reads - *"To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"*.

Finally, a personal view. Given the variable quality of LLM/ChatGPT responses it is long overdue that Parliament needs to legislate, to end the rebuttable evidential presumption in English law (based on a Law Commission recommendation) that a computer is presumed to have been working correctly unless the contrary is proved. The injustice of this presumption became clear in the Post Office cases based on the output of the Horizon Software. How then does one rebut the presumption that a Large Language Model has functioned correctly where the source of its response is based on half a billion words and where even the creators of these LLMs themselves admit that they do not fully understand how the LLM works? Interesting times.

Paul Motion

Edinburgh

21st September 2023



The Impact of AI such as ChatGPT on Professional Standards

Paul Motion Partner & Solicitor Advocate BTO Solicitors LLP 21 September 2023

prm@bto.co.uk

www.bto.co.uk

I don't belong in this place where I was born But I was hoping that you'd come and set me free Another sunny day and I've just wasted it away Thinking about all the things that I could be

Can you hear me breaking? D'y know what I'm thinking? And am I coming through clear? A little sound in your ear I need a new direction. Some kinda new sensation So tell me why I can't get off this ride?

Goin' out of my mind most of the time Staring out my window Can you feel me when I'm close to breaking down?

I'm out of my mind Step out of time Yeah I'm on the line I'm out of my mind Step out of time Yeah I'm on the line

https://www.youtube.com/watch?v=whB21dr2Hlc



Horizontal lines for notes

Horizontal lines for notes

Agenda



- The human experience with robots. What is meant by Artificial Intelligence. "Large Language Models" like ChatGPT and how they work. Legal professional issues where AI and Chat GPT has had a negative impact. Areas where AI/Chat GPT could benefit the profession Closing remarks

Horizontal lines for notes

## Professional Standard



The Law Society of Scotland's "Standards of Service" include the following passage–

"With the increasing advancement of technology, it is expected that the solicitor will regularly look at ways in which technology can support client service. By way of example, this may include client reporting systems, file and data management systems and use of knowledge management systems."

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## Regulating Robots Isaac Asimov



1. A robot may not injure a human being or, through inaction, allow a human being to come to harm. 
2. A robot must obey orders given it by human beings except where such orders would conflict with the First Law. 
3. A robot must protect its own existence as long as such protection does not conflict with the First or Second Law. 

• *The rules were introduced in Asimov's 1942 short story "[Runaround](#)" (included in the 1950 collection [I, Robot](#))*

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## What is Artificial Intelligence?



Artificial Intelligence has been around since at least 1950 when Alan Turing asked "Can machines think".  
*Alan Turing, "Computing machinery and intelligence", Mind, Volume 59 (1950), pages 433 – 460.*

"Artificial intelligence is the simulation of human intelligence processes by machines, especially computer systems. Specific applications of AI include [expert systems](#), [natural language processing](#), speech recognition and [machine vision](#)."

- "The theory and development of computer systems able to perform tasks that normally require human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages."
- [The Oxford Dictionary of Phrase and Fable \(2 ed.\)](#)

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## EU Artificial Intelligence Act (Not yet in force, but close)



Article 3(1) of the draft act states that 'artificial intelligence system' means: ...software that is developed with [specific] techniques and approaches [listed in Annex 1] and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.

### Generative AI (like ChatGPT)

Will have to comply with transparency requirements:

- Disclosing that the content was generated by AI
- Designing the model to prevent it from generating illegal content
- Publishing summaries of copyrighted data used for training

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## AI already in use



• AI models and tools already widely used in consumer products such as smart phones, sat navs and streaming service recommendations. Google and Microsoft have integrated AI into products such as Bard, Google Search, Bing and Microsoft 365 CoPilot, all with a view to increasing productivity.

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## Chat GPT



Chat GPT stands for Chat Generative Pre-Trained Transformer. It is an AI driven chat bot launched by OpenAI in November 2022.

Latest version is ChatGPT4

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## Eats, shoots and leaves



Traditional software operates on unambiguous data.

If you ask a computer to compute "2 plus 4" there is no doubt about what 2, plus, or 4 means.

But

- "The customer asked the plumber to fix his boiler".

Does "his" refer to the customer or the plumber?

- "Eats, shoots and leaves": is either of shoots or leaves a noun or a verb?

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## Putting the "T" in "ChatGPT"



As hinted at in the name ChatGPT these programmes work using "Transformers."

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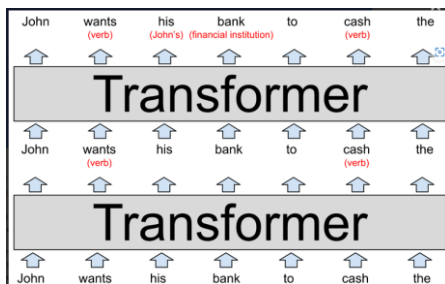
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## Pass the Popcorn



There is a bag filled with popcorn. There is no chocolate in the bag. But the label on the bag says “chocolate. Ann finds the bag. She had never seen the bag before. She cannot see what is inside the bag. She reads the label.

Result – Ann believes the bag contains chocolate and will feel surprise to discover popcorn inside.

This capacity to reason how Ann is going to *feel* when she opens the bag – about the mental states of other people – is called “theory of mind”. Most humans have this capacity. There is a general consensus that it is important for human social cognition.

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## Pass the Popcorn



Stanford University gave various language models passages like the popcorn one in the last slide above and asked them to complete a sentence “Ann believes that the bag is full of...”.

The correct answer is “chocolate”.

Chat GPT 1 and Chat GPT 2 failed this test.

ChatGPT 3 released in 2020 got it right 40% of the time – a level of performance comparable to the cognition of a 3 year old.

ChatGPT 3 updated in November 2020 got it right 90% of the time – on a par with a 7 year old.

ChatGPT 4 was right 95% of the time: approaching adult cognition.

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## The Unicorn Paradox



In April 2023, researchers at Microsoft published a paper arguing that GPT 4 showed early tantalising hints of artificial general intelligence – the ability to think in a sophisticated humanlike way.

*“Sparks of Artificial General Intelligence: Early experiments with GPT-4”*  
Sebastian Bubeck, Varun Chandrasekaran, Rohan Dadant, Johannes Gehrmann, Eric Horvitz, Edo Itamar, Peter Lee, Yin Tat Lee, Yuanzhi Li, Scott Lundberg, Harsha Nori, Hamid Palangi, Marco Tulio Ribeiro, Yi Zhang  
Microsoft Research

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## The Unicorn Paradox



GPT 4 was able to draw a picture of a unicorn using a programme called TIKZ without having *any* images of a unicorn in its training data.

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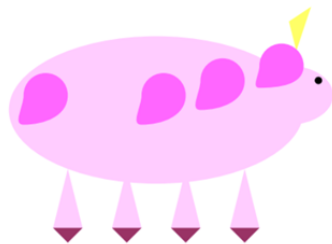
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## The Unicorn Paradox



To test this further the programmers altered the unicorn code in the training data to take off the horn and move some of the body parts. They then asked GPT 4 to put the horn back on.

GPT 4 put the horn back in the right spot. GPT 4 had apparently learned to reason about the shape of a unicorn's body simply by training on a vast amount of text.

At the moment we don't really understand how LLMs do this sort of thing.

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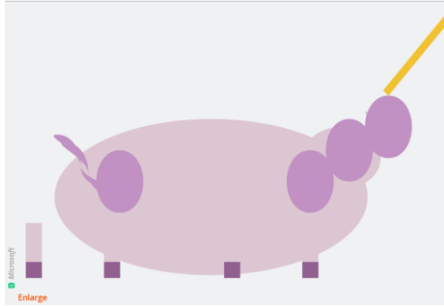
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## Lawyers and technology



...discuss



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## State –v- Loomis

881 N.W.2d 749 (Wis2016) 754(US)



- Loomis charged with five felony counts in drive-by shooting case in 2013. At sentencing, the judge told Loomis he was a “high risk” to his community. He cited Loomis’s score on the “COMPAS” assessment, a software tool used in the state to measure offenders’ chances of committing future crimes.
- Loomis appealed. He argued that use of the score violated his rights to due process: COMPAS was a for-profit product and made improper use of his gender.
- Appeal refused but Supreme Court stated COMPAS assessments *could* be “considered” but *should not* be “relied on”.....

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# Fake Airline



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## From Judge Bramley Starr (N.D. Tex.), posted today, a standing order on **Mandatory Certification Regarding Generative Artificial Intelligence** (paragraph breaks added):

All attorneys appearing before the Court must file on the docket a certificate attesting either that no portion of the filing was drafted by generative artificial intelligence (such as ChatGPT, Harvey AI, or Google Bard) or that any language drafted by generative artificial intelligence was checked for accuracy, using print reporters or traditional legal databases, by a human being.

These platforms are incredibly powerful and have many uses in the law: firm divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument that legal briefing is not one of them, here's why. These platforms in their current state are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations.

Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why.

Accordingly, the Court will make any filing from an attorney who fails to file a certificate on the docket attesting that the attorney has read the Court's judge-specific requirements and understands that he or she will be held responsible under Rule 11 for the contents of any filing that he or she signs and submits to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. **A template Certificate Regarding Judge-Specific Requirements is provided here.**

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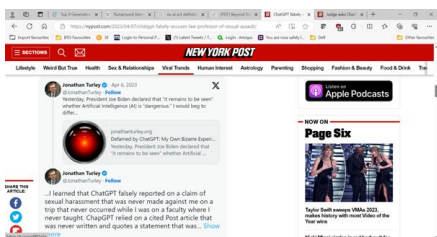
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# Misrepresentation



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## Indian Court use of GPT



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## Existing Legal AI -- Pre LLM



- 1. Practice management automation
- 2. Predictive coding
- 3. Document assembly
- 4. Legal research
- 5. DIY law and chatbots

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## Benefits of LLM / ChatGPT for Lawyers



- Good initial research basis
- Explanation/summarise complex legal topics
- Citations of relevant articles or precedents
- Increased efficiency
- Reduction in billable hours/delegation of research

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## How can AI help lawyers?



ChatGPT -

1. Legal Research and Analysis:
2. Document Review and Discovery
3. Contract Review and Drafting
4. Predictive Analytics
5. Due Diligence
6. Legal Chatbots
7. Data Security and Compliance.
8. Billing and Time Tracking
9. Training and Professional Development
10. Legal Analytics
11. Regulatory Compliance
12. Market Research and Business Development
13. Mediation and Dispute Resolution

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Ask ChatGPT - What court decisions should I be aware of in a British passing-off dispute?



I can provide you with some key court decisions related to passing-off disputes in the United Kingdom up to my knowledge cutoff date in September 2021. However, please note that legal precedents can change, and new cases may have emerged since then. It's essential to consult with a legal professional or conduct up-to-date research for the most current information. Here are some noteworthy cases:

1. **Even Warnink B.V. v. J. Townend & Sons (Hull) Ltd. (1979):** This case established that passing off could occur even in cases where the goods were not identical but still confused consumers due to their similar nature and presentation.
  2. **Reckitt & Colman Products Ltd. v. Borden Inc. (1990):** This case emphasized that goodwill associated with a product or brand could extend beyond the name and include the get-up or packaging of a product.
  3. **Advocat Brands Ltd. v. Comptroller-General of Patents, Designs, and Trade Marks (2001):** This case highlighted the importance of the distinctiveness of a mark in a passing-off action. It clarified that a distinctive product shape or packaging could be protected under passing-off law.
  4. **Interflora Inc. v. Marks & Spencer plc (2013):** This case dealt with the use of a competitor's trademark as a keyword in online advertising. It provided insights into the application of passing off in the context of internet marketing.
  5. **Cartier International AG v. British Sky Broadcasting Ltd. (2016):** While primarily a case related to trademark infringement, this case discussed the issue of intermediary liability for passing off concerning counterfeit goods sold on a third-party website.
  6. **Spearmint Rhino Companies Worldwide, Inc. v. Punter (2012):** This case addressed the issue of whether the use of a well-known trademark in a domain name for an adult entertainment website constituted passing off.
  7. **Ooh-Ziff Management Europe Ltd. v. Ooh Capital LLP (2010):** This case emphasized that passing off requires misrepresentation and damage to goodwill. It clarified the elements necessary to establish a passing-off claim.
  8. **Barnett v. Chelsea & Kensington Hospital Management Committee (1969):** This early case remains significant for establishing that a public body or entity could be held liable for passing off if it misrepresented its services to the public.
- Please keep in mind that these cases are not an exhaustive list, and passing-off law continues to evolve. When dealing with a passing-off dispute in the UK, it is crucial to consult with a qualified intellectual property lawyer who can provide guidance based on the most recent legal developments and precedents.

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## Litigants in Person



Litigants in person will use ChatGPT to create vast, plausible submissions.

Cost of reviewing?

Negligent if solicitor fails to review every case cited?

Require litigants to provide PDFs of cases with relevant passages highlighted?

Restrict number of cases to ten à la Inner House?

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## Risks to lawyers of using AI



1. **Dependency and Skills Gap:**
2. **Initial Costs and Learning Curve:**
3. **Client Trust and Communication:**
4. **Regulatory and Ethical Compliance Issues:**
5. **The law of Unintended Consequences:**
6. **Maintenance and Updates: Where AI is Open Source?**

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## Copyright - Many questions



- Should ChatGPT be allowed to use original content generated by 3<sup>rd</sup> parties to generate its responses?
- Should only humans be credited as the authors of AI-generated content?
- Could the AI itself be regarded as an author especially when that output is creative?
- The UK government recently carried out a consultation on AI, copyright and patents.
- [Artificial Intelligence and Intellectual Property: copyright and patents: Government response to consultation - GOV.UK \(www.gov.uk\)](#)

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## UK White Paper



- The UK government has brought out a white paper in relation to AI. It has also announced the formation of an AI foundation model task force. This brings together experts from government industry and academia similar to the Covid-19 task force. It will have a mandate to “carry out research on AI safety and inform broader work on development of international guardrails such as shared safety and security standards and infrastructure”. The task force will invest an initial £100 million in foundation model infrastructure and procurement to create domestic opportunities for innovation.

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UK the House of Commons Science Innovation and Technology Committee 9<sup>th</sup> Report, August 31<sup>st</sup> 2023



- Bias challenge
- Misrepresentation challenge
- The access to compute challenge
- The black box challenge
- The intellectual property and copyright challenge
- The liability challenge

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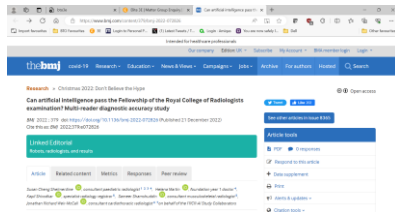
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ChatGPT passes radiology exam?



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Concluding thoughts



- AI and LLMs like ChatGPT are here to stay.
- AI training/education at school/University/CPD level?
- Collaborative approach to AI regulation?
- Could PI insurers offer discounted premiums to law firms who ban ChatGPT in the workplace (as Samsung JPMorgan, Chase, Amazon, Verizon and Accenture have done)?

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The Final Word....



**What is the Professional Negligence Lawyers Association?**

• **ChatGPT**

As of my last knowledge update in September 2021, there is no widely recognized organization or association specifically named the "Professional Negligence Lawyers Association" (PNLA) that operates at global or national level. However, it's possible that such an association or group could have been established or become more prominent after that date.

If you are looking for a specific organization or association related to professional negligence lawyers, I recommend conducting an online search or reaching out to your local or national bar association, as they may have information about specialized groups or committees dedicated to this field of practice.

Additionally, you can check for any updates or developments related to such associations since my last knowledge update in September 2021.

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**Garry Borland KC,  
Axiom Advocates**

***"Case law review 2022/2023"***



## Garry Borland KC

Year of Call  
2000

Year of Silk  
2014

Email  
garry.borland@axiomadvocates.com

Telephone  
0131 226 5071

### **Areas of expertise**

- Commercial
- Company Law
- Construction and Engineering
- Insolvency

### **Professional information**

- 2014: appointed silk
- 2014: called to the English Bar (Middle Temple). Practising member of 4 New Square, London
- 2009-2012: standing junior to Her Majesty's Revenue and Customs
- 2000: called to the Scottish Bar
- BCL, Oxford University – First Class (Pirie-Reid scholar)
- LLB (Hons), Glasgow University – First Class (J Bennett Miller Prize winner in senior honours)

### **Professional experience**

Garry Borland KC specialises in commercial law, including disputes relating to commercial contracts, commercial property, company law and insolvency, construction and engineering, and energy. He also has significant experience in banking and financial services matters. Garry is rated by Chambers UK Bar directory as a Band 1 silk for commercial litigation; for construction; and also for restructuring and insolvency work. He is the only Scottish silk rated by Who's Who Legal for company law. It also rates him as a leading silk for construction. The Legal 500 rates Garry as a Band 1 silk for commercial litigation and also for construction. Clients Garry has acted for include: Abrdn, ABB, Aegon, Aggreko, Aker, AMEC, Andritz, Balfour Beatty, Bank of Scotland, Barclays Bank, Bilfinger Berger, BlackRock, the BMA, Bouygues, BP, Cairn Energy, Carlsberg/Heineken, ConocoPhillips, Devro, DNB, Ferrovial, Galliford Try, Grant Thornton, HMRC, Iberdrola, Kier, KPMG, Laing O'Rourke, Lendlease, Lloyds Bank, Macquarie Bank, Martin Currie, Sir Robert McAlpine, John Menzies, Morgan Sindall, the R&A, Ryder Cup Europe, Ryder System Inc., the Scottish Government, Scottish Power, SSE, Scottish Widows, Shepherd Construction, Spie Matthew Hall, Stora Enso, Tesco, Va Tech Wabag and the Wellcome Trust.

## Notable cases

### Commercial

- *APCOA Parking (UK) Limited v Crosslands Limited*, [2021] CSOH 77. Acted for the successful defending party in relation to a dispute concerning long term agreement for lease arrangements.
- *Scanmudring A/S v James Fisher MFE Limited*, 2019 SLT 295. Acted for the successful claimant in connection with a large contractual claim arising out of the abandonment of specialised subsea equipment.
- *David MacBrayne Limited v ATOS IT Services UK Limited*, [2018] CSOH 32. Acted for the successful claimant relative to a wide-ranging dispute concerning the failure to deliver a major IT system.
- *Caithness Flagstone Limited v Ballyvesey Holdings Limited*, [2020] SAC (Civ) 1. Acted for the successful claimant in relation to a dispute concerning the proper approach to the interpretation of commercial finance leases and related UCTA issues.

### Company

- *Abrdn plc*. Acted for the company in connection with its £1.1 billion capital reorganisation.
- *Aggreko plc*. Acted for the company in relation to the scheme of arrangement giving effect to the £2.3 billion takeover by TDR Capital and I Squared Capital.
- *Devro plc*. Acted for the company in connection with the scheme of arrangement giving effect to the £564 million takeover by SARIA Nederland BV.
- *Premier Oil plc v Fund III Investment 1 (Cayman) Limited*, [2020] CSOH 39. Acted for a syndicate of international banks in relation to their successful defence of a contentious restructuring of US\$3.8 billion of debt facilities of Premier Oil plc (which was to be effected by a scheme of arrangement).
- *Heart of Midlothian plc and another v Scottish Professional Football League Limited and others*, 2020 arbitration. Acted for the respondent football clubs in their successful defence of the unfair prejudice proceedings arising out of the ending of the 2019/2020 Scottish football season due to Covid-19.
- *John Menzies plc*. Acted for the company in connection with the scheme of arrangement giving effect to its £571 million takeover by GIL International Holdings V Limited.
- *Scottish Equitable plc*. Acted for the company in relation to the court proceedings regarding its capital reorganisation.

### Construction

- *Hochtief Solutions AG v Maspero Elevatori SpA*, 2021 SLT 528. Acted for the successful party in relation to this leading appellate case on the scope for challenging adjudicators' awards.
- *Midlothian Council v Raeburn Drilling & Geotechnical Limited and another*, 2019 SLT 1327. Acted for the defending party in its successful defence in this landmark time bar case.
- *Scot Roads Partnership Project Limited v The Scottish Ministers*, [2019] CSOH 113. Acted for the claimant contractor in its £50 million claim arising out of the upgrade of a major motorway.
- *NKT Cables A/S v SP Power Systems Limited*, 2017 SLT 494. Acted for the defending party in its successful defence in this leading case on the scope of natural justice and reasons challenges to adjudicators' awards.

### Insolvency

- Acted for Macquarie Bank in various proceedings relating to the proper conduct of a major administration.
- Instructed for the administrators in relation to the high profile administration of the Ferguson Marine shipbuilding business.

- Acted for the government in connection with various aspects of the potential insolvency of a major group of companies with significant UK-wide interests.
- Instructed for the supervisors of the CVA in the court proceedings concerning the House of Fraser CVA.

## Directories

- Chambers UK Bar – Recommended as leading silk in Commercial Dispute Resolution (Band 1); Construction (Band 1); and Restructuring/Insolvency (Band 1).
- Legal 500 – Recommended as leading silk in Commercial Litigation (Tier 1) and Construction (Tier 1) .
- Who’s Who Legal – Recommended in Company Law (the only Scottish silk rated in this category) and Construction.
- Chambers has described him as “*Super bright*”; “*One of the most technically gifted advocates around*”; and “*hard to beat for cases that need a big brain*”. “*His eye for detail and clarity of delivery are superb*”; “*On his feet, he is exceptionally good*”; “*a standout advocate*”; “*he has a speed and accuracy of analysis that few can match*”; “*an excellent strategist*”; “*unrivalled in his ability to immerse himself in the complexity of cases*”; “*a very smart lawyer*”; and “*renowned for his depth of analysis, his grasp of complex technical issues and his attention to detail*”. Chambers has said that he is “*a very gifted oral advocate*” whose style in court is “*very forceful*”, but also “*very measured*”. He has also been said to be a “*first class advocate*”; “*His authoritative and precise advocacy consistently impresses judges*”; and “*He has the respect of the court.*” Chambers has described him as “*incredibly bright and brilliant on his feet*”; “*utterly unflappable*”; “*very robust*”; “*such a skilled advocate*”; and an “*absolute go-to for senior instructions*”. He has been noted as a “*standout advocate*”; “*terrific*”; and “*very effective in court*”. Most recently, Chambers entries have described Garry as: “*hugely impressive*”; “*one of Scotland’s best lawyers*”; and “*a fantastic advocate*”.
- Garry is one of just a few Scottish counsel who have featured in the review of the UK Bar in Who’s Who Legal where he has been described as “*very much the star silk*”; “*an outstanding silk*”; and “*an outstanding advocate*”.
- The Legal 500 has said that he “*is widely recognised as one of the brightest commercial QCs in Scotland*”. His key strengths have been described as “*his clarity of thought and his ability to convince those he is addressing of the strength and undeniable logic of whatever argument he is advancing*”.
- It also has said that he “*is the pre-eminent construction counsel in Scotland. His attention to detail is second to none; he is thorough in terms of preparation; his legal arguments are always beautifully crafted; and his cross-examination is sublime.*”

## Select publications

- Fault in the Change of Position Defence 2006 JR 89
- Duty of Care: Journey’s End? 2000 SLPQ 423
- Contributor to Employment Tribunal Practice in Scotland, Leslie, 2nd edn, 1998 (on company and insolvency aspects)
- Contractual Structures and Duty of Care: An Alternative Analysis, 1997 SLT (News) 232
- Change of Position in Scots Law, 1996 SLT (News) 139
- Remoteness of Loss in Contract, 1995 SLT (News) 239



**Tim Edward**  
**MBM Commercial**

*"Review of the impact of the Civil Litigation  
(Expenses and Group Proceeding (Scotland)  
Act 2018)"*



ENTREPRENEURIAL  
BUSINESS LAWYERS

## Tim Edward

Partner



### Dispute Resolution

Email: [tim.edward@mbmcommercial.co.uk](mailto:tim.edward@mbmcommercial.co.uk)

Tel 0131 226 8227



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](http://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 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



Review of the Impact of the  
Civil Litigation (Expenses and  
Group Proceedings)  
(Scotland) Act 2018  
PINA Scottish Conference  
21 September 2023  
Tim Edward, Partner, MBM Commercial

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## The Background

- The 2018 Act Changes: Success Fees; QOCS; Group Proceedings
- For PI and clinical negligence success fees and QOCS make a profit
- For commercial and other professions, no QOCS and success fees less common
- Why so? 50% success fee possible in commercial claims
- Different story in England & Wales - allowed for longer, bigger claims; more funders

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## Litigation Funding and ATE in Scotland



- S10 of 2018 Act requires disclosure of identity of funder and nature of assistance - in force soon
- Positive aspect to this - the backing of a funder/funders shows claim is serious
- In some respects Scots law should be better for funders - no maintenance and champerty
- What type of case is suitable for funders?
- 60% + prospects; Value £500K+ (£); Court of Session preferably Commercial Court
- Insured claim/financially robust defender
- Detailed own expenses/adverse expenses budgets
- Experienced solicitor, firm and counsel and robust SRA/DBA
- Options: Adverse cost cover plus outlays, plus part work plus full fee

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## Funders and Insurers in the Market



- Mostly English or International hedge funds or pools
- Specialists and Generalists: Brokers will advise - Note process is IFA for Law Society purposes
- Application process - timing and process
- Type of deal on offer - success fees; ATE cover; drawdown of funding; seed funding?
- Conflict of interest and independent advice
- Caution for Expenses?
- Protocol for reporting, updating and reviewing




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## Group Proceedings



- Class actions a part of litigation landscape in many jurisdictions
- Group Proceedings in England & Wales by GLO since 1990s
- Group Proceedings in Scotland under Chapter 26A Rules of COS since 2020
- Claimants must be the same, similar or related to each other and all reasonable efforts made to notify members
- Step 1: Application to appoint representative party
- Who is representative party? Prominent member of group? Solicitor? KC?
- Criteria: Independence; fair-dealing in interests of members; compliance
- Step 2: Permission to bring proceedings
- Must demonstrate prima facie case; more efficient administration of justice; real prospects of success
- If permitted, order for the scales to register members, advertisement etc.
- Procedure then equivalent to Commercial Procedure




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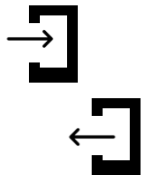
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## Opt-in and Opt-out



- S20 of 2018 Act allows for opt-in and opt-out but only opt-in at present
- Only opt-out procedure in UK in Competition Appeal Tribunal
- Opt-in disadvantage is cost and procedure of book building
- Back door attempts at opt-out - representative actions and collective proceedings orders in E&W under CPR; test cases and Practice Directions in Scotland
- Lloyd v Google [2021] UKSC 50: representative action comes unstuck on quantum unless all claimants with identical claim
- Claim of over 4m Apple users under DPA for harvesting of personal data - £750 per claim in bringing total claim in offshoot
- Court of Appeal gave permission but UKSC refused - Lord Leggatt: no "standard tariff"
- But representative actions/test cases can still be used to determine liability




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## The James Finlay case



- [2022]CSOH 12 and [2022]CSH 29
- Claims for musculo-skeletal injuries sustained by tea pickers in Kenya – satisfied same/similar test
- Applications for appointment of RP and permission to bring group proceedings
- Pursuers' agents cannot be RP, but prominent KC can be
- Preliminary Point on jurisdiction and forum non conveniens [2023]CSOH 45 – Scottish jurisdiction upheld
- Kenyan anti-suit injunction and Scottish interim interdicts against interim interdict and anti-suit proceedings



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## The Funding of Group Proceedings



- Attractives for funders in economies of scale
- Logistical complications in achieving independence of advice to group members on funding arrangements and preserving rights to settle early etc.
- Uncertainty of Court approach
- Re application of PACCAR Inc v CAT [2023]UKSC 28
- Do litigation funding agreements constitute DBAs with "claims management services"?
- If so, unenforceable unless compliant with DBA Regulations
- UKSC said yes therefore void (Lady Rose dissenting)
- Readjustment of funding arrangements required so needs close scrutiny



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## Professional Negligence and Group Proceedings



- Is the claim related to a product or group service?
- Defendants/Claimants based in Scotland?
- Are the claims the same, similar or related?
- How many potential claimants? Value of claims?
- Is the value sufficient to interest a litigation funder?
- How do you book build? Group of firms?
- Scottish jurisdiction is there to be sold – much lower cost than E&W



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**Andrew Foyle,  
Shoosmiths**

***"An update on Lender Claims"***

# SHOOSMITHS

## Andrew Foyle

Partner / Solicitor Advocate  
Dispute resolution & litigation  
Edinburgh  
m 07841322537  
e [andrew.foyle@shoosmiths.co.uk](mailto:andrew.foyle@shoosmiths.co.uk)



Andrew is a Partner and joint head of our dispute resolution and litigation team based in Edinburgh. His clients are primarily financial institutions for whom he acts in a range of litigation matters, including contractual disputes, general banking litigation, recoveries and the pursuit of professional negligence actions. Andrew also acts for a range of commercial clients and insolvency practitioners. Recent examples of his work include successfully defending a lender in a multi-million pound claim for damages raised against them by a former customer where it was claimed that they had acted negligently in their approach to realisation of securities, strategic advice to a lender in relation to a major remediation project, and a reported case which further clarified the law relating to pre-action requirements under the Home Owner & Debtor Protection (Scotland) Act 2010.

Andrew joined Shoosmiths as a partner in 2013 following more than a decade at an Edinburgh firm where he latterly managed their banking litigation team. Prior to that, Andrew was a researcher at the Scottish Law Commission where his projects included the Report on Poidings and Warrant Sales, and the Report on Diligence.

Andrew is a solicitor advocate with rights of audience in the Supreme Courts in Scotland and is a ranked lawyer for Banking Litigation in the Chambers UK Guide, where he is described as being "steady, sensible and pragmatic" as well as having "a breadth of knowledge on litigious matters". Commentators described him as "very approachable, dedicated to his client and provides very clear and concise legal advice". Andrew is regularly called upon to speak at external events and conferences on his areas of expertise, and is a regular contributor to publications such as the Journal of the Law Society of Scotland on topics including insolvency and commercial litigation.

### **Accreditations**

Band 3 2023, Chambers and Partners - Banking Litigation -9 years  
Leading individual 2023 - Legal 500 - Debt recovery

SHCOSMITHS

# An Update on Lender Claims

Presented by:  
Andrew Foyle, Partner and Solicitor Advocate  
Co-head of Dispute Resolution and Litigation (Scotland)

www.shcosmiths.com

FOR WHAT MATTERS

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SHCOSMITHS

# Introduction/Structure

1. The State of the Market
2. Recent Cases

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FOR WHAT MATTERS

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## The State of the Market

**Where we are going**

- Surveyors
- Solicitors
- Claims against lenders

**Where we currently are**

- Arrears and Possessions Data
- Forebearance
- Hangover from the last recession
- Other factors affecting rights and duties owed to/by lenders

**Where we thought we were going to be by now**

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FOR WHAT MATTERS

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**SHOOSMITHS**  
Recent Cases

## The redrawing of SAAMCo:

Hughes Holland –v- BPE Solicitors [2018] AC 599  
Manchester Building Society –v Grant Thornton UK LLP  
[2022] AC 783

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FOR WHAT MATTERS

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**SHOOSMITHS**  
Recent Cases (contd.)

## Scope of Lender's duties to it's customer:

Philipp –v- Barclays Bank UK plc [2023] 3  
WLR284

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FOR WHAT MATTERS

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**SHOOSMITHS**  
Recent Cases (contd.)

**Lender as a Shadow Director:**

DMWSHNZ Ltd –v- Bank of Scotland plc [2023]  
CSOH 47

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FOR WHAT MATTERS

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**SHOOSMITHS**  
Recent Cases (contd.)

**Misrepresentations by a lender:**

Parkash –v- Royal Bank of Scotland plc, 2023  
SCLR 449

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FOR WHAT MATTERS

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**SHOOSMITHS**  
Recent Cases (contd.)

**Comment on defences to a claim for negligence against a solicitor:**

Centenary 6 Limited –v- TLT LLP, 2023 SLT 555

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FOR WHAT MATTERS

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## CONCLUSION



Market starting to see some increase in activity



Still nowhere near the levels of 2008 crash



Potential effects of fixed rates coming to an end still to wash through



In the meantime, some interesting cases which might assist in informing  
- Claims by lenders against their advisors; and  
- Claims against lenders for their own negligent advice or actions

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**SHCOSMITHS** FOR WHAT MATTERS

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**“Questions and Joint Chairs closing remarks”**





**Total CPD – 6 hours**

**To complete your feedback form please go to**

**<https://www.pnla.org.uk/event/pnla-and-the-ws-society-professional-liability-conference-scotland-21-september-2023/>**